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# SUMMARY OF A STATEMENT OF THE EFFECT OF RELIGIOUS PRINCIPLES ON LAWYERS' ETHICAL PROBLEMS

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The effect of religious principles upon the attitude of lawyers toward their professional responsibilities shows itself in their treatment of a wide range of ethical problems. To help in appraising this effect, these problems can be arranged in three general, overlapping categories:

1. Problems whose solution, the lawyer believes, is governed by a religious code of conduct based upon divine law or church doctrine.

2. Problems which arise because of the conflict which the lawyer sees between the requirements of divine justice and the requirements of his role in the administration of a man-made system of laws.

3. Problems which arise because of the difference between the character of the professional relationship between lawyer and client and the more intimate relationship between individuals required by his religious principles.

1. One obvious way to examine the effect of religious principles upon lawyers' ethical problems is to investigate the extent to which they provide positive answers to his specific questions. If the lawyer is guided by a detailed religious code of conduct which is relevant to his professional activities, he will, of course, find answers for his ethical problems within his religion.

For example, Roman Catholic canon law and church doctrine may guide the Catholic lawyer in his handling of otherwise troublesome situations. Illustrations of this type of guidance may be found in two series of lectures given to the Catholic Lawyers Guild of Chicago by officers of the Catholic church. One series, entitled *Canon Law on Civil Action in Marriage Problems*, presents a definite pattern of conduct to follow in divorce and separation cases. Many of his worries concerning his own moral responsibility in this troublesome area are solved for him by rules laid down by the church. Similarly, in a series on *The Natural Law and the Legal Profession*, lawyers in the Guild were given assistance, more or less detailed, based upon religious principles, for guidance in professional work on such matters as sterilization, housing contracts and leases which forbid children, birth control, alienation of affections, abortion, euthanasia, religious education, bankruptcy, anti-trust suits, the plea of the statute of limitation, wage contracts and strikes and the responsibility of the buyer to tell the seller of hidden values in the object of the purchase.

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Most lawyers, including Catholics, apparently believe that their religious faith provides detailed rules for professional conduct in specific situations infrequently, if at all.

Some lawyers derive assistance in the solution of their ethical problems from religious principles of a different degree of specificity. Many give a religious basis to such guiding principles as "loyalty" and "trust." For example, followers of the Buchmanite movement adopt as guiding principles the four absolutes of honesty, purity, unselfishness and love.<sup>1</sup> Although the rule of absolute honesty may not solve particular ethical problems entirely, it may advance their solution by its tendency to eliminate an element which is particularly troublesome to lawyers in many situations.

Divine guidance of an even more general sort is relied upon by lawyers to the extent that they give a religious origin to the "conscience" and "moral law" which they call upon in the solution of many of their difficult ethical problems. For example, "He must obey his own conscience and not that of his client."<sup>2</sup> "The client cannot be made the keeper of the lawyer's conscience in professional matters."<sup>3</sup> "[H]e advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law."<sup>4</sup>

As in the analysis of other principles which motivate lawyers, it is difficult to isolate the particular effect on his actions caused by religious beliefs. However, they probably form a major but unexpressed factor in the decision of many lawyers not to take particular cases, and to stay entirely out of certain fields, for example, divorce practice, criminal practice, and the collection of overdue debts, in which the lawyers might be called upon to face a conflict between professional duties and religious beliefs which they hold concerning the marriage contract, certain crimes, and usury.

A lawyer's faith in a religious standard of conduct may create ethical problems for him, as well as solve them. This is illustrated by the dilemma of a lawyer with a belief in the religious values of marriage who is asked for advice on divorce. Should he take an objective, legalistic view and handle it mechanically like other attorneys, should he act in accordance with his religious beliefs or should he refer the client to non-lawyer advisers in this field?

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1. Miller, *Morality in Tax Planning*, N.Y.U. 10TH INST. ON FED. TAX. 1067 (1952).

2. Canon 15 of the Canons of Professional Ethics of the American Bar Association.

3. Canon 18 of the Canons of Professional Ethics of the American Bar Association.

4. Canon 32 of the Canons of Professional Ethics of the American Bar Association.

As another example, should the lawyer who believes that debts should be payed, as a matter of conscience, plead the statute of limitations for a client who clearly owes the money? If he refuses to do so, is he being unethical by failing to give the client the benefit of this defense?

2. For most lawyers religious principles apparently do not offer directly applicable standards of conduct, either in terms of solutions for particular problems such as that of divorce or in terms of absolutely constant rules of behavior such as that of honesty. Like most people in our society they believe that divine law has no direct relevance to our everyday problems—that interpretations of divine law may be relevant to particular problems at particular times but have no lasting application. For lawyers in this group, religious principles serve in a more indirect way as an aid to the solution of their ethical problems, and as a source of these problems.

A common analysis of the relation between religious principles and the practice of law develops along the following lines (“justice” unless otherwise qualified will be used to mean divine justice; “law” to mean our man-made system of laws.): If divine justice cannot be obtained by the direct application of revealed divine law, it must be approached through some man-made system of dispensing justice. Because of man’s innate imperfections he cannot act in a way consistent with the requirements of divine justice. In order to approach this perfection he seeks justice by setting up a legal system adapted to the requirements of this imperfect world.

By the very nature of such an institution, our legal system approaches the problem of justice on an impersonal basis. “Law of necessity generalizes, it embraces in one rule a multiplicity of cases. There can be no such thing as a law which discriminates the individual, which is entirely fitted to the individual, which would admit as valid the uniqueness of the individual, for that would invalidate the very conception of law.”<sup>5</sup> Also, the legal system is unable to dispense perfect justice because it treats all as bound by rules laid down in advance, following the principle of the value of predictability.

Because individuals differ essentially one from another and because their acts form patterns which do not conform to predictions, these inherent fallibilities in our legal system preclude perfect justice. Also, there is the further addition of the injustices due to the imperfect character of our lawmakers—executives, legislators and judges.

The implication of this argument for the lawyer is that he is participating in a legal system which is designed to approach justice in all cases as nearly as possible, but that the ideal will never be attained because of imperfections in man and the system which he has created.

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5. BRUNNER, *JUSTICE IN THE SOCIAL ORDER* (1945).

Although the system is the best hope for the generality of cases, the lawyer must be aware that in particular instances it will yield injustice for the individual.

In addition to the character of the legal system itself, the lawyer is concerned with the requirements of his particular role in that system. If the lawyer were in a position of complete authority in the system, he might believe it possible to interrupt its operation so as to achieve justice in the unusual cases—"to play God." However, he recognizes that he does not have that power, and that such power in his or anyone's hands would be undesirable. The lawyer's traditional role in the legal system is a specialized one which excludes him from any possibility of control over the system itself.

In the adversary system the function of the lawyer is to present, as an advocate, his client's case in the most forceful manner possible, within certain limits, so that the full value of the client's position can be appreciated by the deciding tribunal—the judge and the jury. The opposing advocate will call attention to the weaknesses in his case and the arguments for the other side. The decision of the tribunal will be based upon these conflicting efforts. This system has been worked out over the centuries and seems to be the one most likely to approach justice in most cases. However, in order for it to function, the lawyer must play a specialized role which does not permit him to pass upon the justice of the case. The lawyer participating in a dispute cannot, himself, see to it that justice is done.

This institutionalized role of the lawyer removes him two steps from justice. In the first place, he realizes that he must seek to achieve justice within the existing legal system. In the second place, he realizes that in order to make the system function properly in general he must confine himself to the role of the advocate. It would be inconsistent with his role and would destroy the merits of the system if he were to take it upon himself to point out his client's faults, or to say himself what the legally just result should be. In addition, he must keep in mind that his arguments must be limited to those which are legally relevant and admissible in court, although, under this limitation, he may believe he cannot "do justice" to the true merits of his client's cause.

It is in connection with these aspects of the lawyer's function that Mr. Curtis has described the role of the advocate as being more closely akin to the Stoic philosophy than the Christian philosophy. In discussing the detachment which the lawyer must have in order to give the client good legal advice he states: "There is authority for such detachment. It is not Christian. Nor is the practice of law a characteristically Christian pursuit. The practice of law is vicarious, not altruistic, and the lawyer must go back of Christianity to Stoicism to the vicarious

detachment which will permit him to serve his client."<sup>6</sup>

To the extent that they must develop an unchristian detachment their role must worry Christian lawyers. However, many lawyers believe that the performance of their limited role is more likely to contribute to divine justice in our complex modern society than any attempt on their own part to assess directly the true worth of their client's case, and, therefore, that their role is compatible with Christian philosophy.

Curtis quotes a passage from Lecky's *The Map of Life*, which defines the problem for the advocate: "[A]t best there must be many things in the profession from which a very sensitive conscience would recoil, and things must be said and done which can hardly be justified except on the ground that the existence of this profession and the prescribed methods of its action are in the long run indispensable to the honest administration of justice."<sup>7</sup>

Apparently some men are unable to accept this reconciliation of the advocate's role and religious teaching. For that reason they leave the study and practice of law because they believe it to be an occupation which is incompatible with their religious principles. Other lawyers who worry about the moral implications of the advocate's function solve their problems by restricting themselves to fields of practice in the law, such as estates and trusts, where they are rarely involved in litigation or other disputes of an adversary nature.

Within the bounds of the advocate's role in the system there remains considerable latitude for him in the manner of the performance of his official duties. The advocate has the great power of being able to present his client's case as he sees fit. The proper performance of the role depends to a great extent upon the lawyer's own self restraint. If he does not feel bound by certain moral standards to confine himself to the proper exercise of his role, the legal system will not work. The lawyer himself cannot see that justice is done but the legal system which attempts to achieve justice depends completely upon his proper performance of his role. In this sense there is a direct relationship between the advocate's moral code and divine justice.

Similar problems concerning the manner in which he presents his client's case arise when a lawyer participates in proceedings which resemble trials but vary in important ways from a formal adversary proceeding in court. Examples of such proceedings are: commercial and labor arbitration, collective bargaining, contract negotiation, consultation and negotiation with the Treasury Department and participation in the many formal and informal proceedings before administrative agencies.

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6. CURTIS, *IT'S YOUR LAW* 32 (1954).

7. *Id.* at 20.

In these proceedings some of the elements of the true adversary system may be lacking. There may be no impartial tribunal. There may be no opponent charged with the task of direct opposition to your case. Because of these differences, the demands on the lawyer's self restraint, in the interest of justice, may be great.

Frequently, lawyers call upon religious faith to help them maintain their precarious balance in this situation between the contending demands of loyalty to the client, obligation to the law as an "officer of the court" and the responsibility of maintaining a professional independence from both client and court.

So far we have been discussing the role and problems of the lawyer as an advocate in an adversary system. If we look at modern lawyers' activities as a whole we can see that most of their work as a group (and as individuals, probably) is done outside of the courtroom and therefore not within the direct, immediate framework of the adversary system. The "office lawyer"—the prototype of the modern American lawyer—who gives legal advice concerning a proposed business transaction or to an individual about his personal plans is, of course, concerned with the adversary system because he realizes that his advice may be put to the test of a trial. However, he knows that the great majority of his arrangements will probably never be put to this test. He is an adviser not an advocate.

What role does an "office lawyer," seeking to apply his religious principles to his occupation, assign himself? What is the relation between divine justice, the legal system, and his job?

As "ministers of the law" some lawyers believe that their best efforts should be directed toward advising clients concerning "what the law is." They believe the lawyer should not try to guide the client in accordance with what he thinks the law ought to be. "Lawyers are not the keepers of the Congressional conscience." If laws are to be changed, the changes should come from the legislature, not from lawyers' advice to private clients, they believe.

This problem of the adviser's role in relation to the law is particularly acute in the field of taxation. There it is talked of, unhelpfully, in terms of evasion and avoidance. Most tax lawyers say that it is their duty to take advantage of any loopholes or imperfections in the tax law which favor their clients. Others condemn them on moral grounds for this attitude. A minority, some explicitly because of religious principles, view it as the tax lawyers' function to raise the standards of tax morality, not only of their own clients, but also of the whole society, by their advice to clients.

The difference in attitude toward the lawyer's roles reflects differences in opinion concerning the lawyer's duty to respect a higher law than that of the existing legal system and, further, differences con-

cerning the means of enacting and enforcing this "higher law." These differences are probably frequently based upon the lawyer's views concerning the existence of divine justice, the relation between that justice and the legal system and the relation between the individual lawyer and both justice and the legal system. Both the existence of a religious faith and the nature of that faith would affect the character of those views.

3. Apart from their influence on his relationship to the legal system, the lawyer's religious principles also affect his relations with his clients.

Although he finds no specific religious code to rely on in his attempts to solve his client's problems, he may draw from his religion an attitude or approach to the problems. This attitude usually consists in the attempt to view the legal matter as one aspect of the total problem of the personality or personalities who are involved in the transaction.

If a transaction is tested for its legal validity, the lawyers will have to follow the pattern required of him by our legal system. However, in the absence of such a testing, he may feel that he is not limited to the purely legal aspects of the problem nor to the role of the advocate before a tribunal.

For example, he should, perhaps, make an attempt to handle the client in terms of the whole man rather than in terms of his legal problems. In this way he would be coming closer to a religious ideal of putting his relationship with his fellow man on a basis of love and mercy rather than justice or, particularly, legality. Of course, the lawyer might not be competent to advise on the non-legal aspects of the problem but this attitude would make him give thought to the total situation.

The traditionally intimate lawyer-client relationship is a good vehicle for this religious attitude. To the extent that the lawyer-client relationship has been weakened by modern developments in the profession, such as specialization with its consequent fragmentation of the client's problems, and the development of large firms in which the client's problems are spread about among many individuals, the lawyer's opportunity to deal with the whole problem is proportionately limited.

This attitude, that religious principles require the lawyer to make the most of his relationship with his client, to be able to act with love and mercy towards his entire problem, is opposed to many of the traditional standards of the profession.

These hold that the ability of the lawyer to give disinterested, and therefore good, legal advice requires an aloof detachment from the client. Involvement with clients, financial and personal, may mean the loss of the distinguishing character of the professional man, his



independence. Finally, his role in the administration of justice requires that the advocate be kept separate from his client. He argues for him but he is not identified with him. It is an impersonal role. That is why barristers are kept apart from their clients and, perhaps, why they wear wigs and gowns.

The lawyer-client relationship provides an opportunity for the intimate relationship in which religious principles can best be acted upon. But taking advantage of this opportunity may destroy the lawyer's usefulness to the legal system and be harmful to the client's purely "legal" affairs. And the trends of the profession toward specialization and combination reduce the intimacy of the lawyer-client relationship and emphasize the lawyer's concern with the legal aspects of his client's problem.