



12-1-1979

Practice of Law As Moral Discourse

Thomas L. Shaffer

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Thomas L. Shaffer, *Practice of Law As Moral Discourse*, 55 Notre Dame L. Rev. 231 (1979).

Available at: <http://scholarship.law.nd.edu/ndlr/vol55/iss2/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

The Practice of Law as Moral Discourse

Thomas L. Shaffer*

“We must learn again to speak to each other with authority and not as the scribes. For the present we are all much too clever and unchildlike to be of real mutual help.”

Karl Barth**

The beginning and end of a lawyer's professional life is talking with a client about what is to be done.¹ My claim here is that this is a moral conversation. I will suggest three ethical orientations which seem to govern the conversation, and then weigh the adequacy of each of the three orientations.

The first orientation is one governed by *role*, that is, by an idea about the function in society of the legal profession, and the function of a lawyer in the profession. The debate between public-interest lawyers and adversary-ethic lawyers is for the most part carried on within this first ethical orientation.² I claim that the role orientation is a way to pretend that the law office conversation is not a moral conversation. Because the conversation is moral, whether or not lawyer and client see it as moral, the role orientation is not truthful.

The second orientation is one governed by *moral isolation*, that is, by the idea that the law office conversation is one in which moral positions are asserted and either accepted or rejected. The profession respects this orientation and has officially provided for it in rules which (a) urge lawyers to seek and to honor the moral decisions of their clients, and (b) announce for lawyers a right to refuse or withdraw from employment when the clients decisions offend the consciences of lawyers. This second ethical orientation respects the moral quality of what lawyers and clients say to one another, and is, therefore, more nearly truthful than role orientation. Moral isolation is inadequate, however, because it does not admit two facts—that lawyer and client influence one

* Professor of Law, University of Notre Dame; Francis Lewis Scholar in Residence, Washington and Lee University (Fall 1979).

** See Barth, *infra* note 22, at 10.

1 This was the Second Annual 'Or 'Emet Lecture, Osgoode Hall Law School, York University, February 2, 1979. The lecture and article are part of a broad attempt to compare "legal ethics" and theological ethics, and of a narrower attempt to suggest a resolution of the tension between loyalty to clients (the adversary system) and the ethics of social responsibility. The resolution I propose involves moral discourse, an idea I find in Jewish and Christian moral theology. This lecture and article suggests the resolution in the context of office practice; see also Brown and Shaffer, *Toward a Jurisprudence for the Law Office*, 17 AM. J. OF JURIS. 125 (1972); and T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING ch. 1 (1976). Other parts of the project argue for the ethics of moral discourse in issues of social significance (*Advocacy as Moral Discourse*, 57 N.C. L. REV. 647 (1979)); in legal counseling (*A Lesson from Trollope for Counselors at Law*, 35 WASH. & LEE L. REV. 727 (1978), and *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975)); in trial practice (*Guilty Clients and Lunch with the Tax Collectors*, 37 THE JURIST 89 (1977)); in revolutionary witness (Hauerwas and Shaffer, *Hope in the Life of Thomas More*, 54 NOTRE DAME LAW. 569 (1979)); in practical consideration of distributive justice (*Justice in Everyday Life*, 22 RES GESTAE 394 (1978)); and in legal education (T. SHAFFER AND R. REDMOUNT, LAWYERS, LAW STUDENTS, AND PEOPLE (1977), and *Moral Moments in Law School*, 4 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 32 (1978)). I propose, within the year, to see much of this in a book, tentatively entitled *Law for the Innocent*.

2 See notes 12, 14, and 16 *infra*.

another, and that the moral life is a life of openness and risk. The problem with the ethics of moral isolation is partly that they are not truthful and partly that they are too safe.

The third orientation is one governed by an aspiration to *care* for the client and to be cared for by him. It admits that the law office conversation is moral, and that those who speak to one another in law offices are interdependent and at risk. It aspires to moral discourse as a exercise of charity—of fraternal correction (Thomas Aquinas), of conditional advice (Karl Barth), and of human relation (Martin Buber). The problem in the third orientation is that the participants in a law office relation are neither equally powerful nor equally concerned for one another.

Preliminary Distinctions

My argument is that law office conversations are almost always moral conversations. This is so because they involve law; law is a claim which people make on one another—a claim resting on obligation, a moral claim—and one upon which they may seek the sanction and coercion of the state. In this derivative sense, a conversation about rights and duties is by definition a moral conversation. A conversation of this sort also usually involves issues on what to do about rights and duties, and of consequences to third persons. Often the moral content is implicit—whether to file a claim for damages for physical injury, whether to probate one's father's will—but moral content is always present. The claim for damages or the distribution of a dead person's property rests on normative considerations as well as objective rules. And when one takes advantage of the rule, he has decided that he ought to take advantage of it. He might have decided that he ought not. Law office choices and decisions often involve consideration of the social effect of what clients do, and of an effect on the character of a particular institution, such as a family or a business within the civil community. If it is possible for a serious conversation, between a lawyer and a client, in a law office, to be without moral content, I cannot think of an example.

I am interested here in personal relationships between lawyers and clients. I exclude the case in which the lawyer does not see his work as representing a person. Abe Fortas said, as reported by Anthony Lewis in *Gideon's Trumpet*, that he did not meet his client, Clarence Earl Gideon.³ Fortas seemed not to want to meet Gideon. Law reform and civil liberties litigation, as often described by lawyers, involves the representation of political positions to which clients are incidental. Such litigation is best treated in discussions of abstract political discourse, characteristic of the constitutional system in the United States, which takes place in courts; its claim to be the representation of par-

3 A. LEWIS, *GIDEON'S TRUMPET* (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Dean Freedman says, of a criminal case in which the lawyer seeks to suppress illegally seized evidence: "[t]he true issue is not the guilt or innocence of the defendant, but the integrity of law enforcement under the Constitution—in short . . . the lawyer is not representing a heinous criminal, but the Fourth Amendment." M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 13 (1975), quoted and discussed in Shaffer, *Guilty Clients and Lunch with Tax Collectors*, 37 *THE JURIST* 89, 100 (1977).

ticular persons is a formal claim only; it is representation only because access to the courts requires a formally interpersonal dispute.

Professional representation by a lawyer commonly involves a personal, narrow focus on some aspect of the client. The *Code of Professional Responsibility* of the American Bar Association expresses this narrow focus as "the benefit of his client . . . free of compromising influences and loyalties."⁴ This means, at least, that lawyers see their clients; that they see them one at a time, in a relatively intimate environment; and that lawyer and client work together as persons, since the benefit to be discovered is that of a person, not a thing. The focus on benefit implies that neither lawyer nor client sees the other as merely a member of a group, and that the lawyer does not see the client merely as a means to an end. When the Code goes beyond benefit, to aspire to law office decisions which are "morally just as well as legally permissible" (E. C. 7-8), it seems to aspire to a deeper level of interpersonal conversation.⁵

If I exclude from consideration the interpersonal and political "representation" in which lawyers sometimes engage, and if I notice that lawyers aspire to a personal association which is deep enough to make both moral admonition and free choice possible, I must also notice that any professional association is, by definition, limited. It may be helpful to say that lawyers are, or should be, concerned about the "whole persons" of their clients, but it is not helpful to say that a lawyer *represents*⁶ the whole person of his client. There should be something personal about a lawyer's representation, but: (1) A lawyer does not, in court or negotiation, say: "I represent Harrison Tweedy, a 50-year-old white, male Anglican with wife, children, and membership in the country club. I have here personal descriptions of him from his parents and his rector, and I offer all of this because my client is a person and a unique and valuable individual." The lawyer talks instead, depending on the case, about Mr. Tweedy's property, or business, or injured body. (2) A profession, by definition, does not serve all of a person. A professional is set apart from other people by his claim to serve limited aspects of people—their property, their injured bodies, their business health, their learning. Professionalism assumes a caring community in which each of a person's needs is met here or there, and in which the community itself sees to it that each of its members' needs is attended to somewhere.⁷ Therefore, an aspiration to be a professional and to serve all of a person's needs is a futile aspiration. The claim to serve the client as a person means that the lawyer aspires to serve some limited aspect of his client, but to

4 ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1969) [hereinafter cited as ABA CODE]. References in the text will be to the Code, and to Ethical Considerations by the abbreviation "EC."

5 That may depend on how one reads "just." The context suggests that "just" means righteous and not merely fair. See JUSTICE, ENCYCLOPEDIA JUDAICA 476 (1971): "Virtually the entire spectrum of ethical values is comprised in the notion of justice . . . While 'distributive' and 'retributive' justice are essentially procedural principles (i.e., how to do things), Jewish justice is essentially substantive (i.e., what life should be like)." This idea of justice combines obedience and compassion. See also W. MAY, NOTES ON THE ETHICS OF DOCTORS AND LAWYERS (Poynter Center, 1977).

6 L. BROWN and E. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NON-ADVERSARIAL LEGAL PROCESS 1-48 (1978), presents an array of short readings and three or four discussable problems on the meaning of "to represent." The term is used there, and generally in the legal profession, to include service to clients which does not involve advocacy.

7 S. HAUERWAS, TRUTHFULNESS AND TRAGEDY 182 (1978): "It is . . . not clear . . . if it is possible to practice medicine as a moral art in a society of strangers," that is, in a society where the assumption is that the community does not meet the patient's [client's] needs.

do that in a way which represents the client as unique—as a person, or, as a Jew or a Christian might add, as a child of God.⁸ The law office conversation is personal but limited. Its moral dimensions have always to be defined or negotiated.

The Ethics of Role

A colleague of mine was the only customer in a neighborhood drugstore one evening when a shabby, hirsute young man came to the pharmacist and said: "My wife is a diabetic. We are out of needles for her insulin injections. I would like to buy a package of needles." The pharmacist located a package on the shelf, handed it to the young man, and collected the price of the needles. When my colleague and the pharmacist were alone, the pharmacist said, "You know, I didn't believe him. He is going to use those needles to shoot heroin." He shrugged. "But what can you do?"

I asked a second pharmacist if this situation arises frequently in the drugstore business, and he said that it does.⁹ But, the second pharmacist said he does not handle the situation as the first pharmacist did. He does not sell needles to such customers. I asked how he distinguishes an eligible customer from an ineligible customer, and he said he asks questions about diabetes and the medication which is administered through needles. The answers to these questions tell him if the diabetes is genuine. If the diabetes is not genuine, this second pharmacist will not sell the needles. I asked him what he says when he refuses to sell the needles, and he said he believes in being honest; he says to the customer, "I will not sell you the needles, because I think you are going to use them to shoot heroin." He said other pharmacists say that they are out of needles, or that they don't have the right kind for insulin.

I now have three categories of pharmacists—sellers, refusers, and evaders. The first of these ways of dealing with the shabby and hirsute turns on an aspiration to give customers what they want. The other two turn on giving customers what they need. It is true that the evasive pharmacist may only seem to want the customer to have what the customer needs, and the refusing pharmacist may not care what the customer needs. However, each of them, if pressed to give moral reasons for evasion or refusal, might argue that his professional actions are for the customer's "own good"—that is, the professional serves his client's need.¹⁰

8 D. BONHOEFFER, *CREATION AND FALL AND TEMPTATION: TWO BIBLICAL STUDIES* 40, 91 (J. Fletcher trans. 1971); C.S. LEWIS, *THE FOUR LOVES* 126-27 (1960). C.S. LEWIS, *THE WORLD'S LAST NIGHT* 86 (1960), puts this point as many Christians would: "Christ died for men precisely because they are *not* worth dying for; to make them worth it." The aspiration that another person—"the other"—sees himself as a child of God is strong in the Jewish tradition, too; see, e.g., Kaplan, *Martin Buber and the Drama of Otherness: The Dynamics of Love, Art, and Faith*, 27 *JUDAISM* 196 (1978).

9 In the state where this occurred, there are no limiting regulations peculiar to the sale of hypodermic needles.

10 Client need may be the product of delusion or sophistry. It may really be professional need—here, the reputation of the pharmacist, or what I call below the pharmacist's moral isolation. Another drugstore example would be the sale of contraceptives to teen-aged boys. My son, Joseph Shaffer, suggested that the scene between Josiah Bounderby and Stephen Blackpool, in C. DICKENS, *HARD TIMES* (1854) 75-82 (Signet ed. 1961), is a third example. Bounderby, the industrial squire, tells Blackpool, the loom weaver, that divorces in England are only for the wealthy, that it is better for society that the poor do not have divorces.

A law office example is a case I put to my students in wills and trusts: A middle-aged wealthy woman says to her lawyer, "I want to give all that I have to the Christian Anti-Communist Crusade, and nothing to my husband or children." My suggestion is that the reply her lawyer makes to her initiates a moral conversation, and that the moral conversation will be about: (1) what the client wants or needs (which is a moral conversation governed by assumptions of role); (2) what the client's conscience requires or what the lawyer's conscience requires (a moral conversation governed by assumptions of moral isolation); or (3) what the goodness of the client requires (a moral conversation governed by the assumptions that the lawyer and the client have obligations of care toward one another). If this lawyer acts on assumptions of role, he may act in one of the three ways the pharmacists acted. He might say, "Whatever you want," and draft the will. He might say, "No, that's not what you want," and then tell the client that she, or her family, or society, needs something she does not want.¹¹ Or he might be an evader: (1) The lawyer may advise his client that wills such as hers are vulnerable to contest as "unnatural," and are subject to the claims of spouses under curtesy or forced-share statutes, and are therefore unwise. (2) He might say that devices to avoid curtesy and forced-share statutes, such as a lifetime transfer to the Christian Anti-Communist Crusade, would be evasive, and therefore virtually illegal, and tell his client that the law will not allow what she wants. (3) He might conjecture that such a will would, in litigation, be indefensible—and tell his client that she cannot be expected to understand the mysteries of will-contest litigation. All of these examples are evasive explanations. They are ways to give the client what the client needs.

Another lawyer case is Harrop Freeman's case of "The Rabbi and the Horsehip Lawyer."¹² A young married woman, the mother of three children, tells her lawyer that she wants a divorce. An interview follows, but the interview is ambiguous. It could be necessary in order to gather information for a divorce pleading. It could seek information as the premise for an inquiry into the consciences of lawyer and client. In either event, the interview develops the facts that (1) the client has a lover; (2) her husband is inoffensive and dutiful; (3) the lover is married and has children of his own; but (4) the lover has told her he will get a divorce as soon as she gets a divorce.

With this information:

Wants The lawyer might decide to prepare pleadings and file for the divorce, saying (to himself or aloud) that the question of whether a divorce is appropriate is the client's business, that the lawyer's business is to do what the client wants done.

Needs The lawyer might decide—as the lawyer in Freeman's case did—that a divorce is inappropriate, that the client is immature, that she should be straightened out (and therefore should see her rabbi), and that the appropriate professional behavior is to do for her what, in the lawyer's view, she needs to have done.

Blackpool says that the law is a muddle. "Don't call the institutions of your society a muddle," Boundedby says, "the institutions of your country are not your piece-work, and the only thing you have got to do is mind your piece-work."

¹¹ Shaffer, "Estate Planning" Games, 47 NOTRE DAME LAW. 865 (1972), analyzes these responses in Eric Berne's "transactional analysis" system. See note 26 *infra*.

¹² H. FREEMAN, LEGAL INTERVIEWING AND COUNSELING 80-88 (1964).

In any of these cases, the needles, the will, or the divorce, the professional may say that he acts for the benefit of his client. Another meaning can be put on benefit, but there is clearly a view and a practice among lawyers that benefit refers more to needs than to wants, and more to needs or wants than to genuine, interpersonal care for the client. One who argues for serving needs rather than wants is inclined to say that there is a difference between the person of the client and the client's statement of what he wants, and that the needs of the client are those which pertain to his person.¹³

On the other hand, a professional might say that he represents what his client wants, and argue that pharmacists and lawyers are providers of services, like hardware store clerks or plumbers. Lawyers also say that they need not worry about the rightness of what clients want, because interests are balanced against one another in the adversary system.¹⁴ A lawyer gives his client what the client wants, and the government then sees to it that the client gets what the client needs. In either argument the client is seen as asserting what he wants and the professional as providing services in reference to what the client wants.

The choice to serve what the client says he wants appears to be a choice against paternalism. The choice takes on a moral justification in defense of competitive politics, or free enterprise, or the adversary system. This justification does not remove paternalism; it moves the role of father from the professional to the government. A particularly appealing justification of this type appeared in early literature growing out of the war on poverty in the United States. For example, Steven Wexler looked at his welfare clients in terms suggesting a choice about needs and wants. He rejected being paternal toward clients and then decided that his clients should be taken at their word:¹⁵ "The lawyer must remember that he is where he is in order to help poor people do their thing The way in which decisions are made about what the lawyer does must reflect a full understanding that the lawyer is there to do what poor people want A lawyer must help them do *their* thing, or get out."¹⁶ I discover a similar reaction among law students when I ask them about the

13 The argument seems paternalistic, an ethical stance which I would include within the ethics of role, subcategory need. T. Beauchamp, *Paternalism and Bio-behavior Control*, in R. BEAUCHAMP & L. WALTERS, *CONTEMPORARY ISSUES IN BIOETHICS* 522-29 (1978), contrasts J.S. Mill (who condemned paternalism); H.L.A. Hart, who, Beauchamp says, saw paternalism as "the protection of people against themselves"; Gerald Dworkin, who defines the term as "the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced"; and Joel Feinberg, who distinguishes between "legal paternalism" (Dworkin's idea) and "extreme paternalism," in which a person is coerced for the good of others. One inquiry to differentiate these kinds of paternalism would be to ask whether the professional is serious when he talks about the "person" of his client.

14 The argument does not always go this far. A lawyer might say that he gives clients what they want—period. He is a robot. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUMAN RIGHTS* 1 (1975), is an effective critique of that and other positions which claim moral dispensation for lawyers. I am assuming that the "wants" position is one which states or implies a Darwinian justification.

15 Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049, 1063-65 (1970).

16 The argument for the poor is complex. One might say that the client won't win unless he's right, which assumes too much about the accuracy of governmental decisions; or that the lawyer in any event serves the government when he helps the client do the client's thing. Both of these positions are discussed below; both, in my view, depend on the assumption that power is the source of goodness. A third argument might be that government is oppressive; it is to law what disease is to medicine. I take a Barthian view of the corruption of government (see note 22 *infra*). Finally, one could argue that the poor, unlike other clients, are too credulous about government's being benign, and that lawyers save them from the consequences of their credulity. (Wexler's point is that poor clients are less credulous than their lawyers are.) See W. MAY, *supra* note 5, and note 83 *infra*.

horsewhip lawyer or the will benefiting the Christian Anti-Communist Crusade. The first pharmacist might argue the same way.

The psychological difference between serving wants and serving needs is that ascertaining needs involves imposition on the client of what the professional wants—the professional's political views as well as more selfish interests—and a resulting determination of what lawyer and client will seek. The conversation in which the client states what he wants is like a conversation in a catalogue store; the professional is the person who takes notes. The conversation in which the client is told what his needs are is like a conversation in the nursery, a conversation in which Father says, "No, that's not what you need. Let me tell you what you really need. . . ."

There are two aspects to the comparison of needs and wants as ethical positions: (1) In either case, the process of decision turns on an untruthful idea of what lawyers do, that is, on a delusion about professional role, and (2) Either resolution of the tension serves power.

Delusions About Role

The argument justifying either approach says, "A lawyer is a person who either does what his client wants or tells his client what to do." If the statement is made in the first form (wants), it is justified by (Social) Darwinian or *laissez-faire* or adversary-ethic arguments which say that the clash of wants between citizen and citizen will be resolved by nature or by the government, and there resolved for the best.¹⁷ If the statement is made in the second form (needs), it is justified, as Tocqueville justified the legal profession in the United States,¹⁸ by saying that an aristocracy is necessary in order to impose moral, or at least orderly, behavior on ordinary people. In one case (wants) the delusion is that the lawyer has no conscience; in the other (needs) the delusion is that the client has no conscience. Both positions are delusions because they pretend that conscience has little to do with the case.

Serving Power

In either situation, the lawyer is seen as a person who serves the system. Mr. Wexler's case for welfare mothers, and arguments in defense of the adversary system, comfort the guilty consciences of lawyers by saying that lawyers are entitled to suspend judgment, in serving what their clients want, because the adversary system (*i.e.*, the government) requires naked assertions of purpose in order to locate truth and justice and thereby to rule. Lawyers serve the government by taking on the duties of being adversaries in this system.¹⁹

17 M. FREEDMAN, *supra* note 3, is a vigorous exposition of the balance-through-contention concept; Dean Freedman's more recent thinking tends more toward what I define, below, as the ethics of moral isolation. See Freedman, *Are There Public Interest Limits on Lawyers' Advocacy?*, 2 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 30-39 (1976); Freedman, *Professional Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978).

18 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284-89 (Random House ed. 1949). ABA CODE EC 7-8 can be read as depending on this view of lawyers, although it appears to have been drafted with less haughty discourse in mind.

19 See M. FREEDMAN, *supra* note 3, at 24: "Zealous and effective advocacy is essential to the adversary system, which itself serves the public interest in a uniquely important way."

Arguments from the public-interest bar, that lawyers should restrain their business clients out of respect for economic or political ideas about fair distribution of wealth, or the preservation of community interest,²⁰ are arguments that lawyers should serve in the same way elected representatives or public officials are expected to serve.²¹ The argument implies that what clients need is a better society and that lawyers in seeking a better society serve their clients. The public-interest argument, like the poverty law argument—one an argument from needs and the other an argument from wants—seems to depend on the assumption that lawyers' fealty is to power. The lawyer who serves needs is ostensibly more a servant of the system than the lawyer who serves wants, but both are servants of the system. The moral justification for serving the system is that the system is a source of goodness. But generalized, principled fealty to the system is fealty to power, which assumes that power is the way to goodness. The assumption that power is the way to goodness is not truthful; it depends on a delusion about people—clients and lawyers—and a delusion as well about society and its history, about government, and about the nature of worldly kingdoms.²² Such delusions are the occupational hazards of professionalism.

20 F. MARKS, K. LESWING, & B. FORTINSKY, *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* (1972); a relevant excerpt (p. 289) is quoted and discussed in L. BROWN and E. DAUER, *supra* note 6, at 8-9.

21 Examples are the suggestions that corporate lawyers should report the misdeeds of corporate presidents to boards of directors, Palmieri, *Officers of the Board*, Wall St. J., Aug. 14, 1978, at 12, col. 3, or report corporate misdeeds to the government, Crock, *S.E.C. to Consider Rule Requiring Lawyers to Disclose Fraud by Corporate Clients*, Wall St. J., Aug. 3, 1978, at 3, col. 2.

22 Hauerwas and Burrell, *Self-Deception and Autobiography: Theological and Ethical Reflections on Speer's Inside the Third Reich*, 2 J. RELIGIOUS ETHICS 99 (1974), reprinted in S. HAUERWAS, *supra* note 7, at 82-98; Hauerwas and Shaffer, *supra* note 1. Scriptural exegesis for these positions is suggested by J. YODER, *THE POLITICS OF JESUS* (1972). There are various ways to explain a wariness of government. One can be historical about it and describe the more or less self-evident sins of government, such as the Holocaust, Hiroshima, or the Viet Nam War. One can draw on Anabaptist traditions; Prof. Yoder does this with lucid eloquence. My own view uses both of these attitudes (see *RES GESTAE* and N.C. L. REV., *supra* note 1), but I prefer the mood and doctrine Karl Barth adopted in an address, in 1919, called "*The Christian's Place in Society*" (in *THE WORD OF GOD AND THE WORD OF MAN* 272-327 (D. Horton trans. 1978)). Government is no more evil than any other institution, but no institution merits a Christian's uncritical loyalty:

We are engaged in life's revolt against the powers of death that inclose it. We cannot longer allow ourselves to be wholly deceived by the theories with which those powers have surrounded themselves and by the facts which seem to point to their authority. There is something fundamental in us that denies those powers. *Id.* at 291.

However, Barth also meditates on Genesis 1:31 (God "saw everything that he had made, and, behold it was good") and Colossians 1:16 ("By him were all things created . . . thrones . . . principalities . . . powers: all things were created by him, and for him"), and concludes with a claim of freedom—"a humble but purposeful and really happy freedom of movement" (at 309)—and a respect for government as creature (at 303): "Destroy it not, for a blessing is in it." See also note 83 *infra*.

It may not be self-evident to everyone that an ethical orientation which seeks vindication from worldly power is inadequate. I argue for my position in three ways—

- (1) The common law-democratic tradition (and experience) leads to a justifiable suspicion of power and a horror of unlimited power (power corrupts, etc.).
- (2) An empirical observation seems justified, that power leads to corruption, at least among those who exercise power; this is "the lesson of Watergate," and a lesson to be learned from the decline or self-destruction of theocracy in such venerable societies as colonial Massachusetts and such puzzling ones as Jim Jones' cult in Guyana. Compare K. ERIKSON, *WAYWARD PURITANS* (1966).
- (3) Christian and Jewish theology says that the only true source of power (and the only safe place to serve power and to trust it) is God, but that God's power is not arbitrary or threatening; His is power exercised, and exercised in love; thus the Apostles' Creed does not say "God Almighty," but "God the Father Almighty, Creator . . ." K. BARTH, *DOGMATICS IN OUTLINE* 46-50 (Harper Torchbook ed. G. Thomson trans. 1959). None of these arguments leads necessarily to a witness against power; but each of them would argue with (1) the idea that service to worldly power is a dependable way to goodness, and (2) the idea that fealty to worldly power is an adequate justification for professional behavior.

Professionalism as an ethical orientation is unable to cope with the truth about power or to suggest adequate ways for lawyers and clients to talk to one another about the moral limits of power. Professionalism makes assumptions about power which are based not on right and wrong, but on force and fear. These assumptions are not a sound way for deciding what the conversation between lawyer and client should be like. They do not involve a significant conversation.²³ If the Code's idea of client benefit is translated in law practice to mean either what the client asks for or what the client is thought by the professional to need, then the Code and its aspirations provide inadequate guidance.

The Ethics of Isolation

There are two kinds of refusal to sell needles in the drugstore. One is evasive, not to say dishonest: The pharmacist, having determined that the young man wanted the needles for heroin, said that the drugstore was out of the kind of needles the customer wanted. He might have proposed to sell a kind of needles which would not work for heroin, or he might have said that he required a physician's prescription for the needles, even though the law does not require a prescription. In the same way, the wills lawyer might say that the client's proposal is not allowed under the law of elective spouses' rights, or is unwise because of the law of undue influence. The divorce lawyer might say that a divorce suit, for motives such as his client has, is bound to end in disaster—loss of alimony, loss of child custody, or even loss of the divorce. These are paternal answers (as well as dishonest answers); all are likely to be defended in terms of the client's need.²⁴

The other pharmacist who refused to sell needles did not use this form of answer. He said, "I think you are going to use the needles to shoot heroin, and I won't sell them to you." The wills lawyer might say, "I will not draft a will which disinherits your husband and children." The divorce lawyer might say, "I will not file a divorce suit which will result in a young mother leaving her family and may result in a young father leaving his." These are not paternal answers; they are what the late Dr. Eric Berne would have called adult-to-adult answers:²⁵ They can be defended in terms of client need, but there is a moral quality about them which is different from the avuncular judgment that what the client needs is not what the client is asking for.²⁶

This moral quality is the assertion of conscience. The candid refusers make a claim of conscientious objection. Each of their answers is an announcement of what the professional's conscience will not allow him to do.²⁷ The

23 They do not require or foster adult-to-adult communication; see Shaffer, *supra* note 11, at 866.

24 See note 32 *infra*.

25 See Shaffer, *supra* note 11, at 866; E. BERNE, *TRANSACTIONAL ANALYSIS IN PSYCHOTHERAPY* (1961); *GAMES PEOPLE PLAY* (1967).

26 Cihlar, *Client Self-Determination: Intervention or Interference*, 14 *ST. LOUIS U. L.J.* 604 (1970), discussed in T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING* ch. 1 (1976).

27 The Indiana Oath of Attorneys (22 *RES GESTAE*, cover, June 1978), which is also Rule 22 of the Rules of the Supreme Court of Indiana, includes: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed"; this is a general professional aspiration; ABA CODE EC 2-16 and EC 2-25 through 2-29; CAN. B. ASS'N, *CODE OF PROFESSIONAL CONDUCT* 53 (1974). However, lawyers in Canada and the United States have reserved the right of conscientious objection to the client's purposes; CAN. B. ASS'N, *CODE OF PROFESSIONAL CONDUCT* 51-55; ABA CODE EC 2-26, EC 2-2, EC 7-8

pharmacist will not be implicated in the use of heroin. The wills lawyer will not be a party to such drastic disinheritance. The divorce lawyer will not be employed to destroy two families. These claims are personal to the professional. They are not statements about the client at all.²⁸

The opposites of these answers would not be "Whatever you want" answers. They would be "If you think it's right" answers. In the ethics of isolation the opposite of asserting conscience against the client's purpose is accepting the client's conscientious defense of his purpose. The pharmacist-customer dialogue might be:

P: I think you're going to use the needles for heroin.

C: Well, yes, I am. But you see, I have to have heroin; I will die without it. The reasons I need new needles are that my old needles are dull and damage my skin more than is necessary, and they are dirty and may give me hepatitis.

P: All right. It's up to you.²⁹

The wills lawyer might say, "Have you thought about your family?" The divorce lawyer might say (as my students, role-playing the case, sometimes do), "Do you realize that there are five children involved here, that your husband is inoffensive, and that, for all that appears, your lover's wife is innocent?" The wills client might answer in terms of devotion to the work of Christian anti-communism. The divorce client might (as the real client did) admit the objective wrongness of what she plans, say that love conquers all, and promise to make the divorces as painless for the children and spouses as she can. In both lawyer cases, the answer might then be, "It's up to you."

These answers are not the same as saying, "Whatever you want." The difference lies in the fact that the professional raised a moral issue, in terms of his own conscience, and raised it candidly. This issue provoked a (more or less candid) reply from the client, in terms of the client's conscience. The lawyer listened to the reply and decided whether the client's explanation made the claim of conscientious objection unnecessary.

If the lawyers had persisted in expressing misgivings, even after hearing about the state of the client's conscience, there would have been in each case a further issue about the lawyer's conscience. The difference between the two sets of answers ("It's up to you" and "I won't do it") would then be that one turns on the conscience of the client and the other turns on the conscience of the lawyer. They differ from role-determined answers because conscience has been placed in issue. Conscience is being asserted. The characteristics of these answers are (1) they make conscience relevant, (2) they are not reasoned and

and EC 7-9. My argument (*see* THE JURIST, *supra*, note 1) has been that lawyers should, at least in the first instance, work more toward discourse (*i.e.*, toward the client's goodness) than toward result (*i.e.*, toward good decisions by either themselves or their clients). This view is supported by ABA CODE EC 7-7, 7-8, and 7-9.

²⁸ They proceed either from principles or from character. *See* note 54 *infra*.

²⁹ The pharmacist might say instead, "Even after hearing what you say, I will not sell you the needles." Either alternative is a matter of conscience confronting conscience.

may be opaque, (3) they assume moral insularity, and (4) they do not involve risk.

Conscience

The client's conscience comes into the case either because the client volunteers it or the lawyer asks about it. In law office cases, such as the two I have put, my observation is that the client usually volunteers an explanation of her devotion to the Christian Anti-Communist Crusade or an excuse for her determination to divorce and marry her lover despite the harm that divorce will bring. My principal recent experience of asking about conscience in this morally insular way has been in observing ethics discussions in law school where the teacher says "What would you do in this situation?" and the student answers, "I would do this, and I would do it because of the way I was brought up."³⁰ In any case, these professional answers, whether "I won't do it" or "It's up to you," involve the relevance of conscience and, therefore, differ from answers given in a law office conversation which is governed by role.

Not Reasoned and May Be Opaque

Conscience is asserted here, rather than offered. Conscience is a way of saying, "This is the way I feel; I cannot do anything about it." In the sense in which I prefer to use the words, the conversation is moral but not ethical.³¹ It deals with right and wrong, but it does not deal with dealing with right and wrong; it is not a conversation about right and wrong but is only an assertion about right and wrong. If the client does not like the lawyer's assertion, he can either get another lawyer or change his mind about what he wants. If the lawyer elicits the client's moral assertion, and then decides he will not cooperate with it, he moves the assertion from the client's moral isolation to the lawyer's moral isolation; he says "It's up to me" instead of "It's up to you." The client does not come to understand the lawyer's moral assertion and is therefore not persuaded by it. He is not convinced; he is overruled.

It is possible to read the aspirations of the Code as requiring this sort of limited discussion. The word "benefit" in Ethical Consideration 5-1 can be read to suggest a filtered consideration of what the client says he wants, and, in fact, lawyers do filter what clients say they want.³² The Code enjoins lawyers to

³⁰ *Moral Moments in Law School*, *supra* note 1.

³¹ While an assertion of conscience might invite discourse, the prototype of the idea is final, definitive, and even private. *See, e.g., Jones, Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978), and Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978). I am helped in my thinking here by a lecture, "Appeals to Conscience," given at Notre Dame on November 29, 1977, by Professor James F. Childress. Barth would say that the conversations which follow from a claim of conscience might involve truth, but not "the truth about truth" (*see* Barth, *supra* note 22, at 137). Claims of conscience are where problems in ethics begin: "It is our acquaintance not with savage and immoral man so much as with moral man that makes us none too proud of his achievements." (*See* Barth, *supra* note 22, at 147.) This is from an address to ministers at Wiesbaden ("The Problem of Ethics Today") in 1922. *See also* J. GUSTAFSON, *infra* note 75, at 84-87.

³² L. BROWN AND E. DAUER, *supra* note 6, pose three moral dilemmas—drafting a deceptive lease, advising a client to violate the law, and defeating a child-custody order by helping a client to kidnap his own children. In each of them the moral dilemma can be seen more as a problem for the lawyer than as matter for moral discourse with the client, so that the choice (for the lawyer) is between dominating the client and be-

advise (meaning, at least, inquire) on "the practical effect" of client decisions (E.C. 7-5); lawyers have to decide for themselves what is "within the bounds of the law" and what is not (Canons 5 and 7); certain decisions in litigation are reserved for lawyers (E.C. 7-7), as certain decisions in surgery are reserved for doctors. Lawyers are to see to it that clients consider their decisions soberly. Lawyers are to inquire whether clients' decisions are "morally just as well as legally permissible" (E.C. 7-8).

Assumption of Moral Insularity

The Code, after defining in these several ways the obligation a lawyer has to inquire into the conscience of his client, emphasizes that moral decisions are for the client, not the lawyer (E.C. 7-8). However, in both Canada and the United States, professional ethics affirm that no lawyer need participate in a case which is offensive to his conscience.³³ When client self-determination and lawyer conscientious objection come together, they imply that the client and the lawyer, although they may talk to one another, are not likely to influence one another. When the conversation is resolved by the moral assertion of the client, the profession is likely to talk about the lawyer as representing the interests of his client, and to defend itself by allusions to the adversary system. When the conversation is resolved by the moral assertion of the lawyer, the profession is likely to talk about the lawyer as representing the best interests of his client, and to defend itself by talking about the social responsibility of lawyers.³⁴ The assumption in either case is that lawyers and clients operate in moral worlds, but that their worlds are isolated from one another.

Modern North Americans come out of a frontier tradition which exalts the rugged individual, values a diversity of cults, and celebrates the economic myth that each person is a unit of production and consumption. We are supported in these assumptions by affluence and help-those-who-help-themselves notions of social welfare. We tend to act, John Donne to the contrary notwithstanding, as though each of us were an island.

But isolation in America is not a fact and never has been a fact. The spiritual history of the United States is the history of pilgrims yearning to be a people, of a religious pluralism which has always sought to deny itself.³⁵ The story of any lawyer's life is a story of influence on clients—sometimes paternal, sometimes what I am here calling conscientious objection, sometimes a deeper influence which depends on conversation.³⁶ To suppose that clients are morally isolated, and that lawyers are incapable of changing the consciences of clients, is not truthful. Isolation as a moral idea is therefore inadequate. Nor are lawyers morally isolated. I think lawyers tend to take on the values of their

ing dominated by him. They quote Cheatham for this view: "The interested striving of two contending parties is, in the long run, an infinitely better agency for the ascertainment of truth than any species of paternalistic inquiry." Cheatham's apparent assumption is that the contenders are lawyers; from the clients' point of view the choice is between contending paternalisms. See note 16 *supra* and accompanying text.

³³ See note 27 *supra*.

³⁴ L. BROWN AND E. DAUER, *supra* note 6, at ch. 1, give several examples.

³⁵ P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 7-19 (1965); V. EDMAN, *FINNEY LIVES ON* (1951); and Rhodes, *The Passing of Nonsectarianism—Some Reflections on the School Prayer Case*, 38 NOTRE DAME LAW. 115 (1963).

³⁶ See LEGAL INTERVIEWING AND COUNSELING, *supra* note 1, at 208-33.

most important clients—and this not as the result of conversation with them but of assumptions about their clients' purposes.³⁷ Lawyers are not the moral agents they—and the professional rules about lawyers³⁸—suppose themselves to be. Even when seen as public moral leaders, lawyers are not isolated:³⁹ “The righteous cannot live by faith alone, if by faith we mean a steadily held, strong-minded, interior spiritual tilt. Such individuals . . . are likely candidates for lives of quiet desperation. Without the links of friendship, worshipping community for political discourse, and associates for their public action, the faithful are also the frustrated.”

Moral Isolation Does Not Involve Risk

Moral isolation is an arrogant idea as well as an untruthful idea. This seems to be so for two reasons. First, choices based on the delusion of moral isolation are often made carelessly. The judgment which the refusing or evasive pharmacist makes about the hirsute young man reasons recklessly from appearances, and then comes to a conclusion based on stereotypes about heroin users. The judgments of the wills lawyer (if he refuses to draft the will) and of the divorce lawyer (if he refuses to file the divorce) draw similar conclusions based on stereotypes (a vindictive or deceived old woman and a spoiled young one)—both of which might fall before insight into the complex and frustrating lives which they (and the rest of us) lead. Second, the moral judgments are typically made without a hint of doubt about the principles or the experience on which they rest.

The horsewhip lawyer in the real case was remarkably overbearing; his account of the case drew an array of published disapproval.⁴⁰ An example from the lore of testamentary counseling illustrates how the dialogue in the wills case might proceed:⁴¹

A lawyer told me about an elderly widow who had one living child and two grandchildren, and who told the lawyer that she wanted her estate divided into three parts and to give one part to each descendant. He said he told her she shouldn't do that. What she should do, he said, was give half to the child and one-fourth each to the grandchildren. That, he said, was the proper way.

I told the lawyer that I was appalled at the way he imposed his idea of propriety (and at its source, which is apparently the 17th-century English Statute of Distributions). I asked him if he always did things like that, and he said that he did—always. Then I asked him what he did when the client insisted that she meant what she said. I gather from his answer that this sort of arrogance from clients, about their lives and their property, doesn't occur very often in his office; but, he said, when it does, he does what the client wants.

37 The fiction of Louis Auchincloss, on the social, economic, and moral attitudes of lawyers who represent business, suggests that lawyers take on the values of their clients. This may also be true of lawyers who represent the poor and oppressed; see Wexler, *supra* note 15, at 1063-65.

38 See note 27 *supra*. M. NOVAK, IN PRAISE OF CYNICISM 11 (Poynter Center 1975), argues that excessive concern with morality produces an absence of social responsibility. Moral concern can foster, he says, “freedom from institutions, from the past, and from social entanglements.” Compare Wasserstrom, *supra* note 14, who makes similar observations on the amorality of lawyers.

39 D. SHRIVER & K. OSTROM, IS THERE HOPE FOR THE CITY? ch. 6 (1977).

40 See note 12 *supra*.

41 See note 36 *supra*, at 221-22; for other empirical examples see *Moral Moments in Law School*, *supra* note 1.

The ethics of isolation, in their untruthfulness and in their arrogance, deserve the misgivings of Karl Barth:⁴² "He who takes the risk of counseling must be prepared to be counseled in turn by his brother if there is need of it. Such mutual counseling in a concrete situation is an event. It is a part of the ethos which is realized ethics. The ethos . . . implies that he refrain from attempting too much and becoming thereby a lawgiver."

Similar objections can be made about assuming moral isolation in clients. What seems to follow the "It's up to you" professional moral reply is a series of rationalizations: "There is no real evidence that heroin is harmful," or "There is nothing I can do about it anyway," or "It really is important to avoid hepatitis," or "She will only go to some other lawyer and get her will or her divorce," or even "It is dangerous to play God."

It is important to realize the inadequacy of the idea of moral isolation, and to distinguish it from the ethics of moral autonomy,⁴³ if only because moral isolation is an appealing delusion. Moral isolation is a temptation from responsibility. When moral insularity is assumed in the client, a lawyer is tempted to the comfort of irresponsibility.⁴⁴ When moral insularity is assumed by a lawyer, the lawyer is tempted to a paternalism which diminishes the moral growth of clients and erodes the possibility of humility and openness in the lawyer. The delusion of isolation is appealing because it tolerates moral propositions and the appearance of moral concern. It seems so much nobler than the morality of role. Isolation is, though, a moral life without risk, since in it the lawyer's views are not made vulnerable.⁴⁵ ("He who takes the risk of counseling must be prepared to be counseled in turn.") Isolation implies, finally, that morals are a private affair; they are asserted, not talked about, which is to suppose that morals are not important, literally not worth talking about. When morals become unimportant, power fills the vacuum; might becomes right; and one's law office is conducted in result, if not in concept, on the ethics of fear.

The Ethics of Care

The ethics of care, like the ethics of isolation, allow for a moral conversation; they make conscience relevant. But care goes beneath and beyond the ethics of isolation; it denies that lawyer and client are moral islands. Lawyer and client depend on one another and influence one another. I assert that as a fact, as well as a norm; the ethics of care is a procedure in which the fact of moral interdependence is the basis of conversation.

Stories offer the most distilled examples of moral conversation, particular-

42 THE HUMANITY OF GOD 86-87 (T. Wieser and J. Thomas trans. 1960).

43 See text accompanying notes 50-59 *infra*.

44 See Wasserstrom, *supra* note 14.

45 See note 31 *supra*; Hazard, *Conscience and Circumstance in Legal Ethics*, 1 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 36, 44-45 (1975):

The picture of the lawyer . . . is that of a lone practitioner who must judge for himself what is right while engaged in intense competition with his fellow professionals and with outsiders who want to intrude on his professional domain. The controls on his conduct, in the contemplation of the rules of professional conduct, are almost entirely those of self-governance under the guidance of rules and the strictures of his conscience.

ly stories about a person making up⁴⁶ or changing⁴⁷ his mind. Those processes are inevitably moral—which is to say at least that they turn on what really matters—and they are inevitably interpersonal. Storytellers and poets explore the process in depth, but even a quickly concocted first-year law-school simulation illustrates it.⁴⁸

- L: Have you had any prior dealings with this broker?
 C: No, only in the purchase of this property.
 L: And you had no written agreement with him concerning this deal [acquiring a tenant], only his request to you for this money, after the fact.
 C: Yes, that's right. He didn't say anything about getting a six per cent commission until after the tenant was in. As far as I was concerned, I shouldn't have to pay him anything. I don't know if I really have to. However, I assume I do. I don't know Do I have an obligation to pay?
 L: Under our law . . . any arrangement or agreement which is made between you and a broker which is not written down is not enforceable
 C: And I could have told him good-bye and leave me alone.
 L: There was nothing he could do about it I think also you have some extra-legal considerations that you shouldn't lose sight of . . . in terms of your business reputation, in terms of if you are ever going to have dealings with other brokers. . . .⁴⁹
 C: What are you telling me then? That I should pay him or that I shouldn't?
 L: Well, I'm not telling you that you should pay him or not pay him, but I think . . . in making your decision you have to consider not just your legal obligations but also other considerations which are up to you, to decide how significant they are to you. You see, the point is that we don't know how difficult it would have been for you to get somebody to become a tenant in that building, and, after all, he did go out of his way to get somebody in that building, and that person is now paying you for leasing. So you're getting a benefit conferred on you right now. Now, it's true that you may not technically be liable to him, and we're not saying that that shouldn't be an important consideration to you, obviously.
 C: Well, all right. I said before I suppose I have to pay him.⁵⁰

The ethics of care seem to operate on a spectrum from autonomy to conversion; and are characterized by two kinds of risk—the risk of openness and the risk of an unrealized mutuality.

From Autonomy to Conversion

Much of modern philosophical ethics talks in terms of autonomy as being the moral destination we should respect and seek in one another.⁵¹ The

⁴⁶ See, e.g., A. TROLLOPE, *THE WARDEN* (1932); Shaffer, *A Lesson from Trollope for Counselors at Law*, *supra* note 1.

⁴⁷ See, e.g., A. TROLLOPE, *THE DUKE'S CHILDREN* (1903); C.P. SNOW, *THE AFFAIR* (1960); Shaffer, Book Review, 4 CAL. W. L. REV. 76 (1968).

⁴⁸ See note 36 *supra*, at 214-15, borrowed from Louis M. Brown's unpublished teaching materials.

⁴⁹ This is not on its face a moral assertion, but, in a professional culture where moral reasons are not often mentioned, and moral arguments are considered weak, it may conceal a moral assertion.

⁵⁰ A novelist would want to find out more about this decision.

⁵¹ See T. BEAUCHAMP, *supra* note 13; G. DWORKIN, *Autonomy and Behavior Control*, at 23 (Hastings Center Report) (Feb. 1976). Dworkin's paper is a widely discussed analysis of the ethics of autonomy; both papers deal with ethical limits on coercion; I am using them in the claim that the psychological influence of professionalism is a form of coercion. See ABA CODE EC 7-7.

substantive moral idea involved is freedom. Those who write on the subject do not talk about particular virtues; they talk instead about providing information, time for thoughtful choice, and institutional procedures which forbid coercion.

Autonomy does not preclude deep moral conversation. That is, there is a difference between freedom and isolation. The aspiration to autonomy assumes moral conversation because it assumes that moral decisions are important and that none of us makes his moral decisions alone. Autonomy (etymologically rule-of-self) assumes a certain amount of independence, but it is not an ethics of isolation. As Gerald Dworkin puts it, autonomy is independence plus authenticity. "We need characterization," he says of the moral agent, "of what it is for a motivation to be *his*, and what it is for it to be *his own*. The first is what I . . . call authenticity; the second independence."⁵² An ethics of isolation would say, "It is he who decides." (It's up to him.) An ethics of autonomy would say, "It is *he* who *decides*." Autonomy focuses on the pronoun (the person) as well as on the verb (the action or, as we say in law school, "the problem"). The result of autonomous ethical reasoning can be thought of in terms of the deeper beliefs of the moral agent—so that the landlord from the contracts class thinks, finally, that paying for benefit conferred is more important to him than the protection of the law.⁵³

Autonomy allows for, and may even require, what Thomas Aquinas called "fraternal correction," and Karl Barth "conditional advice."⁵⁴ Immanuel Kant, who is perhaps the source of the modern ethics of autonomy, emphasized that the autonomous moral agent exercises a "self-control," which overcomes both an array "of outside forces" and "one's own phenomenal self . . . one's empirical inclinations."⁵⁵ Autonomy is open to moral conversation in a deeper way than isolation is, because autonomy involves the self of the client as well as the client's dilemma. Dworkin prescribes a number of standards for the conduct of institutions in such a way as to show respect for autonomy. These can be applied to some extent as well to a professional's showing respect for and seeking moral conversation with his client. I notice three of Dworkin's guidelines which are of interest for the law office:

1. "Methods of influence [should be used] which are not destructive of the ability of individuals to reflect rationally on their own interests."

52 "There are times when we really 'don't want to know.' But we do resent being manipulated even in our own interest." (G. DWORKIN, *supra* note 51)

53 D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974), demonstrates that strategies of the lawyer which seek active participation by the client produce larger material benefits than strategies which depend on the docility of the client. SNOW's character Arthur Brown changes his mind because a conflict of loyalties forces him to reject the ethics of loyalty; C.P. SNOW, *supra* note 47, at 342-52.

54 See note 42 *supra*; T. AQUINAS, *II SUMMA THEOLOGICA II*, Q.33, 1333-41 (Benziger Bros. trans. 1947). Both Barth and Aquinas relate the giving of moral advice to a duty under the virtue of charity. Socrates insists that the way to argue about justice is without reference to power. PLATO, *THE REPUBLIC*, Book One, reprinted in I.B. JOWETT, *THE DIALOGUES OF PLATO* 613 (I.B. Jowett Trans. 1937).

55 Quoted in G. DWORKIN, *supra* note 51. G. Dworkin quotes Piaget, "Autonomy follows upon heteronomy," as a matter of developmental psychology. J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1932). It is possible for a person to be free "substantively" but not "procedurally," Dworkin says; that is, he can, as a child does, come "to view in a critical and rational manner his situation." G. DWORKIN, *supra* note 51, at 25. The idea is similar to the description of early Christian slaves and women, who were told to endure their situations and to be free in them; J. H. YODER refers to this status as "revolutionary subordination." See J. YODER, *supra* note 22.

2. "Methods which rely essentially on deception, on keeping the [client] in ignorance of relevant facts, are to be avoided."
3. One should prefer "methods of influence which work through the cognitive and affective structure of the [client], which require the active participation of the [client] in producing the change, [over] those which short-circuit the desires and beliefs of the [client] and make him a passive recipient of the changes."

I think these could be stated positively as standards requiring (1) time, space, and environment for reflection, (2) full information, and (3) collaboration. Dworkin would probably emphasize legal counseling tactics which seek out the authenticity of the client, over tactics of influence; but he admits that his theory is basically a procedural one and is consistent with the moral agent's admitting to himself, and accepting, the moral influence of another person. It is possible, in Dworkin's view, for a client to be influenced but nonetheless autonomous. Dworkin provides for that with his distinction between procedural and substantive independence. Either kind of independence becomes autonomy when coupled with the client's authenticity. I conclude from this that some influences violate freedom and some do not. Another way to say it would be to say that interpersonal influences are data for decision:

The compassionate or loyal or moral man [has authenticity but] is one whose actions are to some extent determined by the needs and predicaments of others. He is not independent or self-determining. Again, any notion of commitment (to a lover, a goal, a group) seems to be a denial of substantive independence. . . .⁵⁶

Autonomy can make room for moral influence, both indirectly, as the client considers others (the broker, the inoffensive husband, the heirs), and directly, as the client opens himself to fraternal correction or conditional advice. The moment in which this openness occurs, Barth would say, is the moment in which law office conversation becomes an adult, self-conscious, moral enterprise; "it is a part of the ethos which is realized ethics."⁵⁷

Still, it is possible to hope that the client will leave with more moral gain than the ethics of autonomy seem to allow for. It is possible to seek a conversion of the client to a situation which is not only freedom but freedom *for*.⁵⁸ The object of law office discourse as moral discourse is to serve the goodness of the client, and many of us feel that there is more to goodness than autonomy. Born-again Christian lawyers whom I know tell their clients about Jesus Christ as Saviour; some of them have told me that they ask clients to pray with them.

⁵⁶ See G. DWORKIN, *supra* note 51, at 26.

⁵⁷ See note 42 *supra* at 87.

⁵⁸ *Id.* at 77:

Human freedom is not realized in the solitary detachment of an individual in isolation. . . . It is true that He who gave man freedom because He is man's friend, is also *pro me* (for me). But I am not Man, I am only *a man*, and I am a man only in relation to my fellow men. Only in encounter and in communion with them may I receive the gift of freedom. God is *pro me* because He is *pro nobis*.

Bonhoeffer said, "there is no 'being-free-from' without 'being-free-for.' There is no dominion without serving God. Without the one, man necessarily loses the other. Without God, without his brother, man loses the earth." D. BONHOEFFER, *CREATION AND FALL AND TEMPTATION: TWO BIBLICAL STUDIES* 40 (C. Fletcher and K. Downham trans. 1976).

The practice of turning to scripture for legal guidance is as old in the Jewish and Christian tradition as Moses himself.⁵⁹ I, who am a Christian, would say that my hope for my client is that he respond to the redemption which God has accomplished for him. And if that is my hope, then it is my duty, no doubt, to say something about it. At least it is my duty to deal with my client as a child of God, and, when I speak to him, to speak to "the One in the other." All of this is more than autonomy, and none of it is less.⁶⁰

The Risk of Openness

Moral discourse in professional relationship does not require that either party consciously change; it is possible for two people to discuss an issue of conscience, and to discuss it deeply, even though neither of them comes to change his mind. One who meets the other in a deep way, who meets the One in the other, is changed by such a meeting, but this change need not include a conscious change of mind. However, the assumption of moral discourse is that each of the discourses is open to change. Martin Buber said, of the I-You relationship, that the tendency of the relationship was "as far as possible to change something in the other, but also to let *me* be changed by him." Change is the model in moral discourse,⁶¹ and the poetic paradigm as well,⁶² but it is openness to change—vulnerability, risk—which is the essence of moral discourse. Buber said that this openness was, in essence, a belief that there is something in the other (*e.g.*, client) which one can come to trust: "[T]he worst in him and the best in him are dependent on one another . . . [W]hat we may call the good, is always only a direction. Not a substance."⁶³

This means, of course, that even in an I-You relation, even after all of the skills which Dworkin's guidelines imply, the lawyer may have to retain his conscientious objection. He may have to refuse to go further with the client. This is not, however, a retreat to the ethics of isolation—for two reasons: First, the dialogue has taken place, and that means that the lawyer has left his island and asked the client to leave his island. As a matter of behavior, isolation has been left behind. Second, the actors have influenced one another; the matter may be in the hands of God, but it is there in a way it would not be if the lawyer had re-

59 And, perhaps, almost as legal. Passamaneck & Brown, *The Rabbis—Preventive Law Lawyers*, 8 ISRAEL L. REV. 538 (1973).

60 Christian ethical thinking, deriving from such sources as St. Paul's Letter to the Christians in Rome, preserves a discursive distinction between the person I would be and the person I see myself being: "By the law, through which I know God, I am enabled *to will to do good*: by the same law, through which I am known by God, my success in *doing evil* is clearly exposed. Thus my noblest capacity becomes my deepest perplexity; my noblest opportunity my uttermost distress; my noblest gift, my darkest menace." K. BARTH, *THE EPISTLE TO THE ROMANS* 266 (E. Hoskyns trans. 1968), commenting on Romans 7:21-23. Christian faith, in Barth's view, is a matter of accepting what God has done about this dilemma.

Dworkin puts the cases of a smoker who wants to stop smoking and a drug addict who does not want to stop taking drugs. The smoker is authentically a nonsmoker; the addict is authentically an addict. The idea tends to a theoretical schizophrenia, not to say Manicheanism, which Christian theologians are at some pains to avoid: "It is one man that wills and does not perform; one man that does not will, and yet performs; within the four walls of the house of sin dwells but one man." *Id.* Barth makes this one, integrated person an object of discourse when he talks about addressing "the One in the other," *id.* at 506, commenting on Romans 14:1-4.

61 M. BUBER, *THE KNOWLEDGE OF MAN* 167-68 (M. Friedman and R. Smith trans. 1965).

62 See notes 46 and 47 *supra*.

63 See note 61 *supra*, at 180-81.

tained his isolation. It makes a difference that the lawyer has spoken: "Only by declaring the truth openly do we recommend ourselves, and then it is to the common conscience of our fellow men and in the sight of God." The point Barth makes when talking about "realized ethics," and the point Buber makes in his ontology of relation, is that the act of witness is a fact, a phenomenon. Something has happened, whether we know it or not, and a believer must, I think, say that his act in this respect can be faithful without being effective.

The risk of openness is a risk involving the person of the client, and acceptance of the principle (and of the fact) that even in "representation" it is not only an argument or interest which is being asserted, but a person and a relationship that is being—not asserted, but addressed.⁶⁴ Another way of saying this is to say that the professional relation should be, at least to the lawyer, an end in itself and not merely a means to an end.

The result of making the person central is that the professional relation is necessarily tentative. "Every I-You relationship is a situation defined by the attempt of one partner to act on the other so as to accomplish some goal that is condemned never to be complete."⁶⁵ It is necessarily risky, too; attitudes defined by professionalism (that is, by role) are less changeable, clearer, and more secure. Moral isolation makes one less vulnerable. What compels an ethic of care, in the face of clarity and relative security elsewhere, is an interest in living professional life in a truthful way. The risk in trying to live truthfully is not the loss of self⁶⁶ but the loss of security. The price of openness is "not the I but that false drive for self-affirmation which impels man to flee from the unreliable, unsolid, unlasting, unpredictable, dangerous world of relation into the having of things."⁶⁷ What is possible, given the maintenance of moral discourse, is the discovery of truth, and that often requires an openness to the other which is almost passivity.⁶⁸

Buber is occasionally mystical in describing the I-You relationship as a way to truth. More than mystical, his view of relationship is ontological; it is only in relationship that a person comes to be at all. There are less mystical illustrations of the idea, the most common of which, in the law, is probably the Socratic dialogue. The "Socratic method" in modern legal education has come to mean a manipulative device in which the student (client) comes to discover what the master (lawyer) knew all along.⁶⁹ But to Socrates, the method was a conversation in which people discover one another, and each discovers himself,

64 M. BUBER, *I AND THOU* 129 (W. Kaufmann trans. 1970). (Kaufmann translates "du" as "you" in the text, but retains "thou" in the title.) I argue that, in advocacy as moral discourse, it is a person who is being asserted as well as addressed. See Shaffer, *Advocacy as Moral Discourse*, *supra* note 1; Hauerwas and Shaffer, *supra* note 1.

65 See M. BUBER, *id.*, at 179. It is important to notice that, to Buber, the relation was a physical, even erotic, thing. It was not merely a meeting of ideas. M. BUBER, *BETWEEN MAN AND MAN* 29 (R. Smith trans. 1947):

We should live not towards another thinker of whom we wish to know nothing beyond his thinking but, even if the other is a thinker, towards his bodily life over and above his thinking—rather, towards his person, to which, to be sure, the activity of thinking also belongs. . . . The two are loyal to the Eros of dialogue, who love one another, receive the common event from the other's side as well, that is, they receive it from the two sides, and thus for the first time understand in a bodily way what an event is.

66 See Hauerwas and Shaffer, *supra* note 1.

67 See M. BUBER, *supra* note 64.

68 "It comes to resemble passivity"; it is a sense of being more than a sense of doing. *Id.*

69 See T. SHAFFER AND R. REDMOUNT, *supra* note 1, at ch. 8.

and each seeks the true and the good: "We shall unite the offices of judge and advocate in our own persons."⁷⁰ In other words, discourse was, to Socrates, not a method so much as a relation.

The professional consequences of this view of moral discourse are in part a need for skills⁷¹—counseling techniques if you like—for being truthful. A lawyer who wants moral discourse in his office will attend primarily to what in fact worries the client, rather than to what should worry the client—to hepatitis in the case of the needles, evangelical zeal or family resentment in the will case, romance in the horsehip lawyer case. He will learn to listen to what his client says, attend to what his client feels, find out about the client's values⁷² (his authenticity, to use Dworkin's term).

The broader professional consequences could be revolutionary: Lawyers would have to become morally attentive,⁷³ attending, that is, to the persons of their clients as much as to the problems clients bring to them.⁷⁴ Law students would come to insist on education which trains them in the skills of sincerity, congruence, and acceptance. Every level of the legal enterprise would come again to think of moral development as part of its task,⁷⁵ all toward a professional ethic of receiving as well as giving. Parents give; children receive; adults give and receive.

The Risk of Unrealized Mutuality

The ethics of care is distinctive in its mutuality and interdependence. "Humanity is attained by self-determination and other-determination in mutual dependence," Paul Tillich said. "Man strives for his own humanity and tries to help others reach humanity, an attempt which expresses his own humanity."⁷⁶ But this mutuality is rarely realized in professional relationships; it may not even be possible to realize it.⁷⁷ Buber, pressed in his old age to give vocational application to his great insights on human relationships, tended to

70 See note 54 *supra*.

71 T. SHAFFER AND R. REDMOUNT, *supra* note 1. The insistence should be on (a) skills in the sense of professional techniques and habits and (b) skills in the sense of virtues (good habits); S. HAUERWAS, *CHARACTER AND THE CHRISTIAN LIFE: A STUDY IN THEOLOGICAL ETHICS* (1975).

72 C. G. JUNG, *ANALYTICAL PSYCHOLOGY* 12-13 (1968).

73 An unlikely example, but a good one, is A. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948), discussed in T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING* 68-91 (1976).

74 Hunt, *Problems and Processes in the Legal Interview*, 50 *ILL. B.J.* 726 (1962).

Professor Stanley Hauerwas, in helping me with this article, suggested that my position on the hope I have for my client is not consistent with my position that professional service is by definition service to only part of a person. I think, first, that it is possible to sell bolts to a person, or to fill the tank on his automobile, and, despite the slightness of my service, to treat him as a child of God.

A more substantive answer might be this: One subject for the moral discourse between a lawyer and his client is why the client came to a lawyer, and whether, now that he is with a lawyer, he should remain. See Shaffer, *supra* note 3, at 107-08. The "jurisdiction" of the law office is defined by what the client seeks there; the moral discourse that follows on his coming to the office can be one in which lawyer and client decide together which part of the client is served by the lawyer, and that process involves the client as a (whole) person.

75 See M. BUBER, *supra* note 61, at 83, where Buber contrasts "unfolding" with "imposing," in suggesting this idea. William May suggests special ethical content for the idea of "fidelity," W. MAY, *supra* note 5, at 4, in reconciling the apparent conflict between telling the client the truth and acting for the client's welfare. His point is that a relation has been established; the client's world has been altered. That fact imposes a duty to be faithful to the client. See J. GUSTAFSON, *CHRISTIAN ETHICS AND THE COMMUNITY* 154-59 (1971), for the social implications of this idea.

76 3 P. TILlich, *SYSTEMATIC THEOLOGY* 75 (1963).

77 See notes 7, 8, and 74 *supra* and accompanying text.

salvage what he could for professionals, but finally, I think, saw the professional relationship as a poor model for "I and You":⁷⁸

He is floundering around, he comes to you But he is not interested in you as you. It cannot be I see you *mean* being on the same plane, but you cannot There is . . . a certain situation . . . which may sometimes be tragic, even more terrible than what we call tragic. You *cannot* change this.

If a lawyer seeks the relationship with his client which calls him and his client into being, and seeks being only there, he will probably finish in frustration. But, in my view, if he seeks anything less he will not do as much as he can to nourish moral discourse in his practice of law. Even in law offices the moment of surprise is possible.⁷⁹

At least it is possible to regard one's client as being an end, not merely a means, and to regard him as having infinite value. He is unmediated; he is beyond all categories and concepts; he is uncaused: "I become aware of him, aware that he is different from myself, in the definite, unique way which is peculiar to him, and I accept whom I thus see."⁸⁰ This attitude may finally be a matter of faith; Buber saw it as a way to fathom the silence of God. "I can recognize in him, know in him, more or less, the person he has been (I can say it only in this word) created to become."⁸¹

And it is possible, given a mutual commitment to be honest (what I call, above, the risk of openness), to seek my client's growth, and to seek my growth as well as I deal with my client. Buber was so sure of this possibility that he saw relationship as the one thing in creation which is not subject to entropy.⁸² He speaks of me and of my client—he speaks for each of us, even in a law office—when he says:

Surrounded by the air of a chaos which came into being with him, secretly and bashfully he watches for a Yes which allows him to be and which can come to

78 See M. BUBER, *supra* note 61, at 171-72, which is from a transcription of a conversation between Buber and Carl Rogers.

79 This is, as Barth said his theology was, "the description of an embarrassment." See Barth, *supra* note 22, at 102. The analogy is to Barth's question of whether a person could be a preacher—"not How *does* one do it? but How *can* one do it?" *Id.* at 103. The answer, out of his Calvinist tradition, was a sense of being under judgment:

If God has chosen us—miracles being *possible* with *him*—and if he will justify us *as* ministers even *in* the church situation [as lawyers even *in* the system of power we inevitably serve], we may be certain that he will do so only *when* we come under *judgment*, when the church [system] comes under judgment, and when our ministry comes under judgment. *Id.* at 127.

Barth's image is the high priest in Leviticus 16, offering the bullock for himself and for his house before he offers the goat in atonement for the sins of the people. The image is important to an understanding of his concept of conditional advice.

Barth's view, gloomy as it may sometimes be, seems to me more productive than a postulate which requires lawyers to "reach for that justice and fairness of which the law itself is but an approximation," W. MAY, *supra* note 5, at 7, *unless*, as May also suggests, the reaching is out of the relation—a reaching which sees the goodness of the client as more significant than good decision made or imposed by the lawyer (or both). May also endorses, "an emergent conviction that the professional relationship is a partnership, a collaborative enterprise. . . . The existence of God forbids the professional either to play God [ethics of role, subtopic needs] or to be obsequious in dealings with clients" [ethics of role, subtopic wants]. *Id.* at 11. Robert E. Rodes, Jr. and I defended a similar view of the transcendent *legal* value of the human relation. See Rodes & Shaffer, *Law for Those Who Are to Die*, in *NEW MEANINGS OF DEATH* 291 (H. Feifel ed. 1976).

80 See M. BUBER, *supra* note 61, at 79.

81 See M. BUBER, *supra* note 64, at 182; Kaplan, *supra* note 8.

82 See M. BUBER, *supra* note 64, at 100-15.

him only from one human person to another. It is from one man to another that the heavenly bread of self-being is passed.⁸³

Conclusion

My concern is to ask, "Is it possible to be a Christian and a lawyer?"⁸⁴ My answer is that it is possible to be a Christian and a lawyer only if the question remains unsettled—so that the tentative nature of the answer is an admonition to attempt in the practice of law more than the practice itself, the conventional professionalism of it, can bear. To the extent that one determines to conduct his practice as moral conversation, his advocacy as moral discourse, his lawyer skill as the virtue of hope, his life as an affirmation that justice is a gift and not commodity one has from the government, it is possible to be a Christian and a lawyer.⁸⁵ Seen that way, the law is a calling in which "we are saying something that we do not know, that *is* true only when it *becomes* true":⁸⁶

I pray that your inward eyes may be illumined, so that you may know what is the hope to which he calls you, what the wealth and glory of the share he offers you among his people in their heritage, and how vast the resources of his power open to us who trust in him. They are measured by his strength and the might which he exerted in Christ when he raised him from the dead.⁸⁷

Among other things, St. Paul's is a calling to moral discourse with clients, a calling which impeaches the self-deceptions which allow lawyers to suppose that the ethics of role or the ethics of isolation are adequate. It calls us to a conversation in which we speak to one another with authority but not as the scribes. If role and insularity, being clever and unchildlike, are adequate, it is not possible to be a Christian and a lawyer. It is not possible for a Christian: (1) to serve an adversary system on the assumption that the government can provide justice; (2) to serve the conventions of civil society, or the demand for social justice, on the assumption that clients must be duped or coerced into good behavior, that an investment in the goodness of clients is not appropriate to the practice of law;⁸⁸ (3) to determine one's moral answers outside the human relation which provokes moral questions, on the assumption that moral

83 M. BUBER, *supra* note 61, at 71. This emphasis on the human person implies the same sort of wariness toward government suggested, from a New Testament context, in note 22 *supra*. Buber said, "The more unrelated individuals are, the more consolidated the State becomes, and vice versa." M. BUBER, *supra* note 61, at 25-26; and,

The collective aims at holding in check the inclination to personal life. It is as though those who are bound together in groups should in the main be concerned only with the work of the group and should turn to the personal partners, who are tolerated by the group, only in secondary meetings. *Id.* at 73.

This, I think, is a point made as well about the poor as about the rich. See note 16 *supra* and accompanying text.

84 See note 1 *supra*.

85 The same question can be asked by a Jew, but I, who am a Jew only because I am a Christian first, say it this way.

86 See Barth, *supra* note 22, at 87.

87 St. Paul's letter to the Christians in Ephesus, 1:18-20.

88 May's treatment of fidelity is helpful on this point; See notes 5 and 79 *supra*; the scriptural ideal is in Heb. 10:23-24: "Let us be firm and unswerving in the confession of our hope, for the Giver of the promise may be trusted. We ought to see how each of us may best arouse others to love and active goodness."

questions are not worth talking about in a law office. My claim here is that the ethics of care, which are the ethics of Jews and Christians, have relevance in law offices, and that the ethics of care are not served by either deference or paternalism. The alternative to deference and paternalism is moral discourse.⁸⁹

⁸⁹ I am grateful to Daniel M. Snow, Notre Dame Law Class of 1979; to Dr. Robert S. Redmount; and to my academic colleagues, Professors Joseph P. Bauer, Edward M. Gaffney and Robert E. Rodes, Jr. (Law, University of Notre Dame), Stanley Hauerwas (Theology, University of Notre Dame), Louis W. Hodges (Religion, Washington and Lee University), Peter G. Glenn (Law, Washington and Lee University), Richard Wasserstrom (Philosophy and Law, University of California, Los Angeles), and Louis M. Brown (Law, University of Southern California).