

Notre Dame Law School

NDLScholarship

Journal Articles

Publications

1993

The Legal Profession's Rule against Vouching for Clients: Advocacy and the Manner That Is the Man Himself

Thomas L. Shaffer
Notre Dame Law School

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Thomas L. Shaffer, *The Legal Profession's Rule against Vouching for Clients: Advocacy and the Manner That Is the Man Himself*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 145 (1993)..

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1266

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE LEGAL PROFESSION'S RULE AGAINST VOUCHING FOR CLIENTS: ADVOCACY AND "THE MANNER THAT IS THE MAN HIMSELF"

THOMAS L. SHAFFER*

"Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses."

— Aristotle¹

INTRODUCTION

There is an old argument in the American legal profession, as there is in classical philosophy,² and between lawyers and teachers of ethics, over the morality of advocacy as a profession. The American argument is like the classical dispute between rhetoric and philosophy, but it has a focus of its own, in part because the practice of law is in America the exercise of coercive power, and in part because American lawyers claim responsibility for what they call the administration of justice.³

* B.A., J.D., LL.D.; Huber Distinguished Visiting Professor of Law, Boston College, Fall 1992; Robert and Marion Short Professor of Law, University of Notre Dame; member of the Indiana Bar.

1. ARISTOTLE, RHETORIC 25 (W. Rhys Roberts trans., Modern Library ed. 1984) [hereinafter RHETORIC].

2. For descriptions of the classical philosophical discussions, see STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989); and JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984).

3. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1983) [hereinafter MODEL CODE], which states: "A lawyer should assist in maintaining the integrity and competence of the legal profession," and EC 1-1 which states: "A basic tenet of the professional responsibility of lawyers is

Modern American lawyers impose on one another regulatory rules that speak to the old argument but have not resolved it. One of these requires lawyers to advocate the interests of their clients with zeal; another forbids them from arguing that they believe what they say, or in the merit of what they are asking the government to do. The latter of these is a rule against vouching for clients. Rules that require zeal and forbid vouching seek to prevent both advertent deceit and an "unprofessional" limitation of advocacy to causes lawyers believe in. My claim is that these rules are as unsatisfactory as the two evils they attempt to prevent.

My proposal is to appropriate, instead of these rules, or as a way to live with rules such as these, the understanding of friendship Aristotle developed in his *Ethics* and in the *Magna Moralia*.⁴ This paper is part of a broader argument for Aristotelian virtue ethics in American legal ethics. It is more specifically, and in reference to the moral judgments advocates make, an argument for consideration of the virtue of friendship (or *friendliness*), and against dependence on ethical analysis of the statements hypothetical advocates make or might make.⁵

I will attempt to describe, first, the situation of a modern American lawyer-advocate; then the history behind this situation, with attention to the fact that professional teaching on vouching has turned on the misuse of character, rather than on concern for truthfulness. Then I will attempt to survey appel-

that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer."

4. ARISTOTLE, *MAGNA MORALIA* (George Stock trans., 1915) [hereinafter *MAGNA MORALIA*]; ARISTOTLE, *NICOMACHEAN ETHICS* (Martin Oswald trans., 1962) [hereinafter *NICOMACHEAN ETHICS*].

5. I depend on accounts of the virtue of friendship that usually refer to and depend on what Aristotle says about it but that also relate it to the theological virtue of love that is important — indeed primary — in the Jewish and Christian religious tradition. See John M. Cooper, *Aristotle on the Forms of Friendship*, 30 *REV. OF METAPHYSICS* 619 (1977); Eleanor H. Haney, *What is Feminist Ethics? A Proposal for Continuing Discussion*, 8 *J. RELIGIOUS ETHICS* 115 (1980); Stanley Hauerwas, *Companions on the Way: The Necessity of Friendship*, 45 *ASBURY THEOLOGICAL J.* 35 (1990); Timothy P. Jackson, *The Disconsolation of Theology: Irony, Cruelty, and Putting Charity First*, 20 *J. RELIGIOUS ETHICS* 1 (1992); and Rose M. Volbrecht, *Friendship: Mutual Apprenticeship in Moral Development*, 24 *J. VALUE INQUIRY* 301 (1990); see also C.S. LEWIS, *THE FOUR LOVES* (1960); GILBERT MEILAENDER, *FRIENDSHIP: A STUDY IN THEOLOGICAL ETHICS* (1981); THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* ch. 5 & Epilogue (1987) [hereinafter *FAITH AND THE PROFESSIONS*]; Stephen J. Pope, *Aquinas on Almsgiving: Justice and Charity: An Interpretation and Reassessment*, 32 *HEYTHROP J.* 167 (1991).

late opinions from Canada and the United States, for indications on how we lawyers live with rules on zeal and vouching, and how we use them offensively. And, finally, I will offer the Aristotelian alternative and take a look at how it shows up in the anthropology of American lawyers.

I. DESCRIPTION OF THE SITUATION OF AMERICAN LAWYERS AS ADVOCATES

Richard Wasserstrom, lawyer and moral philosopher, in a 1975 essay that has become remarkably prominent, argued that the operating morality of American lawyers will not survive common-sense ethical analysis:

What is characteristic of [the] role of a lawyer is the lawyer's required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance. Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth [of the end sought] or the character of the client. . . . [T]he lawyer is, in essence, an amoral technician whose peculiar skills and knowledge . . . are available to those with whom the relationship of client is established.⁶

Wasserstrom's critique was not directed at excesses. He did not propose to draw a line, or to define a limit. He aimed at the *essence* of the enterprise as modern American lawyers have come to regard it. He spoke to what he saw as the inherent quality of a professional way of life, as one might speak to the inherent quality of the profession of soldiering by asking whether it is moral to kill people in obedience to the state. Wasserstrom's characterization of the operating morality of the modern American profession was that a person is not a real lawyer unless she is prepared to advocate an interest she would otherwise find morally insupportable.

The late Abe Fortas, an eminent American lawyer and judge, commenting on the career of his partner, Thurman Arnold, an equally eminent lawyer, said to students at the Yale Law School, a place of eminent lawyers:

Lawyers are agents . . . and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause that they prosecute

6. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 5-6 (1975).

or defend. They cannot and should not accept responsibility for the client's practices. Rapists, murderers, child-abusers, General Motors . . . cigarette manufacturers and stream-polluters — are entitled to a lawyer; and any lawyer who undertakes their representation must be immune from criticism. . . .⁷

Justice Fortas's justification was a broad appeal to the notion that lawyer professionalism is possible because lawyers are agents. Wasserstrom would apparently agree with framing the issue in those terms. Others have relied on the systemic assurance that the state in its judicial robes will arrive at truth, or provide justice, or both, and therefore lawyers need not worry about the consequences of their advocacy. The argument is that advocates have a task within a system. The relevant moral question is what the *system* does.⁸ "Lawyers are not judges" is the common phrase.⁹

A. The Modern Situation Is a Recent Development

The professional ethic Wasserstrom described and Justice Fortas defended is a recent development among American lawyers. In the three generations of lawyers that fashioned, supervised, and implemented the American Revolution (1770-1860) the dominant ethical teaching was that lawyers are responsible, case by case, for truth and justice. Early nineteenth-century American lawyers thus honored Cicero's maxim that only the good person can speak well: An advocate's art does not succeed when it is used by a bad person, and a good person does not argue for rules of law that would be bad for the community.¹⁰ Eminent American lawyers of a later time — even through the generation that retired from practice in the 1980s

7. Abe Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 1002 (1970); see also Ted Schneyer, *Getting from 'Is' to 'Ought' in Legal Ethics*, 1986 AM. B. FOUND. RES. J. 903.

8. See Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331 (1987); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987) [hereinafter *Good Client*]. These articles describe this ethical position and compare it with an ethical position that rests instead on the autonomy of the client.

9. Fortas can be taken to have invoked the systemic assurance, but I doubt that he depended on it: Fortas and Arnold and their clients had seen and heard, supported and suffered from, the depredations of modern nation-states. Fortas knew better than to rely on any state, even his own, for justice. See LAURA KALMAN, ABE FORTAS (1990).

10. See FISH, *supra* note 2, at 471-502.

— argued that the legal profession is a school for virtue, a way to become a better person.¹¹

If an advocate nonetheless sought from the decision maker a result that would not be good for the community, the soundness of the decision maker was a corrective. American trial lawyers still announce their respect for Cicero's proposition that eloquence serves reason. Trial lawyers believe, of course, that their techniques sway judges and juries; but when they attempt to justify their work they say they trust judges and juries to be rational; trial tactics succeed only when, in justice, they should succeed. In political principle, they would no doubt take Cicero's side of the classical argument between rhetoric and philosophy, and disagree with Aristotle's observation that rhetoric succeeds because of defects in those on whom it is practiced.¹² If you took a survey of American trial lawyers — or attended for several months to the contents of *Trial* magazine, the journal of the American Trial Lawyers Association — you would notice more support for Cicero's affirmation of the dependence of rhetoric on reason than for Aristotle's belief that rhetoric exploits defects in those who hear it.

I discern two Ciceronian notions in this development of the ethics of advocacy among American lawyers. One has to do with the effect of the advocate's character: Only the good person can be an effective advocate. That notion, which would

11. Harry W. Jones, an elder statesman from the Columbia law faculty, argued thus, and argued as well that lawyers provide moral guidance to their clients:

If there is an external moral standard for the [legal] counselor, it is . . . "my client as his values would be if he had studied law." This is not a quibble; . . . If I did not [believe it], I would have to conclude that I had wasted my life in the study and teaching of law.

Harry W. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 973 (1978).

12. Aristotle believed that:

One great use of Maxims to a speaker is due to the want of intelligence in his hearers. . . . [O]ther things affect the result considerably, owing to the defects of our hearers. . . . The aptness of language is one thing that makes people believe in the truth of your story: their minds draw the false conclusion that you are to be trusted from the fact that others behave as you do when things are as you describe them; and therefore they take your story to be true, whether it is so or not. . . . You may use any means you choose to make your hearer receptive; among others, giving him a good impression of your character, which always helps to secure his attention. . . . [A]ll of this has nothing to do with the speech itself. It merely has to do with the weak-minded tendency of the hearer to listen to what is beside the point.

RHETORIC, *supra* note 1, at 138, 165, 178, 203.

accept that character persuades, and would probably therefore not worry about vouching for clients, has become a thin and poorly articulated sentiment in modern American legal ethics.¹³

The other notion — that eloquence serves reason — that however apparently effective advocacy is, the decision maker will not be swayed to an unjust result — has become an argument for the role morality of which Wasserstrom complained. Vouching for clients is a problem for this argument, because it corrupts decision making. One way to resolve the problem is to trust the system to overcome the advocate's attempts to corrupt it. If I infer well from Fortas (and Cicero), American advocates occupy roles in a system that is to be trusted. It is as if we were to have a formal dispute on whether the earth is flat. I could, in good conscience, argue for the affirmative, though I do not believe it. That would be to perform a useful service in a formal dispute, which dispute is a useful thing to have. The British Bar has traditionally regarded advocacy in this way: Trial lawyers there originally travelled around with royal judges, in provincial trials, and took sides as sides needed to be taken. In Geoffrey Hazard's phrase, they were not so much officers of the court as they were members of the court.¹⁴ The court itself (the judge) was taken to be as sound as the pound sterling came to be.

The fact that lawyers are paid focuses the same problem in another way: If advocacy is an amoral enterprise, as Wasserstrom says, it should be available to all litigants, not only to those who are wealthy. Making wealth necessary for obtaining a mere agent is as objectionable as making wealth necessary for obtaining the services of a judge. The British Bar therefore cherishes the fiction that pay is incidental. One cultural model for the trial lawyer in England has been the medieval champion in an ordeal by battle. Champions were not allowed to take pay. In the late twelfth century, one of them was caught

13. See *supra* notes 3 & 12. Aristotle also argued for character in advocacy, but, at least in the RHETORIC, *supra* note 1, he did not so closely connect the advocate's tactics with his character, and he did not depend at all on the soundness of the decision maker.

14. Geoffrey C. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1071 (1978). The nineteenth-century appropriation of Cicero's defense of rhetoric fit the British setting better than it fit advocacy by American lawyers of that time. The Americans were more often than not identified with their clients, rather than with the court. I develop that comparison in THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER ch. 6 (1981) [hereinafter ON BEING A CHRISTIAN].

accepting payment and his hands were chopped off.¹⁵ In a later era, the barrister's robe had a little pocket in the back, into which the client could drop gold coins. The lawyer was surprised, I suppose, when he hung the robe up and found money in the pocket.¹⁶

American lawyers have been rather more candid about being paid by their clients. Legal fees are often the most serious consequence of being in legal trouble, and are a principal administrative cost in the conduct of American business. When you consider that American trial lawyers more candidly understand themselves to be in the pay of their clients, you can perhaps see how Cicero's defense of rhetoric is less persuasive in America than it would be, or would have been, in Britain: Making our services available for pay — being candid about that — and at the same time claiming to be more concerned with service than with fees — makes it more urgent for us to believe that those we serve deserve our services — deserve them on some basis other than their wealth.

A morality that appears to come closer to resolving Wasserstrom's issue, at least among modern American politicians and "public interest" advocates, for pleaders of good causes and champions of social justice, is what Aristotle offered in the *Rhetoric*: The advocate's art is neutral; the morality of advocacy turns neither on its devices, nor on the effect of its devices, but on the motives of those who use them: "What makes a man a 'sophist' is not his faculty, but his moral purpose." The unjust use of the power of speech does great harm, but he said the same is true of all good things except virtue.¹⁷

15. 56 SELDEN SOCIETY, ROLLS OF THE JUSTICES IN EYRE FOR YORKSHIRE, 1218-19 (1937).

16. See generally R.E. MEGARRY, *LAWYER AND LITIGANT IN ENGLAND 179-201* (1962).

17. *RHETORIC*, *supra* note 1, at 23-24. I do not mean to argue here that taking pay for advocacy is in itself morally problematical; for those lawyers who believe in the causes they advocate, who advocate morally admirable causes and are paid for their pains, Aristotle's distinction between the moral rhetorician and the immoral sophist seems applicable. It is as satisfying for a paid advocate as it would be for a volunteer environmental lobbyist who proves his sincerity by using paper cups. Harper Lee's Atticus Finch need not, therefore, have worried that Maycomb County paid him for defending Tom Robinson. Nor — on this point anyway — need the Wall Street corporate lawyers of a century ago have worried about their narrow, vehement, well-compensated service to corporate business: "[T]hey shared the convictions of their clients," Mark DeWolfe Howe said of partners in the Cravath firm. "[O]ne must give them credit for having played a creative role with enthusiasm. To deny [them their] convictions is to drain . . . character of its integrity and convert . . . enthusiasm into cynicism." Mark D. Howe, Book

The Aristotelian ethical analysis of moral purpose appears to be the resolution of the question in American stories about lawyers — Atticus Finch, pleading for the life of Tom Robinson, in Harper Lee's novel (and Horton Foote's screenplay), *To Kill a Mockingbird*; Gavin Stevens working through the night for the uppity Lucas Beauchamp, in Faulkner's *Intruder in the Dust*; Andrew Hamilton, come out of dignified retirement to risk life and limb to defend the rebellious colonial journalist, John Peter Zenger.¹⁸ These lawyer-heroes are like Moses arguing with God: Scripture and the *Midrash* describe how Moses used an ingenious array of rhetorical devices to save the idolatrous children of Israel from destruction.¹⁹ The American lawyer-heroes believe in what they are doing; they have decided that what they are doing is admirable; their art is in service to their good motives.

The same might be said for the office work of lawyers — advising clients, drafting documents, and negotiating the arrangements on which business and government depend. In these matters, which are most of what American lawyers do (although they are minor in the folklore of the profession), American lawyers are more willing to be moral leaders, to be like pastoral counselors, than when, as advocates, they emulate "Race Horse" Haynes or F. Lee Bailey. Some legal ethicists thus argue that American lawyers, whatever the morality of their trial work, should accept responsibility for the justice of law-office planning and drafting.²⁰ This was the argument in the tradition of the republican lawyer-aristocrats, an argument they applied to all of their work: They accepted the burdens of moral leadership.²¹

But the resolution according to purpose has become problematical for an occupation that offers advocacy to all in the community who think they need it, that claims and takes upon

Review, 60 HARV. L. REV. 838, 842 (1947) (reviewing ROBERT SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947* (1946)). It is worth noticing, nonetheless, that one of the ways a false prophet was identified in the early centuries of Christianity was that she or he took pay for preaching.

18. FREE PRESS ANTHOLOGY (Theodore Schroeder ed., 1909).

19. See *Exodus* 32; III MIDRASH RABBAH ch. 43-44 (S.M. Lehrman trans., 1983).

20. That is the burden of Jones's argument, *supra* note 11.

21. See SAMUEL HABER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS* 76-87 (1991); DAVID HOFFMAN, *A COURSE OF STUDY* (2d ed. 1836). Louis Auchincloss's Wall Street lawyers are often put into moral tension on this issue. See HENRY KNOX, *THE GREAT WORLD AND TIMOTHY COLT*; THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS* ch. 6 & 7 (1985) [hereinafter *AMERICAN LEGAL ETHICS*].

itself a public franchise as much as the electric company does. "Profession," in this exclusive and occupational sense, means a group of people who have, in association with one another, undertaken to meet, in general, and entirely, some need in the community that both individuals and the collective institutions that speak for the community regard as important. In the British Bar this undertaking has been expressed by the metaphor of the taxi-cab: A British trial lawyer is available to whomever is next in line.²² Among American lawyers, who have been closer to their clients than barristers are to theirs, the undertaking has been collective: No one of us is professionally obliged to take the next person in line,²³ but we accept, together, the obligation to see to it that some lawyer does.²⁴ The alternatives for legal ethics, then, in meeting the demand for professional advocacy as an enfranchised enterprise, seem to be to deny advocacy to some citizens or to deny the advocate the ability to follow her conscience.

B. Lawyers' Market Morality

The classical tension between rhetoric and philosophy appears in American legal ethics as (i) the enduring Ciceronian notion that the decision maker's sound reason will correct excesses in advocacy, and therefore the advocate's role in the system justifies what would otherwise appear as immoral behavior for immoral ends; and (ii) the less enduring Aristotelian notion that advocacy is justified, not by the soundness of the decision-maker, but by the advocate's motive and purpose.²⁵ On the one hand there is the public franchise argument and the adversary ethic's dependence on the state; and, on the other, is the recurrent situation, found in stories about American lawyers, in which the justice of the case rests, not in the decision but in the advocate's goal: The goal even justifies

22. See MEGARRY, *supra* note 16, at 32-33.

23. See Freedman, *supra* note 8.

24. See, e.g., MODEL CODE, *supra* note 3, EC 2-24 & 2-25. The code makes the responsibility a personal one but gives as examples of admirable responses collective efforts to provide lawyers for people who cannot pay for them. A similar disposition obtains in Canada. See Walter F. Schroeder, *Some Ethical Problems in Criminal Law*, L. Soc'y. U.C. LECT. 87 (1963): "Legal Aid Associations in all the counties and districts of this province . . . function satisfactorily in most areas and . . . receive the warmest encouragement and support of the senior members of the profession." *Id.* at 99-100.

25. Professor Linda R. Hirshman, among many helpful suggestions, points to a distinction in Aristotle's scheme between motive and purpose (or goal or *telos*). That would be a fruitful distinction for further thought, but for present purposes I am using the two interchangeably.

what seem to be deceitful and abusive advocate's devices.²⁶ Consistent with the former side of this tension, American legal professionalism has come to mean that advocates argue for interests they do not believe in. The American profession, especially in New York City, began in our Industrial Revolution to give strident support to such advocates, as Justice Fortas was strident in defense of his law partner Thurman Arnold. They participated as much as the robber barons of industry did in what Emile Durkheim called American market morality.²⁷

Louis D. Brandeis, a "public interest" lawyer if there ever was one, and an example of both sides of the tension, made *payment* the determinative difference. He supported both his family and his efforts for social reform from fees paid him by corporate clients in Boston, whose interests he defended in court and in law-office corporate work, and then opposed in the Massachusetts legislature and in state and national politics. When he took professional time to assist labor unions, working women, and the children of immigrants, he charged these "public interest" clients nothing and paid his partners for his time.

Brandeis has had, in the distinction if not in scrupulous fiscal adherence to the consequences of it, many emulators. The legal-aid and *pro-bono-publico* movements, for example, have been sustained and revived by partners from Wall Street law firms. When legal aid became national policy, part of President Johnson's War on Poverty, it was significantly through the uncompensated advocacy of Lewis F. Powell, then president of the American Bar Association and a partner in Richmond's largest law firm. (I infer that a lawyer working for nothing, or working on behalf of lawyers working for nothing, attends, as Brandeis did, to the moral purpose of his efforts — however he feels about the moral purpose of clients who pay him).²⁸

26. See AMERICAN LEGAL ETHICS, *supra* note 21, at 350-61. This application is what makes the *Rhetoric* a quizzical ethical document.

27. See Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191 (1977); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988) [hereinafter *Unsound Adversary Ethic*].

28. See John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965), substantially reprinted in AMERICAN LEGAL ETHICS, *supra* note 21, at 273-301. Brandeis did not focus on the autonomy of his client. See *supra* text accompanying notes 18-19. He did not serve without pay so that everyone could have a lawyer. He was an Aristotelian in his choice of "pro bono" clients.

II. THE DEVELOPMENT IN AMERICA OF THE LAWYER'S MARKET MORALITY

A. The Courvoisier Case

Brandeis, Wall Street law firms, and Justice Powell illustrate the question I mean to talk about, but the more flamboyant and memorable examples are, of course, from criminal-defense cases.²⁹ The case that agitated nineteenth-century American lawyers most in this respect was the defense in London of a Swiss valet named Benjamin Francois Courvoisier, who killed his employer, Lord William Russell, and stole Lord Russell's jewelry. Courvoisier protested his innocence at first, but during the trial he confessed the crime to his advocate, a trial lawyer named Charles Phillips. The next day, after what he admitted was a sleepless night, Mr. Phillips argued to the jury, for three hours, that Courvoisier should be found not guilty.³⁰

American critics of Phillips did not accuse him of representing a guilty man on a not-guilty plea. It was conceded, among lawyers, then as it would be now, that the murderer was entitled to require the Crown to prove his guilt. Phillips would have been within his brief, as the British lawyers say it, to have invoked the presumption of innocence and to have talked for three hours, as Mr. Rumpole does, about weaknesses in the Crown's evidence and the liberties guaranteed English people in *Magna Carta*.

Phillips said, in a letter to the *Times*, nine years later, that that was all he had done.³¹ His critics — and it was the critics who got American lawyers going — said Phillips's jury speech was a representation to the jurors that he believed his client innocent. His was "an appeal to Heaven for its testimony to a lie."³² Phillips denied that he had appealed to Heaven; all he used, he said, were "fair commentary on the evidence, though undoubtedly as strong as I could make them."³³ He said it was his duty to make strong arguments.

29. American lawyers talking about ethics find it generally comfortable to use criminal-defense quandaries, partly, I think, because so few of us work in the criminal courts.

30. DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (1973) describes the case in detail.

31. Letter from Charles Phillips to Samuel Warren, *THE TIMES* (London), Nov. 20, 1849, reprinted in George Sharswood, *An Essay on Professional Ethics*, 32 REP. A.B.A. 183 app., at 187 (1884) (5th ed. 1907).

32. *Id.* at 190.

33. *Id.* at 189-90.

"If I slumbered for a moment" during the night before he made the jury speech, he said:

[T]he murderer's form arose before me, scaring sleep away, now muttering his awful crime, and now shrieking to me to save his life! . . . I had no right to throw up my brief, and turn traitor to the wretch, wretch though he was, who had confided in me. The counsel for a prisoner has no option. The moment he accepts his brief, every faculty he possesses becomes his client's property.³⁴

He said he knew of "two illustrious advocates of our own day" who had done so "even to the confronting of a king," and who had been praised for their daring and thereafter "promoted," by monarch and profession, "to the highest dignities."³⁵

One of the "illustrious advocates" to whom Phillips alluded was Lord Brougham, a Scots politician who had defended Queen Caroline in the House of Lords against the ugly designs of King George IV. Brougham succeeded and was later made Lord Chancellor. Brougham gave to England and America what has become, for emotional comfort and in official proclamation, the ethic of the modern professional advocate:

An advocate . . . knows but one person . . . and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty. . . . [H]e must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences: though it should be his unhappy lot to involve his country in confusion.³⁶

Brougham's hyperbole contributed to a debate in this country; from the debate has come the adversary ethic, the modern

34. *Id.* at 192.

35. *Id.* at 193.

36. MELLINKOFF, *supra* note 30, at 189. The King had introduced a bill for a legislative divorce in the House of Lords, so that he could keep the Queen out of England. Brougham knew, but the country perhaps did not, that the King was a philanderer who had attempted another marriage before he married the Queen. Brougham's remote purpose was the defense of an innocent lady; his proximate purpose was to warn the supporters of the King that he had the goods on the King and that, if pressed, he would go public with his evidence. I suspect that legal ethics was far from his mind, but what he said, not what he was doing, caught the attention of American lawyers, as did the critics' version of Phillips's behavior in the *Courvoisier* case. See *Unsound Adversary Ethic*, *supra* note 27, at 204-06, 326-27.

American lawyers' attempted resolution of the moral issue I am attempting to describe.³⁷

B. Vouching is Vouching, Even When It's Truthful

Until the debate among American and British lawyers, on Phillips's jury speech for Courvoisier, the principal ethical teaching among American lawyers had been that a lawyer who pretends belief in his client's cause, when he does not believe in it, is a liar. In 1854, the best known teacher of American legal ethics, then and now, Judge George Sharswood of Pennsylvania, appropriated on this point the *Elements of Moral and Political Science* of William Whewell: "[I]f in pleading he asserts his belief that his cause is just when he believes it unjust, he offends against truth, as any other man would do who in like

37. MELLINKOFF, *supra* note 30, at 189.



"Let me tell you, folks—I've been around long enough to develop an instinct for these things, and my client is innocent or I'm very much mistaken."

manner made a like assertion."³⁸ And, in reference to the Courvoisier case: "No right-minded man, professional or otherwise, will contend that it would have been right in [Phillips] . . . to stand up and falsely pretend a confidence in the truth and justice of his cause, which he did not feel."³⁹

Contemporary disapproval interpreted what Phillips did as *deceptive* advocacy: It is a lie to pretend belief where one does not have it. The issue was *false* use of character, which I will attempt here to distinguish from *misuse* of character. Sharswood followed Whewell in treating the moral issue as one involving deceit. They apparently would have approved by implication the truthful vouching of Atticus Finch, Gavin Stevens, Alexander Hamilton, and the public-interest lawyers who tell jurors they believe their clients, but only when they do.

But American teachers of legal ethics in Canada and the United States did not develop either their principles or their rules around the virtue of truthfulness. They discouraged *all* vouching for clients, honest as well as deceptive. Their appeal has been grounded in values other than truthfulness. Their moral reasoning comprehends both the vouching that, on Sharswood's and Whewell's reasoning, is deceitful, and the vouching that is not. Most of their arguments turn on consequences for lawyers' careers — the careers both of the vouching advocate and of his colleagues — and for the state. For example:

— A young lawyer or a lawyer who is a stranger in town, who is not known to the judge and jurors, is at a disadvantage when vouching for clients, because the vouching of older, better-known lawyers carries more weight.

— Vouching invokes character; making an issue of character among the lawyers in the case is a distraction from the issues in the case. It wastes judicial time.⁴⁰

38. Sharswood, *supra* note 31, at 101 (quoting WILLIAM WHEWELL, *ELEMENTS OF MORAL AND POLITICAL SCIENCE* (1845)).

39. *Id.* at 105.

40. Hoffman's and Sharswood's reasoning, discussed just above, comprehends both of these first two arguments. The Canadian Bar Association's "Code of Professional Conduct" invokes the second in its restatement of the rule against vouching: "The lawyer should not express personal opinions or beliefs. . . . The lawyer must not . . . put the lawyer's own credibility in issue." CANADIAN BAR ASS'N, *CODE OF PROFESSIONAL CONDUCT* ch. 9, para. 5 cmt. (1974).

— If today I vouch for my client, and tomorrow have another client for whom I do not vouch, the judge and jurors will assume I do not believe the second client.⁴¹

— If a lawyer's speech asserts facts, including particularly the fact that the lawyer believes another, controverted fact, the government's process for sifting facts in evidence is evaded if not frustrated.⁴²

A generation before Sharswood lectured on legal ethics, the grandfather of the discipline, David Hoffman of Baltimore, argued that vouching is a misuse of character. Advocacy should usually be separated from the character of the advocate: "[I]nfluence . . . [is] the most valuable of my possessions, and not [to] be cheapened, or rendered questionable by a too frequent appeal If the case be a good one, it needs no such appliance. . . ." ⁴³ And if the case is not a good one, Hoffman said, a lawyer should not argue it.⁴⁴ A generation later, Sharswood, quoting Whewell, said:

If [the lawyer] mixes up his character as an advocate with his character as a moral agent, using his moral influence for the advocate's purpose, he acts immorally. He makes the moral rule subordinate to the professional role. He sells to his client not only his skill and learning but himself.⁴⁵

Hoffman was not arguing for role morality. His argument was that vouching is too potent for an ordinary, Wednesday-morning, county-seat lawsuit. He invoked not truthfulness — he believed that in some cases, clients could be vouched for truthfully — but prudence. He deliberated in reference to a fact; as Aristotle said, "We believe good men more fully and more readily than others."⁴⁶ And therefore, he and other nineteenth-century American legal ethicists said, the goodness of

41. See CODE OF ETHICS, ALABAMA STATE BAR ASS'N (1887), reprinted in 118 Ala. xxiii (1899): "If such assertions are habitually made they lose all force and subject the attorney to falsehoods; while the failure to make them in particular cases will often be esteemed a tacit admission of belief of the client's guilt, or the weakness of his cause."

42. See *United States v. Bowie*, 892 F.2d 1494 (10th Cir. 1990): "Use of the 'truthfulness' portions of these arguments becomes impermissible vouching . . . when the prosecutors explicitly or implicitly indicate that they can monitor and accurately verify the truthfulness of the witness' testimony." *Id.* at 1498.

43. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 757 (2nd ed. 1836).

44. *Id.*

45. See Sharswood, *supra* note 31, at 101.

46. RHETORIC, *supra* note 1, at 25.

the advocate had to be taken out of advocacy. It is an undue influence.

Hoffman in the 1830s, Sharswood in the 1850s, and Judge Thomas Goode Jones of Alabama, author of the first code of legal ethics, in the 1870s, like Mr. Justice Schroeder, in Canada,⁴⁷ announced a principle, but not a *rule*. They left truthful vouching to the tactical judgment and moral deliberation of lawyers. Atticus Finch and Andrew Hamilton would have had their approval, no doubt, for putting character on the line in the Robinson and Zenger cases. Atticus ended his jury speech saying, "In the name of God, believe Tom Robinson." When he walked out of the courtroom, the black church in the gallery stood in tribute to him. Hamilton no doubt put his character on the line when he told the jury in the Zenger case, "It is the cause of liberty! . . . [E]very man who prefers freedom to a life of slavery will bless and honor you, as men who have baffled the attempt of tyranny."⁴⁸ But those were extreme cases. I suppose that Atticus Finch, Andrew Hamilton, and maybe even Lord Brougham, accepted the principle that it is usually an imprudent practice (that is, a practice frowned on by practical wisdom) to vouch for clients.

These formulations treat vouching for clients under a principle, and there is a difference between principles and rules. The difference is that a rule can only be followed or broken; principles are more flexible. The traditional place of principles in legal ethics is that they speak to a lawyer's discretion. Principles allow consideration of the context of the case. A principle is one of the circumstances to which a lawyer can bring his practice of the virtues. It is possible to refuse to follow a principle and at the same time to honor it. There are cases where sound morals point to disregarding an otherwise useful principle.

Shirley Letwin's study of Trollope's characters, many of them lawyers, illustrates the difference between rules and principles. She takes up Kant's dilemma about the murderer pursuing his victim. The victim runs past me and thence out of sight. The murderer, smoking gun in hand, comes up to me and says, "Which way did he go?" Kant's rule is that I should not tell a

47. See Schroeder, *supra* note 24, at 91-92. Schroeder states: In the ordinary affairs of life an advocate may be taken to be expressing his own beliefs or his own honestly held convictions, but not so where he is in the forensic arena. What he says there is not and is not presumed to be the expression of his own mind.

48. Ronald L. Carlson, *Argument to the Jury: Passion, Persuasion, and Legal Controls*, 33 ST. LOUIS U. L.J. 787, 793 (1989).

lie. Letwin says the Trollopian gentleman takes inveterate truth-telling to be a principle, not a rule: "He will lie to protect his friend," she says, "but he will not pretend that he has not lied."⁴⁹ The principle that would be ignored or honored in what I am talking about is that, by and large, it is not a good thing to vouch for clients.

C. The Principle Became the Rule

Rules came to American legal ethics as part of the baggage of what Durkheim called the "market morality" of the 1870s.⁵⁰ Market morality produced codes of legal ethics, which at first mixed principles with rules and have since become rules rather than principles; it produced the modern bar association; and, in the codes and through the influence of the bar associations, it developed the adversary ethic that Wasserstrom characterized as immoral and Justice Fortas defended: Lawyers should not accept responsibility for justice; lawyers are not to be held responsible for what clients do with the advice, or for the legal relationships the clients enter, or for the freedom of movement the clients get from lawyers.⁵¹

As new codes were drafted and old codes revised to conform to the adversary ethic, Hoffman's, Sharswood's and Jones's principle on vouching became a pair of rules: The first is the rule requiring zeal in advocacy. The second is the rule against all vouching. This is the form the rule against all vouching took in the 1908 A.B.A. *Canons*: "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justness of his cause."⁵²

49. SHIRLEY LETWIN, *THE GENTLEMAN IN TROLLOPE: INDIVIDUALITY AND MORAL CONDUCT* 72 (1982).

50. *Unsound Adversary Ethic*, *supra* note 27, at 699.

51. *Id.*

52. The rule, in several forms, is applied in civil and criminal cases and when a lawyer is speaking to the press about cases in court. The most recent version of it in the United States is in the A.B.A.'s Rules of Professional Conduct:

A lawyer shall not . . . in trial . . . assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . . [nor] make [such] an extrajudicial statement . . . if the lawyer knows . . . that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. . . .

MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.4 & 3.6 (1992) [hereinafter MODEL RULES]. The rule does not apply to lobbying in legislatures or in disciplinary hearings in which the advocate represents another lawyer who is

This *rule against all vouching* appears — but only appears — to avoid the possibility of deception about the lawyer's opinions, as it appears to focus on the needs of the state and of lawyer professionalism rather than the formation, preservation, or protection of character.⁵³ The appearance is that, since an advocate does not invoke her belief in the truth and justice of her client's cause, she does not deceive judges and jurors as to what she believes. One problem with that apparent solution is that a trial conducted in dependence on such appearances is deceptive unless the judges and jurors understand what the advocates are doing. Another problem is the fact that, as Aristotle said, the evident character and personal goodness of an advocate are powerful persuaders; it is impossible *not* to use them. Unless the judges and jurors understand that they are witnessing the performance of a role, they will probably think that even a lawyer means what she says, even more so when the content of her performance is persuasive.

Wasserstrom distinguished in this way between a trial lawyer and an actor:

If the lawyer actually believes everything that he or she asserts on behalf of the client, then it appears to be proper to regard the lawyer as in fact embracing and endorsing the points of view that he or she articulates. If the lawyer does not in fact believe what is urged by way of argument . . . then it appears to be proper to tax the lawyer with hypocrisy and insincerity. To be sure, actors in a play take on roles and say things that the characters, not the actors, believe. But we know it is a play. . . . The law courts are not . . . theaters. . . . [L]awyers talk about justice.⁵⁴

Because goodness is attractive, evident goodness is, as Aristotle said, an advocate's most effective means of persuasion. An argument is an invitation to share a moral world, even

charged with professional impropriety and may face suspension of his license to practice law.

53. See Wasserstrom, *supra* note 6. Lawyers who talk about justice, in Wasserstrom's (and Aristotle's) account, can justify doing so if they believe the cause is just. On Cicero's account — and in the common justification of lawyers' market morality — they can talk about justice because, regardless of what the lawyers say, those who hear lawyers' arguments will arrive at just decisions. There is a third analysis — Monroe Freedman's — that might say lawyers may talk about justice because such talk by lawyers is a necessary condition for their clients' autonomous freedom in a governmental system based on legal rights. See Freedman, *supra* note 8.

54. See Wasserstrom, *supra* note 6, at 14.

to love the things the advocate loves. If the goodness that persuades is a pretense, the advocate is a deceiver. Jeffrey Stout said:

If I am successful [in my arguments] though, it will probably be because [the person who hears my argument] has observed me long enough to be taken, despite himself, by the way I live, to find his loves gradually shifting, irrespective of argument, in the direction of mine. . . . Then, and only then, are the arguments likely to make a difference.⁵⁵

Ronald Green, in a debate with Stout, during the 1990 meeting of the Society of Christian Ethics, said, "Such a view would consign to the trash heap most of our written tradition of moral philosophy."⁵⁶ But a trial lawyer may have to reply that character persuades, that, as Samuel Butler said: "We are not won by arguments that we can analyze but by tone and temper, by the manner which is the man himself."⁵⁷ Moral standards for advocacy, perhaps unlike moral standards for arguments in moral philosophy, take "the manner which is the man himself" into account — not as the norm, but as inevitable. For that reason, the modern rule against all vouching for clients does not avoid or answer the charge that advocacy pursued according to the rule requiring zeal is a deceptive enterprise.

III. LAWYERS' USE OF THE RULE AGAINST VOUCHING

The rule against all vouching for clients took form at the turn of the century. Between then and now lawyers have argued about the rule and, more indicatively, they have used it as a weapon. There have been, for example, dozens of cases in which improper vouching during trials was made a ground for appeal to higher courts.⁵⁸

55. JEFFREY STOUT, *ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS* 258-59 (1988); see also Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988).

56. Roland M. Green, *Jeffrey Stout's "Ethics After Babel": A Critical Appraisal*, ANN. SOC'Y CHRISTIAN ETHICS, 1990, at 31.

57. THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS 193 (Robert Andrews ed. 1990).

58. See Carlson, *supra* note 48. See generally *United States v. Bowie*, 892 F.2d 1494 (10th Cir. 1990); *United States v. DiLoreto*, 888 F.2d 996 (3d Cir. 1989); *United States v. Hernandez*, 891 F.2d 521 (5th Cir. 1989); *United States v. Swiatek*, 819 F.2d 721 (7th Cir. 1987); *United States v. Phillips*, 527 F.2d 1021 (7th Cir. 1975).

A New York lawyer who was also a priest decided that effective advocacy required him to wear his clerical collar in court. His duty was perhaps suggested to him by a case in Tennessee which involved a lawyer who could cry at will. The Tennessee Supreme Court said: "If counsel has [tears] at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises."⁵⁹ The New York lawyer thought the principle applied as well to lawyers who have emblems of clerical status at command, but the New York judges held against him and made an unfortunate distinction between the two professions: They feared jurors would "ascribe a greater measure of veracity and personal commitment" to the words of a priest than to the words of a lawyer.⁶⁰ One can interpret this to mean that, so far as the law is concerned, the clergy are free to vouch for their clients but lawyers are not.

Most of the cases involve words rather than collars or tears. A prosecutor may, according to the federal courts of appeal, say, "I believe the evidence has shown the defendant's guilt," but may not say, "I believe the defendant is guilty." Appeals from drug convictions indicate that although prosecutors may suggest to the jury that a witness who testifies as a result of a deal with the government can be expected to tell the truth, they may not suggest that disbelieving a government witness supports the inference that prosecutors contrived false testimony. The latter, according to the federal court of appeals in Chicago, would be "vouching to the utmost degree."⁶¹ When a federal prosecutor said to the jury, "We don't take liars. We don't put liars on the stand. We don't do that," the appellate court said his behavior required "reversal per se."⁶²

Prosecutors may not suggest that their experience leads them — and should therefore lead the jurors — to place unusual weight on the evidence from which they are arguing, but they get away with hyperbolic statements of horror at the offenses charged. Clarence Darrow once told a jury:

I have never yet tried a case where the state's attorney did not say that it was the most cold-blooded, inexcusable, premeditated case that ever occurred. If it was murder, there was never such a murder. If it was robbery, there never was such a robbery. If it was a conspiracy, it was

59. *Ferguson v. Moore*, 39 S.W. 341, 343 (Tenn. 1897).

60. *LaRocca v. Lane*, 338 N.E.2d 606, 613 (N.Y. 1975).

61. *Phillips*, 527 F.2d at 1025.

62. *DiLoreto*, 888 F.2d at 999.

the most terrible conspiracy that ever happened since the star-chamber⁶³

A. Use Turns on Form

I generalize from cases such as these that the rule is a rule of form. Indicative statements are almost always all right. The way to comply is to avoid first-person pronouns. The rule does not prohibit opinionated and even inflammatory statement. In the murder trial of Frank James, Jesse's brother, the prosecutor got away with saying, "if all the innocent blood he has caused to go unavenged were collected in some vast reservoir, [the judge] might swim in it."⁶⁴ James, the prosecutor said, "set at naught the laws of his country . . . and bathed his hands in human blood."⁶⁵ This lawyer used indicative statements; he did not use first-person pronouns.

The Iowa Supreme Court once said that flamboyant speeches in court are part of American culture: "They give zest and point to the declamation, relieve the tediousness of the juror's duties, and please the audience. . . ."⁶⁶ Another and more solemn judicial theory, from the *Missouri Reports*, said extravagant speech is a means to truth: "[I]llustrations may be as various as the resources . . . of . . . genius. . . . Forensic strife is but the method — and a mighty one — to ascertain the truth"⁶⁷

Darrow was famous for using windows of opportunity in trials to argue broad social issues instead of the facts of the case he was defending. "I don't care how often [labor unions] fail," Darrow said in his defense of Bill Haywood, or "how many brutalities they are guilty of. I know their cause is just."⁶⁸

B. Zeal Means Giving Your Client the Benefit of Your Doubt

To conclude from such examples that the rules don't work would not be to say lawyers can't follow them. A rule can be

63. See Carlson, *supra* note 48, at 800. Darrow's jury speeches, including this one, are compiled at some length *id.* at 797-802. If the examples he quoted amounted to vouching — and they probably did not — most of them would have been excused under a rule that permits what judges call justifiable retaliation. *Id.* at 819.

64. *Id.* at 796.

65. *Id.* at 797.

66. *State v. Burns*, 94 N.W. 238, 241 (Iowa 1903).

67. *Evans v. Town of Trenton*, 20 S.W. 614, 616 (Mo. 1892).

68. Carlson, *supra* note 48, at 799. Darrow was not referring to the cause that was being tried — Haywood's guilt. That would have offended the rule against vouching.

trivial without being troublesome. In a relatively righteous array of examples, lawyers who limit what they say to what they believe are usually able to follow in good conscience the rule that forbids all vouching for clients. They need not worry about deception and, since character rather than form makes the argument, they develop a knack for satisfying the formal rule: A careful speaker can avoid personal pronouns; the script writers on "L.A. Law" often do it by having the lawyer say, "My client believes" in place of "I believe."

The truthful advocate has more difficulty with the *rule requiring zeal*, first because that rule's demand on the truthful advocate is that she be "professional," and, second, because the demand she consequently makes on herself, as a person who thinks of herself as truthful, is that she believe in her client's cause. The operating morality of zealous advocacy for such a truthful advocate then requires her to give her client the benefit of a doubt, because a lawyer cannot function professionally if she demands pervasive certainty of truth and justice from every client who employs her. As one trial lawyer put it to me, "You can almost always find something you believe in." With significant support from the psycho-dynamics of competition, lawyers persuade themselves that it is not possible to know who is telling the truth or what outcome will be just. This reasoning (or, if you like, self-deception) gains support from the systemic consideration that the alternative would be to limit advocacy to cases a lawyer can believe in without according clients the benefit of a doubt, and that limitation would not be professional.⁶⁹

But benefit-of-a-doubt as a procedure is not as much moral help as it might appear to be. The practice, reinforced in rivalry and by the inclination to believe people who are paying you to help them, seems likely to lead to self-deception.⁷⁰ I suspect that reliance on benefit-of-a-doubt, as much as reliance on the role morality Wasserstrom described,⁷¹ accounts for the impression we legal academics have from our alumni and friends that trial lawyers burn out young or turn to substance abuse. Those who defend drug dealers become cynics, and those who represent bankers become like their clients.

69. Freedman, *supra* note 8, and other sources cited therein, makes this argument.

70. The classic study of self-deception is HERBERT FINGARETTE, *SELF DECEPTION* (1969). I attempt to apply it, with considerable help from STANLEY HAUERWAS, *TRUTHFULNESS AND TRAGEDY* (1977), to lawyers, in *AMERICAN LEGAL ETHICS*, *supra* note 21, ch. 7.

71. See Wasserstrom, *supra* note 6 and accompanying text.

An alternative is to maintain truthfulness by a selective use of the *rule requiring zeal*. Selective application of zeal is, according to the rules, as unprofessional as the demand for pervasive truth and justice, but it has a better pedigree. David Hoffman resolved, he said in 1836, that, when he was persuaded that a client accused of serious crime was guilty,

I shall not hold myself privileged, much less obliged, to use my endeavors to arrest, or to impede the course of justice, by special resorts to ingenuity — to artifices of eloquence — to appeals to the morbid and fleeting sympathies of weak juries, or of temporizing courts — to my own personal weight of character — nor . . . to any of the . . . influences I may possess. . . . Persons of atrocious character . . . are entitled to no such special exertions from any member of our pure and honourable profession; and indeed, to no intervention beyond securing to them a fair and dispassionated investigation of the facts of their cause, and the due application of the law; all that goes beyond this . . . sets a higher value on professional display and success, than on truth and justice, and the substantial interests of the community.⁷²

George Sharswood, a generation closer to the robber barons, was ambivalent, but he agreed with what Charles Phillips said in defending his advocacy for Courvoisier — that advocacy in such a case should be limited to arguments arising on the evidence.⁷³ “You are not necessarily married to the client,” one trial lawyer said to me. Another said, “You can adequately represent your client and at the same time convey to the trier of fact that your client is a sleaze bag.” And a third said, “Why is hoping to win important? Every time you walk into a court, somebody loses.”

Hoffman said he was selective about zeal because he was concerned for people who were not in court. He was like a colleague of mine who commented on my arguing for the release from prison of a man who had been convicted of raping a child. My colleague said, “If you get him out, I hope he moves in next door to you.” Hoffman was a republican lawyer; he believed lawyers were responsible for justice. If lawyers are responsible for justice, their clients must either be right or be made by their lawyers to do right.⁷⁴

72. HOFFMAN, *supra* note 43, at 755, 756.

73. Sharswood, *supra* note 31.

74. See Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673 (1979). Hoffman was less concerned about

The unguarded remarks I quote from my friends may reflect a similar concern for third persons, but they also suggest personal revulsion at the person being represented. This distaste is not Jeffersonian elitism; it seems to be the reaction that upright people have as they want to distance themselves from the deviant. I have argued that this reaction is like the one Jesus provoked from his Pharisaic colleagues when he dined with counterparts of modern Mafia dons: In St. Luke's account, the critics said, "this man receiveth sinners, and eateth with them," and Jesus responded with the parable of the lost sheep.⁷⁵ Modern, role-morality professional ethics has its own way to preserve the distance Jesus refused to observe and at the same time be "professional." An advocate can separate his performance as advocate from his character as moral agent, if he is willing to protect his purity at his client's expense.

But you can almost hear the client of the second trial lawyer I talked to saying, "You could at least *pretend* I am not a sleaze bag"; there otherwise seems to be little service to a client in such selective advocacy. There is, of course, a "professional" response to such a demand for service, from such a client; it is suggested in an annotation in the *American Law Reports*:

It is ethical for a member of the bar to represent the accused even if he knows the latter to be guilty. In fact, it may be on occasion an ethical duty to do so. . . . [However], [t]here are certain inherent limitations. . . . There must be no relationship between them except purely that of attorney and client. . . . Counsel is not expected to stultify himself in an attempt to advance his client's interests. The attorney is justified in withdrawing, where, during the progress of the litigation, the client engages in conduct that tends to degrade or humiliate the attorney.⁷⁶

The rule requiring zeal means at least that my friend may not say that his client is a sleaze bag. A lawyer who did that would not provide adequate representation, and he would also commit legal malpractice. One way to avoid such professional and legal disapproval is to attempt no personal relationship with his client and to use the arts of rhetoric with the jury. If

equality than most of his professional descendants have been, and he was relatively unconcerned about autonomy.

75. *Luke* 15 (King James); see also AMERICAN LEGAL ETHICS, *supra* note 21, ch. 5.

76. Dag E. Ytreberg, Annotation, *Rights and Duties of Attorney in a Criminal Prosecution Where Client Informs Him of Intention to Present Perjured Testimony*, 64 A.L.R. 3d 385, 387 (1975).

Jeffrey Stout, and Samuel Butler are right, these arts nonetheless, and unavoidably, include creating the impression that the lawyer's character is on the line, since *the rule requiring zealous advocacy* mandates a lawyer's giving that impression. Nineteenth-century lawyers worried that such arts were untruthful; modern discussion of them centers in analysis of statements, rather than in the habits and dispositions that make it possible to be both a good person and a good lawyer, or in concern for what decision makers think is going on.

The case reports and commentators demonstrate, I think, how the modern analytical procedure leads to sophistry in the law and to cynicism in its practice. The analytical alternative has also been damaging to ethical reflection. It has suppressed among legal ethicists what might otherwise have become descriptions of the relationships lawyers have with their clients, their colleagues, and those before whom they present advocacy. The profession and its teachers fasten on rules for using pronouns while they neglect description of the character necessary to being a lawyer in the late twentieth century in North America and the development of professional communities that are able to form lawyers in the virtues necessary for the practice of law.⁷⁷

IV. AN ARISTOTELIAN ETHICAL PROSPECT FOR ADVOCATES⁷⁸

A. Benevolence and Meaning What You Say

The way to avoid pretense in advocacy is to say what you mean and to mean both what you say and what you seem to mean in what you say and do. We come to mean what we say about the subjects and the objects of our advocacy — the people involved, rather than the words — by approaching them with benevolence. We are then, in the ordinary meaning of the word, *friendly*, rather than either self-deceived or cynical, as we weigh the stories and claims of our clients and make or seem to

77. A subject that is developed in a more positive way in THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* (1991) [hereinafter *AMERICAN LAWYERS*].

78. I doubt that the argument that follows can be made from the RHETORIC, *supra* note 1, which seems uncharacteristically cynical, unless one puts great weight on the uncharacteristic claim that the advocate's worthy end excuses abusive means. In any event, I depend here mostly on the NICOMACHEAN ETHICS, *supra* note 4, the MAGNA MORALIA, *supra* note 4, and on the secondary sources, *supra* note 5.

make a decision about whether to accord them the benefit of a doubt.

This alternative appeals to friendship not as a bit of good luck, or even as a way to describe a relationship, but (1) as *habit* or disposition that rests on the understandings that (2) friendship is *constituent* of the good life and not merely a consequence of it;⁷⁹ and (3) the claim that practice of the virtue of friendship is in significant part an exercise of *will*. Will Rogers and Harvey's friend, Elwood P. Dowd, described the disposition — Rogers when he said he never met a man he didn't like, Dowd when he said: "Dr. Chumley, my mother used to say to me, 'In this world, Elwood . . . you must be oh, so smart or oh, so pleasant.' For years I was smart. I recommend pleasant. You may quote me."⁸⁰

Beyond disposition and habit, this is to understand friendship as (4) *dynamic*: Aristotle's "lesser forms of friendship," friendships that are pursued for pleasure or for profit, are, when pursued with benevolence, the beginning of and the means to the friendship that is a collaboration in the good. The relatively instrumental relationships an advocate has with the people she meets in "the administration of justice," and the relationships for profit she has with her clients, are, when pursued with benevolence, an initiation to the practice of friendship as collaboration in the good.

This earthy, Aristotelian account of the process of friendship is a radical warning against our modern tendency to separate our friends from those we work with and work for. The tendency to treat our friendships, as we treat our religion, as

79. See Cooper, *supra* note 5.

80. MARY CHASE, HARVEY (1952). Aristotle speaks of friendliness as an aspect of truthfulness: "[I]t has to do with acts and words," and, as virtue, is the middle way between flattery and hostility — the excess going beyond the truth and the deficiency detracting from the truth. *MAGNA MORALIA*, *supra* note 4, at 20-28. I mean to discuss benevolence, which Aristotle treats under the virtue of friendship — "love toward things with life . . . where there can be a return of affection." *Id.* at 35. He speaks of benevolence as "good will . . . the beginning of friendship," the wish and the power to do good "for the sake of the person towards whom good will is felt." *Id.* at 8-9. The virtue, or beginning of virtue, that is described here, particularly with reference to truthfulness, is often made about relationships among lawyers — although there it may more often invoke an organic metaphor and be called *fraternity*. See, e.g., *Valleyfield Constr. v. Argo Constr.*, 7 C.P.C. 60 (Ontario High Court of Justice, 1978)(Linden, J.): "The word of a solicitor is viewed by another solicitor as virtually sacred. . . . Lawyers generally have always done what they said they would do. . . . Thus, real estate transactions worth millions of dollars are closed and title passed on the basis of the word of *another* solicitor." *Id.* at 62 (emphasis added).

private, denies to us the benefit of sharing with friends most of what we do most of the time. "Professionalism" discourages the practice of benevolence with most of the people we deal with, most of the time and with the most intensity.⁸¹ Deprived thus of friendship as support for moral reasoning in professional life, we turn to conditions of loneliness and the ethical processes of (depersonalized) analysis of words and acts.

Friendship as dynamic, as a process, means that the benevolent disposition Cooper⁸² translates literally as "wishing well" — I risk calling it "friendliness" — is common to friendships for profit and friendships that are collaborations in the good. It is prior to the relationship a person has with any particular friend, but it grows in the soil of other, including lesser, friendships. Mostly, I think, the skill of friendship grows in the organic friendships we first have in family, town, and religious congregation. It is in those organic beginnings that we are formed in the ability to be friends. Stanley Hauerwas speaks of constancy in friendship as dependent on constancy to self;⁸³ I want to add to his insight that it is in the organic relationships — the relationships *we do not choose* — that we learn what constancy to self is and what is required to maintain it.

It is possible to assign particular moral weight to an advocate's friendliness toward her client — because it grows — it has begun to grow — in the soil of a lesser friendship.⁸⁴ One who makes such an Aristotelian argument, though, should be prepared to admit its risks. The most prominent of these is the risk of suffering. Friendship presupposes vulnerability. Friendliness in the practice of an arcane, contentious, perilous occupation is often an invitation to pain. This is particularly true, as Emily Hartigan has pointed out, of friendliness in the

81. Although, the notion of "professionalism" seems sometimes to invoke, or at least depend upon, deeper notions of friendship. See Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 406-09 (1990).

82. Cooper, *supra* note 5, at 632.

83. See Hauerwas *supra* note 5; Stanley Hauerwas, *Constancy and Forgiveness: The Novel as a School for Virtue*, 15 NOTRE DAME ENG. J. 23, 26-27 (1983).

84. Book Eight of the NICOMACHEAN ETHICS, *supra* note 4, talks of friendship. Aristotle said that good people are made through participation in a common activity which is worthwhile in and of itself. The practice of law seems to be worthwhile, as any occupation that calls itself a profession does, by reason of the facts that (i) it deals with matters of importance to persons and communities, and (ii) it has been, by client and community, (iii) assigned in a significant (enfranchised) way to persons who are learned in its traditions and its art.

law.⁸⁵ Vulnerability is the determination not to treat those who listen to advocacy, or clients, or potential clients, as instruments. It is vulnerability that makes it possible to practice benevolence toward such people, to wish them well, to take an interest in them.⁸⁶

B. The Aristotelian Alternative in the Anthropology of American Lawyers

Friendship can describe the usual relationship a lawyer has with her clients and can extend to a disposition toward colleagues, witnesses, judges, and jurors. (The opposite sequence seems to risk the republican elitism that modern lawyers dislike in the legal ethics of David Hoffman.) Friendship consistently shows up in legal ethics, although the tradition has also been consistently distorted by abstract statements of principle and rule, and by recurrent obsessions with objectivity — from Hoffman's pompous elitism to the American Bar Association's post-Watergate campaign for "professionalism." With, I hope, the possibility of Aristotle looking over my shoulder, I suggest three examples of friendship from the anthropology of American lawyers.

There is, first, the advertent *limitation of advocacy* to those who are already what Aristotle would call "true" friends. William Kunstler said, at the height of the anti-war movement of the late 1960s and early 1970s, that he would not have a client he did not love.⁸⁷ Once you get over being startled at the lack of "professionalism" in that sentiment, you notice that what lies at the base of it is the discovery that justice is not enough. Not only, as Aristotle said, do friends have no need of justice,⁸⁸ but justice is oppressive when it is not softened by the other virtues.⁸⁹

85. Emily F. Hartigan, *The Power of Language Beyond Words: Law as Invitation*, 26 HARV. C.R.-C.L. L. REV. 67 (1991).

86. See Jackson, *supra* note 5, at 11-14. He demonstrates that not being cruel is not enough — a significant argument for codified legal-ethics rules on treatment of persons other than a lawyer's clients. As to clients, White says that the object of the professional enterprise is truth, and the method is friendship. See WHITE, *supra* note 2. I have suggested that the object is friendship, and the method is truth. Friends do not lie to one another, and friendly people do not approach one another with lies. I suspect White's formulation, like mine, would preclude rules against vouching for clients, as both preclude pretending to vouch for clients. See FAITH AND THE PROFESSIONS, *supra* note 5, ch. 6.

87. See AMERICAN LEGAL ETHICS, *supra* note 21, at 570.

88. See NICOMACHEAN ETHICS, *supra* note 4.

89. The problem with Kunstler's undertaking is that it does not seem to

A second piece of anthropology is the *practice of advocacy among cronies* — among clients who are cronies or cronies of cronies — and advocacy beside, against, and directed toward cronies. I think here of the law practice of George V. Higgins's Boston-Irish lawyers, particularly Jeremiah Francis Kennedy.⁹⁰ Jerry Kennedy's practice turns on doing favors and collecting on favors done. It rests on the sort of friendship that provides profit, but the virtue of friendship can flourish there. Kierkegaard said it always begins there.⁹¹ Jerry Kennedy profits from the fees paid him by Cadillac Teddy Franklin, designer car thief. Toward the end of fifteen years of mutual profit, their relationship has become a collaboration in the good. Their work together has come to the place where Jerry tries to keep Teddy from stealing cars, and Teddy encourages Jerry to be a truthful advocate. Jerry takes fees from clients who are his cronies and clients who are not, but — as Teddy Franklin tells him — he does his best work for his cronies. I regret to report that Jerry vouches for his clients, but that is not uncommon among lawyers who have friends for clients or clients for friends. As for Jerry's advocacy in court, which is only necessary when favors fail, Jerry's friends tell him that he's better when he means it.⁹²

Finally, there is the *anthropology of the late immigrants*, those who began to come to the American legal profession less than a century ago. Their children and grandchildren have come to law school and into a male W.A.S.P. fraternity that imposes regulatory rules, such as the rule requiring zeal in advocacy and the rule against all vouching for clients, but they have not allowed those rules to become an ethic. They obey the rules as they obey traffic lights, and for about the same reasons. Their

comprehend friendship as dynamic. It does not allow for the possibility that friendship begins in relationships for pleasure and profit. Jack Lee Sammons, Jr., suggested to me that advocacy as friendship helps resolve the problem of vouching in a more comprehensive way:

I don't think it is hypocritical to speak for a friend, even to do so in a powerful way for a friend you disagree with. . . . Kuntsler doesn't love enough — he doesn't have enough friends and potential friends. He is not like Elwood P. Dowd. . . . I think of his friends as comrades. We don't need something called lawyers if we are just going to choose up sides.

90. See GEORGE V. HIGGINS, *KENNEDY FOR THE DEFENSE* (1980); GEORGE V. HIGGINS, *PENANCE FOR JERRY KENNEDY* (1985); GEORGE V. HIGGINS, *DEFENDING BILLY RYAN* (1992).

91. See MEILAENDER, *supra* note 5, at 53-63.

92. See *Good Client*, *supra* note 8; see also Schneyer, *supra* note 7, at 1002 (documents several examples in the white-collar criminal-defense bar).

ethic is familial; the Southern-Italian immigrants called it the order of the family, *la via vecchia*, the old way. The Puritan phrase for it is "amoral familism."

Mary M. Shaffer and I have attempted to demonstrate elsewhere that, as *l'ordine della famiglia* found its way into American-lawyer professionalism, the familial was applied outside the family — first to people from the same place in the Old World, then to people from the same region, then to people from the same nation-state, then to those a modern American "professional" person meets in her work.⁹³ The advantage this anthropology develops, as contrasted with practice among cronies, is that the moral boundaries of the familial (which reach beyond friendship for pleasure and profit more than relationships among cronies do) are expanded in reference to and respect for the familial. This becomes an instance of the practice in professional life of the virtue of friendship as we have learned it in the family. (It even sometimes justifies the use of familial metaphors by people in a profession.) If, for example, there is hope that a group of lawyers can become what Alasdair MacIntyre calls a "practice,"⁹⁴ it is because a professional community can take advantage of this organic formation in friendship.⁹⁵

93. See AMERICAN LAWYERS, *supra* note 77, ch. 6 & 7 (Italian Americans); AMERICAN LEGAL ETHICS, *supra* note 21, ch. 12 (Italians and other late immigrants, including Eastern European Jews). In the case of the Italian immigrants, the development was an *American* development; most of these immigrants did not think of themselves as Italians when they were in Italy.

94. ALASDAIR MACINTYRE, AFTER VIRTUE 175-83 (1982).

95. All three of these anthropologies depend on communities that are more powerful and more sustaining than any professional fraternity in America has been able to be — and more powerful, too, than the rather too cool, too masculine "practice." *Id.* The influence of the community behind a position such as Kuntsler's is hard to see, not because the community is not there, but because the context of argument in anti-war protest, brought to courtrooms, was described by a democratic liberalism that knows no communities except the ones produced by choice. See Donald L. Gelpi, S.J., *Conversion: Beyond the Impasses of Individualism*, in BEYOND INDIVIDUALISM: TOWARD A RETRIEVAL OF MORAL DISCOURSE IN AMERICA 1 (Donald L. Gelpi, S.J. ed. 1989); Betty Mensch & Alan Freeman, *Liberalism's Public/Private Split*, TIKKUN, Mar.-Apr. 1988, at 24; Stephen Pope, *Expressive Individualism and True Self-Love: A Thomistic Perspective*, 71 J. RELIGION 385 (1991).

Higgins's stories, on the other hand, and, even more, *l'ordine della famiglia* of the late immigrants, are driven by a tension between the American civic community and the organic communities that teach a lawyer what friendship is. See AMERICAN LAWYERS, *supra* note 77, ch. 5. These organic communities in America have been in significant ways religious. The argument I make here, in Aristotelian terms, depends in a similar way on sustaining organic (and religious) communities. ON BEING A CHRISTIAN, *supra* note 14, ch. 8 &

Zeal for a client's interest is not inconsistent with friendship, but zeal plays out differently with a friend because interest is worked out differently. "Client interest" is a prominent notion in codified American legal ethics, where it seems to mean either the purposes stated by a lawyer's client when he comes to a lawyer, or (more often and more dismally) the purposes a lawyer supposes, without asking, that his client has or should have in view. "Client interest" is not a given, in either of these ways, when your client is your friend. It is then, at first, not so much a purpose as it is a project. Friends decide together what their common interests are and only then decide what each of their interests are. Friends collaborate in the good; if the interest one of them claims is not consistent with collaboration in the good, friends, who have a stake in one another's character, collaborate in what Karl Barth called conditional advice.⁹⁶ (Aquinas called it fraternal correction.) It is not that the lawyer's professional task is to see to it that her client does the right thing; it is that two friends are mutually concerned that both of them be and become good persons.⁹⁷

ch. 1-4. These sustaining communities are where a person is formed in the accepting (*Romans* 14:1) and in the burden (*Romans* 15:1) that friendship entails.

96. KARL BARTH, *THE EPISTLE TO THE ROMANS* 14 (Edwyn C. Hoskyns trans., 6th ed. 1968).

97. I am grateful for the assistance of Joseph Allegretti, Harlan R. Beckley, Frank E. Booker, Louis M. Brown, Thomas Dixon, Fernand N. Dutilleul, Ronald Green, Linda Harrington, Emily Hartigan, Stanley Hauerwas, Linda R. Hirshman, Louis W. Hodges, L. Gregory Jones, Duane C. LaRue, Carrie Menkel-Meadow, Robert S. Redmount, John Robinson, Robert E. Rodes, Jr., Gary Rosenshield, Jack Lee Sammons, Jr., Theodore J. Schneyer, James H. Seckinger, Daniel P. Semmens, and Nancy J. Shaffer. Publication of an earlier version of this paper was planned in a new journal, to have been founded and edited by the late Professor Warren Lehman, of the University of Wisconsin. He died before his interesting new intellectual adventure could begin, but he spent many long hours on this paper; I dedicate my efforts to his memory.

