THE LAWYER'S MORAL PARADOX

The directives contained in the American Bar Association Code of Professional Responsibility regulate a lawyer's professional conduct. There exists, however, an unresolved jurisprudential question as to whether the rules of the profession state ethical guidelines or "legal" standards,[1] although the latter characterization is undoubtedly more accurate.[2] In response to the perception that the Code of Professional Responsibility is ambiguous on this point, the drafters of a new code, scheduled to supersede the current code in 1980, have promised that the new rules will be "enforceable"[3] and, thus, will assume a more clearly "legal" function. Indeed, the new rules will comprise collectively the "law of legal ethics."[4]

One spokesman for the new code has remarked that because lawyers have tended to regard the current Code of Professional Responsibility as stating *ethical* standards, there has been an accompanying danger that lawyers feel entitled to exercise discretion in following the rules.[5] While one may agree that the Code should be formulated to state demonstrably *legal* standards in order to correct this misinterpretation, a corresponding danger then exists that lawyers will regard a "*law* of legal ethics" as precluding the necessity of exercising moral judgment. Quite to the contrary, the complexities of moral judgment that pervade the professional life of a lawyer are by no means resolved by the presence of a lawyer's code of conduct, however it is character-

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THE FOLLOWING CITATIONS WILL BE USED IN THIS COMMENT:

ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter cited as CODE; references to Disciplinary Rules and Ethical Considerations therein hereinafter cited only by DR and EC numbers];

M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975) [hereinafter cited as M. FREEDMAN].

1. *See* Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, 57 N.C.L. REV. 519, 519 (1979).

2. Geoffrey Hazard of the Yale Law School has described the Code of Professional Responsibility approach to legal ethics as "ethical legalism" in which "[l]egal ethics . . . is properly a matter of positive law of the same character as laws governing a regulated business." G. HAZARD, ETHICS IN THE PRACTICE OF LAW 5 (1978). See notes 6-11 *infra* and accompanying text.

3. Robert Kutak, Chairman of the ABA Commission on the Evaluation of Professional Standards, has remarked that "[w]hen a revised version of the Code of Professional Responsibility is unveiled . . . , it will contain 'enforceable duties' . . . ." *Say Revised Ethics Code Will Be 'Enforceable'*, 65 A.B.A.J. 1283 (1979).

4. Patterson, *supra* note 1, at 555.

5. *Id.* 521-23.

ized; rather, the Code of Professional Responsibility represents but a single piece of a larger mosaic of considerations that are morally relevant to a lawyer's conduct.

This Comment first will examine the various considerations that inform a lawyer's moral judgments in the context of his professional life. Specifically, this Comment will attempt to justify the assumption that the rules of the profession *are* appropriately characterized as legal norms and will explore the moral implications that this characterization has for the practicing attorney. Of special concern is the extent to which "legal" rules of professional conduct can guide the lawyer in making moral choices within the context of his professional life. There are, in addition, other systemic considerations that are not codified, but that nonetheless play a vital part in a lawyer's moral judgments, and these too will be given extended consideration.

A second undertaking of this Comment will be to illustrate that, whatever the Code's function with regard to moral *action*, the provisions of a code of professional conduct cannot satisfy the moral demand that one *live* as one ought. Indeed, it is questionable whether the lawyer's role in our society is consistent at all with the possibility of leading a morally exemplary life. Regrettably, the American lawyer's role as advocate frequently alters the structure of his existence in debilitating ways.

To the extent that it is possible for an attorney to act rightly in every instance and yet at the same time violate common sense notions of morality, there exists a paradox. The essential purpose of this Comment is to articulate systematically that paradox.

I. THE CODE OF PROFESSIONAL RESPONSIBILITY AS A COMPONENT OF MORAL DECISIONMAKING

This section will discuss the extent to and manner in which the Code of Professional Responsibility plays a part in a lawyer's judgments of moral right and wrong within the context of his professional life. If the Code is a form of law, then presumably certain socially desirable aims motivate it, and a lawyer should be cognizant of these aims. Moreover, if the Code sets "legal" standards, then to some extent it *binds* a practicing attorney in formulating his conduct. Nonetheless, the ultimate judgment of right and wrong remains with the lawyer who must act in a way that is consistent with his private and discrete moral conscience. Establishing the appropriate balance among these competing claims on a lawyer's conduct is the purpose of the discussion that follows.

A. *The Code of Professional Responsibility as Law.*

Despite references to the Code of Professional Responsibility as a "code of ethics"[6] and allusion to the high ethical standards to which the Code holds a lawyer,[7] the Code does not function as a moral guidebook. It has no claim to moral validity more special or certain than any other system of rules regulating human conduct. Rather, in fundamental respects, it is akin to law.[8]

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6. An early reference by Justice Brewer to the idea of a national code of ethics illustrates the often distorted view of such a code. Justice Brewer wrote that the ideal lawyer "ever sees on the lofty summits of Sinai the tables of stone chiseled with imperishable truth by the finger of God." Brewer, *The Ideal Lawyer*, 98 ATLANTIC MONTHLY 596 (1906), *quoted in* J. LIEBERMAN, CRISIS AT THE BAR 41 (1st ed. 1978).

7. The Preamble to the current Code of Professional Responsibility notes that it is the "obligation of lawyers . . . to maintain the highest standards of ethical conduct." CODE 1. *See also Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

8. As a preliminary matter, it is necessary to note that the Code of Professional Responsibility contains one singularly misleading feature. The Code is divided into three parts—Canons, Ethical Considerations, and Disciplinary Rules—but the Disciplinary Rules alone are of determinative significance.

The Preliminary Statement included in the Code of Professional Responsibility details this tripartite structure. The Ethical Considerations "are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." CODE 1. In contrast, "[t]he Disciplinary Rules . . . are mandatory in character. . . . [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.* Finally, the Canons, although described as "statements of axiomatic norms," *id.*, are in fact mere section headings. There is no symmetry whatsoever among these subdivisions because neither the Canons nor the Ethical Considerations are of any appreciable effect or substance considered independently of the Disciplinary Rules.

That the Disciplinary Rules are at the heart of the Code should invite little disagreement. Consider the manner in which Professor Sutton, Reporter for the ABA Special Committee on Evaluation of Ethical Considerations, has characterized the Ethical Considerations:

> The ethical considerations give a false sense of simplicity because their distinct functions are not clearly delineated in the Code. The ethical considerations are in part commentary on the black-letter disciplinary rules . . . . The ethical considerations also state some ethical norms of aspirations . . . . The third function performed by the ethical considerations—and performed lifelessly—is that of stating the standards of normal professional practices of the legal profession.

Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C.L. REV. 497, 516 (1979). Professor Sutton believes that the new Code should embrace these functions while carefully and specifically distinguishing among them in the reformulated provisions. *Id.* Sutton advocates the inclusion of these standards because of "the feeling both within and without the legal profession that lawyers' goals involve more than mere adherence to regulatory law." *Id.* 502. He concludes on this ground that "a professional code should deal with other standards, in addition to the standards of regulatory law." *Id.* 503. However, if one examines the ethical considerations as they are presently constituted, their primary utility consists in the extent to which they explain and elaborate upon the Disciplinary Rules—the first of the three functions that Professor Sutton identified. It is questionable whether the Ethical Considerations have any other appreciable utility. Indeed, despite this particular utility, the presence of ethical considerations, to some extent, has resulted in confusion because the enunciation of dual standards for the same situation has obscured the application of the rules. *Id.* 508. Inasmuch as the Disciplinary Rules alone state enforceable commands with which the lawyer must reckon, this Comment is essentially concerned

A number of factors suggest a close parallel between the operative mechanisms of the Code of Professional Responsibility and the formal qualities of legal rules. First, inasmuch as the states generally enforce the Code's Disciplinary Rules, thus endowing the rules with the force and effect of law,[9] the command-sanction model of law to which some legal philosophers ascribe is operative within the Code of Professional Responsibility. Second, in contradistinction to the precepts of morality, the Disciplinary Rules can be introduced, revised, and repealed by deliberate promulgation[10]—an obvious characteristic of law. Indeed, changes—possibly radical changes—in the provisions of the disciplinary rules are close at hand.[11] Finally, the Disciplinary Rules set forth in the Code, like legal rules generally, have as their purpose the promotion of the good of the community rather than the moral development of the individual. Thus, the Disciplinary Rules differ from moral standards in purpose, character, and effect. Accordingly, this Comment will assume that the Code of Professional Responsibility is regarded both more fruitfully and more accurately as a form of positive law than as a code of moral rules. The Code, therefore, enjoys no predetermin-

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with the relationship that these rules bear to questions of morality. Thus, in proceeding to characterize the Code of Professional Responsibility as a form of positive law, an operative premise is that the Disciplinary Rules most adequately signify the functional provisions of the Code. However, it does not detract from the analysis that follows to regard the Ethical Considerations merely as ancillary statements of *professional norms* that the lawyer may consult for guidance.

9. The Preliminary Statement introducing the current Code of Professional Responsibility states that "[t]he Code makes no attempt to prescribe either disciplinary procedures or penalties for violations of a Disciplinary Rule . . . ." CODE 1 (footnotes omitted). A footnote to this statement discloses, however, that punishment for violation of a Disciplinary Rule is within the discretion of the courts, and that they may disbar, suspend, or merely censure the attorney as the circumstances may warrant. *Id.* 2 n.11. The applicability of the Disciplinary Rules to our nation's attorneys is universal, for "[i]n every state, the disciplinary rules have been adopted by statute or court rules, or have been enforced by courts without formalization into statutes or court rules." Sutton, *supra* note 8, at 501.

10. This capacity for change and perhaps even policy reversal that characterizes the tenets of the Code marks a distinctive characteristic of legal rules. As H.L.A. Hart has observed, "[s]tandards of conduct cannot be endowed with or deprived of, moral status by human *fiat*, though the daily use of such concepts as enactment and repeal shows that the same is not true of law." H.L.A. HART, THE CONCEPT OF LAW 171 (1st ed. 1961). Moreover, Hart emphasizes that "the idea of a moral legislature with competence to make and change morals, as legal enactments make and change law, is repugnant to the whole notion of morality." *Id.* 173.

11. Although the details of a revised version of the Code have not yet been released, Robert Kutak, chairman of the American Bar Association Commission on the Evaluation of Professional Standards, has outlined some of the major issues under review to members of the National Conference of Bar Presidents. The *ABA Journal* reports that

> [a]mong [the issues under review] are the limits of confidentiality in the attorney-client relationship, and the issue of accountability to the public. Potential conflicts of interest from "revolving-door movement," problems facing lawyers acting as advisers and negotiators, obligations to render *pro bono* services and conflicting interests of the client and the public were also cited.

65 A.B.A.J., *supra* note 3, at 1283.

able moral status, and its relationship to matters of morality, if any, must be carefully articulated.

B. *Law and Moral Conscience—The Informational Value of the Code of Professional Responsibility.*

The policy underlying a law discloses its ultimate objectives, and the objectives may be good or bad. In effect, policy is the guidepost by which we measure the "morality" of a law in the broad sense of determining whether what the law provides is beneficial or detrimental to the idealized goals of the community. That is, although legal rules are *not* moral propositions, in most instances they may be explained or *justified* by moral propositions to the extent that their underlying policy so warrants.[12] Because the proper aim or politics of law is to secure justice or the good of the community, the purposes of law, abstractly considered, accord with the broad moral precept that justice should be done. To the extent that legal rules implement this objective, they have a normative significance. Therefore, although law and morality are distinct, they are also interrelated. One author attempts to delineate the distinctions:

> That law is not co-extensive with morals is generally, although not universally agreed within the Western tradition. This is true of morality in the limited sense of behaviour accepted as right or wrong within a given society, and much more so if morality is considered as ethical science, the theory of the nature of moral judgment, and the formulation of criteria as to what conduct ought to be. That there is some relationship between law and morals, that their spheres, although distinct, overlap, would also secure wide assent in contemporary society.
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> . . . Law is concerned with the general good of the community, and while this is also the concern of morality, it goes beyond this to consider the individual good. Law enforces only those standards of moral behaviour indispensable for community existence, morality has no such pragmatic limitation, but calls for conformity with the ideal.[13]

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12. This assertion rejects, of course, the relativist position perhaps most significantly represented in the later writings of Hans Kelsen. Kelsen argues (1) that if it is accepted that moral norms are purely relativistic, then they may be identified with social norms; (2) that law consists of an embodiment of social norms; and therefore (3) that law is in some sense "moral" by definition. *See* HANS KELSEN—ESSAYS IN LEGAL AND MORAL PHILOSOPHY (O. Weinberger ed. 1973). *See also* N. ST. JOHN-STEVAS, LIFE, DEATH AND THE LAW 15-16 (1961). Clearly, however, it makes sense to ask whether a positive law is just or unjust; moreover, legal norms are not simply of a different "moral order" than that from whose vantage point legal norms are judged. *See* G. CHRISTIE, JURISPRUDENCE 631 (1973); Y. SIMON, THE TRADITION OF NATURAL LAW 112-13 (1965).

13. N. ST. JOHN-STEVAS, *supra* note 12, at 14-15. *See* H.L.A. HART, *supra* note 10, at 152.

Beginning with the assumption that the Code of Professional Responsibility is a form of law and drawing upon this author's analysis, it becomes clear that to the extent that the Code of Professional Responsibility embraces morals (to which it is related but with which it is *not* co-extensive), it has normative informational value. The operative premises are these: (1) lawyers, like all persons, should seek to conform their actions with the good of the community; (2) the Code of Professional Responsibility *qua* law has as its general purpose the good of the community and as its specific purpose the just administration of the laws of our society; and (3) the ultimate function of the lawyer is to administer and to facilitate the operation of the law. It follows that the Code has a positive normative informational value to the practicing attorney whose concern it is to do what is right. The Code informs moral choice without constituting it, because the Code does not embody ethical principles in any immediate sense.[14] Rather, the Code

14. Professor Hazard defines "ethics" as "imperatives regarding the welfare of others that are recognized as binding upon a person's conduct in some more immediate sense than *law* and in some more general . . . sense than morals." G. HAZARD, *supra* note 2, at 1. However, contrary to Hazard's view, one may regard ethics simply as the science or study of morals. Morality, from this perspective, will denote operative notions of right conduct. Right conduct, in turn, is that behavior which optimizes the aesthetic experience of the human community and enhances the potential in man for spiritual growth. Given the conception of the relationship of law to morality adopted in this Comment, it is difficult to envision the halfway house that ethics represents to Professor Hazard. Under the view adopted in this Comment, a standard of conduct is either moral in the immediate sense of stating a fundamental principle of right conduct or in the derivative sense that it may be *justified* by a moral principle. Standards of conduct that are derivatively "moral" are related to but not co-extensive with morality. Legal rules embody standards of conduct of this latter type. In what may be considered by some to be antiquated reasoning, Immanuel Kant draws the distinction by reference to the nonempirical foundation of morality. In *Groundwork of the Metaphysic of Morals*, Kant identifies the ground of moral obligation "not in the nature of man [*i.e.*, anthropology] nor in the circumstances of the world in which he is placed [sociology/psychology], but solely *a priori* in the concepts of pure reason; . . . every other precept based on principles of mere experience . . . can indeed be called a practical rule, but never a moral law." I. KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 57 (1st ed. H. Paton trans. 1964). If a practical rule takes the form of a command backed up by sanctions it is a legal rule. If the legal rule is just it may be morally *justified*. See note 12 *supra*. If, however, the practical rule lacks the force of a command, it is a social norm that, again, may or may not correlate with ultimate norms—that is, morals. Hazard evidently identifies ethics with such social norms, *see* G. HAZARD, *supra* note 2, at 4, but in so doing, he embraces a relativist concept of ethics that is rejected here. The basic assumption about morality that this Comment accepts is that the moral status—*i.e.*, normative value—of a standard of conduct is discovered only by an act of individual moral judgment that is constituted by a reasoned deliberative process.

Note that the concept of rationality can serve to justify the claim of morality to objectivity and universality and yet avoid the pitfalls of dogmatism. *See generally* Hiley, *Relativism, Dogmatism and Rationality*, 19 INT'L PHILOSOPHICAL Q. 133 (1979). The point is that if it makes sense to talk about rationality it makes sense to talk about moral judgment as rational deliberation and choice. Of course, reasoned deliberation can yield more than one morally valid judgment. However, rationality is necessary to the "success" of any such judgment. The requirement of rationality reintroduces the concept of objectivity, though not absolutely. We can talk meaningfully about

dictates norms of behavior that are expected to benefit the public and that in most instances do. It leaves entirely to one side questions of right conduct as such, as well as concern for the good of the individual.[15] Nonetheless, it is every person's proper concern to assure the good of the community insofar as he is able. To the extent that the Code of Professional Responsibility attempts to identify "the good," it has a definite informational importance.

C. *A Closer Look at the Code of Professional Responsibility.*

One cannot derive a full appreciation of the normative significance of the Code from a mere familiarity with its bright-line rules. Rather, truly informed decisionmaking—especially in the event that other considerations do not coincide with the Code's provisions—requires a familiarity with the principles from which the rules have been derived as well as a knowledge of the rules themselves.[16] Thus, a closer look at the provisions of the Code of Professional Responsibility is warranted.

Some of the rules contained in the Code of Professional Responsibility are mere housekeeping rules that require no extended discussion.[17] Others state obvious and incontrovertible norms of behavior necessary to assure the proper functioning of our legal system, and these too require no extended consideration.[18] In contrast to these, the most important, and at the same time the most controvertible, rules of professional conduct have little intuitive appeal. These are rules, by and large, that can be justified adequately only by reference to a broad range of competing systemic considerations to which legal scholars only recently have given much attention.

1. *Operative Systemic Principles.* Dean L. Ray Patterson[19] has identified a number of independently significant considerations as es-

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right conduct, if not in absolute terms then at least by appeal to rationality and to objectively demonstrable propositions about what enhances (as opposed to what detracts from) the human experience. Thus, statements about morality are not purely arbitrary, subjective, or relative, nor need they be dogmatic in their insistence on the existence of absolute verities.

15. See text accompanying note 13 *supra*.

16. *See* 44 A.B.A.J., *supra* note 7, at 1159 ("Under the conditions of modern practice it is peculiarly necessary that the lawyer should understand, not merely the established standards of professional conduct, but the reasons underlying these standards").

17. Examples of this kind of disciplinary rule include the detailed provisions dealing with professional notices and letterheads, DR 2-102, and the rules regarding division of legal fees with a nonlawyer, DR 3-102.

18. For example, the Disciplinary Rule that prohibits a lawyer from knowingly engaging in illegal conduct, DR 7-102(A),(B), has obvious intuitive appeal. This is similarly true of the rule forbidding a lawyer to accept bribes when acting as a public official, DR 8-101(A)(3).

19. Dean and Professor of Law, Emory University School of Law, and Reporter for the ABA Special Commission for Evaluation of Professional Standards.

sential to a fully developed legal system that embraces the goals of a civilized and just society.[20] Among the essential features of the legal system and, correlatively, of the professionalism that the system demands of lawyers are the duty of loyalty to the client with its concomitant concerns of confidentiality and competency,[21] the duty of candor to the tribunal,[22] and the duty of fairness to opposing parties.[23] Elaboration of these concerns actually constitutes a complex conceptualization of the rights and duties of the *client* vis-a-vis the system that serves him and those third parties with whom he enters into legally defined or governed relationships. While the client has a *right* to zealous representation, he has a *duty* to abide by the principles of fairness to others and of candor to the tribunal.[24] It is the balancing of these principles in greater particularity that describes the essentially legislative judgment involved in the formulation of a code or conduct for clients' legal representatives—lawyers.[25] The Disciplinary Rules of the current Code balance these competing considerations for the lawyer and provide him with guidelines for determining the limits of what he may permissibly do in furtherance of his client's interests.

It must be carefully observed that, although these instructional rules are derived from the principles of loyalty, candor, and fairness, their purpose is not to provide the lawyer with *moral* guidance. Instead, the rules are intended to provide the lawyer with *professional* guidance, to assure the effectiveness and justness of the system under which our laws are administered. Insofar as the end is achieved, the rules may be morally *justified* but they do not thereby become identifiable with *rules of moral behavior* or *ethical standards*.[26]

2. *Legislating Rules of Conduct—An Illustration.* Resolution of the conflicts among the various rights and duties that have been identified involves an essentially legislative determination and not a mere embodiment of ethical principles in legal dress. As an illustration, consider the controversy posed by the differing perspectives of Judge Marvin Frankel and Dean Monroe Freedman on the question of the proper balance to be struck between the lawyer's duties of loyalty to client and

20. Patterson, *The Limits of the Lawyer's Discretion and the Law of Legal Ethics:* National Student Marketing *Revisited*, 1979 DUKE L.J. 1251.

21. *Id.*

22. *Id.*

23. *Id.* On the question of fairness to opposing parties in the negotiation setting, see Ruben, *A Causerie on Lawyer's Ethics in Negotiation*, 35 LA. L. REV. 577 (1975).

24. *See* Patterson, *supra* note 20, at 1254.

25. In Patterson's terminology, a lawyer is most appropriately viewed as the client's agent. *Id.* 1268-69.

26. See note 14 *supra.*

candor to the court. The first of these duties embraces the rights of the client—rights of confidentiality and competent representation, for example. The second of these embodies the duty of the client through the agency of his lawyer to be truthful to the court.

Canon 7 of the Code of Professional Responsibility expresses the principle of loyalty to client as a duty owed by the lawyer to represent a client's interests "zealously within the bounds of the law."[27] In the context of an adversarial setting, this principle itself partially embraces the truth-determining function of a trial. The notion is that "the most efficient and fair way of determining the truth is by presenting the strongest possible case for each side of the controversy before an impartial judge or jury."[28] However, Judge Frankel has argued persuasively that this mechanism for determining truth provides inadequate assurance that the truth will prevail. Although the duty of loyalty to client as currently formulated is limited insofar as the disciplinary rules prohibit the use of fraudulent, false, or perjured testimony,[29] Frankel maintains that "[t]hese are not sufficient rules for charting a high road to justice."[30] Perceiving that "many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of truth,"[31] Frankel finds that the current balance struck between the duties of loyalty to client and candor to the court is in need of rethinking. His proposed solution would require a lawyer to prevent his client or witnesses from making untrue statements and from omitting material facts, and would require a lawyer to report to the court and opposing counsel the existence of relevant evidence that he does not intend to introduce.[32]

In stark contrast to Judge Frankel's position, Monroe Freedman has urged that even the limited restraints placed on the principle of

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27. CODE Canon 7.

28. M. FREEDMAN 9. The thrust of EC 7-19 is the same:

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

EC 7-19 (footnotes omitted).

29. DR 7-102(A)(4).

30. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1051 (1975). *See also* Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975); Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 947-57; Uviller, *The Advocate, The Truth, and Judicial Hackles: A Reaction To Judge Frankel's Idea*, 123 U. PA. L. REV. 1067 (1975).

31. Frankel, *supra* note 30, at 1036.

32. *Id.* 1057-58.

advocacy by the rule prohibiting the knowing use of perjured testimony are wrong.[33] Freedman premises his argument on the principle of confidentiality, a duty owed the client by his lawyer under Canon 4 of the Code of Professional Responsibility.[34] The underlying justification for the duty of confidentiality is that such a rule is essential to the full development of the facts necessary for proper representation of the client. Without such a rule, fewer laymen would seek legal assistance and those that did would tend to be more guarded in their communications with the lawyer.[35] According to Freedman, the current rule prohibiting a lawyer from knowing use of perjured testimony is a violation of this principle of confidentiality. Under the current amplification of the rule, a lawyer must decline to engage in normal questioning of his client when the client takes the stand to perjure himself and, furthermore, must omit reference to the client's testimony in summation.[36] The lawyer's prejudicial treatment of his own client is predicated on the client's prior disclosure to the lawyer that he intends to commit perjury. Thus, in Freedman's view, to proceed as prescribed violates not only the primary principle of loyalty to client, but also the principle of confidentiality that assures that laymen will resort to the legal system when necessary and will feel free to communicate openly with their lawyers.[37]

The Frankel-Freedman debate illustrates that competing values of considerable force make enunciation of principles of professionalism a delicate task. As in other legislative determinations, a decision must be made to assign primacy to one of a myriad of competing considerations. The standards against which such determinations are measured are, of course, the objectives of the system itself. But it can never be conclusively established which of several possible determinations most closely approximates such objectives. Thus, the final product is a well-intentioned piece of compromise lawmaking, a form of legislation and not a determination of any ultimate normative significance. The final rule is not an embodiment of some discreet ethical principle,[38] but rather a legislative policy resolution of several competing considerations. It is perhaps arguable, however, that the rule does indicate an underlying determination, at a level abstracted from immediate choice, of what *ought* to be.

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33. M. FREEDMAN 27-41.

34. CODE Canon 4.

35. M. FREEDMAN 30-31; *see* EC 4-1.

36. M. FREEDMAN 36. Freedman makes reference to ABA, STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.8 (1971).

37. M. FREEDMAN 31, 36-37; *see id.* 27-41.

38. See note 14 *supra*.

Having determined that the provisions of the Code thus deserve to be given weight in the process of moral decisionmaking, the question remains: How much weight should they be given and when should they be considered?

D. *The Presumptive Validity of the Code of Professional Responsibility.*

If the purpose of the Code of Professional Responsibility were to assure the moral correctness of the conduct of lawyers, then both the need for and propriety of such a code would be questionable. This is because such an undertaking would amount to a logically questionable attempt to endow standards of conduct "with . . . moral status by human *fiat*."[39] After all, the morality of a course of conduct is predicated upon an act of individual moral judgment. That act *X* is a moral act is a concrete determination that can only be true if it reflects the considerations relevant to moral choice under a given set of circumstances. Thus, a standard of conduct cannot be endowed with moral status by positive declaration alone. In contrast, a standard of conduct may be endowed with *legal* significance by simple declaration, provided that the enunciated standard satisfies the formal requirements of law. Therefore, whereas the legislative mode is appropriate to the promulgation of law, morals may not be "promulgated" at all.

The Code, however, does not presume to legislate morals; rather, it purports to identify professionally correct behavior. Moreover, it does so not by reference to the bearing that the rules will have on the personal values of practicing attorneys, but rather by reference to the good sought to be achieved by placing boundaries on professional conduct. Thus, the Code is entitled to a presumptive validity quite distinct from the negative presumption that necessarily accompanies any attempt at "moral legislation."

The tenets of the Code of Professional Responsibility are presumptively valid on two grounds: first, on the ground of consent to authority and, second, on the more obscure ground that the Code itself represents an approximation, however imperfect, of a just system for the administration of our laws.[40]

As a condition to an attorney's right to practice law, he must swear allegiance to the rules of the state bar association of which he is to

39. H.L.A. HART, *supra* note 10, at 171.

40. Professor Patterson identifies the principles of the Code of Professional Responsibility as "fundamental principles of law administration, for it is on these principles that the implementation of the rights and duties of the individual in our society and under our adversary legal system ultimately depend." Patterson, *supra* note 1, at 554.

become a member. In general, these state rules embody the principles of the American Bar Association Code.[41] Even in those states in which the rules of the American Bar Association Code have not been formally adopted, the courts have enforced the provisions of the Code against transgressors.[42] Thus, given the universal applicability of the Code of Professional Responsibility in this country, it is arguable that all lawyers have consented to its authority upon entering the practice of law. It may be concluded, therefore, that in the absence of countervailing moral considerations, a lawyer should respect the dictates of the Code on the ground of prior consent. To the extent that keeping promises is a moral obligation, the lawyer is morally bound to adhere to the requirements of the Code of Professional Responsibility.

Perhaps a still more fundamental obligation that reinforces the presumptive validity of the Code is the notion of a naked duty of obedience to law. Of course, insofar as consent to authority is the very basis of law, obedience to law is itself no more than the fulfillment of an implied promise. However, the principle of obedience to law involves more than the notion of tacit consent. To the extent that a law is just, it commands our express obedience on that basis alone. Specifically, the purpose of the Code of Professional Responsibility is to assure that the laws are administered fairly and equitably, and it attempts to create a system of behavior to achieve that purpose. As such, the system of behavior authorized by the Code partakes of the notion of justice. As a lawyer, one should share the Code's concern and should respect the Code's attempt to structure a system to implement those concerns. The Code, then, should serve as a first reference point in shaping one's professional conduct.[43] Upon closer reflection, however, it is evident that, despite its presumptive validity, the Code cannot serve as one's *sole* point of reference. It is not properly viewed as a conclusively valid, independent behavioral code.

E. *The Limits of the Code as a Guiding Force.*

Given the presumptive validity of the Code, the question remains whether it is ever proper to violate the Code and, if so, under what circumstances. In answer to the first question, clearly there will be occasions when it is proper to reject the facial requirements of the Code. The reasons for departing from strict adherence to the Code may vary. On the one hand, a rule of professional conduct may be patently unjust or misguided. The American Bar Association drafting committee, after

41. See note 9 *supra* and accompanying text.

42. Patterson, *supra* note 1, at 554.

43. See note 14-16 *supra* and accompanying text.

all, is not incapable of legislating poorly.[44] On the other hand, the rules considered in the abstract may be uniformly unimpeachable and yet violate principles of justice "as applied." In short, various circumstances may arise that cannot be anticipated or for which no exception can be made in formulating the rules, and for which some exception nevertheless must be made if one is to act rightly under the circumstances.[45]

In the case of a rule that is unjust as applied, there is a tradition of philosophic thought upon which an attorney may rely in deciding whether circumstances justify a departure from the requirements of the Code. In the *Nichomachean Ethics*, Aristotle offers, in generic terms, a perception of both the problem and its solution:

> [A]ll law is universal but about some things it is not possible to make a universal statement which shall be correct. . . . When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission—to say

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44. In this regard, it is interesting to note some of the revelations that have come to light concerning the origin and evolution of the first Code of Professional Responsibility in 1906. In *Crisis at the Bar*, Lieberman states that, in adopting its first code, the American Bar Association

> pinned the stigma of immorality on the "lower" class of lawyers and allowed the bar to avoid (that is, to ignore and conceal) its obvious racial, religious and class prejudices. For it was no accident that the "shysters" were Jewish, Catholic, and other immigrant lawyers who talked, dressed, and acted differently.

J. LIEBERMAN, *supra* note 6, at 59. The author goes on to explain that ABA members who drafted the Code to prohibit solicitation were unaffected by the provision because their clients were rich and enduring. Of course, "the less advantaged lawyers, the 'shysters' and the 'barratrously inclined,' had no such luxuries." *Id.* 60. In another interesting passage, Lieberman notes that two canons preventing the unauthorized practice of law and lawyer advertising were adopted during the Depression. *Id.* 63. The thrust of all this, of course, is to indicate that the "good" that many of the canons aimed to secure was rather parochial.

For additional criticisms of the Code with specific reference to the rules prohibiting solicitation and limiting lawyer advertising, see J. CARLIN, LAWYERS ON THEIR OWN 155-64 (1962); M. FREEDMAN 113-24; J. LIEBERMAN, *supra* note 6, at 87, 101-06; Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968).

45. The following hypothetical, derived from one posed by Dean Paul Carrington of the Duke University School of Law, illustrates the problem. Lawyer *L* is appointed to represent Client *C*, who is charged with child abuse. *C* has admitted guilt to *L*, but refuses to accept psychiatric counseling or any other form of help. *L* believes that it is quite likely that *C* will repeat the offense, and might even kill his child, if he is not restrained. On inquiry of the prosecutor, *L* learns that the overworked staff has not prepared its case and will be quick to fold in response to a vigorous defense. What should the lawyer do? Can he take action to protect the child?

The Code of Professional Responsibility fails to provide an exception to the confidentiality requirement that adequately addresses this hypothesized situation. The most nearly applicable provision is DR 4-101(C), which provides that a lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime. *L*'s client, of course, has not specifically revealed an intention to engage in future acts of child abuse and so *L*'s hands are tied insofar as a literal application of the rules is concerned. Clearly, therefore, *L* is faced with a situation in which a breach of the rule is warranted, if *L* is to act as he feels he must. Arguably, *L*'s breach of confidence is not, in any real sense, an act of disobedience.

> what the legislator himself would have said had he been present, and would have put into his law if he had known.[46]

Perhaps Aristotle's observation is simply that woodenheaded obedience to the law may involve a misconstruction of the true intent or spirit of the law that, in turn, may lead to the wrong result. In such instances, careful deliberation may justify "legislating" to oneself a course of action that better fits the circumstances than the universal statement of law does. However, Aristotle's observations also raise a more difficult question. How does one decide when the law (the Code of Professional Responsibility or any other law) has failed to speak effectively to an issue and when one is simply in disagreement with what the legislator has wrought? It is interesting to note that a great Aristotleian, St. Thomas Aquinas, has addressed this issue and advises that "if the observance of the law *according to the letter* does not involve any sudden risk needing instant remedy, it is not competent for everyone to expound what is useful and what is not useful . . . ."[47] This argument would imply that a substantial deference to the law is in order. Absent a striking need to depart from the letter of the law, it is not for everyone to decide what might make a more fitting rule.[48]

Without exploring the issue further, one may draw the following tentative conclusions about the lawyer's relationship to the Code of Professional Responsibility. First, under any analysis, the Code is but a component in the lawyer's deliberative processes, for the lawyer must act on his own initiative when the legislator fails him through omission, oversimplification, or outright mistake. A professional standard does not constitute the moral choice; it only informs the moral choice. When the standard fails to inform or informs poorly, the lawyer must reach an independent judgment. Second, given the presumptive validity of the Code, a lawyer's affirmative decision to disobey the Code should not be premised on a mere disagreement about proper policy if the prescribed course of conduct is otherwise clear. Rather, a breach of the Code is justified only when the disagreement implicates one's fundamental notions of right and wrong. In other words, before the lawyer takes it upon himself to "expound what is useful and what is not useful,"[49] the moral claim of the situation must rise to the level of a

46. IX THE OXFORD TRANSLATION OF ARISTOTLE 1137a-1137b (W.D. Ross ed. 1925).

47. 8 THE "SUMMA THEOLOGICA" OF ST. THOMAS AQUINAS 74 (3d ed. Fathers of the English Dominican Province trans. 1942) (emphasis added).

48. Certainty is surely not characteristic of even the most thoughtful inquiries into this subject, however. Indeed, elsewhere in his writings, Aquinas himself departs from the idea of deference to law remarking that "as Augustine says (De Lib. Arb. i.5), *a law that is not just, seems to be no law at all.*" *Id.* 70 (emphasis in original).

49. *Id.* 74.

moral *demand*.

II. Other Role-Related Considerations That Inform Moral Choice

The current Code of Professional Responsibility, whether fortuitously or by design, recognizes the structural limitations of law and operates within those limitations. Matters not properly an object of formal regulation are left to the conscience of the individual lawyer.

The primary examples of this self-limiting aspect of the Code are provided by Ethical Considerations 7-8 and 7-9. Ethical Consideration 7-8 advises the lawyer that he may point out factors to his client "which may lead to a decision that is morally just as well as legally permissible."[50] However, "[i]n the final analysis, . . . the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client . . . ."[51] In a nonadjudicatory matter, if the client insists on acting contrary to the lawyer's advice, the lawyer may withdraw from employment.[52] Ethical Consideration 7-9 similarly provides that "when an action in the best interest of his client seems to [the lawyer] to be unjust, [the lawyer] may ask his client for permission to forego such action."[53] In short, while it is obviously true that the right to decide whether to pursue legally permissible objectives must rest with the client, the Code does not usurp the lawyer's freedom to offer or withhold assistance as he sees fit.

The Code's position on the troublesome issue of the immoral client as embodied in Ethical Considerations 7-8 and 7-9 is eminently sound. Inasmuch as the principles of the Code are, in the last analysis, principles of law administration[54] and not principles of morality, and, given the fact that our laws sometimes permit what morality would condemn,[55] it would be highly inappropriate, for example, for the Code to *require* the lawyer to withdraw from representation of a client on moral grounds even though the client's objectives are lawful.[56] Rather, the

50. EC 7-8.

51. *Id.*

52. *Id.*

53. EC 7-9. It should be noted that the relevant Disciplinary Rules parallel the permissive content of EC 7-8 and EC 7-9. DR 7-101(A)(2) permits a lawyer to withdraw from employment as permitted under DR 2-110. DR 2-110(C), in turn, provides in pertinent part that a lawyer may withdraw from representation of a client if his client "[i]nsists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer . . . ."

54. See note 40 *supra*.

55. See note 60 *infra* and accompanying text.

56. For an argument that, ideally, the Code *should* require lawyers to turn such clients away, see Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 680-85

Code *permits* the lawyer to withdraw from representation of a client under such circumstances in deference to the fact that there is, after all, a person hiding behind the legal mask.[57]

The attorney, however, may find it difficult to remove this mask, notwithstanding the permissive outlook of the Code. Although the lawyer is not constrained by the Code to do the will of a client whose values collide with his own, he is not thereby freed to follow his intuitions. The lawyer's role demands that he abandon trust in his intuitions in favor of a more complex deliberative process in which personal moral choice is "informed" by systemic considerations that, though not codified, are nonetheless relevant to, if not determinative of, choice. If, as one author has suggested, "the ultimate function of the lawyer is to individualize the law for the client,"[58] then presumably he

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(1978). Professor Schwartz begins with this radical proposition, but, realizing the excessive subjective imposition that such a proposition would involve if it were made a rule, Schwartz limits the scope of his proposed proscription to instances in which the client wishes to engage in transactions that have been recognized by positive law as being unenforceable and unconscionable. *Id.* 684-90. So limited, his position makes sense; it neither operates to prohibit the client from reaching legal objectives (an outcome legally unenforceable is not, strictly speaking, "legal") nor subjects the client's interests to the unbridled views of lawyers.

For the reader's convenience, Schwartz's proposal is reprinted below:

(A) When acting in a professional capacity other than that of advocate, a lawyer shall not render assistance to a client when the lawyer knows or it is obvious that such assistance is intended or will be used:
  (1) to facilitate the client in entering into an agreement with another person if the other person is unaware
    (a) of facts known to the lawyer such that under the law the agreement would be unenforceable or could be avoided by the other person, or
    (b) that the agreement is unenforceable or could be avoided under the policy of the law governing such agreements; or
  (2) to aid the client in committing a tort upon another person, provided that this rule applies in business or commercial transactions only to torts as to which it is probable that the other person will in the circumstances be unable to obtain the remedy provided by the law; or
  (3) to allow the client to obtain an unconscionable advantage over another person.

(B) For the purpose of this rule, "assistance" does not include advice to a client that a particular course of action is not unlawful.

Id. 685, 686.

57. A more pragmatic concern may be at work as well. If a lawyer's compunctions are so strong that they interfere with his ability to serve his client's interests properly, the lawyer cannot fulfill his duty of loyalty to the client to the fullest extent. This situation is addressed in the Code. DR 5-101(A) provides that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." The focus of Canon 5 generally is on the question of conflicts of interest as they arise in financial settings and in the context of representation of multiple clients. Nonetheless, the underlying principle of unimpaired loyalty to the client is the same whether the conflict of interest is financial or personal. Thus, if a lawyer's personal feelings disable his professional judgment, he not only can but should withdraw from employment.

58. Patterson, *supra* note 1, at 536.

must do this whether or not he believes a given law to be just.[59] Moreover, the duty to provide a client with the protection of the law is the same whether the client is honorable or dishonorable.[60] Thus, the decision to withdraw from representation of a client on moral grounds amounts to a refusal to administer the law when, in the lawyer's *personal* judgment, the law is dysfunctional. To do so is, in short, to retreat from the public role of lawyer into one's role as a discrete moral individual with a private life and personal values.

If it is only by casting off one's role as lawyer that one may assert

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59. In this regard, Kenneth Pye has observed that, in the context of criminal litigation,

> [m]any of what appear at first blush to be ethical questions actually are questions about the wisdom of our rules of evidence and procedure. Many of the ethical issues are raised only when the problem is put in terms of whether the defense counsel should use an existing procedure or rule of evidence to advance the cause of his client.

Pye, *supra* note 30, at 933. Pye concludes that the lawyer should make use of available law:

> The cardinal principle that should govern counsel's conduct is that he may assert any right his client possesses under the law. The trial is not a process of determining moral culpability according to abstract principles of justice. It is a procedure to determine legal guilt in accordance with existing provisions of law. Counsel takes the law as he finds it. The law requires the state to prove guilt beyond a reasonable doubt by competent evidence. Counsel has a right, and indeed a duty, to insist that guilt be determined according to that law.

Id. 941.

60. One author has stated the problem this way:

> [T]he role-differentiated character of the lawyer's way of being tends to render irrelevant what would otherwise be morally relevant considerations. Suppose that a client desires to make a will disinheriting her children because they opposed the war in Vietnam. Should the lawyer refuse to draft the will because the lawyer thinks this is a bad reason to disinherit one's children? Suppose a client can avoid the payment of taxes through a loophole only available to a few wealthy taxpayers. Should the lawyer refuse to tell the client of a loophole because the lawyer thinks it an unfair advantage for the rich? . . . In each case, the accepted view within the profession is that these matters are just of no concern to the lawyer *qua* lawyer. The lawyer need not of course agree to represent the client . . . but there is nothing wrong with representing a client whose aims and purposes are quite immoral. And having agreed to do so, the lawyer is required to provide the best possible assistance, without regard to his or her disapproval of the objective that is sought.

Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 7, 8 (1975).

While there does seem to be something paradoxical in the notion that one may permissibly assist another in the pursuit of arguably immoral objectives, the problem is made somewhat intractable by the fact that under our system of laws every person has a right to pursue all lawfully available objectives. Moreover, it is a right that is not properly granted or withheld on the basis of a private attorney's individual judgments of right and wrong.

In what amounts to a partial reply to Wasserstrom's query, one tax attorney makes these remarks:

> The tax lawyer should put aside private disagreements with Congressional and Treasury policies. His own notions of policy, and his personal view of what the law should be, are irrelevant. The job entrusted to him by his client is to use all his learning and ability to protect his client's rights, not to help in the process of promoting a better tax system. The tax lawyer need not accept his client's economic and social opinions, but the client is paying for technical attention and undivided concentration upon his affairs. He is equally entitled to performance unfettered by his attorney's economic and social predilections.

Paul, *The Tax Lawyer as Tax Adviser*, 25 ROCKY MTN. L. REV. 412, 418 (1953). See text accompanying notes 62-64 *infra*.

the primacy of one's personal values, then the key inquiry is necessarily whether the assumed role may be cast aside and, if so, with what effort and what implications. It would appear that the role of lawyer, once assumed, cannot be relegated to the realm of the irrelevant in implementing one's personal values. The role of lawyer itself is a relevant component in one's moral decisionmaking. Inasmuch as a lawyer is presented with certain moral choices *because* he is a lawyer, in appropriate circumstances such moral choice must reflect his chosen role. Personal values do not exist in a vacuum.[61] They must be translated into choice. As one author has explained,

> [i]n so far as one's primary concern is to do what is right or best or what he ought, he will deliberate with the purpose of determining *what it is* that he ought to do, and he would rather do, and hence choose to do, that action which he comes to believe he ought to do.[62]

The lawyer cannot possibly undertake successfully the process of deliberating so as to do what is right if relevant information is excluded. Surely, the practical ramifications of the lawyer's acts are among the appropriate elements of concern.

In deciding what he ought to do about the dilemma of the immoral client, the lawyer must take a number of factors into account. First, if lawyers habitually refuse potential clients access to the legal system on the basis of their personal assessments of the morality of the individual or his goals, they will largely undermine the efficacy—indeed, ultimately the justice—of our existing legal system.[63] Second, in the last analysis the lawyer's objection goes to the perceived injustice of a *law*

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61. Consider the difference between that which is noted and that which is notable, loved and lovable, honored and honorable, *valued* and *valuable*. It is, as the pragmatist philosopher John Dewey has observed, "the difference between mere report of an already existent fact and judgment as to the importance and need of bringing a fact into existence . . . ." J. DEWEY, THE QUEST FOR CERTAINTY 261 (1929). This observation leads Dewey to his main proposition: "Judgments about values are judgments about the conditions and the results of experienced objects; judgments about that which should regulate the formation of our desires, affections and enjoyments. For whatever decides their formation will determine the main course of our conduct, personal and social." *Id.* 265 (emphasis deleted). Thus, Dewey adopts an operational approach to moral judgment that complements the emphasis on *informational values* in this Comment. As Dewey further remarks, "To assume that anything can be known in isolation from its connections with other things is to identify knowing with merely having some object before perception . . . . There is no knowledge without perception; but objects perceived are *known* only when they are determined as consequences of connective operations." *Id.* 267-68 (emphasis in original). In the realm of moral judgment, therefore, "[t]here is no value except where there is satisfaction, but there have to be certain conditions fulfilled to transform a satisfaction to a value." *Id.* 268.

62. Reilly, *Moral Weakness*, 17 INT'L PHILOSOPHICAL Q. 167, 177 (1977) (emphasis added).

63. As one author has recognized, "If lawyers were to substitute their own private views of what ought to be legally permissible and impermissible for those of the legislature, this would constitute a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers." Wasserstrom, *supra* note 60, at 10-11.

that permits the client to pursue patently immoral objectives. Presumably, all attorneys would agree that the client has a *right* to legal assistance and that the existence of this right should not turn on the personal judgment of other individuals. Thus, the lawyer's moral response to the situation may consist of an effort to change the law rather than to withhold legal assistance.[64] Quite simply, if the lawyer accepts that our legal system is overall a just one, then he must recognize that judgment does not sit with him but rather with the legislature.[65]

The lawyer must weigh these factors against his more fundamental moral compunctions and render a decision. If he acts as he has decided he ought to act—whether the decision is to render or to withhold legal assistance—then he has acted morally or with a good will.

If a lawyer reviews all the various considerations that should enter into the decision to give or to refuse assistance to the "immoral client," the lawyer may decide that he ought to serve the client and proceed to do so. In that case, it has been suggested, he has no more compromised his personal values than if he had decided to the contrary. However, most of us would feel intuitively that he has indeed compromised him-

64. The 1958 ABA Report on Professional Responsibility drew an example of this approach to resolving conflicts between professionalism and one's personal views from the life of Lord Talfourd. Although the illustration was offered more to emphasize the dichotomy between private practice and public service than to demonstrate a solution to a personal moral dilemma, it nevertheless serves well in the latter role.

> As a barrister Talfourd had successfully represented a father in a suit over the custody of a child. Judgment for Talfourd's client was based on his superior legal right, though the court recognized in the case at bar that the mother had a stronger moral claim to custody than the father. Having thus encountered in the course of his practice an injustice in the law as then applied by the courts, Talfourd later as a member of Parliament secured the enactment of a statute that would make impossible a repetition of the result his own advocacy had helped to bring about. Here the line is clearly drawn between the obligation of the advocate and the obligation of the public servant.

44 A.B.A.J., *supra* note 7, at 1162. Note that whatever relevance this anecdote may have to the conflict between professionalism and personal morality, it has been criticized as an inadequate formulation of the public service aspects of the legal profession. *See* Smurl, *In the Public Interest: The Precedents and Standards of a Lawyer's Public Responsibility*, 11 IND. L. REV. 797 (1978).

65. Note that the lawyer's concern with the integrity of the system is, in some sense, itself a moral concern. Although morality should not be considered a relative concept, certainly the contexts in which moral choices arise are "situational":

> Moral rules and values are intrinsically social in that they define and bind social structures and relationships. Consequently, respect for the moral law or being motivated to do as one ought . . . is not independent of being concerned about the persons to whom one is committed or of taking seriously, or having an interest in, the (integrity of the) social structures which define one's existence and in terms of which one lives with other persons.

Reilly, *supra* note 62, at 172. This observation may serve to answer Professor Fried's query as to how it is that "one can at the same time admit that the general good is one's only moral standard, while steadfastly hewing to obligations to friends, family, and clients." Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060, 1068 (1975); *see* Dauer & Leff, *Correspondence—The Lawyer as Friend*, 86 YALE L.J. 573 (1977); Fried, *Correspondence—Author's Reply*, 86 YALE L.J. 584 (1977).

self—at least if we disregard for the moment the special role that the lawyer plays. Perhaps, therefore, the demands of the lawyer's role call into question the moral legitimacy of the role as such. Intuitively, there seems to be something intrinsically wrong with the notion that an attorney may act morally while assisting others in their nefarious purposes.

A lawyer is required in effect to suspend personal judgment; the lawyer facilitates action but does not act; he advises but does not decide. Perhaps it is the suppression of personality and of the personal values that a person brings to the practice of law, a suppression necessitated by the role of agent, that lies at the heart of the problem. The lawyer's situation is quite paradoxical. On the one hand, a good argument can be made that the lawyer can serve in his agency role without sacrificing the moral demand to act rightly. On the other hand, common sense tells us that in many instances fulfillment of one's role as lawyer inescapably involves moral compromise. Thus, the lawyer's moral paradox is yet to be solved.

III. THE LAWYER'S MORAL PARADOX: DOING AS ONE OUGHT VERSUS LIVING AS ONE OUGHT

A. *Doing as One Ought.*

If it is agreed that law is essential to the creation and preservation of a just and peaceful society, then it is evident that society needs lawyers. Moreover, it needs lawyers who are faithful servants of the law, administering the law evenhandedly and in accordance with the principles of democracy and individual liberty.[66] Presumably, therefore, anyone should be proud to perform this public function and should expect to have unanimous public approval if he exercises his lawyerly responsibilities competently. Yet, no one would deny that lawyers frequently suffer scorn at the hands of a contemptuous public. It is a somewhat common perception that lawyers are, as one author has put it, "at best systematically amoral and at worst more than occasionally immoral in [their] dealings with the rest of mankind."[67] We have seen, however, that by incorporating an awareness of his professional role into his moral decisionmaking, a lawyer *can* perform his functions as a lawyer honorably without sacrificing the moral demand that he act

66. See note 63 *supra* and accompanying text.

67. Wasserstrom, *supra* note 60, at 1. Wasserstrom further notes that

> [p]rovided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established. The question . . . is whether this particular and pervasive feature of professionalism is itself justifiable.

Id. 5-6.

rightly or as he ought.

The lawyer's world of moral choice is not a simple one. Its very complexity creates the *appearance* of amorality. Of course, the lawyer may decline to confront moral issues or, indeed, may choose to act other than as he has come to believe he ought, but in either instance the lawyer acts immorally, not amorally. It is incumbent upon every person to confront moral issues and to participate in informed deliberation in problematic situations. The failure to so do, therefore, may be perceived as amorality, but in fact it must be identified as immorality. It is fully within a lawyer's grasp to *act* morally in the conduct of his professional life. The more troubling question is whether a lawyer can service the law and *live* as he ought.

B. *Living as One Ought.*

By its terms, the question whether a lawyer lives as he *ought* assumes some standard for comparison. For present purposes, we shall assume a radical formulation of the human ideal with no less a zealot than Friedrich Nietzsche as its spokesman. For Nietzsche, the basic idea of culture assigns to everyone the single task of "promot[ing] inside and outside of ourselves the generation of the philosopher, the artist, and the saint, and thus to work at the perfection of nature."[68]

Against such a standard, the lawyer's life fares poorly. There is an essential contentiousness inherent in the role of lawyer that is far removed from the mode of existence that Nietzsche envisioned. Indeed, society needs lawyers because, as a function of universal mistrust, people require advocates in their disputes with other persons. Lawyers are summoned so that one person or institution may collect his legal due from another. Problems of crime, poverty, war, and interpersonal strife necessitate social taxing and spending. Because man is essentially egoistic, he needs lawyers to minimize his forced financial contribution to the solution of social evils, and, at the opposite end of the spectrum, he needs them just as much to effect the collection of that contribution. Observations of this sort could be continued at length. To the extent that the law serves to bring people together in a semblance of order and harmony, it represents the essential disharmony of man.[69] The law undoubtedly provides an invaluable service in performing its harmoniz-

68. VII GESAMMELTE WERKE, MUSARIONAUSGABE 5 (23 vols. 1920-29), *reprinted as translated in* W. KAUFMAN, NIETZSCHE 172 (4th ed. 1974).

69. [L]aw in particular presents over most, if not all of its bulk, the phenomenon of clashing interests of antagonistic persons or groups . . . . Hence the eternal fight for the control of the machinery of law, and of law making, whereby the highly interested *A*s can hope partially to force their will upon the equally but adversely interested *B*s . . . .
Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 461 (1930).

ing function; however, for a person to make his living as its servant appears to compromise his fundamental human potential to transcend the imperfections in man that necessitate law in the first place.

Undeniably, this troublesome feature of a lawyer's existence is not altogether absent among other professions. Parallels may be drawn to the life of the policeman or the judge, for example. However, the comparison is incomplete. Unlike either the policeman or the judge, each of whom *arbitrates* the tensions among conflicting parties as justice demands, the lawyer in many of his roles *advocates* the position of one of two parties. Whether negotiating, litigating, or just assisting with business planning, the lawyer acts as agent for one of two sides who are in actual or potential conflict. In short, he functions in an essentially combative capacity.

Finally, there are conflicts both between the lawyer and the client and between the lawyer and his adversaries at the bar. These conflicts are morally debilitating. The conflict between lawyer and client, although most pronounced when the client is indifferent to the immorality of his conduct, exists to some extent in every lawyer-client relationship because of the unnatural way in which the interests of the client become relevant to the lawyer.[70] Because the lawyer generally does not know his client as a person prior to taking his case, he cannot take a personal interest in the client's affairs, at least initially. After all, concern for others grows out of interpersonal relationships and does not generally originate in role-defined relationships in which both client and lawyer have only a circumscribed interest in one another.

The tension among adversaries is of greater concern. Rather than merely posing an obstacle to true interpersonal relationships, the tension created by the principle of advocacy creates an artificial *enmity* among members of the profession representing clients with adverse interests. Of course, normal civility and fairness can minimize the tension, but the lawyer's role as advocate of his client's best interests requires that a certain untrodden area of potential interaction be left between lawyers on opposing sides of a controversy. While lawyers should not lie on behalf of their clients or use unfair tactics in order to secure an advantage for their clients, at the other end of the spectrum, lawyers also may not make concessions or actively "collaborate with the enemy" if this is not in the best interests of the client, regardless of

70. For an extended discussion of the problems generated by the way in which both lawyers and clients generally view their relationship, see D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974). *See also* Wasserstrom, *supra* note 60, at 15-24, where the author focuses more specifically on the shallowness and imbalance of the interpersonal relationship between lawyer and client.

the merits of the respective clients' positions. Because of the way the system is currently constituted, lawyers have no reason even to be inclined to seek the most judicious result rather than the client's self-interest. Hence this is often the cause of antagonism among lawyers—an unhealthy but long-nurtured concern for winning and losing that obscures the ideally existing concern for justice.

Although there are tensions in everyone's lives, they occur more frequently in the life of a lawyer who, after all, makes his living by championing the causes of others. The problem is complicated by the fact that, by and large, the lawyer cannot pick and choose his causes. Thus, for example, the supposed appeal among idealistic law students for jobs as criminal defense attorneys no doubt centers upon the quality of the cause. The life of advocate of freedom from oppression and injustice authenticates the decision to be a lawyer. Unfortunately, the young lawyer may find that his clients are, in many cases, guilty of the crimes of which they have been accused. Of course, among the other roles that a lawyer plays there is less room for disillusionment from the start, because it is clear that the interests being advanced are the narrowly personal causes of clients—causes that frequently resolve themselves in some form of economic *quid pro quo*. However, the essential point is that even if the causes are just (of which there can be no guarantee), the lawyer is the advocate of a position that is only artificially his own. As a logical corollary, there is a dichotomy between belief and action, between person and function.

The lawyer is the agent of man's conflicts in a world full of conflicts. It is no wonder that the public views lawyers as a contentious and quarrelsome lot, but the criticism, however true, is patently unfair, ignoring as it does the social realities which demand that someone play the part. The public has merely entrusted *its* disputes to lawyers. The underlying problem, therefore, belongs to all of us.

IV. CONCLUSION

Although the Code of Professional Responsibility is undoubtedly of practical importance to lawyers because of its regulatory elements, it is of only limited significance to the lawyer's moral existence. While the Code clearly can serve to inform moral choice, it does not constitute moral choice. Only a dulled sensitivity can ignore the demand that one's choices as a professional form a continuity with one's broader moral compunctions. Thus, the legal community should abandon the notion of the Code of Professional Responsibility as a "code of ethics." The confusion revealed by loose references to ethics holds out the prospect of encouraging moral thoughtlessness as surely as it threatens to

obscure the essentially regulatory foundation and mandatory intent of the Code.

The broader considerations raised in this Comment regarding the tensions intrinsic to the lawyer's role in our society are perhaps unanswerable. If these are tensions that are traceable to human imperfection, then perhaps the lawyer's role is singularly destructive of the potential in each of us for transcendence of that imperfection. If, however, these are tensions that may be traced to man's *imperfectibility* (a view to which most of us perhaps subscribe), then the lawyer's place in society is not so ignoble after all. Under this latter view, the lawyer is a primary actor in the resolution of recurring conflicts, conflicts that are in some sense an essential and eradicable feature of human existence. Under the former view, however, the lawyer is a participant in a way of thinking and acting that perpetuates unnecessary conflicts for which there exists some final solution within man's spiritual grasp. Of course, if one opts for *this* position, he has evidenced an optimism for mankind that is only paralleled by the negative message it has for lawyers. Another paradox?

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