Columbia Law School
Scholarship Archive

Faculty Scholarship Faculty Publications

1978

The Ideology of Advocacy: Procedural Justice and Professional Ethics

William H. Simon
Columbia Law School, wsimon@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Legal Ethics and Professional Responsibility Commons

Recommended Citation

William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/730

This Response/Comment is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

COMMENTARY

THE IDEOLOGY OF ADVOCACY: PROCEDURAL JUSTICE AND PROFESSIONAL ETHICS

WILLIAM H. SIMON

TABLE OF CONTENTS

I. THE PRINCIPLES OF THE IDEOLOGY 34
II. THE LAWYER AS CHAMPION (THE WAR OF ALL AGAINST ALL) 39
A. *Positivist Advocacy* 39
B. *The Critique of Positivist Advocacy* 42
1. THE PROCEDURAL PROBLEMS 43
2. THE TYRANNY OF ADVOCACY 52
C. *The Present State of Positivism* 60
III. THE LAWYER AS PARA-BUREAUCRAT (THE HALF-HEARTED APPEAL TO TRUTH) 61
A. *Purposivism* 62
B. *The Purposivist Accommodation to Advocacy* 67
1. THE TECHNIQUE OF THE SEPARATION OF FUNCTIONS 68
2. THE MORALITY OF THE LONG RUN 73
C. *The Critique of Purposivist Advocacy* 74
1. THE COLLAPSE OF FUNCTIONAL DISTINCTIONS 75
2. THE CONFLICT OF MORALITY AND EFFICIENCY 83
D. *The Present State of Purposivism* 89
IV. THE LAWYER AS ACOLYTE (THE SANCTIFICATION OF CEREMONY) 91
A. *Ritualist Advocacy* 92
B. *The Critique of Ritualist Advocacy* 94
1. IGNORING EXPERIENCE 94
2. COLLAPSING RESULT INTO PROCESS 99
3. THE JURISPRUDENCE OF RESIGNATION 101
C. *A Revision: The Game Analogy* 102
D. *The Finale: The Friendship Analogy* 106
V. PROCEDURAL FETISHISM 113
A. *Discontinuity* 114
B. *The Sublimation of Conflict* 119
VI. CONCLUSION: NON-PROFESSIONAL ADVOCACY 130

THE IDEOLOGY OF ADVOCACY: PROCEDURAL JUSTICE AND PROFESSIONAL ETHICS*

WILLIAM H. SIMON†

"If you want to take dough from a murderer for helping him beat the rap you must be admitted to the bar . . . ."

Rex Stout[1]

The system! I am told on all hands, it's the system. I mustn't look to individuals. It's the system. . . . I mustn't go to Mr. Tulkinghorn, the solicitor in Lincoln's Inn Fields, and say to him when he makes me furious by being so cool and satisfied—as they all do, for I know they gain by it while I lose, don't I?—I mustn't say to him, "I will have something out of someone for my ruin, by fair means or foul!" He *is not responsible. It's the system. But, if I do no violence to any of them. . . . I will accuse the individual workers of that system against me, face to face, before the great eternal bar!*

Charles Dickens[2]

Conventional morality frowns at the ethics of advocacy. Public opinion disapproves of what it considers the lawyer's most characteristic activities. Popular culture can reconcile itself to him only by pretending that all his clients are virtuous. The lawyer's response takes the form of a dialectic of cynicism and naiveté. 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 more heartening ones as serving an institutional justice higher than conventional morality. The two moods divide the profession as a whole, and the division can sometimes be seen in the professional lives of individual lawyers, as, for instance, when they turn from their paid efforts on behalf of what they admit to be private interests to their donated services on behalf of what they claim to be the public good.

The formal, articulate expression of the lawyer's response is the "Ideology of Advocacy." The purpose of the Ideology of Advocacy is to rationalize the most salient aspect of the lawyer's peculiar ethical orientation: his explicit refusal to be bound by personal and social norms which he considers binding on others. The most elaborate expressions of the

* I am grateful to many for advice and encouragement in connection with this essay. It would be impractical to name them all, but I must acknowledge special debts to Gary Bellow, Marc Galanter, Jeanne Kettleson, Leslie A.J. Simon, and Roberto Mangabeira Unger.

† A.B., 1969, Princeton University; J.D., 1974, Harvard Law School.

1. R. STOUT, IN THE BEST FAMILIES 199 (1950).
2. C. DICKENS, BLEAK HOUSE 228 (Signet ed. 1964) (emphasis in original).

Ideology of Advocacy occur in officially promulgated rules of ethics, in doctrinal writings on legal ethics, the attorney-client evidentiary privilege, and the constitutional right to counsel, and in writings on the legal profession.

Although this literature is voluminous, it is barren of any fundamental questioning of the ethical premises of legal professionalism. The profession has never been inclined to join issue on any but the most superficial level with the lay critique of these premises, and it presently seems less disposed toward reexamination of them than ever. The public disgust at the behavior of the lawyers in the Watergate affair has prompted an elaborate pretense of soul-searching on the part of the profession, but Watergate has in fact been an occasion for retrenchment and reindoctrination, rather than reexamination. The profession has viewed Watergate as revealing problems regarding the enforcement of professional norms, but has refused to see it as raising questions about the validity of those norms. In the profession's current view, what is needed is not criticism of legal ethics, but rather more zealous propagation of those ethics through greater emphasis on the professional catechism in law school curricula and bar examinations.

Of course, there is a growing body of writing addressed to the profession which is critical of the conduct of lawyers and professional organizations. Yet, most of these discussions take place within the framework of the Ideology of Advocacy and do not involve criticism of its premises.[3] The more prominent of these discussions have been of two types. First, doctrinal writings on legal ethics and judicial procedure often take the form of a debate between the partisans of a "battle" model and the partisans of a "truth" model of adjudication. A famous example of this debate will be discussed in the next section.[4] These writings criticize certain kinds of conduct by lawyers as inconsistent with one or the other of these models. Yet, almost all of the distinctive ethical views of lawyers can be rationalized in terms of one or the other of the models, and the differences between them are greatly exaggerated in the debate. Both models accept the basic principles of the Ideology of Advocacy and are primarily concerned with defending those principles.

Second, there is a substantial body of sociology and social criticism which focuses on the legal profession. Some of this literature argues that lawyers compromise their clients' interests in order to advance their own

3. Important exceptions, which do involve criticism of the basic premises, are Bellow & Kettleson, *The Mirror of Public Interest Ethics: Problems and Paradoxes* (1977) (unpublished manuscript on file with author) [hereinafter cited as Bellow & Kettleson]; Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970) [hereinafter cited as Griffiths]; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975).

4. *See* text accompanying notes 8-13 *infra*.

interests.[5] Other studies focus on an elite within the profession and argue that the elite has used professional ethics and organization to achieve prestige and economic privilege at the expense of the less powerful members of the profession and of the lower classes generally.[6] Studies which emphasize the exploitation of clients explicitly accept the Ideology of Advocacy and criticize lawyers for failing to live up to it. Although studies which emphasize elite domination purport to criticize legal ethics and professionalism, they do not deal with the basic principles expressed by the Ideology of Advocacy. Instead, they focus on principles such as restrictions on membership in the profession and prohibitions on advertising and solicitation. Such studies are concerned less with the nature of legal services than with their distribution.[7] In suggesting that the increased availability of legal services allegedly inhibited by professional ethics and organization would be desirable, these writings often rely on the Ideology of Advocacy. It is notable that writing from both perspectives often calls for reforms which would enlarge the size and power of the profession.

This essay attempts a critical examination of the Ideology of Advocacy. Section I outlines the basic principles of the Ideology. The following three sections are then devoted to a discussion and criticism of the jurisprudential doctrines with which these basic principles are defended. Each of these sections describes and criticizes one of the three most prominent versions of the Ideology. The descriptions of the three versions are not derived directly from officially promulgated doctrine or from the writings of any specific theorist. Rather, they are in the nature of ideal types, heuristic constructions which are intended to be representative of the prevailing thought within the profession about the ethics of law practice. The use of this procedure involves the risk that the ideal types will be taken for "straw men." Yet, the procedure is necessary in view of the absence of any coherent, systematic defenses of legal ethics. The

5. *See, e.g.*, D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 106-16 (1974) [hereinafter cited as ROSENTHAL]; Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC. REV. 15 (1967) [hereinafter cited as Blumberg]; Skolnick, *Social Control in the Adversary System*, 11 J. CONFL. RES. 52 (1971) [hereinafter cited as Skolnick].

6. *See* J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976) [hereinafter cited as AUERBACH]; J. CARLIN, LAWYERS' ETHICS (1966); Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968).

7. More radical criticisms of conventional law practice are sometimes made by partisans of public interest law. *See, e.g.*, Nader, *Law Schools and Law Firms*, 54 MINN. L. REV. 493 (1970); Comment, *The New Public Interest Lawyers*, 79 YALE L. J. 1069, 1119-37 (1970) [hereinafter cited as Comment, *The New Public Interest Lawyers*]. However, such criticism is often ambiguous. Like the works cited in the preceding note, it tends to focus disapproval on the professional elite and on its service to the dominant social groups. On the other hand, it sometimes urges lawyers not only to make conventional legal services available to the less powerful but also to devote their efforts to specific substantive ends and interests. Such criticism seems to hesitate between a critique based on the distribution of legal services, which would be compatible with the Ideology of Advocacy, and a critique based on the nature of legal services, which would involve a repudiation of the Ideology of Advocacy.

more general writing on jurisprudence has usually avoided the questions of legal ethics and professionalism. On the other hand, writing directly concerned with these subjects has tended to treat the issues in conclusory terms. So long as its doctrines are expressed only in an amorphous, fragmentary fashion, the Ideology eludes criticism. Even arguments which have been discredited after critical examination in other areas of law remain unchallenged as tacit assumptions in the Ideology of Advocacy. In order to criticize the Ideology, it is necessary to reconstruct the unstated or partially stated assumptions and arguments on which it depends.

The descriptions of the three versions of the Ideology of Advocacy are also intended to suggest the nature of the evolution of the ethical consciousness of lawyers over the course of the present century. Although the three versions of the Ideology of Advocacy all defend the same core of basic principles, each is based on different attitudes and commitments, and each describes and recommends a somewhat different style of law practice. Although all three versions exert influence today, each originated in a distinct historical situation and attained its greatest influence at a different time. The influence of the three versions has also varied significantly among different strata of the profession and in different areas of law practice. The three ideal types depart in some respects from some familiar categories of American legal history. For instance, writers identified with American Legal Realism will be cited in connection with all three versions. In part, such differences may be due to the overbreadth of the familiar categories, but they are also due more directly to the fact that the focus on this essay is more limited than that of writings on legal intellectual history in general. The present essay focuses on the way in which lawyers rationalize their departures from personal and social norms. Although, as will be shown, this issue depends on many other critical jurisprudential issues, it is partially independent of some issues.

The fifth section of the essay will attempt to formulate an overview of the subject matter from the critiques of the three versions of the Ideology of Advocacy and to describe the fundamental defects of all defenses of lawyers' ethics and legal professionalism. It will argue that the practices prescribed by the Ideology of Advocacy are inconsistent with the values invoked to justify those practices. At the base of each version of the Ideology of Advocacy is an appeal to an aspect of the fundamental value of individuality: autonomy, responsibility, dignity. Yet, in each instance, the practices and attitudes of professional advocacy subvert the norms of individuality in the interest of a repressive conception of social stability. The essay will argue that to take the value of individuality seriously would require the abandonment of the Ideology of Advocacy and of legal professionalism. Indeed, it will also suggest that

respect for the value of law itself may require the repudiation of legal professionalism. The concluding section of the essay attempts to suggest an alternative approach to the problems of advocacy which might avoid the defects of the Ideology of Advocacy.

I. THE PRINCIPLES OF THE IDEOLOGY

> *There was tangled in these exchanges still another ever-recurring question. This was as to the range (if any) of values which would be said to be basic enough to be presented to students as demanding acceptance and respect in all circumstances. It was the view of Fuller, Mathews, Williams, Stone and others that there are, indeed, some values, certainly including the integrity of the judicial process from tampering, on which one single standard would be insisted upon. On this view, what must be taught on such matters is not merely the duty to participate, but the duty to participate by* supporting that particular form of social order.
>
> Julius Stone
> (reporting on the Conference for the
> Education of Lawyers for Their Public Responsibilities)[8]

Although certain issues of legal ethics are debated incessantly, the debates almost invariably take place within a framework of certain common, unquestioned principles. Consider the exchange between Monroe Freedman and John Noonan on what Freedman called "the three hardest questions" for the criminal defense lawyer. The questions concerned whether or not it is proper for a lawyer to attempt to discredit an adverse witness whom he knows to be telling the truth, to put a witness on the stand knowing he will commit perjury, or to advise a client in a manner likely to tempt him to commit perjury.

Freedman's answer to all three questions was affirmative.[9] The lawyer might argue with his client about the morality of such activities, but ultimately, he insisted, the lawyer must bow to his client's will. Freedman's argument focused on the notion of confidentiality. If the client thought that the lawyer would refuse to do anything which would mislead the trier, then the client would probably lie or withhold information in order to convince the lawyer that actions in his interest would not be misleading. But in order to present the best possible defense, the lawyer has to know all the facts. The client cannot know when it is in his interest to conceal or falsify information. Thus, the lawyer must have the confidence of the client. The only way to achieve this is to assure the client that he will not be prejudiced by telling his lawyer the facts. For the

8. J. STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY 34 (1959) (reporting on the Conference for the Education of Lawyers for Their Public Responsibilities, 1956) (emphasis in original).

9. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) [hereinafter cited as Freedman].

lawyer to refuse to follow the client's wishes after the facts had been revealed would betray the promise which had induced disclosure and would undermine the credibility of such promises in the future.

Freedman suggested that refusal to impeach accurate testimony would in some instances harm innocent defendants because evidence in itself accurate might still be misleading on the question of guilt. Yet, Freedman did not justify the conduct he advocated in terms of any contribution to the accurate determination of guilt or innocence. On the contrary, he relied on "policy considerations that at times justify frustrating the search for truth and the prosecution of a just claim" which are widely recognized in the legal system.[10] He pointed to the provisions in the Canons of Ethics that require adversary zeal and confidentiality. He noted that lawyers as eminent as Williston had recognized a professional duty to acquiesce in mendacity. And he emphasized the tacit sanction of mendacity in judicial procedures, such as the right of a defendant to plead not guilty regardless of his guilt.

Noonan congratulated Freedman on a candid and accurate portrayal of the working principles of a large segment of the profession, but he argued that these principles affront the dignity of the profession and the legal system by turning the lawyer into a "tool" of his client and the trial into an irrational battle.[11] Noonan criticized Freedman's reliance on the battle model of criminal procedure and advocated as more enlightened the truth model. In his view, the purpose of judicial proceedings is to produce wise and informed decisionmaking, and the lawyer's job is to assist the trier in this effort.[12] The lawyer's duty to advance his client's interests must be subordinated to the fundamental purpose of truth-seeking which brought the relationship into being. He must not therefore mislead the trier by introducing false testimony or discrediting accurate testimony. Moreover, this obligation applies even where the lawyer believes that by misleading the trier with respect to a particular piece of evidence he will promote a wiser and more informed decision on the ultimate issue. In addition to recognizing his duty to the goal of truth, the lawyer must recognize his auxiliary status in the quest for truth. The trial is structured as a whole to produce the most accurate results possible, and it functions best when each participant adheres to his own role. The lawyer is sometimes expected to exclude evidence, but his basic job is to introduce accurate evidence. The responsibility for assessing the weight of the evidence on the ultimate issue rests with the trier. For the lawyer to attempt to influence this assessment by deception on the basis of his own judgment of the evidence would be to transgress the limit of his own role and usurp the trier's function.

---

10. *Id.* at 1482.
11. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1491 (1966) [hereinafter cited as Noonan].
12. *Id.* at 1487.

Freedman and Noonan differ less in their arguments than in the attitudes they bring to the subject. They illustrate the modes of cynicism and naiveté in which the Ideology of Advocacy is usually elaborated. In his article, Freedman casually assumes that the legal system routinely convicts innocent people. He shows no more indignation at this fact than he does discomfort at the fact that the measures he advocates will result in the acquittal of guilty defendants. He speaks of cases not in terms of justice or suffering, but in terms of probabilities of acquittal.

On the other hand, Noonan assumes that the legal system produces justice so dependably that the lawyer defending an innocent man need not even ask himself whether following the usual rules might lead to a disastrous ultimate result. He glosses over the aspects of the system which seem to institutionalize aggression and dishonesty. He seems to think that lawyers could transform the trial system from the battle model to the truth model simply by adopting a different attitude toward it.

Despite their differing attitudes, Freedman and Noonan both clearly assume four principles. These are the basic principles of the Ideology of Advocacy. Two are principles of conduct which prescribe attitudes and behavior. They appear on the surface of most discussions of advocacy. The other two are foundation principles which have to do with the way the principles of conduct are derived and applied. They rest below the surface of discourse on legal ethics, but they are nevertheless pervasive and important.

The first principle of conduct is the principle of neutrality. This principle prescribes that the lawyer remain detached from his client's ends. The lawyer is expected to represent people who seek his help regardless of his opinion of the justice of their ends.[13] In some cases, he may have a duty to do so; in others, he may have the personal privilege to refuse.[14] But whenever he takes a case, he is not considered responsible for his client's purposes. Even if the lawyer happens to share these purposes, he must maintain his distance. In a judicial proceeding, for instance, he may not express his personal belief in the justice of his client's cause.[15]

The second principle of conduct is partisanship. This principle prescribes that the lawyer work aggressively to advance his client's ends. The lawyer will employ means on behalf of his client which he would not consider proper in a non-professional context even to advance his own ends. These means may involve deception, obfuscation, or delay. Unlike the principle of neutrality, the principle of partisanship is qualified. A line

13. *See Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216-17 (1958) [hereinafter cited as *Professional Responsibility*].

14. W. FORSYTH, HORTENSIUS: AN HISTORICAL ESSAY ON THE OFFICE AND DUTIES OF THE ADVOCATE 387 (3rd ed. 1879); A.B.A. Op. No. 281; ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-101(B) (1976) [hereinafter cited as ABA CODE].

15. ABA CODE, *supra* note 14, at EC 7-24.

separates the methods which a lawyer should be willing to use on behalf of a client from those he should not use. Before the lawyer crosses the line, he calls himself a representative; after he crosses it, he calls himself an officer of the Court. Most debates within the Ideology of Advocacy concern the location of his line. Freedman and Noonan disagree on the location of the line, but they both take principle of partisanship for granted. Both men would probably agree that the lawyer should not reveal adverse evidence learned from the client even though it may be relevant and probative.[16] They would probably agree that he should exclude accurate, probative adverse evidence at trial whenever the rules of evidence permit.[17] They would agree that he should not hesitate to plead his client not guilty even when he knows the client has committed the crime with which he is charged, and they would probably agree that he should invoke the statutes of frauds and limitations to defeat otherwise valid civil claims.[18] Also, Freedman thinks, though Noonan disagrees, that the lawyer should present perjured testimony and discredit accurate testimony. Others have thought that partisanship warrants the use of dilatory procedural tactics, lying under almost any circumstances in which discovery is unlikely, and the citation of false precedents to the judge.[19]

The principles of neutrality and partisanship describe the basic conduct and attitudes of professional advocacy. The two principles are often combined in the terms "adversary advocacy" or "partisan advocacy", and this essay will adopt that usage. However, it should be noted that the two principles are distinct in important respects. Many occupational roles, for instance the bureaucrat and the doctor, are expected to serve the general public without regard to the ends of those who seek their help. Yet, they are not expected to engage in the partisan pursuit of individual ends. On the other hand, political representatives are expected to be partisan, but they are not expected to serve all comers without regard to their ends.[20] Only the lawyer seems to insist on making a virtue of both neutrality and partisanship.

16. *See id.* EC 5-1 to 5-24.

17. Freedman, *supra* note 9, at 1474-75; Noonan, *supra* note 11, at 1487-88; *see also* ABA CODE, *supra* note 14, at EC 7-20.

18. Freedman, *supra* note 9, at 1470; Noonan *supra* note 11, at 1489-90; *see also* H. DRINKER, LEGAL ETHICS 149 (1953) [hereinafter cited as DRINKER]; Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 589 (1961) [hereinafter cited as Thode].

19. DRINKER, *supra* note 18, at 83; LE DROIT DE LA NATURE ET DES NATIONS § XXI at 195-98 (French trans. 1747); Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 8 (1951); *but see* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-23 and DR 7-102(A)(1), (A)(5).

20. Similarly, an adjudicatory procedure can adopt one principle without the other. The principle of neutrality was not involved in the highly partisan adjudicatory procedure of trial by battle which was used during the Middle Ages. *See generally* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 633 n.7 (1968 ed.). On the other hand, in the adjudicatory procedures of contemporary continental Europe, the principle of partisanship plays a muted role, while the principle of neutrality is enshrined. *See* D. RUESCHMEYER, LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN THE UNITED STATES AND GERMANY 85-87, 127-31, 143 (1973).

Two further principles, though less obvious, are also assumed by Freedman and Noonan. The first is the principle of procedural justice. In its most general usage, procedural justice holds that the legitimacy of a situation may reside in the way it was produced rather than its intrinsic properties.[21] Another aspect of the principle is that, given adequate procedures, one can act justly by conforming to them regardless of the consequences to which one's conduct contributes. In this essay, the term "procedural justice" is used more specifically to refer to the notion that there is an inherent value or legitimacy to the judicial proceeding (and to a more qualified extent, the entire legal system) which makes it possible for a lawyer to justify specific actions without reference to the consequences they are likely to promote. Freedman and Noonan tacitly embrace this principle. For both of them, the nature of the consequences to which the lawyer's actions may lead is irrelevant to the ethical decisions he must make. Freedman invokes procedural considerations which are explicitly indifferent to outcomes. Although Noonan refers to outcomes in his emphasis on truth-seeking, he clearly rejects the notion that any particular ethical decision can be made by determining which course of action is most likely to lead to the discovery of truth. Rather, Noonan insists that the lawyer must stay within the boundaries of his role regardless of whether doing so will promote the discovery of truth. For Noonan, the goal of truth legitimates the entire system of procedures and informs its design, but it does not determine specific ethical decisions. Such decisions are determined by procedural requirements.

The second foundation principle of the Ideology of Advocacy is professionalism. In its most general usage, the term professionalism refers to the notion that social responsibility for the development and application of certain apolitical and specialized disciplines should be delegated to the practitioners of these disciplines.[22] In this paper, the term is used more specifically to describe the notion that the law is an apolitical and specialized discipline and that its proper development and application require that legal ethics be elaborated collectively by lawyers in accordance with criteria derived from their discipline. Freedman and Noonan both assume this principle. They never doubt that the "three hardest questions" are in fact questions of *professional* ethics. They assume that the questions are to be resolved in terms of legal doctrine and that they should be resolved by lawyers collectively in their occupational capacities and not by lawyers individually in terms of personal or social norms or by broad-based political institutions.

Most of this essay, Sections II through IV, will be concerned with criticizing the kind of advocacy defined by the principles of neutrality and

21. B. BARRY, POLITICAL ARGUMENT 97-98, 102-106 (1965) [hereinafter cited as BARRY].

22. Carr-Saunders, *Professions*, in 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 476 (1934).

partisanship. Yet, the foundation principles of procedural justice and professionalism will remain in the background, and in Sections V and VI, the essay will return to them directly in order to discuss their relationship to each other and to adversary advocacy.

II. THE LAWYER AS CHAMPION (THE WAR OF ALL AGAINST ALL)

> BOSWELL: "*But what do you think of supporting a cause which you know to be bad?*"
> JOHNSON: "*Sir, you do not know it to be good or bad till the Judge determines it.*"
>
> James Boswell[23]

The fullest justification of the Ideology of Advocacy rests on Positivist legal theory. The term Positivist is used here to refer to the kind of theory which emphasizes the separation of law from personal and social norms, the connection of law with the authoritative application of force, and the systematic, objective character of law.[24] Positivism was the basis of the profession's conception of advocacy in the late 19th and early 20th centuries, and it is still an important component of the professional self-image of some lawyers, despite its repudiation in most areas by the intellectual leaders of the bar. Even lawyers who reject Positivism as a general jurisprudential theory are sometimes prone to fall back on it when justifying their professional roles.

A. *Positivist Advocacy*

The Positivist theory is constructed on the philosophical foundation laid by Thomas Hobbes.[25] In the Positivist view, society is an aggregate

23. J. BOSWELL, LIFE OF JOHNSON, *quoted in* 2 THE WORLD OF LAW 763 (E. London ed. 1960).

24. *See, e.g.*, J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Hart ed. 1954); H. HART, THE CONCEPT OF LAW (1961) [hereinafter cited as HART]; Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter cited as Holmes]; Kelsen, *The Pure Theory of Law: Its Methods and Fundamental Concepts*, (pts. 1-2) 50 L.Q. REV. 474 (1934) and 51 L.Q. REV. 517 (1935).

There is no general jurisprudential work representative of the version of Positivism which has had the greatest impact on American legal history. As Karl Llewellyn wrote, "The older Jurisprudence . . . is one which the profession did not have occasion to particularly study; a lawyer just absorbed it, largely through the fingers and the pores, as he went along." Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 582-83 (1940). This jurisprudence, often called Legal Formalism, was the prevalent type of legal thought in the late 19th and early 20th centuries. In the field of applied doctrine, it is well exemplified by the majority opinion in Lochner v. New York, 198 U.S. 45 (1905), and by J. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1916). Since Formalism included some natural law elements, it may not be strictly accurate to designate it as Positivist. Nevertheless, the elements of the Formalist system which bear on the issues of advocacy are consistent with the Positivist doctrine sketched here. For an early treatment of legal ethics from a Formalist perspective, see the letters of David Dudley Field *reprinted in* A. KAUFFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 249-66, especially at 257-60 (1975) [hereinafter cited as KAUFFMAN].

25. T. HOBBES, LEVIATHAN (1651). *See*, L. FULLER, THE LAW IN QUEST OF ITSELF 19-26 (1940) [hereinafter cited as FULLER]; R. UNGER, KNOWLEDGE AND POLITICS 5, 37-38 (1975) [hereinafter cited as UNGER].

of egoistic individuals each pursuing his own ends. Government is an artificial creation, the basic function of which is to remedy the disorder which would result if the natural centrifugal tendencies of society went unchecked. Disorder is undesirable for two reasons. First, it makes for uncertainty, a constant fear about the future and an inability to plan one's activities so as to best attain one's ends. Second, it makes for oppression, the necessity of subordinating one's own ends to those of whomever is strongest at the moment. Since the need for order is the most basic of social needs and is shared by all men, a government which secures order has a claim to the loyalty of all its citizens.

Ends are natural, individual, subjective, and arbitrary. Social norms result from the random convergence of individual ends. By contrast, it is possible to construct a system of rules which is artificial, impersonal, objective, and rational. The best way to provide order is to create a sovereign (*e.g.*, monarch, legislature, party) which is neutral toward the various ends of the citizens and which acts through rules. Rules will give a regularity to social life and thus eliminate uncertainty. Oppression will be eliminated once power is concentrated in the hands of a neutral ruler. An obstacle remains. The legitimacy of the sovereign rests solely on the unique end of order which all share. Yet, from the point of view of each citizen, this end extends only to the orderly behavior of the others. People will constantly be tempted to violate the rules in order to pursue their own individual ends. No one will be willing to pay the price of resisting such temptation without some assurance that the others will also obey. The solution is to have the rules provide for the administration of rewards and punishments in a manner calculated to insure general obedience.

The rules will define for each citizen a private sphere of autonomy. Within this sphere, he need not account to anyone for his actions. So long as he remains within his sphere, he need not fear coercion by the sovereign. The sovereign's enforcement of the rules against the other citizens will insure that they do not trespass within his sphere. Where disputes arise, they must be resolved in accordance with the rules. Since the sovereign cannot itself apply the rules to every particular dispute, it must appoint judges to act on its behalf. It is important that the judges apply the rules with impersonal regularity. They must not refer to their own personal ends. Otherwise, they would create uncertainty, and their decisions would be oppressive. The rules cannot specify a specific result for each situation to which they apply, but the judge will be able to determine the proper result in any given situation because the rules have a systematic quality. The system may involve formal logic, linguistic analysis, empirical observation, or some combination of these methods. The system enables the judge to reason from the general prescriptions of the rules to particular results. The judge applies the rules to the factual premises of the given situation. The disposition of the case is dictated by the system. The judge has no discretion; he is bound by the system.

The need for lawyers in the Positivist theory arises from the strangeness of the law. Since the legal system is independent of personal ends and social norms, its prescriptions often appear alien. They may be very complicated, and the sovereign may find it convenient to express them in an esoteric language. Thus, the rules are not easily apprehensible. But the individual needs to know how he can further his ends without causing the sovereign to intervene with sanctions. Otherwise, he will be in the very state of uncertainty that government was supposed to remedy. Moreover, if other citizens can gain a superior understanding of the rules, they can use this knowledge to oppress him by maneuvering him into situations where sovereign power will operate to his disadvantage. The solution is to create a class of legal specialists and to require its members to serve every citizen regardless of his ends.

The function of the lawyer is to explain how, and under what circumstances, the sovereign will intervene in his client's life. The lawyer enables his client to pursue his ends effectively by predicting the likelihood of assistance or sanction which attaches to alternative courses of action. He does so by the same type of systematic reasoning which the judge uses to decide cases. From another perspective, this function can be described as informing the client of his rights. A right is an opportunity to invoke or resist the force of the sovereign in a certain way. Rights are defined by the rules of the legal system.

The lawyer's various other services as advocate are all ancillary to this basic task of prediction. In litigation, he simply sets in motion the system which vindicates (or refutes) his prior predictions. The lawyer presents the court with the factual premises to which the rules are to be applied. The outcome of the case is determined by the autonomous operation of the system of rules on these premises. At best, the lawyer anticipates the outcome; he does not determine it.

The lawyer's neutrality is essential to the proper performance of his basic task of prediction. Since the legal system is independent of personal ends and social norms, the lawyer's ends and his notions of social norms have no relevance to the prediction of the sovereign's actions. Because ends are individual, subjective, and arbitrary, if the lawyer attempted to take his ends into account in advising his client, he would reduce the accuracy of his predictions and the effectiveness of his services. If the attempt caused him to take an unrealistically liberal view of the scope of permissible conduct, the client would suffer unexpected state interference and would thus be deprived of a measure of the certainty which he was promised. If it caused him to take an unrealistically restricted view of the scope of permissible conduct, then the lawyer would be abusing his position to oppress his client.

The lawyer's partisanship arises from his duty to assist the client in

the pursuit of his ends. The lawyer cannot legitimately recognize any limitation on this pursuit aside from the rules of the legal system.

The rule that the lawyer cannot reveal a confidence of the client without the client's consent is designed in part to enhance access to legal advice by insuring that the client will not be prejudiced by seeking such advice. It is also, more fundamentally, a reflection of the fact that the lawyer is, in effect, an extension of the client's will. Since he cannot consult his own ends or his own notions of social norms, the lawyer has no basis other than the interests of his client for deciding whether or not to reveal confidences. Noonan's criticism that the lawyer acts as a "tool" of his client is entirely correct but beside the point.[26] A tool is precisely what the client needs in order to invoke his rights and maximize his autonomy. The lawyer is not responsible for what he does because he is acting as the instrument of the client, and he should not be criticized for renouncing responsibility because, by doing so, he merely helps the client to invoke the rights which the system guarantees him.

B. *The Critique of Positivist Advocacy*

This summary does not begin to do justice to the rigor and elegance of the best expositions of Positivism. Yet, rigor and elegance are not sufficient to overcome the fundamental problems of Positivist theory, and these problems are as fatal in the most elaborate expositions as they are in the summary presented here. The Positivist version of the Ideology of Advocacy fails in two broad respects. First, Positivism's failure to take account of the problematical relation between substance and procedure undermines its promise to eliminate uncertainty and oppression. Second, Positivist notions about the relation between law and personal ends are inconsistent with the Positivist notion of the advocate's role. The Positivist version of the Ideology of Advocacy purports to show that the advocate enhances his client's autonomy. Yet, given Positivism's psychological assumptions, the advocacy it prescribes can only subvert this autonomy.[27]

26. Noonan, *supra* note 11, at 1491.

27. The disastrous consequences of Positivist advocacy to be described are in part hypothetical and in part actual. They are the consequences which *would* occur *if* the Positivist assumptions about the world and the legal system were correct and *if* lawyers behaved in the way Positivism suggests they should. In fact, the Positivist assumptions are wrong in important respects, and lawyers often do not behave in accordance with the Positivist prescriptions. *See* text following note 70 *infra*. However, no attempt will be made either here or in the critique of the other versions of the Ideology of Advocacy, to specify the discrepancy between assumption and actuality except generally and in passing. Most of the argument which follows is intended to show that the Ideology of Advocacy is untenable even on its own assumptions. On the other hand, much of the interest and plausibility of the argument lies in the fact that each version of the Ideology of Advocacy does to some extent accurately describe a familiar aspect of our social and legal experience, and the contradictions of the Ideology of Advocacy correspond to actual problems of the legal order and the society.

1. THE PROCEDURAL PROBLEMS

Procedure comes as something of an afterthought in Positivism, and the problems it creates are never fully acknowledged. Two procedural problems in particular—the problems of enforcement and access—represent serious dangers of uncertainty and oppression for which Positivism makes no adequate provision.

Positivist discussions of procedure begin with a belated recognition of a basic contradiction: in the Positivist system, the sovereign is both the only guarantee of order and the greatest threat to it. Since obedience to the rules does not come naturally, the sovereign must be charged with the power and duty to enforce them. But this task poses a terrifying prospect. The only effective means of enforcement involve torture, deprivation of liberty, invasion of privacy, or confiscation of property. These means are necessary both to get the information needed to determine that the rules have been violated and to deter future violations. Fact-finding holds the further danger that the sovereign will constantly be finding new evidence or revising his reasoning so as to upset previous determinations on which people have relied. Moreover, once the facts have been determined, there remains the further problem that the sovereign and its agents are likely to act inconsistently in applying the rules to different situations. No matter how elaborately the legal system is constructed, ambiguities will remain, and in choosing among alternative interpretations, the judges will act inconsistently, and will thus produce unpredictable results. Thus, within his own system, the Positivist finds the very danger of disorder which he had set out to remedy.

To meet this problem, Positivism proposes a second body of rules which limit the enforcement powers of the sovereign. As the purpose of the first set of rules is to impose regularity on conduct in the social world, the purpose of the second is to impose regularity on the actions of the sovereign. The first kind of rule is called substantive, and the second kind procedural. The procedural rules require that certain evidence be produced before the sovereign may act on the premise that a substantive rule has been violated. They limit the ways in which the sovereign can procure evidence and prescribe the manner in which it can be presented. They limit the authority of the sovereign to make and revise findings of fact and interpretations of rules. And they specify the sanctions which the sovereign may apply upon finding that the rules have been broken.[28]

The establishment of this second body of rules has a curious consequence. The substantive rules reflect the basic purpose of the system, the

28. *See* HART, *supra* note 24, at 89-96.

The question of how the enforcement of the procedural rules can be guaranteed is a further problem of Positivism and liberal political theory generally which is not considered here. *See, e.g.*, J. LOCKE, TWO TREATISES OF GOVERNMENT II § 242 (Laslett ed. 1960) (on the "Appeal to Heaven"); THE FEDERALIST PAPERS Nos. 47, 51 (J. Jay, A. Hamilton, J. Madison) (on the separation of powers).

securing of order in the social world. The procedural rules are designed to deal with a technical problem. Once the system is set into motion, however, the procedural rules play the more fundamental role. Order depends on the citizens' compliance with the substantive rules, and compliance depends on the application of sanctions by the sovereign. The application of sanctions is governed by the procedural rules. The key to the system is the operation of the sovereign, and the ultimate test of the legitimacy of any of the sovereign's acts is procedural. For the citizen, this means that compliance with the substantive law does not guarantee immunity from state sanctions. Nor does liability necessarily follow from violations of the substantive rules. The procedural rules legitimate results which may be substantively wrong. Having repudiated personal notions of justice at the outset of its system, Positivism ends by refusing to guarantee the citizen even the legal justice defined by the substantive law. All the citizen can count on is a day in court.[29]

The citizen's bewilderment may be a matter of indifference to the Positivist, but it is not so easy for him to shrug off another difficulty. The second body of rules has not solved the problem of disorder. The risk of disorder from the sovereign has been diminished only by impairing the efficiency of the sovereign's enforcement powers and hence by increasing the risk of disorder from the citizens. The procedural rules give the citizens a broad range of discretion. The existence of this discretion undermines the Positivist claim to secure order through the delegation of power to a neutral sovereign who exercises it through a system of rules. The citizens can use their procedural discretion to thwart the enforcement of the substantive rules and to affect the exercise of state power in accordance with their individual ends. Once the existence of this discretion is recognized, the actions of the sovereign appear to result, not from the neutral, systematic application of rules to given factual premises, but from the strategic exercise of procedural discretion by private parties.

29. Thus, when a man who has been duly convicted of a crime returns to the court with conclusive proof of his innocence, the Positivist judge replies:

> The Court is persuaded that . . . a grave miscarriage of justice has taken place. However, at the outset the Court is faced with the question of its power to grant relief. . . .
>
> The defendant's position is that in its totality the proceeding deprived him of his constitutional rights. However, he has not averted to . . . any impairment of any specific constitutional right or any unfairness upon the trial that would warrant a holding that due process has been denied.
>
> Essentially, the defendant is applying for relief upon the ground of newly discovered evidence. . . . However, this avenue is unfortunately closed since Rule 33 of the Federal Rules of Criminal Procedure . . . requires that a motion for a new trial based upon newly discovered evidence "may be made only before or within two years after final judgment."
>
> This time limitation, which has been rigidly enforced, works a great hardship in this case, for it is difficult to see how some of the vital evidence now presented could have been available to the defendant during the two year period . . . .
>
> It is with extreme reluctance that the Court is forced to the conclusion that it is without power to grant the application, but it may not exceed the limits of authority.

United States v. Kaplan, 101 F. Supp. 7, 11-14 (S.D.N.Y. 1951). This is the Positivist kiss-off: "I'd like to help, but my hands are tied."

For instance, the procedural rules which require that evidence be produced before sanctions can be applied and which limit the ways in which evidence can be obtained enable people to conceal violations of the substantive rules by not leaving evidence or by withholding or destroying it. The rules which govern evidence at trial enable people to thwart the enforcement of the substantive law by excluding or discrediting probative evidence or by introducing misleading evidence.[30] Procedural rules permit people whose claims have no substantive validity to put others to the risk of proof.[31] They enable people to frustrate enforcement by delaying and by imposing expenses on their adversaries.[32] They permit people to influence enforcement by strategic choices as to whether to initiate proceedings,[33] when to do so, and before which tribunal to do so.[34] They

30. *See, e.g.*, D. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 736-39 (1970).

31. This is generally recognized as the usual and appropriate sitation in the criminal law. *See, e.g.*, Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter cited as Alschuler]; *see also* Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 389-90 (1972) [hereinafter cited as Simon].

32. Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95, 119-22 (1974) [hereinafter cited as Galanter]; Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115 (1969). *See, e.g.*, Halverson, *Problems in Settling the "Big Case" with the Government or the Private Plaintiff*, in REPRESENTING CORPORATE CLIENTS IN THE PROSECUTION OF GOVERNMENT AND PRIVATE ANTITRUST LAWSUITS (Massachusetts Continuing Legal Education—New England Law Institute 1976) at F.M. 42-44, 47-48 [hereinafter cited as Halverson]:

> PRACTICAL SUGGESTIONS ON SETTLEMENT STRATEGIES
>
> A. Private Plaintiffs
>
> 1. Monopolization Suits
>
> a. Take exhaustive discovery, particularly if your client has resources advantage, and concentrate on the plaintiff's market definition problems. . . .
>
> c. Show the plaintiff that it is not costless to sue. Counterclaim! . . .
>
> f. Remember private plaintiff looks at his pocketbook and not at so-called 'public interest', so make plaintiff worry about his pocketbook.
>
> g. If more than one private suit, get the weak one to trial fast and first and beat him.
>
> h. If exposure there, identify the needs of the plaintiff (often some kind offer to cease a particular practice, coupled with some cash), and then offer just enough to start the negotiation process . . . .
>
> Once the offer is there and the plaintiff's Board has seen months of attorneys' fees and corporate disruption, the plaintiff's Board will work in your favor, nudging the lawyers toward a compromise. . . .
>
> B. Government Suits
>
> 1. Monopolization
>
> a. Make certain that the government gets enough documents and data so that personnel on the team will turn over several times during the pendency of the action.
>
> b. Take advantage of the fact that your client is usually better organized and financed than the government.

33. In the criminal system, the sovereign retains prosecutorial discretion, but in the civil system, the procedural rules give such discretion to the citizens. Enforcement depends on the exercise of this discretion, and it has great potential to create disorder. People usually find it in their interest not to enforce their rights through the legal system. *See* Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). When they do not do so, others are likely to take actions and enter into relations in reliance on this pattern of non-enforcement. However, when someone's perception of his interests changes, he may decide to assert his rights in a manner which undermines the expectations of those who have relied on their previous failure to do so. For example, consider the

make it possible for some to influence rule interpretation by framing legal issues for decision in factual contexts favorable to the interpretation which suits their ends.[35]

J. Willard Hurst has described how the plutocracy in the late 19th and early 20th centuries used campaigns of multiple "diversionary lawsuits" to put pressure on adversaries and how it carefully framed test cases to present legal issues in a light favorable to the results it sought. Hurst emphasizes that the notion of litigation as a mechanism "to enforce rights and duties according to an existing body of 'law' " simply does not apply to these activities. This litigation was not a means of enforcing compliance with preexisting commands of the sovereign. It was "both an instrument of fixing policy and a tactical device in its execution."[36] The results were not determined by the operation of an autonomous system, but by the exercise of procedural discretion by private parties in the course of a free-wheeling struggle.

More recently, litigation has been used in this manner on behalf of lower- and middle-income individuals against dominant economic interests. The claim of spokesmen for large corporations that many recent class actions represent "legalized blackmail"[37] reflects an accurate perception that the procedure is not being used merely as a more efficient way of enforcing a substantive claim, but also as an instrument of private policy for the vindication of expectations which are not justified by the substantive law. The availability of the class action device may have a critical impact on the result independently of the substantive merit of the claim.[38] Analogously, the threat of mass assertions of due process rights by criminal defendants or welfare recipients is a potential instrument by which substantive concessions could be exacted from enforcement officials.[39]

situation of a landlord who enters into a lease in reliance on the tenant's pattern of nonenforcement of rights under a housing code. He may agree to a lower rent on the assumption that he will not have to meet code standards. Yet, the tenant retains the discretion to assert his rights under the code, and there may be no way for the landlord to be certain that he will not do so.

34. For an account of an elaborate strategy which may have been critically determinative of the outcome to choose a forum and a judge in a multi-million dollar personal injury action, see G. STERN, THE BUFFALO CREEK DISASTER 54-56, 84-86 (1976).

35. *See* J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 34-51 (1950) [hereinafter cited as HURST]; Galanter, *supra* note 32, at 101.

36. HURST, *supra* note 35, at 349, 347-52.

37. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 9 (1971).

38. Simon, *supra* note 31, at 389:

> The principal impetus for settlement comes from the atomic dynamics of large user class actions. When a firm with assets of, say, a billion dollars is sued in a class action with a class of several million and a potential liability of, say, $2 billion, it faces the possibility of destruction. A settlement offer may then be made of $20 million—or one percent of possible exposure. . . . What defense lawyer can tell his client that his probable success in any jury case is better than 100 to 1; no matter how little merit there is in plaintiff's claim?

39. *See* Alschuler, *supra* note 31; Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48 (1976); Subrin & Sutton, *Welfare*

Although the point is clearest in large-scale contests involving great interests, in fact almost all litigation has this instrumental, discretionary, *disorderly* character. In the vast majority of cases which are settled, there is not even a pretense that the result has been determined by the application of a system of substantive rules to given factual premises. The sovereign merely ratifies a result which the parties have negotiated by each giving up procedural discretion to injure the interests of the other.[40] Even when there is a contested judgment it will rarely appear as a mechanical vindication of substantive commands. More often, it will seem a consequence of a party's exercise of discretion, for instance, to plead not guilty, or to choose a favorable forum, or to appeal to the prejudices of the jury. On Positivist premises, given the existence of such discretion, every lawsuit is likely to be a form of "legalized blackmail."[41]

In creating a critical role for private discretion, procedure undermines the basic Positivist guarantee of order. Uncertainty becomes inevitable because the actions of the sovereign cannot be reliably predicted. The sovereign's actions are determined by procedural discretion. This discretion is not exercised by the citizens in any systematic fashion, but rather it is exercised instrumentally in the pursuit of their individual, subjective, and arbitrary ends. The problem is not just that procedure complicates the analysis. More importantly, the procedural rules create a situation in which outcomes depend on contingencies which are not susceptible to legal analysis. They depend on private decisions which are not controlled by the rules. Moreover, oppression still threatens. Positivism's claim to eliminate oppression is plausible only to the extent that people see state intervention as governed by a neutral system of rules. The system as a whole can be shown to be just vis-à-vis all the citizens, but no particular outcome can be shown to be just except by tracing it to the system. However, once the role of procedural discretion is recognized, the actions of the sovereign appear to be determined by private power.[42] As such, they constitute oppression.

Thus, to the extent that procedure checks public anarchy, it unleashes private anarchy. The debate within Positivism between authoritarians and libertarians is concerned with striking the balance between public and private disorder. Yet, by this point, Positivism has conceded its failure to secure the basic goal of order. Authoritarians and libertarians

Class Actions in Federal Court: A Procedural Analysis, 8 HARV. C.R.-C.L. L. REV. 21, 54-55 (1973); *see also* Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934).

40. *See* L. FRIEDMAN & S. MACAULAY, LAW AND THE BEHAVIORAL SCIENCES 162-70 (2d ed. 1977); Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975).

41. *See* Leff, *Injury, Ignorance, and Spite—The Dynamics of Coercive Collection*, 80 YALE L. J. 1 (1970) [hereinafter cited as Leff].

42. *See generally* Galanter, *supra* note 32; Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973) [hereinafter cited as Kennedy].

merely claim to achieve an appropriate allocation of the incidence of disorder. The threat to the citizen from the sovereign has been alleviated only at the cost of aggravating the threat from his fellow citizens.

In the work of the Legal Realists, the tension between substance and procedure is recognized and discussed from within the framework of Positivism. The Realists saw clearly that rules are not self-interpreting and self-enforcing, and they acknowledged the impact of procedure in compromising the enforcement of substantive prescriptions.[43] Their writings suggest two strategies for dealing with the tension between substance and procedure without abandoning the basic Positivist premises. Neither is successful.

One strategy is to eliminate the distinction between substance and procedure by collapsing the two sets of rules into a single set. This can be done by reading the procedural rules as qualifications to the substantive rules. In this way, law can still be viewed as the prediction of the application of force from a unitary body of rules. The predictions simply become more complicated. This strategy seems to underlie some of the more familiar rhetoric of discussions of legal ethics. For instance, lawyers argue that a person has a "right" to plead the Statutes of Frauds or Limitations to defeat an otherwise valid claim or to object to probative hearsay because the rules authorize such actions.[44] And they insist that a person has a "right" to breach contracts because the law does not specifically enforce prohibitions of breach but merely imposes damages.[45] Significantly, however, such rhetoric rarely embraces the more extreme consequences of this line of thought. Lawyers never argue that a person has a right to commit murder so long as he does not leave behind proof beyond a reasonable doubt of his act. Nor do they assert that a person may lawfully swindle others if he flees to Brazil before the sovereign brings him to trial. Their reluctance to go this far has not been due to mere timidity. The distinction between substance and procedure reflects a real conflict within the Positivist system between the total dependence on the sovereign's power and the extreme danger from it. The procedural rules which are needed to limit the sovereign's power give discretion to citizens which undermines order. The experience of this discretion and of the disorder which it creates cannot be eliminated by a merely rhetorical or conceptual change.

Another strategy which Realism suggests is to make the sovereign's enforcement power more effective and to limit the discretion of citizens to

43. *See, e.g.*, J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JURISPRUDENCE (1949) [hereinafter cited as FRANK]; Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931).

44. *See, e.g.*, DRINKER, *supra* note 18, at 149; R. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 86 (1971) [hereinafter cited as PATTERSON & CHEATHAM]; Thode, *supra* note 18, at 586-91.

45. *See, e.g.*, Holmes, *supra* note 24, at 461-62; *but see* HART, *supra* note 24, at 35-41.

manipulate the system.[46] But this approach merely turns the problem on its head. Limiting the discretion of the private parties only increases the discretion of the sovereign and thus enlarges the danger of disorder from that source. For example, if the rules were changed to abolish the discretion of criminal defendants to escape enforcement by excluding illegally seized evidence, the effective discretion of the sovereign to torture, wrongly imprison, and confiscate property in the quest for evidence would be enlarged greatly.

The second procedural dilemma of Positivism arises from the question of access to the legal system. Positivism recognizes that the strangeness and complexity of the law creates a new danger of oppression. The danger is that some will be able to anticipate state intervention better than others and that they will use their knowledge to the disadvantage of the less informed. Positivism's basic response to this danger is a promise to make counsel available to people regardless of their ends. Availability can mean either access for those who can pay, or some guaranteed level of access regardless of wealth. But neither approach is adequate.

Availability means merely formal access when Positivist legal theory is linked to the theory of the self-regulating market, as it commonly was in the late 19th and early 20th centuries.[47] According to this theory, each individual should be left to choose for himself which goods and services he will receive from the rest of society, but only within the limits of his wealth. The limits of his wealth should be determined by a series of bargains in which he sells his labor or whatever else he has for the best price he can get for it. In this view, legal services are merely another commodity which the individual can purchase or not according to his own schedule of satisfactions. Formal availability is the opportunity to use the proceeds of the sale of one's own labor to purchase legal services at the going rate. Under this standard, the lawyer's obligation is merely to make his services available to those who can pay for them.

This situation involves the citizen in a vicious circle. Because the process of economic bargaining is defined and regulated by the law, a person needs to know the law in order to understand his position and his options. In order to make the best bargains, he needs legal advice. Yet, in order to get legal advice, he needs to make good enough bargains to provide himself with the means to hire a lawyer. Contrary to the assumptions of those who advocate formal availability, legal services are not just another commodity, but rather a prerequisite to participation in the system. Where legal services are only formally available, the poor, who are unable to purchase legal services, may remain poor for precisely that reason. Their ignorance of the law puts them in an inferior bargaining

46. *See, e.g.*, FRANK, *supra* note 43.
47. *See* J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924).

position which will prevent them from realizing the full value of their labor in the market.[48]

The profession's more recent response to the problem of access is to acknowledge some responsibility for making legal services available to those who cannot pay for them.[49] Yet, in terms of Positivist theory, this solution is little more plausible than the formal one. There is no practical way of equalizing access to legal services sufficiently to preclude oppression. The society is not prepared to make the enormous expenditures necessary to provide everyone with substantial access to legal assistance.[50] Although only a minority has substantial access at the present level of availability, the cost of maintaining even this level strikes many laymen as intolerably expensive. Moreover, cost seems to increase geometrically as the level of services grows, since formal disputes become not only more plentiful, but also more complicated.

Class representation is not a viable solution within the framework of Positivism to the prohibitive expense of individual representation. First, there is no reliable means of determining when the ends of individuals converge sufficiently to make them a class. Without a concrete factual basis for classification, the definition of classes inevitably involves resort to the personal ends of the people doing the defining, and thus creates uncertainty and oppression. The actual ends of many class members may differ sharply from the ends attributed to them by those who control the litigation.[51] Moreover, even where a genuine convergence of ends actually exists initially, class representation will itself disrupt this convergence by creating a conflict of interest between those who actually control the litigation and those who do not. The control of the litigation is an asset which those who possess can use to their own advantage at the expense of the other class members.[52] Finally, class representation tends, in practice, to favor those whose ends converge with others over those whose ends do not.

Thus, knowledge of the rules will necessarily be unequally distributed, and as a practical matter large numbers of people will be denied any substantial access to the legal system. Those who can afford a large amount of legal services will be able to use their superior knowledge to

48. *See* R. SMITH, JUSTICE AND THE POOR 241 (1919).

49. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-17 to 2-25.

50. One "conservative" estimate holds that "[i]t would require something on the order of a tenfold increase in the size of the *entire* bar to begin to provide the whole population with the legal services that the affluent presently enjoy." Bellow & Kettleson, *supra* note 3, at 57 (emphasis in original); *see generally id.* at 56-58.

51. *See, e.g.*, Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegration Litigation*, 85 YALE L.J. 470 (1976) [hereinafter cited as Bell]; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1762-70 (1975) [hereinafter cited as Stewart]; White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503 [hereinafter cited as White].

52. *See, e.g.*, Simon, *supra* note 31, at 389-94 (1972); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1124-25 (1970).

maneuver others into situations where the sovereign's interventions will benefit them at the expense of the others. It may turn out that the sovereign's interventions routinely serve the ends of those with superior knowledge of the rules.[53]

The problem of access is aggravated by the problem of enforcement. The citizen needs legal services not only to learn his rights, but also to enforce them against the trespasses of others. The advantaged can make far better use of their procedural discretion than the disadvantaged. They can engage in far more elaborate and sophisticated procedural strategies. They can use the procedural rules to increase the expenses of the disadvantaged in asserting their claims so that the latter must give up or compromise before their claims have been determined.[54]

At the same time, any attempt to alleviate the problem of access by increasing the availability of legal services will only aggravate the problem of enforcement. The expansion of legal services multiplies the number of people able to exploit their procedural rights so as to thwart the commands of the substantive law and escalates their ability to do so.

The problems of enforcement and access undermine the Positivist image of the lawyer. They make it implausible to portray the fundamental legal activity as the prediction of the actions of the sovereign. The lawyer does not merely anticipate outcomes, he makes them. This is so for two reasons. First, the notion of the lawyer as predicting events depends in large part on the notion of the law as a system with a momentum of its own, operating independently of the will and conduct of any particular actors. Yet, in fact, the outcomes of legal proceedings depend on strategic procedural choices in which the lawyer participates.[55] In becoming the tool of the client, the lawyer does not merely enable his client to vindicate expectations based on a determinate set of rights. Rather, he becomes an agency for the exercise of discretionary power. Second, the notion that the lawyer predicts events also depends on the assumption that there is no scarcity of legal services so that a lawyer's decision to represent a particular client has no significant impact on the distribution of legal knowledge. Yet, the problem of access refutes this assumption. The

53. *See* Galanter, *supra* note 32.

54. *See* Galanter, *supra* note 32; Halverson, *supra* note 32.

55. The Positivist view of the lawyer as merely anticipating the consequences produced by the autonomous operation of the legal system has receded in recent years, but it still persists in very prominent quarters. Defending the Ideology of Advocacy in the sphere of litigation, the Code states that, unlike the situation of counseling where a lawyer "assists his client in *determining* the course of future conduct and relationship," the courtroom advocate "must *take* the facts as he finds them". ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-3 (emphasis added). The implication is clear that, while in counseling the lawyer affects the outcome, in litigation the outcome arises directly from the operation of the system on the "facts" and does not depend on any action of the lawyer. *Compare* PATTERSON & CHEATHAM, *supra* note 44, at 135 *and* Thode, *supra* note 18, at 576-79 *with* HURST, *supra* note 35, at 349 ("[L]itigation as well as office work might be both an instrument of fixing policy and a tactical device in its execution.").

lawyer's acceptance of a particular client does not and cannot implement a condition of general availability. Availability will necessarily be limited, and the incidence of availability will be determined by the lawyer's decisions as to whom to represent. Lawyers' decisions as to whom to represent determine the distribution of legal knowledge, and hence, the distribution of power in the society. Whether or not a lawyer shares his client's interests, he influences the balance of power in favor of those interests by accepting him as a client.

2. THE TYRANNY OF ADVOCACY

The dilemmas of enforcement and access undermine the Positivist notion of the role of the lawyer in the legal system as a whole. They suggest that lawyers as a group cannot safeguard the general social interest in the elimination or containment of uncertainty and oppression. The Positivist notion of the lawyer's role also involves another perspective, that of the individual lawyer and his client. From this perspective, Positivism envisions the lawyer as enhancing the client's autonomy, as enabling the client to make the fullest use of his freedom to pursue his own ends. This latter perspective is to some extent independent of the larger one. For even after acknowledging the failure of the legal system to check uncertainty and oppression, the Positivist can still argue that the lawyer enables individual clients to pursue their ends more effectively within the limits imposed by both the legal system and social disorder. Yet this second perspective involves difficulties as serious as those of the first. Positivism fails to show that the lawyer can enhance his client's autonomy. Rather, it appears from Positivism's own premises that the lawyer who adheres to the Positivist version of the Ideology of Advocacy must end by subverting his client's autonomy. The problem is that the lawyer's task of explaining the impact of the legal system on the client's personal ends cannot be accomplished without some direct understanding of these ends. Yet, Positivism forbids the lawyer to seek or rely on such an understanding.

The lawyer purports to assist his client by using his objective knowledge of the precise, regular, mechanical operation of the legal system to predict the consequences of alternative courses of action. The lawyer assumes specific courses of action as factual hypotheses and reasons from them in accordance with the rules of the legal system in order to determine the consequences in terms of state action which follow from them. Yet by itself, this type of assistance is of little use to the client. The client is not interested in the consequences of *any* course of action. Of the infinity of possible courses of action, he is interested in only those which might advance his ends. Moreover, the client is not interested in *all* the consequences of a course of action. Of the infinity of

probable consequences, he is interested in only those that will affect his attainment of his ends.

The Positivist version of the Ideology of Advocacy focuses on the person for whom the law is a mystery. Such a person, even if conscious of and articulate about his ends, would not know which aspects of them the lawyer would need to understand in order to gauge the impact of the legal system on his life. In order to isolate these aspects, he would need the legal knowledge for which he relies on his lawyer. The lawyer, on the other hand, has no reliable way of learning the client's ends on his own. Because these ends are subjective, individual, and arbitrary, the lawyer has no access to them.[56] Because the lawyer's only direct experience of ends is his experience of his own ends, he cannot speculate on what the client's ends might be without referring to his own ends and thus biasing the neutral predictive analysis he is supposed to perform. Any attempt to frame inquiries to the client concerning his ends or to interpret the client's ambiguous replies will necessarily involve the intrusion of the lawyer's own ends. Thus, consciously or not, the Positivist lawyer is faced with a dilemma: On the one hand, he cannot give intelligible advice to his client without referring to ends; on the other hand, he cannot refer to ends without endangering the client's autonomy, and thus, undermining the basic purpose of his role.

Today, in most areas of law practice, lawyers have repudiated Positivism. Even at the turn of the century, when the prevailing jurisprudence was Positivist, many lawyers who purported to subscribe to this jurisprudence ignored some of its assumptions and prescriptions in practice. Yet, there are some areas of practice where lawyers do operate on Positivist premises. In these areas, the Positivist dilemma is a real problem. Thus, Positivism has developed a strategy for dealing with the dilemma. Sometimes the strategy is acknowledged; more often, it is implicit. It can be found in a variety of discussions which view the legal system from a Postivist viewpoint.

The strategy is to impute certain basic ends to the client at the outset and to work to advance these imputed ends. This strategy drastically compromises the Postivist premise of the individuality of ends, but it seems to be the Positivist's only choice. The Positivists seem to assume that, if the ends imputed are sufficiently simple and sufficiently widespread, the risk of interference in the client's autonomy can be minimized. By imputing ends to the client at the outset, the lawyer obviates dangerous inquiries into the particular ends of the particular client. On the other hand, if most people actually do share the imputed ends to some degree, then the lawyer will usually advance the client's

56. *Cf.* S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 341 (1960) ("The basic assumption [of liberal political thought], that each was the best judge of his own interests, rested squarely on the belief that no individual could truly understand another.").

actual ends when he works to advance the imputed ends. The ends which Positivism imputes are derived from the basic Positivist premise of egoism, but they go beyond this initial premise to emphasize characteristics of extreme selfishness. The specific ends most often imputed are the maximization of freedom of movement and the accumulation of wealth.

The notion that the advocate should serve, not the individual ends of the client, but rather certain standard ends imputed to him is implicit in cases dealing with the effectiveness of advocacy. The law of procedure repeatedly recognizes that critical decisions are made by the lawyer without any participation by the client.[57] Occasionally, such a decision results in disaster to the client, and the issue arises whether he has been represented effectively. This issue is often seen to depend on whether the lawyer's decision was strategically reasonable under the circumstances in which it was made.[58] A strategically reasonable decision is one well calculated to advance certain ends. Yet, these discussions often proceed in total ignorance of the actual ends of the particular client. Rather, the strategic reasonableness is assessed with respect to the imputed ends of Positivism. The lawyer is not criticized for failing to ascertain his client's ends, but only for failing to advance the ends which have been imputed to him.

In the area of the criminal law, lawyers and laymen have recognized increasingly the extent to which the lawyer dominates the client in conducting the defense. Yet, this recognition has led them, not to a reexamination of the premises of adversary advocacy, but to a re-invigorated defense of it in terms of the imputed ends. Thus, critics deplore criminal defense lawyers who fail to exercise their broad discretion more vigorously in order to make it more difficult for the state to coerce the client.[59] The interest in escaping conviction under any circumstances is not something which these critics have discovered after examining the lives of any particular clients. Rather, it is an end which has been imputed to the clients *a priori*.

This Positivist strategy is a complete failure. It can only precipitate, rather than mitigate, the lawyer's subversion of the client's autonomy. The Positivist's vague, crudely drawn psychological assumptions cannot begin to do justice to the specific complexity of his client's actual ends.

57. *See, e.g.*, RESTATEMENT OF JUDGMENTS §§ 126 (2)(e) & (f), 129 (a) (1942) (no relief from erroneous and inequitable judgment entered due to attorney negligence); *see also* Williams v. Beto, 354 F.2d 698, 706 (5th Cir. 1965) (The client "should know that in the course of a lawsuit there are many critical Rubicons at which the attorney must make finely balanced, often agonizing, decisions."). *See generally* Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120 (1968); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L. J. 1035, 1078-86 (1977).

58. *E.g.*, Estelle v. Williams, 425 U.S. 501, 514-15 (1976) (Powell, J. concurring); Henry v. Mississippi, 379 U.S. 443, 445-52 (1965); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1092-1116 (1973).

59. *See generally* Alschuler, *supra* note 31; Blumberg, *supra* note 5; Skolnick, *supra* note 5.

Unlike the hypothetical person assumed by the Postivist advocate, actual people have not just a few, discrete ends, but rather many ends which are interrelated in a complex fashion. Moreover, these ends are set in a social context in which the individual's fulfillment depends on his relations with others. Even assuming the basic Positivist psychology of egoism to be accurate, it would not follow that a person's ends could be reduced to a few crude presumptions. On the contrary, a person's fulfillment is likely to depend on a complex balance among many different satisfactions. Moreover, the attainment of individual satisfaction depends on the cooperation of others. Yet, Positivism is blind to all but the crudest ends, to the relations of ends among each other, and to the social relations on which personal fulfillment depends.

Thus, when the client comes to the Positivist seeking to protect the delicate rhythms of his private life from disruption by the mechanical operation of the state, the lawyer will implement the very result he was supposed to prevent. The lawyer explains to the client the probable impact of the state, not on the client's own life, but on the life of the hypothetical person assumed in the Positivist model whose simple, crude ends bear only the most problematical relation to those of the client. This advice is much worse than useless to the client. Though it will often be irrelevant to his ends, the client may not be in a position to reject it. The client of whom Positivism is most solicitous is the naive person, face to face with the alien force of the state, threatened with a massive disruption of his life. Confronted with the need to act in this strange situation, the client must make sense of it as best he can. The lawyer puts himself forth quite plausibly as the client's best hope of mastering his predicament. If he is to avoid being overwhelmed by chaos, he must acquiesce in his lawyer's definition of the situation. He must think in a manner which gives coherence to the advice he is given. He may begin to do this quite unconsciously. If he is at all aware of the change, he is likely to see it as a defensive posture forced on him by the hostile intentions of opposing parties, of whom his perception is mediated by the categories of his lawyer's framework of analysis.[60] His only strategy of survival requires that he see himself as the lawyers and the officials see him, as an abstraction, a hypothetical person with only a few crude, discrete ends.[61] He must assume that his subtler ends, his long-range plans, and his social relationships are irrelevant to the situation at hand. This is the profound and unintended meaning of Holmes's remark:

---

60. *See, e.g.*, L. AUCHINCLOSS, POWERS OF ATTORNEY 184-86 (1963).

61. On the process by which an individual comes to accept the others' definition of his situation, see J. SARTRE, BEING AND NOTHINGNESS 55-67, 252-302 (Barnes trans. 1952) [hereinafter cited as SARTRE]; Goffman, *The Moral Career of the Mental Patient*, in ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 127-169 (1961) [hereinafter cited as Goffman]; Lukacs, *Reification and the Consciousness of the Proletariat*, in HISTORY AND CLASS CONSCIOUSNESS 83-110 (Livingstone trans. 1971) [hereinafter cited as Lukacs].

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[62]

The role of the bad man, conceived as an analytical device for the lawyer, becomes, under pressure of circumstances, a psychological reality for the client.

The image of rational choice by the client in response to neutral analysis by the lawyer is the shabbiest fiction of the Ideology of Advocacy. The most vulnerable facet of Monroe Freedman's article, so often praised even by its critics as frank and realistic, is its thoroughly misleading presentation of the "three hardest questions" as subjects of meaningful choice by the client. Even where the issue is formally submitted to the client as a matter for his decision, the client's choice is determined, or at least strongly biased, by the way in which the lawyer defines the question.

Thus, a lawyer representing a murderer does not discuss society's feelings about the nature of the crime, the legitimacy of the state's attempt to punish him, the client's own views of his actions, or their effect on his life in society. In advising him about whether to cooperate with the authorities, he will not explain the complex functional and extrinsic policies behind the privilege against self-incrimination. As a scrupulous professional, all he can do is explain that, of two courses equally incomprehensible to the client, one will probably lead to prison and the other to release. Similarly, the good Positivist advocate does not explain that the obligation made unenforceable by the Statute of Frauds would be binding but for a formality. Neither will he inquire into the fairness of the bargain, the nature of the relationship between the two parties, or the effect of not paying on the client's future business dealings or his standing in the community. His analysis must leave the client to decide whether or not he wishes to be coerced by the state to pay a sum of money to the plaintiff.

Of course, in practice, lawyers often do not even go through the motion of presenting critical questions to the client as occasions for choice.[63] They decide the questions unilaterally in terms of the imputed ends of selfishness.[64] This practice seems entirely justifiable because

62. Holmes, *supra* note 24, at 459; *see* FULLER, *supra* note 25, at 93.

63. *See, e.g.*, ROSENTHAL, *supra* note 5, at 32 (survey of personal injury litigation in New York City indicating that critical decisions are routinely made by lawyers with little or no participation by clients).

64. *E.g.*, L. AUCHINCLOSS, THE PARTNERS (1974):

> She asked him to review one of her estate plans whereby the rich husband of an incompetent was enabled to set up a trust in such a way as to throw the bulk of his estate taxes on his wife's children by a prior marriage, leaving the trust principal intact for his own.
>
> "But the widow's property will all be gobbled up!"

when inquiries are made in the framework of the imputed ends, when only the considerations relevant to the "bad man" are mentioned, the answer is a foregone conclusion.

Despite its complete irrationality, this Positivist strategy for dealing with the problem of the inaccessibility of personal ends has become so widely accepted that many lawyers have come to equate the manipulation of the client in terms of imputed ends with neutral advice to the client on his rights. For instance, lawyers constantly express astonishment at the willingness of intelligent laymen, aware of their rights, to make inculpatory statements to the authorities. They can think of no other explanation for this phenomenon besides confusion or pressure from the interrogators, and they thus conclude that no one can be expected to make an "informed decision" on such matters without the assistance of counsel.[65] But the

---

> "I don't know what you mean by 'gobbled up,' Mr. Simmonds."
>
> "I mean that Mr. Pierson will have shoved the taxes that properly belong on his estate off on his wife's. His children will end up rich while hers are bust."
>
> "It's an odd situation, certainly. I think I have handled it to the advantage of my client."
>
> Ronny stared. "But does Mr. Pierson *know* about his wife's will and the effect of this?"
>
> Mrs. Stagg smiled thinly. "*One thing you'd better learn right away, Mr. Simmonds, is never to ask what clients know*. Mr. Pierson does not come to One New Orange Plaza for spiritual advice. He wants to look after his incapacitated wife with the minimum injury to *his* offspring. I think that is precisely what my plan will effect.

Id. at 32-33 (second emphasis added). Mrs. Stagg is engaging in the strategy of imputed ends. For her, the issue is whether or not the client wishes to save money for his family, and the answer is sufficiently self-evident to make formal inquiry of the client superfluous. For Mr. Simmonds, the issue is whether the client wishes to save money for his family at the expense of his wife's family. Mrs. Stagg thinks that putting the question this way makes impermissible assumptions about the client's ends. The desire to save money for one's own family is sufficiently simple and basic an end to be imputable to the client. On the other hand, the concern for more remote relatives would implicate far more particular and subjective considerations. Since this concern is clearly on the far side of the line which separates the realm of imputable ends from the realm of pure subjectivity, there is no more reason to present this consideration to the client than there is to ask him whether he wishes the trust assets to be invested in companies which do business with South Africa. In attempting to speculate on his client's actual ends, Mr. Simmonds has really been trying to foist his own personal ends on the client.

See also PATTERSON & CHEATHAM, *supra* note 44, at 86: "The layman might well view [pleading the Statute of Frauds] as being unfair, but the advocate does not. The duty of loyalty to his client requires the plea, regardless of the merits of the claim." Notwithstanding the fact that the client, presumably a layman, might regard the plea as "unfair," the authors do not speak of consulting him, and they assume that the Statute will be routinely pleaded when it is available. The "duty of loyalty" thus appears to be, not to the client's actual ends, but to the imputed ends.

65. *E.g.*, Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L. J. 300 (1967). This article exemplifies the unconscious influence of ideological assumptions on empirical research. It is based on an actual, unstaged incident in which members of the Yale University community were interrogated individually on two occasions by agents of the FBI about their involvement in illegal draft protests. In the first series of interrogations, despite the fact that the agents gave *Miranda* warnings, all of those questioned discussed their involvement. After these sessions, those questioned attended a meeting at which they were then informed of their rights, this time in more detail and by a "friendly source," that is, three Yale law professors. At the subsequent interrogations, all refused to give any information to the agents. The authors attribute the change of mind to the "greater understanding" resulting from the meeting and suggest that the agents' *Miran-*

lawyer's assistance does not take the form of neutral information or the alleviation of pressure. Along with his knowledge of the law, the lawyer brings his own prejudices and his own psychological pressures. These derive from the conception of the roles of lawyer and client which is implicit in Positivism generally and in the strategy of imputed ends. As Justice Jackson put it, "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances."[66] The Positivist lawyer is not an advisor, but a lobbyist for a peculiar theory of human nature.

Positivist lawyers fail to see that the kind of behavior they impose on their clients is meaningless when it originates in the lawyer's conception of his own role rather than in the will of the client. And yet, because the imputed ends cannot approximate the complexity of the client's actual ends, Positivist advocacy cannot join forces with the will of the client. This is so even in the area of criminal defense, where the Positivist case for an imputed end is strongest, but nevertheless insufficient. It may be true that the desire to escape criminal punishment is basic and widespread. But the standard adversary defense cannot be justified by routinely imputing such a general desire to every client. The actual and specific ends of even a purely selfish individual may not be served by an adversary defense. For instance, such a defense may merely prolong and intensify an ordeal regarded as more terrible than the threatened punishment.[67] Or it may make the punishment, if it should occur, more difficult

da warnings had been ineffective because they were mechanically and tersely given and because of psychological pressures inherent in the interrogation situation, stemming in part from middle-class habits of courtesy and cooperation and a natural fear of the alien, coercive force of the state. They conclude that mechanical recitals of the *Miranda* provisions by officials are not enough and that a person requires an "advocate" at interrogation proceedings.

The central thrust of the article is its portrayal of the psychological pressures involved in interrogation. It shows no awareness whatsoever of the possibility of pressure from a "friendly source" or an "advocate." Yet, from the authors' account of the incident, the following conclusions seem at least as plausible as theirs. First, the three friendly sources gave more than information; they also conveyed, tacitly or explicitly, the impression that cooperation with the FBI in an investigation into the political expression of students was contrary to the expected standards of behavior of members of a liberal university community. Second, the fact that the second interrogation was conducted under the indirect scrutiny of third parties, while the first was not, was a factor encouraging the students to refuse cooperation the second time when they had cooperated the first time. *Cf.* Darley & Latané, *When Will People Help in an Emergency*? 2 PSYCHOLOGY TODAY (Dec. 1968) (presence of third party observers inhibits willingness to take responsibility in an emergency). Third, put to the test, the students' middle-class instincts of cooperation proved stronger with respect to other students and faculty, members of the same upper-middle professional class to which the student subjects belonged, than with respect to the police, members of a lower social class and an occupational group held in low esteem by the upper-middle professional class.

66. Watts v. Indiana, 338 U.S. 49, 59 (1949); *cf.* Justice Jackson's remark on his experience of civil practice in Jamestown, N.Y., ". . . a lawyer there, if he was consulted on a matter, usually dominated the matter, no matter who the businessman was." E. GERHART, AMERICA'S ADVOCATE: ROBERT M. JACKSON 63 (1958).

67. *See, e.g.*, F. DOSTOEVSKY, THE BROTHERS KARAMAZOV, at 552-53 (Magarshack trans.

to endure by forcing the client to struggle against it and to deny its legitimacy.[68]

The Positivist psychology either makes advocacy impossible or forces the lawyer into the strategy of imputed ends. Because the imputed ends ignore the most important dimensions of the client's personality,[69] the strategy leads to the manipulation of the client by the lawyer in terms of the lawyer's own moral and psychological prejudices. In this manner, the lawyer becomes the agent of the result he was supposed to prevent. He subverts his client's autonomy.[70]

1958). During the investigation by the examining magistrate and the public prosecutor, Dmitry Karamazov's fear and discomfort increase as the officials emphasize his procedural rights:

> "You see, gentlemen," he said suddenly, restraining himself with difficulty, "you see—I listen to you and I seem to be haunted by a dream—you see, I sometimes have such a dream—a curious kind of dream—I often dream it—it keeps on recurring—that someone is chasing me—someone I'm terribly afraid of—chasing me in the dark at night—looking for me, and I hide somewhere from him behind a door or a cupboard—hide myself so humiliatingly—and the worst of it is that he knows perfectly well where I've hidden myself from him, but he seems to be pretending deliberately not to know where I am, so as to prolong my agony, to enjoy my terror to the full. . . . That's what you're doing now. It's just like that!"

68. *See, e.g.*, A. SPEER, SPANDAU: THE SECRET DIARIES 58 (R. Winston & C. Winston, trans. 1977): "Who could survive twenty years of imprisonment without accepting some form of guilt?"

69. If the imputed values of Positivism fail to approximate even purely selfish ends, *a fortiori*, they fail to take account of communitarian ends (e.g., the desire to be reconciled with one's fellows). It is possible, though not necessary, to interpret the Positivist emphasis on the egoism of the individual as a denial of the existence of communitarian ends. *See* S. LUKES, INDIVIDUALISM 99-106 (1973). Yet, such a denial would be unpersuasive. First, it would conflict with the fact that many people do experience such ends or at least profess to experience them and act as if they did. More fundamentally, it would conflict with the basic Positivist premise of the arbitrariness and individuality of ends. If ends are arbitrary, then there seems to be no logical reason for excluding any category of imaginable ends; and if ends are individual, then there seems to be no factual basis on which one individual could assert that another could not have a particular end. Yet, the imputed values of Positivist advocacy are completely inconsistent with communitarian ends, and Positivist advocacy is destructive of such ends. *Cf.* Griffiths, *supra* note 3, at 371-417 (contrasting adversary advocacy with the "family model" of criminal procedure).

70. A Positivist might attempt to avoid the criticism made here by qualifying or retracting the principle of the subjectivity of ends. He might assert that ends are sufficiently shared, or at least understood, so that even strangers can achieve some understanding of each other's ends. This being so, the lawyer could respect his client's autonomy by making strong efforts to come to an understanding of his ends. The Positivist might assert that, although many lawyers do engage in the strategy of imputed ends, there is nothing in Positivism, so revised, which requires that they do so.

I doubt that Positivist Advocacy can be made more acceptable by such a revision. In the first place, to the extent that the revision avoids the problem of the inaccessibility of ends, it becomes less plausible ethically than the version stated above. There are severe limitations on the extent to which a person, particularly a stranger, can understand with any depth the ends of another without actually sharing those ends. The language in which we describe ends is often vague and indeterminate. To understand its meaning in a specific context, one must often share the moral outlook of the person who uses it. *See* FULLER, *supra* note 25, at 92-95; UNGER, *supra* note 25, at 101. Thus, in order to suggest that the advocate can gain an understanding of his client's ends, the revision must assume a substantial degree of sharing of ends throughout the society. Yet, to the extent that such a sharing exists, the insistence that the advocate refrain from holding either himself or his client to personal or social norms becomes untenable. In the Positivist version, the ethical validity of adversary advocacy

C. The Present State of Positivism

Positivism has been repudiated as a general jurisprudential theory by most American lawyers, and the influence of the Positivist version of the Ideology of Advocacy on the practice and discourse of the legal profession has diminished substantially since the beginning of the century.

In the area of private law, the destructive tendencies of Positivist advocacy have been generally acknowledged. In this area, Positivism no longer provides the basic rationalization for the lawyer's partisanship and neutrality. Positivist notions have been banished almost entirely in theory and substantially in practice. They function largely as a fallback position for situations of unusual difficulty. As a general matter, Positivism has been superseded by a jurisprudence which emphasizes individual and social responsibility and shared values and which teaches sensitivity to the subtleties of personal factors and social relationships.[71] The new category of "counseling" in legal ethics and education reflects, not only the changed nature of legal practice, but the recognition of the need to curb the destructive tendencies of Positivist advocacy. The Ideology of Advocacy is now identified most readily with litigation, while new fields of expertise, such as negotiation, counseling, and arbitration, have among their primary purposes the avoidance of litigation.

On the other hand, Positivist notions of advocacy continue to play a significant, though somewhat ambiguous, role in criminal law, and to a lesser extent, in civil liberties and poverty law. The Positivist emphasis on normless strife seems to correspond to many lawyers' experience of practice in these areas. Moreover, in these areas, where lawyers frequently confront clients from very different social backgrounds, the Positivist

---

depends heavily on the premise that values are subjective, arbitrary, and individual. If there were a substantial sharing of values in society, then the reference to such values by judges and lawyers would not be likely to cause uncertainty. If lawyer and client did share values, then the lawyer's adherence to such values would not constitute oppression of the client.

In the second place, the notion that ends are inaccessible accurately describes the experience of lawyers in some areas of practice. This is particularly true in criminal law, where the client is likely to be from a different social background than the lawyer. Albert Alschuler has written, "Most criminal defendants do not understand our [sic] system of criminal justice and cannot be made to understand." Alschuler, *supra* note 31, at 1310. In this situation, Alschuler suggests, no meaningful choice by the client as to the exercise of certain procedural rights is possible. *Id.* If this is true, then it can only be because most defense lawyers do not understand their clients and cannot be made to understand. If the lawyer understood his client, he would be able to give him the information about the criminal justice system which the client would need in order to make an autonomous choice. The strategy of imputed ends is not merely a theoretical ploy. It is a response to the experience of the inaccessibility of client ends in actual practice. It seems unlikely that the problem can be solved merely by telling lawyers to try to learn their clients' ends.

71. *See* text accompanying notes 73-132 *infra*. *See, e.g.*, H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW ch. II (1958) (unbound edition prepared for classroom use) [hereinafter cited as HART & SACKS]; Cavers, *Legal Education and Lawyer-Made Law*, 54 W. VA. L. REV. 177 (1952); Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971) [hereinafter cited as Stone, *Legal Education*].

implication that the client's ends are inaccessible seems most solidly grounded. Some lawyers practicing in these areas have become sympathetic to the Positivist notion that social norms represent merely arbitrary convergences of individual ends and therefore cannot justify punishment or other forms of government coercion. They have thus been willing to pay homage to the Positivist notion that coercion can be justified only by a rigorously applied, impersonal system of rules. Yet, this homage is often ambiguous, and these Positivist notions sometimes seem to lead a precarious co-existence with other, inconsistent notions. For instance, many lawyers who discuss law in Positivist terms also seem to be aware that the state does not operate as a neutral mechanism to secure order, but that it is an instrument of uncertainty and oppression. They seem to feel that aggressive partisan advocacy is most justified when it is undertaken on behalf of the least powerful because it has the effect of partially redressing the imbalance of power and wealth in society.[72] To the extent that such lawyers come to justify their efforts in terms of service to particular individuals or groups and in terms of substantive, result-oriented criteria which are independent of the legal system, they have departed from Positivism and from the Ideology of Advocacy. Thus, in contemporary discussions, Positivist advocacy sometimes seems on the verge of changing into something radically different from the Ideology of Advocacy.

III. THE LAWYER AS PARA-BUREAUCRAT (THE HALF-HEARTED APPEAL TO TRUTH)

"It's not [the trial lawyer's] job to pursue the truth, but [to] pursue the process from which the truth emerges."

Charles Haar[73]

The justification of partisan advocacy as instrumental to the attainment of concrete social ends was a secondary theme in the Ideology of Advocacy at the beginning of this century. The conservative, formalist attitudes which prevailed among lawyers at that time were not hospitable to this type of argument. In the 19th century, utilitarian political philosophers had considered legal institutions in instrumental terms, but their considerations had led them to condemn adversary advocacy.[74] However, an instrumental version of the Ideology of Advocacy became increasingly prominent throughout the present century. Its victory over the Positivist view was formally acknowledged by the replacement of the Canons of

72. *See, e.g.*, Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1335-36 (1964) (defending a basically Positivist style of advocacy—one which emphasizes that the lawyer has no access to his client's ends—on the basis of non-Positivist considerations of distributive justice).

73. Professor Charles Haar, Harvard Law School, *quoted in* The Boston Phoenix, Jan. 15, 1974 at 20 (commenting on James St. Clair's decision to represent President Nixon in the Watergate investigations).

74. *See, e.g.*, 7 THE WORKS OF JEREMY BENTHAM 473-80 (Bowring ed. 1962 reprint).

Ethics with the Code of Professional Responsibility.[75]

The instrumental approach was based on a jurisprudence which developed in opposition both to formalism and to the cynical, antijudicial attitude of the more extreme Realists. This jurisprudence, which had been elaborated in various ways in the writings of Pound, Brandeis, Fuller, Llewellyn, Freund, Hart and Sacks, and Hurst, among many others, was, at least until recently, the reigning philosophy in the law schools, and it continues to exert a powerful influence on the judiciary and the bar.[76] It is not as precise or as coherent a theory as Positivism, and it can be treated as a single doctrine only by ignoring substantial differences among the theories in question. Yet, there is an important core of agreement among these theorists. This core, which can be called Purposivism, has a more ambiguous relationship to the Ideology of Advocacy than Positivism, and some Purposivists, have at least partially repudiated adversary advocacy.[77] However, most Purposivists, when faced with the question, have committed their doctrine to the defense of adversary advocacy, and a Purposivist version of the Ideology of Advocacy has emerged from their work.

A. *Purposivism*

In the Purposivist view, society is populated not by atomistic egoists but by people held together by shared experiences and norms. The purpose of law is not just to maintain order, but also to coordinate the actions of citizens so as to further their common purposes as effectively as possible.

Unlike the subjective and individual values of Positivism, the social norms of Purposivism are intuitively perceived and accepted throughout the society. To a large extent norms are self-enforcing because people are spontaneously disposed to conform to them. Nevertheless, spontaneous conformity to social norms is insufficient to secure their fullest implementation. The most effective implementation of social norms requires the application of technique. Unlike norms, technique cannot be

75. The Code was promulgated in 1969, but it embodied ideas which had been considered and studied by the American Bar Association for decades. A particularly influential document from this long period of gestation is a report by a joint conference of the ABA and the Association of American Law Schools. *See Professional Responsibility, supra* note 13.

76. *See, e.g.*, L. BRANDEIS, *Business—A Profession, The Opportunity in the Law, The Living Law*, in BUSINESS: A PROFESSION 1-12, 313-27, 344-63 (1914) [hereinafter cited as BRANDEIS]; P. FREUND, THE SUPREME COURT OF THE UNITED STATES (1961) [hereinafter cited as FREUND, SUPREME COURT]; L. FULLER, THE ANATOMY OF THE LAW (1968); HART & SACKS, *supra* note 71; HURST, *supra* note 35; K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); R. POUND, THE SPIRIT OF THE COMMON LAW, chs. 7-8 (1921); Freund, *The Legal Profession*, 92 DAEDALUS 689 (Dec. 1963); Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292 (1954).

77. *See* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404 (1906).

intuitively apprehended. Technique involves abstract cognition and requires aptitude, study, and training. The law is a technical apparatus for the advancement of social norms.

The application of technique involves the exercise of power. In contrast to Positivism, Purposivism does not require that power be monopolized by the state. Purposivism recognizes that lawyers and private citizens exercise power. The exercise of power by private citizens is justified by the same principle which legitimates its exercise by the state: its tendency to further the shared norms of the society.

Moreover, the exercise of power is not entirely constrained by rules. Rules are only one among a variety of legal tools for the advancement of social norms. Judges reach behind rules directly to the social purposes the rules are intended to serve, and when they find the rules wanting in the light of the relevant purposes, they abandon or modify the rules. The predictability of judicial decisions remains a goal of the legal system, but it has a different significance than in Positivism. First, the mechanical application of rules is not viewed as the best way to achieve predictability. Predictability can often be better achieved by appealing directly to the intuitively perceived shared norms of the society. Second, predictability is not the pre-eminent goal of the system. It must be weighed against competing purposes, and it may be occasionally sacrificed to them.

The lawyer's role is a social function designed to facilitate the advancement of norms through the application of legal technique. Legal technique involves the use of institutional forms to manipulate the social world productively. But the lawyer's role requires more than knowledge of legal technique. It also depends on his knowledge of the shared norms of the society. It is only through the intuitive normative understanding which the lawyer has by virtue of his membership and experience in the society that he can use legal technique productively.

In further contrast to Positivism, the role of the Purposivist lawyer is constructive, rather than predictive. He uses institutional forms to create generally rewarding patterns of interaction. He works in the interstices of the patterns created by legislators and judges. The individual's personal ends, though identical or compatible with those of others, are submerged in the minute practical considerations of his particular activity. The lawyer discerns these ends and houses them in an institutional form congruent with the larger patterns of the society. He thus links the concrete and particular with the abstract and general, but not through a system of rules held together by formal logic. He does so by bringing out the latent harmonies among different individual concerns and giving them a secure institutional foundation. His approach is technical and instrumental. He reasons not from rule to conclusion, but between ends (shared purposes) and means (institutional forms).

The implications of Purposivism for advocacy are not as immediately clear as are those of Positivism. Indeed, at first glance, Purposivism seems to present troubling difficulties for the Ideology of Advocacy. The most basic difficulty arises from the necessity of reconciling the Purposivist emphasis on shared values and social harmony with the large measure of social antagonism presupposed by the institutions of adversary advocacy. On the one hand, it is difficult to see how any substantial conflict could exist in a society founded on shared ends. On the other hand, given the existence of such conflict, it is difficult to see how it could be resolved in terms of shared ends, since conflict often arises from differing ends. It is particularly difficult to see how the institutions of adversary advocacy could resolve such conflict, since these institutions seem to preserve and engender social antagonism. In Positivism, where conflict is presumed to be natural and order depends on force, this fact is not an objection. But in Purposivism, where order depends on the tacit acceptance of social norms, the antagonistic nature of adversary advocacy seems a fatal defect.

Of the variety of more specific questions which Purposivism poses for the Ideology of Advocacy, two categories of questions are particularly significant. The first concerns what appear to be the different levels of responsibility imputed to the lawyer and to other citizens. The Purposivists attribute a large measure of responsibility to ordinary citizens for conforming spontaneously to intuitively apprehended social norms. This responsibility follows from the Purposivist emphasis on the value of the voluntary creative activity of the individual. The Purposivists believed that a great virtue of the social system they defended was that it enabled the society to secure the full benefits of this creativity by giving broad latitude to individual initiative, and they contrasted this sytem favorably to authoritarian or socialist systems in which individual initiative is stifled.[78] The Purposivists recognized that a concomitant to the principle of individual initiative is individual responsibility. If the Purposivists favored giving individuals broad discretion, they also expected them to be held responsible for their acts.[79]

The Purposivist emphasis on responsibility is strikingly evident in Purposivism's attitude toward retroactivity. In Positivism, a retroactive sanction, one which was not explicitly specified by a rule in effect at the time of the action in question, is completely arbitrary and unjustified. The Purposivists, on the other hand, recognized that rules are indeterminate, and they wanted the judge, not to shrink from the discretion this recognition implied, but to use it vigorously to further social ends. They were not disturbed by the fact that such a program would require the imposition of

78. *See, e.g.*, L. FULLER, THE MORALITY OF LAW 162-77 (rev. ed. 1969); HART & SACKS, *supra* note 71, at 111-12, 183-84; A. MASON, BRANDEIS: A FREE MAN'S LIFE 141, 149-51, 160, 303-04, 359-60 (1946) [hereinafter cited as MASON].

79. *E.g.*, HART & SACKS, *supra* note 71, at 263; Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 4 (1934) [hereinafter cited as Stone].

sanctions for violations of previously unformulated or ambiguously formulated commands.[80] They justified this retroactivity in terms of the individual's responsibility to respect the shared norms of the society. Unlike Positivism, Purposivism did not leave individuals free to flout the public interest in the interstices of formal rules.

Purposivism's emphasis on individual responsibility and its tolerance for retroactivity raise the question of how the lawyer can be blameless when he defends conduct for which the client can be punished. In Positivism, where the application of force is generally not retroactive, the only relevant consideration governing the lawyer's activities is that they be authorized by the applicable rules. It is of no importance that these activities may have led to a socially undesirable result because the system is not concerned with the social desirability of outcomes, and it would be subverted if lawyers tried to take account of such considerations. Things are different with Purposivism. Here decisions may be formally retroactive, but they are justified because they are based on social values known to the client and binding on him as a member of the society. Since the norms are also known to the lawyer and he is also a member of the society, his efforts to thwart their enforcement would seem to be as offensive as his client's violation of them. Unlike Boswell, the Purposivist lawyer does not need to wait for the judge to tell him so in order to know that certain kinds of conduct are wrong.[81]

There appears to be a similar discrepancy in Purposivism between the responsibilities of the lawyer and those of the judge. Purposivism repudiated the notion that judicial decisions were determined by the autonomous operation of legal rules. It insisted that decisions were in large part an exercise of power on the part of the judge and that this exercise could be justified only in terms of social norms. It refused to permit the judge to escape responsibility for his decisions by claiming that they had been compelled by the rules.[82] When a particular application of a rule leads to a result which frustrates its underlying social purposes, Purposivism expects the judge to reject it. On the other hand, in the adversary proceeding, the lawyer has no corresponding responsibility to ensure that rules are applied in a manner which furthers their underlying purposes. The adversary proceeding seems an inefficient method for the attainment of truth precisely because rules are so frequently applied in a manner which frustrates their basic purposes. For instance, if the purpose of the hearsay rule is to exclude inaccurate and misleading testimony, then why should the rule be enforced when the testimony in question,

80. *E.g.*, HART & SACKS, *supra* note 71, at 377-81, 574-76; Fuller, *The Forms and Limits of Adjudication*, in HART & SACKS, *supra* note 71, at 421-26 [hereinafter cited as Fuller, *The Forms and Limits of Adjudication*].

81. *See* text accompanying note 23 *supra*.

82. *See, e.g.*, HART & SACKS, *supra* note 71, at 515-46; Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

though it falls within the language of the rule, is neither inaccurate nor misleading? In most situations, the judge has no way of deciding whether or not the testimony is misleading or inaccurate. But the lawyer often does. Why, then, should he not have the same responsibility Purposivists impute to the judge to see that the underlying social purposes are served by the enforcement of the rules he invokes?

A second important category of questions which Purposivism raises concerns the way values are perceived by the lawyer. This difficulty is illustrated by a passage in which Lon Fuller criticizes Holmes's quintessentially Positivist "bad man" theory. Fuller argues that Holmes's attempt to separate law and morals is untenable. First, to define legal analysis in terms of the calculations of the "bad man" is arbitrary. Most men do not think of the law in this fashion. They are concerned not only with state-imposed sanctions but with many other things, such as the good opinions of their friends and neighbors. Second, even an analysis which focuses only on predicting the application of state force cannot effectively separate law and morals. For the application of force will ultimately depend on the decision of a judge. Because legal rules are indeterminate, the judge will have to refer to the moral standards which underlie them in order to apply them to the case at hand. In order to anticipate the judge's decision, the lawyer himself will have to resort to these moral standards. Fuller concludes that if the lawyer is "[t]o be a good positivist, he will have to become a good natural-law lawyer."[83]

There is an ambiguity here. Does the natural-law lawyer merely do a better job than the Positivist, or does he have a different job? Is it just that by including values in his calculus he is able to derive a more accurate prediction of the probability of sanctions? Or are his efforts more evaluative than predictive because he reasons in terms of norms which he recognizes as binding on himself and his client as members of society? Like some contemporary analytical philosophers, Fuller contends that thought processes often discussed in terms of abstract cognition really make sense only in terms of the shared understandings and practices of the community to which the thinker addresses himself. But does the lawyer's membership in the community merely enable him to manipulate it more effectively; or does it constrain his activities?

The question is difficult. On the one hand, if the answer is that the Purposivist analysis merely provides more accurate predictions, then the argument against the Positivist separation of law and morals is trivial. Holmes was concerned with defending the objective character of the law and its basic emphasis on the prediction of the application of force. Moral values understood merely as data relevant to such predictions are different from moral values as they are usually understood, that is, as norms binding independently of the force behind them. The "bad man" obvi-

83. FULLER, *supra* note 25, at 95.

ously wants the most accurate prediction possible. On the other hand, if the answer is that the Purposivist analysis involves the recognition of norms binding on those who engage in the analysis, then it seems incompatible with adversary advocacy.

B. *The Purposivist Accommodation to Advocacy*

The Purposivists did not often recognize that their doctrine posed serious problems for the Ideology of Advocacy. This oversight was part of a general tendency on the part of Purposivism to ignore or minimize social conflict. For example, in the course of regretting the *Dred Scott* and *Pollock* decisions, Paul Freund once argued that the cases should have been decided on technical grounds without reaching the constitutional issues. He then concluded, "These were cases in which counsel were perhaps too eager for the settlement of burning issues."[84] Thus are events which historians have regarded as major battles in a class struggle reduced to a matter of technical confusion on the part of a neutral professional group.

When the Purposivists did not ignore conflict entirely, they tended to assume that the problems it presents had been superseded by the advent of a society in which any divergences between individual interests and social interests were almost automatically brought into line by the operation of public institutions. Hart and Sacks' *The Legal Process* illustrates this attitude. For instance, Hart and Sacks are sharply critical of the conduct of counsel for railroads, which in the 19th century sought to use their monopolistic power to contract out of negligence liability for freight damage and personal injury. This effort was thwarted eventually by judges, legislators, and government officials. Hart and Sacks argue that the railroad lawyers should have convinced their clients to work out voluntarily a fair arrangement with their customers. They conclude, "[h]ad members of the American bar in the last century taken this course, consider the aggregate of judicial, legislative, and administrative action that would have been unnecessary."[85] They never consider that the railroads' recalcitrance might have been profitable. Their reproach does not take the form of righteous indignation at the selfish, antisocial behavior of the railroad lawyers, but rather expresses surprise at their obtuseness in failing to perceive the inevitability of events which would bring self-interest and the public interest into line.

This Purposivist belief in the reconciliation of public and private interest was not a mere Panglossian intuition. It was closely related to the political developments culminating in the New Deal and to judicial reforms which the Purposivists had supported. The growth of government

84. FREUND, SUPREME COURT, *supra* note 76, at 149. For a contrasting view of *Pollack*, see A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960). *See also* FULLER, *supra* note 25, at 17.

85. HART & SACKS, *supra* note 71, at 263.

regulation and the decline of rule formalism in adjudication had made *ad hoc*, retroactive intervention to protect social interests a routine government activity. Formal rules no longer created pockets of discretion in which selfish individuals were free to flout the public interest. Thus, Adolf Berle suggested that Purposivism and the New Deal had mooted the issues of advocacy and that they would liberate "the bulk of the corporation bar from the profitable but mostly undistinguished bondage in which most of it lives" regardless of what position it took on these issues:

> At Columbia we teach . . . that there is an inchoate law affecting corporations holding market power, or on which the community has come to depend for some essential function, and that this inchoate law has recognizable criteria and principles. The moment these principles are seriously infringed, the state predictably intervenes. In that case an explicit rule of law presently results. Great and powerful interests cannot afford to risk being caught in a major infringement even though the rule has not become explicit.[86]

The Purposivist answer to the general question of the compatibility of conflict and shared values was to insist that conflict was a result of short-sightedness and confusion rather than of divergent norms, and to recommend that it be resolved simply by showing individuals that their true interests converged with the public interest. The principal theoretical underpinnings of this view of advocacy were the Purposivist notions of the separation of functions and the long run. The separation of functions purported to explain the apparent difference in the levels of responsibility attributed to the lawyer and to other citizens. The principle of the long run purported to explain how norms could be integrated into a technical, predictive analysis and yet still be understood as binding moral imperatives.

1. THE TECHNIQUE OF THE SEPARATION OF FUNCTIONS

The basic theory of the separation of functions is simple. Specialization into roles makes it possible to perform specific tasks more efficiently. This is so for two reasons: expertise and cognitive dissonance. First, there are limits to the amount of knowledge a person can absorb and the number of skills he can develop. Second, a person's understanding of a particular problem is limited by his tendency to develop preconceptions based on some aspects of the situation which distort his understanding of other aspects. The first factor limits the number of tasks a person can ever perform. The second factor limits the number of tasks a person can perform at the same time. Because of these factors, a person works most productively when he concentrates his efforts in a specific area. Yet, this specialization creates a new problem. Because a specialized role is

86. Berle, Book Review, 76 HARV. L. REV. 430, 431-32 (1962). *See also* HURST, *supra* note 35, at 355-56; PATTERSON & CHEATHAM, *supra* note 44, at 137-38.

designed to further only specific social values and needs, specialization creates the danger that the role occupants will pursue these values and needs at the expense of other values and needs outside the range of their role competences. This problem can be solved by coordinating the roles and functions so that each is confined to the sphere of operation where it is most effective and any deficiencies in the operation of one role can be remedied by the operation of the others. Thus, efficiency can be enhanced through specialization, while a proper balance among values and needs can be achieved by coordination.

The Purposivists saw the legal profession both as surrounded by coordinate, specialized roles and insitutions and as itself divided into specialized roles. While the value of specialization for other institutions, such as agencies and legislatures, rested in large part on expertise, the value of role specialization within the profession rested for the most part on cognitive dissonance. The two most important legal roles were the counseling and advocacy roles, and the distinction between them was a central pillar of the Purposivist version of the Ideology of Advocacy. This distinction was emphasized by the early Purposivists whose demands for the reform of the profession were prompted by the out-of-court activities of the corporate bar.[87] One of their principal criticisms of the *Canons of Ethics* was that the *Canons* were exclusively addressed to the lawyer's function as courtroom advocate and ignored his function as counselor and private law-maker. As Purposivism evolved, it developed a complex intra-professional separation of functions, which included not only the counseling and advocacy roles but also two other roles for which Purposivism won recognition: the government lawyer, and the lawyer pro bono publico.[88]

The Purposivist theory of the separation of functions was well explained by Fuller and his collaborators in the Joint Conference of the American Bar Association and the American Association of Law Schools which worked on the revision of the *Canons*. In their view, the purpose of advocacy is to promote "a wise and informed decision of the case." The utility of adversary advocacy in promoting such a decision lies in the application of the principles of specialization and coordination within the judicial proceedings:

> In a very real sense it may be said that the integrity of the adjudicative process itself depends on the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter who attempts to decide a dispute without the aid of partisan advocacy.
>
> Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these

87. *See, e.g.*, BRANDEIS, *The Opportunity in the Law*, in BUSINESS: A PROFESSION, *supra* note 76, at 339-41; Stone, *supra* note 79.

88. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-25, 7-13, 7-14, 8-1, 8-6, 8-9.

> roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving—in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of the undertaking are obvious.[89]

The practical consequence of such an undertaking is "that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without waiting for the proofs the label is promptly assigned." This results from the necessity of giving some pattern of coherence to the evidence, for "without some tentative theory of the case there is no standard of relevance by which testimony may be measured." Partisanship is seen as "the only effective means for combating the natural human tendency to judge too swiftly that which is not fully known." Thus, "[t]he arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances."[90]

Thus, the need for adversary advocacy arises not, as in Positivism, from divergent ends, but from the problem of cognitive dissonance. The separation of functions within the trial contributes to an informed decision by assuring that no aspect of either side's position will be overlooked. The advocate's partisanship is a psychological convention designed to enable him to achieve the benefits of specialization.

However, for the Purposivists, partisan advocacy was valuable only in certain situations, and the advocacy role was viable only as one of a number of specialized legal roles. A critical element of the Purposivist version of the Ideology of Advocacy was its emphasis on the residual nature of the function of advocacy. This emphasis follows from the Purposivist insistence that conflict is not the central element of social life. As Hart and Sacks put it, "The overwhelming proportion of the things which happen and do not happen in American society pass without any later question."[91] Adversary advocacy is needed only for that residuum of "trouble cases" as to which later question does arise. Adversary advocacy is not destructive in these situations because social relationships

89. *Professional Responsibility*, *supra* note 13, at 1160. (Fuller was co-chairman of the group which produced the report.) *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-19; Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 43-44 (Berman ed. 1971).

90. *Professional Responsibility, supra* note 13, at 1160.

91. HART & SACKS, *supra* note 71, at 312.

have already broken down, and private, voluntary efforts to restore them have failed.

In other situations, however, the Purposivists proposed to curb the principles of neutrality and partisanship and substitute new legal roles. The principle of specialization dictates a spectrum of ethical obligations to accord with different functions.

In the Purposivist view, the prototypical legal activity is counseling, rather than advocacy. The counselor most closely approaches the Purposivist ideal of the creator of mutually beneficial patterns of interaction. The counselor deals with individuals, but unlike the advocate's clients, they are not isolated individuals. Rather they are actual or potential participants in social relationships and institutions.

The fundamental ethical innovation which the Purposivists sought to establish was the counselor's affirmative duty to channel the client's egoistic impulses into socially desirable paths.[92] In this manner, they sought to find a middle way between the wholly public responsibilities of the civil servant and the aggressive partisanship of the adversary advocate. Unlike the civil servant, the counselor must be intimately concerned with, and sympathetic to, the special needs of particular people. Moreover, because the counselor does much of his work in the interstices of public policy, dealing with matters toward which public policy is indifferent, he has a greater range of discretion than the civil servant. Yet, unlike the advocate, the counselor does have an affirmative obligation to oppose his client's antisocial impulses. He can reconcile his obligations to his client and the public by focusing on the points of congruence between the particular interest of the client and the general welfare.

Yet the Purposivists realized that the added but limited responsibilities of the counseling role were not sufficient to enable the legal profession to play the most effective role it could in the social order. Rather than raise the counselor's public obligations still higher, however, and thus sacrifice the benefits of specialization, the Purposivists attempted to integrate more public responsibility into the profession through the government and the pro bono roles.

The government lawyer is at the opposite pole of the spectrum of legal roles from the advocate.[93] He is concerned entirely with the general welfare, and his responsibilities are entirely public. His role is closest to that of the civil servant in that the government lawyer should not direct his sympathies or energies toward any particular individual or group. His primary task, the enforcement of statutes, can be most effectively performed with a non-partisan attitude.

The pro bono lawyer also has primary obligations to the public at

92. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-3 to 7-5; PATTERSON & CHEATHAM, *supra* note 44, at 134-38; Thode, *supra* note 18, at 578-79.

93. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 to 7-14.

large, but these obligations are more limited than those of the government lawyer because the pro bono function is residual.[94] The job of the pro bono lawyer is to serve people and interests which have been slighted by the law enforcement efforts of the government and who have not gained effective private legal representation. In this task, he needs to be more sensitive to the needs and aspirations of particular groups than does the government lawyer, but in order to decide which of the potentially infinite number of unrepresented or underrepresented interests he should serve, he needs to take a public viewpoint. (Of course, once the pro bono lawyer has committed himself to a particular group or interest, he will assume the counseling or adversary role.)

Though none of these roles is sufficient to guarantee a satisfactory legal order, all of them can be coordinated so as to remedy the deficiencies of each. Lawyers will adopt the role most suitable to the situation at hand and, when the situation changes, will defer to a coordinate role. The Purposivists did not overlook that through incompetence or ill-will lawyers might deviate from the prescriptions of the separation of functions. But they were confident that deviations on the part of any one role could be rectified by the operation of the other roles. The task of checking excesses on the part of the others is built into the functional competence of each role.

While the Purposivists had criticized the application of neutrality and partisanship in the counseling sphere, they were not troubled by its application in the adversary sphere because they felt that in the judicial proceeding excesses of adversary zeal could be checked by the judge and the opposing lawyer.[95] They did not fear that the antagonistic tendencies of adversary advocacy would damage viable social relationships because they counted on the counseling role to keep such relationships out of the adversary sphere. The counselor is charged with a higher standard of public duty than the advocate to reflect the fact that he is subject to less direct scrutiny by opposing interests and public officials. Nevertheless, this ethical prescription is supplemented by pressures exerted from coordinate roles. If the counselor should attempt to further his client's interests at the expense of the interests of others, other lawyers in the advocacy, pro bono, or government roles would bring things back into line, either by causing him to reconsider or by precipitating the situation into the adversary sphere.

From this perspective, the difference in the ethical obligations imposed on the attorney, judge, and client appears as an application of the principle of specialization. The advocate's distinctive ethical orientation enables him to pursue his special tasks more effectively and thus to serve

94. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25, 8-1 to 8-6, 8-9.

95. *See, e.g.*, PATTERSON & CHEATHAM, *supra* note 44, at 181; BRANDEIS, *The Opportunity in the Law*, in BUSINESS: A PROFESSION, *supra* note 76, at 339-41; Thode, *supra* note 18, at 576-579.

better the social norms implicated in these tasks. His peculiar ethical orientation does not threaten other social norms because destructive tendencies on his part are checked by the operation of coordinate roles.

2. THE MORALITY OF THE LONG RUN

The principle of the separation of functions is complemented by the principle of the long run. The basic principle of the long run is that social norms should be pursued with a view toward achieving their greatest aggregate implementation over time, rather than toward an immediate, continuous implementation. The principle of the long run dictates that present sacrifices be suffered when they make possible greater future benefits. It prescribes that social norms be violated in particular instances as a means to the general welfare.

The principle of the long run is in marked contrast to the principles of Positivist legal theory. In Positivism, results must be immediately (even if only tautologically) just. Each legal decision must be rationalized on its own without reference to future consequences.

The Purposivist adoption of the morality of the long run was based on the realistic insight that in the modern world the achievement of most substantial social goals entails certain negative externalities. The operation of an airport requires that some suffer noise and smog.[96] The establishment of a criminal justice system requires that some innocent people be imprisoned.[97] Yet, such immediate negative results are eventually compensated for by greater positive ones. To refuse to tolerate such negative results would be to call a halt to progress. The short-run gains of such a refusal would be drastically outweighed by the ultimate decline in the level of satisfactions.

The notion of the long run underlies the Purposivist justification of the lawyer's role. Although Positivists often referred to the lawyer's role and particularly the rule of confidentiality as instrumental to the effective provision of legal services, the point was neither a difficult nor an important one because Positivism felt no need to rationalize the antisocial consequences produced by the lawyer's partisanship and neutrality. On the other hand, the Purposivist lawyer is not an extension of his client's will, but an agent of social welfare. The antisocial results of his activities cannot be rationalized as implementing the client's rights, for rights are themselves social functions.[98] These results must be seen as means to the greater long-run implementation of social norms. Thus, Purposivism emphasizes that, for every unjust result caused by the lawyer's refusal to

96. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter cited as Michelman].

97. *See* Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968).

98. *See* Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

reveal his client's lies or crimes, a greater number of just claims are vindicated because of the greater access to legal services and the more effective presentation of claims which the rule of confidentiality makes possible.[99]

The principle of the long run provides an answer to the question of how the Purposivist lawyer can reject the viewpoint of Holmes' "bad man" and still acquiesce in his client's intentions to thwart the implementation of social norms. Like the other role occupants in the system, the lawyer perceives norms intuitively and regards them as binding on him, but only in the long run. Violations of social norms by lawyers in the performance of their professional role are merely means to advance social norms in the long run. Thus, the lawyer's neutrality operates only in the short run. It is a necessary concomitant to his commitment to social norms in the long run.

C. *The Critique of Purposivist Advocacy*

Once the Purposivist doctrine has made room for adversary advocacy, it looks more like Positivism than it did earlier. Law seems to have lost some of its organic ties with social norms and to have taken the form, if not of the conceptual system of the scientist, then of the mechanical system of the engineer. Once again, considerations of system appear to have compromised the lawyer's moral integrity.

However, even from this perspective, Purposivism promises much more than Positivism. First, the Purposivist system serves, and can be judged in terms of, a variety of concrete social ends, not just the unique, formal Positivist end of order. Second, in the counseling, pro bono, and government roles, the lawyer's service to shared norms is more direct and his experience of them more immediate than in the adversary role, which was the only one emphasized by Positivism. Third, the possibility of alternating among several roles gives the Purposivist lawyer an opportunity to bridge the gaps which separate the various functions and to enlarge the scope of his immediate experience of social ends.

Nevertheless, as in Positivism, a subtle shift of emphasis occurs when the Purposivist turns from general jurisprudential theory to legal ethics. In Positivism, the shift is from substantive rules to procedural rules. In Purposivism, the shift is from shared values to function.[100] The

99. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 4-1; Noonan, *supra* note 11.

100. Consider, the response of the Purposivist to the litigant whose claim is being denied despite its substantive justice:

> In any event, the policy of avoidance, if otherwise applicable, must prevail, despite hardship to the litigant and despite what is in other circumstances a strong policy in favor of authoritative and speedy pronouncement of governing rules. There are crucial differences . . . between the role of the Supreme Court in constitutional cases and the function of courts of general jurisdiction. The latter sit as primary agencies for the peaceful settlement of disputes and, in a more restricted sphere, as primary agencies for the vindication and evolution of the legal order. They must, indeed, resolve all controversies within their jurisdiction, because the alternative is

lawyer first sees his role in terms of social values. But then he learns the need to sacrifice these values to considerations of function. Properly understood, this phenomenon is no more than a foregoing of the short run in favor of the long run. Yet, it is inevitably experienced with a sense of tension and disappointment. Purposivism always begins exultantly with an attack on Positivism in the name of shared values, but it always ends soberly with an insistence on the need to defer to the constraints of function. Thus, Noonan opens his critique of Freedman with a celebration of the pursuit of truth as the lawyer's highest duty, but soon begins to caution the lawyer that this pursuit must stop when it reaches the line which separates the judge's role from his own.[101]

This sense of disappointment is not a mere side effect. It is a symbol of deep weaknesses in the Purposivist attempt to renovate the Ideology of Advocacy in terms of the principles of the separation of functions and the long run. First, the principle of the separation of functions cannot be effectively implemented. Second, the principle of the long run suffers from a serious ambiguity in its understanding of morality, or social values, and of the relationship of morality to technique. This ambiguity undermines Purposivism's claims both to legitimacy and to efficacy.

1. THE COLLAPSE OF FUNCTIONAL DISTINCTIONS

The basic defect of the principle of the separation of functions is the incompatibility of specialization and coordination. Purposivism insists on the efficiency of narrowing one's focus to a particular aspect of a situation. It also admits that the benefits of this specialization can be reaped only if the various limited perspectives can be coordinated from a broader point of view. Yet, the same reasons which make specialization efficient seem to make coordination impossible.

The rationalization of adversary advocacy in terms of the principle of specialization involves the Purposivists in the reverse of the difficulty which plagued the Positivist theory. Purposivism began with the important insight, ignored by Positivism, that in order to further his client's ends, the lawyer needs an intuitive grasp of them. But it begged an important question in reasoning from the premise that a single lawyer cannot fully discern the divergent views of two different people at the same time to the conclusion that partisan advocacy can effectively ascertain the truth. The argument fails to explain how the divergence of views is resolved. Purposivism never explains how the lawyer translates the

> chaos. The Supreme Court in constitutional cases sits to render an additional, principled judgment on what has already been authoritatively ordered. . . . Fixation on an individual right to judgment by the Supreme Court is, therefore, largely question-begging.

A. BICKEL, THE LEAST DANGEROUS BRANCH 173 (1962) [hereinafter cited as BICKEL]. This is the Purposivist kiss-off: "I'd like to help, but it's not my job." Compare this approach with that of the Positivists, at note 29 *supra*.

101. Noonan, *supra* note 11, at 1487-88.

insights achieved from a sympathetic consideration of his client's position into a form assimilable by the judge in an impartial consideration.[102]

It is true that the presence of advocates on each side may counterbalance any predisposition toward one side or the other which the judge might bring to the trial. In this way, advocacy makes for greater impartiality.[103] But this is not enough. The Purposivist must also show that the kind of impartiality enhanced by adversary advocacy is likely to lead to more accurate, socially efficient decisions. It is no virtue that adversary advocacy "hold[s] the case . . . in suspension between two opposing interpretations" while all the "peculiarities and nuances" are explored, unless it also increases the likelihood that the balance will ultimately be struck in favor of the correct interpretation.[104]

The Purposivist argument suggests no reason to believe that it does. In suggesting that partisan sympathy is necessary to fully understand a person's views, the Purposivist psychology of cognitive dissonance implies that no single person can ever simultaneously grasp the divergent views of different people. It would thus seem unlikely that a judge could ever fully understand both sides of the same case. If this is true, then Purposivist advocacy merely replaces prejudice with arbitrariness. The "familiar pattern" with which the trier begins may be subverted by the vigorous presentation of alternatives, but the pattern which ultimately emerges seems as likely to be the product of the distortions or obfuscations of one or both of the litigants as of anything else. In Purposivist terms, this displacement of the trier's initial prejudices by arbitrariness seems almost certain to be a loss in terms of the quest for truth. Prejudices, after all, are often very accurate, and in a world of shared values and common experiences, one expects "familiar patterns" to have a certain reliability.

Not only does Purposivism beg the question of the way the judge performs his job, but it misrepresents the way the lawyer performs his. The actual psychology of working lawyers does not conform to the model of partisan sympathy assumed by the Purposivist theory of cognitive dissonance. Practical discussions of litigation technique are full of warnings not to behave in precisely the manner that the Purposivist argument suggests the lawyer should act. They insist that a lawyer who accepts his client's version of the facts without being constantly sensitive to the

102. It should be noted that the problem of advocacy in Purposivism is in some ways distinct from the problem of rule interpretation. Purposivists sometimes suggest that the latter problem can be solved by a compromise method in which both rules and norms are taken into account. *Compare* HART & SACKS, *supra* note 71, at 155-68, *with* Kennedy, *supra* note 42, at 395-98. While such a method might justify the judge's role in resolving disputes, it does not justify the ethical and methodological division of labor between lawyer and judge. In order to explain this, two separate methods must be elaborated, and their congruence must then be shown.

103. *See* Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972).

104. *Professional Responsibility, supra* note 13, at 1161.

possibility that he may be mistaken or lying, or who focuses on the arguments favorable to his client without making an equally vigorous attempt to anticipate those of his opponent, is likely to do a poor job regardless of the merits of the case.[105] For all its faults, the Positivist theory was a far more accurate description of the realities of adversary advocacy. Adversary advocacy tends more to encourage indifference toward the ends of the client than to encourage sympathy for them. The lawyer's analytical abilities are more compromised than enhanced by such sympathy.[106] The actual psychology of practicing lawyers in analyzing and preparing their clients' cases does not seem radically different from that of a judge trying to understand both sides with a view toward arriving at a decision. This psychology seems to contradict the contention that cognitive dissonance would compromise truth-seeking without adversary advocacy.

Yet even if it is assumed that the Purposivist psychology is accurate, the theory of the separation of functions is untenable both within the adversary sphere and within the legal system as a whole. The various roles in the system cannot be specified so as to permit their effective coordination with each other.

Purposivism suggests that roles are defined by lines. Within the lines, the role occupants are guided directly by social values, but when they reach the limits of the lines, they defer to other jurisdictions. But how are such lines to be drawn and understood? Two types of thought appear in Purposivism. First, there is the intuitive understanding of shared norms which all members of the society share. Second, there are a variety of technical skills possessed by various trained minorities which concern the use of institutional forms to advance the shared values. Neither of these types of thought can solve the problem of delineating the limits of role competences. Intuition cannot do the job because, in order to define the roles, one would need an understanding of the skills on which they were based. The roles are artificial; they are themselves instruments to social ends. Thus, technical knowledge is necessary to shape them. But one of the essential characteristics of technical knowledge is that it is specialized. Each particular skill is of no use in defining its relation to any other skill. The whole point of drawing the lines is to keep people within them, but it seems that they cannot be drawn unless people go beyond them.

One tempting solution to the dilemma is to delegate the task of line-drawing to some very generalized institutional competence, such as a philosopher-king, a constitutional convention, or a legislature. But this proposal only drives the Purposivist back toward the problem of formalism which he originally set out to escape. The lines will have to be

105. *See, e.g.*, R. KEETON, TRIAL TACTICS AND METHODS §§ 9-10 (1954).
106. C. CURTIS, IT'S YOUR LAW 26 (1954) [hereinafter cited as CURTIS].

expressed in a manner which can be understood by people who, because of the problem of specialization, have no direct, intuitive perception of their basis. The lines would take the form of rules. But the Purposivists have shown conclusively that rules are ineffective without some direct access to the understanding which lies behind them. When the Purposivists ignore their own insights and attempt to prescribe such lines, they fall into formalism and circularity.[107]

In the light of this dilemma, the Purposivist claim to rectify the inadequacies of the separate legal roles by coordinating them with one another is untenable. If cognitive dissonance limits the perspectives of the roles, then it also precludes the role occupants from perceiving the limits of their role competences. There is no way of confining the roles to the situations to which they are appropriate.

The counseling role is supposed to construct and maintain viable social relationships. It is supposed to do so by discouraging the client's short-sighted pursuit of his interests and channeling his energies along paths where these interests coincide with those of others. Yet, there is no reason to believe that the counselor will be able to recognize those short-sighted courses of action which are likely to bring his client into conflict with the interests of others. The counselor must seek an intimate and sympathetic understanding of his client's ends. The principle of cognitive dissonance suggests that this understanding must, at least to some extent, compromise his understanding of the interests of others. In constructing institutions and relationships, the counselor will thus interpret the interests of others in terms of his client's interests. He will be slow to see the points at which his client's short-term interests diverge from the interests of others. Failing to perceive such divergences, he may devote his talents to maintaining relationships which have become exploitative or destructive. In doing so, he may retard or prevent the appropriate transition of the matter from the counseling to the government or adversary spheres, where corrective action could be taken. Thus, he may perpetuate a socially undesirable situation. On the other hand, if timely intervention by other roles does occur, the problem will be rectified only at the cost of the kind of friction the counselor was supposed to prevent.[108] The basic

107. This is most dramatically evident in Purposivist critiques of the Warren Court. For instance, Philip B. Kurland introduces one such critique as follows: "I suggest that we ask whether, as the Warren Court has moved toward the legislative mode and away from the judicial mode of carrying on its business, it has endangered the capacity to perform its peculiar function." Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 20 (1969) [hereinafter cited as Kurland]. Of course, since any "peculiar function" of the Supreme Court must be defined in terms of the "judicial mode," the reader is not surprised that the answer is that the departure from the latter endangers the former.

108. Brandeis, the first theorist of the counseling role, is also the source of striking examples of the problems which the principle of specialization poses for the notion of the counselor. In 1906, Brandeis acted on behalf of the United Shoe Machinery Company in successfully opposing a bill before the Massachusetts legislature which would have outlawed the tying clause in United's leases to shoe manufacturers. Brandeis argued that the clauses were in the interests of the public and the shoe manufacturers. In fact, as Brandeis

distinguishing feature of the counseling role is the lawyer's duty to divert short-sighted projects before they lead to the kind of behavior which requires litigation or government intervention. Yet, the counselor is unlikely to be able to perceive that projects which benefit his client immediately are short-sighted until litigation or government intervention is underway.

The advocate will not be able to insure that the destructive tendencies of his activities are confined to the area in which they are appropriate, that is, to situations in which beneficial relations have broken down irreparably. As the counselor will be slow to perceive divergences of interests between his client and others, so the advocate will be slow to perceive opportunities for reconciliation between his client and others. Once he adopts the perspective of partisanship, cognitive dissonance will blind him to chances to alleviate the costs of an adversary battle and to rescue viable relationships.[109]

The pro bono lawyer, in deciding where to allocate his services, will not be able to gauge what their impact will be once he has taken on a client and the relationship has assumed the form of counseling or advocacy. After he has taken on his client, particularly if he does so as an advocate, in order to represent the client's interests effectively he may be led to pursue a course which will jeopardize the public interest or the interests of other people who are not adequately represented. In attempting to decide how to remedy certain problems, he cannot be sure that he will ultimately not create worse ones.

Moreover, the semi-public orientation of the pro bono lawyer requires that he look at the world in terms of abstract notions of procedural

---

later acknowledged, the tying clauses were an oppressive exercise of United's monopoly power. Brandeis's biographer suggests persuasively that in 1906 his perception of the public interest and the interests of the shoe manufacturers was distorted by his close relation to United. His successful representation had the effect of preserving an exploitative relation by retarding intervention by the government. MASON, *supra* note 78, at 214-29.

Another example is the Lennox case in which Brandeis agreed with the insolvent Lennox that a member of the Brandeis firm would become trustee of his property for the benefit of creditors. Disputes later developed between Lennox and the trustee over how much Lennox would be paid for managing the property and over his father's obligation to turn over hidden assets. Ultimately, the trustee put Lennox into bankruptcy. Lennox and others alleged that Brandeis had accepted him as a client and then acted contrary to his interests in the administration of the assignment. However, the record indicates that Brandeis did not undertake to act on behalf of Lennox but rather on behalf of the creditors. Nevertheless, it seems fair to criticize Brandeis for failing to perceive the significance of the conflict between Lennox's interests and those of the creditors and for failing to emphasize to Lennox that he was not his lawyer and that the trustee might have to act contrary to his interest. Brandeis's identification with the creditors colored his perception of the interests of others involved in the situation. *See* Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965); *see also* KAUFFMAN, *supra* note 24, at 109 n.3.

If one were to accept the Purposivist psychology of specialization upon which the counseling role and the separation of functions are based, one would have to regard situations of this sort as inevitable and typical.

109. *Cf.* Leff, *supra* note 41, at 18-19, 38-46 (discussing the destructive role of "spite" in collection litigation).

fairness. Unlike the counselor, he cannot be expected to be sensitive to the more subtle ways in which social relationships serve the concrete needs of the participants. (If he undertakes representation as a counselor, he may ultimately achieve such sensitivity, but if, as more commonly happens, he undertakes representation as an advocate, his perspective will soon be biased by partisan sympathy.) Since the pro bono lawyer's primary job is to enhance access to the legal system, he will be prone to frame issues in terms susceptible to legal resolution and to seek whatever legal remedies are available. He will thus be likely to ignore dimensions of problems which are not susceptible to legal resolution and to present the problems to the courts outside of their relevant social context. He will encourage the courts to intervene with judicial remedies in situations with which the courts are not equipped to deal and where judicial remedies may aggravate aspects of the problems over which courts have no control. The specialized perspective of the pro bono lawyer is likely to lead him to damage viable social relationships.[110]

Similarly, the government lawyer, whose orientation is public, will be prone to view matters from a formal, legalistic, bureaucratic point of view. In exercising his prosecutorial or administrative discretion, he is likely to ignore the value and effectiveness of informal, spontaneous patterns of cooperation, and his efforts are likely to damage such patterns.[111]

To rely on other roles to discern where any particular role goes wrong merely reverses the problem. Each role will naturally tend to detect the considerations for which it is responsible and to ignore the considerations with which the other roles are charged. For instance, when examining the counselor's performance, the advocate will naturally tend to find conflict; the pro bono lawyer, procedural unfairness; and the government lawyer, inefficiency or illegality. Even to the extent that these perceptions are accurate, they are likely to ignore the possibility that intervention may damage spontaneous, informal patterns of cooperation worked out by the counselor and naturally overlooked by the other roles.

110. A familiar example, which for present purposes can be taken as hypothetical, is the argument that the pro bono lawyer who brings lawsuits on behalf of poor tenants against landlords to compel compliance with housing codes worsens the plight of low-income tenants by compelling the landlords to raise the rent, or if the rents are already as high as the market will bear, to abandon the buildings. The court can compel compliance with the code, but the housing situation of the poor depends on other factors which it cannot control, such as the income of the poor and the level of investment in low-income housing. *See, e.g.*, Blum & Dunham, *Slumlordism as a Tort—A Dissenting View*, 66 MICH. L. REV. 451, 460-61 (1968). *See also* Bell, *supra* note 51 (arguing that school desegregation litigators have emphasized abstract notions of equal protection at the expense of concrete educational needs of blacks); White, *supra* note 51, at 503 (arguing that efforts to establish procedural rights of debtors will raise cost of credit to the poor). *See generally* Galanter, *supra* note 32 (suggesting that pro bono lawyers tend to overestimate possibilities for use of legal system to effect social change).

111. *Cf.* Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1113-19 (1954) (the administrator develops a presumption in favor of regulation).

The phenomenon of cognitive dissonance which the Purposivists emphasize reflects a real problem which recurs in every area of law practice. Yet, the Purposivist scheme of separated functions merely institutionalizes the problem; it does not solve it. Purposivism fails because it treats what is really a moral and political problem as a psychological and technical one. The real source of the lawyer's dissonance is not his inherent mental limitations, but the weakness of the infrastructure of shared values on which Purposivism rests. The difficulty in coordinating the various specialized roles reflects the inability of the legal order Purposivism describes to reconcile private and public ends. Private individual ends are far more antagonistic than Purposivism allows. The public ends which actually are shared tend to be shallow, vague, and remote from the experience of individuals. This is the reason why in each of the roles and in the system as a whole, responsibility for private ends turns out to be incompatible with responsibility for public ends, or vice versa.

By treating the phenomenon of dissonance as a technical problem, Purposivism ignored the ethical and political issues raised by its proposal to integrate public responsibility into the lawyer's role. To accomplish this goal, it would have been necessary to work to establish a set of public norms of sufficient concreteness to serve as binding guides for private conduct. It would have been necessary to work to persuade people of the validity of these norms and to use power to institutionalize these norms and to block their frustration by purely private interests. Yet, to follow this route would have required a radical transformation of the role of the lawyer. Brandeis' career provides thrilling suggestions of what the Purposivist model could have been.[112] Yet, the model which ultimately triumphed in Purposivism is best represented, not by Brandeis, but by those New Deal lawyers who left government practice to become servants of large corporations, helping the corporations to manipulate in their own interests the agencies the lawyers had helped to establish in the public interest.[113] They could rationalize abandonment of the public interest by associating it with a role they no longer occupied. The Purposivist scheme of the separation of functions proves to be merely a set of alibis. Each lawyer can rationalize his refusal to face the ethical and political contradictions of law practice by assigning a critical portion of responsibility to some other role. The contradictions persist, but it becomes easier to ignore them.

The tensions in the separation of functions approach are most severe in the counseling role. The counseling role was the focus of the Purposivist claim to integrate responsibility to social norms into legal ethics. The most direct attempt to reconcile public and private ends was to be made in

112. *See generally* MASON, *supra* note 78.
113. *See, e.g.*, J. GOULDEN, THE SUPERLAWYERS 110-73 (1972).

this sphere. Yet, by underestimating the tension between private and public ends, by treating dissonance as a psychological problem, Purposivism usually ignored the difficult questions the counseling role raised. Much of the Purposivist literature was ambiguous as to whether the counselor might ever have a professional duty to actively oppose his client's antisocial projects. In the *Code of Professional Responsibility*, this ambiguity was resolved in a manner which confirms the bankruptcy of the separation of functions approach. The need to develop concrete guidelines for the counseling role squarely presented the draftsmen with the problem that any meaningful commitment to public norms would occasionally bring the lawyer into active opposition to his clients. The response was to reduce the distinction between advocacy and counseling to mere rhetoric.

Unlike the responsibility of the government lawyer, which is directly to public values,[114] the responsibility of the private lawyer under the *Code* is defined by "the bounds of the law."[115] But the *Code* emphasizes the fundamental Purposivist insight that the bounds of the law are uncertain and can be determined only by reference to social norms. This leads to the distinction between advocacy and counseling: "Where the bounds of the law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different."[116] But this distinction turns out to be of no practical significance. The ethical obligations imposed by the *Code* are generally consistent with the more Positivist approach attributed to the *Canons*:

> While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.[117]

As advocate, he will urge any position favorable to his client that is not "frivolous."[118] As advisor, he will continue to represent his client even if the client decides to ignore his advice as to what "would likely be the ultimate decisions of the courts."[119]

The *Code* refers to an "obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."[120] But no serious attempt is made to integrate this obligation into any specific prescriptions. The *Code* is quite clear on the

114. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 to 7-14.
115. *Id*. at EC 7-1.
116. *Id*. at EC 7-3.
117. *Id*.
118. *Id*. at EC 7-4.
119. *Id*. at EC 7-5.
120. *Id*. at EC 7-10.

priority of this obligation: "In the final analysis, however, 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."[121] Thus, in the final analysis, for all its rhetoric to the contrary, the *Code* abandons the attempt to distinguish advocacy from counseling and with it, the attempt to remedy the problems of the Ideology of Advocacy by integrating a responsibility to social norms into legal ethics. Ultimately, the *Code* falls back on a vision of the lawyer as the servant of private, individual will. In situations of conflict, where the critical decisions arise, it turns back to a notion of the "legal" defined in terms of the prediction of the authoritative application of force.

The *Code* does take one innovating step past the *Canons* in this area which reflects an approach typical of late Purposivism. The *Code* emphasizes the lawyer's discretion to dissociate himself from his client. Thus, it provides that the lawyer *may* "[r]efuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal."[122] This discretion is narrow in the area of advocacy, but broad in the area of counseling. But this is far from a significant step toward concretizing the counseling role. It does not solve any problems in terms of professional ethics, but rather simply withdraws certain problems from the area of professional ethics. The concern here is not to reconcile the client's proclivities with social norms, but to reconcile the client's proclivities with the lawyer's proclivities. The lawyer's perception of public values, which was once seen as the foundation of a new professional identity, is here given a purely private significance. To refuse to aid a client's anti-social plans, previously seen as a professional obligation, is here a mere personal privilege.

The *Code's* definition of the professional responsibilities of advocates and counselors almost entirely in terms of service to private ends reflects the ineffectuality of the Purposivist attempt to reconcile private ends and social responsibility in the separation of functions.

2. THE CONFLICT OF MORALITY AND EFFICIENCY

The morality of the long run fails to resolve the basic moral ambiguity of Purposivism. It cannot contain the doctrine's mutually subversive tendencies to view norms as values on the one hand and as facts on the other. In the Purposivist view, social norms, viewed as values, are ends in themselves. They are an important source of human satisfactions and the only source of the legitimacy of public institutions. But social norms, viewed as facts, are means. They are useful because people spontaneously conform to them and intuitively recognize their demands. They thus make it possible to have a social order which avoids the drawbacks of

121. *Id.* at EC 7-8.
122. *Id.* at DR 7-101 (B) (2).

totalitarianism and a jurisprudence which avoids the embarrassments of Positivism. Yet, these two ways of looking at values undercut each other. To perceive norms intuitively as values leads to the inefficiencies of the short run. But to perceive norms instrumentally as facts destroys the sense of worth and obligation which made them important in the first place.[123]

This theoretical difficulty corresponds to a practical dilemma. The more directly and immediately the society concerns itself with shared values, the more it limits its technical options and causes its institutions to stagnate. On the other hand, the more it unleashes its technical dynamism, the more it attenuates the experience of the values which are the basis of its legitmacy. The majority of Purposivists have tended to pursue the instrumental logic of Purposivism at the expense of its moral infrastructure. For that reason, the history of Purposivism has been a history of technical triumph (and the triumph of technicians) and of normative disintegration. Under the Purposivist version of the Ideology of Advocacy, the advocate has risen to greatest power and prestige at a time when the values he is supposed to further have declined.

The critical aspect of the morality of the long run is its approval of deliberate injustice. In the Positivist system, all outcomes are just by definition. The Purposivists recognize that this kind of perfect justice is a lawyer's mirage. Yet, they do not merely recognize the inevitability of failure, they accommodate themselves to it. They support a legal system which in particular situations often prescribes that social norms intentionally be sacrificed.

These sacrifices are justified in terms of the more remote but greater implementation of social norms which they make possible. The validity of such justification depends on the scarcely examined premise that the Purposivist technique includes some method of weighing effectively the relative values of present sacrifice and future benefit. The existence of such a method remains problematical. Yet, even if one could be demonstrated, it could not remedy the fundamental problem of the principle of the long run. In focusing on the relative value of the concrete *results* which follow from alternative decisions, the Purposivists ignore the impact of the *way* in which decisions are made on the experience of those involved. This impact is to diminish the sense of worth and obligation which attaches to the norms that provide the criteria of measurement. This impact cannot be assessed along with the other results in the weighing calculation because it arises in part from the calculation itself. It is inherent in the perspective of the long run.

123. The following discussion concerning the conflict of morality and efficiency draws on E. DURKHEIM, MORAL EDUCATION (Wilson and Schnurer trans. 1961); Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 77-150 (1973) [hereinafter cited as Williams]; Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 SO. CAL. L. REV. 617, 630-33 (1973) [hereinafter cited as Tribe]. *See also* D. WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 207-32 (1974) (discussing tension between "organicism" and "instrumentalism" in Pound's writings).

In the judicial proceeding described by Purposivism, the litigant is brought to view social norms less as ends which he shares with others than as means to the advancement of interests which conflict with those of others. In the beginning, as the Purposivists assume, the litigant may feel that his personal concern implicates a generally shared norm. Thus, he may invoke a norm as a basis for the social recognition of his personal concern. Yet, he is soon disappointed. From the perspective of the long run, the court does not view his claim as a particular embodiment of a shared value, but rather as an opportunity for the general furtherance of a variety of social norms. The court does not recognize the litigant's personal concern in terms of a shared value, but rather manipulates the litigant in the interests of the larger society. A victory for the litigant does not mean the social vindication of his personal concern, but merely that allowing his claim has been found an adequate means for the advancement of social purposes (consider the exclusionary rule). Conversely, if the litigant loses, it is not because his claim is inconsistent with social norms, but merely because its denial is required in the interest of the long run (consider default procedures).

When social norms do not prove a vehicle for the social recognition of his personal concern, the litigant learns that social norms are neither shared, nor values. The failure to achieve recognition on the basis of norms emphasizes to the litigant his separateness. It teaches him that norms do not link his immediate personal concerns to those of the larger society. Yet, he also learns that the invocation of social norms produces somewhat predictable responses from social institutions. He discovers that he can use these norms to advance the personal concerns which he now feels to be separate and individual. He no longer perceives norms as ends or imperatives, but rather as facts and tools for the manipulation of society to serve his individual purposes.

Although the judicial decision plays an important role in this process, the process begins much earlier when the citizen is initiated into the proceeding. Purposivism expects and encourages the litigant to act not as an individual seeking justice but as a conduit for issues and arguments of public interest. The distinction is made clear in, for example, the case of *Federal Communications Commission v. Sanders Brothers Radio Station*.[124] Apparently motivated solely by the hope of preserving a private economic advantage, a radio station owner sought to challenge the granting of a license to a competitor. The Commission refused to hear the challenge because the station owner's concern implicated no relevant social norm. The applicable statutes were not intended to protect owners from competition. The Supreme Court did not dispute this premise, but it considered that the social norm of good broadcasting might be served by the denial of the license. Thus, it ordered that the challenger be given a

124. 309 U.S. 470 (1940).

hearing so that he might try to show the Commission that this public interest would be served by the advancement of his individual interest. Although the *Sanders* case has a special significance in the law of standing, it expresses with unusual directness the general Purposivist notion of the litigant. Litigants are expected to pursue immediate individual interests by invoking the public interest. Thus, the guilty criminal defendant is permitted to invoke the public interest in the protection of the innocent by excluding certain kinds of evidence of his crime. Thus, the welching debtor is permitted to invoke the public interest in the protection of those who pay their debts by pleading the Statute of Frauds. The problem is that in this process the public interest becomes something remote from, and contradicted by, the experience of individuals.

The conduct and attitudes of the lawyer, as prescribed by the Ideology of Advocacy, play a critical role in this experience. The principle of neutrality encourages the view of social norms as data. In the light of the lawyer's attitude of authoritative indifference, norms are stripped of their ethical significance. The principle of partisanship encourages the client to view norms as a means to individual concerns. From the perspective of partisanship, social norms merely define technical options to be weighed in accordance with individual concerns. The consequence of this psychological transformation is disastrous. At just the moments when the individual's sense of solidarity with the society is most at stake, the lawyer deprives him of confirmation of his social identity in terms of shared values and hence undermines his satisfaction from the implementation of social norms. At just the moments when the individual's disposition to conform to social norms is weakest, the lawyer releases him from the pressure of the expectations of his fellow citizens and hence aggravates his antisocial dispositions.

It is futile to hope that the litigant's tendency to view social norms as instruments to selfish ends can be redeemed by a simultaneous sense of the long-run coincidence of his private ends with social norms, or that his altered attitude toward social norms will be confined to the sphere of litigation and give way to a renewed sense of the binding quality of norms upon his return to private life. In the first place, the relation between the litigant's actions and the long-run social welfare is a technical matter which can be determined only with technical knowledge. It cannot be assumed that the litigant has the expertise necessary to understand how his course of conduct will, in the context of the specialized Purposivist institutional apparatus, affect social norms in the long run. Thus, he does not experience his pursuit of his individual ends as advancing social norms. In the second place, the experience of the judicial proceeding is not something which the litigant can step into and out of in the manner in which the lawyer dons and removes his professional role. The dispute which is the subject of the proceeding arises from the litigant's private

life, and its resolution will affect his private life. It has developed naturally and unpredictably; it cannot be contained within the artificial confines of a formal role.

Moreover, the morally corrosive impact of the long run is not confined to those directly involved in the "trouble cases" which require resolution in the adversary sphere. Even assuming that the non-advocacy legal roles could be designed to preserve a more immediate experience of social norms, the corrosive experience of the adversary sphere extends beyond the direct participants. Purposivists themselves have emphasized the importance of indirect participation by the general public in the judicial proceeding. For instance, they have argued that adversary advocacy is "essential to a sound development of public opinion" because it facilitates the public resolution of controversies in a manner which provides full public exposure of the issues. Without adversary advocacy, it is argued, "a fear arises that perhaps more might have been said for the losing side and suspicion is cast on the decision reached."[125] Yet such arguments ignore the impact that the spectacle of a litigant reaping a private profit, or escaping his obligations, in the name of a remote public interest has on the citizens' experience of social norms. This impact is inevitably to weaken their sense of satisfaction in, and obligation to, the norms in question.

The principle of the long run undermines the moral infrastructure on which Purposivism depends. It makes the Purposivist calculation of present sacrifices and future benefits meaningless. Such calculation depends on the use of social norms both as data concerning the likelihood of future conduct for the prediction of results and as criteria by which the value of competing results can be measured. A change in norms resulting from the application of Purposivist technique between the time the calculation is made and the time the benefits are supposed to accrue vitiates the calculation in two respects. First, the predicted results may not occur because essential conduct predicted on the basis of the original norms may fail to occur. Second, even if the predicted results do occur, they may be no longer considered, when measured in terms of the altered social norms, worth the past sacrifices. On a more general level, the cumulative effect of the repeated application of Purposivist technique in various areas of public life is to attenuate the experience of social norms throughout the society and thus to destroy the principal basis Purposivism recognizes for social cooperation.

The basic problem of the morality of the long run has been most clearly perceived in relation to the Warren Court's reforms of criminal procedure. These reforms created myriad opportunities for defendants to manipulate judicial procedures so as to frustrate, in the immediate in-

125. *Professional Responsibility, supra* note 13, at 1216; *see* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1035-36 (1974) [hereinafter cited as Kaplan].

stance, the social norms protected by the substantive criminal law. These reforms were often defended as appropriate means to more effective long-run control of official discretion, and the commentary of both critics and defenders has often taken the form of attempts to weigh present sacrifices against long term benefits of this kind.[126] Yet, commentators also have discussed the impact of procedures designed with a view to the long run on people's experience of the substantive norms of the criminal law. For instance, Paul Bator has pointed out that the elaborate procedural apparatus created by the Warren Court tends to diminish the defendant's sense of the validity of substantive norms and to preclude a sense of the legitimacy of the final outcome of his case:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders. The first step in achieving that aim may be a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation; and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.[127]

Yet, having thus appeared to recognize the problem, Bator fails to perceive its implications. The solution he proposes resorts to the very institutional formalism which is the source of the problem. He argues for greater emphasis on the principle of finality and more specifically, for the limitation of post-conviction review. But the problem lies not in the quantity of procedures, but in their quality, specifically, in the fact that they fail to respect the defendant's immediate, subjective sense of the relation between his conduct and social norms. In arguing for a limitation of post-conviction review, Bator assumes that the sense of guilt which is the moral predicate of the criminal law arises not from the defendant's understanding of what he has done, but from his understanding of the operation of judicial procedure. If the defendant has violated the criminal law, there is no reason to believe that the effect of adversary advocacy in undermining his sense of responsibility for his criminal acts can be

126. *See, e.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

127. Bator, *Finality in Criminal Law and Federal Habeus Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963).

reversed merely by cutting off the formal procedures at some definite point. The damage will have begun once the client is introduced to the criminal process through his lawyer's attitude of authoritative indifference, once he comes to see himself as a private attorney general empowered to escape the consequences of his acts in the name of a remote public interest. On the other hand, if the defendant has not committed the crime for which he has been convicted, finality is equally irrelevant. The suggestion that the defendant who knows he has been erroneously convicted should cease regarding himself as a victim of injustice and submit to his condemnation merely because he has exhausted procedures for review is monstrous. It could be followed only by giving up any sense of the meaningfulness of substantive standards of guilt and innocence.

D. *The Present State of Purposivism*

This critique of the Purposivist version of the Ideology of Advocacy is not conclusive. Purposivism has never been elaborated with sufficient precision or coherence to permit a conclusive refutation. Thus, doctrinal criticism must remain on the same impressionistic level as the theory itself.

In response to the criticism of the separation of functions, the Purposivist might still insist on a third type of thought, apart from the intuitive apprehension of norms or technical rationality, which could resolve the problem of coordination. Moreover, the Purposivist might insist that there is some method by which the morally subversive effects of the long run could be taken into account in general calculations of long-run social welfare.

But such arguments would not get Purposivism very far. For if Purposivism has yet to be refuted in theory, it appears to have been superseded by events. The increasing visibility of political conflict in recent decades has undermined the vision of fundamental shared values on which Purposivism was founded. Events have discredited both the technique of the separation of powers and the morality of the long run.

The theory of the separation of functions has been discredited by recent challenges to the institutional allocation of authority established by the New Deal, most notably, by the civil rights and public interest law movements. These challenges undermined the notion that the New Deal allocation was a technical, rather than a political achievement. When new political forces challenged the New Deal notions of the role competences of courts, agencies, and legislatures, the indeterminancy of role boundaries became apparent, and the concepts crumbled. When the federal judiciary destroyed the New Deal allocation, it attempted to justify its decisions in the language of institutional competence, and its critics responded by asserting that role boundaries had been transgressed. Yet, the debate has proved sterile, and many have come to feel that the critical

decisions cannot be defended or criticized satisfactorily within the framework of the separation of functions. Thus, legal discourse has moved gradually away from this perspective.[128]

The morality of the long run has also fared ill. Purposivism has been severely criticized for slighting distributional considerations in its calculus of short-run sacrifices and long-run benefits, and for ignoring the tendency of benefits on the one hand and burdens on the other to cumulate in different sectors of the society.[129] Moreover, the fundamentally self-destructive quality of the principle of the long run is becoming increasingly apparent. The decline at all levels of society in both voluntary compliance with social norms and the sense of legitimacy of public institutions is one of the most striking facts of recent history.[130] This phenomenon appears to be in part a consequence of the design and operation of public institutions on the principle of the long run. Short-run violations of public norms have diminished respect for public institutions in situations where people cannot see how such sacrifices will be justified in the long run. Norms are increasingly seen as remote and abstract. From this perspective, the long-term benefits of social cooperation often seem too risky or remote to justify the short-run curbing of egoistic impulses which cooperation requires. Many people who are not inclined to conform to social norms in their private lives most vociferously condemn official institutions for their short-term infringements of social norms. This apparent contradiction is a natural response to the society's adherence to the morality of the long run. The further institutions drive values from the immediate experience of individuals, the more they undermine the basis of their own legitimacy.

The most notable attempts to shore up Purposivism in the face of this recent history have involved modifications of the basic assumptions of the doctrine. Purposivism has drifted toward a conservative historicism[131] on the one hand, and a liberal idealism, on the other.[132] The most critical change reflected in both perspectives is the muting of the classical Purposivist distinction between the natural infrastructure of shared values and the artificial superstructure of institutional forms. Institutional forms are no longer seen as artificial. They are portrayed as intuitively perceptible embodiments of either ideals or social practices. In this manner, the problem of coordination is avoided because general intuitive faculties can perceive role boundaries, and the problem of the long run is avoided because the operation of the institutions now has an inherent value. On

128. *E.g.*, Linde *Judges, Critics and the Realist Tradition*, 82 YALE L. J. 227 (1972) [hereinafter cited as Linde]; Stewart, *supra* note 51.

129. *See generally* Comment, *The New Public Interest Lawyers, supra* note 7.

130. *See* D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM (1976); A. GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY 275-77 (1970).

131. *See generally* BICKEL, *supra* note 100; Kurland, *supra* note 107.

132. *See* Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Michelman, *supra* note 96.

the other hand, the institutional forms are still seen as partially instrumental. From the conservative perspective, they are useful because they embody almost the only shared values left in the society and thus represent the only alternative to anarchy. From the liberal perspective, they are useful because they protect minorities and procedural norms from the externalities which result as the majorities pursue substantive purposes.

To the extent that such doctrines escape the difficulties of role formalism and the long run, they often slide back into the difficulties of Positivism. Yet, at their most original, they point beyond both Positivism and Purposivism to a third version of the Ideology of Advocacy which is the subject of the next section.

IV. THE LAWYER AS ACOLYTE (THE SANCTIFICATION OF CEREMONY)

> *[Thurman Arnold] put his finger on a matter too often overlooked: an impressive ceremonial has a value in making people* feel *that something is being done; this holds, whether the result is right or wrong; and there is some value in an institution which makes men content with fate, whatever that fate may be.*
>
> Karl Llewellyn[133]

The third version of the Ideology of Advocacy, which can be called Ritualism, has not achieved the preeminence of its predecessors. It is only one of several doctrinal responses to the decline of Purposivism. Yet, it is the most sensitive and ingenious response within the framework of the Ideology of Advocacy to the difficulties of both Positivism and Purposivism, and it comes closer than competing doctrines to resolving these difficulties. On the other hand, in creating new problems of its own, it shows the futility of attempting to reformulate the Ideology of Advocacy.

Ritualism responds to the critique of Positivism and Purposivism by changing the terms of the debate. It acknowledges the irrationality and inefficiency of the legal system, and then embraces it anyway. In a sense, it represents a synthesis of the two other versions, though only one of several possible syntheses. Ritualism refuses to follow Positivism in insisting that the legal system be viewed as independent of social ends; and it refuses to follow Purposivism in seeing the legal system as simply a means to such ends. The Ritualists suggest that judicial procedure be viewed as both means and end. Procedure can be seen as serving ends, but serving them less by producing them than by embodying them. This logical compromise is accompanied by similar compromises in politics and psychology. The Ritualists think the Positivists right in insisting on the presence of conflict in the social world. And they agree with the Purposivists that law is impossible without shared values. Thus, instead of strife on the one hand and harmony on the other, they propose to substitute the illusion of harmony. The Ritualists see with the Purposiv-

133. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 610 (1940) (emphasis in original).

ists that men have other ends in common beside order, but they concede to the Positivists that it would be impractical to attempt to realize these ends. Thus, instead of retreat into private realms on the one hand and struggle for concrete social achievement on the other, they propose to substitute the performance of public ceremony.

A. *Ritualist Advocacy*

Among the adherents of Ritualism there are both cynics and naifs. Yet, the differences between them are superficial, and both groups share a common view of law and life. This view has been characterized by Charles P. Curtis and Roberto Mangabeira Unger, from very different perspectives, as Stoic.[134] It involves a faith in the immanent rationality of the world as it is, a determination to be modest in one's expectations of it, and a belief in social role as the natural locus of moral obligation.

Cynical Ritualism emerged in the writings of a few of the legal Realists who were not inclined toward Purposivism, and who did not join in the call to reform judicial procedure along instrumental lines to make it a more effective mechanism for the attainment of truth.[135] Rather, they adopted an attitude of bemused resignation toward the irrationalities of the system. The classical Positivists had taught that, though the legal system as a whole could be shown to be rational in terms of the overriding goal of order, particular results could not be evaluated by social criteria because the system was necessarily independent of society. Some Realists—most notably, Thurman Arnold—later suggested that particular results could not be criticized for precisely the opposite reason. They suggested that the system was submerged in society, where it served subliminal cultural needs too subtle to be susceptible to critical analysis. They explained that judicial procedures, including the advocate's role, served a dramatic function by expressing values which were deeply rooted, though only partially articulated, in the culture. These values, such as liberty, equality, and above all, individual dignity, are metaphysical abstractions which only complicate the practical affairs of life, but whose magical power over the culture is such that men cannot bring themselves to let go of them. Judicial procedure is perfectly designed to assuage the fears and longings engendered by such irrational attachments. By allowing these values to be symbolically enacted in its public forums, the society reassures its members that the values have not been forgotten and are still part of their lives. But by confining them to the realm of drama, it guarantees that they do not get in the way of the efficient fulfillment of material needs.

134. CURTIS, *supra* note 106, at 33-34; UNGER, *supra* note 25, at 179.

135. *See* T. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935); T. ARNOLD, THE FOLKLORE OF CAPITALISM (1937); CURTIS, *supra* note 106; Fortas, *Thurman Arnold and the Theater of the Law*, 79 YALE L.J. 988 (1970).

The naive form of Ritualism has emerged more recently, sometimes in connection with discussions of the Warren Court's reforms in criminal procedure. The Warren Court and its supporters occasionally acknowledged that some of its holdings in this area could not be justified either as deductions from the language of the Constitution on the one hand, or as instrumental to the control of official discretion or the assurance of the accuracy of determinations of guilt or innocence on the other hand.[136] It was occasionally suggested that the procedures required by such decisions were justified by their service as expressions of fundamental moral values, such as individual dignity, trust, equality, and fraternity.[137] In Charles Fried's explanation, the trial is an end in itself in the same way that religious rituals and artistic performances are not means to ulterior purposes but are intrinsically valuable. The procedures enable the society to communicate to outsiders and to reaffirm to its members the kind of society it is and hopes to be. The rituals and performances cannot be viewed as means to this expression because they constitute it. The manner of expression and the content expressed are unintelligible apart from each other. The role of counsel is thus viewed as an expressive element in the expressive system of the trial. It is structured by the values the system embodies, and it contributes to the over-all expression as one of the musicians in an orchestra contributes to the performance of a symphony.

Fried does not limit his interpretation to criminal procedure. He suggests that the entire legal process be viewed as a system of such expressive structures, and the lawyer's role as at once implementing the system and constituting an expressive component of it. Ritualism adopts the entire structure of role formalism elaborated by Purposivism, but without the difficulties which this unacknowledged formalism caused in Purposivism. Having severed the roles from their instrumental bases, the Ritualists make a virtue of their formal qualities.[138] Roles and institutions are not functional components of a division of labor, but expressive elements of a performance. Because they are defined by shared norms rather than technique, their boundaries can be intuitively perceived without specialized training.

The principles of the Ideology of Advocacy occupy a prominent

136. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 497 (1966); *but see* 384 U.S. at 517 (Harlan, J. dissenting); Linde, *supra* note 128.

137. C. FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 123-135 (1970) [hereinafter cited as FRIED]; Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, especially 1391-2 (1971); Tribe, *Structural Due Process*, 12 HARV. C.R.-C.L. REV. 267 (1975); *see also* Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975) [hereinafter cited as Ball].

138. *See* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963) [hereinafter cited as Fried, *Two Concepts*]; Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

place in both versions of Ritualism. The lawyer's neutrality makes it possible for everyone to have a lawyer and to participate in the legal system regardless of his ends. Neutrality thus expresses and implements the value of equality. Partisanship also expresses the value of equality. The vigorous presentation of alternative views by each side gives the trial the form of a contest between equals. Both principles are also closely linked to the value of individual dignity. Neutrality embodies a recognition that all individuals have rights regardless of their ends. Partisanship expresses the value of individual dignity by allowing the litigant wide latitude in the presentation of his case. The discretion allowed the litigant emphasizes the respect with which society views his claims, and perhaps also (from the naive point of view) a sense of trust in him.[139]

There are two interesting differences between the newer version and the earlier, cynical Ritualism. First, in the more recent version, the values expressed by the legal system are not mere sociological data, but, in part, ideals. They are not discussed in terms of purely empirical assertions, but in terms of a kind of moral discourse implicit in social life. Thus, the interpretation cannot be refuted merely by surveying the attitudes of the population any more than an art critic's interpretation of a work of art is refuted merely because some individuals do not see it that way. Second, unlike the cynical Ritualists, the newer Ritualists appear to include themselves in the culture whose values are thought to be expressed in the legal system. They do not pretend to hold themselves apart from what they describe. The new version thus completes the process of the erosion of the autonomy of the legal system and the submersion of it in society. The prevalence of procedure over substance, originally rationalized in Positivism as a response to the danger of public anarchy, is now explained as a manifestation of social harmony.

B. *The Critique of Ritualist Advocacy*

Two kinds of objections can be raised to the Ritualist version of the Ideology of Advocacy. First, it can be questioned whether the judicial proceeding is regarded, or should be regarded, as an embodiment of shared social values. Second, the propriety of the analogy of the judicial proceeding to theatrical or ceremonial performances can be disputed.

1. IGNORING EXPERIENCE

The cynical version of Ritualism depends on the assumption that the judicial proceeding functions to gratify beliefs actually held by the general public. Yet, it appears that this assumption is erroneous. Although Legal Realism, from which cynical Ritualism grew, purported to place a high value on systematic empirical research, the cynical Ritualists were

139. T. ARNOLD, THE SYMBOLS OF GOVERNMENT 128-48 (1935); FRIED, *supra* note 137, at 130-32.

generally content to rely on their intuition in the matter of lay attitudes toward the legal profession and judicial procedure. Had they been inclined to look seriously into the matter, they would have been surprised to find that the moral notions so readily attributed to the multitudes are in fact a matter of indifference to vast numbers, probably the great majority, of the American people.

In fact, the multitudes do not thrill to the ritual incantation and celebration of such values as equality and individual dignity. Indeed, of all the various manifestations of such values, none seems to have a more slender following than those which are specifically associated with the judicial proceeding. Moreover, not only does the judicial proceeding tend to be held in low esteem by the population as a whole, but it is even less well regarded by those who have actually had the experience of participating in it directly as litigants. The facts turn out to be not only a refutation of Arnold's theory, but something of a joke on him. Arnold seemed to assume that, while liberal professionals might be skeptical of adversary advocacy because of its shortcomings as a method of attaining the truth, the general public uncritically appreciated the judicial proceeding because it served popular political superstition. In fact, it appears that the attitudes which Arnold attributes to the nation as a whole are actually most typical of that minority to which the professionals themselves belong, the group which Herbert McClosky refers to as "the articulate classes."[140]

---

140. McClosky, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361, 362 (1964) [hereinafter cited as McClosky].

In the past two decades, a large empirical literature on legal and political values and attitudes toward official institutions has developed. For a review of this literature, see Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC. REV. 427 (1977) [hereinafter cited as Sarat]. The empirical research suggests a "remarkably weak commitment to what seem to be fundamental democratic ground-rules among the American people." F. GREENSTEIN, THE AMERICAN PARTY SYSTEM AND THE AMERICAN PEOPLE 9 (2nd ed. 1970). The surveys show a low level of commitment to values such as equality, freedom, and procedural fairness, particularly when the values are viewed in the context of specific situations rather than as general and abstract phrases. *See* Sarat, *supra* this note, at 470-72. (Sarat's conclusion that there is widespread commitment to equality as a "democratic norm", *id.* at 457, is contradicted by the surveys on which he relies, and appears to result from his failure to distinguish between the norm of equality and a feeling of envy or resentment. *Cf.* J. RAWLS, A THEORY OF JUSTICE 530-41 (1971); M. SCHELER, RESSENTIMENT (1961)).

Commitment to the values specifically associated with the judicial proceeding seems considerably lower than commitment to other political values. Many, and perhaps most, Americans are hostile to the Warren Court notions of the procedural rights of criminal defendants, particularly when such rights are perceived as frustrating the enforcement of the substantive law. *See* Kaplan, *supra* note 125, at 1035-36; Sarat, *supra* this note, at 447-48; *see also* F. GRAHAM, THE SELF-INFLICTED WOUND (1970). In McClosky's survey, 75.7% of a national sampling agreed with the statement: "Any person who hides behind the laws when he is questioned about his activities doesn't deserve much consideration." McClosky, *supra* this note, at 367.

Whether or not they hold such values, most people do not regard the trial as a satisfying expression of democratic values. Dissatisfaction with the courts is widespread, and most significantly, it is considerably more widespread among those who have actually had first-hand experience with the courts than among those who have had no such experience. *See*

The naive version of Ritualism depends less on assumptions about the views actually held by the public. Naive Ritualism was first elaborated when the Warren Court's most notable procedural decisions were producing a storm of hostile criticism throughout the country. In this situation, those who sought to justify these decisions could not comfortably appeal to prevailing social beliefs. Thus, the naive Ritualists did not insist that people actually respected equality, trust, and individual dignity or that they actually viewed the judicial proceeding as an expression of these values. Rather, they suggested that these values *should* be respected and that the judicial proceeding *should* be viewed in this way, in the same manner that a beautiful work of art should be appreciated and understood.

But if the Ritualist emphasis on the importance of such values as trust, equality, and individual dignity can be accepted with some qualifications, the Ritualist interpretation of the judicial proceeding as a dramatic expression of these values cannot. The public disdain for adversary advocacy does not arise from philistinism or insensitivity. It is a natural and perceptive response to the operation and design of the institutions prescribed by the Ideology of Advocacy.

The source of the Ritualist error is evident. In a limited sense, the trial *is* a ritual in which ideals *are* affirmed and celebrated. But it is not the ordinary citizen who participates in the celebration or who experiences the affirmation of trust, equality, and individual dignity. The litigants are not the subject of the ceremony, but rather the pretext for it.

Most litigants find the trial a completely irrational and oppressive experience. Far from seeing his dignity affirmed, the litigant is more likely to feel it is being assaulted. Far from celebrating mutual trust, the average litigant feels that he is involved "either in achieving or in checkmating chicanery . . . ."[141] Far from feeling engaged in a contest of equals, he is constantly reminded of his inferiority.

In fact, the celebration of trust, equality, and individual dignity in the judicial proceeding is done exclusively by, and for, the lawyers. The only manifestation of trust which occurs in the judicial proceeding is the willingness of the lawyers (and the judge) to rely on each other's professional honor. This willingness stands in sharp contrast to their attitude

Sarat, *supra* this note, at 441, 466-7. Some of this dissatisfaction is due to the fact that people perceive that procedural values are slighted in practice by the courts, but much of it is due to the fact that people are not committed to such values.

McClosky's study also indicates that a far greater portion of "the articulate classes" subscribes to liberal democratic values, including the norms associated with the judicial proceeding, than of the general population. McClosky mentions as defining characteristics of the articulate classes "education, S.E.S., urban residence, intellectuality, political activity." McClosky, *supra* this note, at 362. Other studies also suggest a higher level of commitment to democratic values and to courts among such articulates. Sarat, *supra* this note, at 466-72.

141. T. VEBLEN, THE THEORY OF THE LEISURE CLASS 231 (Modern Library ed. 1934). Veblen attributes this attitude to the lawyer, ignoring that the Ideology of Advocacy enables him to feel that he has escaped to a higher moral plane.

toward the litigants and the general public. The lawyer often unflinchingly mouths his client's lies, but he holds himself and his legal brethren to a higher moral standard than that which he expects and encourages in ordinary citizens. Thus, in litigation, a critical moral distinction is drawn between statements of the client or of witnesses repeated by the lawyer, which are regarded with extreme skepticism, and statements backed by the lawyer's professional honor, on which other lawyers willingly rely.[142]

The elaborate patterns of courtesy and respect of the trial are entirely for the lawyer's benefit. In the courtroom, a place of special prominence from which laymen are excluded is reserved for the lawyers. Though the lawyer openly heaps contempt on the opposing party, he calls the opposing counsel a brother, refers to him with elegant courtesy, and criticizes him only with gentle circumlocution. The judge refers to the lawyer by titles such as counselor or officer of the court. Even where the judge must reprimand the lawyer, he honors him by assuming him to be bound by a code which the client is assumed to be incapable of understanding.

It may seem peculiar that the lawyer should routinely yield to the judge obsequies which, in almost any other sphere of life, would seem intolerably degrading. Yet, this exaggerated deference is really part of the ceremonial patterns which confirm the lawyer's distinctive dignity. The formal courtesy which the judge returns to the lawyer is all the more satisfying as coming from so exalted a source. As the European aristocracies confirmed their moral distinctiveness from the common people with elaborate ceremonies of deference for, and professions of loyalty to, the king, so the lawyer confirms his moral distinctiveness in acknowledging the judge as ***primus inter pares***. Nevertheless, the preeminent position of the king and the judge can become a threat to the dignity of the peers. In such instances, the peers may choose to appeal to the people against the exalted one. When the judge's position ceases to enhance his dignity, the lawyer can appeal in defiance of the judge to the jury. Although the case for permitting counsel a broad scope of argument to the jury is usually put in terms of the interests of the client, it is occasionally acknowledged that what is at stake is less the rights of the litigants than "the independence of the bar,"[143] that is, the ritual affirmation that the lawyer's honor is not entirely subordinate to the judge's.

The ritual incarnation of social values is accomplished by the lawyers and by the judge without any help from the litigants. It is the lawyers who perform the ceremony. It is they who assert rights and see their assertions recognized by the judge. They set the rhythm of the proceeding. In alternating turns, each shapes the trial, partly in accordance with

142. *Cf.* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106 (C) (4) (lawyer is not to assert "personal opinion" that client's claim is valid).

143. M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 16 (1975) (quoting Lord Erskine).

his own itinerary and partly in response to his adversary's.[144] Out of this interplay of performances, a sense of resolution or wholeness may emerge and be crystallized and confirmed by the judge. To be sure, he gives judgment only to one side, but he expresses his conclusions in the terms established by both.

Throughout all this, the litigant, if he is well advised, will sit mutely and foolishly. If he should attempt to assert his individual dignity by speaking out, the judge will admonish him to let his lawyer do the talking.[145] If he should persist, he may be bound and gagged, or excluded entirely from the ceremony which is purportedly honoring his individuality.[146] Usually, the client will hesitate to do anything without furtive, whispering conferences with his lawyer. He will have to rise and sit awkwardly in accordance with the unfamiliar etiquette of the court.[147] The physical design of the courtroom, and particularly the bench where the judge sits, will intimidate him. Unaccustomed to striking the proper balance between sycophancy and assertiveness, he will stammer when addressing the judge.

The client's only opportunity to tell his own story is to take the stand. Yet, if he does so, his testimony will be rigidly controlled by the lawyers and the judge in accordance with a complicated body of rules which make no sense to him. He will be repeatedly interrupted, and he will be prohibited from saying much of what he wishes to say. But even the opportunity to make this expurgated, truncated personal statement can be had only at great cost. The litigant must submit to a cross-examination in which he is forced to respond, in accordance with a highly restrictive and peculiar logic and an oppressive etiquette, to a series of questions

144. *See, e.g.*, F. BAILEY & H. ROTHBLATT, FUNDAMENTALS OF CRIMINAL ADVOCACY 44 (1974): "As to your position as his attorney, make it clear [to the defendant] that you alone will control the strategy of the defense, decide what legal points are to be raised, determine what witnesses to call, engage in whatever discussions you deem necessary with the prosecution."

145. A litigant represented by counsel has no right to participate in the conduct of his trial either by examining witnesses or addressing the trier. *See* Annot., 67 A.L.R.2d 1102 § 3 (1959) (civil authorities collected); Annot., 77 A.L.R.2d 1233 § 4 (1961) (criminal authorities collected).

146. Illinois v. Allen, 397 U.S. 337, 343-46 (1970); *see generally* N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT ch. 6 (1973) [hereinafter cited as DORSEN & FRIEDMAN].

147. DORSEN & FRIEDMAN, *supra* note 146, at 276-77, report a survey in which more than half of 842 judges answering a question as to what a judge should do when a defendant engages in "passive insubordination," such as refusing to stand at the start of the proceedings or to address the judge as "your Honor," stated that the judge should hold him in contempt, that he should threaten contempt or some other sanction, or that he should lecture him on his bad manners. The authors quote one of the presumably more liberal judges who favored taking no action in response to passive disrespect by explaining, "Some don't stand up out of ignorance. If you landed on them then you would merely embarrass them and probably force them into taking a defiant attitude. I think that these small problems should be handled much in the same way as you deal with children." *Id.* at 111.

On the intimidation of *pro se* litigants in small claims courts, see Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

designed to distort his position and perhaps also to abuse him personally. Testifying in an adversary proceeding is a humiliating experience. Witnesses are expected to tolerate abuse, condescension, and authoritarian discipline of a sort they would never willingly submit to in private life.

Except for such brief and unsatisfying participation, the litigant will be an alien spectator at his own trial. The language of the trial will be largely foreign to him.[148] It is not himself whom he will see represented, but a puppet manipulated by his lawyer in the character of "plaintiff" or "defendant". His lawyer will have dressed and groomed him in a manner calculated to please the trier. He will have drilled him in detail on how to behave throughout the proceeding so as to present an image consistent with the legal position the lawyer has taken.[149]

It cannot be denied that the Ritualist interpretation of the judicial proceeding has some social foundation. Indeed, Ritualism is a symptom of an important phenomenon: for many people, the judicial proceeding is the only meaningful, fulfilling ceremony which remains in contemporary society. But Ritualism errs in attributing this attitude either to vast majorities of the population or to the litigants. In fact, it is the lawyers and those members of the "articulate classes" who share the lawyer's values and can identify with his role who regard and experience the trial as ritual. The litigant is not the beneficiary of the trial, but the victim of it. His dignity and autonomy are sacrificed in order that his lawyer's may be celebrated.[150]

2. COLLAPSING RESULT INTO PROCESS

The Ritualist analogy of the judicial proceeding to drama and ritual

148. Alschuler, a strong proponent of defendants' rights, states that, "[m]ost defendants do not understand our system of criminal justice and cannot be made to understand." Alschuler, *supra* note 31, at 1310.

149. *E.g.*, A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (3rd ed. 1974):

> Finally, counsel should help the defendant to see ways in which he can best present himself to the jury as a likeable person, someone they can identify with and want to acquit. . . .
>
> Counsel should ask his client to dress for one of the pretrial interviews as the client will dress at the trial, so that the counsel can look him over. A lawyer who simply tells his defendant to "dress well" for trial and does not check out his choice of clothing in advance will often be horrified on the trial date to discover what the client considers "dressing well."

Id. at §§ 280-81.

150. The most serious attention to the moral psychology of the trial has been given, not by lawyers or legal scholars, but by novelists, and their conclusions often strikingly contradict the assumptions of Ritualism. One of the many anti-legalist themes of 19th century fiction is the view of the trial as crushing the dignity of the litigant by forcing him to conform to an artificial, alien discipline, and to recast his actions and his personality to flatter the vanity and appeal to the prejudices of the trier. The theme plays an important part in, for example, STENDAHL'S THE RED AND THE BLACK, bk. II, chs. 70-71 (1831), and in DOSTOEVSKY'S THE BROTHERS KARAMAZOV, bk. XII (1880). In addition, Dostoevsky emphasizes that the lawyer, in implementing the sacrifice of his client's moral integrity, uses the ritualistic aspects of the trial to gratify his own vanity. *Id.*

is ingenious and in some respects enlightening, but it is also fundamentally misleading. These analogies eliminate the problems of instrumentalism and the long run, but they do so in a question-begging manner. Dramas and rituals do not involve issues of instrumentalism and the long run because dramas and rituals do not produce distinct consequences; their purpose is not to alter the landscape against which they are played. But a trial does have a consequence; it is a decisionmaking procedure. It is designed to alter the landscape in a very precise fashion.

The significance of the Ritualist analogies can be clarified by comparing them to another possible analogy for the trial: the game. The anthropologist Claude Levi-Strauss has contrasted the notions of ritual and game thus:

> Games . . . appear to have a disjunctive effect: they end in the establishment of a difference between individual players or teams where originally there was no indication of inequality. And at the end of the game they are distinguished into winners and losers. Ritual, on the other hand, is the exact inverse; it *conjoins*, for it brings about a union (one might say communion in this context) . . . .[151]

Of these two alternatives, it is clearly the game which is the proper analogy for the trial. For the trial works to distinguish winners and losers. The Ritualist approach simply ignores that at the end of the trial one of the parties may imprison or coerce the other or deprive him of property. To ignore such facts is to commit the reverse of the mistake which the Ritualists attribute to instrumentalism. In Laurence Tribe's own rhetoric, it is to collapse result into process.[152]

The problem is not that procedures cannot be seen as expressive phenomena, but that the results which are produced by the procedures must also be seen as a part of what is expressed. The Ritualists cannot acknowledge this because, more often than not, the results of the judicial proceeding contradict the values which the procedures are supposed to express. It becomes more difficult to see the trial as a manifestation of social harmony when it is recalled that, at the end, one of the parties may inflict some sort of pain on the other. It becomes more difficult to see the trial as a "contest between equals" when it is recalled that its outcome will be determined in substantial part by the state of the substantive law and the nature of the available evidence. Where these factors put one party at a disadvantage, are they to be considered illegitimate handicaps? Suppose the result of the trial is that an ignorant person loses his savings through the enforcement of an unfair contract which he entered in reliance on the advice of the other party. What will have been said about trust? Suppose the result of the trial is that a person will be sent to a cesspool of

151. C. LEVI-STRAUSS, THE SAVAGE MIND 32 (Chicago ed. 1966) (emphasis in original).
152. Tribe, *supra* note 123, at 630-33.

a prison. What will have been said about the dignity of the individual?[153]

The Ritualists can justify the trial only by detaching it from its social context and by closing their eyes to the practical consequences which the judicial system implements. This perspective is a real psychological possibility for the lawyer. For him, the trial does end when the procedures are exhausted. The rhythms of his life continue as before; he merely turns to another proceeding. But it is absurd to impute this perspective to the litigant. The litigant cannot ignore the outcome; he will suffer or benefit from it. After the trial, he turns not to another proceeding, but to the task of adjusting his life to the change which the trial has wrought.

The error of the Ritualist argument is very similar to the one exposed by Rousseau in his attack on the ceremonial defense of the theater. Rousseau points out that a ceremonial ethic detached from the reality of social life can only obfuscate moral understanding:

> I hear it said that tragedy leads to pity through fear. So it does, but what is this pity? A fleeting and vain emotion which lasts no longer than the illusion which produced it; a vestige of natural sentiment soon stifled by the passions; a sterile pity which feeds on a few tears and which has never produced the slightest act of humanity. . . . Tacitus reports that Valerius Asiaticus, calumniously accused by the order of Messalina, who wanted him to perish, defended himself before the emperor in a way that touched this prince very deeply and drew tears from Messalina herself. She went into the next room in order to regain her composure after having, in the midst of her tears, whispered a warning to Vitellius not to let the accused escape. I never see one of these weeping ladies in the boxes at the theatre, so proud of their tears, without thinking of the tears of Messalina for poor Valerius Asiaticus.[154]

Should not the Ritualist exultation in the trial as an expression of the dignity of the litigants also be likened to the tears of Messalina for poor Valerius Asiaticus?

3. THE JURISPRUDENCE OF RESIGNATION

For all their differences of mood, both the cynical and the naive versions of Ritualism share the basic defect of removing procedure from its context in the legal system and in society. Arnold adopts the stance of the objective social scientist so that he does not have to justify the irrational system from which he benefits as a lawyer. Fried takes the position of the abstract moral philosopher so that his justification can

153. John Griffiths points out the contradiction, in many contemporary writings on the criminal law, between the scrupulous concern for procedural justice and the indifference to the fate of the defendant once he has exhausted the procedures to which he is entitled. Griffiths, *supra* note 3, at 378-80.

154. J. ROUSSEAU, POLITICS AND THE ARTS (LETTER TO M. D'ALEMBERT ON THE THEATER) 24-25 (Bloom trans. 1960).

safely ignore the facts of suffering and bewilderment which the legal system produces. Arnold's thesis is founded on a sociological datum; Fried's on an aesthetic intuition. Yet, both foundations are weak. Arnold believes, without evidence and in defiance of fact, that people actually hold the views he would like them to hold. This is the naiveté of his cynicism. Fried implies that man's experience of shared values cannot go beyond ceremonial form, that result must be severed from process in order to create public ritual. This is the cynicism of his naiveté.

For the Positivists, the law was a zero-sum game in which one could win only at someone else's expense. For the Purposivists, it was a "dynamic pie" from which everyone could have a slice.[155] For the Ritualists, the law neither inflicts losses nor produces rewards; it offers consolation in terms of a pleasing rhetoric and imagery detached from social reality.

Ritualism represents a policy of resignation. It is based on a strategy of avoiding disappointment by moderating expectations of success and putting the best possible face on failure. Ritualism acknowledges the irrationality of adversary advocacy just enough to establish credibility. It glamorizes adversary advocacy just enough to discourage criticism.[156] As Alvin Gouldner writes of Erving Goffman's "dramaturgical" sociology, "[i]t is an invitation to the *enjoyment* of appearances."[157]

C. A Revision: The Game Analogy

In some respects, Goffman's dramaturgical sociology is more cynical than the jurisprudence of even the most cynical Ritualists, for Goffman seems indifferent to whether or not *any* of the actors in the dramas he describes actually believes in the part he plays. Yet, Goffman is interesting because he suggests a modification of Ritualism which might avoid some of the difficulties just mentioned. Though he has influenced some Ritualists, they have declined to follow the more radical aspects of his thought. Still, his ideas seem to be characteristic of the unarticulated attitudes of some lawyers.

Goffman's approach partly avoids the difficulties of conventional Ritualism, first, because it acknowledges a certain dissonance between the ostensible or surface meanings of formal patterns of interaction and the actual experience of the participants; and second, because it acknowledges that the formal patterns have distinct and concrete consequences.[158]

155. HART & SACKS, *supra* note 71, at 111.

156. This is the Ritualist kiss-off: "Things are not as bad as you think."

157. A. GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY 384 (1970) (emphasis in original) [hereinafter cited as GOULDNER]; *see generally id.* at 378-90.

158. *See* Goffman, *supra* note 61; *see also* E. GOFFMAN, INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR (1967), especially at 48-56 [hereinafter cited as GOFFMAN, INTERACTION RITUAL]; E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959) [hereinafter cited as GOFFMAN, PRESENTATION OF SELF].

Goffman sees the world as drama or ritual, but the performance is to a large extent false. The individual does not take on a role in order to express his harmony with the others, but to escape his terror of them. The mask which the individual puts on is not a message to his fellows, but a shield against them.

In Goffman's world of radical alienation, individual identity is so fragile and dessicated that every gaze from another person is perceived as a threat. Every social encounter is a crisis in which individuals struggle desperately to maintain their autonomy by erecting barriers to penetration by the others. In such situations, ritual and role provide breathing space. They shelter the individual from the siege of foreign gazes and temporarily relieve him from the constant pressure of having to improvise defenses.

This perspective can be readily applied to the judicial proceeding. By giving the proceeding a formal structure based on a moral rhetoric with which the participants have some familiarity, and by giving them fixed roles to play, the system offers the individual a little comfort and privacy in a situation of great stress. The litigant may welcome the identity which his lawyer fashions for him, for it frees him from the strain of adjusting his outward appearance to a new and frightening situation, and gives him a mask with which to shield his inner feelings from the intimidating presence of hostile strangers. He knows that he can satisfy everyone's expectations by adhering to the script. Similarly, by creating the formalized alliance of lawyer and client, the system enables the two actors not only to protect their separate identities from each other, but also to cooperate in the protection of their joint identity from the pressure of others.[159]

The principle of neutrality relieves the client from the pressure of having to account for himself to the lawyer. The principle of partisanship encourages the lawyer to run interference for the client against the advances of others. The lawyer is similarly benefited. Because he portrays himself to his client as indifferent to all purposes, he does not have to defend his own. Because he is expected to be partisan toward the ends of his client, he need not fear public criticism for his activities.

This line of thought travels some distance from the purer forms of Ritualism. It is like Purposivism in that it sees the proceeding as in part instrumental to an ulterior purpose. (Of course, in both pure Ritualism and the revision, the ritual might be described as instrumental to a particular mental state, but in pure Ritualism the mental state is more directly bound up with the ritual itself.) But this ulterior purpose is not the kind of purpose on which Purposivism usually focused, that is, concrete social achievements. The new version is like Positivism, in that it works to delineate pockets of autonomy within which the individual can exist

159. *See* GOFFMAN, INTERACTION RITUAL, *supra* note 158, at Ch. 2.

without accounting to others. But the pockets are much smaller, and they depend on a delicate balance of social forces, not just on state power. And the new view also suggests a compromise between the Positivist and the Purposivist visions of the social world. On the one hand, individuals are seen as alien and hostile, desiring barriers behind which they can isolate themselves from the others. On the other hand, they do not need much coercion to cooperate with each other. There is a spontaneous reciprocity of assistance in the task of safe-guarding order, which is now known, in Goffman's phrase, as "impression management."[160]

A second strength of Goffman's approach is that, though it often speaks in terms of drama or ritual, it is actually based on an analogy to game, as Levi-Strauss explains the term. Goffman does not overlook the fact that the patterns of interaction which he studies function to divide the society into winners and losers. Far from viewing such patterns independently of the results they produce, he insists on what he calls "consequentiality."[161] He recognizes not only that patterns of interaction are refuges for the harried ego, but also that they produce concrete social changes.

The game analogy rationalizes the contradictions between substance and procedure. The game is a social phenomenon in which the satisfactory quality of the outcome depends almost entirely on the proper implementation of procedures. People usually feel that when the rules are followed the outcome of a game is just, precisely because the rules have been followed. They usually are not inclined to assess outcomes in terms of an independent set of criteria. This is particularly true of the game of chance, where the only substantive criterion is negative: that the results have no discernible significance. It should not therefore be surprising that some philosophers find the game the most satisfying example of procedural justice.[162]

For many, the game analogy will appear dubious because the game appears to depend to such a large degree on chance and arbitrariness, and it appears remote from meaningful political activity. Yet, the game might be a useful metaphor for authoritative patterns of interaction, such as the judicial proceeding, to someone who believed that such patterns were arbitrary or had no substantial meaning. To see the central institutions of the society as constructed along the principle of the game of chance is to cease to hold the society to any substantive standards of meaning or consistency. To one willing to accept this conclusion, the game, particularly the game of chance, might be a satisfactory model for social institutions. If the central institutions of the society are viewed in terms of the game of chance, then the arbitrariness of the results they produce is a

160. GOFFMAN, PRESENTATION OF SELF, *supra*, note 158, at ch. 6.
161. *See* GOFFMAN, INTERACTION RITUAL, *supra* note 158, at 151-61.
162. *E.g.*, BARRY, *supra* note 21, at 102-103.

virtue which proves the integrity of the system. On this view, the threat of contradiction would arise only if the results should actually produce meaningful patterns.

Abraham Blumberg's article, *The Practice of Law as a Confidence Game*, suggests that many criminal defense lawyers view the legal process in Goffmanian terms.[163] Charles P. Curtis has defended the view of law practice in terms of the game analogy as a special ethical prerogative of the lawyer. The lawyer, he suggests, is under much greater strain than the client because of his conflicting obligations to the public and to his client. The game analogy helps him to view his activities in a way which reduces the strain of his dual commitment. Thus, he writes, "Never blame the lawyer for treating litigation as a game . . . ."[164] On the other hand, Douglas Rosenthal's study of personal injury litigation suggests that lawyers lead clients to view the litigation in terms of the game analogy. Rosenthal emphasizes the passive nature of the client's role and his manipulation by the lawyer. He notes of one litigant: "The lawyer talked her into exaggerating her pain under oath by acknowledging that there were special 'rules' in the 'game' of trial tactics."[165] He quotes another as saying, "the lawyer is a reassuring presence who takes away your guilt feelings. He says, 'Hey, this is the way the game is played.' . . ."[166]

The greatest strength of the game analogy is its realism. It is more consistent with the actual experience of large numbers of people than the ritual or theatrical analogies. Moreover, it is a view which can be shared by both winners and losers, both lawyers and litigants. The lawyer is far more likely to be successful in inducing the client to see the litigation as a game than as a ritual.

Yet, the realism of the game analogy is not really a virtue, for the experience to which it defers is itself false and unworthy of respect. To encourage the client to see the results produced by the legal system as arbitrary is to discourage him from considering that they might have a meaning other than the one the legal system attributes to them. A litigant disposed to reflect on the meaning of the consequences produced by the legal system might decide that, while the judicial proceeding does not express such values as harmony, equality, and dignity, neither is it arbitrary. For instance, he might decide that it expresses such phenomena as cruelty, injustice, and oppression. The game analogy abandons the claim that there is any principle by which the way the system works to distinguish winners from losers can be justified, but in doing so, it also rejects the claim that there is any principle by which it can be criticized.

163. Blumberg, *supra* note 5.

164. CURTIS, *supra* note 106, at 35; *see also* Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 4 (1951).

165. ROSENTHAL, *supra* note 5, at 45.

166. *Id.* at 171.

The game analogy subverts criticism of the legal system at the same time that it debunks the system.

Moreover, although the game analogy appeals to losers as well as winners, its appeal seems to be limited to the two extremes. As Alvin Gouldner writes of Goffman's sociology:

> A dramaturgical model . . . is for those who have already made it in the big game, or for those who have given up playing it. It has appeal to those members of the middle class who generally mask their alienation out of concern to maintain a respectable appearance and to those "dropouts" in the Psychedelic Culture who feel no need to conceal their alienation; both groups are alike in that they are not moved to protest against and actively oppose the system that has alienated them.[167]

Even more serious is the failure of the game analogy to distinguish between winners and losers in the attitudes it encourages toward the legal system. It induces the same kind of complacent cynicism in both the powerful and the weak. The game analogy admits that the actions of the litigants influence concrete consequences, as the actions of players influence who wins a game. However, it ignores the wide variation among the players in the legal system in the capacity to influence consequences. The problem is not so much that differences in power give some an advantage over others, since such power differences can be seen as the result of previous games. Rather, the problem is that the analogy conceals the extent to which people with power could, if they wanted to, stop playing the game, or attempt without great risk to alter its rules in accordance with some substantive standard of meaning. The game analogy encourages the winners to think of themselves as lucky but helpless beneficiaries of a situation they have not made and can do nothing about.

D. *The Finale: The Friendship Analogy*

In a recent article, Charles Fried has defended legal ethics in terms of yet another analogy: friendship. Unlike drama, ritual, and game, friendship is an analogy, not for the legal system, but for the lawyer-client relation itself. It is interesting because it illustrates a tendency to think of the lawyer-client relation as having a value apart from and even antagonistic to the legal system as a whole.[168]

Perhaps surprisingly, in view of the unalloyed naiveté of his earlier rhetoric, the newer article is full of statements associated with the most primitive sort of Positivism. Fried emphasizes the preservation of the client's "autonomy" as a basic purpose of the lawyer's role. He speaks

167. GOULDNER, *supra* note 157, at 386.

168. *See* Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN L. REV. 98 (1969); Shafer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975) [hereinafter cited as Shafer].

of lawyers' antisocial conduct in terms of pulling "legal levers" and of implementing the client's "rights." He explicitly recognizes and approves some of the lawyer's most unsavory activities such as helping the wealthy to exploit the poor or to avoid taxes.[169]

Yet, these points are peripheral to the basic thrust of Fried's new argument which is entirely foreign to Positivism. Fried's principal purpose is to defend lawyer-client relations as "good in themselves." As before, Fried is concerned with the embodiment of ideals such as "the ideal of personal relations of trust and personal care."[170] But now the relevant ideals are embodied, not in the legal system as a whole, but in the attorney-client relation itself. This relation is seen less as a component of a larger structure and more as an independent entity.

The defense of partisanship and neutrality as protecting an intrinsically worthwhile relationship is not new. In fact, it appears that the attorney-client evidentiary privilege was first rationalized in the 17th century precisely as safeguarding a valuable personal relationship. It was then argued that the rule of confidentiality followed from the more general principle that gentlemen do not reveal each other's confidences. However, in the following century the defense of confidentiality and legal ethics generally shifted to the claim that such principles are necessary to the proper functioning of the legal system as a whole.[171] Since that time, at least until recently, the Ideology of Advocacy has focussed on the alleged requirements of the system. The notion that lawyer-client relationships were intrinsically valuable remained a background theme, but it played small part in the public defense of legal ethics.

By contrast, Fried now attempts to rationalize legal ethics by emphasizing the personal worth of the relations defined by the professional norms of partisanship and neutrality. Fried suggests that partisanship is like friendship in that it involves "an authorization to take the interests of particular concrete persons more seriously and to give them priority over the interests of the wider collectivity." At the same time the lawyer's neutrality bespeaks a deference to the "concrete individuality" of the client which is similar to the deference one friend would show to another. The fact that the lawyer's concern is not reciprocated in kind by the client does not differentiate the relation from friendship. On the contrary, it exemplifies the lawyer's freedom to bestow and the client's "freedom to receive an extra measure of care" which also exists in friendship.[172] Fried argues that, after one has recognized in the lawyer-client relation the

169. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1074, 1077, 1085 (1976) [hereinafter cited as Fried, *The Lawyer as Friend*]. For an excellent critique of this article, see Dauer & Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L. J. 573 (1977).

170. Fried, *The Lawyer as Friend*, *supra* note 169, at 1075.

171. J. WIGMORE, 8 EVIDENCE §§ 2286-90 (McNaughton ed. 1961).

172. Fried, *The Lawyer as Friend*, *supra* note 169, at 1066, 1069, 1074.

qualities generally valued in friendship, one should accept the lawyer-client relation as good in itself.

The friendship analogy represents a substantial development beyond Fried's earlier work, but it is a development which exacerbates rather than remedies the flaws of the earlier work. The first flaw, as discussed above, was that Fried's idealized model of the judicial process did not reflect the actual experience of litigants. Fried's recent article totally blurs the distinction between the ideal and the actual and tries to pre-empt the vocabulary needed to establish it.

Fried writes: "[L]ike a friend [the lawyer] acts in your interests, not his own; or rather he adopts your interests as his own. I would call that the classical definition of friendship."[173] Now this is clearly an error. The classical definition of friendship emphasizes, not the adoption by one person of another's ends, but rather the sharing by two people of common ends.[174] Moreover, the classical notion of friendship includes a number of other qualities foreign to the relation Fried describes. These missing qualities include affection, admiration, intimacy, and vulnerability.[175] On the other hand, if Fried's definition is amplified to reflect the qualification, which Fried repeatedly acknowledges, that the lawyer adopts the client's interests *for money*,[176] it becomes apparent that Fried has described the classical notion, not of friendship, but of prostitution.

The conflation of the ideas of friendship and prostitution is typical of the moral obfuscation which pervades the article. For Fried, the problem of a doctor who must decide what to do for "a severely deformed baby who can be kept alive only through extraordinarily expensive means" is "analogous" to the problem of a lawyer who must decide what to do for a client who wants "to avoid the effects of a tax or a form of regulation." The task of helping a "disagreeable dowager" tyrannize her relatives deserves the same intensity of commitment as the task of "defending the civil liberties case of the century."[177]

---

173. *Id.* at 1071.

174. *See* ARISTOTLE, NICOMACHEAN ETHICS, bk. 8, especially at 218-23, 231 (Ostwald ed. 1962).

175. *Id.; see also* F. NIETZSCHE, *Thus Spoke Zarathustra* in THE PORTABLE NIETZSCHE 167-69 (Kaufmann ed. 1954) [hereinafter cited as NIETZSCHE]; W. SHAKESPEARE, THE MERCHANT OF VENICE, especially I:iii, ll. 131-38; IV:i, ll. 265-88.

176. "It is undeniable that money usually cements the lawyer-client relationship." Fried, *The Lawyer as Friend, supra* note 169, at 1075.

Fried adds, "But the content of the relation is determined by the client's needs . . . . So the fact that the lawyer works for pay does not seriously undermine the friendship analogy." *Id.* at 1075. This is unconvincing. The content of any commercial relation is determined by the buyer's needs. Of course, the lawyer's customers get "personalized" service, but so do the customers of tailors and insurance salesmen, if they can pay for it. Fried's suggestion that the lawyer is different because he feels obliged to continue to represent a client even when he becomes unable to pay is wrong. The profession recognizes no such obligation. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110 (C) (1) (f) (lawyer may withdraw if client deliberately fails to pay fees); *see also id.* at DR 4-101 (C) (4) (lawyer may reveal client's confidences when necessary to collect a fee).

177. Fried, *The Lawyer as Friend, supra* note 169, at 1063-64. The nadir in the use of

Fried's lawyer is a friend in the same sense that your Sunoco dealer is "very friendly" or that Canada Dry Ginger Ale "tastes like love." The friendship analogy is one of those "self-validating, analytical propositions" which Marcuse describes as typical of "the closing of the universe of discourse":

> The unification of opposites which characterizes the commercial and political style is one of the many ways in which discourse and communication make themselves immune against the expression of protest and refusal. How can such protest and refusal find the right word when the organs of the established order admit and advertise that peace is really the brink of war, that the ultimate weapons carry their profitable price tags, and that the bomb shelter may spell coziness? In exhibiting its contradictions as the token of its truth, this universe of discourse closes itself against any other discourse which is not on its own terms.[178]

Marcuse's thesis that this style characterizes and rationalizes the flattening out of personality in contemporary society is amply confirmed by Fried's article. If Fried's earlier defense was a naive counterpart of Arnold's analysis, his recent one is a naive counterpart of Goffman's. Like Goffman, Fried celebrates the farnkly exploitative alliances of convenience between desperate, selfish little men. Fried explicitly strives to infuse with pathos and dignity the financial problems of the tax chiseler and the "disagreeable dowager." By collapsing traditional moral categories, this rhetoric reflects the homegenization of previously distinct personal characteristics. Fried can assert that the lawyer affirms the client's individuality because, like Goffman's protagonists, Fried's clients have almost no individuality. Any pretense to the contrary is abandoned by the middle of the article when Fried insists that corporations as well as natural persons are entitled to "legal friendship." After all, Fried argues, corporations are "only formal arrangements of real persons pursing their real interests."[179] Fried began his defense of the analogy by emphasizing that both friendship and the lawyer-client relation involve direct contact with a concrete individual. It now appears that these concrete individuals have so little individuality that a lawyer's relation to a "formal arrangement" can manifest the same qualities. Fried's final example of legal friendship involves friendship with a "finance company."[180]

"Orwellian" discourse to defend legal ethics occurs, not in Fried's article, but in Shafer's. *See* Shafer, *supra* note 168, at 738, 753, where the Code is analogized to "St. Matthew's Gospel" and the lawyer's attitude of neutrality to the "human experience Jesus identified as the source of his salvation."

178. H. MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY 88, 90 (1964).

179. Fried, *The Lawyer as Friend, supra* note 169, at 1076.

180. *Id.* at 1086

The second major flaw in Fried's earlier work was its tendency to focus on judicial procedure to the exclusion of the consequences produced by the operation of the judicial system, that is, to collapse substance into process. The friendship analogy represents an even further narrowing of this focus. It focusses on the attorney-client relation to the exclusion, not only of substantive consequences, but of the other elements of the judicial proceeding as well. The most striking feature of Fried's position is that the "moral foundations of the lawyer-client relation" have so little to do with law of any kind.

For Fried, the legal system is a condition of the value of the lawyer-client relation, but it is not the source of this value. Legal friendship arises from the fact that the client has a special need for help in order to exercise the autonomy which the legal system guarantees. The fact that this autonomy is a moral value legitimates certain of the lawyer's anti-social conduct, but it does not give it the special pathos and dignity celebrated by the friendship analogy. These qualities arise, not from the specifically legal character of the client's need, but from the fact that the need is integrally related to the integrity of the person, that it is "implicated in crises going to one's concreteness and individuality."[181] Although Fried argues, somewhat half-heartedly, that the need is a special one which is different from needs for non-professional services,[182] he expressly indicates that the need for legal help is similar to the need for other professionals services, particularly, medical help.

Of course, the legal system defines the patterns and boundaries of the relation, but these patterns and boundaries seem to limit, more than to promote, the qualities emphasized by the friendship analogy. Fried does not contemplate that the lawyer do many things which friends might be expected to do for each other, such as to destroy evidence, lie to the court, or do anything else which would violate the law or the *Code of Professional Responsibility*. After first extolling friendship in glowing and unqualified terms, Fried breaks the bad news that the lawyer is only a "special-purpose friend."[183] Although the lawyer-client relation has

181. *Id.* at 1072.

182. Fried needs to make this argument to distinguish the lawyer from the friendly Sunoco dealer or the friendly insurance salesman, but the distinction is untenable. In the first place, while some clients, particularly the criminal defendant, can plausibly be viewed as involved in a "critical assault on one's person" or at least in a situation implicating their "concreteness and individuality," others cannot be so viewed. If a finance company's attempt to foreclose on a poor widow or a wealthy person's attempt to evade taxes—both examples used by Fried—can be viewed as implicating concreteness and individuality, then it is difficult to think of any effort to satisfy any desire which could not be so viewed. Moreover, Fried ignores the fact that for people who do not have secure employment or independent wealth it is precisely in the material dealings with landlords, employers, and bureaucrats that their individuality is most at stake. For most people individuality is jeopardized not by an ignorance of the law, but by an economic dependence which is largely sanctioned and implemented by the law. For them, concreteness and individuality would be better served by a friendly landlord than by a friendly lawyer.

183. Fried, *The Lawyer as Friend, supra* note 169, at 1071-72, 1080-87.

value apart from considerations of fairness and efficiency, that value must yield in some situations to the need to maintain the integrity of the legal system.[184] The legal system thus appears as a threat to the lawyer-client friendship.

The game analogy expressed a sense of the meaninglessness of the operation of authoritative institutions. The friendship analogy acknowledges their legitimacy, but emphasizes their remoteness. In an earlier example of the friendship analogy Charles P. Curtis wrote, "Justice is a chilly virtue. It is of high importance that we be introduced into the inhospitable halls of justice by a friend."[185] Fried asserts the intrinsic value of legal friendship against the "cooler, more abstract" notions of justice and social welfare.[186] The judicial proceeding no longer appears, as it did in Ritualism, as a warm, comfortable setting in which the litigant's identity is affirmed. It is cold and inhospitable. Affirmation is possible within the lawyer-client relation, but this relation is no longer harmoniously integrated into the larger system. As with Goffman, the relation shelters the participants against the harsh operation of the system.

Social norms no longer provide any kind of satisfaction. Rather they pose an intolerable burden, and even their ceremonial enactment is threatening. Fried argues against the Purposivist notion of responsibility—which he portrays in a Utilitarian caricature—as a "monstrous conception."[187] Where the classical Purposivists saw social norms as energizing creative individual behavior, the friendship analogy sees them as frightening individuals into retreat. The autonomy Fried celebrates is much different from the aggressive egoism portrayed in the classic Positivist writings. It is defensive and passive.[188]

---

184. Fried's article seems particularly incoherent at this point. At the beginning, the basic characteristic of friendship was portrayed as "an authorization to take the interests of particular concrete persons more seriously and to give them priority over the interests of the wider collectivity." *Id.* at 1066. Yet, in recognizing an obligation not to violate the law or the *Code of Professional Responsibility* on behalf of the client, the lawyer refuses precisely to give priority to his client's interests over "the interests of the wider collectivity." This obligation to the system seems incompatible with friendship as Fried himself has described it.

It is no answer to this objection to say that the legal system gives meaning to the client's autonomy by defining the rights which protect it and that, therefore, the lawyer respects his client's autonomy by respecting the law. For the law gives meaning to autonomy only in a very abstract and general sense, and it is precisely such abstract and general notions which Fried rejects in favor of commitment to the concrete interests of the particular client.

185. CURTIS, *supra* note 106, at 1.

186. Fried, *The Lawyer as Friend, supra* note 169, at 1070.

187. *Id.* at 1078.

188. Fried also relies on the familiar distinction between wrongs "of the system" and the lawyer's "personal wrongs." The reasons why this type of rationalization is untenable have been discussed in the criticism of Positivism. *See* notes 29-42 *supra* and accompanying text. But Fried's version deserves further comment. He attempts to distinguish between the lawyer's putting the client on the stand to lie ("exploiting the system") and the lawyer's telling the lie himself ("engaging his own person in doing personal harm to another"). Putting the client on to perjure himself is all right because in doing so the lawyer is "like the letter carrier who delivers the falsehood." On the other hand, a direct lie is unethical

If the Ideology of Advocacy is a rationalization of the ethical orientation of lawyers, then the friendship analogy seems both its culmination and its finish. The lawyer's distinctive identity has emerged from behind the facade of the legal system and is now openly celebrated as an end in itself. The irony of this development is that at the same time that it celebrates the legal profession more openly than previous defenses, the friendship analogy also comes closer than previous defenses to acknowledging the failure of the legal profession to accomplish the task for which the lawyer's role was created in the first place, the reconciliation of public and private ends. Previously, the lawyer justified his role in terms of the resolution of individual differences through order, justice, welfare, or ceremony. Yet, in fact, to the extent that he was sensitive to outcomes at all, he experienced them not as resolutions, but as arbitrary concessions to one of two opposing spheres. In emphasizing the remoteness and coolness of public ends, the friendship analogy admits that the magic with which the lawyer once claimed he could resolve the clash of individual wills is a fraud.

Yet, the admission is only implicit. The friendship analogy diverts attention from failure by conflating the lawyer with a less problematical social role. The same effect occurs in the familiar comparison of the legal role with that of doctors (also used by Fried) or clergymen.[189] Such comparisons emphasize the commitment of all three professionals to individual clients, patients, or penitents against the claims of the collectivity, as illustrated particularly by the norms of confidentiality to which all three adhere. Yet, they gloss over a critical difference. The insistence of the doctor and the clergyman on maintaining the confidence of those they serve represents a commitment to the values with which their professional activities are concerned above competing social values. On the other hand, the lawyer's insistence on confidentiality represents a

because "every speech act invites belief." Fried, *The Lawyer as Friend, supra* note 169; at 1084-86.

Here are Fried's characteristic mistakes in striking form. First, the treason to actual experience: the competent trial lawyer must invite the trier's belief with his appearance and gestures just as much as with his speech, with the questions he asks and the way he asks them just as much as with the statements he makes. As Freedman writes, "[e]ffective trial advocacy requires that the attorney's every word, action, and attitude be consistent with the conclusion that his client is innocent." Freedman, *supra* note 9, at 1471. The ABA-ALI's *Civil Trial Manual* suggests that the trial lawyer "practice before a mirror on his mannerisms" and it observes that the advocate acquires his skills by "hard work and self-reformation." R. FIGG, R. MACULLOUGH, & J. UNDERWOOD, CIVIL TRIAL MANUAL 358 (1974). The distinction between speech and conduct is meaningless; personality is engaged in both, and in both it intentionally misleads. (On a more practical level, Fried ignores that the lawyer will have to argue explicitly to the jury that the client's lie is credible in his summation.)

Second, the suppression of consequences: Fried ignores that the client's lie—directed and affirmed by the lawyer—will, if successful, probably lead to an unjust result. The letter carrier analogy would be more truthful if the letter contained a bomb likely to blow up in the face of the recipient.

189. Fried, *The Lawyer as Friend, supra* note 169, at 1072-73; *see also* S. WILLISTON, LIFE AND LAW 272 (1940).

compromise *among* the values with which he is professionally concerned, or perhaps even a sacrifice of these values to extrinsic values. The doctor and the clergyman insist that for them health and salvation must take precedence over justice. The lawyer asserts that his relationship with his client must take precedence over justice, but in doing so he forgets that his relationship was originally defined and rationalized in terms of justice.

In the friendship analogy, the plaintive tone of Ritualism reaches its highest pitch. The lawyer tacitly concedes his failure, but rather than apologize for it, urges the society to lower its expectations. Unable to justify his role in terms of public means and ends, he urges that it be accepted as an end in itself.[190]

V. PROCEDURAL FETISHISM

> *[T]he ubiquitous question asked, "Do you think the Rosenbergs were guilty?" is a wrong question and can only result in a wrong answer. The question should be "Do you think there was sufficient evidence warranting the jury, which sized up the witnesses, to decide tnat the Rosenbergs were guilty?"*
>
> Louis Nizer[191]

This section considers, briefly and tentatively, some of the broader implications of the critique of adversary advocacy. First, it argues that the most basic defect of the three versions of the Ideology of Advocacy is that the practices they prescribe engender a discontinuity between experience in the social world and experience in the world of ostensibly autonomous legal institutions. This discontinuity involves the alienation of the individual from his ends and actions. It thus leads to the subversion of the very values which the Ideology of Advocacy purports to safeguard: values such as individual autonomy, responsibility, and dignity. Second, this section speculates that an important, subsurface reason for the success of adversary advocacy is that it serves the goal of social stability by sublimating conflict. The characteristic form which this process of sublimation takes is the translation of issues of substantive law and justice into procedural issues. Although the Idology of Advocacy claims to serve individuality, this process of conflict sublimation actually subverts the norms of individuality in the interests of social stability. The argument concludes by suggesting that a different and no less realistic attitude toward conflict than the one which underlies the Ideology of Advocacy would lead to the abandonment of the Ideology of Advocacy. Both of the points made in this section refer to a phenomenon which can be called procedural fetishism.

190. *Cf.* Sartre's critique of Nietzsche's ethic of recurrence as a strategy of self-consolation for the philosopher's failure to change an intolerable situation: "[T]his man who is drowning demands that the instant of his choking last forever." J. SARTRE, SAINT GENET 349 (Frechtman trans. 1963).

191. L. NIZER, THE IMPLOSION CONSPIRACY 9 (1973).

A. Discontinuity

The practices prescribed by all three versions of the Ideology of Advocacy alienate the individual from his own ends and actions at the moments when his individuality is most at stake. In this situation, autonomy, responsibility, and dignity— the very norms the Ideology of Advocacy invokes in its own defense—are frustrated. The fatal discontinuity is inherent in the notions of procedural justice and professionalism and is implemented in practice by the principles of neutrality and partisanship.

The problem is manifested in the most salient contradictions of the three versions. Positivism promises to safeguard the autonomy of the individual. Yet, when the individual's autonomy is threatened, it thrusts him into a situation where he cannot make rational choices and must submit to the will of his lawyer. Purposivism promises to enhance social welfare by encouraging individual responsibility. Yet, at points of stress, Purposivism exacerbates centrifugal tendencies by encouraging individuals to regard values in a manner which strips them of their meaning and force. Finally, Ritualism makes only the modest claim to ceremonially affirm individual dignity. Yet, the ceremonies it prescribes turn out to be a mockery of individual dignity.

The common defect of the three versions is that they require that disputes be resolved in a specialized setting discontinuous with the one in which they arose, and in specialized terms discontinuous with those in which they were originally framed. Disputes arise in the social world in terms of rules, values, and practices associated with the substantive law. Procedural considerations such as finality, self-incrimination, notice, hearing, confrontation, repose, and standing, play little part in this context. However, when disputes resist voluntary resolution, they must be precipitated into a distinct, specialized setting in which these procedural considerations become dominant and dispositive.

The first consequence of the shift from the social world to the procedural world is the alienation of the individual from his ends.[192] Each version of the Ideology of Advocacy describes a different form of this phenomenon. In Positivism, because his own ends are assumed to be unintelligible to others, the individual must adopt the more familiar and limited ends which the legal system imputes to him in order to be recognized by the others, and to make sense of the situation. In Purposivism, the individual may retain his own ends, but he is pressured to abstract them from his experience, to look at them from a perspective which weakens their ethical force. In Ritualism, the individual is forced to watch and participate in a formal affirmation of his abstract individuality at the same time that his particular ends are being frustrated.

A further consequence of this shift from the social world to the

192. *See generally* Williams, *supra* note 123, at 77-150.

procedural world is the alienation of the individual from his actions.[193] In the social world, where individuals conduct disputes on their own behalf, they are conscious of creating and affecting the dispute through their own choices. The dispute appears to each disputant to proceed in accordance with actions which he and his adversary have taken, and the outcome of the dispute also appears to result from his and his adversary's actions. However, once lawyers move the dispute into the world of judicial procedure, this perspective changes. It seems to the disputants that the dispute has been taken out of their hands. Formal procedures seem to carry the dispute along with a momentum of their own. The client comes to see his actions as dictated by the requirements of procedures. He sees the lawyer's actions as representing, not the client's own choices, but rather features of an autonomous proceeding. The outcome of the dispute seems to have been determined, not by the client's actions, but by the autonomous operation of a system of rules, a mechanism of functional roles, or a ritual of ceremonial roles.

The Ideology of Advocacy cannot accommodate the autonomous, responsible, dignified individual. Such a person must be able to experience a set of ends as *his own* in the sense that they guide or explain his actions and constitute or contribute to his identity. Moreover, this experience must have some continuity over time. An individual does not make choices solely with regard to preferences of the moment, but rather with regard to ends which he has had and expects to have. This does not mean that a person's ends cannot change, but rather that when such change occurs a person's present ends are related to his past ends by a process of growth or development. Such change is continuous because it can be perceived, at least by the individual himself and often by others as well, as occurring within the framework of a single personality. A person who was merely the setting of a series of discrete transient desires would not be recognizable as an individual.[194]

In addition, an individual must be capable of conscious, deliberate action in furtherance of his ends. His actions can only be meaningfully related to his ends, and to him as an individual, if he has consciously and deliberately chosen to take the actions in the light of his ends.[195] Here too there must be continuity. A person's past choices will limit and influence his present choices, as his present choices will limit and influence his future choices. He must be capable of a continuous series of choices if he is not to blindly undo at night what he has purposefully accomplished by day.

The regime of proccdural justice requires that this continuity be

193. *See generally* Lukacs, *supra* note 61, at 83-110.

194. *See* T. NAGEL, THE POSSIBILITY OF ALTRUISM ch. VIII (1970); SARTRE, *supra* note 61, at 462-67; UNGER, *supra* note 25, at chs. 1 and 5; Williams, *supra* note 123, at 93-118.

195. *See* H. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW ch. 4 (1968).

interrupted in situations of dispute. It radically abstracts the individual from the social context in which he created the dispute, and requires that he pursue it from a specialized, artificial perspective. It encourages him to forget what he has been and would like to be in the future, and to shape his concerns to the exigencies of the moment. It makes it impossible for him to relate the choices to be made in the procedural setting to the choices previously made, and expected to be made, in the social world. Underlying the disorienting experience of adversary advocacy is the client's sense of the autonomous, inherently legitimating force of procedure.[196] Because the judicial proceeding is designed to focus attention on its inherent norms, it subverts the participants' sense of their own ends. Because the pattern of the judicial proceeding is so formal and so alien to everyday social intercourse, it precludes active, coherent participation by the litigants.

The lawyer implements the discontinuity of procedural justice through the practice of neutrality and partisanship. Given the client's dependence on him, the lawyer, wittingly or not, will redefine the initial terms of the dispute in terms of his own procedural orientation. The fact that the lawyer presents himself (under the principle of partisanship) as sympathetic and committed to the client and yet (under the principle of neutrality) detached from and indifferent to his client's ends leads the client to view his own ends with detachment and indifference. The fact that (under the principle of partisanship) the lawyer is willing to take aggressive action on behalf of the client and yet (under the principle of neutrality) disclaims responsibility for the consequences of such action leads the client to see these consequences, not as results of his or his lawyer's choices, but as the products of autonomous forces.

Professionalism plays a critical part in this re-definition of the situation. The lawyer's formal and practical monopoly over access to the institutions of authoritative dispute resolution gives him a large measure of power over the client.[197] But the transformation of perspective can be accomplished only because the lawyer presents himself to the client, not

196. This psychology has been acknolwedged insofar as it affects the lawyer, but its impact on the client has geen generally ignored. *See, e.g.*, Parsons, *A Sociologist Looks at the Legal Profession*, in ESSAYS IN SOCIOLOGICAL THEORY: PURE AND APPLIED 380 (rev. ed. 1957) [hereinafter cited as Parsons]:

> The fact that the case can be tried by a standard procedure relieves . . . [the lawyer] of some of the pressure of commitment to the case of his client. He can feel that, if he does his best, then having assured his client a fair trial, he is relieved of responsibility for an unfavorable verdict if it comes. He may even take a case with considerable reservations about its soundness, counting on procedural fairness to protect the interests of the opponent.

197. It should be recalled that I am speaking of the relatively powerless and unsophisticated client. Of course, powerful, sophisticated clients are less likely to be dominated by their lawyers. But the arguments of the Ideology of Advocacy become inapplicable, or at least more implausible, to the extent that the client is powerful and sophisticated. The Ideology of Advocacy focuses on the relatively naive and unsophisticated client, and the validity of its prescriptions must stand or fall on their impact on that kind of client.

as an individual with ends and responsibilities of his own, but as the embodiment of a neutral specialized discipline. If the lawyer were merely an individual with personal ends, his definition of the situation would have no special priority. But because it is presented as standing above individual views, his professional view of the situation disarms defenses which might be raised to merely individual views, and lays claim to acceptance regardless of the client's personal views. Similarly, if the lawyer were an ordinary individual, he would be responsible for his actions, and his association with the client would not affect the client's responsibility for the client's own actions. But as an embodiment of a neutral, specialized discipline, the lawyer is a kind of filter through which the client's will is cleansed of responsibility. The client comes to see the lawyer not as an individual, but as a component in the procedural system. Thus, the consequences of the lawyer's actions on behalf of the client come to be seen as products of the system.[198] By creating this discontinuity whereby the client loses track of his own ends and his capacity to implement them, the Ideology of Advocacy precludes the most basic psychological prerequisites of individual autonomy, responsibility, and dignity.

It should be emphasized that the suggestion that legal experience should be continuous with other forms of social experience does not amount to a plea for a return to a pre-industrial communalism in which law is completely undifferentiated from other norms.[199] The values of individuality imply that law should be continuous with other social and moral experience, but not necessarily indistinguishable from it. Indeed, as I will emphasize below, liberal legal theory is correct in claiming that individuality and justice are best served by a distinctive form of law and legal experience which is differentiated from other categories of social norms and experience. The notion of continuity suggests only that people should be able to relate legal norms to other forms of understanding and experience in a coherent fashion. The critical point is that the law should be accessible to those who are governed by it. Thus, the notion of continuity is opposed, not to differentiation, but rather to specialization, that is, to the notion that the legal doctrine should or must be accessible only to a trained occupational minority, and that legal institutions should

198. *See, e.g.*, ROSENTHAL, *supra* note 5:

> If I had not had a lawyer here I would probably have settled for about $2,000 to cover my out-of-pocket expenses. But the lawyer is a reassuring presence who takes away your guilt feelings. He says, "Hey, this is the way the game is played; you take as much as you can get; it's what they expect; it's the way it's done." He takes upon his own shoulders the burden of your guilt—he's the professional. I hadn't thought of this before but it occurs to me now as what's [sic] involved.

Id. at 171 (quoting a plaintiff interviewed during a survey of personal injury litigation in New York City).

199. *Contra*, Diamond, *The Rule of Law Versus The Order of Custom*, in THE RULE OF LAW (Wolff ed. 1971). Neither does it amount to a plea for revolutionary socialist communalism. *But see* Pashukanis, *The Soviet State and the Revolution in Law*, in SOVIET LEGAL PHILOSOPHY (Babb trans. 1951).

or must be dominated by such a minority.[200]

Far from being a repudiation of modernity, the appeal to continuity is a plea for the fulfillment of a principle which is acknowledged or assumed in most legal thought as fundamental to modern law: what Hegel calls the "right of giving recognition only to what my insight sees as rational."[201] Like contemporary legal theorists, Hegel considered that, to be seen as rational by the litigants, a judicial decision must be justified in a manner accessible to the litigants in terms of norms which they understand as binding on them. In addition, it must embody active, meaningful contributions by the litigants to the proceeding from which it emerges.[202] Yet, unlike most contemporary theorists, Hegel saw the danger posed by a specialized legal system to the principle of continuity.[203] When access to the courts is monopolized by an occupational group and legal discourse becomes isolated from social norms,

> the members of civil society, who depend for their livelihood on their industry, on their own knowledge and will, are kept strangers to the law, not only to those parts of it affecting their

200. Sociological writing on law often obscures the tension between the notion that modern law is specialized and the notion that it serves a legitimating function by controlling the exercise of state power in a manner which citizens can perceive as rational. Some writers emphasize that modern law is specialized and discontinuous with social experience without considering the claims of modern legal systems to legitimate the actions of the state. *See, e.g.*, L. RUDOLPH & S. RUDOLPH, THE MODERNITY OF TRADITION 254-59 (1967); Nader, *Styles of Court Procedure: To Make the Balance*, in LAW IN CULTURE AND SOCIETY (L. Nader ed. 1969). On the other hand, other writers emphasize that the legitimating function of law in modern society requires continuity between legal and other social experience, but ignore the extent to which modern legal systems engender discontinuity. *See, e.g.*, FULLER, *supra* note 25; Fuller, *Human Interaction and the Law*, in THE RULE OF LAW (Wolff ed. 1971) [hereinafter cited as Fuller, *Human Interaction and the Law*]. For a discussion of legitimation which addresses the problem of discontinuity, see Tushnet, *Perspectives on the History of American Law: A Critical Review of Friedman's "A History of American Law"*, 1977 WIS. L. REV. 81, 100-02 [hereinafter cited as Tushnet].

201. G. HEGEL, PHILOSOPHY OF RIGHT 87 (Knox trans. 1952) [hereinafter cited as HEGEL].

202. *Id.* at 140-45; Fuller, *The Forms and Limits of Adjudication, supra* note 80, at 421-26.

203. The contradiction between the notion that the law serves democracy by enabling citizens to perceive as rational the exercise of state power, and the notion of law as specialized, is evident in late Purposivism. The later Purposivists often emphasized that the legitimation of the exercise of judicial power requires that courts establish the rationality of their decisions. They based this requirement on the nature of democracy and the right of citizens not to be subject to arbitrary power. They distinguished "law" from "fiat" on the ground that the former is bound to "gain reasoned acceptance." Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 5 (1957); *see also* HART & SACKS, *supra* note 71, at 665-67. Yet, in applying their theories, these writers were never less satisfied than when judicial decisions were most accessible to ordinary citizens. The criteria by which they tested the rationality of judicial decisions were drawn not from ordinary moral and political discourse but from the technical discourse of lawyers. *See generally* Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1306-09 (1960) [hereinafter cited as Arnold]. In practice, the only audience from whom they insisted that decisions gain reasoned acceptance was the legal profession. The need for reasoned acceptance was said to stem from the moral and social imperatives of democracy; yet the test of reasoned acceptance was the satisfaction of a small elite.

> most intimate affairs, but also to its substantive and rational basis, the right itself, and the result is that they become the wards, or even in a sense the bondsmen, of the legal profession. They may indeed have the right to appear in court in person and 'to stand' there (*in judicio stare*), but their bodily presence is a trifle if their minds are not to be there also, if they are not to follow the proceedings with their own knowledge, and if the justice they receive remains in their eyes a doom pronounced *ab extra*.[204]

Not law, but rather the kind of law practice defined by the principles of professionalism and procedural justice engenders the discontinuity which subverts individual autonomy, responsibility, and dignity.

B. The Sublimation of Conflict

Ideologies are usually conceived as providing a facade of universality for particular group privileges and interests. I think that the Ideology of Advocacy functions to mask privilege and to rationalize domination, but I am not prepared in this essay to analyze in any detail the way it does so. Instead, I will suggest a related subsurface reason for its appeal: The Ideology of Advocacy rationalizes widely felt tensions and anesthetizes painful social choices. Since, in doing so, it functions to preserve the status quo and blunt efforts at social change, it benefits the dominant groups in society. Yet, it cannot be seen simply as an instrument of these groups, for the tensions it dulls seem to arise within as well as between groups, and the choices it rationalizes seem to have been made at several levels of society.

The Ideology of Advocacy is a tacit response to the tension between the norms of individuality and the goal of social stability. It is also a response to the often unacknowledged tension between the ideal of law and the goal of social stability. The nature of this response is to translate substantive concerns, which threaten to produce conflict, into more innocuous and manageable procedural concerns. In doing so, adversary advocacy promises to reconcile individuality and law with stability, but in fact it merely rationalizes the sacrifice of the former to the latter.

It may seem perverse to accuse the Ideology of Advocacy of selling out individuality when it attempts to justify itself primarily in terms of values associated with individuality. Yet, the critique of the Ideology of Advocacy has shown that, whatever its pretensions, the Ideology of Advocacy actually subverts the values of individuality. In this light, it is not implausible to suggest that the Ideology of Advocacy is strongly but tacitly committed to a competing goal, the goal of stability.

The goal of stability asserts the fundamental social value of formal,

204. HEGEL, *supra* note 201, at 145. Hegel's theory of the civil service as a "universal class", *id.* at 188-93, has flaws analogous to those he criticized in the theory of legal professionalism. *See* K. MARX, EARLY WRITINGS 100-16 (Vintage ed. 1975).

established institutions and practices. It defines itself in opposition, not to disorder, but to conflict. Conflict entails the mutual recognition of antagonistic wills. It involves conscious, deliberate action taken to further an end against an opposing end. Disorder, on the other hand, is merely randomness. Disorder represents a social failure, but it is a limited social failure which can be contained.[205] It does not call the entire structure of society into question. Conflict involves the assertion of claims which may challenge the ideological foundations of the social structure. It thus threatens the very existence of the established institutions and practices. For those who see stability as the fundamental social norm, the elimination of open conflict is the paramount social task.[206] However, this view presents a difficult problem for legal theorists. For there is a very sharp tension between the goal of stability and the ideal of law.

As far as the goal of stability is concerned, it is more important that conflict be eliminated than that it be eliminated in any particular way. An authoritative decision has value regardless of its content if it causes the disputants to cease to press their claims.

By contrast, the ideal of law prescribes that disputes be determined in a specific way. As elaborated in classical liberal theory, the ideal of law refers to substantive law. It is the notion that conduct in society should be governed in accordance with transcendent, universal norms.[207] The transcendent character of the law means that it stands above, and independent of, individual wills, including the wills of the people who make and apply the laws. The universal character of the law means that it applies to all citizens on similar terms and conditions. Although liberal theory has claimed that law secures stability, in fact law often is more a threat to stability than a guarantee of it. Law takes the form of rules or values. Yet, because rules are indeterminate and values are not fully shared, an official decision reached through the attempt to implement the ideal of law may not be accepted by the disputants as legitimate. The losers can always continue to appeal to their interpretation of the relevant rule or to the values to which they are committed. Unlike ideals of traditional or personal authority, the ideal of law itself may encourage a person who feels that a decision misinterprets a rule or violates a norm to reject the decision and continue his struggle. The transcendent character of the law invites the citizen to appeal beyond the particular official application of the law to the law itself. Moreover, unlike a decision based on tacit, ad hoc considerations, an authoritative decision which seeks to

---

205. For an illustration of the distinction between conflict and disorder, see Walzer, *Two Kinds of Regicide*, in REGICIDE AND REVOLUTION ch. 1 (1976).

206. *See* GOULDNER, *supra* note 157.

207. *See* FULLER, THE MORALITY OF LAW (rev. ed. 1969); F. HAYEK, THE CONSTITUTION OF LIBERTY 148-61 (1960); KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (Ladd trans. 1965); UNGER, *supra* note 25, at 72-76. The ideal of law is often closely associated with the ideal of popular or participatory government. *See, e.g.*, J. ROUSSEAU, THE SOCIAL CONTRACT 32-35, 80-87 (Hafner ed. 1947).

implement universal imperatives is likely to carry the issues beyond the immediate parties and make them a matter of contention throughout the society. Thus, far from resolving disputes, the attempt to implement the ideal of law may aggravate existing ones or even stimulate new ones.[208]

Modern social theory has focused on the tension between individuality and stability, and sociological writing often seems more or less explicitly to reject individuality in favor of norms more compatible with stability.[209] Although law is closely associated with individuality in American legal thought, the tension between law and stability is rarely acknowledged. Lawyers tend to be deeply committed to the goal of stability;[210] yet, the doctrines and principles which rationalize their privileges are based, to a large extent, on the norms of individuality. In this situation, lawyers are reluctant to confront the tensions between stability and law and to acknowledge openly that stability might require the sacrifice of law and individuality. Modern legal thought tends to rationalize the sacrifice of law and individuality, but tacitly, rather than explicitly. The sacrifice takes place under the cover of vague notions of legality which are flexible enough to contain the tensions without making them explicit. Sociologically minded jurisprudence often simply conflates the notions of law and stability without acknowledging the difficulties law poses for stability.[211]

A notable illustration of this tacit commitment to stability at the expense of law is the well-known passage of Hart and Sacks concerning "The Great Pyramid of Legal Order." The Pyramid is concerned entirely with dispute resolution. It consists of an ascending series of successively narrower stages: no dispute, informal dispute, private settlement, lawsuit initiated, summary judgment, judgment after trial, and disposition on appeal. Once they occur, "trouble cases" are shunted up the Pyramid until they terminate in "success, or at least . . . no trouble."[212] The

---

208. *See generally* BICKEL, *supra* note 100, at ch. IV (on the "passive virtues"); A. BICKEL, THE SUPREME COURT AND THE IDEAL OF PROGRESS (1970). *See also* E. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS ch. 4, especially at 83 (1963); E. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 258-69 (1976) [hereinafter cited as THOMPSON, WHIGS]:

> What was at issue was not property supported by law against no property; it was alternative definitions of property rights; for the landowner, enclosure, for the cottager, common rights, for the forester, the right to take turfs. For as long as it remained possible, the ruled—if they could fund a purse and a lawyer—would actually fight for their rights by means of law. . . . When it ceased to be possible to continue the fight at law, men still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.

Id. at 261.

209. *See* GOULDNER, *supra* note 157, at 91-92, 422-32; S. WOLIN, POLITICS AND VISION ch. 10 (1960).

210. *See* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 245-58 (Mayer & Lerner eds. 1966).

211. *E.g.*, K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE chs. 10-11 (1941); Fuller, *Human Interaction and the Law*, *supra* note 200.

212. HART & SACKS, *supra* note 71, at 312.

difficulty with this vision is that it is not clear, in terms of Hart and Sacks's general theory, why the Pyramid should represent *legal* order. Elsewhere, Hart and Sacks repeatedly identify law with principles of institutional competence and social norms. Yet, the Great Pyramid seems to stand entirely apart from these considerations. It makes no difference to the vision of the Pyramid that the trouble cases may be eliminated without regard to institutional competence or shared norms. Hart and Sacks fail to take account of the fact that most disputants drop out of the climb up the Pyramid, not because they are convinced justice has been done, but because they are too weak, ignorant, or poor to pursue it. At one point, Hart and Sacks seem to acknowledge, in passing, that this may be the case, but they then go on to identify "the essence of the healthy functioning of any legal order" with the stifling of most conflict at the lower stages of the Pyramid.[213]

Another, more concrete illustration of the tacit response to the tension of law and stability is the case of *Walker v. City of Birmingham*,[214] in which the United States Supreme Court held that Martin Luther King and others could be punished for engaging in a constitutionally protected civil rights demonstration. The demonstration was intended, in significant part, to publicize the demonstrators' claim that certain established social practices prevailing in Birmingham violated the equal protection clause of the United States Constitution. This appeal to the ideal of law was perceived by local officials as posing an immediate threat of violence, and a more long term threat of destroying established social practices. The officials therefore sought and obtained an injunction against demonstration. The demonstrators believed that the injunction violated their rights of free expression under the first amendment, and they therefore proceeded with the demonstration despite the injunction. After being sentenced for contempt for violating the injunction, they urged the United States Supreme Court to reverse because the injunction was unlawful, and their conduct had been protected under the first amendment. This appeal to the ideal of law was perceived by the Supreme Court as posing a threat to established institutional patterns. The demonstrators, the Court noted, had failed to challenge the injunction through established judicial procedures. The Court thus held that, even though the injunction was illegal and the demonstrators' conduct was protected by the substantive law, they could be punished for "ignor[ing] all the procedures of the law and carry[ing] their battle to the streets."[215]

Of course, the Court in *Walker* did not consider that it was compromising law, and perhaps it is more fair to characterize its decision as relying on a conception of legality other than the ideal of law. This second conception of legality might be called the "rule of law." While

213. *Id.*
214. 388 U.S. 307 (1967).
215. *Id.* at 321.

the ideal of law views law as a regime of transcendent social norms, the rule of law views law as a regime of immanent institutional norms. The rule of law portrays law less as prescribing a desirable ordering of affairs in the social world, than as prescribing patterns of institutional propriety.[216] From the perspective of the rule of law, norms are less standards by which actual practices can be criticized than they are standards which inhere in the way things are actually done. Of course, the distinction is a matter of degree. Most discussions of the ideal of law acknowledge that legal norms are rooted in social practices at least to some extent. And from the point of view of the rule of law, social norms are sufficiently independent of the way things are done to make it possible to say on occasion that a particular action has violated the applicable norm. Nevertheless, the distinction is significant. The rule of law tends to portray norms as more closely bound up with the practices they govern than does the ideal of law. Moreover, the rule of law lacks the emphasis of the ideal of law on universality. It views law less as a moral basis for the public life of the entire society, and more as the province of public institutions and officials. While the ideal of law suggests that the primary obligation of officials is to secure justice in society, the rule of law suggests that their primary obligation is to safeguard the integrity of institutions. While the ideal of law emphasizes the active role of the citizen in interpreting and applying the law, the rule of law emphasizes the passive role of the citizen in respecting and acquiescing in the commands of legally constituted authority. The rule of law is a conception of legality far more compatible with stability than the ideal of law.[217]

216. Examples of works dominated by the perspective of the rule of law are A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); MONTESQUIEU, THE SPIRIT OF THE LAWS (1748); Bickel, *Watergate and the Legal Order*, 57 COMMENTARY 19 (January 1974); Parsons, *supra* note 196. The contrast between the two points of view is particularly clear in Bickel's work on the Supreme Court, wherein the main theme is that the Warren Court naively concerned itself with the implementation of universal norms in society and betrayed its responsibilities to the canons of institutional propriety. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

217. This opposition can be resolved on the level of formal theory, but only at the cost of making theory irrelevant to experience. The theoretical reconciliation rests on the argument that the ideal of law can only be implemented in society through a specific institutional structure. *See* A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1959). For example, the notion of a right suggests both a substantive entitlement to engage in an activity or to receive a benefit in society, and an institution to enforce the entitlement. Thus, adherents to the rule of law usually argue that by supporting institutions they are supporting corresponding substantive entitlements. There is theoretical force to the argument. The problem occurs when the theorists argue that *existing* institutions accomplish such a reconciliation between substantive and institutional norms. In the first place, the argument ignores that many institutional principles (*e.g.*, finality, standing, default, and prosecutorial discretion) explicitly compromise substantive prescriptions. Second, it ignores the pervasive experience in societies committed to legal ideals of a tension between substantive legal norms and the commands of authoritative institutions. People constantly find that substantive ideals are violated by authoritative institutions and that the ideal of law requires that institutions be defied or transformed.

Opposing notions of legality, similar to what are here called the ideal of law and the rule of law, are sometimes discussed as distinguishing opposing schools of legal thought. Yet, each of the three versions of the Ideology of Advocacy is characterized by the presence of both notions and by a surface ambiguity which conceals the tension between them. The rhetoric of the Ideology generally refers to "law" and "legality" without distinguishing between the ideal of law and the rule of law. Yet, the substance of the discussion often seems to rely on distinct and incompatible frames of reference. Indeed, the basic structure of many discussions of legal ethics involves a tacit transition from the perspective of the ideal of law to that of the rule of law. This transition usually appears as a shift from substantive to procedural considerations.

Positivism focuses on the substantive law as a system of social order. Yet, when the issues of advocacy arise, procedure turns out to be the basic key to the system. Purposivism begins by portraying procedure as an instrument to the attainment of substantive ends, but when the issues of advocacy arise, it finds itself rationalizing the sacrifice of substantive concerns to maintain the integrity of procedural institutions. Ritualism puts procedure in the forefront at the outset, but only as a partner in a marriage of procedure and substance. Yet as the ritualist theory is elaborated, substance is rapidly collapsed into procedure.

In all three versions, procedure is generally associated with stability. Procedural principles such as finality and standing are explicit responses to the impotence of substantive law to check the persistence and proliferation of conflict. In fact, the entire system of judicial procedure, as described and rationalized in the Ideology of Advocacy, may be seen as a response to the need to accomodate law to stability.

The regime of adversary advocacy is designed to sublimate conflict so that the sacrifice of substantive ideals is not acutely felt. Conflict is diverted from its social setting, where resolution is problematical, into a stylized setting designed, like a classical dramatic work, to lead inevitably to some definitive termination. The termination may then seem appropriately final in terms of the formal structure of the artificial setting, rather than in terms of the original social setting of the dispute. Unlike substantive formalism, procedural formalism does not depend entirely on abstract reasoning, but rather it is implemented by a concrete artificial world of sets and role players. Professionals move the disputants into the stylized setting and encourage them to transfer their energies and frustrations from the social world to the world of procedure. As their participation is channeled in this fashion, the procedures absorb their energies and numb their frustration. Thus, at best, the disputants acquiesce in the translation of the dispute into procedural terms and see the decision as legitimate merely because of its formal properties. At worst, the exhaustion and numbing which result from this stylized participation diminish

their inclination to press their claims. Procedure enables them to "work out" their claims.[218]

As Lawrence Stone has noted in a discussion of the litigiousness of the Elizabethean aristocracy, the procedures worst designed to produce substantively legal or just results may be best suited to the task of conflict sublimation:

> From the point of view of the state the manifold inadequacies of the legal system had their advantages. So long as there was a remote prospect of ultimate victory, men would turn hopefully to the law as a weapon against their natural enemies. Once launched, the suit would with its complexity and prolixity consume their time, their energies, and their substance for years and years on end. The very deficiencies in the machinery of the law, its great cost, its appalling slowness, its obsession with irrelevant technical details, made it an admirable instrument for the sublimation of the bellicose instincts of a leisured class.[219]

The discontinuity which makes adversary advocacy so inadequate from the point of view of individuality is its principal strength from the point of view of stability. The design of adversary advocacy in terms of stylized aggression well serves the task of conflict sublimation. The client's own ends are reduced to crude pretexts for the standard partisan approach the lawyer takes on behalf of all his clients. The lawyer maneuvers the client into a role defined in terms of a formal, undifferentiated hostility. The client perceives the other party, not in terms of the other's concrete ends, but in terms of the formal, undifferentiated hostility which results from the other lawyer's partisanship. The litigant is discouraged from either considering his own ends or confronting those of the other party. The pre-condition of conflict—the mutual recognition of antagonistic wills—is thus precluded. The artificially stimulated aggression of adversary advocacy is sufficiently tractable to be channeled within the confines of a procedural pattern.

Adversary advocacy does not accomplish miracles. The typical losing party does not leave the trial with the feeling that, although the ends which he brought to the trial have been thwarted, he can still take satisfaction in the fact that he was given a "fair (that is, procedurally correct or elaborate) trial." He is not likely to feel that his day in court was an adequate substitute for the substantive benefit he did not get. Although this consideration is an important objection to the Ritualist claim that procedure is inherently satisfying, it does not substantially undermine the thesis that the regime of procedural justice functions to sublimate conflict. To sublimate conflict, it is not necessary that the

218. *See* Ball, *supra* note 137, at 107; Parsons, *supra* note 196, at 383.

219. L. STONE, THE CRISIS OF THE ARISTOCRACY: 1558-1641, at 117-18 (Galaxy ed. 1967); *see also* Parsons, *supra* note 196, at 383.

litigant be satisfied, but merely that his energies and expectations be redirected. The goal of stability may in fact be well served when the litigant is left bewildered and exhausted, even though unhappy. As the analysis of the game analogy suggests, the cynicism often bred by adversary advocacy is far less threatening to stability than the kind of appeal to law made by the petitioners in *Walker v. Birmingham*.

The contribution of the Ideology of Advocacy to stability does not lie solely in its ability to induce losers to accept their losses, but also in its ability to convince the winners of the legitimacy of their victories. It numbs doubts and anxieties which might lead the winners to re-examine and perhaps even challenge the practices from which they benefit. This effect is particularly important with respect to lawyers, who are among the biggest winners in the legal system. Lawyers tend to be wedded to established institutions and practices by self-interest, but many of them have the security and sophistication which might incline them toward criticism and change. By translating subversive substantive considerations into procedural ones, adversary advocacy dulls such inclinations.[220]

Procedural fetishism has become increasingly explicit in the Ideology of Advocacy. Procedural considerations appear in Positivism as an afterthought. They figure much more prominently in Purposivism, and they are explicitly dominant in Ritualism. This development reflects the growth of procedural fetishism generally in legal thought. As substantive legal doctrine has become increasingly politicized, as barriers once seen as separating substantive doctrine from the other academic disciplines and from social norms have fallen, lawyers have tended increasingly to think of the distinctive content of their discipline in terms of procedure. The claim that law is a specialized discipline, upon which lawyers' professional identity and organization rest, is often expressed in purely procedural terms.[221]

Some of the most important doctrinal developments of recent years are examples of the tendency to obscure conflict-threatening issues by focusing on procedure. The Jesuitical attention to criminal procedure of the Warren Court has diverted consideration away from fundamental doubts about the substantive bases for punishment, and about the character of existing penal institutions.[222] Similarly, attention to procedure in the area of government benefits has taken the place of attempts to

220. *See* Parsons, *supra* note 196; Tushnet, *supra* note 200, at 101; *cf.* Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1335-36 (1964) (adversary advocacy enables lawyer to represent poor without being "apologetic about his middle class background").

221. *See, e.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring) ("It is procedure that spells much of the difference between rule by law and rule by whim or caprice."); Freund, *Henry M. Hart, Jr.: In Memoriam*, 82 HARV. L. REV. 1595, 1596 (1969) (Hart viewed basic procedural considerations as a "kind of transcendent natural law, a law above laws, standing as the scientific process does to the mutable body of science itself").

222. *See* Griffiths, *supra* note 3, at 415-16.

confront growing doubts about the justice of the distribution of wealth.[223] Marc Galanter has analyzed a related phenomenon at the level of practice.[224] Efforts to provide legal services to the poor have focused on adjudication at the expense of organization-building, even though the latter promises more substantial benefits to the poor and is less conducive to lawyer-domination.[225]

Although procedural fetishism succeeds to a significant extent in sublimating conflict, it fails to reconcile stability and individuality. The Ideology of Advocacy begins by defending the ideal of law in terms of such values as autonomy, responsibility, and dignity, but ends by rationalizing practices which subvert these values, and hence any ideal of law which might embody them. The sacrifice of these values is a consequence of the effort to serve the pre-eminent goal of stability.[226]

Some level of stability is necessary to the benefits of society, but the cost of serving a goal of stability so shallow and fragile that it is threatened by any overt manifestation of conflict is great. Though conflict can jeopardize autonomy, responsibility, and dignity, some measure of conflict is essential to the development of these qualities. Individuality is a social phenomenon which develops through interaction with others, not merely the spontaneously cooperative interaction on which conservative jurisprudence and social theory focus, but friction-producing interaction

223. *Compare* Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) *with* Goldberg v. Kelly, 397 U.S. 254 (1970); *see also* Arnett v. Kennedy, 416 U.S. 134, 151-53 (1974). *Cf.* Reich, *The New Property*, 73 YALE L.J. 733 (1964). Reich's new property is defined largely in terms of the procedures which protect it. For an example in another area of the attempt to avoid difficult political issues by re-orienting doctrine toward procedural terms, see Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970).

224. Galanter, *supra* note 32; Galanter, *The Duty Not to Deliver Legal Services*, 30 MIAMI L. REV. 929 (1976).

225. There are, of course, important qualifications to the argument of this section. First, I do not deny that the rule of law and notions of procedural justice can make, and have made, contributions to individual autonomy, responsibility, and dignity, particularly by restraining the crueler and more arbitrary excesses of state power. *See* THOMPSON, WHIGS, *supra* note 208, at 264-69. Nor do I deny that the Warren Court's procedural reforms were progressive developments toward a more humane and just society. Procedural considerations are not irrelevant to individuality, and they are not simply an ideological facade. Nevertheless, when and to the extent that procedural doctrines obscure substantive consideratons, they obfuscate understanding and inhibit action in a manner which can subvert individuality and justice. Even when procedurally oriented reform is progressive, it can inhibit change which would be more progressive.

Second, the argument that the type of legal thought and experience represented by the ideal of law has an inherent potential for conflict is not intended to suggest that this kind of legality invariably tends to produce conflict, much less that it invariably leads to justice. Obviously, the ideal of law can, and does, serve stability. Its affinity for conflict is a potential one, and the extent to which this potential is activated depends both on the content of the substantive norms and on surrounding social circumstances. The purpose of the present argument is simply to suggest that lawyers, at some level of consciousness, increasingly have perceived this potential as threatening, and that the Ideology of Advocacy has been part of their response to it.

226. *See generally* GOULDNER, *supra* note 157, at 218-24; *but see* FULLER, *supra* note 25.

which can flare into conflict. A society which treats all conflict as a threat sacrifices individual development to conformism and impoverishes both self-expression and social relations.[227] In such a society, where officially sanctioned patterns of behavior are perceived as coercively imposed, they engender cynicism and frustration. Where they are spontaneously adopted, they narrow the individual's perception of the world and of his own possibilities.

Remarks about the dangers of conformism for individuality have been a commonplace in American thought for a long time, though they rarely acknowledged the extent to which individuality entails conflict. Legal thought has accorded a high position to the goal of individuality, but it has accorded an even higher one to the goal of suppressing conflict. Lawyers have created a role for themselves which requires that, when individuality is most at stake—that is, when it involves conflict—they implement its systematic suppression in the interests of stability. If legal thought were to take seriously such values as autonomy, responsibility, and dignity, it would be led to ask whether, contrary to the common assumption expressed by Hart and Sacks,[228] the health of a legal system might depend on its willingness to tolerate conflict, even the persistent, proliferating conflict which leaves open wounds on the body politic. To entertain such a notion would be to take a long step beyond the Ideology of Advocacy.

The very least that can be said in favor of such consideration is that it might lead to the elimination of a great amount of the disorder which is artificially generated by the Ideology of Advocacy. The present system encourages the prosecution of claims which would not be pursued by people who were forced to seriously confront their own and society's values. It also causes the prosecution of sincere claims by means, such as delay and procedural fencing, which would not be used if the litigants were forced to make their own choices as to whether particular procedural decisions were justified in the light of the substantive ends at stake.

However, the elimination of this type of disorder will not be enough to justify abandoning the Ideology of Advocacy. The most important claim to be made against the system of procedural justice is that it frustrates the resolution of conflict in terms that would preserve the ideals of substantive justice. It teaches litigants to regard substantive norms as strategic props in a contest defined by procedure. The litigant ceases to take seriously either his own claim or that of his opponent. There is thus no possibility that he will experience either a settlement or an authoritative decision as a reconciliation of his claim either with that of the other party or with a higher norm. A favorable termination is a lucky coinci-

227. *See generally* D. RIESMAN, THE LONELY CROWD (1950) [hereinafter cited as RIESMAN].
228. HART & SACKS, *supra* note 71.

dence; an unfavorable one is a "doom pronounced *ab extra*."[229]

Genuine reconciliation would be possible only through the growth or development of one or both of the parties. In a setting where a party was conscious of his responsibility to press his claims in terms of substantive justice, he would be open to growth and development. It would always be possible that he might be led, through interaction with the other, to take a different view of his original claim. Procedural justice closes the possibilities of growth and development by forcing litigants into roles of stylized aggression.

The case against adversary advocacy rests in substantial part on the conviction that the pursuit of conflict is often better than its sublimation, that conflict can unleash creative energies, that it can promote understanding and personal growth, and that it can even lead to the sharing of values needed for its just resolution.[230] It can be hoped that the struggle for substantive justice will produce cumulative benefits which will some day make the resolution of conflict in terms of shared norms of justice a matter of routine. However, at present, newly unleased conflict is bound to prove tenacious. Thus, the rejection of procedural justice would entail the belief that enhanced conflict itself would better vindicate the values of autonomy, responsibility, and dignity than the anesthetized acquiescence induced by the regime of the Ideology of Advocacy.

If the notion of stability as the pre-eminent social goal were abandoned, it would not seem necessary to sacrifice the ideal of law to the rule of law. As E.P. Thompson writes, "law has not only been imposed upon men from above: it has also been a medium within which other social conflicts have been fought out."[231] Law can be valued, not as a mechanism of dispute resolution, but as an "arena of conflict."[232] Freed from the monopoly of the legal profession, law might provide a mode of public discourse and a framework for political action. Law conceived as a set of transcendent and universal public norms expresses the values of individuality. This is not to say that a conception of law or even a set of legal institutions can guarantee autonomy, responsibility, and dignity. But law

229. HEGEL, *supra* note 201, at 145.

230. The notion that conflict is essential to the development of both individuality and genuinely shared social values is central to the thoughts of Hegel, Mill, and some versions of psychoanalysis. *See, e.g.*, E. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968) (on personal growth and creativity in the identity crisis); G. HEGEL, THE PHENOMENOLOGY OF MIND 228-240 (Torchbook ed. 1967) (on the attainment of freedom through the master/slave relation); H. MARCUSE, EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD 87-88 (Vintage ed. 1961) (on the development of individuality through Oedipal conflict); J. MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 102-152 (Everyman ed. 1950) (on the attainment of, *inter alia*, moral truth through differences of opinion). For a recent defense of conflict and a critique of its sublimation in various areas of social policy and practice, see R. SENNETT, THE USES OF DISORDER (1970). *See also* the critical account of the sublimation of politics in modern social theory in S. WOLIN, POLITICS AND VISION ch. 10 (1960).

231. THOMPSON, WHIGS, *supra* note 208, at 267.

232. *Id.* at 264.

can inspire and shape efforts which may advance these values.[233] The gaps and indeterminacy of the law are not obstacles to this effort. They make room for creative effort and struggle. Nevertheless, it would remain possible that if conflict should lead to resolution, to genuinely shared values, then the gaps could be filled and indeterminancy lessened.

Incarcerated in the Birmingham jail for violating the injunction ultimately upheld in *Walker*, Martin Luther King reflected on the choice of the liberal middle class between stability and conflict, the ideal of law and the rule of law, and wondered whether "the Negro's great stumbling block in the drive toward freedom is . . . the white moderate who is more devoted to 'order' than to justice, who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice."[234]

VI. CONCLUSION: NON-PROFESSIONAL ADVOCACY

> *Is the inside-dopester an enemy, with his sympathetic tolerance, but veiled lack of interest, and his inability to understand savage emotions? Are they enemies, those friends who stand by, not to block but to be amused, to understand and pardon everything? An autonomous person of today must work constantly to avoid shadowy entanglements with this top level of other-direction—so difficult to break with because its demands appear so reasonable, even trivial.*
>
> David Riesman[235]

Showing that the Ideology of Advocacy is incoherent in theory and destructive in practice is not the same thing as showing that it should be abandoned. It remains to be shown that there is a more satisfactory alternative. There is an alternative implicit in the critique of the Ideology of Advocacy. The alternative can be called "non-professional advocacy." Although this essay cannot show conclusively that non-professional advocacy would prove more satisfactory, it can suggest the issues involved in the decision whether or not to adopt it. The choice between the Ideology of Advocacy and non-professional advocacy rests on one's view of the relative priorities of individuality and stability, and of the prospects

233. *See* Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC. REV. 529, 545-69 (1977) [hereinafter cited as Trubek]. On the value of differentiated modes of discourse and interaction to individuality and to effective political action, see R. SENNETT, THE FALL OF PUBLIC MAN (1977).

The argument here is in some respects analogous to Theodore Lowi's critique of "pluralism." T. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1969). Lowi urges the abandonment of interest group pluralism, a legislative version of procedural justice in favor of the ideal of law, although because of his somewhat naive attitude toward formalism, he does not fully acknowledge the issue of conflict.

234. King, *A Letter From Birmingham City Jail* in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 79 (Bedau ed. 1969).

235. RIESMAN, *supra* note 227, at 256-57.

of reconciling the tension between them.[236]

Non-professional advocacy is difficult to describe with precision, but it is not at all mysterious. On the contrary, it relies on a style of thought and conduct with which everyone has at least some familiarity. The foundation principle of non-professional advocacy is that the problems of advocacy be treated as a matter of *personal* ethics. As the notion is generally understood, personal ethics presupposes two ideas diametrically opposed to the foundation principles of the Ideology of Advocacy. First, personal ethics apply to people merely by virtue of the fact that they are human individuals. The obligations involved may depend on particular circumstances or personalities, but they do not follow from social role or station. Personal ethics are at once more particular and more general than professional ethics. On the one hand, they require that every moral decision be made by the individual himself; no institution can define his obligations in advance. On the other hand, the individual may be called upon to answer for his decisions by any other individual who is affected by them. No specialized group has a monopoly which disqualifies outsiders from criticizing the behavior of its members. Second, personal ethics require that individuals take responsibility for the consequences of their decisions. They cannot defer to institutions with autonomous ethical momentum.

236. The principal thrust of the present argument is that adversary advocacy is incompatible with the norms of individuality to which it appeals. An alternative critique of the Ideology of Advocacy could be constructed on the basis of norms of community. *See* Griffiths, *supra* note 3. Such a critique would not necessarily be inconsistent with the present argument.

Individuality and community are best viewed, not as opposing norms, but rather as interdependent aspects of what Unger calls the Paradox of Sociability. UNGER, *supra* note 25, at 215-17. The notion of individuality depends on the norms of community because individuality is a social phenomenon. Because an individual's sense of self depends on recognition by others, individuality can flourish only in a community committed to the autonomy, responsibility, and dignity of each of its members. At the same time, the notion of community depends on the norms of individuality because it implies voluntary commitment to the values which are the basis of the community, and voluntary acceptance of membership in the community. For the members to exercise the voluntary choice necessary to form a genuine community, their capacities as individuals must be developed.

Thus, the notion of individuality discussed here implies a complementary rather than an antagonistic notion of community. For instance, I will suggest below that a style of advocacy which seriously respected individuality would be more likely to promote mutuality and altrusim in the judicial process than partisan advocacy. This is because people actually do hold communitarian values which partisan advocacy represses. To the extent that individuals do hold communitarian values, a style of advocacy which respected the litigant's own values and permitted him to act on them would promote both individuality and community. Moreover, even where they do not hold such values, a style of advocacy which respected the individual's capacity for personal growth would make possible the development of such values.

It may be objected that the notion of individuality discussed here is not the same one assumed by the Ideology of Advocacy. The objection is possible because the writing on partisan advocacy contains no analysis of the norms of individuality which it constantly invokes. But to be persuasive, the objection would have to elaborate an alternative notion of individuality which would be a plausible basis for an ethical or legal theory, and which would be consistent with the prescriptions of the Ideology of Advocacy. It seems unlikely that this can be done. *See generally* UNGER, *supra* note 25, at 211.

Personal ethics involve both a concern for one's own integrity and respect for the concrete individuality of others.[237] The non-professional advocate presents himself to a prospective client as someone with special talents and knowledge, but also with personal ends to which he is strongly committed. The client should expect someone generally disposed to help him advance his ends, but also prepared to oppose him when the ends of advocate and client conflict. If the two sets of ends coincide, then a strong alliance on behalf of these ends is possible. If the two sets of ends are irreconcilably opposed, then no relationship will be possible. It is essential that neither advocate nor client feel strong pressure to accept the other. Between the extremes of an alliance on behalf of entirely shared ends and a situation in which no relationship is possible, there is a broad category where one party will be able to win over the other to his position of where the parties will work out a compromise.

Non-professional advocacy does not preclude conflict. Conflict is possible both inside and outside of the relationship. Where their ends are opposed, the advocate may engage in conflict with the client (although

237. The concern for both one's own integrity and the integrity of others makes personal ethics somewhat problematical. It raises difficult questions in situations where one's own ends and the ends of others conflict. As I will suggest below, one of the ways in which personal ethics deal with such situations is by referring to social norms and institutions such as those associated with law. Conceived in this way, personal ethics differ from two other alternatives to professional ethics: radical individualist ethics and radical politicization.

Radical individualist ethics hold that moral decisions should be a matter of entirely autonomous, independent, and self-conscious choice by the individual decision-maker. *See, e.g.*, SARTRE, *supra* note 61; J. SARTRE, SAINT GENET (Frenchtman trans. 1963). From this point of view, social norms and institutions, and even the concrete ends of other people, are at best irrelevant and at worst oppressive constraints on the moral freedom of the individual. The radical individualist approach is unsatisfactory because it fails to take adequate account of the social dimension of individuality. Because the individual's sense of self depends on recognition by others, individuality depends on social relations. To a significant extent, individuality can only be expressed in terms which are meaningful to others. A person whose ethical choices were entirely independent of social norms and the ends of others could not have a coherent moral personality. See R. JACOBY, SOCIAL AMNESIA: A CRITIQUE OF CONFORMIST PSYCHOLOGY FROM ADLER TO LAING chs. 3, 5, 7, (1965) [hereinafter cited as JACOBY]; UNGER, *supra* note 25, at 215-22.

The approach of radical politicization holds that moral decisions should be entirely instrumental to the establishment of a new social order. *See generally* Lukacs, *Legality and Illegality*, in HISTORY AND CLASS CONSCIOUSNESS (Livingstone trans. 1971). From this point of view, existing social norms and institutions and the concrete ends of individuals are merely reflections of the injustice and repressiveness of the existing order. Moral decision on the basis of personal ethics must await the establishment of the new order. This view suffers from the defects of moralities of the long run. *See* text accompanying notes 123-27 *supra*. It treats existing norms, institutions, and personal ends as means to future ones, and hence collapses process into result. The problems of justice and freedom must be confronted in the course of social change; they cannot be deferred to an idealized future order. Moreover, the radical politicization approach ignores the extent to which the ideals for which it strives are themselves rooted in existing social norms and institutions and the concrete present concerns of individuals. To a significant extent, the realization of these ideals may require the resolution of problems and contradictions within the existing order. In relying solely on a vague idealized negation of the existing order, radical politicization begs the questions presented by these problems and contradictions. *See* UNGER, *supra* note 25, at 181-89, 250-52; Trubek, *supra* note 233.

obviously any large measure of conflict will end the relationship). Where their ends are shared, advocate and client may join together to engage outsiders in conflict. On the other hand, non-professional advocacy does not presuppose conflict any more than it presupposes the stylized aggression of the Ideology of Advocacy. The advocate may lead the client to modify or abandon a collision course so as to make voluntary, informal resolution possible. Indeed, one of the most important effects of non-professional advoacy should be to increase the client's concern for the impact of his conduct on others, and to enlarge the minimal role which norms such as reciprocity and community now play in attorney-client decisions.

If the major foundation principle of non-professional advocacy is that advocacy be deemed a matter of personal ethics, the major principle of conduct is this: advocate and client must each justify himself to the other. This justification need not embrace the person's entire life, but merely those aspects of it which bear on the dispute. Each must justify the goals he would pursue and the way he would pursue them. In this manner, the advocate-client relation is reconstructed in each instance by the participants themselves. It is not set in advance by formal roles. Such relationships will sometimes arise spontaneously, but they will often arise only after patient, step-by-step efforts. Advocate and client may become friends, not in Fried's sense, but in the more familiar sense of an intimacy made possible by shared ends and experience. Yet, friendship is not necessary to the relationship. The basic requirement is that each have respect for the other as a concrete individual. In addition, some sharing of ends will be necessary, but this sharing need not approach a complete coincidence of ends.

Trust is an important value in non-professional advocacy.[238] But it is not a formal, definitional property of the advocate-client relation. It is a quality which the parties must create or fail to create in each instance. When confidentiality may be important to the client, advocate and client should arrive at some understanding at the outset concerning this issue. The scope of confidentiality need not be defined for the entire relation at the outset. It can be defined in stages as lawyer and client gain greater understanding of each other. The client's claim to assurances of confidentiality is a strong one, and once assurances have been made, his claim that

238. The goal of trust does not arise, as Freedman and Noonan suggest, from the requirements of the legal system. Nonprofessional advocacy cannot justify confidentiality as protecting the client's capacity to invoke formal procedural rights. Nor can it accept the premise that confidentiality will enhance the capacity of the legal system to produce substantively desirable results. However, as Fried comes close to suggesting, the value of trust is implicated in any situation in which a dependent person seeks the help of another. The priority of confidentiality does not arise from the specifically legal character of the client's need, but simply from the facts that he has a need, and that he seeks the advocate's help. Legal norms will probably weigh against confidentiality more often than they will support it.

they be honored is much stronger still. Yet, these claims must be viewed in the context of other, potentially conflicting values. They must be considered in the context of the specific ends which the client seeks to further. The claim of a client who seeks legal services to exploit or oppress another cannot have the same priority as the claim of one who seeks to escape exploitation and oppression. This approach to the problem of confidentiality means that the client must take a risk in seeking an advocate, and that the advocate-client relation will sometimes end in betrayal.[239] This element of risk is inherent in any effort by lawyer and client to come to terms with each other as concrete individuals. It is in part because of this risk that trust, when it is created, can be a vital and concrete psychological reality rather than an empty, formal claim.

The non-professional relation is quite different from the "helping" or "accepting" lawyer-client relation described by recent writing which draws on the concepts and jargon of existentialist psychotherapy.[240] This writing is valuable because it recognizes that the task of understanding the client's ends is a difficult one, and that the client's consciousness of his own ends is shaped in the lawyer-client relation. It also acknowledges, at least partially, that the lawyer's posture of detachment can threaten, rather than safeguard, the client's autonomy. Yet, the relation of relatively intimate, sympathetic, and personal involvement prescribed by the psychotherapists is unsatisfactory. Although these writers purport to be concerned with respecting the client's concrete individuality, the style of practice they propose will often be more of a threat to it than traditional advocacy. As they describe him, the lawyer claims to be dedicated to his client's concrete individuality, but he does not present *himself* to the client as a concrete individual. Individuals have ends about which they care deeply. Even the most tolerant individual cannot view everyone's ends with the same undifferentiated sympathy. Yet, the psychotherapists seem to contemplate that the same homogeneous acceptance be dispensed

239. Since this statement is likely to outrage the pious professional more than any other, two points should be made to put it in perspective. First, even hard-line professional defenses of confidentiality contemplate some situations in which the lawyer will betray his client. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(C)(3) (when client intends to commit crime); *id.* at DR 4-101(C)(4) (when client fails to pay fee). Second, most professional defenses of confidentiality rest on a moral formalism and absolutism which most people, including even most lawyers, reject in other areas of moral decision. The contradiction is strikingly evident in Freedman's work. *See* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975). Freedman fully appreciates the defects of formalist, absolutist moralities when it suits his purposes. He rails at length against "legalist-anti-utilitarian" moral views, which he associates with Kant, in arguing against people like Chief Justice Burger who assert that lawyers should never participate in the deception of the trier. *Id.* at 46-47. Yet, Freedman's own defense of confidentiality is quintessentially legalistic, anti-utilitarian, and Kantian in precisely the sense he rejects in Burger's argument. *See id.* at 1-5.

240. Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5 (1975); Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98 (1969); *see also* Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975). For a critique of the psychological literature on which these articles draw, see JACOBY, *supra* note 237, at chs. 2-3.

indiscriminately to the exploiters and the exploited, the creative and the destructive, the smug and the despairing. No individuality of any depth could be expressed through such an attitude.

A relation defined in advance in terms of acceptance is more likely to be a relation of bureaucratic impersonality than one of respect and understanding.[241] It is doubtful that either lawyer or client would achieve a heightened understanding of the client's ends in a relation of this kind. The fact that the lawyer withholds or denies his private ends, while he seeks to ascertain his client's, undermines the credibility of his claim of loyalty to the client. The lawyer's posture of selflessness often will seem either false and hypocritical, or a defensive retreat to the refuge of role. In either event, the client will be led, as Goffman suggests, to retreat himself rather than, as the psychotherapists predict, to open himself to understanding by the lawyer. Moreover, the psychotherapists ignore that tension and even conflict is often essential to the growth of both self-consciousness and mutual understanding. The flaccid, undifferentiated sympathy so extravagantly dispensed by the psychotherapists may discourage precisely the kind of doubt, questioning, and reflection which would best enhance the client's understanding of his own ends. Non-professional advocacy must recognize that a relation of respect and understanding between autonomous individuals can rarely be an entirely accepting relation.[242] Respect and understanding will often depend more on resistance than on acceptance.

One of the most important questions raised by non-professional advocacy concerns the bases for the establishment of a relationship in the absence of a coincidence of ends. The question is not as difficult as it initially appears. In the first place, in many situations in which ends are not shared, there will not be opposition, but merely indifference. In these situations, there will be a large range of courses of action on which the parties will be able to agree. In the second place, even in those situations in which ends are actually opposed, there are a variety of quite familiar bases for compromise. These are the formal values of liberal theory, such as reciprocity, promise keeping, the ideal of law, and the ideal of representative government. These values do not provide a precise, objective, neutral mechanism for the resolution of differing ends. Moreover, they can never be dispositive by themselves. However, as values, they will often provide a substantial basis for an alliance between people with

241. *Cf.* RIESMAN, *supra* note 227, at 307-325 (on "false personalization").

242. Although the advocate-client relation will rarely assume the intimacy of friendship, Nietzsche's remarks about friendship are pertinent to it:

> If one wants to have a friend one must also want to wage war for him: and to wage war, one must be *capable* of being an enemy.
>
> In a friend one should still honor the enemy. Can you go close to your friend without going over to him?
>
> In a friend one should have one's best enemy. You should be closest to him with your heart when you resist him.

NIETZSCHE, *supra* note 175, at 168.

differing concrete ends. Consider, for instance, the ideal of law. The ideal of law has taken a battering in recent years, but it is still alive. We do not always know what the law says, and we sometimes feel that what it says is unjust. But there are many situations in which we do know what the law says and have no reason to think it unjust. At least in these situations, many people still feel that the ideal of law does have independent moral authority, that it can still provide a reason for doing something even when it conflicts with many more concrete ends. Thus, where the lawyer is convinced that the claim against his client is unsupported by law, or that his client's claim against another is supported by law, the ideal of law will often provide a basis for association even in the absence of a sharing of more specific, concrete ends.

Although non-professional advocacy rejects the determinative role of procedural considerations in the Ideology of Advocacy, it does not ignore procedural values entirely. The non-professional advocate recognizes that the *way* in which a dispute is settled or a decision made can be a matter of importance. In particular, he recognizes the strong value of assuring the client an opportunity to attempt to explain or justify himself publicly. Moreover, the non-professional advocate may encounter situations in which he feels that he cannot effectively assess his client's position, and thinks that a judge or jury would be in a much better position to do so after an adversary hearing.

Such procedural considerations provide a further basis for accommodation between parties with opposing ends. The non-professional advocate should take them very seriously. He does not, however, regard them in the same manner as the Ideology of Advocacy does. First, he will never consider them independently of the substantive legal and moral values involved. Unlike Freedman and Noonan, the non-professional advocate cannot answer any of the "three hardest questions" without knowing the nature of the result to which his decision is likely to lead. Second, the non-professional advocate considers procedural considerations as they arise in each case. He refuses to assume that such considerations are necessarily present in every case, or that when present they will invariably be advanced by any particular mode of conducting the case. The value of enabling the client to explain and justify himself in public is implicated only when the client sincerely wants to explain or justify himself and proposes to do so. The utility of adversary advocacy in facilitating informed decisionmaking is relevant only when there is some reason to believe that the truth is not clear, and that the judge will be in a better position to decide after a trial than the advocate is now. Neither of these procedural considerations can ever justify attempts to exclude probative evidence, to discredit testimony which is not misleading, or to engage in any of the routine procedural tactics designed to obfuscate rather than clarify the issues. There may be other considerations which would justify such actions, but they must be identified and considered in

each case along with the competing considerations which favor the exposure of truth.

So far in this essay, the terms procedural justice and procedural values have been used to refer to norms associated specifically with the judicial process. The terms can also be used to refer to a more general notion which is also relevant to non-professional advocacy. This is the notion of a legitimacy or fairness arising from equality of access and participation in the society as a whole. Where there is substantial inequality and the lawyer can assist the relatively powerless to a greater measure of access and participation, this general notion of procedural justice will often provide a basis for advocate-client relationships in the absence of shared substantive values. The general notion of procedural justice will have a particularly strong claim on the advocate where his prospective client has little or no prospect of finding another advocate. In such situations, given the drastic inequality of power between lawyer and client, it will be unusually difficult to work out a genuinely voluntary relationship, and there is a great danger that the lawyer's insistence on his substantive ends may force the client to compromise his own in order to secure some measure of access and participation. For this reason, many who reject the determinative role of the specific notion of procedural justice contend that the general notion should be the exclusive basis of the advocate-client relationship, at least where the client is among the relatively powerless. From this line of thought, a modified version of the Ideology of Advocacy has emerged in the field of public interest law.[243]

Yet, non-professional advocacy cannot regard general procedural considerations as exclusively determinative of the advocate's ethical obligations even within the area of representation of the powerless. The importance of substantive considerations is most apparent in situations where the oppressed client proposes a course of action which will injure others who are equally powerless. In such situations, the public interest lawyer's appeal to procedural justice as a basis for representation is self-contradictory. He first commits himself to his client on the basis of his belief that institutional processes do not operate fairly, and then rationalizes the harm he does to others by asserting that institutional processes should be relied upon to protect their interests. Moreover, even where the client's course of action does not implicate the interests of other oppressed people, the interests of the client's own autonomy, responsibility, and dignity will sometimes require that the advocate insist on his own substantive ends.[244]

243. *See* Comment, *The New Public Interest Lawyers, supra* note 7, at 1110-37.

244. Although public interest lawyers are generally more sophisticated than conventional lawyers about client autonomy, they tend to commit the error of the Ideology of Advocacy in assuming that the lawyer's detachment from the client is the best guarantee of this autonomy. Thus, public interest lawyers warn their colleagues not to become politically involved with their clients. *Id.* at 1124 (citing to the California Rural Legal Assistance guidelines). They exhort lawyers to leave their "middle-class values" at home and to submit

Thus, non-professional advocacy rejects the foundation principles of professionalism and procedural justice entirely. Its response to the principles of conduct of the Ideology of Advocacy is more complex. The most important objections to the Ideology of Advocacy are addressed not to either of the principles individually, but to the stylized aggression which results from their combination. Non-professional advocacy rejects the notion that the advocate-client relation must invariably be characterized by both partisanship and neutrality, but it does not rule out the possibility that either principle might sometimes be relevant. There may be situations in which the non-professional advocate will find it appropriate to present to a tribunal a claim to which he is not willing to commit himself personally. And there may be situations in which he will find it appropriate to present a claim aggressively even to the point of engaging in obfuscation or deception. Yet, from the point of view of non-professional advocacy the two principles appear, not complementary, but antagonistic. Where the advocate is not committed to the cause of the client, aggressive methods will almost always seem improper. The non-professional advocate is likely to regard a strong commitment to a claim as a necessary condition to the use of such methods.

To a significant extent, non-professional advocacy avoids the critical problems of the three versions of the Ideology of Advocacy. The critical problems of Positivism are, first, that the advocate's conduct generates disorder throughout the legal system and the society because of the

to their clients' decisions and values. *See* Cahn & Cahn, *supra* note 72. They insist that for the lawyer to introduce his own substantive ends with any force into the relationship would be elitist or paternalistic. These views are fundamentally mistaken.

In the first place, the attitudes expressed toward "middle-class values" are inconsistent. Although the public interest theorists rarely specify these values, they often appear to have in mind conventional views on topics such as sex, honesty, and private property. Yet, the value of procedural justice is as middle class as any other value. *See* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 186 (1962). Moreover, the attitude of diffidence toward one's own values, and of reluctance toward personal commitment, is also distinctively middle class. *See generally* RIESMAN, *supra* note 227, at chs. 5, 9. The public interest proponents do not hesitate to insist that this middle-class value and this middle-class attitude be incorporated into the advocate's role. They do not hesitate because they do not see this value and this attitude as impositions on the client. But, as this essay has tried to show, the lawyer's procedural values and his attitude of detachment do affect the way the client sees his situation, and thus can limit his practical options and subvert his autonomy.

In the second place, the public interest proponents fail to see that, far from guarding against elitism, their insistence on the lawyer's independence reflects an elitism of its own. The public interest lawyer assumes that the client should remain mired in the limitations of self-interest or class-interest while he himself is struggling to reach a higher moral plane which transcends egoistic and class orientations. *Cf.* F. NIETZSCHE, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 523 (Kaufmann ed. 1954) (arguing that the detached person is more exploitative than the political manipulator: "Perhaps he even wants a worse advantage: to feel superior to other human beings, to be able to look down on them, and no longer to mistake himself for one of them.").

In the actual practice of public interest law, the principle of procedural justice may be less destructive than it could be because it is frequently ignored. One suspects that public interest lawyers allow substantive considerations to enter into their practical decisions much more than they acknowledge in their theoretical discussions.

problems of enforcement and access; and second, that the advocate usurps the client's autonomy by redefining his situation in terms of procedural justice and forcing him to adopt the mask of the "bad man." Non-professional advocacy promises to mitigate, and perhaps even to resolve, the difficulties of enforcement and access. It mitigates the problem of enforcement by discouraging litigants from pressing insincere claims, and from pursuing sincere claims through the exploitation of obfuscatory and dilatory procedural devices. It mitigates the problem of access by encouraging the lawyer to consider concrete substantive and distributional norms in deciding where to commit his services. The effectiveness of non-professional advocacy in these respects depends in large part on the emergence of genuinely shared norms of fairness. At the least, non-professional advocacy makes possible the development of such norms and their incorporation within the legal system.

Second, the non-professional advocate can give his client advice which will enhance, rather than subvert, the client's autonomy. The non-professional advocate does not deny himself access to his client's ends. When there is sympathy and a sharing of values between lawyer and client, the lawyer's ability to consult his own ends, far from creating a risk of oppression, makes possible greater understanding of the client's position. Even when there is no sympathy, the non-professional advocate has an advantage. For he can engage his client in conflict; and conflict, even when unresolved, can lead to a greater depth of understanding between the participants than the stylized tolerance of the professional advocacy relation. Moreover, the non-professional advocate is less likely to dominate his client because he presents himself as an ordinary individual rather than as a manifestation of disembodied expertise. Thus, the client is aware of the contingency of the lawyer's definition of the situation. He does not see the lawyer as a component in a system of autonomous procedural institutions. He need not forget either that there is a broad range of choices open to him or that the actions which the lawyer takes on his behalf represent choices he (the client) has made and for which he is responsible.

The critical problems of Purposivism are, first, that the lawyer is a prisoner of various specialized perspectives which prevent him from seeing where the interests with which he is immediately concerned connect or conflict with other interests; and second, that the lawyer undermines the moral authority of social norms by encouraging the client to regard them as facts and to treat them instrumentally. Non-professional advocacy could avoid both problems. First, the non-professional advocate does not take any artificially limited view of his client's situation. He brings the full range of his understanding to bear on the issues. Second, the non-professional advocate represents, and puts forth, social values to the client to the extent that he (the advocate) himself holds these values. He may not require that his client adhere to them, but he will at least

make the client aware of these values *as* values, not facts. Where social values are genuinely shared, and the client has some intuition of them, the lawyer's role will strengthen rather than undermine the client's commitment.

The critical problems of Ritualism are, first, that it celebrates a ceremony of individual dignity which contradicts the litigant's own experience of the trial as oppressive and manipulative; and second, that it ignores the client's fundamental concerns about the practical consequences of formal proceedings on his life. Non-professional advocacy eschews role playing and procedural formalism. It discourages the client's passive reliance on the lawyer, and encourages the client to take an active role in the conduct of his case. The non-professional advocate does not regard any particular procedures as intrinsically valuable, and he does not tend to push his client into any particular *mise-en-scène*. Moreover, non-professional advocacy insists on the significance of outcomes. It refuses to assess procedural options independently of the outcomes they produce.

Thus, non-professional advocacy has the critical virtue of preserving continuity of moral experience in the judicial process. The process still involves certain patterns of change. The formality of interaction increases as the dispute progresses. Certain procedural values may play a more important role in the later stages of the dispute. Yet, the basic terms of the dispute remain the ends of the individuals involved. The disputants need not lose sight of these ends or of the significance of their actions in relation to them.

Although non-professional advocacy could greatly alleviate the problems of adversary advocacy, it could not solve them alone. The problem of discontinuity stems from the specialization of the legal system. The ethical orientation of the Ideology of Advocacy is one of the most important aspects of this specialization, but it is not the only aspect. The prevailing patterns of the regulation of law practice, the practices of the courts, and the style and substance of legal rules and doctrine all promote specialization. All contribute to the alienation of the citizen from the law and to the weakening of his capacity for autonomous participation in the legal system and in society. The resolution of the problems which underlie adversary advocacy would require, in addition to a change in the attitude and style of practice by lawyers, a change in the structure of the legal system. The principles which support non-professional advocacy also support institutional reforms which would break down the professional monopoly over advocacy and other legal tasks, restructure courts and political institutions to enhance the ability of laymen to participate actively, and make legal rules and doctrine more accessible to ordinary citizens.[245]

245. A variety of such de-professionalizing reforms have been considered. Some focus

Yet, it seems unlikely that reform will ever completely abolish the problem of discontinuity. Ideally, everyone should be his own advocate, but this ideal does not seem capable of realization. The very existence of the occupation of the advocate pre-supposes some measure of alienation from law. Unlike the professional, the non-professional advocate can reduce, rather than aggravate, this alienation. Yet, except where advocate and client can develop a relation of genuine understanding and fraternity, he will not eliminate it. Except where the relation is based on shared substantive ends and experience, the client's dependence on the advocate will compromise his autonomy. It is important to recognize that, like the

---

on breaking down the professional monopoly over advocacy by: (1) lowering or eliminating the licensing requirements for law practice generally or for specific legal tasks (*see* Ehrlich & Schwartz, *Reducing the Costs of Legal Services: Possible Approaches by the Federal Government*, in KAUFFMAN, *supra* note 24, at 583-87 [hereinafter cited as Ehrlich & Schwartz]); (2) training non-lawyers to serve as advocates (*see* Lufler, Trubek, & Greenberg, *Meeting Legal Needs Without Lawyers—An Experimental Program in Advocacy Training*, (Center for Public Representation, Madison, Wis. 1977) [hereinafter cited as *Meeting Legal Needs*]; Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1055-59 (1970) [hereinafter cited as Wexler]); (3) giving non-lawyers authority to regulate the legal profession, for example, non-lawyers on disciplinary boards, legislatively promulgated ethical codes (*see* KAUFFMAN, *supra* note 24, at 522-23); and (4) reforming legal education to eliminate the emphasis on indoctrination in professional ideologies (*cf.* Stone, *supra* note 71).

Other possible reforms focus on decreasing dependence on legal services by institutional changes such as: (1) increasing lay instruction about law on both academic and practical (i.e., "do-it-yourself") levels (*see The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976) (student project); *see also* Wexler, *supra* this note); (2) requiring judges and court personnel to be more accomodating to *pro se* representation (*see* Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1663-75 (1969) [hereinafter cited as Note, *Persecution and Intimidation*]; (3) allowing represented litigants to participate actively with their lawyers in conducting their cases, for example, by examining witnesses or addressing the trier (*but see* Annot., 67 A.L.R.2d 1102 § 3 (1959); Annot., 77 A.L.R.2d 1233 § 4 (1961)); (4) instituting new procedures to facilitate *pro se* representation or establishing informal forums designed specifically for *pro se* assertion of claims (*see* Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC. REV. 675 (1975); Note, *Persecution and Intimidation, supra* this note); and (5) re-orienting efforts to provide legal services to the poor away from litigation and toward organizing people to pursue their claims in the political process (*see generally* Galanter, *supra* note 32).

Still other possible reforms focus on decreasing the dependence on legal services by changes in rules and doctrine: (1) clarifying and simplifying the organization and language of legal rules and doctrine (*see* Bloomfield, *William Sampson and the Codification Movement*, in AMERICAN LAWYERS IN A CHANGING SOCIETY: 1776-1876 ch. 3 (1976); Ehrlich & Schwartz, *supra* this note, at 587-89); and (2) re-orienting the content of rules and doctrine away from specialized technical considerations, for example, from institutional formalism, toward social norms (*cf.* Arnold, *supra* note 203; Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

The specialization of the law is not an autonomous phenomenon. The legal system is in large part a function of the larger social structure, and it could be transformed effectively only in connection with the transformation of other social institutions. Thus, the success of the reforms listed above would require that they lead to, or be accompanied by, further reforms designed to reduce alienation and enhance participation in other social institutions. *See* UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 143-47, 176-81, 238-42 (1976); Galanter, *supra* note 32; Trubek, *supra* note 233.

soldier's, the advocate's occupation arises from social imperfection. This imperfection may be inevitable, but it is important that the advocate not feel that he has a vested interest in it. If the non-professional advocate is to perform his job, he must be willing and even anxious to work to diminish the power and importance of his own role in order to enhance the client's autonomy. For this reason, it may be desirable for the non-professional to be a part-time advocate, one whose primary means of livelihood is in some activity other than advocacy.[246]

The rejection of the Ideology of Advocacy in favor of non-professional advocacy would not guarantee progress toward the realization of the values of individuality in the legal system. Non-professional advocacy is a necessary, but not a sufficient, condition for the realization of these values. Progress toward this goal would depend on the particular ends which people brought to the judicial process, and on the extent to which the conflict unleashed by non-professional advocacy led to the enhanced sharing of concrete ends necessary to a social order in which individuality can flourish.[247] The change would thus require a certain amount of optimism, but if lawyers were seriously committed to the values of individuality, they could do no better than to abandon their professionalism.

This brief suggestion of the nature of non-professional advocacy leaves many problems to be worked out in theory and in practice. For the present, it will be sufficient to anticipate two of the more prominent objections with which the basic proposal will be met.

First, it will be argued that non-professional advocacy will make it more difficult or impossible for many to secure an advocate. Lawyers will decline to represent at least some people whose values they do not share. Those with unpopular views may thus find themselves without representation. Moreover, people will be unwilling to consult lawyers or to confide in them for fear of oppression or betrayal. Contentions such as these are among the oldest and most common arguments on behalf of professional ethics. One answer to them is that they are beside the point. Since the principal thrust of the critique of the Ideology of Advocacy is to show the destructiveness of legal services as they are now rendered, the possibility that reform might diminish the availability of legal services is hardly a disadvantage. Even if it were a disadvantage, it would seem plausible that it would be outweighed by the qualitative improvement which non-professional advocacy would bring.

There is a further answer to these contentions. The parade of horribles which they put forth as the hypothetical outcome of hypothetical reform is in fact precisely the situation which obtains *now* and which has obtained for the past century under the hegemony of the Ideology of

246. *See Meeting Legal Needs, supra* note 245.
247. *See generally* UNGER, *supra* note 25, at 183-85, 242-53.

Advocacy. There is now a wealth of empirical studies which confirm what most laymen have always known: only a tiny minority, composed almost entirely of the wealthy and the powerful, is assured or ever has been assured substantial access to legal services. The majority of the public distrusts and dislikes lawyers and seeks their help, if at all, only in connection with a few types of routine transactions or in desperate situations as a last resort. This distrust is well grounded; lawyers commonly pursue self-interest at the expense of their clients' interests.[248] The history of the profession mocks the contention that there is any connection between the Ideology of Advocacy and the adequate provision of legal services. In this dismal situation, the risks of reform are slight. At best, the abandonment of professional ethics, by broadening the lawyer's ethical perspective, will lead to a more equitable distribution of services than now exists. At worst, it is difficult to see how it could produce a less satisfactory situation than now exists.

Second, it will be objected that non-professional advocacy puts an unrealistically large moral and psychological burden on the lawyer. The constant responsibility for the consequences of his efforts on behalf of so many others with varying ends will generate a "role strain" which will make non-professional advocacy intolerable for lawyers.[249] The often voiced premise of this criticism—that the lawyer's conditions of work involve greater responsibility or ethical pressure than others—seems wrong. Most occupations involve, directly or indirectly, constant, and often intimate and confidential, dealings with strangers which implicate moral responsibilities. The real difference between the position of the lawyer and that of, for instance, the corporate bureaucrat lies not in the greater pressure on the lawyer, but in his greater freedom. The autonomy of the lawyer should not be exaggerated. Most lawyers work under conditions of bureaucratic routine. Nevertheless, compared with most other occupations, lawyers have achieved a remarkable measure of autonomy in their conditions of work. Not every lawyer has the opportunity to act like Brandeis, but some do, and many have more latitude in defining the nature of their work than the most powerful corporate executives. The strain which the lawyer feels results less from the weight of his responsibilities than from the weight of his freedom. The corporate executive sacrifices his personal values more easily because he perceives his choices as more limited. The lawyer must undertake more strenuous efforts to rationalize his compromises because the pressures on him to compromise are weaker. Non-professional advocacy merely asks the lawyer to make the most of the freedom he has.

The proposal to abolish legal professionalism will strike most law-

248. *See* AUERBACH, *supra* note 6; ROSENTHAL, *supra* note 5; Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1965); Sarat, *supra* note 140, at 435-38, 464-65, and works cited therein.

249. *See* Parsons, *supra* note 196, at 380.

yers as radical and unrealistic. But at least in some respects this impression is wrong. After all, it has become commonplace to speculate on the "death of law." It should not be surprising that such discussions rarely embrace the death of the legal profession; or indeed, that they often take place within the bastions of professional privilege and power.[250] For, legal professionalism thrives on contempt for the ideal of law. Yet, the ideal of law and the values of individuality have been a potent historical alliance, and they may well prove more tenacious than the most entrenched contemporary institutions. In this light, the death of the legal profession may be a more conservative and more practical alternative to the death of law.

---

250. *See, e.g.*, IS LAW DEAD? (E. Rostow ed. 1971).