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The Unique, Novel, and Unsound Adversary Ethic

Thomas L. Shaffer

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The Unique, Novel, and Unsound Adversary Ethic

Thomas L. Shaffer*

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The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. . . . The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to . . . seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense. Code of Professional Responsibility¹

I. INTRODUCTION

The dominant ethic in the American legal profession in 1988 is the adversary ethic. The adversary ethic, in the words of the late Justice Abe Fortas, claims that “[l]awyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause that they prosecute or defend. They cannot and should not accept responsibility for the client’s practices.”² This ethic is the principal—and often the only—reference point in professional discussions. Although it is embedded in our professional codes, our cases, and our law offices, this Article argues that the adversary ethic is unique, novel, and unsound.

* Robert E.R. Huntley Professor of Law, Washington and Lee University; author, *FAITH AND THE PROFESSIONS* (1987), *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981). The Author is grateful for the assistance of Stanley Hauerwas, Steven Hobbs, H. Jefferson Powell, Robert E. Rodes, and Nancy J. Shaffer.

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981) (footnotes omitted) [hereinafter MODEL CODE].

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

II. THE ADVERSARY ETHIC IS A UNIQUE CLAIM OF MORAL IMMUNITY FOR LAWYERS

The American lawyer's adversary ethic is unique among moral systems for guilds and practices because it claims dispensation from the conventional ethic of complicity—the ordinary determination that if I help someone do something I am implicated in the moral quality of what he does. American lawyers give three justifications for this dispensation. First, these lawyers assert that the adversary ethic is an ethic of *service to the state*. Service to the state is conventionally explained as the modern lawyer's moral philosophy. For example, when I was a young civil liberties lawyer, I once argued for the free-speech rights of a member of the American Nazi Party. My client put anti-Semitic pamphlets on the windshields of automobiles in a parking lot. He was charged with a felony for violating the Indiana Anti-Hate Act.³ I did not like Nazis and did not like having this man for a client; I said I was defending the Constitution. As is often true in civil liberties litigation, I did not meet my client. I did not think of myself as representing him. My professional influence on my client, if any, was remarkably indirect.

Second, lawyers claim that the adversary ethic is an ethic of *service to the autonomy*—the self rule or the freedom—of *clients*. Lawyers believe that dispensation from the ordinary ethics of complicity is necessary in order to protect a client's freedom. This is Professor Monroe Freedman's argument.⁴ Although a lawyer meets his clients, gives them moral advice, and cares about their well-being, a lawyer is primarily the guardian of his clients' ability to choose the morals that determine their use of the law.⁵

Third, lawyers argue that the adversary ethic is an ethic of *service to the goodness of one's neighbor*, without coercion. This is, I have argued, a form of Martin Luther's theology of the two kingdoms.⁶ It is the

3. IND. CODE ANN. §§ 35-15-1-1 to -11 (Burns 1985) (repealed 1977).

4. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331 (1987).

5. See Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U.L. REV. 319 (1987) (discussing Freedman's view of the adversary ethic); Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987). The difference between Freedman's position and Kronman's position is the difference between the goal of autonomy and the goal of goodness (or character). See *infra* text accompanying notes 6-7. Freedman does recognize limits, however. In a case in which the price of client autonomy is the loss of life of one other than the client, Freedman said recently that lawyers should "act to save human life regardless of the rules." See Kaplan, *Death Row Dilemma*, Nat'l L.J., Jan. 25, 1988, at 35, col. 1.

6. Shaffer, *The Legal Ethics of the Two Kingdoms*, 17 VAL. U.L. REV. 1, 1-27 (1983).

In . . . the kingdom of tribute, custom, honor, and fear, one obeys with his life, his goods, and his honor. One follows, there, natural reason . . . [in this] kingdom of hangmen. . . . Called to be a shepherd, a Christian may be a hangman too if his neighbor requires it. . . . God acts in the civil order, but He acts there with a mask; the mask is the face of Caligula; those who serve Caligula serve God when they obey Caligula.

Id. at 12-13.

Christian course of conduct the Great Reformer urged on his prince, the Duke of Saxony.⁷

These justifications for the adversary ethic are countered by the arguments of critics who say that the adversary ethic is not an ethic at all, that it is a claim of moral immunity for lawyers,⁸ or an excuse for lawyer immorality.⁹

The adversary ethic in America is a unique professional notion. It is a departure both from classical moral philosophy and from the American religious tradition.¹⁰ This lawyer's ethic is an instance of what Emile Durkheim called "the decentralization of the moral life"—a separate morality defined by lawyers for lawyers, described within their professional associations and manifested (as in the 1969 *Code of Professional Responsibility*) in a closed understanding of the morals of practice.¹¹ As my colleague Steven Hobbs has expressed it, the lawyers of America give themselves "a free pass out of the community's moral discussions."

The adversary ethic describes professional practice as an occupation carried on in a society of strangers, in which conventional moral connections are weak between, for example, one lawyer representing his client and another lawyer's client. Some sense of moral duty runs from one lawyer to the other lawyer's client, but the explanation of that duty is incoherent, pre-rational, and undeveloped.¹² Modern American legal

7. The ethic of professional service as service to one's neighbor is related to the Torah and to the Gospel. Each of the other two theories in defense of the adversary ethic is also elaborated in religious ethics—as well as in philosophical ethics and in social history. In Martin Luther's teaching, service to the state is related to St. Paul's admonition of obedience to civil authority. *Romans* 13:1-7. In Monroe Freedman's thought, service to autonomy is related to a doctrine of human dignity that turns finally on the client's being a child of God. See T. SHAFFER, *FAITH AND THE PROFESSIONS* 71-110 (1987); Freedman, *supra* note 4.

8. See Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1 (1975).

9. See Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83 (D. Luban ed. 1983); Lasky, *Is One Ethic Enough?*, 17 *VAL. U.L. REV.* 41 (1983).

10. Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 *AM. J. LEGAL HIST.* 191 (1977) (discussing these historical and cultural developments).

11. *Id.* at 200-01 (discussing Durkheim's theory).

12. None of those who argue seriously for the adversary ethic—that is, those who argue that it is an ethic and not merely a license—would deny this duty. However, the applied adversary ethic argument usually describes duty to client in such vivid and compelling terms that harm done to the other lawyer's client is seen as either incidental to performing one's duty for clients or as the tragic result of a necessary but conventional moral choice between two good courses of action. See, e.g., *Berlin v. Nathan*, 64 *Ill. App. 3d* 940, 952, 381 *N.E.2d* 1367, 1376 (1978) (stating that "it would be contrary to public policy for [the court] to hold that an attorney has a duty to an intended defendant not to file a weak or perhaps 'frivolous' lawsuit since we would be creating an insurmountable conflict of interest between the attorney and the client. . . . When a tort action is brought [an attorney] has but one intended beneficiary, his client; the adverse party is certainly not an intended beneficiary of the adverse counsel's client").

ethics diminishes appreciation for the layperson's common-sense thought that it is as blameworthy to injure another person with the law as it is to injure him with a baseball bat. This description of American lawyers poses a fundamental and intractable question for legal ethics: Can the law be practiced in a society of strangers? If our society is assumed to be disorganized, heterogeneous, and uncongenial, are the traditional notions of the good person, in a community that considers the common good, incoherent?¹³

There are two aspects to this difficult question; each is a way to justify a specialized task within a community that considers the common good. First, it is probably impossible for a good person to practice any profession in a society of strangers. Writing about the medical profession, Alasdair MacIntyre and Stanley Hauerwas argue that a necessary condition of professional practice is that the professional person be entitled to consider one limited part of the client's life.¹⁴ Thus, the professional is entitled to concern himself only with a pancreas, or a drunk driving charge, or the resolution of a marital spat, or the cultural setting of Plato's *Protagoras*.¹⁵ The professional is entitled to ignore his client's other needs.¹⁶

The professional is forgiven for not tending to the client's other needs because a morally sanctioned division of labor exists in the community. Thus, the lawyer is allowed to ignore his client's pancreas, even though the client may die as a result of it, because a physician will see to the client's medical condition. At the same time, the physician is allowed to ignore the disgrace that a drunk driving charge will bring to her patient because the physician is not licensed to deal with disgrace; the lawyer is. In this assignment of tasks, however, each person's wel-

The civic-virtue sense of community on which the older, American, republican legal ethic rests, has become, according to Schudson, "heterogenous, disorganized, and . . . uncongenial." Schudson, *supra* note 10, at 209. Frederick Elliston, a philosopher, in an essay on the regulatory requirement that lawyers have good moral character, says that "morally good person" is now an incoherent notion—one that is so vacuous that you cannot build practical professional regulation on it. Elliston, *Character and Fitness Tests: An Ethical Perspective*, B. EXAMINER, Aug. 1982, at 8, 9.

13. The modern codified American legal ethic does limit the permissible uses of the legal process: a lawyer is not allowed to use the legal process *merely* for harassment or malicious injury. The adverb here seems to take the force out of this limitation; but it is interesting to notice that, in interpreting the limitation, bar associations' ethics committees and the courts, tend to ignore the adverb and to apply the rule when harassment or malicious injury is incidental to a permissible course of action. The point is developed *infra* notes 70-74 and accompanying text.

14. The Hauerwas-MacIntyre discussion is encompassed in S. HAUERWAS, TRUTHFULNESS AND TRAGEDY 184-202 (1977), and in S. HAUERWAS, SUFFERING PRESENCE 39-62 (1986) (discussing MacIntyre and the theory of professions developed by the late Yves Simon).

15. PLATO, PROTAGORAS (C. Taylor trans. 1976).

16. The next four paragraphs are adapted from Shaffer, *On Being a Professional Elder*, 62 NOTRE DAME L. REV. 624, 627-28 (1987).

fare remains a community concern, and the lawyer is a member of the concerned community. The welfare of each person is the basis for moral arguments within the community's consideration of the common good. It is in this way that a good person practices a profession and also adheres to the concept, expressed by John Donne, that "no man is an island."¹⁷

Proponents of the adversary ethic say or imply that traditional, republican legal ethics¹⁸ have either been abandoned or redefined. American republican lawyers provide a second communal justification for the substance of professional practice: according to republican lawyers, narrow service is permissible because it is done within the context of a sense, shared across the community, of what is important. Such a sense largely makes coherent the notion that the community can judge an individual's character. A cultural reference point provides the professional context; a physician, lawyer, or teacher serves personal needs in reference to large cultural purposes. Thus American lawyers who taught law before 1850 told their pupils that it was wrong to argue for a legal interpretation that did not serve the common good.¹⁹

17. MEDIATION XVII (1624), in 1 NORTON ANTHOLOGY OF ENGLISH LITERATURE 1108-09 (4th ed. 1979).

18. "Republican" legal ethics refers to the legal ethics that came from the two generations of American lawyers who fashioned a common-law jurisprudence for America from colonial legal practice and the communitarian idealism of our revolution. A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965). There is an historical continuum in legal ethics that runs from David Hoffman's essay on professional deportment (1817), through Hoffman's fifty resolutions (1836), through the essays and lectures on legal ethics by Judge George Sharswood (1854), through the first bar-association codes (1880s), to the American Bar Association's *Canons of 1908*. An example of *principle* in republican legal ethics, in addition to those discussed in the text of the Article, is the republican lawyer's reluctance to plead, against civil actions, defenses that do not address the merits of the plaintiff's claim—for example, statutes of limitation, the claim of infancy, or the Statute of Frauds. See T. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS AND DISCUSSION TOPICS* 59-68, 94-96, 114-15, 132-34, 146-49 (1985) (reproducing Hoffman's Resolutions); *id.* at 177-78, 197-202, 220-21 (reproducing George Sharswood's *Essay on Professional Ethics*); *CODE OF ETHICS*, 118 Ala. Rep. xxiii (1899) (the Alabama progenitor of the 1908 canons). Hoffman's Resolution XII on limitations states, "I will never plead the Statute of Limitations, when based on the mere efflux of time, for if my client is conscious he owes the debt, and has no other defence [sic] than the legal bar, he shall never make me a partner in his knavery." T. SHAFFER, *supra*, at 64. Hoffman's Resolution XIII on infancy states, "I will never plead, or otherwise avail the bar of infancy, against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defence [sic] than that it was contracted by him when under the age of twenty-one years, he must seek for other counsel to sustain him in such a defence [sic]." *Id.* Hoffman acknowledges that statutes of limitations and the claim of infancy were created to encourage timely claims and to protect minors. He states, however, that the lawyer should "be the sole judge (the pleas not being compulsory) of the occasions proper for their use." *Id.*

19. T. SHAFFER, *supra* note 18, at 64 (reprinting Hoffman's Resolution XIV which states that "[s]hould the principle . . . be wholly at variance with sound law, it would be dishonourable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day"); see also B. STEINER, *LIFE OF ROGER BROOKE TANEY* 267-73 (1922).

Professional narrowness is immoral therefore in certain situations. First, professional narrowness is immoral in a community that does not attend to what its professionals are licensed to ignore during office hours. The practice of family medicine or the preparation of wills and trusts, for example, makes no sense in a community that leaves the family naked to its enemies. Second, professional narrowness is immoral in a community that does not provide a moral context for professional service. In a value-free society, the only service that is justified is a service that protects a client's isolation from other people. In a value-free society, the franchise that a profession enjoys is not justified in terms of virtue or common purpose, but in terms of protecting the client from the interests of others.

These theories of and from the notion of civic virtue framed the late nineteenth century public debate²⁰ on the adversary ethic. The republicans in that debate relied on a public moral sense, a sense for the common good. They said both that there was such a thing as a public moral sense and that the public moral sense had vitality; it could, by and large, be depended upon.

What was crucial to the republicans' claim, and what remains crucial to an argument such as the one made in this Article, is not the existence of a consensus on particular moral or legal issues, but that a public conversation occurs, which includes, and includes prominently, arguments about what would be good for the community, as distinguished from arguments about the rights of individuals. The essence of the enterprise is a tolerant openness to being persuaded in a conversation on the common good. It is important that participants listen carefully to one another because there is a chance that one person's argument will convince the others. As Anthony Kronman states:

[I]t is the sign of a wise political judgment that it promotes community, not through the construction of a false and unattainable unanimity, but in the only way that human beings with strongly divergent interests are ever likely to achieve it: by strengthening the capacity of each to entertain the views of those with whom he disagrees. . . .²¹

20. See, e.g., T. SHAFER, *supra* note 18, at 176-87, 193-208, 215-31. This is a point on which I disagree with Monroe Freedman. His position is that a lawyer should seek his client's autonomy—freedom—as either the client's ultimate good or the highest good that a lawyer can hope to help his client achieve. That seems to imply that a community of autonomous persons, a community of rights, has no common good. If Freedman's position does not imply despair for the common good, then it implies that the state, the market, or a laissez faire political system can provide a common good—can be depended upon to provide goodness—which seems to me to be manifestly not so. See T. SHAFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981).

21. Kronman, *supra* note 5, at 861. This is another example of how a compelling modern description of the virtue of tolerance (Kronman calls it judgment) turns a personal disposition or habit into a social ethic. See generally G. TINDER, *TOLERANCE* (1976).

The characteristic of good judgment in such a conversation is vulnerability rather than interest balancing.

The republicans are optimists. They say that the rhetoric of despair they hear today in professional ethics overstates the pace of decline of the public moral sense in America,²² and therefore overestimates the usefulness of a unique professional ethic for lawyers. There is interesting evidence and argument to the effect that we still have steady, resilient, and strong "habits of the heart."²³ I hope the evidence is reliable because, in my opinion, professional practice as a moral way of life—as something a good person can do—depends on it. A good person does not claim a unique ethic for his job. A good person probably cannot practice a profession in a society of strangers.

III. THE ADVERSARY ETHIC IS A RECENT AND EPISODIC DEVELOPMENT

The adversary ethic traces its origins from four events of significant concern to American lawyers, events that coincided with the emergence of the large commercial centers of the northeast—particularly in New York City—as the dust cleared from the Civil War. The first of these events was a process of justification for lawyers who were representing the "robber barons" of the railroad, manufacturing, and financial industries. Michael Schudson's example²⁴ is Daniel Drew, James Fisk, Jay Gould, and the Erie Railroad's fight against Commodore Vanderbilt and the New York Central Railroad. It was a late nineteenth century hostile take-over in which Vanderbilt was buying up Erie stock, and Drew, Fisk, and Gould, not interested in such delicacies as poison pills, white knights, or crown-jewel sales, met the competition by printing new stock.

Clients fled a jurisdiction in order to evade an injunction; clients frequently bribed legislators, and very possibly directed the commission of murder. Their lawyers included the distinguished David Dudley Field, law reformer, author of the Field code of procedure, brother of a Supreme Court justice, and advocate for the powerful. These lawyers represented their clients in the legislature and the courts. They continually frustrated the judicial process by meeting any injunction against their clients with a countermanding injunction from another judge. This tactic was possible because of the curious jurisdictional provisions

22. See, e.g., Robb, *Women's Contribution to the Meaning of Justice*, 21 PAC. THEOLOGICAL REV. 38 (1987); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

23. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWINDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985) [hereinafter R. BELLAH & R. MADSEN].

24. See Schudson, *supra* note 10.

of the procedural code drafted by Field.²⁵ The most illustrious lawyers in New York City—Samuel Tilden, Thomas Shearman, and many other founders of the Bar Association of the City of New York—represented parties to such corporate wars in the 1870s.²⁶

The second event that contributed to the development of the adversary ethic was growth and strength for the practice of law in law firms. Although law firms in America date from the 1820s, they were not significant as professional associations until the 1870s.²⁷ The third event was the founding of the first local and national bar associations. The fourth event was the appearance of the first codes of legal ethics.²⁸ All four of these events provoked or occurred in response to a public and journalistic perception that America's leading lawyers were acting immorally.

The articulate laymen of that era—including, for example, Henry Adams, who was a social critic, novelist, and descendant of presidents, and Samuel Bowles, editor of the Springfield Republican—reacted publicly by expressing stern moral disapproval of the activities of the country's leading lawyers.²⁹ These laymen argued that this behavior on the part of American lawyers was a betrayal of the personal public responsibility that Adams' ancestors had accepted as the burden of being American lawyers. "[P]ublic opinion," Adams said, "was silent or was disregarded."³⁰

This argument was based on the perception that the lawyers for the robber barons were refusing to cooperate with a public consideration of the common good. What was crucial, if republican social ethics were to remain plausible, was the claim that Bowles, Adams, and editorials in the *New York Times* made about the relevance of the lawyers' behavior in the robber baron cases: the issue was not so much that the

25. *Id.* at 194-95. I do not understand Schudson to imply that Field drafted the jurisdictional provisions of the code so that his clients could manipulate the process of issuing injunctions—although some of the evidence Schudson assembles may support such an inference.

26. See J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 14-18 (1976); SHEARMAN AND STERLING 69-90 (1973) (copy on file with Author).

27. Howe, Book Review, 60 HARV. L. REV. 838 (1947) (reviewing R. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS* (1946)).

28. Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063 (1978).

29. See, e.g., Schudson, *supra* note 10, at 195-200. Bowles' public debate with Field forms the principal datum in Schudson's essay. Bowles' newspaper, according to Schudson, was "the only small city journal to exercise significant national influence during the Civil War period." *Id.* at 204. Its motto was "All the News and the Truth About It." *Id.* Bowles described the duty of a newspaper as more than "a mere historian of the day. It intrudes into other spheres; it preaches, it teaches, it legislates, it reforms. It is not content with reporting what the public mind is thinking about; it insists that the public mind shall think about the right things." *Id.*; see also M. SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* (1978).

30. Schudson, *supra* note 10, at 195.

behavior was wrong, but that its rightness or wrongness was a matter of public concern. It was not intrusive for newspaper writers to question what lawyers did for clients because the community was within legitimate limits when it called upon lawyers to account for what they did for clients, and to do so publicly. The republicans' attempts at fraternal correction were, functionally, not so much condemnations as invitations to discuss the common good. The lawyers declined the invitations, not with the argument that what they and their clients talked about were not moral matters, but with the argument that they were private moral matters. The issue was open and public consideration of lawyers' behavior as relevant to the common good.

The moral alarm sounded by Henry Adams was also alarm toward the secret power of corporate business. Alexis de Tocqueville feared the early beginnings of government by moneyed corporations in America.³¹ De Tocqueville's conception of American democracy was the basis of Adams' republican argument: corporations don't act; only people act.³² To take seriously the legal fiction that the corporation acts was to give up the moral argument. To behave as if lawyers for business corporations are not accountable for what the officers of their corporate clients do adds insulation to the denial of responsibility by corporate officers, as it extends the denial of responsibility by the legal profession.

Louis Auchincloss' character Henry Knox,³³ a third-generation successor to the New York law-firm lawyers of the 1870s, remembered well the lessons of his professional grandfathers: "Your client wants you to do something grasping and selfish. But quite within the law", Knox said. "As a lawyer you're not his conscience, are you? You advise him that he can do it. So he does it and tells his victim: 'My lawyer made me!' You're satisfied, and so is he. . . ."³⁴

Bowles and Adams argued that a lawyer's work for his clients is public business. The lawyers responded by invoking the notion of individual rights—especially what a later generation has come to talk of as a right to privacy. Adams and Bowles argued that power should be exercised in such a way that the people can see it and contain it. The final issue for Adams and Bowles was public sovereignty. The lawyers' defense was autonomy and the sovereignty of the individual—every man is his own tyrant.

These were important arguments. They still are. It might be useful to ponder these arguments a bit and to notice how familiar use of words

31. *Id.*

32. *Id.*

33. L. AUCHINCLOSS, *THE GREAT WORLD AND TIMOTHY COLT* (1956).

34. *Id.* at 73.

of moral and legal debate were used in them. The word "rights," for example shows up on the adversary ethic, robber baron side of the argument. David Dudley Field claimed that what he and his clients talked about and decided to do was not public business. He and his clients had a right to keep the legal decisions made in Field's law office from the public. Adams and the newspapermen claimed that Field's law practice was public business because corporate business and office decisions in aid of corporate business were matters of public concern. These republicans were not as interested in talking about the rights of the robber barons as they were in talking about the morals of the robber barons: the republicans insisted that a substantive, moral, public debate was a legitimate interest, as against the assertion of individual rights, privacy in lawyer-client relationships, and autonomy in deciding, within the councils of a business enterprise, what the business should do.

The word "rules" is also useful in understanding the adversary ethic argument. As it did in Field's day, the republican professional world still talks about character, disposition, virtue, and habit. The new rhetoric of adversary ethics talks of privacy—and privacy needs rules. Professor Richard Stith has shown recently how talk of rules will more likely occur in a debate about rights, privacy, and individualism, than in a debate about the common good:³⁵

To the degree to which a "community" . . . exists, shared public values are effectively pursued by all. . . . [R]ules are unimportant. For example, if neighbors were to gather to build a common barn, it would be silly to set down rules granting individual claim rights to hammers. . . . [T]he common goal would be to use hammers wherever they are most needed. No individual would insist on getting his or her prescribed turn with a hammer. . . .

By contrast, to the degree to which a society is "individualistic," there are no public values. All goals are personal and private, and human beings interact only insofar as necessary in order for each to achieve his or her private values. Consequently, rules are very important. For example, if a number of individuals are constructing their own separate barns, and there is a scarcity of tools, they will surely set down a set of rules for sharing hammers. . . . Private planning requires certainty about rules, requires *rights*. . . . [O]ne is disinclined to relinquish a turn at the hammer even if one happens to have run out of nails.³⁶

Rights lead to rules and, during these corporate lawyers' professional lives, the rules were gathered into codes, which were promulgated by bar associations and protected by (as well as protective of) law firms.

Words for "voluntary associations" within the community are a third example of the rhetoric of the adversary ethic debate. The issue in this context is one of political theory regarding groups. The adversary ethic tends to rely on the right to associate and, therefore, on the state's

35. Stith, *New Constitutional and Penal Theory in Spanish Abortion Law*, 35 AM. J. COMP. L. 513 (1987).

36. *Id.* at 515 (emphasis in original).

power to recognize which associations are worthy of state protection. Republican political theory tended to encourage voluntary public associations that nurtured culture. These associations formulated points of view that served to sharpen issues within the republic. According to republican theory, these associations did not depend on the state; they shared power with the state and, in some senses, the state depended on them. As the republicans perceived it, sovereignty did not move cleanly from the people to the state: “[G]overnment must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.”³⁷ “Private” in this context means that the association is not dependent on government sanction. But an argument for authoritative associations is not necessarily an argument against public moral accountability. Bar associations after 1870 claimed an insulated moral authority, which was not to be debated in the community. They were, as they are now, protected by the state. Bar associations exercise as much authority as the state permits them to exercise. In this way bar associations provide their members with a free pass out of the community’s moral discussions.

Proponents of the adversary ethic have an affinity for words such as rights, rules, privacy, individualism, contract, independence, detachment, and self-government. Proponents of the republican argument have an affinity for words such as community, commonality, connection, context, relationship, response, influence, attachment, virtue, moral discourse, and common good. The recent professional history of lawyers—and the codification of that recent history in professional regulation—is the history of a movement toward rights and rules, and a movement away from moral discourse about the common good. Most of what we now call jurisprudence, and virtually all of what we think of as constitutional jurisprudence, embodies the rules-rights side of these verbal preferences. Republican political thought in America, including republican legal ethics, embodies the context-virtue side. Modern feminist ethics,³⁸ much of theological ethics,³⁹ and the ethics influenced by

37. Howe, *Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953).

38. See Sherry, *supra* note 22, at 588; Robb, *supra* note 22, at 39; Kerber, *The Republican Mother*, in L. KERBER & J. DE HART-MATHEWS, *WOMEN’S AMERICA: REFOCUSING THE PAST* 83 (2d ed. 1987); see also Kronman, *Practical Wisdom and Professional Character*, 4 SOC. PHIL. & POL’Y 203 (1986).

39. See S. HAUERWAS, *AGAINST THE NATIONS* (1985); S. HAUERWAS, *A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC* (1981); UNITED STATES CATHOLIC CONFERENCE, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* (1986).

the cultures of the immigrants who came to America after 1890 also embody the context-virtue side of these verbal preferences.⁴⁰

The recent professional history of lawyers thus describes a novel moral world. At least it would have appeared novel to earlier generations of American lawyers and to generations elsewhere. Indeed, it appears strange to some of us in this generation. The adversary ethic description of law practice does not resemble the republican moral world that the earliest American lawyers thought they had forged from the Revolution: "religious in its roots and civic in its expression."⁴¹ The republicans insisted—as they still insist—that law is a profession of public responsibility. Henry Adams knew it. Samuel Bowles and the editorial writers at the *New York Times* had perceived it.

Nor was this a moral world the late immigrants could admire. As this novel moral argument appeared in business and the legal profession, great waves of immigration brought Eastern European Jews, Italians, Poles, and Slavs to America. The immigrants did not admire the commercial morals they found in America. They would not, had they thought about it, have admired lawyers who protected commercial morals from public criticism. An Italian immigrant wrote home that Americans had "been pickled in the sour juices of Puritanism."⁴² Americans, it seemed, worshipped money and work and nothing else. Another Italian immigrant said, "Joy is a fruit the Americans eat green" (*frutta senza sapore*).⁴³ Americans, these immigrants thought, evidenced no sense of community, which was the soul of the immigrant's morals. The Italian *contadini* called it *la via vecchia*—the old way—the way of community. Americans, one Italian said, "will go to a funeral of their best friend and keep a straight face. I believe they are ashamed if in a moment of forgetfulness they've turned to look at a flower or a beautiful sunset."⁴⁴ Americans were "persons who knew no refinement of language, of bearing or of manners. . . . Dignity had no place in [their] life."⁴⁵

This lawyers' morality is also strange to a modern American business client who looks back on the first generation of big city law firms. If you were writing a parallel history of business practice, if you were comparing the transactions David Dudley Field, Thomas Shearman, and Samuel J. Tilden represented to the takeover wars and insider

40. T. SHAFFER, *supra* note 7, at 173-228.

41. Schudson, *supra* note 10, at 327; see also R. BELLAH & R. MADSEN, *supra* note 23.

42. M. LASORTE, *L'AMERICA: IMMAGINE DI UN'ITALIA VERDE* 147, 195-97 (1985).

43. *Id.*

44. *Id.*

45. *Id.*

trading cases of today, you might conclude that the morals of commerce a century ago were not only less public than the morals of commerce today, they also were much worse. Morals in commerce are background and substance for the morals of the lawyers who protect and represent commerce. If commercial morals today are both better and more public than they were in 1880, the morals of lawyers seem to be both worse and more private. Clients' morals have improved but lawyers' morals have not.

IV. THE ADVERSARY ETHIC IS UNSOUND

The historian may, at this point, be doing more than history. In discussing the adversary ethic as a departure from republican moral culture, Michael Schudson sought to "illuminate the condition of modern professional life."⁴⁶ His social description indicated that modern American lawyers practice a market morality, which dominates lawyers' behavior—and even lawyers' ethical thought.⁴⁷ Today, such lawyers consider a person who argues republican legal ethics as an ethical alternative to be moralistic, anachronistic, condescending, and, at best, nostalgic.⁴⁸

This market-morality characterization likely would have been true of corporate lawyers' behavior in 1880; but it would not have been true of corporate lawyers' ethical discourse. As is often true in professional ethics, the proclaimed ideals of the American lawyers of the 1870s were betrayed by the behavior of these lawyers. These lawyers invented the adversary ethic as they self-righteously condemned what they were inventing. Schudson traced David Dudley Field's disgust for Lord Brougham's adversary argument and concluded that Field maintained his low opinion of Brougham but lost all logical reason for having such a low opinion.⁴⁹

Brougham had said, in curious circumstances in Britain, that an advocate has a duty to ignore "the alarm, . . . the torment, the destruction which he may bring on any other," and should be prepared even "to involve his country in confusion."⁵⁰ Throughout Field's career, he repeatedly condemned Brougham. But Field became one of Brougham's lawyers despite himself. Field ignored alarm and torment. He brought destruction upon others. He involved his country in confusion. (I am even inclined to blame Field for the fact that I cannot ride trains

46. Schudson, *supra* note 10, at 193.

47. *Id.* at 191-92.

48. *Id.*

49. *Id.* at 207.

50. T. SHAFER, *supra* note 18, at 204-07 (quoting and discussing Lord Brougham's statements on the duties of the advocate).

anymore.)

We are Field's heirs, and our ethical language has caught up with Field's behavior. "The condition of modern professional life" is the same adversary behavior, now with a new rhetoric to justify the behavior—the new rhetoric of the adversary ethic, which was invented and then codified by bar associations to justify the behavior of lawyers such as Field, Shearman, and Tilden. The justification of this lawyers' behavior coincided with the prominence of law firms, the creation of bar associations, and the imposition of professional codes.

Judge E. Darwin Smith accused Shearman and Field of "the use and abuse of legal process" for their clients.⁵¹ This was Judge Smith's view of the way in which these lawyers manipulated injunctions; he called it a conspiracy.⁵² Judge Smith pointed a judicial finger at Shearman and Field as individual errant lawyers. The law firms responded to Judge Smith by taking these individual lawyers out of the dock. The firms packaged the adversary ethic in enduring institutions that business could depend on and judges could not reach. The robber barons soon did not need to rely on temperaments as volatile as Field's and Tilden's; they could do business with professional institutions that were solid and finally impersonal, and which became at least as immortal as the business institutions they served.⁵³

The bar associations eventually did their part by adopting codes that defined comfortable limits on the behavior of Shearman, Tilden, and Field and their law firms. The bar associations supplemented the codes with the elaborate political rhetoric of individualism, of rules and rights.⁵⁴ Firms and associations gave the profession a rhetoric to justify itself to the republic, while the profession abandoned its responsibility for the republic.

First, lawyers and judges in the service of this ethic talk of themselves as *administering justice*. Justice is defined as a thing of rules and rights. Rules and rights are complex. If justice is a thing of rules and rights, then justice is complex, and a person may need a professional license to know what justice is. Justice is a commodity one gets from lawyers. It is the product of expertise, similar to the products of investigative journalism or food processing. Justice is compounded in secret and dispensed professionally, as information is dispensed by a country newspaper in North Carolina, the front page of which says "All the News You Need." Justice is like food from Ralph's Pretty Good Gro-

51. Schudson, *supra* note 10, at 196.

52. *Id.*

53. Rodas & Shaffer, *Law for Those Who Are to Die*, in *NEW MEANINGS OF DEATH* 291 (H. Feifel ed. 1977).

54. Schudson, *supra* note 10, at 202-04.

cery, where, if they don't have it, you probably can get along without it. Justice is not a legitimate subject of public concern to which citizens, as citizens, are able to respond.⁵⁵

Second, the profession claims a distinctive ethic of its own, a private ethic. "[A] distinctive code of *honor*," Schudson calls it.⁵⁶ According to classical ethics, *honor* is not a virtue and is not dependable in forming good character. Honor evidences a moral system in which a member of a class seeks his justification from other members of his class.⁵⁷ Professional "honor" evidences the decentralization of moral life.⁵⁸

Schudson claims that the lifeblood of the new commercial law firms was specialization.⁵⁹ I think he is wrong about that, and wrong on his own account: the lifeblood of the law firms was the development of a selective, insulated notion of honor. Law firms became places of a separate professional morality. Lawyers call this morality honor, and they defend it by claiming to administer justice. American lawyers thus could hide from the implications of the moral leadership which Samuel Bowles and Henry Adams wanted to talk to them about. The point is not that all American lawyers hid from these implications. Perhaps most did not. Perhaps most do not. But they can hide if they want to, any time they want to, and their profession will protect them. Their firms, their associations, and their codes give lawyers a place to hide. The adversary ethic protects the hiding place, by making what lawyers do with the law a professional matter, rather than a public or political matter.

In the debate in Samuel Bowles' newspaper, Field argued that the new professional honor was private—and none of the community's busi-

55. Generalizing from the Aristotelian argument made by Alasdair MacIntyre in A. MACINTYRE, *AFTER VIRTUE* 56 (1981), William C. Spohn has written:

MacIntyre indicts our . . . culture . . . for destroying the notion that human beings possess a common direction of development. . . . For Aristotle and the medievals, humanity was a functional concept. They understood "the concept of *man* . . . as having an essential nature and an essential purpose or function. . . . That is to say, 'man' stands to 'good man' as 'watch' stands to 'good watch' or 'farmer' to 'good farmer' within the classical tradition." Actions or habits were termed "good" because they contributed to objective human flourishing. Thus, there is a factual relation between acting justly and being a good human being: acting justly is an essential ingredient of being fully human. . . .

When human beings are conceived as individuals apart from social roles or a common humanity, then no common *telos* exists; hence no factual relation can be asserted between certain virtues or actions and humanity.

Spohn, *Notes on Moral Theology: 1986, Virtue and American Culture*, 48 THEOLOGICAL STUD. 123, 126 (1987) (footnotes omitted, emphasis in original).

56. Schudson, *supra* note 10, at 207 (emphasis added).

57. B. WYATT-BROWN, *SOUTHERN HONOR* 362-401 (1982).

58. Schudson, *supra* note 10, at 208.

59. *Id.* at 192.

ness.⁶⁰ That argument appears occasionally in a reported case in which a lawyer is disciplined,⁶¹ the argument implies that lawyers have no responsibility for harm to non-clients.⁶² When the California Supreme Court in *Heyer v. Flaig*⁶³ found a legal relationship between a lawyer and legatees under a will the lawyer had drafted, the court created a startling piece of jurisprudence. The court put the adversary ethic up for re-evaluation in public and at the hands of lay jurors. If the legal profession was not shocked by *Heyer*, it should have been. The spirit of that opinion is both republican and apocalyptic.⁶⁴

The point of my argument is the conclusion—which I now invite you to make—that the adversary ethic is not, for all the official, pretentious support it receives, a settled matter. If history is persuasive, my invitation is to consider the argument that the adversary ethic is not only unique and novel but also unsound. It is still possible to ask an American lawyer: Does your practice make people better—not just your client, but other people in the community? I want to be able to revive classical social ethics and apply it to the legal profession. “When you embark on a public career,” Socrates asked, “pray will you concern yourself with anything else than how we citizens can be made as good as possible?”⁶⁵ The adversary ethic supposes that such a question is irrelevant. Whether the lawyer even makes her own client better is no one’s business but her own. I am arguing that the adversary ethic is not as firmly in place as it thinks it is, and that has never made sense.

V. AN AFTERTHOUGHT

A nonhistorical way of looking at this ethical question is to see the adversary claim as the movement of a deviance process. Deviance systems, from dress codes and salad forks to the criminal law, define a community.⁶⁶ The lawyers of New York City defined the professional community that arose from the 1870s with distinctive forms of practice (the firms), distinctive forms of organization (the associations), and new

60. Schudson, *supra* note 10, at 198-200.

61. See, e.g., *In re Haupt*, 250 Ga. 422, 297 S.E.2d 284 (1982).

62. See *Teasdale v. Allen*, 520 A.2d 295 (D.C. 1987); *Walker v. Lawson*, 514 N.E.2d 629 (Ind. Ct. App. 1987); *Hale v. Groce*, 304 Or. 281, 744 P.2d 1289 (1987); *Berry v. Dodson*, Nunley & Taylor, P.C., 717 S.W.2d 716 (Tex. Ct. App. 1986).

63. 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

64. Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 FAM. L.Q. 413, 416-17 (1986) (discussing application of the *Heyer* doctrine in cases involving the welfare of children); Gossman, *Professional Liability for Negligent Misrepresentation*, 31 RES GESTAE 274 (1987).

65. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI L. REV. 849, ____ (1983) (quoting Professor J.B. White's translation of Plato's *Gorgias*).

66. K. ERIKSON, *WAYWARD PURITANS* (1966).

systems of professional regulation (the codes). In this story, American lawyers defined what American lawyers are, which is what a deviance system does.

Schudson uses the metaphor of a scapegoat for David Dudley Field,⁶⁷ but that characterization is entirely wrong. In ancient Hebrew ritual the scapegoat is sent away, and then toppled over a cliff.⁶⁸ Although for a while, Field and Shearman were objects of self-righteous scorn among the lawyers of New York City, when it came to deciding on scapegoats, they were not sent away; they were included, invited, and enrolled in the new formal fraternity of lawyers who were members of the firms and the bar associations. The lawyers who were sent away in those days, that is, the lawyers who were regarded as deviant and defined as outside the new, selective fraternity, were those representing street criminals and labor unions, not corporate business people. Examples of the real scapegoats of the period might include Clarence Darrow, or perhaps Ephraim Tutt.⁶⁹ The legal community defined itself as including Field, Shearman, and Tilden. The formation of the Association of the Bar of the City of New York was a kind of deviance process, which is the way that Schudson shows us "the condition of modern professional life."

The new fraternity ultimately included Field and Tilden. Did it endorse what they had done and were doing for the robber barons? Clearly, the answer is yes. But the bar association did do something *around* these lawyers, if it did not do something *about* them, by describing what these lawyers were doing in a new way. The profession now speaks of a lawyer's behavior not in terms of the common good, as the republicans did and still do, but in terms of procedure: the mechanism of the new ethic is a thing of procedures. As the medical ethicist H. Tristram Engelhardt has expressed it:

[T]he custodians of the moral order of the next century will, should we live freely, be like good bureaucrats who follow procedures respecting the freedom of a nation's citizens without imposing a particular view of the good life. One might think here of a mail carrier who delivers with equal reliability the *New England Journal of Medicine*, *Playboy*, and the *Journal of Medicine and Philosophy*.⁷⁰

He may also deliver *Hustler*, *Business Week*, *Harper's*, and the *A.B.A. Journal*.

The conversion of professional ethics from a purpose resting in the common good to a system of contention that rests on procedure is a

67. Schudson, *supra* note 10, at 193.

68. *Leviticus* 16.

69. T. SHAFER, *supra* note 18, at 473-540 (reprinting and discussing Arthur Train's stories about Mr. Tutt, which appeared in *The Saturday Evening Post*).

70. Engelhardt, *Bioethics in Pluralist Societies*, 26 *PERSP. BIOLOGY & MED.* 64, 66 (1982).

clear development and a moral claim. But we American lawyers, for all our talk, are ambivalent about this development. The conversion, like the broader adversary ethic it supports, is not settled. It is not over. The Disciplinary Rules under Canon Seven of the A.B.A. *Code of Professional Responsibility*⁷¹ are a limited example that illustrates and provokes the ambivalence the profession has toward the adversary ethic and professional morals that stop at procedure.

Canon Seven is evidently a set of rules about lawyers using procedures. The rules have been applied, however, in such a way as to exceed, and even to undermine, a morality based on procedures. For example, the *Code* imposes a disciplinary rule against assisting a client who seeks *merely* to inflict malicious injury and harassment on others;⁷² lawyers are not permitted to use legal procedures if that is all they are up to for their clients. As stated, this is a trivial rule. It is what the lawyers for the robber barons wanted. Rarely will a lawyer have a client who wants to use the law for mere malice or mere harassment; the law is an expensive and stressful form of revenge. It would be cleaner and cheaper to go to Florida and get a gun.

The profession, however, has used the rule to disapprove of situations that are not covered by the language of the rule. For example, filing a lawsuit in a county that is inconvenient for the defendant is deemed to be a tactic designed merely to inflict malicious injury, even when there are strategic reasons (not malicious, or at least not merely malicious reasons) for filing it there. The plaintiff may say he is not out for malicious injury; he is out to win. Nevertheless the rule against mere malicious injury keeps his lawyer from filing the suit in the inconvenient county.⁷³ Similarly, using change of venue not to find an unbiased tribunal, but as a tactic for delay or to force settlement, is held to be merely harassment.⁷⁴ Changing the nominal ownership of assets that would otherwise be available to creditors is held to be maliciously injurious.⁷⁵ In other words, procedures are available for the substantive purposes they were established to serve. The test of whether they are being used properly is whether they are related to such substantive purposes.

71. MODEL CODE, *supra* note 7, Canon 7 (providing that a lawyer should "Represent a Client Zealously Within the Bounds of the Law").

72. *Id.* DR 7-102(A) (1981); see T. SHAFER, *supra* note 18, at 338-39.

73. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1011 (1967), noted in AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 308 (1979) [hereinafter A.B.F.]; see also C. WOLFRAM, MODERN LEGAL ETHICS 597-600 (1986).

74. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 557 (1963), noted in A.B.F., *supra* note 73, at 308.

75. *In re Mussman's Case*, 111 N.H. 402, 286 A.2d 614 (1971), noted in A.B.F., *supra* note 73, at 308; see also Withered, *Frivolous Law Suits and Duties to Clients*, 30 RES GESTAE 164 (1986). See generally A.B.F., *supra* note 73, at 305-10.

If the procedures are used for unworthy purposes—even though they are clearly available and not clearly limited—the lawyer who uses them is subject to punishment, and is so subject under a rule against mere harassment or mere malice.

I detect in the application of this apparently trivial rule one little piece of evidence that demonstrates the insecurity of the adversary ethic.⁷⁶ I even detect one small reason to hope that the adversary ethic has a dim future. What I want to be able to say is this: When American lawyers feel personally responsible for honesty and justice they behave better⁷⁷ than they do when they depend on their institutions.

76. Other commentators also have noticed the insecurity of the adversarial ethic. See, e.g., Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978).

77. George V. Higgins' two-fisted street lawyer Jerry Kennedy is an example, and one that shows that this argument is not at home only among the *effete*: in the second Kennedy novel both Jerry's wife and his best client, Cadillac Teddy Franklin, tell Jerry: You're only good when you mean it. See G. HIGGINS, *PENANCE FOR JERRY KENNEDY* (1985).

