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PRINCES OF DARKNESS AND ANGELS OF LIGHT: THE SOUL OF THE AMERICAN LAWYER

DAVID BARNHIZER*

Thus the classic epitome of the lawyer . . . spreads throughout the western world: a consummate malevolence, callousness to truth the basic vice, hardened with the sin of avarice, and a consequent denial of God's favored—the downtrodden poor.¹

—David Mellinkoff

There is an effort to foreclose the absolute freedom of lawyers to represent their clients and the reason is that lawyers have been successful in doing so. I can't think of any time in the history of the country . . . that the independence of the legal profession has been as threatened as it is now.²

—Philip S. Anderson

The basic concept of freedom under law, which underlies our entire structure of government, can only be sustained by a strong and independent bar.³

—Justice Lewis F. Powell, Jr.

* Professor of Law, Cleveland State University College of Law. I thank the Cleveland-Marshall Fund for its support of this work. This article is dedicated to Monroe Freedman, Gary Bellow, William Greenhalgh, and Beatrice Moulton.

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1. DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 13 (1973).

2. William Glaberson, *Lawyers Contend With State and Federal Efforts to Restrict Their Rising Power*, N.Y. TIMES, Aug. 5, 1999, at A16.

3. Future Justice Lewis F. Powell, Jr., wrote in 1962: "This Committee is deeply concerned with improving . . . the economic status of lawyers. . . . It is plainly in the public interest that the economic health of the legal profession be safeguarded. One of the means toward this end is to improve the efficiency and productivity of lawyers." ABA COMMITTEE ON ECONOMICS OF LAW PRACTICE, *THE LAWYER'S HANDBOOK* vii (1962) [hereinafter *LAWYER'S HANDBOOK*].

I. INTRODUCTION

Life is not made up of love; it is made up of fear and greed and money.⁴

Rather than being perceived as helping professionals and conservators of democratic values in the way described in Tocqueville's classic work, *Democracy in America*, lawyers have become the butt of jokes that call into question the basic values of the adversary system and the lawyer's responsibility within it.⁵ In one reasonably typical cartoon, a patient is sitting on the edge of a doctor's examining table with the physician standing thoughtfully behind him. On the patient's back is an ugly gnome-like creature—complete with miniature suit and briefcase—with its teeth and claws dug into the patient's back. The doctor offers the following diagnosis: "I can see what's causing the problem—you've got a lawyer on your back." In another attempt at humor, two women are sharing coffee and one remarks to the other: "It's finally over—Frank's lawyer got the apartment, and my lawyer got our two cars and the beach house."⁶

Lest we think such pointed jibes are unfair or lack any grounding, it may be useful to consider a report of a coup at the venerable New York based law firm of Cadwalader, Wickersham and Taft—a carefully plotted strategy among younger partners to oust some of their seniors. The strategy, designated "Operation Rightsize" by the conspirators, was not cost-free, either to the lawyers who were pushed out or to the firm which ended up on the losing end of several multi-million dollar judgments. The dismissed partners at Cadwalader sued the firm, and the litigation offered a dramatic insight into how far the idea of principled behavior and institutional loyalty has plummeted among some members of the legal profession. The *Wall Street Journal* reported

4. Paul M. Barrett, *Putsch and Shove: A Once-Stodgy Firm Makes a Flashy Return, But at What Cost?*, WALL ST. J., Aug. 17, 1998, at A1 (quoting deposition testimony of Jack Fritts, former chairman of Cadwalader, Wickersham and Taft).

5. Alexis de Tocqueville described lawyers as the "aristocracy" of the American system, a profession that held the system together and protected the basic values of democracy:

In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 42 (1945).

6. LAWYERS! LAWYERS! LAWYERS!: A CARTOON COLLECTION 1, 11 (S. Gross ed., 1994).

that “[i]n deposition testimony in the Beasley case . . . , Jack Fritts, a former firm chairman who backed Project Rightsize, observed that ‘life is not made up of love; it is made up of fear and greed and money.’”⁷

A. *Extreme Commercialization and the Decline of the Legal Profession*

The increasing belief among many lawyers that life is comprised of “fear and greed and money” has altered the legal profession and helped make lawyers into one of the most feared and powerful groups in American society—and one of the most scorned.⁸ In the midst of the widespread contempt American society is showing lawyers, this article seeks to explain the special role the legal profession serves in our complex democracy. At the same time it condemns attitudes such as those reflected in Fritts’ statement. The belief that life is driven by fear, greed, and money has created a process that is resulting in the extreme commercialization of the legal profession to such an extent that the profession is being “deprofessionalized.” This process has been unfolding for almost half a century, but has accelerated in the past decade.

The extreme commercialization of the legal profession is stripping away from lawyers any entitlement to be treated as a special profession in our society. Jules Henry suggests the effect on principle that results when humans convert everything into financial considerations. Henry observes: “Monetization waters down values, wears them out by slow attrition, makes them banal and, in the long run, helps Americans to become indifferent to them and even cynical. Thus the competitive struggle forces the corruption of values.”⁹ Unless steps are made to reverse the pro-

7. Barrett, *supra* note 4, at A1; *see also id.*:

[A] group of younger partners at Cadwalader decided to clean house In a secret meeting in a midtown hotel, they compiled the names of less productive colleagues—and then forced them out, cutting the size of the partnership nearly 20% The remaking of 330-attorney Cadwalader exemplifies a sweeping transformation in the law industry.

8. *See* Glaberson, *supra* note 2, at A16:

“We’re still at a place where we can avoid what happened to the medical profession,” said Lawrence J. Fox, a Philadelphia trial lawyer who is a former chairman of the bar association’s ethics committee. “But we have to defend the proposition of professional independence right now—today. We can’t wait any longer.”

9. JULES HENRY, *CULTURE AGAINST MAN* 65 (1965). Francis Fukuyama, one of our more exceptional modern thinkers, concludes:

Although conservatives like William J. Bennett are often attacked for harping on the theme of moral decline, they are essentially correct: the breakdown of social order is not a matter of nostalgia, poor mem-

fessional decline, lawyers in a “free-market legal profession” will soon be seen as nothing more than profit-driven business people who are entitled to no more respect or deference than a Wal-Mart or a pizza carryout. The problem with this is that lawyers—as zealous advocates and wise counselors—are an integral part of a complex and competitive American society attempting to retain its character under the rule of law.

Lawyers are increasingly confused about the legitimacy of the legal profession, as well as how to determine where moral and professional limits exist as to appropriate behavior.¹⁰ While lawyers sense that by providing an advocate’s voice in disputes they are doing something of importance for our democratic society generally, and for their clients specifically, they are understandably troubled by a society that makes no bones about the fact that it views them as immoral manipulators who are unworthy of trust.

Distrust of lawyers is ancient; even Plato could not resist describing lawyers as, “keen and shrewd” but with “small and unrighteous” souls who have no mature human soundness and wrongly think themselves masters of wisdom.¹¹ Although ancient and chronic, the criticisms have recently intensified to a level approaching vilification. The past decade has witnessed an explosion in books, studies, law courses and articles that deal with issues such as professional ethics, professional responsibility, professionalism, what it means to be a lawyer, role-differentiated morality, the “civility” movement, “skills and values,” and more.¹² We have heard of the “good” lawyer, the zealous lawyer, the “alternative” lawyer, the “kinder and gentler” lawyer, the moral

ory or ignorance about the hypocrisies of earlier ages. The decline is readily measurable in statistics on crime, fatherless children, reduced educational outcomes and opportunities, broken trust, and the like.

FRANCIS FUKUYAMA, *THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER* 5 (1999).

10. A decline in principle is afflicting the U.S. See *infra* pt. VI and sources cited therein. This decline has led not only lawyers—but many other people and professions—to be confused about the limits of what they should do. Consider the irony of Ken Starr’s intensive investigation of Bill Clinton for lying, and the fact that Starr’s office was investigated for abuses allegedly committed during the process, including lying. See David Johnston & Don Van Natta Jr., *Inquiry to Ask Whether Reno Was Misled by Starr’s Office*, N.Y. TIMES, Feb. 10, 1999, at A1.

11. MARTIN MAYER, *THE LAWYERS* 4 (1966).

12. Assessing the nature of law practice is in part shooting at a moving target. The profession is changing so rapidly in structure, scope and diversity of activities, internal competitiveness, numbers of competitors, values and much more, that it seems almost impossible to capture.

lawyer, the principled lawyer, and the need for "civic virtue."¹³ While much of the literature is commendable, it typically fails to confront the fundamental nature and consequences of being a lawyer. Nor does it have much to say about the effects of law practice on those who devote themselves to lives representing clients. Missing from most of the literature is any awareness of the critical contribution made by the advocate to the well-being of a complex democratic society based on the rule of law.

B. *Zealous and Competent Representation as the Lawyer's Central Principle*

This article seeks to present a tough and realistic sense of what it means to be a principled lawyer. It does so in a context of admiration for what good lawyers do, and contempt for the commercialization of the legal profession. But the essay is not an apology for the legal profession as it now exists, nor is it an urging that lawyers and what they do for their clients be limited and made "kinder and gentler." This article defends both good lawyers and the adversary system—and asserts that there are not enough effective advocates working zealously on behalf of their clients.

13. See MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) [hereinafter FREEDMAN, *ADVERSARY SYSTEM*]; MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990); *LAWYERS: A CRITICAL READER* (Richard Abel ed., 1997); *THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM*, CONFERENCE PROCEEDINGS (Joan S. Howland & William H. Lindberg eds., 1994) [hereinafter MACCRATE REPORT]; *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum*, A.B.A. SEC. OF LEGAL ED. & ADMISSIONS TO THE BAR (1992); Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671 (1997); Monroe H. Freedman, *The Ethical Danger of "Civility" and "Professionalism,"* 6 CRIM. JUST. J. 17 (1998) [hereinafter Freedman, *Ethical Danger*]; Monroe H. Freedman, *The Trouble With Postmodern Zeal*, 38 WM. & MARY L. REV. 63 (1996); James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781 (1997); Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861 (1997); *Symposium, The Lawyer's Duties and Responsibilities in Dispute Resolution*, 38 S. TEX. L. REV. 1 (1997). See also John Q. Barrett, *A Post Conference Reflection on Separate Ethical Aspirations for ADR's Not-So-Separate Practitioners*, 38 S. TEX. L. REV. 705 (1997); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997); *Symposium Papers from the W. M. Keck Foundation Forum on the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. (1996). For excellent sources on many issues of professionalism and professional responsibility, see DEBORAH RHODE, *PROFESSIONAL RESPONSIBILITY: LEGAL ETHICS BY THE PERVASIVE METHOD* (1994); RICHARD ZITRIN & CAROL LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* (1995).

The main premise of this essay is therefore that the person who is performing the lawyer's mission well through providing zealous and competent representation to the client is simultaneously a "prince of darkness" and an "angel of light." The metaphor of the "prince of darkness" does not stand for evil, but for the application of power and manipulation of people to gain the client's ends. Similarly, the "angel of light" does not represent the pursuit of specific ends that everyone would consider "good," as opposed to *legitimate* ends that are allowed as legal by our society. Lawyers representing tobacco companies, murderers and polluters are consequently serving the interests of society and working for a form of the good, just as much as are those we commonly think of as public interest lawyers. Although there are limits to what the lawyer should do for the client, for most lawyers the issue is that of less-than-zealous advocacy and considerably less than competent assistance to clients rather than the over-zealousness that is popularly lamented.

The duty to provide zealous and competent representation is inherent in the lawyer's assumption of responsibility for another's fate and is reflected in—though not ultimately derived from—obligations such as are described in the ABA Model Code of Professional Responsibility relating to zealous representation. The Code provides:

EC 7-1: The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. . . . The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.¹⁴

14. 1999 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 202 (Thomas Morgan & Ronald Rotunda eds., 1999) [hereinafter 1999 STANDARDS] (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980)). "Lawyers are accused of taking advantage of 'loopholes' and 'technicalities' to win. Persons who make this charge are unaware, or do not understand, that the lawyer is hired to win, and if he does not exercise every legitimate effort in his client's behalf, then he is betraying a sacred trust." William J. Rochelle & Harvey O. Payne, *The Struggle for Public Understanding*, 25 TEX. B.J. 109, 159 (1962). Compare the Model Code with the altered language of the ABA's Model Rules of Professional Conduct: Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1998). The comment to this rule states:

Although some might argue this obligation should be changed, or that it has severe limits, in this essay I suggest strongly that the duty created in the ideas of zealous and competent representation set forth in Ethical Consideration 7-1 represents the heart of the lawyer's principled obligation, both to the client and to the society. I argue that it is our failure to honor this duty—rather than the reverse as many suggest—that is at the center of many of the most intractable conditions in American society. This means there are reasons to seek a clarification and a strengthening of the adversary system and the role of the advocate in our society, rather than the weakening that seems to be the prevailing view. A legal profession without a strong sense of duty to its clients is not entitled to any special privileges or status in our society. Too frequently, however, claims of service to society are only masks for privilege. As Thomas Shaffer suggests:

A lawyer or doctor or teacher has to give some reason for her or his privileges—licensed access to mysteries, social power, status, and, usually, high income. He and his fraternities (she and her sororities) feel the need anyone does, and particularly anyone in the modern world, to fit his or her situation into some universal and objective morality. The usual way this is done in the professions is through the claim that professionals are set aside for service.¹⁵

C. *Strong Advocates are a Critical Balance Against Entrenched Power*

Ironically, but totally consistent with the adversary process, is the fact that those who have had the resources and political power to dominate the legal system and obtain laws that favor their positions often lead attempts to restrict the quality, substance and access to legal representation by less powerful people and by those who have been directly harmed by their clients' actions and failures of responsibility. Ralph Nader describes what has been occurring in the American legal system as a plot by extremely powerful interests to undermine the legal system.¹⁶

A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

Id. Rule 1.3 cmt.

15. THOMAS SHAFFER, FAITH AND THE PROFESSIONS 58-59 (1987).

16. See RALPH NADER & WESLEY SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA (1996).

A recent string of decisions by judges seems to be reversing a fifteen-year trend of legislative victories by the combined power of large corporations, doctors, and the insurance industry.¹⁷ Several studies have shown that the so-called "litigation explosion" that has been used to help fuel popular depictions of lawyers, is in fact often made up of deliberate exaggerations aimed at creating anger toward lawyers in order to develop political support for laws limiting the liability of the wealthy and powerful groups backing the "reform" strategy. William Glaberson recently reported a variety of exaggerated claims by lawyers representing powerful interests that were aimed at gaining passage of legislative changes that would restrict their clients' own tort liability. He cited a law professor's description of the strategy as: "The story of tort reform across the country is that it is one of the most carefully developed and exquisitely executed political campaigns ever," and includes statistics relating to the award of punitive damages—a main argument of the corporate defenders in their quest for legislative "reforms."¹⁸ Glaberson asks:

Huge punitive damage awards, for example, have become everyday events, right? Actually, a study of courts in the nation's 75 largest counties conducted by the National Center for State Courts found that only 364 of 762,000 cases ended in punitive damages, or 0.047 percent. OK, but isn't it true that more and more liability claims are filed every year? Actually, a study of 16 states by the same

17. See Ashbel S. Green, *Court Says Damages Cap Violates Constitution*, OREGONIAN, July 16, 1999, at A1:

According to some legal experts, the ruling is part of a nationwide trend of state courts overturning 15 years' worth of efforts by businesses, insurance companies and medical groups to limit jury awards. "The state courts are invalidating huge parts of the tort reform legislation to the consternation of supporters of tort reform," said professor Mark Geistfield of New York University Law School. "There is much more judicial hostility to this kind of legislation than anyone was expecting."

The Model Code also contains Canon 8, *A Lawyer Should Assist In Improving the Legal System*. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8 (1980). EC 8-1 provides, for example, that "[c]hanges in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system." *Id.* EC 8-1. This is amusing in light of what Ralph Nader aptly describes as "the corporate scheme to wreck our justice system." NADER, *supra* note 16, at 24. Part of that "scheme" has been to prevent plaintiffs from obtaining substantial damages against several extremely powerful classes of defendants by lobbying for legislative limitations on the state level. It must be extremely frustrating for the defense firms to see a considerable number of their wins evaporate.

18. William Glaberson, *When the Verdict Is Just a Fantasy*, N.Y. TIMES, June 6, 1999, at A1.

center showed that the number of liability suits has declined by 9 percent since 1986.¹⁹

But my comments about how lawyers function need to be separated into personal, social and moral beliefs in which I find the lawyers' behavior contemptible, and my professional beliefs, where I find them legitimate and even admirable. This article deals with the obligations of lawyers as zealous advocates and as zealous and wise counselors. One of its main points is that this kind of strategic behavior represents how an advocate is *supposed* to function and how the advocate *should* function. This premise rests on a simple insight. We are not going to change human behavior as reflected in how powerful interests attempt to manipulate every aspect of the system to acquire, protect and expand their shares of wealth and power—and seek to insulate themselves against others' efforts to take what they possess. This is human nature and not particularly nice. But it will not change.

In the complex and competitive political system we find in America, such behaviors are both necessary and inevitable.²⁰ It is the job of the lawyer to provide a voice to the competing interests.²¹ The difficult aspect, however, and one that most people do not want to confront, is that many people do not want their less powerful competitors to have an effective voice through zealous and competent representation. Thus, whenever possible, they implement strategies to ensure less-than-effective representation by disfavored opponents.²² Those strategies will often

19. *Id.*

20. See HENRY, *supra* note 9, at 13 (describing America perfectly: "Ours is a driven culture. It is driven on by its achievement, competitive, profit, and mobility drives, and by the drives for security and a higher standard of living.").

21. See AUERBACH, *infra* note 25, at 141:

The dependence of Americans upon law, and their apprehension about it, are reciprocal. The exercise of freedom, channeled into the acquisitive pursuit of wealth, requires the vigorous assertion of individual rights, which law protects. It also assures incessant conflict between competing individuals, who are virtually unrestrained by any purpose beyond self-aggrandizement. The Darwinian jungle is filled with the excitement of the hunt, but it is a scary place because the hunters simultaneously are hunted. As Americans pursue their quarry, they need protection (provided by law) for themselves, and weapons (also provided by law) against their adversaries.

22. See *id.* at 145:

Law can symbolize justice, or conceal repression. It can reduce exploitation, or facilitate it. It can prohibit the abuse of power, or disguise abuse in procedural forms. It can promote equality, or sustain inequality But diversion from the legal system is likely to accentuate that inequality. Without legal power the imbalance between aggrieved individuals and corporations, or government agen-

involve making up reasons that support their positions, because, after all, if insurance companies, doctors, and product manufacturers came right out and said: "We don't want to pay all this money to people we have hurt. We don't want to have to be more careful and thoughtful in what we do. And we want to keep all the money for ourselves," it wouldn't be all that effective in helping them to obtain legislative changes favorable to them. What the most powerful interests understand fully, while the less powerful and traditionally disadvantaged still do not grasp adequately, is that the only way through which they can gain a greater share of power or call those who have wronged them to account, is by becoming empowered through law and access to zealous and competent lawyers.

D. *The Impact of the Adversary System on Lawyers*

There are consequences for lawyers in serving as the client's voice in the adversary system, and those consequences are poorly understood. In this article, I have sought to capture the role of the lawyer through the combination of the metaphors of the "prince of darkness" and the "angel of light"—the manipulator of people and systems in the championing of the client's cause. And here, I emphasize, is meant in the service of any client with a legitimate legally protected interest, or a right to do something or not be compelled to do something the client doesn't desire. The argument offers a different perspective on "darkness." It is that the exercise of the "dark" skills necessarily used by all lawyers and through which they manipulate power—while being neither inherently satanic nor saintly—has a profound impact on creating and defining the "soul" of those who use such skills on their clients' behalf. This will often mean that some human qualities and personality characteristics are repressed and others elevated to prominence through the combination of heightened need and frequent use. The concept of the dark skills—which are in fact the skills involved in manipulation and strategy of the kind done by nearly all lawyers—makes lawyers "princes of darkness."²³ The service they render to clients and to the preserva-

cies, cannot be redressed. In American society, as Laura Nader has observed, "disputing without the force of law . . . [is] doomed to fail."

23. Certain kinds of behaviors produce corresponding effects or at least reveal something "true" about the actor. I am using the idea of "dark skills" to capture the fact that inherently manipulative processes generate emanations of a specific kind and quality. In large part we create ourselves through our acts. Marshall McLuhan described a similar process as humans increasingly relied on written words and moved away from oral and physical activities. See MARSHALL McLUHAN, *THE GUTENBERG GALAXY* 93 (1962).

tion of our complex political system makes lawyers into “angels of light.” A central thesis is that while use of the dark skills is a necessary part of being a good lawyer, their use extracts a price.²⁴

The price lawyers pay is created in part by the dynamics of the adversary system. Jerold Auerbach warned us against the impacts of the adversary system, even while conceding its vital purpose. “Litigation expresses a chilling, Hobbesian vision of human nature. It accentuates hostility, not trust. Selfishness supplants generosity. Truth is shaded by dissembling.”²⁵ Auerbach’s warning is uncomfortably accurate even while being inadequate. The practice of law is even more powerful than he suggests, and its effects on those who engage in it—profound. The interaction of dark and light I am suggesting is offered as an integrated quality explaining how people actually function. In this essay, I am arguing for the intellectual illumination of a system of real morality, one based honestly on human nature and the legitimate culture of law practice. The approach is difficult to accept both emotionally and intellectually because it requires that we

24. See Beck et al., *infra* note 209; Goldberg, *infra* note 38; David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 93 (David Luban ed., 1984); Kevin Lyskowski, *Conflicted Liberals and the Lure of Money*, *NAT’L L.J.*, May 2, 1994, at A19.

25. JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* vii (1983) [hereinafter AUERBACH, *JUSTICE WITHOUT LAW?*]. In two illuminating works Auerbach has attempted to describe some of the evils of the social system and legal profession and also sketch the lineage for what he considers to be a much healthier system of alternative dispute resolution. He recognizes the severe limits of alternative approaches to dispute resolution of the kind now being prescribed as cures for the deficiencies of the adversary process—admitting the adversary system, while problematic, is a necessary evil in an anonymous society which has increased greatly in its scale of operation and lost any real sense of local and tight-knit community. See *id.*; JEROLD AUERBACH, *UNEQUAL JUSTICE* (1976) [hereinafter AUERBACH, *UNEQUAL JUSTICE*]. See also Michael Wolf, *Of Devils and Angels, Lawyers and Communities: Justice Without Law?*, 97 *HARV. L. REV.* 607 (1983) (book review). Locke and others have also understood the important role of the legal system as umpire. See JOHN LOCKE, *OF CIVIL GOVERNMENT* 67, 68 (Henry Regnery ed., 1955). Hobbes tells us:

Men have no pleasure, (but on the contrary a great deale of griefe) in keeping company, where there is no power able to over-awe them all. For every man looketh that his companion should value him, at the same rate he sets upon himselfe Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.

THOMAS HOBBS, *THE LEVIATHAN* 185 (C.B. MacPherson ed., 1968). Law, and its processes, are critical instrumentalities by which Hobbes’ “common Power” keeps the disputants “in awe.”

step away from several of the most powerful metaphors that shape, distort and define how we perceive the world.²⁶

The challenge faced by the lawyer is enormous because moral conflict and compromise creep up on us on cat feet rather than through conveniently clear and obvious choices. As we accept small inroads into our value systems, the detritus of confused choices and small seductions tends to accumulate and eventually changes us. The subtlety of the process is due in part to the very fact of our professional obligation to serve others zealously and competently. This means that we assert or defend others' behaviors and failures and are at least a step removed from the actual consequences produced by our clients' acts. We, therefore, do not feel the full consequences on others of the decisions we advance through our representation and instead live our professional lives "at a remove."

The professional distance lawyers should keep from their clients is an integral part of the dispassionate judgment required of effective advocates, but creates its own moral risk—much like the distinction between bomber pilots who experience very little emotion when dropping bombs from 50,000 feet that cause the deaths of 1,000 people, and the infantry soldier who must pay the moral costs of knowing the face of the person he is forced to kill. Shaffer warns, "Professional morals, because they are vicarious, tend to obscure the moral question, 'What am I up to?'"²⁷ He suggests that when:

The moral question being asked is, "What is the client up to?" The modern, professional moral answer is, "That's none of my business. I'm just doing my job." But the moral question can be answered in another way, a way . . . that would interpret the question, "What is the client up to?" as a different and more troubling question. "How is the client, in his association with me, changing? What is she or he becoming because of me?"²⁸

While Shaffer's question concerning how clients are influenced by their lawyers is important, of greater significance to the issues developed in this article is the question of how the *lawyer* is being changed through the interactions with clients, through the processes of obtaining clients' goals, and by the weight of the cumulative experiences of law practice. Shaffer puts it thus: "pro-

26. See, e.g., MAXINE GREENE, *TEACHER AS STRANGER* 72 (1976) (discussing the Platonic dichotomy between our ordinary human existence and the "higher and better" person that philosophy has told us hides within us).

27. SHAFFER, *supra* note 15, at 60.

28. *Id.*

professionals find it necessary to protect themselves from their clients. Otherwise we end up asking whether it is moral for us to lie, to kill, to destroy—questions that would be readily answered if one of us professionals was acting only for himself.”²⁹

The shaping of the lawyer is inevitable because lawyers are submerged in the maelstrom of law practice and must continually make critical and immediate moral decisions while being subjected to the powerful forces of client interests and competitive advocacy—as well as the increasingly difficult economics of practice.³⁰ Practicing lawyers must live in the world and work on its front lines while engaging in its conflicts of morality and the exercise of power. Some lawyers thrive on the interplay and take energy and meaning from the conflict. Many others adapt and go through a moral transformation. Others are wounded emotionally and morally, with many resorting to aberrant behavior in an effort to cope. Few lawyers possess a viable flight option even if they want it.

A former associate in a Los Angeles law firm describes the unanticipated moral impact of the lawyer’s bargain that he experienced in law practice:

I never could absolve myself of culpability for my clients’ misdeeds. I remember holding a farm worker’s baby born without legs, probably because of pesticide sprayings I had helped defend in court. Professional ethics would have had me just wash my hands of complicity. I felt like Pontius Pilate before Christ’s crucifixion. All my life, my family, my teachers, my church had taught me to accept responsibility for the consequences of my actions. Law

29. *Id.*

30. Economics is taking over everywhere and altering the nature of virtually every activity from law to medicine and even publishing—which, after all—ought to represent the pinnacle of our intellectual activity. See Ted Solotaroff, *Free-market Writing*, THE NATION, Oct. 16, 1995, at 439 (commenting on the changes he perceives within the publishing industry in terms of a decline in professionalism caused by the “takeover of the arts and other professions [including law] by the market economy”). For some thoughts on the direct impacts of economic trends on law practice, see Marc Galanter, *The Many Futures of the Big Law Firm*, 45 S. CAL. L. REV. 905 (1994); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991); Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359 (1990); F. Bentley Mooney, Jr., *How to Triple Your Effective Hourly Billing Rate*, LEGAL ECON., Oct. 1989, at 32.

school lectures on professional responsibility could not undo that instinct. They were too little, too late.³¹

Peter Drucker observes: "Education is for somebody, not for something. The product of education is not knowledge or learning; it is not skills, ability or virtue, jobs or success, dollars or goods. It is always a person . . ." ³² But what kind of *person* is it realistic to expect will develop through the combination of the experiences, obligations, and culture of law practice? Consider Abraham Maslow's description of the characteristics of the healthy person and compare it with the observations by Kevin Lyskowski, who described law firm associates as "conflicted liberals" whose private values were contradicted by their professional work and as "groveling" before senior partners and clients who held their professional fates in their hands. Maslow indicates:

[T]he objectively describable and measurable characteristics of the healthy human specimen are—clearer, more efficient perception of reality. More openness to experience. Increased integration, wholeness, and unity of the person. Increased spontaneity, expressiveness; full functioning; aliveness. A real self; a firm identity; autonomy, uniqueness. Increased objectivity, detachment, transcendence of self. Recovery of creativeness. Ability to fuse concreteness and abstractness. Democratic character structure. Ability to love, etc.³³

E. *The Legal Profession's "Avoidance Behavior" Has Undermined Its Integrity*

My assertion is that the failure to confront and understand the stresses of using the dark skills of law practice and of operating within the culture of law practice has severely undermined the legal profession as a principled activity. We have long ignored and confused the values that provide legitimacy to the profession, and that justify what we do, who we are, and why we act. In part this is because the lawyer's culture and skills represent an environment and set of behaviors that polite society traditionally used but did not want to admit. People avoid facing unpleasant truths, and the avoidance behavior of the legal pro-

31. Lyskowski, *supra* note 24 (quoting a young lawyer: "I wish I could still commit to an idea or cause with abandon; often I feel I've lost what made my life meaningful.").

32. PETER DRUCKER, *LANDMARKS OF TOMORROW* 137 (1965).

33. ABRAHAM MASLOW, *TOWARD A PSYCHOLOGY OF BEING* 157 (2d ed. 1968).

fession is predictable. Abraham Maslow warned, in terms directly applicable to lawyers and the legal profession:

We tend to be afraid of any knowledge that could cause us to despise ourselves or to make us feel inferior, weak, worthless, evil, shameful. We protect ourselves and our ideal image of ourselves by repression and similar defenses, which are essentially techniques by which we avoid becoming conscious of unpleasant or dangerous truths.³⁴

. . . .

In any case, this close relation between knowing and doing can help us to interpret one cause of the fear of knowing as deeply a fear of doing, a fear of the consequences that flow from knowing, a fear of its dangerous responsibilities. Often it is better not to know, because if you did know, then you would have to act and stick your neck out.³⁵

The self-denial in which lawyers engage, and the values conflict that is consuming many members of the legal profession, is created in part by the social myths and unreal assumptions we have made about use of the skills of manipulation and strategy—powers of action I am calling the dark skills. The point made here is that some of what are intuitively thought of as bad ways to act are in fact integral and legitimate aspects of being a human—and the responsibility of the lawyer to the client requires the lawyer to draw upon those abilities to an even greater degree than is typically found in other areas.³⁶ The conflict rests in part on what Shaffer and others have termed “task morality” in which “[a] common professional and political view is that a lawyer may do for his client, or an official for his country, or a physician for his patient, what would be immoral if either acted in the same way for himself.”³⁷

Our conflicting systems of morality generate moral dissonance among lawyers. Stephanie Goldberg reported on a survey of thirty-four managing partners of Denver-based law firms:

[T]he problem of lawyer impairment—one that firms of all sizes are slow to acknowledge and even slower at doing something about—is far from unusual. . . .

. . . .

34. Abraham Maslow, the founder of “Third Force” psychology based on the characteristics of healthy humans rather than Freud’s analysis of neuroses, further explains why we avoid knowledge. *See, id.*

35. *Id.* at 157-58.

36. *See* MCLUHAN, *supra* note 23.

37. SHAFFER, *supra* note 15, at 73.

The causes of impairment were most often alcoholism and marital problems, and the areas of performance most often affected were billable hours (79 percent), the ability to withstand pressure (79 percent) and the quality of work (75 percent).³⁸

Those who seek cloistered lives of ethereal purity or the pursuit of knowledge for itself should therefore not become lawyers. But even given the consequences of being a lawyer, I argue against the idea that we should seek to alter the legal profession to make it "kinder and gentler." Instead I advocate the need for a more honest and realistically principled understanding of what it means to be a lawyer, and educating lawyers about how to limit its most harmful personal effects while understanding the social importance of lawyers in American society. This demands a great deal more honesty and depth in our examination of the legal profession. Part of this honesty requires that we accept the price of being our client's advocate and champion.³⁹

F. *The Rich and Prominent Lawyer Contrasted with the Great Lawyer*

One of the problems with principled action of the kind the good advocate performs on the client's behalf is that we have lost any belief in heroic sacrifice and substituted banal celebrity in its place. Daniel Boorstin contrasts *celebrity* which can be made into an ongoing and marketable commodity, with *heroism* which tends to be quickly rendered an historical event rather than an ongoing process which can be exploited for commercial gain. Those who benefit from the sale of celebrity have no regard for hero-

38. Stephanie B. Goldberg, *Lawyer Impairment: More Common Than You Might Think, Denver Survey Suggests*, A.B.A. J., Feb. 1990, at 32, 32.

39. For many, the stresses of the "game" lead to what has come to be called occupational "burnout." See Janice S. Gomez & Ron C. Michaelis, *An Assessment of Burnout in Human Service Providers*, J. REHAB., Jan. 12, 1995, at 23, 23-24:

The chronic emotional stress associated with the provision of human services produces "a syndrome of physical and emotional exhaustion, involving the development of negative self concept, negative job attitudes, and a loss of concern and feelings for clients."

Some individuals seem more predisposed than others to burnout. "Feeling" personality types (as classified by the Myers-Briggs Type Indicator) experience a much greater depletion of emotional energy in the face of negative reactions to people than do "thinking" types. In addition, those who are more likely to become emotionally involved in their work are more likely to burn out than those who have a more detached workstyle.

ism. Indeed, our society gives credit for the debunking of the hero—as if we can't stand the comparison. Boorstin observes: “[T]he growth of the social sciences has given us additional reasons to be sophisticated about the hero and to doubt his essential greatness.”⁴⁰ He continues: “We see greatness as an illusion; or, if it does exist, we suspect we know its secret. We look with knowing disillusionment on our admiration for historical figures who used to embody greatness.”⁴¹ What are the deep principles of a society that consumes and trivializes its heroes?

In such a debased culture what does it even mean for a lawyer to be principled? What is the image of the great lawyer? Is it Clarence Darrow and Abraham Lincoln, Thurgood Marshall or Michael Tigar—or the top ten lawyers ranked by *The American Lawyer* based on how much money they earned last year or who won the year's biggest jury verdict? Martin Buber put the issue eloquently:

Our age has experienced this paralysis and failure of the human soul successively in three realms. The first was the realm of technique. Machines which were invented to serve men in their work, impressed him into their service. They were no longer, like tools, an extension of man's arm, but man became their extension, an adjunct on their periphery, doing their bidding.⁴²

The power and scale of institutional structures is part of the pervasive force of the economic and political technique Jacques Ellul describes as shaping modern society. Ellul writes, “propaganda seeks to induce action, adherence, and participation—with as little thought as possible.”⁴³ He describes the shift toward specialization and its cost:

Technique is of necessity, and as compensation, our universal language. It is the fruit of specialization. But this very specialization prevents mutual understanding. Everyone today has his own professional jargon, modes of thought, and peculiar perception of the world The man of today is no longer able to understand his neighbor because his profession is his whole life, and the technical

40. DANIEL BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 50 (1961).

41. *Id.* at 51.

42. MARTIN BUBER, *BETWEEN MAN AND MAN* 158 (1965) (The second realm was the economic, and the third, the political).

43. JACQUES ELLUL, *PROPAGANDA* 180 (1965).

specialization of this life has bound him to live in a closed universe.⁴⁴

II. THE LAWYER'S BARGAIN WITH SOCIETY

A. *The "Sacred Oath" to Represent the Client Zealously and Competently*

In Goethe's classic work, Faust entered an unwise bargain with Mephistopheles in which he traded his eternal soul and condemned himself to damnation in exchange for transient earthly power. The terms of the bargain as stated by Mephistopheles were deceptively simple:

I'll pledge myself to be thy servant here,
Still at thy back alert and prompt to be;
But when together yonder we appear,
Then shalt thou do the same for me.⁴⁵

At the time he agreed to the exchange, Faust was blinded by his desire to regain his youth and the hope for love and beauty. The trade seemed worth it to him when made, but as his world disintegrated around him he soon discovered one does not win a bargain with Satan. After great anguish, however, his resurgent faith gained Faust redemption in the eyes of God and the chance to recapture his soul. Lawyers to some degree enter a similar bargain, and it poses great risks to their souls. As with Faust, lawyers seek power and earthly wealth through their bargain. And as with Faust, at the time the oath is taken and the obligation agreed to, the new lawyer has no real sense of its implications or of the demands that will be placed on them by the *Mephistophelian* combination of clients, legal institutions, and employers. Part of the knowledge deficiency is inevitable, because experience is required as a precondition to full understanding. But just as with initiation into any special order, most of the experience can only come after the person is already bound to the obligation.

Judge William Hoevelar describes the lawyer's responsibility to the client as a "sacred trust," stating that "[m]en and women entering the practice of law undertake an important trust, a trust that involves the care of other people's lives, their money, their fortunes and their futures. That's why we are required to take an oath, because we are undertaking this sacred trust."⁴⁶ Francis

44. JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* 132 (1969).

45. JOHANN WOLFGANG VON GOETHE, *FAUST* (Charles W. Eliot ed., 1909).

46. *Professionalism in Practice*, A.B.A. J., Aug. 1998, at 48, 50 (comments of Judge William M. Hoevelar).

Bacon reminds us of the responsibility of the counselor, and remarked that if we who are counselors do not see our oath as a sacred trust accepted on our client's behalf, but instead consider our own interests first—whether they be personal, systemic, or financial—then “that is the case of bad officers, treasurers, ambassadors, generals, and other false and corrupt servants; which set a [personal] bias upon their bowl [in which their share is measured], of their own petty ends and envies, to the overthrow of their master's great and important affairs.”⁴⁷

The contract between lawyers and society begins with the special oath lawyers take in which they promise to represent their clients zealously and competently.⁴⁸ That obligation both limits an individual's freedom to pursue personal aims at the expense of the client and creates an oath and duty-based responsibility that legitimates a different kind of moral code. The legal profession's oath requires the lawyer to be the client's agent and even apologist in order to achieve the client's goals.⁴⁹

There is, however, a close link between the economic conditions within which lawyers are required to operate and the ability to fulfill the contract through functioning professionally by devoting sufficient quality of work and time to a particular client's case. The problems that are produced by inordinate time pressure and competing financial demands include the quality of the work done, the cultivation of the right attitudes and values of

47. FRANCIS BACON, *ESSAYS, CIVIL AND MORAL* 64 (Charles W. Eliot ed., 1909).

48. The oath taken as part of a lawyer's admission to the bar in Ohio provides in part:

I will represent my client zealously within the bounds of the law, and will not knowingly assert any unwarranted claim or defense, take any unjust action, or employ or countenance any undue influence, deception, falsehood, or fraud; I will attend to my clients' affairs with diligence, dispatch, and competence, free from compromising influences and conflicting interests, and preserve the confidence of my clients

OHIO R. OF CT. Rule 1, § 8 (1997).

49. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980) (“In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.”). Canon 5 of the ABA Model Code provides: “A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.” *Id.* Canon 5 (1980); see also *id.* EC 5-1:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desire of third persons should be permitted to dilute his loyalty to his client.

professionalism, and the need to operate a practice under constant financial and competitive conditions.⁵⁰ It has been observed that the shift to hourly billing undermined professionalism. One critic argues the "hourly fee system is a devilish creature that rewards inefficiency and paralyzes productivity."⁵¹ Technological changes have further intensified and speeded up the movement toward a kind of "free-market deprofessionalism."

Arthur Schlesinger⁵² cites Hans Morgenthau's argument regarding the intellectual world:

The contemporary intellectual, in his view, lived in a world that was distinct from, though potentially involved with, that of the politician. The intellectual . . . seeks truth; the politician, power. And the intellectual . . . can deal with power in four ways: by retreat into the ivory tower, which makes him *irrelevant*; by offering expert advice, which makes him a *servant*; by absorption into the machinery, which makes him an *agent and apologist*; or by "*prophetic confrontation*." The "genuine intellectual," Hans Morgenthau wrote, "must be the enemy of the people who tells the world things it either does not want to hear or cannot understand."⁵³

Lawyers should have no false dreams about being what Morgenthau calls a "genuine intellectual." When lawyers are working as advocates and counselors on their clients' behalf, they are agents and even apologists. The responsibility and the relationship needs to be better appreciated and understood by both academics and practicing lawyers. Confronting the effects and responsibilities of the task of the lawyer requires considerable courage, and also is necessary for true principled behavior because the connection with power between the lawyer and client tends to seduce the lawyer—not the client. We all possess the natural tendency to be attracted to power, and, unless we understand and control this, it is likely to corrupt us.⁵⁴ Hexter

50. Twenty years ago there were three lawyers for every 1,000 adult Americans. Now there are more than 4.6 lawyers for every 1,000 adult Americans. See Glaberson, *supra* note 2.

51. Kenneth Roberts, *The Hourly Fee System is a "Devilish Creature"*, in *BEYOND THE BILLABLE HOUR: AN ANTHOLOGY OF ALTERNATIVE BILLING METHODS* 35, 35 (Richard C. Reed ed., 1989).

52. Arthur Schlesinger, *Intellectuals Role: Truth to Power?*, *WALL ST. J.*, Oct. 12, 1983, at 28.

53. *Id.* (emphasis added).

54. See, e.g., J.H. HEXTER, *MORE'S UTOPIA: THE BIOGRAPHY OF AN IDEA* 137 (1965) (discussing the turmoil Thomas More felt in considering whether he should continue to work as an external critic, or become part of the King's

explained that intellectuals are always tempted to think themselves able to resist the corruption of the process and instead always end up subordinating themselves to the king's agenda.⁵⁵

At the core of the analysis is the understanding that the lawyer engages in principled behavior based on the fulfillment of the duty to the client accepted through oath and professional obligation. Of course there are other duties—less central and secondary, but still important, owed to society and the legal system—but too many people fail to understand that the primary function and contribution of the lawyer to the preservation and growth of our political system is the protection through zealous advocacy of members of our society against abuses of power, and the resolution of disputes that would otherwise damage the system.⁵⁶ These represent lawyers' primary obligations and their vital purposes and contributions to a complex system founded on the rule of law.⁵⁷ This allows lawyers to function on behalf of their clients in ways that are undeniably strategic and manipula-

council). Hexter addresses the rationalization in which we engage in deciding whether to serve power:

Hythloday's answer to the [rationalizing idea of the innovating intellectual in government service as a] devil's advocate is that he [the innovator] is misconstruing what necessarily happens in a prince's council and evading the moral implications of that kind of service for the Christian humanists themselves. Men are called into a prince's service only to help the prince work out expeditious ways for getting what he is determined already to have at any cost. Instead of leading him along paths that they believe to be good, they soon find out that they are having their brains picked to ease his way along paths they know to be bad. Such talents as they have end up being deployed not to support but to subvert the causes closest to their hearts.

Id.

55. *See id.* ("The innovating intellectual who surrenders his freedom to define the problem and ends up by merely giving those in power advice on the handiest way to follow a predetermined course of action cannot evade responsibility for what he is doing.")

56. *See AUERBACH, JUSTICE WITHOUT LAW?*, *supra* note 25; HOBBS, *supra* note 25.

57. The current president of the ABA sees the numerous legislative efforts to limit lawyers and lawsuits as a sign that they are working effectively against interests that may have traditionally been able to control the legal process. *See Glaberson, supra* note 2:

Some lawyers see a connection between their growing power in American society and new efforts to control them. Anderson, a Little Rock lawyer who has been the bar association president for a year, said "civil rights and liability cases like the tobacco and gun suits, showed that lawyers were sometimes more capable than government of tackling problems." "That," he said, "made lawyers a target."

tive—as well as sometimes unpleasant—and makes that action at least potentially principled.⁵⁸

B. *The Oath-Bound Duty Alters the Oath-Taker*

Regardless of whether the lawyer has the ability to select the clients for whom the dark skills are used, consider the real meaning of the lawyer's acceptance of a code that defines and guides a vital part of one's life and of taking a solemn vow to commit oneself to serving another person's interest. The idea of a code of honor or absolute obedience can obviously be taken too far—as evidenced by the Nazi SS motto, "My Duty is My Honor"—a code that justified anything. Nor would many lawyers elect to follow the Japanese Code of Bushido in which one committed *seppuku* or ritual suicide at the order of the master. But all codes in which one commits to the benefit and service of another are a surrender of a degree of free will and personal interest in service to a calling. All real codes have consequences both on those who accept the duty and on those who are served. Such commitments inevitably alter the oath-taker.

Many lawyers are uncertain about the force and meaning of a professional code that to many seems an antiquated concept of duty based on an oath of service to another. While language historically has been seen as a source of power, codes and oaths have lost much of their meaning and effect in the modern world. The very idea that "a man's word is his bond," and neither to be lightly given nor breached must strike a large number of people as humorous. Stephanie Salter describes a society that believes in nothing but money:

Like much of Hollywood and cable television, Madison Avenue appears to be in the grasp of clever but sophomoric young men who never met a person, product or issue they couldn't turn into a joke—preferably one with a babe in it. Not only is nothing sacred or deserving of dignity, anything that was once held as such—say, a sense that excess, greed-driven wealth is obscene—is Public Enemy No. 1, begging for a put-down. But lightweight intentions do not always produce inconsequential results. Advertising is ubiquitous today because it works. Added to the not-so-subtle message that conspicuous consumption and the widening wealth gap already send to all Americans, is it

58. See DAVID BARNHIZER, *THE WARRIOR LAWYER* (1997) (discussing the connections between the strategic processes and what lawyers do on their clients' behalf).

such a far reach to expect hip and clever ads to intensify the situation?⁵⁹

This unfortunately captures the banal culture from which lawyers emerge and in which their values are formed. As Auerbach makes clear, "lawyers . . . are creatures of American culture, not its creators. It is, ultimately, a question of values, translated into social structure."⁶⁰ Shaffer brings out the point that the terms of the lawyer's oath in America have been consistently diluted over the past century:

Each generation of American lawyers since Judge Jones's [Alabama Code of 1887] has revised its code of ethics; and each revision says less about morals, and says what it does say about morals less precisely. . . . The American Bar Association's . . . Rules of Professional Conduct for American lawyers (1983) bring this development to new fullness by avoiding the traditional words of ethical argument—words such as conscience, morality, right, good, and propriety—in favor of the words of mandate and permission that are the stuff of statutes and court orders.⁶¹

Nor can it be said that law schools or the legal profession do anything to reverse the decline. In such a situation it is unsurprising that lawyers educated in a system without values and surrounded by a culture filled with contempt for ideas such as duty and loyalty have difficulty taking the lawyer's oath of zealous and committed responsibility seriously. Oaths have traditionally been solemnly-entered and substantial manifestations of duty, commit-

59. Stephanie Salter, *Suffering from an Unseemly Lust for Money*, OREGONIAN, July 15, 1999, at D9. "Being rich as Croesus isn't enough; we desire more-more-more and want it now-now-now." *Id.* This greed as the driving force behind almost everything was certainly reflected in the question asked by one of the partners forced out in Cadwalader's "Operation Rightsize." Some might appreciate the court's response to Mr. Fritts:

In a biting July 1996 ruling, Circuit Court Judge Jack Cook of West Palm Beach responded to Mr. Fritts, writing, "While life in the marketplace may well be made up of fear, greed and money, life in a partnership is not so composed." Judge Cook awarded Mr. Beasley \$3.6 million, which was reduced on appeal to about \$1.5 million. Last December, a New York state-court jury awarded Mr. Ruskin \$3 million, a judgment Cadwalader is seeking to reverse.

Barrett, *supra* note 4.

60. AUERBACH, *JUSTICE WITHOUT LAW?*, *supra* note 25, at 10. Fukuyama observes a continuing decline in trust within the American culture: "Trust . . . is not in itself a moral virtue, but rather the by-product of virtue; it arises when people share norms of honesty and reciprocity and hence are able to cooperate with one another. Trust is damaged by excessive selfishness or opportunism." FUKUYAMA, *supra* note 9, at 51.

61. SHAFFER, *supra* note 15, at 72.

ment, and honor. Such principles have increasingly little weight in modern societies that, while purporting to emphasize the individual to an extreme degree, in fact have steadily enlarged the power of institutions over people. Richard Sennett attributes much of the decline in principled commitment to the conditions generated by 20th century capitalism. Sennett considers capitalism to have eaten away at the loyalty, commitment and perspectives of both workers and employers.⁶²

With the new social freedom and decline in principle and loyalty Sennett describes, many lawyers—perhaps even a significant number of those who teach in American law schools—are finding the obligations created by the lawyer's oath unacceptable. There is also a growing movement in which judges and the organized legal profession have mobilized to undercut the zealous advocacy to which clients are clearly entitled. Masquerading as *civility* and *professionalism*, the dishonesty of a "kinder and gentler" formulation of how advocates should behave ignores the injustices and low quality of advocacy that is typical for many clients.⁶³ I endorse Jerold Auerbach's observation regarding this movement and its dangers:

The current enthusiasm for delegalization represents an effort by legal professionals to put their system back together again. Like the king's horses and men, however, they are overwhelmed by the enormity, indeed the impossibility, of the task. By now, alternative dispute settlement primarily expresses the values of these professionals, who are reluctant to relinquish their control over the disputing process. Their rationale constantly sputters into the same arguments for judicial efficiency that have been heard in legal circles since the turn of the century.⁶⁴

Some of the people who seek to alter the adversary system see their own beliefs as paramount over all others or lack the willingness to serve another to the degree required. Others simply put their own agendas first. Many more have an understandable difficulty with the morality of advancing interests they consider morally wrong. This reflects the lawyer's intense moral dilemma, and is very close to what Thomas Hobbes warned about when he described six factors that lead to the weakening or disso-

62. See RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* (1998).

63. See Freedman, *Ethical Danger*, *supra* note 13 (warning of the potential for judges punishing an "unseemly" lawyer by making discretionary rulings that hurt not only the lawyer's present, but future clients due to the lawyer incurring judicial disfavor).

64. AUERBACH, *JUSTICE WITHOUT LAW?*, *supra* note 25, at 142.

lution of a political commonwealth. Hobbes' factors included three that are central to the moral crisis felt by lawyers attempting to redefine the nature of the adversary system. If these three factors are accepted, then the system of professional morality and the obligation to serve the client must either be trumped by the personal value systems or the individual acting against personal principles on the client's behalf is thrust into a conflicting state in which some duty is violated no matter what is done.⁶⁵

Quite a large number of lawyers do not consciously face such conflicts, at least not at the beginning of their careers, because they simply do not understand what it means to be a principled and moral advocate. This is not surprising because neither law schools nor the legal profession have done the difficult job of preparing new lawyers to understand what they will be confronting—or of creating a system of values that allows law students and new lawyers to understand its consequences.

III. THE LAWYER AS A "PRINCE OF DARKNESS" AND "ANGEL OF LIGHT"

A. *Confronting False Ideals*

There are fundamental conflicts and contradictions between the ideal and the real in the terms of what is involved in the lawyer's principled professionalism. The ideal dimension the legal profession has traditionally used to describe the nature of principled lawyer professionalism is not correct. There are striking differences between who we are, who we want to be, and who we pretend we want to be. The gap is captured with great pathos in the response by the robot Radius, speaking to Alquist, in Karel Capek's, *R.U.R.*—a play dealing with the theme of dehumanization caused by technological "progress."

Radius: "Slaughter and domination are necessary if you want to be like men. Read history, read the human books. You must domineer and murder if you want to be like men. . . . We have read books. We have studied science and the arts. The Robots have achieved human culture."⁶⁶

The substance of Radius' comments concerning human nature has power because they purport to be delivered from a different, if not more objective perspective. The power also derives from

65. See HOBBS, *supra* note 25, at 125 (the three factors include: "The belief that every private man is Judge of Good and Evil actions"; "The belief that whatever a man does against his conscience, is sin"; "The belief that Faith and Sanctity, are not to be attained by Study and Reason, but by Supernatural Inspiration or Infusion.").

66. KAREL CAPEK, *R.U.R.* 105 (P. Selver trans., 1969) (1923).

the juxtaposition of our being measured based on what humans actually do rather than what we proclaim ourselves to be. Radius damns us by his empirical observations that are not some Platonic ideal offered as a self-serving description of what we ought to be, but a starkly revealing portrait of what we are. In the same way, I am attempting to capture what lawyers are and must be if they are to fulfill their oaths. The “ideal” offered here is that of the mixture of light and dark. Being a “prince of darkness” changes us from what we would otherwise be if we had not become lawyers. We tend to be tougher, stronger, more ruthless, precise and impatient. This is less a shift in our morality than in our personalities—one that may lie latent within us but which starts to emerge in law school and is fully manifested after several years of law practice.⁶⁷

Regardless of rhetoric about collaborative approaches and non-competitive trust—given lawyers’ goal-driven behavior and inevitable manipulation, it is wise in the practice of law to keep in mind Machiavelli’s admonition that “[a] man who wishes to make a profession of goodness in everything must necessarily come to grief among so many who are not good.”⁶⁸ Law practice is in many ways a combination of Darwinian and Hobbesian processes in which the most focused and ruthless survive. The ruthless, goal-driven behavior may well be muted within the “velvet glove” and even become more effective through such subtlety, but always present are the toughness and client loyalty that are the characteristics of all good lawyers.

There is an enormous gap between the theory and the reality of the legal profession. The theory underlying the legal profession is the lawyer’s oath-based obligation to provide a client with “zealous advocacy” along with competence. The reality is something far different for too many lawyers. The willingness to do nearly anything legal on behalf of a client doesn’t even seem to be fairly distributed. Stephen Gillers comments on the differential system of law that applies to minorities and whites:

In theory, the Constitution guarantees indigent defendants effective counsel. In reality, Supreme Court rulings have allowed judges to treat lawyers as effective even when they

67. “The lawyer’s approach to a problem . . . is argumentative.” MAYER, *supra* note 11, at 4.

68. NICCOLO MACHIAVELLI, THE PRINCE (1532), *quoted in* DANIEL COQUILLETTE, LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY 28 (1995). Coquilllette’s anthology offers a rich and diverse set of readings and questions to allow the development of the most critical ideas of personal moral responsibility within the legal system.

conduct no investigation, fail to cross-examine crucial witnesses, sleep during testimony or come to court drunk.⁶⁹

The reality of constantly having to deal with tough, manipulative and even dishonest people who see us as a means to an end they desire—even if we personally prefer to “make a profession of goodness in everything”—makes it impossible or at least deeply irresponsible to be anything but strong and unrelenting in what we do for our clients. Machiavelli’s greatest sin was honesty about how people and human institutions actually function. As to his warning about coming to grief among people who are not good—including the opponents you face, the institutions they serve, and the clients they represent—as a lawyer representing a man convicted of murder, how would you feel about the integrity of the prosecutor in a recently reported case where the defendant was convicted more than fourteen years ago at a trial at which even the prosecutor said he had doubts about the evidence?

The convicted man served fourteen years in prison before it was discovered that evidence in the possession of the police was not given to the defense, even though the notation in the file indicates the witness seemed credible and there was a legal obligation to provide exculpatory evidence to the defense.⁷⁰ The key point here is not to ask *why* this was done—as if it is a rare aberration—but to accept that such behaviors do occur, and almost certainly with far greater frequency than we would like to believe.⁷¹

B. *Yin and Yang*

The concept of the dark skills, and that of the lawyer as a prince of darkness and angel of light, are in some ways similar to the mutually reinforcing nature of the qualities contained within what Chinese philosophers have called the yin and the yang. Darkness and light are neither inherently good nor evil—but reflect the interplay of different qualities and powers within all humans. The complex dynamic of the lawyer’s life is comparable to the alternation of light and dark qualities within nature and

69. Stephen Gillers, *The Double Standard: Inequality in Criminal Justice May Be a Good Thing for the Favored Classes*, N.Y. TIMES, Mar. 21, 1999, at A13.

70. See Bill Sloat, *Evidence May Clear Inmate on Death Row: Eyewitness Account Not Given to Defense*, CLEVELAND PLAIN DEALER, June 8, 1999, at 1A.

71. See, e.g., Flynn, *infra* note 208 (concerning Priscilla Chenoweth’s tireless work to win the release of a wrongly convicted man in New York); Mike Robinson, *Chicago Teenager Jailed for Months Even Though He Had a Perfect Alibi*, CLEVELAND PLAIN DEALER, May 22, 1999, at 8A (describing such abuses in Chicago).

the human personality that is fundamental to Chinese thought. Milton Chiu tells us:

The Chinese character of Yin . . . and Yang . . . signify the shadowy and sunny sides of the same mountain, which indicates the idea of two sides of the same existence Polarity is part of all existence, and it divides and differentiates, even creating tension between two poles, but it does not necessarily conflict and tear apart the two poles. It works like a swinging pendulum or an electric charge between the plus and minus poles to create balance and dynamism. In religious terms, realization of "diversity in unity" and "unity in diversity" becomes the clue for producing creativity as well as harmony.⁷²

A similar theme of humans as mixtures of dark and light is offered by Abraham Maslow in somewhat inelegant words: "Even our most fully-human beings are not exempted from the basic human predicament, of being simultaneously merely-creaturely and godlike, strong and weak, limited and unlimited . . . , fearful and courageous, . . . yearning for perfection and yet afraid of it, being a worm and also a hero."⁷³ My argument accepts the spirit and dynamism of the qualities described by Chiu and Maslow, and develops from the principle that "dark" is not automatically bad, just as the yin/yang principle does not represent good and evil but seeks to capture the idea of real and dynamically interacting differences contained within the fully evolved person. These themes run throughout our religious and intellectual history, but our dominant philosophical system has always denied our real nature.⁷⁴

C. *Prince of Darkness*

Although the connection between Satan and lawyers is of ancient lineage, my idea of the lawyer as a prince of darkness is derived from one of the wonderful movies about law, *The Verdict*.⁷⁵ *The Verdict* is a film I often use when introducing law stu-

72. MILTON CHIU, *THE TAO OF CHINESE RELIGION* 147 (1984).

73. MASLOW, *supra* note 33, at 157.

74. See JOHN GARDNER, *THE RECOVERY OF CONFIDENCE* 44 (1971) (telling us that, while our intellectual and moral traditions demand an ideal in which we should be "individuals, initiators, and creators, free and responsible," the reality is increasingly different, and "[t]he conflict between that harsh reality and our tradition of individual freedom and responsibility is severe and growing worse").

75. *THE VERDICT* (Universal Studios 1982). For other examples of the historical fear and contempt in which lawyers are held, see ABEL, *supra* note 13 and sources cited therein, and MELLINKOFF, *supra* note 1.

dents to some of the more troubling issues of law practice. It tells a story about an alcoholic, down-and-out lawyer named Frank Galvin who has plummeted from being a young partner in a major law firm to a pariah who is wrongly thought to have tampered with a jury. Galvin was framed by a senior lawyer in the firm who was the actual culprit.

When the story opens, Galvin is reduced to pathetic attempts to acquire new clients by approaching grieving widows at funeral homes, pretending he had been a friend of their deceased husbands. His only client is a permanently comatose woman who was allegedly administered the wrong anesthetic by doctors at a hospital run by the Archdiocese. Although he has had the case for over a year, Galvin has never bothered to visit his client, has sent a single letter to the sister who is acting as her guardian, not interviewed witnesses, and failed to contact the opponent for possible settlement discussions. At the point the film begins, less than two weeks remain before the trial date. Galvin even has to be reminded of this fact by his now retired former law partner, Mickey Morrissey.

Most lawyers will not find their lives filled with benign interactions with enlightened lawyers. This was brought forth strongly in *The Verdict* when Galvin is talking to Morrissey about his opponent, Ed Concannon, a partner in a powerful Boston law firm. Galvin remarks that he has heard Concannon is, "pretty good." Morrissey replies: "Good? I'll tell you who he is, he's the Prince of . . . ing Darkness, that's who he is." Putting aside the satanic aspect of the prince of darkness concept, what if, properly understood, a variation of "the Prince of Darkness" is in some ways a fair characterization of what lawyers ought to be? That question—which I answer in the affirmative and then discuss the consequences—serves as the central theme of this essay.

D. *Angel of Light*

The "angel of light" idea represents the lawyer's function of helping another do something that is legally legitimate—with the important realization that "legitimate" and "moral" are not the same. The vicariousness of the lawyer's moral life helps us to understand that, if "angel of light" meant only representing justice and there were a single and obvious "justice" inherent in any situation, the analysis would be easy. The line quickly becomes murky when we try to fully analyze "justice" on a system-wide basis. On February 18, 1999, Ohio executed its first person in over thirty years. He had been convicted of planning and carrying out the murder of his employer, and there was no question

he had done the act. But there is rarely a neat equation to follow, particularly in a complex society with so many different perspectives and interests. Members of the victim's family possessed their own definitions of justice, as presumably did the relatives of the killer. Those generally in favor of the death penalty had their own more generalized interests, as did those opposed to the death penalty. Each competing and distinct interest represents a legitimate perspective on a critical point of action by the legal "dispute resolution" system.

The fact that there are radical disagreements about others' beliefs does not make those views wrong. The advocate who provides a legitimate interest with the opportunity to be heard is a voice for light within that system.⁷⁶ This concept has long been recognized by the American Civil Liberties Union, an organization that has often subordinated its members' individual beliefs to the need to provide a voice to the most unpopular. This includes Jewish lawyers representing Nazis and White Power advocates who have described Jews as a "mud race," and African-American lawyers representing the Ku Klux Klan.⁷⁷ David Baugh, a Virginia lawyer who happens to be black, responded to those surprised at his representation of a KKK member. "The sole purpose of this statute is to suppress an expression of a group despised by the majority," Baugh said. "I despise the KKK. But if we are going to have a democracy we are going to have dissent and we must tolerate political dissent."⁷⁸

The easiest meaning of the "angel of light" is the doing of things we would all consider obvious acts of what can be called positive justice.⁷⁹ Representing a powerless and wronged person against the abuse of power is one example.⁸⁰ Obtaining the release of a wrongly convicted person is another. Confronting

76. Consider the alternatives. See, e.g., Diana Jean Schemo, *Political Battle Threatens to Destabilize Paraguay*, N.Y. TIMES, Mar. 2, 1999, at 11. In the United States we have the same kinds of pressures to use governmental power to abuse disfavored interests, but we are usually relatively successful at blunting the attacks. See, e.g., *Flag Burning Spurs Debate About Access*, CLEVELAND PLAIN DEALER, July 3, 1999, at 5B ("Free speech is controversial. It's supposed to be. If we all got along and toed the official line, we should just pack our bags and move to Iraq."); cf. John Daniszewski, *Egyptians Say New Law Muzzles Rights Groups*, CLEVELAND PLAIN DEALER, June 20, 1999, at 21A ("First it was the political parties. Next, the news media. Now, say critics of Egypt's new law on associations, the government is muzzling nongovernmental organizations.").

77. See Pam Belluck, *Avowed Racist Barred From Practicing Law*, N.Y. TIMES, Feb. 10, 1999, at A12; David Reed, *Black Lawyer Defending Klansman*, 1999 WL 9736071 (Associated Press).

78. Reed, *supra* note 77.

79. See *Peru's Endangered Dissidents*, N.Y. TIMES, Feb. 4, 1999, at 27.

80. But it may not be only the poor and powerless. Shaffer observes:

abusive police conduct in which the New York police savagely beat an innocent bystander and caused him to lose sight in one eye—then charged him with disorderly conduct to try to cover up their fault—is another. It appears, however, that the “code of secrecy” that characterizes the police may be showing cracks. In a case where a New York policeman sexually abused a person in the bathroom of a police station, the United States Attorney’s Office successfully prosecuted the perpetrators, leading the New York Times to comment in an editorial:

The United States Attorney, Zachary Carter, said it best yesterday as he stood outside the Brooklyn Federal Courthouse and assessed the latest verdicts in the Abner Louima case. The most important lesson New York police should learn from the Louima trial, he said, is that their “worst betrayal” is not testifying against a fellow officer. It is betraying their oath of office out of “a false loyalty” to colleagues.

Mr. Carter’s case was bolstered dramatically last month by a series of police officers who broke the old code of silence and testified against officer Justin Volpe. After having protested his innocence for months, Mr. Volpe then confessed to sodomizing Mr. Louima with a stick in a police precinct house bathroom. A Federal jury in Brooklyn yesterday convicted Charles Schwarz as the officer who held Mr. Louima down in the bathroom.

. . . .

. . . Whatever the outcome, it could help destroy the code of secrecy to the benefit not only of the Police Department brass but also of those honorable officers who have long chafed at the unwritten rules that require silence. The Louima case brings home the old warning that silence about a bad police officer can make trouble for the entire department.⁸¹

[David Dudley Field] claimed a dispensation from having to answer for what his clients did. “I shall, whenever I speak for them in the courts of the country, stand between them and popular clamor, just as I would stand between them and power, if they were menaced by power of any kind, monarchical or republican.”

SHAFFER, *supra* note 15, at 75.

81. *The Louima Verdicts*, N.Y. TIMES, June 9, 1999, at A28. But this result was achieved not by the State of New York but by federal prosecutors after bringing enormous pressure to bear on the various defendants. It unfortunately characterizes a culture of limited accountability and coverup found almost everywhere power and a protected system exist. It is less a breakthrough than a glimpse of how power is abused and the responsibility of lawyers to challenge such abuses.

The lack of understanding of the values of the principled advocate in American society is reflected in the fact that one of the lines virtually guaranteed to bring a laugh in America is the Shakespearean quote, "let's kill all the lawyers." The punchline, "First, let's kill all the lawyers," is usually offered as a condemnation of the legal profession, followed by a joke. Lawyer jokes are everywhere, even in countries without effective legal systems of their own. Not too long ago I was in Colombia, returning on a small boat from a trip to a farm along the northern coast. We took the boat along the waterways and across the Bay of Cartagena rather than travel on the roads, because rebels were stopping people at roadblocks. When one of the Colombians I was with found out I was a lawyer, he immediately asked: "What do you call 300 lawyers on the bottom of the ocean?" I smiled back at him and he took this as encouragement and finished: "A good start!" And then he laughed so hard I thought he would fall overboard. We continued talking and he told me how someone he knew was in an important government job involving international trade in goods. This man had been approached by drug lords and given an option. "We will pay you \$4 million to look the other way. If you do not, then we will torture and kill one of your children each week. When there are no more children, we will do the same to your wife. And if you still don't cooperate, we will do it to you." This is the kind of situation where the rule of law has broken down, and it has done so in many countries. It is also a situation that helps me clarify and better understand the important role of advocacy and law as one of the core conditions that separate us from many other nations and cultures.

The irony of the "kill all the lawyers" proposition is that the quotation actually reflects the system-preserving characteristics of the legal profession and the knowledge that lawyers are a barrier against insurrection. William Kovacic describes a very different perspective on "kill all the lawyers" than exists in popular anti-lawyer discourse. He relates the experience of listening to an American speaker using the line unsuccessfully as a joke at the beginning of his speech. The speaker wondered why the Eastern European audience simply looked at him rather than laughing.⁸² Kovacic tells what followed.

82. See William E. Kovacic, Recent Development, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT'L L. & POL'Y 437 (1996). Lawyers who are attempting to serve what would normally be considered public interest ends are among the most vulnerable targets. See *Bishop's Eulogy Calls For Peace Mourners Who Gathered to Honor Lawyer Killed By Car Bomb Receive Sermon Rebuking Retaliatory Actions*, *Augusta Chron.*, Mar. 19, 1999, at A14 [hereinafter *Bishop's Eulogy*].

A young Ukrainian lawyer immediately stood up and spoke. He said that he read and enjoyed Shakespeare, but doubted that this fragment of Henry VI, Part II was a suitable prescription for Ukraine. To explain, the lawyer recounted the context of the line. The famed proposal is uttered by Dick the Butcher during the gathering of a gang that wants to impose tyrannical rule by its leader, John Cade. The gang seeks to seize wealth by force and redistribute it, to have the state sell goods at a fraction of their cost, and to hang those who can read and write. Killing all the lawyers is only the first step toward liquidating anyone whose obsession with rules and reason might block the gang's ascent. After recreating the literary setting, the Ukrainian posed a question. "In this century," he said, "the Soviet Union did what Dick the Butcher wanted. We killed many lawyers. We killed laws that disperse power. We destroyed people with independent ideas. We elevated tyrants. Why do Americans ridicule institutions that have helped protect personal freedom and create economic prosperity?" The businessman watched silently, swamped by waves of nodding heads.⁸³

I don't want to overstate the case, because lawyers also serve as the defenders and preservers of injustices and are frequently apologists for corrupt political interests. Certainly this is too often the situation. But it is equally clear that those who would abuse peoples' rights within a system find it essential to deny effective legal representation to powerless people who have been abused. Lawyers who are attempting to serve what would normally be considered public interest are among the most vulnerable targets. In a recent car bomb murder of an Irish lawyer it was reported:

Bishop Francis Gerard Brooks said retaliation also would be disrespectful to the memory of Rosemary Nelson, 40, a human rights lawyer "who strove by political and legal means to right a grievance."

Thousands of mourners packed St. Peter's Church in Lurgan, 30 miles southwest of Belfast, to honor Mrs. Nelson, who died Monday when a bomb planted in her silver BMW exploded just yards from her home. An outlawed Protestant group claimed responsibility.⁸⁴

83. Kovacic, *supra* note 82, at 463.

84. *Bishop's Eulogy*, *supra* note 82.

It is so very difficult for people to see how this works from within the complacent comfort of our own system, so it may be useful to consider a few examples of how things work in other countries. Diana Jean Schemo quotes a Paraguayan citizen bewildered by what was happening in a recent government crisis in which Paraguay's newly elected president ignored an order of the country's Supreme Court: "How can people believe in democracy? . . . How can they believe in anything when the president simply decides to ignore an order of the court and nothing happens?"⁸⁵ The article suggests that Venezuela, "now has the trappings of democracy, with periodic elections, a constitution and separate branches of government. But there is little confidence in the independence of the courts and the Congress."⁸⁶ In Colombia, in an effort to destabilize the rule of law in that nation, the drug cartels murdered prosecutors and judges who would not take their bribes. In Turkey, lawyers representing Kurdish dissident leader Ocalan resigned after protesting death threats and the perceived unwillingness of the Turkish government to provide adequate protection. In China, the government conducted trials of political dissidents and denied them lawyers prior to finding them guilty and sentencing them to lengthy prison terms.

In Peru, a government intent on silencing an important newspaper editor critical of its political activities went after his lawyer in an effort to intimidate both press and lawyer. Baruch Ivcher, former owner of a Peruvian television station is now exiled in Israel after having his citizenship stripped away and being convicted in absentia of customs violations and sentenced to twelve years in prison. He describes his experience with Peru's president Alberto Fujimori:

When Channel 2 in Lima, of which I was the majority shareholder, broadcast reports on the use of torture by the intelligence service, military involvement in drug trafficking and—this was the *pièce de résistance*—the million-dollar income of the head of the intelligence service, the Government of President Alberto Fujimori apparently decided the station had to be silenced and I had to be punished. . . . [T]he Government is now prosecuting my defense lawyers. The Government is deaf to appeals from Peru's Cardinal and groups like the Inter-American Human Rights Commission. Then there is the use of politically inspired prosecutions, like the trumped-up tax case against Delia

85. Schemo, *supra* note 76, at 11.

86. *Id.*

Revoredo. She was dean of the Lima Bar Association and a member of the Constitutional Tribunal; her troubles began when she cast her vote there against a third term for Mr. Fujimori.

. . . .

. . . To get away with these types of things, the Government needs to control the entire judicial system. Today two-thirds of Peru's judges have only temporary status, meaning that they hold their positions at the pleasure of the Government and cannot act independently. In addition, the National Magistrates' Council, an autonomous body established in the Constitution to appoint and dismiss judges and prosecutors, has been largely gutted.⁸⁷

E. *The "Bad" Lawyer Distinguished from the "Dark" Lawyer*

Although many might automatically think to classify venal, incompetent, or dishonest lawyers under the heading of the "dark" lawyer, that is not at all what I intend.⁸⁸ Being incompetent and/or betraying one's obligation to the client through greed, neglect, betrayal or some other variation is being a "bad" lawyer as opposed to a "dark" lawyer. Such "bad" lawyers—and I am using the term to include affirmatively bad, dishonest and negligent lawyers—are an affront to the legal profession and exist in considerably greater numbers than a principled profession ostensibly committed to zealous and competent client representation should tolerate or allow. But lawyers who fit into the above categories are irresponsible, unprofessional and bad lawyers, not principled professionals committed to their clients' well-being.⁸⁹

Unfounded litigation is supposed to be an ethical violation, and it takes a really nasty and immoral person to deliberately accuse another of reprehensible and criminal conduct you know they didn't do. This behavior not only occurs but seems to be increasing. Eisler's survey reports, for example, that "[m]aking a bad situation worse is the popular perception that hot-button issues can drive a spouse into submission. Child abuse. Incest.

87. *Peru's Endangered Dissidents*, *supra* note 79.

88. See, e.g., Kim Isaac Eisler, *The Truth About Divorce Lawyers: It's Hard to Find Lawyers Both Civilized and Fair to Clients Who Need a Divorce. Here's Why*, WASHINGTONIAN, Oct. 1995, at 128 ("Putting your divorce in the hands of an honest counselor-at-law isn't easy. Divorce lawyers, as a class, have earned a dismal reputation.").

89. The problems are not limited to the oft-maligned divorce bar. For an exposure of abusive billing practices among some large corporate firms, see NADER, *supra* note 16, at ch. 7.

Adultery. Claims for all these are on the rise, and they are often unfounded.”⁹⁰ A vicious conflict between a divorce lawyer and his client was reported in *Forbes* magazine, in which Linda Sarofim Lowe’s former lawyer Earle Lilly worked with her to concoct “a nasty scheme against Faye Sarofim [her now ex-husband] to force a settlement in the divorce, including publicly accusing the Egyptian-born investment whiz of fraud and rape.”⁹¹

Kim Eisler’s description of “bombers” and “sharks” is closer to what I mean by the concept of legitimate though dark skills. In describing Washington’s top divorce lawyers, Eisler reports on the results of a survey she conducted which identified forty lawyers considered to be the best at handling a divorce in an effective but civilized manner. It also described ten others—ones labeled “bombers”—who were regarded as the best at what they do, stating, “[w]hat these ten others often do is torment the spouses of their clients. They sometimes are referred to as ‘bombers’ or ‘sharks.’ Although contentious, the ten divorce lawyers known as bombers are as admired by their clients, the evidence suggests, as they are disliked, or feared, by peaceminded attorneys.”⁹² Each of these categories is close to what I intend by the concept of principled and dark lawyers, doing what is legal, while putting their clients’ needs and allowable agendas first.

Eisler’s survey also describes lawyers who waste client resources under the guise of providing aggressive representation, remarking, “[i]t’s called churning. The beauty of it, from the unscrupulous lawyer’s point of view, is that although the client is being fleeced, he or she thinks the lawyer is a fierce fighter for the cause.”⁹³ Churning a case for personal profit, negotiating a deal with an opposing lawyer that looks good but which the lawyer knows is considerably less than could have been obtained or more than was necessary to give up in payment, are examples of bad lawyering. So are such behaviors as not responding to client needs, not being professional in the preparation of a case, not keeping accurate track of work actually done, and overbilling, all

90. Eisler, *supra* note 88, at 128. But the zealous advocate can go too far. See NADER, *supra* note 16, at 134-57 (describing the increasing problems with the destruction or spoliation of evidence).

91. John Gorham, *Menage a Trois*, FORBES, Oct. 12, 1998, at 350. Ms. Lowe has now apparently sued lawyer Lilly, claiming that he “romanced her and, while she was high on booze and prescription drugs, coerced her into signing a contingency-fee-based contract to extricate her from her marriage.” *Id.*

92. Eisler, *supra* note 88, at 128.

93. *Id.*

of which represent unprofessional or bad lawyering designed to serve the lawyers' interests rather than the clients'.

The problems of the bad lawyer who betrays his or her obligation to the client are of course not limited to the divorce bar that served as the basis of the Washington, D.C. area survey. Typical abuses of clients represented by large firms include billing unworked hours, senior partners billing at their higher rates for the work of junior personnel, advising clients not to accept settlements that are reasonable so the firm can keep billing, taking unnecessary depositions, and failing to provide detailed bills so the clients can't accurately monitor what has been done.⁹⁴ All represent techniques through which bad lawyers cheat clients.

Many lawyers become too close to clients and begin acting as the client rather than a professional. This proximity cost the law firm of Jones, Day, Reavis and Pogue \$57 million when they were found liable for helping clients in the S&L scandal in ways that were considered over the line of counseling a client regarding appropriate action and into the area of helping to advance the illegal scheme. Inordinate closeness has been a recurring theme in the widespread tobacco litigation where at least one law firm representing tobacco interests operated as an integral policy and managerial arm of the client. An Associated Press report in the *New York Times* on February 18, 1999, relating to Florida litigation against a tobacco company revealed the plaintiffs' efforts to introduce a document demonstrating how a lawyer for the tobacco company had attempted to convince a company scientist to alter a report to make it more favorable to the company.⁹⁵

IV. CORE ELEMENTS OF THE DARK SKILLS: "TRUTH," MANIPULATION, AND POWER

A. *The Advocate's "Truth"*

The adversary system is many things—including preserver of power and privilege, occasional righter of wrongs, a mechanism through which we can pretend that justice is done, a callous processor of people who have offended the law, a pressure release valve, and a resolver of disputes through the application of latent societal force. But it is not, has never been, and is unlikely to be a search for truth for a variety of reasons. These of course include the fact that the resources of the adversary process tend to be seriously imbalanced on behalf of one side or the other. But even if the resources were more equal, this would

94. See NADER, *supra* note 16.

95. See *Florida Smokers' Lawsuit Buried*, N.Y. TIMES, Feb. 18, 1999, at A14.

only lead to more deception rather than less. It also includes the fact that juries clearly make decisions—just as do judges—on grounds that have nothing to do with truth but with bias, political considerations, physical appearance of the parties, emotion, and numerous other factors unrelated to any strict understanding of truth.⁹⁶

Lawyers work within a culture of deception, manipulation, and power. Aristotle captured this idea more than two millennia ago in describing the role of the advocate: “[Y]ou must render the audience well-disposed to yourself, and ill-disposed to your opponent; (2) you must magnify and depreciate [make whatever forms your case seem more important and whatever forms his case seem less].”⁹⁷ Plato phrased it more poetically in saying the advocate “enchants the minds” of the courts of law. The advocate’s role is inherently deceptive rather than truth-directed. The dilemma is not of recent origin. Plato remarked, “rhetoric [is] . . . a universal act of enchanting the mind by arguments. . . . [H]e who would be a skillful rhetorician has no need of truth—for that in courts of law men literally care nothing about truth, but only about conviction.”⁹⁸

The dynamic is inescapable and the overall system is not going to change enough to affect the basic way of doing business. Lawyers are immersed in a life comprised of manipulating people and power. They do so in order to defend and assert incommensurable and colliding value systems and claims on behalf of their clients with the goal of gaining advantages from opponents

96. See Bob Van Voris, *Jurors Do Not Trust Civil Litigants. Period.*, NAT’L L.J., Nov. 2, 1998, at A24.

97. ARISTOTLE, THE EPILOGUE, in THE RHETORIC OF ARISTOTLE 3, 19 (L. Cooper ed. & trans., 1932). The common law operates on a multiplicity of levels that transcends the narrow limits of science. It shifts between these levels at will and works through the application of political language to discretionary situations. I explored this as a distinct system of knowledge in David Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127 (1988).

98. THE WORKS OF PLATO 292, 306 (I. Edman ed., 1928). Sun Tzu suggests approaches by the strategist that provide a flavor of how the legal strategist must act deceptively and in a manipulative manner to achieve success. “All men can see these tactics whereby I conquer, but what none can see is the strategy out of which victory is evolved.” BARNHIZER, *supra* note 58, at 73 (quoting Sun Tzu’s *The Art of War*). “In all fighting, the direct method may be used for joining battle, but indirect methods will be needed to secure victory.” *Id.* at 75. “[W]hat enables the wise sovereign and the good general to strike and conquer, and achieve things beyond the reach of ordinary men, is foreknowledge.” *Id.* “By altering his arrangements and changing his plans, he keeps the enemy without definite knowledge. By shifting his camp and taking circuitous routes, he prevents the enemy from anticipating his purpose.” *Id.* at 100.

who hold conflicting aims.⁹⁹ It is an inherently competitive undertaking with consequences for those caught in it. It has become increasingly popular to criticize the perceived deficiencies of the adversary system and the lawyer's role within it. Anne Strick has challenged the validity of the entire adversary process by emphasizing the lawyer's commitment to winning through advocacy over the attainment of truth. In her book, *Injustice For All*, Strick called this "the treason of the adversary system," and comments at length on how many lawyers attempt to falsely justify the adversary system as a mechanism for the effective determination of the truth of controversies.¹⁰⁰

B. Pecuniary Psuedo-Truth

Jules Henry has offered the concept of pecuniary pseudo-truth to characterize our age, defining it as "a false statement made as if it were true, but not intended to be believed."¹⁰¹ He applies the idea of pecuniary pseudo-truth to law through his concept of "legally innocent prevarication" which is used to "cover all statements which, though not legally untrue, misrepresent by implication."¹⁰² Henry argues that "[t]he heart of truth in pecuniary philosophy is contained in the following three pos-

99. See Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6 and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409 (1997); Thomas L. Shaffer, *On Living One Way in Town and Another Way at Home*, 31 VAL. U. L. REV. 879 (1997); Nicholas Targ, *Attorney-Client Confidentiality in the Criminal Environmental Law Context: Blowing the Whistle on the Toxic Client*, 14 PACE ENV'T L. REV. 227 (1997).

100. ANNE STRICK, *INJUSTICE FOR ALL: HOW OUR ADVERSARY SYSTEM OF JUSTICE VICTIMIZES US AND SUBVERTS JUSTICE* 124 (1977). But consider the remarks of lawyer Jerome P. Facher, the defense lawyer in the case that provided the basis for Jonathan Harr's *A Civil Action*:

And if a trial aspires to be a search for truth, the student must still ask whose "truth" are we searching for, whose "truth" has been revealed and whose "truth" do we accept? Is it the lawyer's truth? The plaintiff's truth? The defendant's truth? The witness's truth? The judge's truth? The public's truth? The media's truth? Whatever the answers to these philosophical puzzles, a trial confronts us with a real life controversy which must be resolved by presenting evidence, finding facts and applying the law. In light of this reality, a fair trial in a fair adversarial system not only resolves the controversy, but, I believe, comes closest to finding that elusive and undefined concept called "truth."

Jerome Facher, *The Power of Procedure: Reflections on "A Civil Action"*, in A DOCUMENTARY COMPANION TO A CIVIL ACTION xvii (Lewis Grossman & Robert Vaughan eds., 1999).

101. HENRY, *supra* note 9, at 50.

102. *Id.* at 51.

tulates: Truth is what sells[;] Truth is what you want people to believe[;] Truth is that which is not legally false."¹⁰³

Henry argues rather tellingly that the value systems and institutions of the twentieth century have somehow reversed the truth-seeking spirit of several millenia—essentially resulting in a culture of lies: "One of the discoveries of the twentieth century is the enormous variety of ways of compelling language to lie."¹⁰⁴

C. *"Truth" Is Most Abused in the Pre-Trial and Non-Litigation Phases*

As to the use of dark skills, those who fixate on the problems with the trial process are missing the points where the real games of abuse, deception, and injustice take place in the practice of law. A trial is actually far more likely to approximate a fair outcome based on the community's definitions of truth and fairness than is a negotiation. Trials are public. Trials have clear rules of competition. And trials have judges to run the process. Fairness and truth are far more likely to be at least approximated in the trial context than in negotiation.

Much of negotiation and case preparation are invisible in terms of the clients' opportunities to participate and to evaluate what is or is not being done on their behalf. This invisibility creates enormous potential for abuses of power on the part of the lawyers. The invisibility of the negotiation processes also allows lawyers to ignore the relative truth of claims and "truth-based" outcomes in favor of ones based on the possession of the greatest power and leverage. Negotiation, investigation, client counseling, and discovery behaviors frequently involve concealment, innuendo, ambiguity, leverage, and manipulation. This is caused by the invisibility, plausible deniability, and lack of a source of formal authority to govern the behaviors of lawyers. Use of the "dark skills" is at the core of the lawyer's life, and are far more compelling, seductive and powerful in terms of their effects on lawyers than are trials.¹⁰⁵

D. *An Entire Social System Based on Lies and Misrepresentation*

While lying and deception have always been with us, we have taken a quantum leap in the sophistication, extent, intensity, incessancy, presence, and depth of penetration of propaganda and half-truths in a system designed to persuade and sell.¹⁰⁶

103. *Id.* at 50.

104. *Id.* at 91.

105. See HANNAH ARENDT, *THE HUMAN CONDITION* 159 (1959).

106. See ELLUL, *supra* note 43.

Truth is one of the casualties in this process—indeed even frequently an obstacle to be overcome. The problem is not that there is dishonesty, but that there is so much of it, and that it is now an accepted part of our cultural values rather than something to be disdained. It isn't only lawyers who are having trouble with principle. Journalists, business people, politicians, and physicians are all experiencing the dilemma of lacking a system of honor in a deceptive world of telemarketers, public relations, media ratings frenzies, and "spin doctors."¹⁰⁷

Lawyers, after all, are people first and learn the values of our society long before they come to law school and enter law practice. Lying, avoidance of responsibility, and slippery qualification have become an increasingly large part of that system's values.¹⁰⁸ Michael Sandel describes the problem:

[Liberal and conservative debate] does not speak to the two concerns at the heart of our discontent. One is the fear that, individually and collectively, we are losing control of the forces that govern our lives. The other is the sense that, from family to neighborhood to nation, the moral fabric of community is unraveling around us. These two fears define the anxiety of the age.¹⁰⁹

107. See, e.g., Salter, *supra* note 59.

108. See, e.g., Miles Benson, *Making Lying Look Easy: Politicians Fine-Tune the Art of Untruths*, CLEVELAND PLAIN DEALER, Oct. 5, 1997, at 1E; Ethan Bronner, *College Students Value Money Over Mind*, *Survey Finds*, N.Y. TIMES, Jan. 12, 1998, at A14; Eugene Kane, *Survey Finds Brightest Students Often Cheat*, CLEVELAND PLAIN DEALER, Nov. 13, 1998, at 21A; Richard B. Schmitt, *In U.S. Courts, the Whole Truth Is Often Anything But*, WALL ST. J., Oct. 9, 1998, at B1. Sissela Bok has authored two works that help illuminate the purposes and tension of concealment. Her views of the responsibility of lawyers to keep potentially damaging client confidences secret, even if they might endanger others, would not always agree with my own. See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE*; SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* (1983). See also Van Voris, *supra* note 96 (analyzing the *National Law Journal-Decision Quest Juror Outlook Survey*).

109. Michael J. Sandel, *America's Search for a New Public Philosophy*, ATLANTIC MONTHLY, Mar. 1996, at 57. Krishnamurti's observation has much to tell us in our attempt to determine the nature and function of the advocate and whether it is either reasonable or realistic to assume we can become cooperative:

The world is torn by conflicting beliefs, by caste and class distinctions, by separative nationalities, by every form of stupidity and cruelty—and this is the world you are being educated to fit into. You are encouraged to fit into the framework of this disastrous society; your parents want you to do that, and you also want to fit in.

J. KRISHNAMURTI, *THINK ON THESE THINGS* 12 (1964). This does not mean that we must accept all the terms of this contentious and repressive world, but that we must understand it and operate within its realistic limits and conditions.

A particularly poignant irony is that lawyers have used the skills of manipulation and deception for centuries, but have now been passed by a deceptive society whose machinations put most lawyers to shame and whose practitioners lack any sense of principle and limit. Good lawyers, as I set forth in this work, necessarily use manipulative and strategic "dark skills," but within the legal profession there had traditionally been some sense of appropriate limits and the need for principled constraint. Even though this awareness of limits and constraint must become far clearer and more central to the legal profession, we find that in general society there are no limits other than what one is able to get away with.

This was painfully obvious in the comments of the U.S. women's soccer team goalkeeper after the team's recent victory in the 1999 World Cup, won by the Americans 5-4 in a shootout with the Chinese. While admitting she broke the rules by moving both vertically and laterally prior to the opponent kicking the ball, the goalie said, "It's not cheating if they don't call it." I have no question that many if not most Americans would agree with this "anti-principle" which means nothing more than nothing you do is wrong if you don't get caught. This is consistent with Anne Strick's description of the lawyer elevating winning over truth.¹¹⁰ The willingness to lie is also captured by Amitai Etzioni. In offering an example of what some would call overzealous behavior by lawyers, Etzioni recites a prominent lawyer's defense of lying that implicitly justifies a system of professional values many would consider unprincipled. Etzioni's lawyer concluded: "in our current climate we should not be surprised when lawyers state things that have nothing to do with truth because we should know that they will say anything that might help a client."¹¹¹ Compare this with John Finnis' position that there is an absolute duty not to lie.¹¹²

E. *The Lawyer's Obligation to Deceive*

In many ways similar to the seminal work of Monroe Freedman, I argue that—consistent with the oath taken on entering the legal profession—the lawyer's duty imposes the obligation to

110. See STRICK, *supra* note 100. David Luban challenged the claim that the adversary system operates as a search for truth in Luban, *supra* note 24, at 93; see also WILLIAM SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1997).

111. AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* 157 (1996).

112. See John Finnis, *What Is the Common Good and Why Does It Concern the Client's Lawyer*, 40 S. TEX. L. REV. 41 (1999).

provide a “sovereign” client with zealous representation and confidential, loyal, and effective counsel.¹¹³ Part of the process—perhaps even the heart of the lawyer’s work—involves deception, legalized half-truths, and concealment of falsehoods and damaging evidence on behalf of clients. Consider, for example, Strick’s recounting of a deception engaged in by Samuel Williston, one of the legal profession’s icons:

Once upon a time, [Samuel] Williston, called by a colleague “One of the most distinguished and conscientious lawyers I or any other man have ever known,” was defending a client in a civil suit. In the course of trial, Williston discovered in his client’s letter file material potentially damaging to the man’s case. The opposition failed to demand the file; nor did Williston offer it. His client won. But, recounts Williston in his autobiography, the judge in announcing his decision made clear his ruling was based in part on his belief in one critical fact: a fact Williston, through a letter from the file in his possession, knew to be unfounded.¹¹⁴

I have long shared Williston’s quandary. After I had won a settlement in a consumer class action lawsuit based on alleged fraudulent sales practices, a young married couple told me that they really hadn’t been cheated as the lawsuit had claimed. Of course they waited until the settlement check was safely in their hands. I had been naive enough to tell them during the intake interview what other “similarly situated” clients had described, and they simply adjusted their “facts” to fit the other clients’ allegations. I did not telephone the opposing lawyer and relate this fact.

V. THE CULTURE OF LAW PRACTICE

“It is the way of heaven to take from what has in excess in order to make good what is deficient. The way of men is otherwise. It takes from those who are in want in order to offer this to those who already have more than enough.”

—Lao Tzu

For the lawyer, the culture of practice shapes us into different people than we would otherwise be. The shaping is driven primarily by five factors—the oath we take to represent our clients zealously and competently, the people we represent, the

113. See FREEDMAN, *ADVERSARY SYSTEM*, *supra* note 13.

114. STRICK, *supra* note 100, at 123 (he did not speak up at that time, and felt it would violate his professional responsibility to the client to do so).

goals they seek, the skills and language we use to achieve their goals, and the effects on us of defending or facilitating the clients' past or intended acts. Taken together, these factors make the practice of law in many ways a morally dangerous and Faustian art in which its practitioners surrender a part of themselves as the price of power.¹¹⁵ It is a necessary art because of the skills we use, the people we represent, the institutions within which we work both directly and secondarily, the types of problems we help solve and create, and ourselves. It is a dark art because, in helping one set of people we call clients, we hurt others.¹¹⁶

A. *The Machiavellian Nature of the Adversary System*

While many people instinctively recoil from that connection being asserted between principled behavior and being a "dark" lawyer—and from the demands law practice imposes on those who advance its processes—I argue that the dark side of the lawyer's life is neither atypical nor exceptional, but reflects an inevitable and necessary component of being a good, i.e., effective, lawyer. The idea that behaviors most people feel are calculating and manipulative to an otherwise unacceptable degree can still reflect a legitimate and principled system is something with which many are understandably uncomfortable. Some will reject the premise being offered out-of-hand. Yet, while many people immediately recoil from even the idea of it being legitimate and principled to manipulate others to achieve one's ends, it is in fact a natural and inevitable element of how all people function. A few examples might help illuminate the idea.

While we prefer not to think of ourselves as conspiratorial seekers of ends even to the extent of using strategies we conceal from our intended "targets," parents continually manipulate their children in an attempt to help them mature into responsible people. Teachers use carefully designed methods based on the psychological insights of learning theory to manipulate their students with the purpose of enhancing their learning. Businesses manipulate the consciousness of employees to make them

115. See GOETHE, *supra* note 45.

116. Roscoe Pound tells us: "Conflict and competition and overlapping of men's desires and demands and claims, in the formulation of what they take to be their reasonable expectations, require a systematic adjustment of relations, a reasoned ordering of conduct, if a politically organized society is to endure." ROSCOE POUND, *NEW PATHS OF LAW* 3 (1950). In this competitive context: "The ability to weigh two duties, and balance them against each other, is the measure of human worth and dignity." *WORLD TREASURY OF RELIGIOUS QUOTATIONS* 257 (Ralph L. Woods ed., 1966) [hereinafter *WORLD TREASURY*] (quote from R.W. CHAMBERS, *LIFE OF SIR THOMAS MORE* (1935)).

more productive, and through advertising, product design, and packaging essentially subtly brainwash consumers to encourage them to buy their products and services. Military trainers manipulate the minds and emotions of recruits in order to prepare them for war and killing. Without even understanding what we are doing or calling it strategic manipulation, we have developed an enormous range of processes and strategies intended to achieve what are thought of as legitimate ends—effective child-rearing, improved education, more efficient workers, consumers willing to buy our products. We justify such activities based on some kind of higher or at least important purposes either tacitly or explicitly accepted as vital or at least legitimate.

Jerold Auerbach describes several seemingly less than desirable aspects of the adversary system lawyers serve, even while admitting that he would view with some trepidation a system that attempted to function without providing disputants with resort to lawyers to represent competing interests, as well as judges to mediate and compel decisions that serve to resolve otherwise endless disputes:

[L]aw and litigation have their darker side. The legal process can be threatening, inaccessible, and exorbitant—usually it is all of these for the least powerful people in society. It is more likely to sustain domination than to equalize power. Litigation expresses a chilling, Hobbesian vision of human nature. It accentuates hostility, not trust. Selfishness supplants generosity. Truth is shaded by dissembling. Once an adversarial framework is in place, it supports competitive aggression to the exclusion of reciprocity and empathy.¹¹⁷

Among the most critical of the factors is the consequence of using what I am calling “dark skills” to achieve the client’s goals. Use of a metaphor of darkness as neutral or positive rather than representative of something invariably evil has proved difficult. It has sometimes felt as if there were an invisible shield around the concept of “dark” skills that caused my mind to slide around it rather than directly grasp the full meaning. Yet, I am convinced that in the multi-dimensional world of the kind lawyers experience, the darkness metaphor is a vital step to learning who we are. I contrast the power and richness of the interacting combinations of light and dark—often, but not always falling into patterns of “light” ends and “dark” means—with the much more ethereal and simplistic world of the rarified ideal which is so

117. AUERBACH, JUSTICE WITHOUT LAW?, *supra* note 25, at vii.

unattainable that it is an “impossible dream” that can exist only when out of touch with the real.¹¹⁸

Consider, for example, Machiavelli’s observation that the individual must be cunning and deceptive, and that the prince must combine the talents of beast and man in order to survive in a harsh and deceptive world:

One must be a fox in order to recognize traps, and a lion to frighten off wolves. Those who simply act like lions are stupid. . . . [A] prudent ruler cannot, and must not, honour his word when it places him at a disadvantage. . . . If all men were good, this precept would not be good; but because men are wretched creatures who would not keep their word to you, you need not keep your word to them.¹¹⁹

Machiavelli continues: “[O]ne must know how to colour one’s actions and to be a great liar and deceiver.”¹²⁰ And that the prince, “should appear to be compassionate, faithful to his word, kind, guileless, and devout. And indeed he should be so. But his disposition should be such that, if he needs to be the opposite, he knows how.”¹²¹

Machiavelli recognized that certain positions demanded behaviors that might harm the reputation of the individual while benefiting the community. Lawyers are made Machiavellians by the terms of our professional oath, and by the realities of dispute resolution. Many of the ends we seek—either directly for our clients or indirectly for the integrity of our political system—do justify the means we use, and those means are inevitably manipulative. The result is what Thomas Shaffer has termed “compromised morality.”¹²²

118. See BOORSTIN, *supra* note 40, at 60 (“Have we been doomed to make our dreams into illusions? . . . An illusion . . . is an image we have mistaken for reality. We cannot reach for it, aspire to it, or be exhilarated by it; for we live in it. It is prosaic because we cannot see it is not fact.”).

119. NICCOLO MACHIAVELLI, *THE PRINCE* 99 (George Bull trans., 1961). One might hope that the angels would be found in government service, but reality contradicts that piece of wishful thinking. See, e.g., Robinson, *supra* note 71.

120. MACHIAVELLI, *supra* note 119, at 99. Machiavelli tends to be misunderstood and certainly undervalued as a thinker and strategist relevant to our time. See, e.g., MICHAEL LEDEEN, *WHY MACHIAVELLI’S IRON RULES ARE AS TIMELY AND IMPORTANT TODAY AS FIVE CENTURIES AGO* (1999).

121. MACHIAVELLI, *supra* note 119, at 99.

122. SHAFFER, *supra* note 15, at 83.

B. *The Culture Defines the Lawyer, Not the Reverse*

We are created by what we do, not by our utterance of moral platitudes—no matter how lofty. Caroline Whitbeck has traced the growing realization among ethical philosophers that moral rules must be tied to the context within which we function rather than left to float as abstractions in a sea of general theory.¹²³ Camus reminds us of the dangers of relying on overblown idealizations and urges on us the importance of understanding the functional limits to our human capabilities. He warns of the inevitability of personal and political failure unless we become more aware of the realistic extent of our power and devise realistic strategies and behaviors that allow us to be effective in our actions: “There does exist for man . . . a way of acting and of thinking which is possible on the level of moderation to which he belongs. Every undertaking that is more ambitious than this proves to be contradictory.”¹²⁴

I argue that Camus and Whitbeck offer a vital reminder of the need to be affirmative but realistic—or at least what I have always called *pragmatically idealistic*—in defining the system of moral obligation to which we lawyers owe allegiance. The culture of law practice works according to a specific set of rules and values, and the culture of law practice defines us far more than we do it. Professional responsibility and morality simply can not be usefully understood when left abstract or cut adrift from the context within which we act. And one of the aims in this essay is to describe several of the most compelling aspects of law practice that combine to create the culture that shapes the soul of the American lawyer.

The effects of the culture of law practice and our use of dark skills are inescapable. Hannah Arendt tells us that we are manifested through our acts, which—for lawyers—will often mean we become manifest through our words because to a great extent our words are our acts. Arendt describes the connection between our acting and speaking:

123. See CAROLINE WHITBECK, *PROBLEMS AND CASES: NEW DIRECTIONS IN ETHICS* (1996).

124. ALBERT CAMUS, *THE REBEL* 303 (Anthony Bower trans., 1956). Camus reminds us of the limits to our human capabilities:

Politics is not religion. Or if it is, then it is nothing but the Inquisition Even by his greatest effort man can only propose to diminish arithmetically the sufferings of the world. But the injustice and the suffering of the world will remain and, no matter how limited they are, they will not cease to be an outrage.

Id.

In acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world, while their physical identities appear without any activity of their own in the unique shape of the body and sound of the voice. This disclosure of "who" in contradistinction to "what" somebody is—his qualities, gifts, talents, and shortcomings, which he may display or hide—is implicit in everything somebody says or does.¹²⁵

This thought runs together with the observation by Ruth Anshen that humans are linguistic constructs.¹²⁶ The issue then becomes that of if humans are language in the way Anshen suggests, and the lawyer language is in large part one of deception and manipulation—then a lawyer is something very different from a person constructed of a different "language act."

While the degree and nature of how our acts define us depends in part on the individual person, as well as the experiences and types of practice in which the lawyer works and the institutions dealt with, we are all affected to some extent. If you lie too much, you become a liar. If you argue too much, you become an arguer. If you deceive too much, you become a deceiver. And if you seek out others' weaknesses and use them against them to achieve your goals, you are a lawyer. We deceive, we argue, we seek to undermine, and we use the advocate's skills to persuade. These behaviors are inevitable even though we attempt to pretend they are not. They represent what lawyers are required by oath to do for their clients and they define who we are. Nor are these intrinsic moral problems of the lawyer's life of recent vintage. In words that must penetrate the lawyer's soul, Plato described the consequences he perceived as becoming manifested in the personality of those who practice law:

[The lawyer] has become keen and shrewd; he has learned how to flatter his master in word and indulge him in deed; but his soul is small and unrighteous . . . from the first he has practiced deception and retaliation, and has become stunted and warped. And so he has passed out of youth

125. ARENDT, *supra* note 105, at 159.

126. The lawyer is caught between two fundamental opposites—the language of ambiguity and the language of ultra-specialized and detailed technique. Neither contributes to in-depth understanding of principle or moral substance. Each is a language of power, control, and manipulation depending on the particular goals being sought. See MCLUHAN, *supra* note 23, at 276 (quoting Ruth Anshen, "For man is that being on earth who does not *have* language. Man *is* language.") (emphasis added).

into manhood, having no soundness in him; and is now, as he thinks, a master in wisdom.¹²⁷

Plato's description strikes close to the heart of lawyers. We do practice deception, we do flatter when it is to our clients' advantage, and we are necessarily keen and shrewd if we are at all effective in what we do for our clients. But have we "passed from youth into [our maturity] having no soundness" to us? This strikes me as a profound accusation, and one that must be addressed honestly to assess its truth. Certainly it would be very easy for lawyers to be nothing else but the pathetic and contemptible creatures Plato describes—beings in possession of power and some degree of influence but full of conceit and empty of soul. In fact many lawyers seem to fit the description far too well. This is not surprising because the dark skills are sources of power for those who exercise them.

C. *Power Disconnected from Principle Inevitably Corrupts*

As with all power, the dark skills possess no intrinsic morality of their own and are subject to being abused while corrupting the person who uses them. Power, without a firm grounding in principle, makes us like the soulless *golem*, that in Jewish folklore had to be destroyed because it lacked a soul to give it the ability to know the difference between good and evil.¹²⁸ Power is at the core of what lawyers do and must be grounded in principle in order to at least mitigate its abuse. Whether a lawyer engages in a diverse civil, criminal, administrative, and political practice or specializes in a more limited field, the nature of the professional process offers numerous situations with questionable moral options. Lord Acton's insight that "all power tends to corrupt, and absolute power corrupts absolutely" is particularly applicable to law practice.¹²⁹

Acton's warning about the consequences of wielding power is central to this essay because unaccountable and invisibly exercised power over the lives of others is at the core of what lawyers do. But the situation is not so inevitably bleak as Acton's idea of

127. MAYER, *supra* note 11, at 4 (quoting Plato).

128. Most people may be more familiar with the concept of the *golem* than they realize. In J. R. R. Tolkien's book, *The Hobbit*, and subsequent Ring Trilogy, the sad and vicious creature who chased Frodo in order to recover the ring of power continually muttered "gollum" to the extent that Frodo began to refer to him in that way. The ring he called "his precious" was one of power linked to the Dark Lord, and its use affected those who activated it to such a degree that it incrementally seduced them and stole their souls.

129. WORLD TREASURY, *supra* note 116, at 100 (stated in a letter from Lord Acton to Bishop Mandell Creighton, dated April 5, 1881).

corruption suggests. There are different kinds of power and they generate different outcomes. Rollo May describes some of power's diverse qualities:

In Nietzsche's proclamation of the "will to power," it is important that we remind ourselves that he meant neither "will" nor "power" in the competitive sense of the modern day, but rather self-realization and self-actualization. If we are freed from thinking of power only in the pejorative sense, we are better able to agree with Nietzsche.¹³⁰

He continues: "Indeed, the chief reason people refuse to confront the whole issue of power is that if they did, they would have to face their own powerlessness."¹³¹ For lawyers, the exercise of power is absolutely inevitable—and is something for which we have no preparation to guide our use. But it is the principled exercise of power that we are seeking to understand, and part of this requires an understanding and acceptance of who we are as people.

The problem with lawyers and power derives in large part from the invisibility of what lawyers do on behalf of clients, and their general lack of accountability. Here, I am using the lack of accountability in a way that highlights the lawyer's work as abusing the responsibility to the client by not doing what is needed. This is distinct from the "principle of non-accountability" for which Luban cites Murray Schwartz.¹³² Schwartz's principle stands for the proposition that lawyers acting in their clients' behalf are not accountable to those other interests they harm in order to legally advantage their own clients. This principle is one of responsible law practice rather than being able to escape accountability to one's client even though you have done a substandard job. Consider, for example, the lawyer's accountability in the following situations:

[C]harges were dropped against a man who had been on death row for a 1985 murder-rape. DNA evidence cleared Ronald Jones, who became the 12th death row inmate to be freed since capital punishment was reinstated in Illinois in 1977.

And in April, a judge acquitted a 16-year-old boy who spent more than a year behind bars awaiting trial for murder. The teenager had confessed to stabbing a woman who, it turns out, was never stabbed at all. The judge sug-

130. ROLLO MAY, *POWER AND INNOCENCE: A SEARCH FOR THE SOURCES OF VIOLENCE* 21 (1972).

131. *Id.*

132. *See* Luban, *supra* note 24.

gested that the zeal of police and prosecutors clouded their judgment.¹³³

Such all-too-common events are only the tip of the iceberg. Virtually all of what lawyers do is invisible from the perspective of the client and of the formal institutions of the bar and government. In this invisible system the duty to provide zealous and competent advocacy is continually betrayed by the reality of the legal system. In fact, much of the nation's dispute resolution system is designed to function in ways that reward half-hearted efforts on a client's behalf and even punish zealous advocacy. Even if that were not the case, few clients can afford the cost of a private attorney's fully zealous representation. Zealousness, therefore, becomes the luxury of the law firm representing a wealthy client, the government attorney who has the power of the state or federal government behind him, or the personal injury lawyer who has her sights on a "deep pocket" defendant and is already supported by a substantial litigation budget. For most private lawyers, zealousness—defined as the ability, time, and resources required to see a contested matter through—is only a dream.

In such a context, the standards of quality and commitment we profess to meet on our clients' behalf are far beyond the level at which we actually perform. Lawyers are, however, hidden in the shadows of their offices, well away from the oversight of their clients. Not being visible, not being monitored, having enormous discretion, practicing the "mysteries" of law, operating in an environment characterized by extremely weak systems of oversight and accountability, and with little probability of being caught—is a powerful recipe for professional irresponsibility. In such a context, as one philosopher has told us: "Power can be invested with a sense of direction only by moral principles. It is the function of morality to command the use of power, to forbid it, to limit it."¹³⁴ Lawyers possess a great degree of power over their clients' welfare, but very little principle and almost no real accountability. Power both enables and corrupts, and many of the most troubling issues within professional responsibility relate to the use and abuse of power that is not anchored in principle. Few of us know how to handle power well, and if we are not held to a strong standard of performance we, like flowing water, take the easiest path.

133. Robinson, *supra* note 71, at A8.

134. WORLD TREASURY, *supra* note 116 (quoting John Courtney Murray).

D. *The Lawyer is the Client's Instrumentality*

It is impossible to understand the morality of the lawyer and legal profession outside the context of law practice. Of course part of this context is created by the function of lawyers in society, the goals sought by clients, the values of general society from which lawyers emerge, and the institutional demands placed on lawyers by employers and legal constructs. But the understanding of the culture of law practice begins with the awareness that much of what we do as lawyers requires working with situations in which our clients have been harmed, will be harmed, fear being harmed, want to harm, or at least get even in some way with other people they feel have hurt or offended them.¹³⁵

Law practice involves dealing with people who want to come out ahead on a bargain, or make more money at the expense of the persons against whom they are negotiating. Lawyers work with and against people who are in conflict and/or seeking to avoid responsibility for past, present, or future actions. This doesn't mean a client's goals are unjust or undeserved. But for most lawyers the answer to such questions doesn't matter. Simpson defense team lawyer Gerald Uelman states:

Our purpose was to employ every advantage the law permits to enhance the prospects of our client's acquittal. Our purpose was to utilize every device and stratagem the law allows to weaken and discredit the prosecution's case. The vindication of our client was the beginning, the end, and the substance of our every effort. Anything less would have been a violation of our ethical responsibility to faithfully perform the duties of an attorney-at-law.¹³⁶

135. See AUERBACH, *JUSTICE WITHOUT LAW?*, *supra* note 25 (explaining the current approach in American society as one involving continual game playing and maneuvering for competitive advantage). Eulau and Sprague liken the lawyer to the people's tribune. See HEINZ EULAU & JOHN SPRAGUE, *LAWYERS IN POLITICS: A STUDY IN PROFESSIONAL CONVERGENCE* 96 (1984):

Of the roles that were identified . . . as peculiarly characteristic of advocacy, one was characterized as "tribune." The tribune is the people's advocate in the political domain. The role is historically rooted in the representative's function to fight the people's battle against the Crown. . . . The lawyer as advocate and the politician as tribune are roles that seem to be functionally equivalent.

136. Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 293 (1998) (quoting Gerald Uelman); cf. Janeen Kerper & Gary L. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103 (1998); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidence to Prevent Harm*, 70 IOWA L. REV. 1091 (1985). See also Charles B. Rosenberg, *The Law After O. J.*, A.B.A. J., June 1995, at 72 (indicating that some of the fallout from the

Uelman's statement as to his duty helps make clear that we are servants of Machiavelli's prince. Our client is our primary sovereign, and we take a solemn oath to work on our sovereign's behalf within the limits of the law.¹³⁷ Of course there are other allegiances, including those to self, general society, and the legal system. But those allegiances are of a thinner character than that owed to our client. This fact has become clouded in a dialogue where many are seeking intuitively to avoid the commitment that becoming a lawyer imposes on those who accept the responsibility for a client's wellbeing.¹³⁸ Acceptance of responsibility for another's fate does not necessarily mean one likes the person or institution being represented, or that the lawyer agrees with the client's agenda. One lawyer comments in words that could be

public's exposure to the O.J. criminal trial include doubts about the fairness and efficiency of the criminal justice system; the perception that justice can be bought; the awareness that lawyers on both sides are engaged in "tricky behavior," and the jury system is flawed). Rosenberg writes:

[Viewers' comments indicate] that most people do not understand the adversary system. Or at least they do not understand that, within certain ethical boundaries, lawyers are permitted or even required to advance arguments for their clients even though the arguments may be less than fully persuasive.

Indeed, many people seem to view the justice system as a pristine search for truth, where lawyers on both sides ought to serve as assistant truth seekers. Many people's comments appear to suggest that they would be more comfortable, at least in theory, with an inquisitorial system based on the European model.

Id. at 74.

137. See *supra* note 14 and accompanying text.

138. As to that obligation, see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976). Being a professional friend is far from easy in many instances. The business world that provides some of law firms' most powerful and lucrative clients has its own problems with achieving ethical behavior. Increasing attention has been paid in business schools to the development of business ethics. See William Bole, *Excesses Shame Business*, ST. PETERSBURG TIMES, Aug. 10, 1991, at 6E; William Briggs & Thomas Bernal, *Validating the Code of Ethics; International Association of Business Communicators' Code of Ethics*, COMM. WORLD 40 (May, 1992); Charles M. A. Clark, *Ethics and Excellence: Cooperation and Integrity in Business*, REV. BUS., Mar. 22, 1994, at 41 (book review); Tenisha Mercer, *Evaluating Values: Biz Schools Make Students Think About Ethics of Their Actions*, CRAINE'S DETROIT BUS., Aug. 4, 1997, at 9; Edward Schumacher, *49% of Americans Polled Say Businessmen Less Ethical*, WASH. POST, Mar. 12, 1977 at C8; Max M. Thomas, *Classroom Conundrum: Profits + Ethics = ?*, BUS. MONTH, Feb., 1990, at 6; Harry J. Van Buren III, *Business Ethics for the New Millennium*, BUS. & SOC'Y REV., Mar. 22, 1995, at 51; Patricia H. Werhane & Henry J. Wirtenberger, *The Business of Ethics*, HARV. BUS. REV. Nov.-Dec., 1993, at 198; John Wilcox, *The Ethics of Business Face Challenge*, N.Y. TIMES, Jan. 31, 1982, 11 at 18; Art Wolfe, *We've Had Enough Business Ethics*, BUS. HORIZONS, May, 1993, at 1; *How to Be Ethical, and Still Come [Out on?] Top*, THE ECONOMIST, June 5, 1993, at 71.

uttered by a majority of attorneys: "After a while, . . . the lawyer grows cynical, coming to believe that clients are not friends but enemies. Not only do you not want to become their champion, you don't believe a word they say."¹³⁹

Lawyers are others' instruments of action in matters that fall within their sphere of professional knowledge and responsibility. Part of the moral angst lawyers feel is the unwillingness to accept the fact of their instrumental nature. This operates on at least two distinct levels. One is the dislike of anyone having the ability to control your actions—essentially giving up a part of your independence in service to another. While this is an increasing obstacle in a culture preoccupied with self, a distinct but serious issue is also created when the client needs the lawyer to do something that violates the lawyer's sense of right and wrong. This obviously depends on the type of issue and behavior involved on the client's part and on what the lawyer would have to do.

Dealing with this situation may be more difficult at this point in our history than ever before because our general culture has elevated one's individual preferences and wants to a level of semi-divine importance that trumps almost any other relationship. The problem with this admittedly discordant proposition that the lawyer is the client's instrumentality of action, for those who prefer neater moral systems than the one I am suggesting, is that lawyers often operate in a zero-sum situation in which one client's good is the opposing client's bad.¹⁴⁰ A critical distinction between lawyers and other helping professions is that much of lawyers' work tends to be in a zero-sum context where, by achieving specific justice for our client, we deprive another of justice either as an intended consequence or an inevitable side-effect.¹⁴¹ This, however, is consistent with the nature of the American adversary system and the responsibility of the lawyer within it. Mayer describes the system's essence:

139. Eisler, *supra* note 88, at 128 ("Putting your divorce in the hands of an honest counselor-at-law isn't easy. Divorce lawyers, as a class, have earned a dismal reputation.").

140. For a detailed discussion of "burnout" and "compassion fatigue," see Anne Ferguson, *Career Burnout: Causes and Cures*, MGMT. TODAY, July 1989, at 122.

141. Our clients often want something just because the opponent has it, or aren't even aware of their best interests because they are operating under stress and in the short term. We often think only in economic terms, but must include the other "coinage" of value to our clients and our opponents. This is often money or freedom, but the desire for vengeance, dignity, power, fair treatment and so forth are powerful motivators. If a client desires a certain kind of outcome, our responsibility is to try to achieve that end for that person—with some limits obviously.

[U]nder an adversary system of law the lawyer is not supposed to see the resolution of these disputes as a question of what might be best for the society as a whole. He is an advocate; his function is to see the possible resolution of a controversy in terms of his client's best interests (though he is not obliged to accept his client's view of what these best interests may be). Nobody knows, anyway, what might be best for society; such knowledge can come, if at all, only a fortiori, after the dispute has played itself out, rather than a priori, as part of the terms of reference.¹⁴²

The fact that we can argue lawyers are required to be their clients' advocate and as part of that responsibility are not required, obligated or even much permitted to focus on considerations that are not in their clients' interests does not mean lawyers are ignorant or oblivious to the effects of what they or their clients do to others. While there are numerous methods for rationalizing, ignoring, or obscuring those inevitable direct and secondary effects of what they do, that does not mean lawyers can escape a sense of moral accountability for the consequences. The tendency to cause harm when being a successful advocate—and I do include counseling within advocacy—makes the conflict worse for us than for other professions. The rules are that in the competition to gain advantage in what lawyers and clients tend to see as a zero-sum environment where material desires and power dominate, we are responsible for our client, and someone else is responsible for the "good" of other clients. This sounds terrible in some ways—but within limits it is the best way for the system to work out its disputes. Otherwise, there is an impossible blurring in which perceived obligations to "society," "future generations," the "opposing client," "the other lawyer," and so on—conflict with the clarity of our obligation to our client.¹⁴³

This point can easily be taken too far as a rationalization of what lawyers do, but it is a strong principle for grounding the lawyer's actions. The burden should not be on the legal advocate to make what are in fact society's political and policy judgments at their clients' expense. In any event, in most situations where the calculus of social good is operating on a grand scale, there are a variety of legitimate positions being advocated by competing or inconsistent interests. Imposing some form of unguided and amorphous responsibility on the legal advocate requiring the subordination of one position to another would

142. MAYER, *supra* note 11, at 76.

143. See, e.g., *id.* ("we really can't know what is good for general society anyway").

destroy the adversary system and that would also be a profound social decision with enormous impact. This is why Lord Brougham described his responsibility as one to his client rather than to England, recognizing that the adversary system was created to benefit the country by ensuring the ability to stand up to abuses of power.¹⁴⁴

There could of course be situations described in which a lawyer should put others' interests ahead of the client's. One of these is already covered by the rules of ethics—involving the right to disclose a client's intention to harm someone in the future.¹⁴⁵ I have absolutely no problem with this and even might create it as more of a duty than the privilege to go outside the limits of confidentiality as the responsibility is currently structured. But even this just tends to show the reality of the system, one where major corporate clients are counseled about behaviors that will unquestionably result in harm to large numbers of people in the future and while some lawyers might suggest other paths that eliminate or reduce harm, few would question that if the client desires a particular action the lawyer very quickly concentrates on advising how it can be achieved with the least exposure and risk for the client. Nor is the lawyer going to

144. Henry, Lord Brougham, acting as counsel for Queen Caroline in 1820, described the role of the advocate:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty. . . .

MELLINKOFF, *supra* note 1, at 189 (quoting Lord Brougham). As I have suggested, while Queen Caroline might have the resources needed to fund such zealous advocacy, very few people can actually afford the ideal of the advocate. There is a shortage of the effective advocates and resources required to make this system work as it is theoretically designed. The solution is not to give up and try to pretend we are something other than we are, but to expand the quality and availability of advocates as a balance against the advocacy of those who can afford the best lawyers.

145. Model Rule 1.6 contains a privilege by which the lawyer can reveal information confidentially gained from the client in order to prevent serious future harm to another. Traditionally the exception was something the lawyer could do but was in no way required to do. At present, the system is shifting more toward an expectation of the lawyer revealing privileged information if there is a threat of significant harm. Take as an example the possibility that a future defendant in the Oklahoma City bombing case came to a lawyer and in some way revealed his plan to blow up the federal building. Assuming the lawyer believed him, is he entitled to reveal the information? The answer is yes, but how much of it, how detailed, how close to enough to identify his client, and how serious must the potential harm be? For a state-by-state analysis of how confusing this rule is in operation, see 1999 STANDARDS, *supra* note 14, at app. A.

demonstrate “disloyalty” to the client by reporting the planned behavior in a way that might result in protecting those who would otherwise be harmed. Again, the clever distinction between the lawyer as counselor and as advocate helps protect the lawyer.

Being another’s instrumentality can, and often does, exact a heavy price. It has been described as the price of conflict between personal values and a client’s interests:

[F]ew attorneys admit to what is for many of them an equally important source of discontent: hypocrisy. The hypocrites are the lawyers in the elite firms who think of themselves as liberals. Not surprisingly, these lawyers use their lavish salaries to make sizable donations to various left-of-center groups, such as the American Civil Liberties Union, the National Organization for Women and the environmentalist organization Greenpeace. But how do these self-described liberals get the huge salaries from which the huge contributions are made? They defend oil shippers whose spills have poisoned pristine ecosystems, companies that like to keep the “girls” below the glass ceiling, and school districts that dismiss gay, lesbian or HIV-positive teachers. However “neutral” most firms’ work may be, sooner or later “liberal” lawyers learn not to think twice about representing clients whom they consider politically incorrect. I even know a lawyer who has, in a single day, written a brief opposing a suit by the Natural Resources Defense Council, and then gone home to renew his NRDC membership.¹⁴⁶

E. *An Unhealthy Profession? The Prevalence of Burnout and Abuse*

There are consequences of such an instrumentalist system for lawyers who inevitably live the terms of a quasi-Faustian bargain. Understanding the quality of those consequences requires a deep awareness of the nature of the legal system in America, developed in the context of the skills lawyers must use. It also requires an awareness of these considerations in accord with the

146. Lyskowski, *supra* note 24, at A19. There obviously is some hypocrisy present, but the interesting point is that the conflicted liberals described in the quote are making some accommodation to their situation and are attempting to do their job professionally and live their lives responsibly as professionals. It is hypocrisy—but that isn’t necessarily nearly as bad as we generally think. In other words, the conflicted liberals are doing a whole lot better than is suggested. Part of my princes of darkness argument is that they should understand that they have to develop coping mechanisms for a life that imposes inherently incompatible responsibilities.

values, dynamics, incentives, and structure of the culture of law practice. While the cumulative effect of the contract between lawyers, clients and society in many ways creates significant goods for a disputatious society that would otherwise be unable to resolve its fundamental disagreements—it also generates significant bads for the specific individuals who lose out in the adversary process.¹⁴⁷

Hazel Johnson observes that “[i]n an ever-changing legal world, it has become more difficult than ever before to find ‘happiness’ in lawyering.”¹⁴⁸ Beck concluded:

The dangers of psychological distress among members of the legal profession arise, at least in part, from two of the very elements that are traditionally associated with effective litigation strategy—directed anger and hostility. Both of these factors may often be counter-productive to one’s overall well-being. Posed differently, the environment surrounding lawyers is conducive to the creation of substantial psychological distress.¹⁴⁹

Other scholars have analyzed the characteristics and personalities of lawyers—including those who enter law school and the effects of the educational process.¹⁵⁰

Working to achieve a client’s good in a helping relationship would seem to offer a formula for emotional wellbeing and satisfaction rather than disillusionment, “burnout,” and moral crisis. Aristotle, for example, described justice as the highest virtue precisely because the doer of justice seeks to achieve benefit for others, rather than self.¹⁵¹ It can easily be said that lawyers fill

147. See Goldberg, *supra* note 38 and sources cited therein. See also Anthony Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 959, 964 (1981):

The most important skill the law teacher imparts is the skill of advocacy. . . . [The problem is that, t]he indifference to truth that all advocacy entails is likely . . . to affect the character of one who practices the craft for a long time and in a studied way.

148. Hazel L. Johnson, *Life, Law and the Pursuit of Balance: A Lawyer’s Guide to Quality of Life*, L. PRAC. MGMT., Nov./Dec. 1997, at 60 (book review).

149. Beck et al., *infra* note 209, at 2.

150. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997); Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723 (1994).

151. Aristotle says:

Justice is often thought to be the greatest of virtues And it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also. . . . For this same reason justice, alone of the virtues, is thought to be

this role of helping others. So why is the legal profession in such a state of self-doubt and moral condemnation? It cannot be as simple as the fact that clients often want things with which their lawyers do not agree. The lawyer's obligation is to use his or her professional talents on the client's behalf to achieve the client's wishes, not to advance the lawyer's. This submergence of self in another's interest is at the heart of the lawyer's oath-bound obligation. Not all people can accept this obligation. Few are trained to understand it or to understand its necessary limits. They may go too far and sell their soul, or not far enough and betray their client.

Others find they can achieve the required subordination of self-interest in some kinds of situations and with some types of clients but not with others. In many instances the conflicts between the lawyer's values and the clients and their goals are subtle and incremental without any obvious signs. The lawyer's experiences build up over time, and the lawyer comes only very slowly to realize how the experiences are changing his or her personal identity. This realization can result in a moral crisis that brings a spiritual erosion after a lengthy period of law practice. By that point, however, it is too late and most lawyers are already trapped in the particular practice environment that creates the problems and lack effective options for escape.

The problems many lawyers experience arise from the difficulty we face in compartmentalizing our personal moral selves, and the depersonalization and other costs involved in objectifying or dehumanizing opposing clients, as well as the innocent casualties of the professional actions we undertake on behalf of our clients. The fact that lawyers serve a vital social purpose does not and should not fully protect them from the moral impacts of their actions. The professional obligation does provide some protection but beneath the professional mask many lawyers struggle with the fundamental conflict created by the act of doing-harm-through-doing-good that characterizes much of our work. Lyskowski's description of conflicted liberals in large law firms and the hypocrisy they act out in their personal and professional lives captures some of the pain our failure to understand the need to balance competing compartments of belief and value generates within us. We should have little wonder at the stresses such a complex life can create, particularly for those who are the most thoughtful, self-aware and compassionate. This is, however,

"another's good," because it is related to our neighbor; for it does what is advantageous to another, either a ruler or a copartner.

ARISTOTLE, *NICHOMACHEAN ETHICS* bk. V, ch. 1 (W.D. Ross ed. & trans., 1925).

part of the price we pay for being lawyers—and it may even be an emotionally healthy though likely irresolvable pain. Those who are not affected by this conflict are often people who are much too unquestioning in their sense of duty and who go too far for clients, or people who operate without a real moral dimension to their character. The lawyers most in danger of what has been called an “erosion of the spirit” are those most vulnerable because they possess a soul in the first place.

But it is also important to note that lawyers are not alone. Practitioners of helping professions other than law also suffer from what have been called “burnout” and “compassion fatigue.”¹⁵² The nature of even the entirely benign “helping” professions is such that eventually we tend to dehumanize even our own clients and often reach a condition of emotional and moral burnout. Bettina Martin states that “the best definition [of burnout] thus far [is] ‘a progressive loss of idealism, energy, and purpose experienced by people in the helping professions as a result of their work conditions.’”¹⁵³ She cites other researchers in describing the consequences of professionally induced burnout: “Pines and Kafry . . . identify three stages: physical fatigue and feeling drained; psychological fatigue with alienation from clients and work; and spiritual fatigue, which involves self-doubt. Alienation from clients, and spiritual fatigue, reflect a loss of commitment and moral center.”¹⁵⁴

The impact of the culture of law practice on each lawyer depends in part on the character, values, vulnerability and resilience of the specific individual—and on the intensity and type of law practice. The conditions of a particular practice, the characteristics of individual lawyers, and the types of cases and clients dealt with are all part of the environment from which the “stuff” is created. Different types of law practice will have different effects. Even with the varying qualities of practice, lawyer distress is widespread.

Law practice is not monolithic. It can be thought of in much the same way as the functional structure of medical services. In medicine we find generalists, diagnosticians, surgeons, family practice, lab support, hospitals, outpatient treatment, systemic diseases, emergency care, trauma, stabilization, chronic diseases, incurable diseases, aging problems, structural, dietary, digestive, brain, speech, hospices, wellness and homeopathic

152. See Ferguson, *supra* note 140.

153. Bettina G. Martin, *Burnout in the Lab: Symptoms, Stages, Strategies*, MED. LABORATORY OBS., Mar. 1986, at 26.

154. *Id.*

approaches. Each function requires a different kind of approach and each contains within it different levels of experience and intensity that will lead to distinct impacts on those who perform a particular function. Emergency room doctors and nurses and those working in trauma centers find themselves subject to a unique and pressurized environment that requires special skills to handle. Plastic surgeons who do tucks and facelifts presumably operate under different levels of anxiety than do brain or heart surgeons.

This may help to provide a sense of the wide variety of practice structures, problems, functions and services in law practice.¹⁵⁵ Similarly, just as with medical personnel, not all lawyers are affected the same way or to the same degree. Some lawyers possess a heightened "hardiness" by which they can better withstand the effects of the practice environment.¹⁵⁶

Lawyers possess different degrees of tolerance and hardiness regarding the kinds of disputes and clients they are either willing or capable of handling. The degree of the effects of being an advocate depends on a variety of factors. These include the kinds of clients and cases dealt with; the institutional structure within which the lawyer operates, as well as that against which the lawyer must work on behalf of the client. These institutions also produce great pressures on those under their control to conform to rules of behavior. This produces a culture powerful enough to mold those who practice law into patterns acceptable to legal institutions and powerful clients.¹⁵⁷

F. *Choosing One's Personal "Mephistopheles"*

Much of the thinking about a lawyer's moral responsibility assumes the lawyer has freedom of choice about which clients to accept or reject. Such analysis is done in the context of clear value conflicts between the lawyer's core beliefs—religion, being pro or anti abortion, representing people who committed terri-

155. The practice of law is not monolithic, either by structure of practice, clientele, or case-type. See MACCRATE REPORT, *supra* note 13 and sources cited therein.

156. See Linda Schwab, *Individual Hardiness and Staff Satisfaction*, NURSING ECON., May 15, 1996, at 14 ("There are three dimensions to personal hardiness. These include (a) a sense of commitment, (b) a perception of control, and (c) the ability to view change as a challenge.").

157. The nature/nurture debate has never been adequately pursued in the context of the effects of law practice on lawyers. But the work culture has great power and ability to affect us over time. Any trial lawyer would immediately admit that in selecting a jury one of the most important criteria is the work and resulting experiences of the prospective jurors. Nor does it require a great period of time in which its effects are felt. See, Beck et al., *infra* note 209.

ble crimes—and the potential client's values, agendas or prior or planned bad acts as seen from the lawyer's perspective. This analysis places the lawyer, as person, at the center of the equation and argues that the lawyer's value system trumps the client's needs. In such a scenario, for example, the Christian lawyer owes a duty to herself to not represent a pornographer either as a charged criminal defendant or through serving as a counselor to assist in the business operation of the "evil scheme" through legal advice. Similarly, it might be considered morally legitimate—or even morally essential—to reject a potential client who wants to picket an abortion clinic because the lawyer is pro-choice.¹⁵⁸

While this situation is certainly not unimportant for lawyers who have complete freedom of choice regarding what clients to represent, it avoids the far more difficult and much more typical conflict most lawyers face in law practice. For a variety of legitimate reasons most lawyers' freedom to make value-based choices of desirable clients grounded on the lawyers' personal beliefs is either constrained or effectively eliminated by the specific context in which the lawyer is operating. In other words, most lawyers lack the option of rejecting potential clients or withdrawing from the service of existing clients because they do not agree with what the client has done or wants to do. Although my premise is that even lawyers who represent only those clients with whom they are in moral accord also use the dark skills in service of their clients and are shaped by their use, I am also concerned with those lawyers who find themselves with limited effective choice over whom they represent.

The ideal situation would of course seem to be one where the lawyer represents only those clients with whom he or she is in moral synchronization. That is not even close to how the process actually works for most lawyers who are part of large organizations or are "captured" by large organizations due to an economic dependency relationship.¹⁵⁹ Nor is it how the system is

158. See, e.g., Benjamin Allison, *A Person or a Lawyer*, 72 NOTRE DAME L. REV. 1723 (1997); Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation With Evil*, 66 FORDHAM L. REV. 1339 (1998); Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19 (1997).

159. Insurance companies are attempting to control the private lawyers who do work for them, by dictating the outcomes of cases rather than the clients. This has always been a hidden problem of who runs the litigation in which an insurance company is potentially obligated by contract to an insured, but the companies are now coming out and publicly demanding control.

One legal battleground across the country that is attracting wide interest here is a fight between lawyers and insurance companies over the costs of litigation. Some insurance companies have recently begun to

supposed to work. In any event, there are relatively few legal jobs in which lawyers have complete control over client selection. Law firms, government agencies, corporations and other bureaucracies—all select clients according to their agendas and criteria and then assign the legal tasks to the lawyer. The individual lawyer's freedom of choice in such situations—particularly new lawyers—is greatly constrained to the point of non-existence. Even in situations where lawyers operate on a smaller scale of practice, such as in solo practice or very small firms and where there is no powerful and controlling institution making the selection decisions, it is increasingly difficult to turn cases away in a competitively harsh environment.¹⁶⁰

Justice Powell's A.B.A. Committee on Economics of Law Practice could have had no idea of the monster it was part of creating and its eventual impact on professionalism. Instead of creating greater professionalism among lawyers, the committee helped set in motion a process that has done much to undermine the legal profession. The stunning contrast between the culture of practice existing at the time of Justice Powell's committee and the magnitude of the changes in the overall culture and conditions of law practice that have taken place since the publication of the *Lawyer's Handbook* are reflected in its words concerning the potential level of feasible "fee-earning" hours the

audit the way lawyers handle the cases of the insured clients, sometimes requiring advance approval of decisions that have traditionally been lawyers' alone, like how many depositions to conduct or which expert witnesses to hire. Although malpractice insurers, for example, theoretically save money when they do not have to pay verdicts, some lawyers say insurers sometimes decide that some cases are not worth the investment required to win. That, the lawyers say, puts them in the position of being pressured to forfeit the interests of the person they are defending to satisfy an insurance company that is paying the bills. Insurance companies argue that they have a right to control litigation they are subsidizing.

Glaberson, *supra* note 2. Compare what the insurance companies are seeking with the requirements of ABA Model Code EC 5-1 in which the lawyer is not permitted to allow any conflicting loyalties and influences in seeking to advance her client's interests. See 1999 STANDARDS, *supra* note 14.

160. See *LAWYER'S HANDBOOK*, *supra* note 3, at 208. Ralph Nader relates "The Case of the Black-Balled Lawyer," in which Robert Baker, a medical malpractice defense specialist whose firm had represented the medical insurance establishment for more than twenty years. Baker provided written testimony to the Judiciary Committee of the U.S. House of Representatives suggesting that "reform" efforts in California had benefited insurance companies and doctors but harmed people injured by medical malpractice. Baker and his firm were then boycotted by insurance companies and Kaiser. See *NADER*, *supra* note 16, at 295-98.

lawyer should take into account in determining the possible earnings:

There are only approximately 1300 fee-earning hours per year unless the lawyer works overtime. Many of the 8 hours per day available for office work are consumed in personal, civic, bar, religious and political activities, general office administration and other non-remunerative matters. Either 5 or 6 remunerative hours per day would be realistic, depending on the habits of the individual lawyer or the practices of the particular office.¹⁶¹

Compare this 1300 hours with the 2000-2200 billable hours now typically required of many law firm associates—which translates into seventy-eighty hours per week that must actually be worked to achieve the required level of billable hours. Even sixty hours per week of work—which is very conservative—for a period of fifty weeks means the associate is putting in 3000 hours per year of time to achieve 2000 billable hours. The pressures on family, emotional well-being, reflective thought, devotion to doing the highest quality work possible, and other important elements of a truly professional culture are virtually impossible. Practice becomes nothing more than a highly stressful rat race for survival in a Darwinian system.¹⁶²

Unsupervised discretion that can be exercised invisibly is one of the serious problems in law practice. Discretion is power, and power is easily abused. It was often a problem created by a lawyer's inadequate skill or professional laziness, but financial pressures that require shuffling, churning, and mass-production and standardization of client problems are now having significant impacts. Much the same situation is found in the HMO medical field where the quality of diagnosis and the traditional caring doctor-patient relationship fall victim to abbreviated consultations and fast turnover of patients. Tough cases require more time and thought and that gets in the way of profit. It is worse in the medical area because of the existence of insurance systems that create the incentives to maximize income by doctors and large medical corporations while reducing needed treatment services but at the same time expanding testing and laboratory services.

161. LAWYER'S HANDBOOK, *supra* note 3, at 287.

162. The lure of the money is incredible for those who are successful. See Glaberson, *supra* note 2 ("According to *The American Lawyer* magazine, the gross revenues of the country's 100 largest firms more than doubled to \$23.1 billion The 1,467 partners of the largest 13 law firms made annual profits of more than \$1 million per partner.")

Ideally, each lawyer must understand the limits he or she must place on the nature of representation so that the lawyer's essence is protected. Theoretically the advocate must set moral tolerance level high once the obligation to represent a client is accepted. The point of moral qualms should precede representation, not come during the interaction in ways that reduce the quality of the advocacy provided the client. Of course this is often not possible when one is only a part of a powerful and self-interested institution in which such value judgments have already been made and the lawyer is brought into a pre-existing relationship. Nor is it particularly likely when a lawyer works for a governmental bureaucracy or even for a public interest organization that has an already developed agenda the lawyer is responsible for advancing. Public and private organizations have lives and cultures of their own. The new lawyer coming into such a pre-existing context is not a free agent. The problem between the ideal and the reality is that most lawyers are thrust into a context someone else has already created and never face the issue of what they would do if they were free to make their own screening and policy decisions. Their freedom of choice is enormously constrained by institutional choices that predate their involvement or by policy decisions and economics over which they have little or no control.

This means that serious issues of moral responsibility are far less likely to be individual decisions under a lawyer's personal control than some might prefer. The system is a structure and it has great power. The problem with this from a responsible moral perspective, is that economic institutions as well as political and social ones—lack anything that could fairly be considered a soul. Those that serve these institutions therefore are in most instances little more than bureaucratic cogs serving interests other than their own and rarely anguishing over deep moral conflicts. In the context of legal institutions the situation is much the same: "The horrible thing about all legal officials, even the best, about all judges, magistrates, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it."¹⁶³

An example of such institutional behavior is readily provided by the state of Texas. Texans seem to have become very accustomed to a limited form of criminal justice. Bob Herbert discusses proposed "reforms" in Texas, reporting: "The state of Texas is not big on protecting the rights of the accused. And

163. MAYER, *supra* note 11, at 149 (quoting G. K. Chesterton).

when it comes to providing lawyers for indigent criminal defendants, it is one of the most backward states in the Union.”¹⁶⁴ He offers several examples, including: indigent defendants who languish in jail for months before a lawyer is appointed to represent them; the lack of a procedure for the appointment of counsel before an indictment; a lawyer who failed to present evidence during the trial that the man was incarcerated at the time he was supposed to have raped a child; a mentally ill man accused of punching his grandfather in the arm spent four years in jail awaiting trial; a man convicted of murder spent ten years on death row before an attorney investigated his alibi and won his release.¹⁶⁵

Many lawyers love the life of law practice. A recent survey of law firm partners by *The American Lawyer* suggests, for example, that successful partners are at least reasonably happy with their careers. The survey results highlight contentment with the partners’ niche within the legal profession, including their levels of compensation [a range of \$555,000 to nearly \$1 million annually] and the challenging nature of their task.¹⁶⁶ They typically found the “rainmaking” function in which they were responsible for attracting paying clients for their firms, among the least attractive parts of their responsibilities.¹⁶⁷

Associates, however, tend to have a very distinct view of the life and culture found within large law firms. Shaffer reminds us of “[Stewart’s] picture of the associate in a large firm [1983] is the picture of a lawyer who feels exploited by an amoral if not corrupt institution.”¹⁶⁸ Part of the conflict is seen as generated by “[t]he failure of a profession to [any longer] be a moral teacher [and this] seems to show up in one of two ways—as a failure to aspire and as self-deception.”¹⁶⁹ Although the degree to which the profession generally ever actually served as a moral guide for all young lawyers in what is a very diverse profession is open to question, there does seem to have been a cultural

164. Bob Herbert, *Defending the Status Quo*, N.Y. TIMES, June 17, 1999, at A31.

165. *See id.* (pointing out that “for some folks in Texas the idea of providing even minimal constitutional protections for poor defendants is going a step too far . . . [including] George W. Bush”).

166. *See Partner Survey: The View From the Top*, AM. LAW., June 1999, at 79 [hereinafter *Partner Survey*].

167. *See id.*

168. SHAFER, *supra* note 15, at 137.

169. *Id.* at 143.

change that has altered the lawyer's environment in both large firms and law practice generally.¹⁷⁰

G. *At Grave Risk of Selling Your Soul*

"We've got a form of brainwashing going on in our country," Morrie sighed. "Do you know how they brainwash people? They repeat something over and over. And that's what we do in this country. Owning things is good. More money is good. More property is good. More commercialism is good. More is good. More is good. We repeat it—and have it repeated to us—over and over until nobody bothers to even think otherwise. The average person is so fogged up by all this, he has no perspective on what's really important anymore."¹⁷¹

Alexander Hamilton observed that "[a] power over a man's subsistence amounts to a power over his will."¹⁷² The likelihood of a lawyer's soul being bought by clients depends on several factors. One of course is the degree of inner strength of character and principle a person possesses in the first instance. An obvious problem is that principle is most easily exercised in a context that places few competing demands on the individual. While individual character is therefore quite important, the context within

170. I say this because the practice of law is a diverse environment. Shaffer, for example, like many of the lawyers who have remarked on the moral role of the large law firms in past generations, could even be accurate about the decline in principle and values-based mentoring in those firms, and still be unaware of the conditions that had characterized many other forms of law practice for many years. For descriptions of the differences between types of law practices, see AUERBACH, *UNEQUAL JUSTICE*, *supra* note 25, and MAYER, *supra* note 11. See also ABEL, *supra* note 13 (offering an excellent set of excerpts on many of the issues, as well as numerous citations to relevant works); JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1994).

The differences relate to size and profitability of practice, law schools attended, and even ethnic background. Criminal defense and divorce practice have long tended to be ranked at the "unsavory" bottom in terms of reputation, along with personal injury plaintiffs. See MACCRATE REPORT, *supra* note 13 (providing very helpful information in its introductory chapter regarding the structure of law practice; firm size, types of practices, distinct cases, and the profession's changing demographics); *id.* at ch. 2 (clarifying the great diversity of practice structures, including such organizational forms as solo and very small scale (up to 6 lawyers); middle-sized and large firms; in-house counsel, government lawyers, legal clinics, prepaid legal service plans, criminal and civil representation for indigent clients, and new forms of providing legal services). See also Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345 (1994).

171. MITCH ALBOM, *TUESDAYS WITH MORRIE* 124-25 (1997).

172. WORLD TREASURY, *supra* note 116, at 748 (quoting THE FEDERALIST No. 79 (Alexander Hamilton)).

which we function and the values of that culture are of enormous importance. The lone individual who thinks he or she is capable of transcending the environment within which the daily work unfolds and which offers rewards and incentives for success in activities that serve its needs, is doomed to fail. That means lawyers who work in a variety of practice settings are at risk of succumbing to the amoral and self-interested value systems of the institutions they serve.

The factors creating that risk relate to such considerations as financial need, dependency on a limited number of clients for the income needed to sustain a practice, and dependence on the continuing "good will" of a category of clients such as insurance companies who demand loyalty from the lawyers they frequently retain. Financial dependence buys allegiance, and allegiance purchased as if the lawyer is an employee is considerably different from the kind of allegiance offered in the professional relationship. The approach to avoiding such dependency relationships in which the legal professional becomes submerged in the dependent-employee relationship and dominated by the client is similar to the concept of diffusion of power that underlies the American democracy. The lawyer who is able to build a relatively diverse "stable" of clients in which their degree of contribution to the particular law practice's well-being is relatively limited in relation to the scale of practice retains some degree of ability to act in a manner that would be considered principled.

As a particular client or cluster of clients comes to dominate the specific practice, the ability to make sound moral and professional judgments is decreased. Even here there are dangers, because as with the insurance companies, there is a chance that a lawyer's principled action will offend a particular client and that the group of similarly situated clients will decide to punish the lawyer or firm for "disloyalty." At that point, a lawyer who has carefully constructed a specialized client base may find it has disappeared overnight.

One of the areas of law practice where clients have great power over the souls of their lawyers, is in the large-scale corporate law firms. This heightened impact is produced in large part because—unlike every other client group in which the lawyer tends to control the client rather than the reverse dynamic that characterizes most relationships between client and lawyer—the financial incentives and enormous power and knowledge of larger and wealthier corporate clients increases those clients' ability to corrupt the lawyers and law firms who represent them. New lawyers become fodder for the machines of the private employers. I don't know what we in the legal profession can do

to change these conditions, but without a change in the use of institutional power and behavior the rhetoric of independent professionalism based on the strength of character and values of the individual lawyer rings hollow.¹⁷³

The culture of commercialism and its assault on principle involves not only lawyers but our entire society. This was made strikingly evident by a recent report involving medical ethics and the widespread attempts by companies to prevent the dissemination of research findings that might harm their financial interests. Hotz reports:

When Dr. Nancy Olivieri at the University of Toronto wanted to warn patients about the toxic side effects of a drug she was testing, the company supporting her research tried to quash her findings, citing a nondisclosure agreement. When she alerted her patients anyway, the company suspended the clinical trial and canceled her research contract. Even so, she published her misgivings in the *New England Journal of Medicine*. The Hospital for Sick Children, where she worked, sided with the company and dismissed her, triggering an international protest earlier this year.¹⁷⁴

Another researcher suffered a similar fate. It was reported that when Dr. David Kern, an occupational health specialist at Brown University, discovered a new and deadly disease at an industrial facility, the company sought to restrain the findings through a secrecy agreement. Kern went ahead and reported the discovery at a professional conference and to the United States Center for Disease Control. Officials at the hospital where he worked then announced his contract would be allowed to lapse, the occupational health program in which he worked was closed, and his position on the medical school faculty was eliminated.¹⁷⁵ This situation caused a response by a leading scientist:

The commercialization of science has led to a new regimen of secrecy that is of great concern to the scientific community . . . secrecy of an entirely new scope and scale," said physicist Irving A. Lerch, who is spearheading an effort by the American Association for the Advancement of Science to combat the trend.¹⁷⁶

173. See Lyskowski, *supra* note 24 (comments of Geoffrey Hazard).

174. Robert Lee Hotz, *Scientific Researchers Irked by Sponsors' Secrecy Clauses*, CLEVELAND PLAIN DEALER, May 19, 1999, at 14A.

175. See *id.*

176. *Id.*

Those who become infatuated with the power of the mind—particularly their own—are the most fertile targets for corruption. Because they think themselves able to withstand the seductions of avarice and ego they become its most pathetic victims. This situation was described decades ago by Jacques Ellul, when he observed that “[t]he intelligentsia will no longer be a model, a conscience, or an animating intellectual spirit for the group. . . . They will be the servants, the most conformist imaginable, of the instruments of technique.”¹⁷⁷ This is what happens in regard to many lawyers in powerful law firms who think they are anointed to dispense wisdom to some of the most powerful forces in society and that they will somehow be able to overcome the influences of power and wealth. Instead they become the most coopted workers in the legal profession.

For lawyers, powerful clients are capable of exercising such a degree of control over our value systems that it results in stealing the souls of the lawyers who represent them and who depend on their continuing largesse and good will. The problem involves a combination of the desire for security, our need to become part of a community such as a law firm represents, and fear of rejection by the primary professional community within which we work. An important way of ensuring our successful niche within that community is adopting and absorbing the values, allegiances and behaviors that are part of that community. Those are powerful motivations to become fully absorbed servants of our most powerful employers.¹⁷⁸ One of the problems is that we prize financial security and status much more than real freedom. Real freedom is not co-extensive with license. It carries within it a personal responsibility and accountability that we instinctively avoid. Peter Berger concludes that “most of the time we ourselves desire just that which society expects of us. We want to obey the rules. We want the parts that society has assigned to us.”¹⁷⁹

We also become hostages to our careers and the obligations we owe our families. Obviously, the debt loads we have when we enter law practice, as well as the burden we assume with mort-

177. ELLUL, *supra* note 44, at 349. This was also Hexter’s point when he described the “doppleganger” to which all intellectuals were subject—which was the enormous and seductive attraction to the service of political power and the inevitable submission of ourselves to advancing its ends rather than those we knew were the best. See HEXTER, *supra* note 54.

178. See, e.g., BERGER, *infra* note 179; *supra* note 172 and accompanying text. See also Glaberson, *supra* note 2 (noting that 1,467 partners in the 13 largest law firms have annual incomes above \$1 million); *Partner Survey*, *supra* note 166.

179. PETER BERGER, *INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE* 93 (1963).

gages, spouses, children and lifestyle costs add significantly to the ability of institutions to own us. But of equal significance is that most people are not ground breakers or adventurers. Most of us want to settle into a secure niche and have a decent life.¹⁸⁰ Consider the black-balling episode reported by Ralph Nader in which an entire industry shut off dealings with a firm that had provided representation for two decades because of the perceived disloyalty of honest testimony provided a Congressional committee.¹⁸¹ The money involved is too great for law firms or individual lawyers dependent on the continuation of referrals and retainers on which their economic survival is based to make waves or fail to "go along with the program." In a market economy, values are based on financial considerations.

We profess to admire heroes like Doctors Olivieri and Kern, who lost their jobs as a result of their principled actions in reporting medical dangers revealed by their research even though the private companies attempted to suppress the results.¹⁸² But in our system such courage exacts a price in terms of lost financial opportunities, reputation among colleagues who are threatened by your values, and career itself. We may write about such people and admire their courage, but just as with "whistleblowers" reporting government fraud, we tend to look the other way when they are shunted to distant outposts or fired for other reasons. Human institutions—public and private—are capable of a wide range of inhumane behavior. Consider the recent report of the "shunning" behavior that is apparently gaining increased prominence in Japanese companies, behavior in which co-workers participated in the exclusion of the hapless victim from the work community. "Under extreme pressure to survive, Japanese companies are relying more and more on a perverse form of restructuring—bullying and isolating their workers—at a time when outright layoffs are still unacceptable, legally cumbersome and expensive."¹⁸³ One victim reports: "All my co-workers became cold. They wouldn't greet me. They refused to talk to me."¹⁸⁴

180. Compare this with Krishnamurti's observation regarding how we seek to fit into the comfortable but inhuman world of our parents. See KRISHNAMURTI, *supra* note 108.

181. See NADER, *supra* note 16.

182. See HOTZ, *supra* note 173.

183. See Mark Magnier, *Japanese Companies Use Silent Treatment to Force Workers Out*, CLEVELAND PLAIN DEALER, July 25, 1999, at 4A.

184. *Id.*

H. *Counselor v. Advocate: Which Activity is More Morally Harmful?*

In using the concepts of darkness and light I am not equating what are normally thought of as public interest activities with "the good," or classifying private representation of "evil" clients such as tobacco companies with "the bad."¹⁸⁵ My central theme is that all clients are entitled to be represented by good lawyers who are excellent advocates and provide committed and zealous representation to their clients. The problem in this society is not that there are too many good advocates but that there are far too few and that they are distributed poorly. Lawyers' clients have often done reprehensible things—or are seeking to do things that are reprehensible from at least someone's perspective. One of the most obvious limits lawyers confront is that between helping clients do reprehensible things as opposed to helping them after they have arguably been caught for doing those things.

185. See Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). For sources that touch on many of the most profound aspects of the conflict between an individual's system of values and the nature of the adversary system and its demands, see Allison, *supra* note 158; Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992); Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684 (1996); Collett, *supra* note 158; Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735 (1992); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996); Jennifer A. Freyer, *Women Litigators in Search of a Care-Oriented Judicial System*, 4 AM. U. J. GENDER & L. 199 (1995); Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and Its Values*, 59 BROOK. L. REV. 931 (1993); Green, *supra* note 158; Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219 (1995); Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33 (1996); Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563 (1996); Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45 (1994); Reed Elizabeth Loder, *Out of Uncertainty: A Model of the Lawyer-Client Relationship*, 2 S. CAL. INTERDISCIPLINARY L.J. 89 (1993); Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Enquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477 (1995); Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984 (1995); Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307 (1988); Robert Eli Rosen, *Ethical Soap: L.A. Law and the Privileging of Character*, 43 U. MIAMI L. REV. 1229 (1989); Thomas Shaffer, *The Profession as a Moral Teacher*, 18 ST. MARY'S L.J. 195 (1986); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395 (1998); Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9 (1995); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995).

This purported dichotomy between the lawyer's role as counselor and as advocate is, however, often a false or impossibly gray line. Far more evil is likely to be done when a lawyer is acting as a counselor than as an advocate in litigation. It is perhaps easiest to draw and recognize the line in the street crime context such as a robbery or murder when the lawyer comes to the case only after a specific bad act has been committed. Although many might consider the criminal defense lawyer to represent one of the most unsavory aspects of law practice because of the situations and people dealt with, that situation is actually much cleaner and more obvious than where the representation is more a mixture of advocacy and counseling. As tragic and vile as the person and act might be, the criminal defense lawyer has not been a part of its commission in any way. This is far less likely to be the case in corporate practice where the lawyer often plays an integral role in advising clients how to do things that result in widespread harm.

It is easy, for example, to determine that a lawyer who helps a drug lord plan and implement his illegal schemes has gone beyond what is professionally allowed and is facilitating a criminal conspiracy. But what about lawyers who council General Motors that, from an economic and legal perspective, it would be appropriate to conceal dangers of the placement of a gas tank on 1979 Chevrolet Malibus because the cost of fixing the problem would be \$8 per car while the cost of settlements—once people were harmed or burned to death—would be slightly more than \$2 per vehicle?¹⁸⁶ There is a very thin moral line between one situation and the other, assuming that when GM's lawyers provide this advice it is an accepted statistical premise that people will be harmed in the future due to the failure to recall affected vehicles. And that is the kind of world within which many lawyers work.

As to the power and values of the corporate culture and the demands of its decision-makers for unquestioning loyalty to the "community," consider the situation described by Bennett S. LeBow, CEO of the Liggett Group, who broke ranks with other tobacco CEOs and testified against them in various stages of the massive tobacco litigation efforts. LeBow described his relation-

186. General Motors was hit with a \$4.9 billion verdict in favor of six plaintiffs who were all badly burned when their 1979 Malibu burst into flames after being struck in the rear by another car in 1993. The California jury verdict followed a 10 week trial and included \$107 million in compensatory damages and \$4.8 billion in punitives. Many lawyers think the verdict will be either reversed or reduced. See Bob Van Voris, *Short Life Seen for Big GM Verdict*, NAT'L L.J., July 26, 1999, at A4.

ship with the other CEOs as one in which: "They all hate my guts. . . . They don't write. They don't send cards. And when they see me they just walk away."¹⁸⁷ LeBow said he hired his own lawyers rather than use those typically relied on by the industry, and that his new lawyers discovered that the industry had been lying and hiding information about tobacco concerning its addictiveness, health effects, and the deliberate targeting of young people—all areas about which industry representatives had lied to the public and in the course of Congressional hearings.¹⁸⁸

There are numerous issues in such a situation, including the fact that some of the lawyers for the offended CEOs were almost inevitably aware of the cover-ups and may even have facilitated them as some have suggested. Yet, just as are murderers, robbers, and rapists—tobacco companies are entitled to be represented by lawyers and are among the kinds of clients with whom we must deal. They are not, however, entitled to commit perjury, destroy evidence, or illicitly ruin the lives of those who dare to oppose them. Yet once becoming part of a culture in direct service to such powerful interests, how does the lawyer resist the pressures to do almost anything asked?

The problem goes considerably beyond the bounds of zealous advocacy based on professional principle into the Faustian realm of having sold your soul. Nor should we deceive ourselves into thinking we can win our bargain with the Devil. One should always keep in mind Sun Tzu's admonition that "there are some roads that should not be taken, some cities that should not be besieged, and some battles that should not be fought."¹⁸⁹ In the same way, once within certain situations, anyone who thinks he or she is immune from being influenced beyond professional limits by interactions with such clients and opponents is engaging in self-deception.

187. James F. McCarty, *Tobacco CEO Airs Rock-the-boat Views*, CLEVELAND PLAIN DEALER, Feb. 26, 1999, at 2B.

188. *See id.*

189. BARNHIZER, *supra* note 58, at 73 (quoting Sun Tzu's, *The Art of War*). Sun Tzu suggests approaches by the strategist that provide a flavor of how the legal strategist must act deceptively and in a manipulative manner to achieve success. "All men can see these tactics whereby I conquer, but what none can see is the strategy out of which victory is evolved." *Id.* "In all fighting, the direct method may be used for joining battle, but indirect methods will be needed to secure victory." *Id.* at 75. "[W]hat enables the wise sovereign and the good general to strike and conquer, and achieve things beyond the reach of ordinary men, is foreknowledge." *Id.* "By altering his arrangements and changing his plans, he keeps the enemy without definite knowledge. By shifting his camp and taking circuitous routes, he prevents the enemy from anticipating his purpose." *Id.* at 100.

The effective performance of the advocate's function involves the inevitable use of the dark skills of law practice. But, unlike the example from the tobacco companies in which it seems almost certain the lawyers sold their souls beyond legitimate professional limits, use of the lawyer's dark skills is not synonymous with doing anything or with being owned by the client. Once the lawyer has gone beyond the exercise of independent professional judgment on a client's behalf any claim to principled behavior has disappeared. Even this line is difficult to recognize and follow in practice in a system based on zealous representation, but we actually tend to have an intuitive moral sense that tells us about what is right or wrong in difficult situations. Our problem is that we tend to be moral cowards who deny the existence of problems and rationalize away the dilemma until it is too late.¹⁹⁰ Francis Bacon captured the influence of wealth on our moral identity:

I cannot call riches better than the baggage of virtue. The Roman word is better, impedimenta. For as the baggage is to an army, so is riches to virtue. It cannot be spared nor left behind, but it hindereth the march; yea, and the care of it sometimes loseth or disturbeth the victory. Of great riches there is no real use, except it be in the distribution; the rest is but conceit.¹⁹¹

VI. SOME FURTHER IMPACTS OF USING DARK SKILLS

A. *The Dehumanizing Impact of Goal-Oriented Zealousness*

Zealousness—including not allowing ourselves to be deflected from achieving our client's "good" due to concerns for the effects of our actions on the opposing client or on society

190. See MASLOW, *supra* note 33 (reminding us that we avoid true knowledge of troubling situations for fear of what that knowledge would require us to do—or to avoid having to confront our true state of cowardice or helplessness. It is a form of self-deception in which we all commonly engage). Ernest Becker has written of the "delicately constituted fiction" of human aspiration in ways that I suggest apply to our delicately constituted fiction of trials as a search for truth as opposed to outcome:

The world of human aspiration is largely fictitious and if we do not understand this we understand nothing about man. . . . Man's freedom is a fabricated freedom, and he pays the price for it. He must at all times defend the utter fragility of his delicately constituted fiction, deny its artificiality.

ERNEST BECKER, *THE BIRTH AND DEATH OF MEANING* 139 (2d ed. 1971). Erving Goffman would go even farther and suggest that our very selves and everyday actions are a kind of fiction that we offer to the world. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1972).

191. BACON, *supra* note 47, at 92.

generally—is one of the most difficult aspects of what we do.¹⁹² As loyal and zealous advocates, the opponents are almost inevitably dehumanized and tend to become objects, cases, statistics, or some other “thing” for which we have no moral or professional responsibility. This is the essence of an adversary system in which the other is an “opponent,” “enemy,” or “object” rather than a person. I note that the increasingly reduced commitment to the obligation of zealousness that Shaffer has described as occurring each time the American Bar Association reformulates its principles of practice, presumably to reflect a “kinder and gentler” world of disputes, may well be a key factor in accelerating and justifying a shift toward a view of law practice as a business rather than a calling.¹⁹³ Competence by itself is such a low-level ideal contrasted with zealous representation on a client’s behalf, that it basically trivializes the relationship to a client. What profession should expect to be taken seriously that proclaims “competence” as its central tenet? Left unstated, would that mean there was no obligation to provide competent service to the client or patient? There must be more. Similarly, placing the fundamental relationship with the client in a four-part and apparently mutually equivalent hierarchy of responsibilities such as is done in the MacCrate Report diminishes and blurs the obligation to the client.¹⁹⁴

The impact of using the advocate’s skills is heightened because the focused processes and rules of law practice create a powerful lens that concentrates the effects of the application of power, manipulation, greed, meaninglessness, ambiguity, coping with legal institutions operating in ways that contradict and demean their claims to principle as well as our ability to act in a principled fashion. This led Strick to conclude:

[T]he goals of winning on one hand and truth on the other are mutually exclusive, indeed irreconcilable contradictions between which the lawyer is caught—in a flat conflict of interest. But in that conflict, winning must take precedence over truth. Winning . . . is the profession’s “honor, duty, as well as profit.”¹⁹⁵

192. See 1999 STANDARDS, *supra* note 14.

193. See SHAFFER, *supra* note 15.

194. See MACCRATE REPORT, *supra* note 13.

195. ANNE STRICK, INJUSTICE FOR ALL: HOW OUR ADVERSARY SYSTEM OF LAW VICTIMIZES US AND SUBVERTS JUSTICE 124 (1977).

B. *Dehumanization Through Technology*

Technology creates capabilities but it also alters us and constructs new barriers between us. Among those barriers, for people who lack inner principles that set limits on activities, is the reorganization of activity according to the new capabilities that have been granted. Amazingly complex information and data management systems have, for example, allowed us to track and subdivide things into ever more discrete bundles and we have learned how to package these bundles and charge fees for them. Information is power and since we can do it, we do it. In a system whose only principle is money, only fools give things away or charge less than the "market will bear." This is having a terrible impact on professionalism, just as assembly lines and Taylorism had unforeseen dehumanizing effects on people with the rise of mass production. I don't mean to romanticize, but the carving up of what we do into increasingly finite "task bits" is undermining our profession and making it more likely that those who see law as only a business will win the debate by default.

Health care has been turned into an extremely profitable but professionally bankrupt set of soulless institutions.¹⁹⁶ It is also undeniable that technology for information acquisition and management can also be extremely important in overcoming some of the time management problems in law practice. It can save money, and help link lawyers working on similar cases into more efficient problem solving and collaborative networks that help less economically advantaged clients compete on a more equal footing with wealthy clients. Technology can help in so many ways to improve certain aspects of law practice that on balance it is positive.

Dr. Stephen Harlin warns of the potential harm of a financially-driven system that possesses great technological capability and lacks humane values:

196. For insights into the unanticipated consequences of the information society, see GENE ROCHLIN, *TRAPPED IN THE NET: THE UNANTICIPATED CONSEQUENCES OF COMPUTERIZATION* (1997). As our power to manage our lives in micro-detail increases exponentially, so does others' ability to insist that we use that power to increase our efficiency and productivity. What is billed as an incredible technology for human freedom instead becomes one in which freedom is lost, intrusiveness is increased beyond imagination, and the human is further submerged in the technology. Dr. Stephen Harlin, *infra* note 197 indicates that the rise of HMOs has resulted in an extreme commercialization of the medical profession and that it was sold as an effort to increase efficiency and productivity with the espoused purpose of improving the quality of service. Harlin warns: "Under the guise of cost-efficiency and accountability, dangerous constraints are being placed upon doctors and their patients." *Id.*

But patients are patients; not commodities. Patients need medical care; not management. The complexity of clinical reasoning makes it virtually impossible to link medical ethics with business ethics. Conflicting obligations are certain if clinicians deliberate resource allocation. Physicians have a moral duty to make clinical decisions based upon the biological, the empirical, the empathetic, the ethical; not the fiduciary. Ethical dilemmas in the profession of medicine have long been inseparable from its practice. Notwithstanding, recent problems raise extraordinary concerns. A revised code of ethics now permits third party insurers to refuse treatment. On behalf of their patients, physicians have a moral obligation to lodge explicit protest.¹⁹⁷

C. A "Tired Wisdom" and Gradual Erosion of the Spirit

One burden of the dark skills is that their effective exercise demands that the lawyer know things most people prefer to avoid. This results in the acquisition of knowledge people may be better off not possessing. For those raised in the Judeo-Christian tradition, our deepest belief systems emphasize the corruption of knowledge as a tool of Satan.¹⁹⁸ Too much experience and knowledge caused us to be expelled from Eden. If those who gain too much knowledge are inevitably tainted—particularly in a society where knowledge is power—what can be said about those who use knowledge to help implement and defend the plans and schemes of people who are continually seeking to gain advantage over others or to avoid responsibility for their actions? Even more morally problematic are those who know the face of evil and work to advance its ends.¹⁹⁹

197. Stephen Harlin, *Physician Protest and The Hippocratic Oath*, N.Y. TIMES, June 15, 1996, at A14.

198. In both Christianity and Buddhism, there has long been a split between those who seek enlightenment by retreat from the world and those who feel that the depths of understanding and compassion are to be found in the struggle to improve the world. In Buddhism, the *bodhisattva*, or one who had attained enlightenment, is honored because even though it was now possible to leave the earthly turmoil behind, the person rejected that path and remained on earth in order to offer the chance for enlightenment to others. Throughout our history we find this thread that seeks to reject the physical and emotional realities of humans and proclaim that perfection required the repression of the biological characteristics.

199. Laws create and allocate legal and political benefits and responsibilities. Lobbyists are expert in attempting to obtain allocations that benefit their clients. Ironically, that quest to shape the laws on behalf of their clients' "general interests" may frequently violate Canon 8, which states that lawyers should pursue reform and justice in the legal system—including the legislative—even if

The tired wisdom and knowledge of the lawyer is not acquired for itself but to better serve the client. It is used to obtain advantages.²⁰⁰ The advocate who does not use this greater knowledge to manipulate people to achieve the client's goals is a dishonest advocate and an oath-breaker. This starkly worded description of the lawyer's obligation strikes me as somewhat chilling, but I remain convinced it is an honest statement of what we are responsible for doing on behalf of our clients. Its implications are clear, however, in terms of the potential consequences on those who engage in such behavior.

One price lawyers pay is that people implicitly fear and resent those who have knowledge greater than they themselves possess. Martin Mayer tells us that "[m]uch of the unpopularity of the lawyer simply reflects his proprietorship of a mystery—all professions, as Bernard Shaw once put it, are conspiracies against the layman, and are perceived as such."²⁰¹ When that knowledge is one of power, such as is possessed and wielded by lawyers, the resentment is greatly heightened. Just as the tax collector is feared and ridiculed because of the power wielded over our fates, the lawyer has become the equivalent of the bogeyman in a system that has shifted from a society based on the rule of law—at least for some—to one dominated by technical and intrusive laws governing virtually every sphere of our activity. The contempt for lawyers and the barbed humor that has grown exponentially are the equivalent of people whistling in the dark to keep their spirits up and fend off the lawyers.

The impacts of being a lawyer are also increased because new lawyers are not adequately mentored in the practice of law. Many employers and institutions have incentives to keep the truth of law practice masked until it is too late for new lawyers to alter the terms of their bargain. One result can be a gradual "erosion of the spirit" Susan Davis describes as "burnout" of the kind many lawyers are experiencing.²⁰²

the general interests and desires of their clients conflict. If a lawyer advocating for "tort reform" designed to cap their clients' financial risks were challenged for activity that arguably advanced a client's interests but was demonstrably unfair by under-compensating numerous injured parties, the entire legal world would be amazed and bemused.

200. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); see also Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM L. REV. 116 (1990) (book review).

201. MAYER, *supra* note 11.

202. Susan Davis, *Burnout*, AM. HEALTH, Dec. 1994, at 48. See also Cary Cherniss, *Job Burnout: Growing Worry for Workers, Bosses*, U.S. NEWS & WORLD REP., Feb. 18, 1980, at 71 (relating impact of finding out one's ideals and commitment to helping others were at odds with the reality of clients' behavior).

True burnout doesn't occur suddenly, as the result of trauma or short-term deadlines, and it doesn't disappear after a good night's sleep. Rather, it's a chronic condition, what one researcher has called "a general erosion of the spirit," that can have severe consequences: loss of enthusiasm for work or family, trouble concentrating, reduced creativity, depression, alienation, even paranoia or psychosis. Burned-out workers may lose all sense of meaning in their lives and begin drinking or using drugs. Marriages suffer and careers erode.²⁰³

Although they are in an impossible situation, responsible criminal defense lawyers have my eternal respect. They are on the front lines of the conflict between state power, community indignation, and ensuring governmental power is held to some standard of accountability.²⁰⁴ After a decade of handling criminal cases I reached the end of my willingness to work in criminal defense. A public defender asked me to help defend an individual I became convinced was guilty of repeatedly sodomizing a young boy before inflicting more than 60 knife wounds and stabbing him to death. It does no disrespect to the vital social task performed by criminal defense attorneys to recognize that I had given up as much of my humanity as I could afford. The need to cope with human evil and to check the power of the state was never more obvious than in reaction to a recent report relating how the defendant married his former girlfriend, planning to make her pregnant, allow her a period of time to fully bond with their child, and then murder the infant in revenge for his wife not having cut short a 1996 cruise when the defendant's father had died. He waited till seven months after his son was born, and then smothered him to death with plastic wrap to simulate Sudden Infant Death Syndrome (SIDS).²⁰⁵

Unfortunately, the nature of the clientele and the opposition tends to erode defense lawyers, and the overall quality of service is often inadequate due to lack of resources. Consider, for example, the resources available to the public defender in the "Chicago teen" case in which the defendant was in school several miles away from the site of the killing when the crime was committed, and still remained in jail for two years. His defense lawyer had 25 cases at any one time, with 12 of them murder

203. Davis, *supra* note 202, at 51.

204. See Robinson, *supra* note 71. See also, e.g., Marcia Coyle, *Suit: Death Defense is a Sham: Claim in Fla. Provides Lawyers But Makes It So They Can't Save Inmates*, NAT'L L.J., Dec. 21, 1998, at A1.

205. See Cops: *Man Fathered Baby To Kill It*, N.Y. TIMES, June 28, 1999, at A1.

defenses where prosecutors were asking for the death penalty. There was a single investigator who was shared with four other lawyers with similar caseloads.²⁰⁶ As someone who has done a considerable amount of litigation, I strongly assert it is *impossible* to do a *competent*, much less *zealous* job in that situation. Compare this with the level of assistance for death row inmates in Florida who are appealing their convictions, a system described as a sham.²⁰⁷

There are many instances in which lawyers do very good things and protect helpless people against injustices in a fully real sense. Rectification of injustice, as well as its prevention, are critical elements of this professional mission. Priscilla Read Chenoweth obtained the release of a man wrongly convicted of murder after establishing that he wasn't even near the scene of the crime at the time of the killing.²⁰⁸ In arguing for the morality of the oath-based legitimacy of all responsible advocates I am not proposing that all types of practice are the same. Although the responsible advocate is fully principled in representing tobacco and asbestos companies that covered up knowledge of the dangers of their products and lied repeatedly, or murderers, toxic waste dumpers, defrauders, that doesn't mean such cases don't have significant moral and psychological impacts on the lawyers.

Being principled and acting in a legitimate professional manner in the service of ends and dispute resolution processes that can be demonstrated to be in the ultimate interest of our society still does not insulate a lawyer from the effects of helping clients whose behavior harms innocent people. Many attorneys who reach the end of their ability to cope with advancing the interests of clients whose actions have or will harm others nonetheless lack viable escape options. They are forced to continue to a point far beyond where they are able to deal with the demands of practice. Even with the principled defenses created by the advocacy role, and our true commitment to the client, we still cannot escape the reality of ourselves and the hypocrisy of the system we serve. This produces emotional and moral crises generated by the inner dissonance we experience in our souls. This dissonance often results in emotional and moral ailments that include job-related depression, professional burnout, drug

206. See Robinson, *supra* note 71.

207. See Coyle, *supra* note 204.

208. See Kevin Flynn, *Lawyer's Crusade Ends in Man's Liberation From Prison*, N.Y. TIMES, Oct. 23, 1998, at B4.

and alcohol addictions, and the loss of ideals and sense of personal significance and meaning.²⁰⁹

Such symptoms are commonly thought of as aberrant. But what if many of the symptoms of emotional trauma, stress, inadequate performance, ambiguous and confused ethical behavior and the like are natural consequences of law practice that inevitably come to a far too significant number of those who practice law? And what if they are even most intensely felt by lawyers who are among the most moral and sensitive members of the legal profession? It might be useful to think about such phenomena as a variety of battle fatigue or post-traumatic stress syndrome. Certainly this pattern has been identified by researchers in other professions who have found the more idealistic and caring people to be those most vulnerable to burnout and cynicism.²¹⁰

D. *"Burnout" Through the Impact of Intellectual and Moral Ambiguity*

One result of a life spent confronting or ignoring difficult moral dilemmas and using the "dark skills"—many of which involve choices between two or more bads of various intensity rather than between obviously good and evil alternatives—is that the cumulative pressure of the experience alters the nature of who we are. The effects take many forms. Some are manifested in lawyers' emotional states, their values, and in how they deal with the world. Since lawyers have never been trained to understand the moral implications of what they do, but still possess an intuitive moral sense of the limits of right and wrong, the tension undermines the spiritual strength of many who practice law. They become trapped in a confused environment in which their actions and principles are in conflict in ways that can never be made harmonious. One report concluded, for example, that lawyers were the most emotionally depressed group among those studied—reasoning that the poor emotional health of many lawyers, "might be the result of operating in moral ambiguity. They

209. See Goldberg, *supra* note 38. See also MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 5 (1994). A comprehensive analysis of the impact of law practice on lawyers is found in Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1995-96).

210. See Ferguson, *supra* note 140, at 122 ("The people most likely to burn out are those who start their careers or jobs filled with idealism and enthusiasm. Most vulnerable are those men and women who spend a large part of their time dealing with other people, whether they are subordinates, clients, customers or patients.").

might be representing positions they may not like or believe in."²¹¹

A fascinating aspect of this observation about the effects of law practice is that the reasons given for the depressed emotional state of numerous lawyers—functioning in a climate of moral ambiguity, and representing people or positions with which the lawyer might not be in agreement—merely restate the intrinsic, morally ambiguous essence of a major part of law practice.²¹² Ambiguity is everywhere for the lawyer.²¹³ It is present in the very fabric of the law.²¹⁴ It exists in the advocate's rhetorical

211. *Excerpts: The Betrayal of the Legal Profession*, NAT'L L.J., Feb. 28, 1994, at 36 [hereinafter *Betrayal*] (discussing SOL LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994)). It isn't only the law where ambiguity is found. Briggs and Bernal offer a context by writing:

Tom Peters, business management's answer to Indiana Jones, has characterized capitalism and democracy in society as 'messy' and says that anyone not perpetually confused about ethical issues is out of touch with the richness of the world. From ancient times forward, one way—perhaps the only way—out of this behavioral temple of doom is the study of ethics.

Briggs & Bernal, *supra* note 138.

212. Service to another can, and often does, exact a heavy price. It has been described as the price of conflict between personal values and a client's interests.

[F]ew attorneys admit to what is for many of them an equally important source of discontent: hypocrisy. The hypocrites are the lawyers in the elite firms who think of themselves as liberals. Not surprisingly, these lawyers use their lavish salaries to make sizable donations to various left-of-center groups, such as the American Civil Liberties Union, the National Organization for Women and the environmentalist organization Greenpeace. But how do these self-described liberals get the huge salaries from which the huge contributions are made? They defend oil shippers whose spills have poisoned pristine ecosystems, companies that like to keep the 'girls' below the glass ceiling, and school districts that dismiss gay, lesbian or HIV-positive teachers. However 'neutral' most firms' work may be, sooner or later 'liberal' lawyers learn not to think twice about representing clients whom they consider politically incorrect. I even know a lawyer who has, in a single day, written a brief opposing a suit by the Natural Resources Defense Council, and then gone home to renew his NRDC membership."

Lyskowski, *supra* note 24, at A19.

213. See MCLUHAN, *supra* note 23, at 276 (quoting Ruth N. Anshen as saying, "For man is that being on earth who does not *have* language. Man is language.") (emphasis added).

214. For lawyers, however, it is important we understand the kinds of language which come to define us. Civil lawyer Rene David observes that "English law (common law) is not an educating or moralizing law, but an esoteric, technician's law." RENE DAVID, *FRENCH LAW: ITS STRUCTURES, SOURCES AND METHODOLOGY* 76 (Michael Kindred trans., 1972).

need to persuade judge, jury, and opponent. Ambiguity is contained within the fundamental concepts of the American legal system—including due process, reasonableness, mens rea and intent, as well as the terms used in many other basic doctrinal categories. The shadow of ambiguity penetrates and infiltrates most of what lawyers do, and is an inescapable aspect of law practice. When we become immersed in a culture of ambiguity, many of us lose the ability to draw clear moral lines of right and wrong.²¹⁵

Part of the ambiguity results from the fact that our most important legal terms are open-textured and malleable. They offer the ambiguous frameworks within which lawyers think and work. They shape lawyers' minds and modes of perception. The elasticity and plasticity of our legal language is both a strength and weakness. Since our very language is plastic, it should not be surprising that the best lawyers are those most adept at manipulation of the inherent ambiguities—on the one hand muttering incantations that produce a sense of solidity when it is in our clients' interests, and on the other expanding the uncertainty and situational ambiguity when it is not. The expectation that the entire American society will be able to agree on specific outcomes and directions as a matter of shared rational principles derived from a common set of values ignores that we hold very different beliefs based on our individual points of departure premised on our distinct systems of valuation. Sometimes it is better to know our limits—just as Justice Blackmun observed in *Roe v. Wade* when he deliberately avoided the question of judicially determining when human life begins, stating: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer."²¹⁶

I argue that the conflicted state in which ambiguity thrives is an inevitable, appropriate, and morally dissonant state that nonetheless captures the essence of being a lawyer. The dilemma was captured in Jesus' admonition: "Render unto Caesar what is Caesar's and to God what is God's." The problem is that Caesar and God don't always agree as to the appropriate allocation and entitlements, and "Caesar's" rewards and punishments tend to be

215. Roger Cramton captured the effects of the legal method in his classic essay, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978). See also Lawrence M. Friedman, AMERICAN LAW 257 (1984) ("The legal system is a structure. It has shape and form. It lasts. It is visible. It sets up fields of force. It affects ways of thinking.").

216. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

much more obvious and immediate. Our lives are filled with fundamental conflicts based on obligations owed to different centers of power, loyalty, and values. This necessarily results in our developing compartments of valuation within ourselves in order to tolerate the inconsistencies and incommensurate categories of behavior.

But to the extent that it requires us to separate into a variety of selves spread across our categories of important activities and belief, there will be some overlapping and leakage between the compartments. This creates an emotional dissonance that results in various degrees of stress because some part of us intuitively understands at least some of the inconsistencies and hypocrisy involved in the process. I want to emphasize that we are dealing with multiple compartments that are not only tied to the personal and professional selves, but operate according to inconsistent clusters of values and types of action according to their degrees of importance to us.²¹⁷

The error is on the part of those who want a neat and simple moral system worked out on a coherent and fully rational level. They need the comfort of a system without contradictions, but that simply isn't found in the real world. One of the most difficult aspects of legal analysis that troubles new law students involves the tension and complexity of dealing with the intellectual ambiguity that characterizes legal thought. But for the lawyer that is only the beginning, and perhaps the easiest part of the process.

One critic argued that the hypocrisy inherent in advocacy was a cause of the legal profession's morally ambiguous professional culture. He suggested that the source of lawyers' dissatisfaction with their job was that, "seeing shades of gray may signify intellectual maturity, but it's also somehow impoverishing."²¹⁸ I am uncertain as to whether impoverishing is the correct word because in some ways the experience is empowering. But there is no question that a life lived in that fashion is sufficiently powerful to alter who we are. Too much direct experience in the darkness of the human soul—and helping others avoid responsibility for the consequences of their actions or to gain advantages from others—may produce a kind of tired wisdom, but also destroys much of our innocence and idealism.²¹⁹

217. See ROLLO MAY, *MAN'S SEARCH FOR HIMSELF* 46 (1953) ("This compartmentalization of values and goals leads very quickly to an undermining of the unity of the personality, and the person, in 'pieces' within as well as without, does not know which way to go.").

218. Lyskowski, *supra* note 24, at A19.

219. See *id.*:

Kevin Lyskowski quotes a young lawyer as saying, "I wish I could still commit to an idea or cause with abandon; often I feel I've lost what made my life meaningful."²²⁰ But Lyskowski describes part of our dilemma. We prefer to think of virtue or goodness in terms of actions that create what might be called unilateral positive benefits in which everyone is pleased and lives "happily ever after." But when a lawyer functions as an advocate, someone or some aspect of the social system is harmed or significantly distressed through the outcome. Others are helped. As advocates we engage in corrective and allocative actions between people and human institutions in which we win or lose our clients' rights, freedom, money, piece of "the pie," power. It is very much a kind of "invisible hand" situation that to a significant degree must be taken on faith, while the worst abuses are identified and mitigated through the system's regulatory mechanisms, legal doctrines of accountability, and legislative fiats. Most of these mechanisms are inadequate in holding the legal profession up to any responsible level of accountability.

VII. IS BEING A PRINCIPLED LAWYER AN IMPOSSIBLE DREAM? THE FLIGHT FROM FREEDOM AND RESPONSIBILITY

At the end of one millenium and the start of another, we have lost our ideals and substituted base material and illusions. When clearly and powerfully articulated, our most central moral principles reflect ideals of the kind we need to keep our society intact. Daniel Boorstin brings this forth.

"Ideals are like stars," observed Carl Schurz on April 18, 1859, the anniversary eve of Lexington and Concord; "you will not succeed in touching them with your hands. But like the seafaring man on the desert of waters, you choose them as your guides, and following them will reach your destiny."²²¹

Few lawyers are so candid; most deny any paradox exists. Almost every law firm liberal claims there's no conflict between his conscience and career because of the "role of the lawyer": At work, a lawyer must simply represent his client (bad actor or not) and not his conscience. Only at home can a lawyer put his conscience first: At home, he's acting on his own behalf, not his client's. Law firm liberals must stop drawing this non-existent line between their personal and professional selves and confusing schizophrenia with well-being.

But Lyskowski is wrong. The line does exist. It is not schizophrenic. But it does and should produce a degree of emotional discontent. My point is that a lawyer is not promised a "rose garden" and some problems of stress are completely proper in a healthy and moral person.

220. *Id.*

221. BOORSTIN, *supra* note 40, at 182.

Boorstin goes on to ask:

Have we been doomed to make our dreams into illusions?
 . . . An illusion . . . is an image we have mistaken for reality.
 We cannot reach for it, aspire to it, or be exhilarated by it;
 for we live in it. It is prosaic because we cannot see it is not
 fact.²²²

Given all the problems that characterize the legal profession and the intrinsic nature of law practice, is it possible for a lawyer to be a principled person and still practice law? The play, *Man of La Mancha*, contains a wonderful song of great power called *The Impossible Dream*. Its words project eloquent imagery of courage, purity, individuality, and selfless grace.

To dream the impossible dream. To fight the unbeatable
 foe. To bear the unbearable sorrow. To run where the
 brave dare not go. This is my quest. To follow that star.
 No matter how hopeless. No matter how far. To fight for
 the right. Without question or pause. To be willing to
 march into hell for that heavenly cause. And the world will
 be better for this. That one man, scorned and covered
 with scars. Still strove with his last ounce of courage. To
 reach the unreachable star.²²³

Compare this “impossible dream” with the life of the lawyer. The conflict between the competing systems of valuation involved in being a good person and a good lawyer is unavoidable. Nor is either system necessarily wrong from a moral perspective—as opposed to being different to the degree they are largely incompatible and in inevitable conflict. This occurs not only between the lawyer and the general value systems of society, but also within the lawyer. Achieving justice, defined narrowly as legal benefit, for one to whom the lawyer has accepted a deep obligation and responsibility can be virtuous and just in Aristotelian terms. But it is a form of real life virtue and justice that for many people feels darker and more troubling than the angelic or ideal virtue we normally associate with principled moral behavior. Aristotle defined practical wisdom in the following way: a “true and reasoned state of capacity to act with regard to the things that are good or bad for man.”²²⁴ Practical wisdom is Aristotle’s attempt to describe human abilities and knowledge applied to the earthly activities of people in political society rather than the ideal realm postulated by Plato’s Cave in which people mistook shadows for reality. Our approach to profes-

222. *Id.* at 239.

223. MITCH LEIGH, *MAN OF LA MANCHA: A MUSICAL PLAY* 49-50 (1966).

224. ARISTOTLE, *supra* note 151, at bk. 6, ch. 5.

sional responsibility has remained in the shadows because we have not examined ourselves and the masters we serve with a sufficient degree of honesty.

Aspirations and ideals can create standards toward which we strive and improve the quality of our actions, or they can represent unattainable expressions of overly grand ideas or values that are disconnected from the conditions they purport to reflect and influence. This is the situation I am arguing exists in the context of ideal professionalism and real professionalism—one in which the ideal bears virtually no relationship to the real—and therefore generates unproductive tangents, contempt, or cynicism—rather than a forward looking impetus for improvement.²²⁵

Shaffer describes how American culture was traditionally defined by religious principles and then asks:

I wonder if the reason biblical morality has been peripheral, in this interpersonal view of what American professional ethics is, is that the Bible speaks too clearly and too plainly. Maybe the reason biblical morality has been left out is that it is both insistent and unpleasant; it demands too much.²²⁶

Certainly it is fair to consider the fact that we have become increasingly embedded in the webs of powerful systems that either dictate our principles or punish us for even visibly possessing principles that conflict with their own desires. The myth of the strong and principled individual standing up heroically against a corrupt society carries extremely slight weight in an American society that has many idols and celebrities and virtually no heroes. The conditions that now surround us contradict centuries of development in which we attempted to define the terms of an evolving human species. John Gardner captured an important aspect of the situation:

Our tradition tells us that we should be individuals, initiators, and creators, free and responsible. It tells us that every person is important. But the trend . . . transforms individualists into specialist-links in larger systems, locked into their roles, increasingly incapable of autonomous functioning.

. . . .

225. See CAMUS, *supra* note 124, at 302-03 (observing the frustrating limits on what we can really accomplish in solving the ills of the world, contrasted with the scale of the challenges we want to overcome).

226. SHAFFER, *supra* note 15, at 61.

. . . The conflict between that harsh reality and our tradition of individual freedom and responsibility is severe and growing worse.²²⁷

Contrast Don Quixote's "impossible dream" and Camus' recognition of human limits with Abraham Maslow's description of the human dilemma as struggling under the burden of simultaneously being "worms and gods" where we are frustrated by the knowledge that we are capable of reaching the greatest heights and most sordid depths of human behavior.²²⁸ Compare the impossible dream of striving to be a more highly evolved being reaching toward perfection, with the chained and highly ordered life most lawyers and other professionals confront after years of law school or other professional education.

The farther we move through our society's educational institutions the wider the gap between ideal and real becomes, and the more obvious it is that we are caught up in a process of falling from grace rather than one in which we are evolving into more enlightened and "godlike" beings. As we begin law school and enter the legal profession, for example, powerful institutions immediately begin to shape and direct our actions in ways both overt and subtle. The institutional "hands" that mold the clay of our being use the power of ambition, status, fear, and economics.

Lawyers are not uniquely the objects of this process that makes a mockery of individual growth and development. Numerous social philosophers have lamented what they perceive as an emptiness at the heart of humanity, arguing that it is caused in part by the enormous power, complexity, and contradictory forces of modern society.²²⁹ Walter Lippmann tells us that modern men "are, as Karl Jaspers says, men dissolved into "an anonymous mass" because they are "without an authentic world, without provenance or roots," without, that is to say, belief and faith that they can live by."²³⁰ In two classic and prescient works, *The Technological Society* and *Propaganda*, Jacques Ellul warned of an inexorable movement toward technique—even to the level that we have created a "technological society" that molds human behavior and results in a progressive loss of our

227. JOHN W. GARDNER, *THE RECOVERY OF CONFIDENCE* 44-45 (1970).

228. MASLOW, *supra* note 33.

229. See BUBER, *supra* note 42, at 158. The power and scale of institutional structures is part of the economic technique, which Jacques Ellul describes as shaping modern society. See ELLUL, *supra* note 44, at 180 ("propaganda seeks to induce action, adherence, and participation—with as little thought as possible").

230. WALTER LIPPMANN, *ESSAYS IN THE PUBLIC PHILOSOPHY* 87 (1956).

humanity.²³¹ Albert Schweitzer described the rise of institutional control over our lives as one of the most critical challenges humans have faced, suggesting that, while institutions have always played such controlling and defining roles, the sheer magnitude of what we are now experiencing has resulted in a unique change:

About the struggle which must needs ensue no historical analogy can tell us much. The past has, no doubt, seen the struggle of the free-thinking individual against the fettered spirit of a whole society, but the problem has never presented itself on the scale on which it does today, because the fettering of the collective spirit as it is fettered today by modern organizations, modern unreflectiveness, and modern popular passions, is a phenomenon without precedent in history.²³²

Confronted by complexity and power beyond imagining, and feeling completely incapable of individually mastering the world, the person seeks refuge in powerful institutions that offer a kind of security and legitimation.²³³ But, for many, institutional control and the loss of free choice of the kind we have been raised to consider an essential element of human development generate fundamental and irresolvable tensions of suffi-

231. ELLUL, *supra* note 44, at 132:

Technique is of necessity, and as compensation, our universal language. It is the fruit of specialization. But this very specialization prevents mutual understanding. Everyone today has his own professional jargon, modes of thought, and peculiar perception of the world. . . . The man of today is no longer able to understand his neighbor because his profession is his whole life, and the technical specialization of this life has bound him to live in a closed universe.

232. ERICH FROMM, *THE SANE SOCIETY* 201, 202 (1955).

233. A fascinating possibility in regard to the inhumanity of the globalized economy where there is no longer any real security for anyone, is that we may already be seeing a counter revolution in terms of people awakening to their own responsibility. See, e.g., Teresa Dixon Murray, *Many Workers Have Lost Trust as Firms Close Unexpectedly: Corporate Loyalty is Replaced by Corporate Suspicion, Distrust*, CLEVELAND PLAIN DEALER, July 11, 1999, at 1D. In a situation in which the Builder's Square Company enticed employees to stay on the job during reorganization by promising benefits and severance pay, the company reneged on its promise and declared bankruptcy while leaving the workers unpaid and bitter. "Tales of corporate betrayal like the Builders Square shutdown have had a ripple effect on all companies, fueling greater cynicism among a work force that already distrusts employers who seem capable of any degree of ruthlessness or inhumanity, as long as the bottom line is protected." *Id.* Even if we want the security and ignorance of comfortable institutions to act as our "mothers" for life, they basically have disappeared in the modern world. How we are going to adapt to the loss of institutional security is still an open question.

cient intensity to result in what has been called an “existential vacuum”:

[T]he individual ceases to be himself; he adopts entirely the kind of personality offered to him by cultural patterns; and he therefore becomes exactly as all others are and as they expect him to be. The discrepancy between “I” and the world disappears and with it the conscious fear of aloneness and powerlessness.²³⁴

Fromm continues: “The person who gives up his individual self and becomes an automaton, identical with millions of other automatons around him, need not feel alone and anxious any more. But the price he pays, however, is high; it is the loss of his self.”²³⁵

I argue that much of the problem with the professionalism and principles of lawyers derives from such conditions. The existential vacuum is created when the principles we have been taught to honor—or which we know intuitively—are very different from those we are required to apply in our lives. Ironically, tragically, this contradiction between ideal and reality may be significantly lessened in a society—such as now exists in America—that has so blurred, trivialized, and ignored traditional principles and ideals that most of its members no longer even possess the conceptual vocabulary that allows them to be consciously aware of the issues. One rather base solution to values-grounded conflicts is simply to avoid the unpleasant confrontation by redefining and discarding the troubling values, and this has happened on many levels throughout the United States.

Hannah Arendt reminds us, however, of the importance of the conceptual language of principle, and given the rapid decline in our secondary and university systems’ interest in teaching concerns of value, it may well be that teachers who were trained only a few decades ago find themselves operating according to a set of beliefs that are not in any way shared by current students and recent graduates—and in a way far beyond what can be explained away by the old idea of a generation gap.²³⁶ When an idealized system of asserted human values or character traits has very little to do with the obligations that we accept, the cultural reality we inhabit, and the actions we take to fulfill our

234. FROMM, *supra* note 232, at 208-09.

235. *Id.* at 209.

236. See HANNAH ARENDT, *THE LIFE OF THE MIND* Vol. 1, 5 (M. McCarthy ed., 1978) (“Could the activity of thinking as such . . . be among the conditions that make men abstain from evil-doing or even actually ‘condition’ them against it?”).

responsibilities, the result is a state of either moral dissonance, hypocrisy, or simply a blind emptiness.

Our economic system has become almost wholly dependent on the continuous expansion of material desires and human insecurity in order to drive economic activity. Overweight, imperfect, in need of artificial breasts so you will be "attractive," neurotic, hyperactive?—nearly all are market phenomena that both create and prey on our insecurity. When we speak of deception we should step back and understand that deception in one form or another has become the defining characteristic of our culture. The irony may well be—even though I have no empirical basis—that lawyers as a group might be more honest than the overall society. Lawyers have a code of behavior, albeit weak. Lawyers know that at some point promises count. For too many people there has been a fading of integrity and honesty with the result being that everything is seen as fluid and negotiable regardless of any exchange of promises.

As to where we people of the end of the twentieth century fit in this process, Paul Tournier offers a description:

[People] have become merely cogs in the machine of production, tools, functions. All that matters is what they do, not what they think or feel. In any case their thoughts and feelings are similarly moulded by propaganda, press, cinema and radio. They read the same newspaper each day, hear the same slogans, see the same advertisements.²³⁷

Jules Henry made a similar distinction between "drives" and "values," when he wrote that "[o]urs is a driven culture. It is driven on by its achievement, competitive, profit, and mobility drives, and by the drives for security and a higher standard of living."²³⁸ "If you are propelled by drives, the culture offers innumerable opportunities for you; but if you are moved mostly by values, you really have to search, and if you do find a job in which you can live by values, the pay and the prestige are usually low."²³⁹ "Values are merely ideas about good human relations, and though they do give people direction, they lack the compelling power of drives because they do not have institutional support."²⁴⁰

At the end of the twentieth century the ideal of the courageous principled individual seeking self-actualization and full

237. PAUL TOURNIER, *THE MEANING OF PERSONS* 40 (Edward Hudson trans., 1957).

238. HENRY, *supra* note 9, at 13.

239. *Id.* at 14.

240. *Id.* at 15.

knowledge seems to be an increasingly false ideal—at least as measured by how we behave and what we value. As with most false ideals, we pretend to aspire to such a state because it somehow makes us feel more satisfied with being human. But offered the choice of freedom to pursue a life of principle, we run from it because we intuitively understand its dangers and perhaps even its impossibility. Maxine Greene tells us that, although our ideals would cause us to think it is important to pursue the goal of operating as a “man of principle,” she warned that any person who attained this level of clarity in thought, values, and action would be tragically estranged from other humans who would not be able to cope with the person’s qualities and who were threatened by the contrast between themselves and this “higher being.”²⁴¹ The most poignant sadness in the loss of nearly any deep principle in the last part of the twentieth century is that our response has been to substitute the “man of celebrity” as our cultural icon and to worship at the empty altar of name recognition rather than moral quality.

Ideals are aspirational targets that play roles in shaping personal and societal behavior, both by telling us what is prohibited and by pulling us toward desirable actions.²⁴² Nonetheless, if an ideal is false or impossible to attain even as an approximation, it will produce conflict and cynicism, or invoke scorn which, unlike the somewhat out-of-touch Don Quixote, many lack the courage to withstand.²⁴³ An illusory ideal is a cynical device that attempts to allow us both our “cake” of being as we wish and our “dessert” of self-deception.

In many areas of life—and being a lawyer is one of these—a moral system is needed that more fully and honestly incorporates the conditions of human reality, rather than offering a pretty facade erected on a foundation of sand that presents no legitimate standards to guide our decisions. We haven’t sought to develop a real system of professionalism and professional morality because the process and knowledge we would necessarily develop is likely to force us to face aspects of ourselves with which we feel uncomfortable. Greater honesty would impair our well-developed ability to rationalize what we do. While we therefore lament the decline of professionalism, the truth may simply be that most people want little more than to be given direction and

241. See GREENE, *supra* note 26.

242. The Golden Rule and Ten Commandments offer simple examples of principled rules that are aimed at encouraging positive behavior (the Golden Rule), and ones intended to block dangerous behavior of the kind capable of undermining a community (the Ten Commandments).

243. See LEIGH, *supra* note 223.

be cogs in the machine. New lawyers fill this role in the machinery of their employers, whether private or public. I don't know what we in the legal profession can do to change these conditions, but without a change in the use of institutional power and behavior, the rhetoric of independent professionalism based on the strength of character and values of the individual lawyer rings hollow.

In understanding just how difficult a meaningful return to real values and deep professionalism will be, consider, for example, the following observation:

Most people do the job they have to do regardless of what they want to do; technological drivenness has inexorable requirements, and the average man or woman either meets them or does not work. With a backward glance at the job-dreams of his pre-“labor force” days the young worker enters the occupational system not where he would, but where he can; and his job-dream, so often an expression of his dearest self, is pushed down with all his other unmet needs to churn among them for the rest of his life.²⁴⁴

Nor is the power of institutions to mold us to their needs something to be taken lightly.²⁴⁵ That power over an employee's will has grown dramatically over the past two decades. Consider that for a Harvard Law School student, annual costs are estimated to be in excess of \$40,000 per year. Many students graduate Harvard owing over \$100,000 in principal plus accumulated interest of \$10-15,000. Even public law schools regularly see students graduating who enter the profession more than \$60,000 in debt. This enormous debt load forecloses public interest options for many new lawyers, and causes them to be extremely dependent on their employer's goodwill. The situation goes beyond the graduates' debt load.

For even the most idealistic (or wealthy) graduates there are problems with the reality of the professional experience in contrast with what they anticipated the life of the professional to involve. Cary Cherniss explains:

People who go into the professions, research has shown, are often motivated by a strong need for autonomy. And they go into a particular field because they think they will be able to call their own tune. But increasingly, professionals work in either public or private organizations where

244. HENRY, *supra* note 9, at 25

245. *See supra* note 172.

they don't have that much control over their own destinies.²⁴⁶

The idea of having "control over their own destinies" must seem laughable to associates who describe the conditions of large firm practice as involving "groveling at the feet of clients and senior partners."²⁴⁷ Former Yale President Kingman Brewster once described the lawyer in the following words: "The lawyer is not going about his own affairs: he is on a mission for someone else. Of all mankind, he is the most removed from being 'that happiest figure in the law, a servant on a frolic of his own.'"²⁴⁸

Compare the great power through which our large organizations shape the people who operate within them with J. K. Krishnamurti's description of the ideal function of education:

[S]hould not education help you to find out what you really love to do so that from the beginning to the end of your life you are working at something which you feel is worth while and which for you has deep significance? Otherwise, for the rest of your days, you will be miserable. Not knowing what you really want to do, your mind falls into a routine in which there is only boredom, decay and death.²⁴⁹

Alan Watts warns that in the epoch of Nietzsche's "God is dead" we have discovered no comparable substitute to guide us, stating: "Once there is the suspicion that a religion is a myth, its power is gone. It may be necessary for man to have a myth, but he cannot self-consciously prescribe one as he can mix a pill for a headache."²⁵⁰ Watts goes on to conclude:

Consequently our age is one of frustration, anxiety, agitation, and addiction to "dope." Somehow we must grab what we can while we can, and drown out the realization that the whole thing is futile and meaningless. This "dope" we call our high standard of living, a violent and complex stimulation of the senses, which makes them progressively less sensitive and thus in need of more violent stimulation.²⁵¹

Watts continues: "To keep up with this 'standard' most of us are willing to put up with lives that consist largely in doing jobs

246. Cherniss, *supra* note 202, at 71. Compare this with Maslow's listing of the characteristics of the healthy human, *see supra* note 33.

247. *Betrayal*, *supra* note 211, at 36.

248. MAYER, *supra* note 11, at 16.

249. KRISHNAMURTI, *supra* note 109, at 16.

250. ALAN WATTS, *THE WISDOM OF INSECURITY* 19 (1951).

251. *Id.* at 21.

that are a bore, earning the means to seek relief from the tedium by intervals of hectic and expensive pleasure."²⁵²

CONCLUSION

Gaining a full understanding of the limits and nature of principled professionalism is difficult because we—academics, lawyers, and judges—are in a state of denial or disingenuous ignorance concerning the intrinsic nature of much of law practice. This situation is caused partly because the truth is more than we feel comfortable facing, and partly because maintaining the deceptive hypocrisy of what we prefer to think of as a just and fair legal system is an integral aspect of preserving our democracy. Too much truth can be destructive—both of legitimate and illegitimate interests. Selective ignorance allows us to rationalize our behavior in ways that protect our self-concept and preserve critical ego defenses. This ensures that the image we see in our subjective mirrors—of self and system—reflects the one we want to see.

A substantive reconceptualization of the lawyer and legal profession will be particularly difficult to achieve because we need to alter how we typically think about ourselves. We will also need to concede we are considerably less noble than we like to envision. The tension between these seemingly lesser ideals and the more grand ideals (or myths) upon which many of our most basic human self-deceptions are grounded makes it extremely difficult to see the situation with a satisfying degree of clarity. Certainly I feel as if I am laboring to develop what is offered here—even to the limited extent I have been successful in explaining the concepts.

Am I ready at this point to say I fully understand the implications of the issues I am describing? Absolutely not. But if we do not come to terms with the nature and power of what we lawyers do and the limitations on what we can do for those we serve, then the legal profession will continue its steady degeneration into nothing more than a form of hyper-competitive economic activity with nothing other than the profit motive and power at its core. This is not an attack on the reasonable economic necessities of private law practice. It is an honest recognition of its impacts and the need to limit the more extreme effects of the drive for profit. It is also an affirmation of the need for a core of strong, non-economic principles around which to orient the legal profession.

A. *The Legal Profession as Part of the Solution?*

Those who seek to focus the reform of the legal profession on changes in the law schools' curricula and teaching methodologies have at best offered a strategy that will alter the profession only slightly and then only over a lengthy period. Regardless of what occurs, there are no quick fixes for what ails the legal profession. Even slowly paced solutions of any consequence are, however, extremely unlikely because of the power and intractability of the system into which new lawyers are sent.

The scale and institutional realities of the entrenched legal system and the interests its most influential participants serve—both in their private and public aspects—are simply too powerful and massive to be much affected by the thousands of neophyte lawyers the law schools send forth each year to be morally slaughtered. This inadequacy is exacerbated by the law schools' continuing failure to provide instruction of the kind that might prepare students for what they will confront in the profession. It is further ensured by the fact that law graduates are spread thinly across many positions of employment and cannot realistically achieve any critical mass. It is intensified by the competitive pressures in practice and graduates' need to prove themselves to employers to achieve advancement. Rather than launching crusades against the behaviors and values of those who have the ability to determine their long-term success or failure in their careers, the new lawyers are willingly—if not eagerly—drawn into the system.

The forces against change are so massive, pervasive, and virtually impenetrable that pretending that law schools can responsibly educate and send out humanistic and civil new graduates who will be able to successfully compete against, much less change the behavior of ruthless lawyers who are operating as aggressive and calculating advocates, will simply result in sending lambs to the slaughter house. It is therefore much more important to devise means for helping the mass of existing lawyers to become better and more professional advocates than it is to concentrate primarily on what law schools can do for current law students.

The effort to better prepare law students is not irrelevant, however, because law schools are likely to provide the organizational and institutional impetus for some positive change. But incremental improvement in the skills and values of existing lawyers should become one of the most important targets for the schools' efforts—one which law schools are currently ill-equipped to undertake. Nor should the difficulty of such a mis-

sion be understated. Such lawyers are not easy to influence. It takes little time for economics to affect what lawyers think and feel. Law practice is capable of producing cynicism and mistrust of both clients and opponents—as well as suspicion of judicial and other decision-makers—in a very brief span.

In theory, continuing legal education requirements for practicing lawyers were intended to play an important role in reforming the profession, but as most lawyers will admit, many of the CLE programs are very marginal and the professional responsibility requirements tend to be almost laughable. Part of the reason for the failure of CLE to reform the profession is, however, that the profession does not really want to change. Another reason is economic. CLE programs have become lucrative sources of revenue where the larger the number of lawyers attending the session and the fewer teachers required, the greater the profit. In nearly all instances, this ensures superficiality and limited impact on the participants. Such factors add greatly to the difficulty of changing the legal profession.

Bar disciplinary committees could do something about the most severe cases of lawyer inadequacy and excess. But the profession's disciplinary processes are simplistic, and self-protective. Lawyers do not want to sanction other lawyers unless the behavior is something close to felonious. Lawyers on the disciplinary boards are essentially sitting in judgment on themselves and are not going to treat other lawyers harshly when they know "there but for the grace of God, go I." Nor is the bar's formal discipline applied even-handedly. The misbehaviors of lawyers in the most powerful firms rarely are handled by bar disciplinary committees. But one of the greatest problems is that the system is incapable of dealing with the invisible behavior of lawyers operating within the "black box" of practice. This invisible behavior makes up well over ninety-nine percent of what lawyers do. There are rarely witnesses to the behavior since so much of it is omission and nuance. When it is witnessed by an opposing lawyer who benefits from or participates in the resulting unprofessional behavior, that lawyer is not going to come forward and complain about another lawyer's breach.

B. *The Judiciary as Part of the Solution?*

An important part of the answer to perceived problems of both excessive zealotry and inadequate quality of representation by lawyers lies in the hands of the judiciary. This responsibility is even more important in a chaotic and conflicting society of the kind we inhabit. The law schools can have some positive

impact through improving legal education about the profession and better preparing students in the skills needed to practice law. But this is an entirely inadequate strategy because there are already a million lawyers in the U. S. "Retrofitting" a million lawyers to become kinder and gentler is not a viable or realistic option.

Some frustrated efforts to improve the performance of lawyers have most recently come through judicial rule rather than disciplinary decision.²⁵³ In theory, judges can be the key to a higher level of lawyer professionalism, at least for those cases that are taken very far into the litigation process. But efforts by judges to regulate the invisible behaviors of lawyers by rules such as Rule 11 relating to sanctions for egregious activities, and now Rule 26 requiring voluntary disclosure in discovery, have ironically tended to increase the problems rather than cure them. In keeping with their "dark" nature, lawyers have learned to use the "reforms" as weapons in their litigation arsenals.²⁵⁴

Another obstacle to the judiciary playing a significant role in improving the behavior of lawyers is that riding lawyers is a labor-intensive and thankless task—one that judges understandably don't want to accept. To do it effectively would be expensive, requiring significantly more judges and other administrative resources to police the legal profession. Ultimately it might produce a quasi-Germanic model of the kind described by John Langbein in which the judge directs and conducts the factual inquiry.

This judicially-driven model would necessitate a dramatic shift in the processes of American law and practice, one unlikely to occur in part because of the dramatic nature of the change and also because it is out-of-sync with the American culture and character. We are such a contentious society of non-homogeneous and competitive high-stakes players—and lawyers are an even more concentrated group of contenders—that judges forced to cope with the disputes among lawyers would soon be candidates for institutionalization. The second obstacle to such reform is that very little of what lawyers do ever makes it into formal litigation to the extent that a court would be involved. If most of the real abuses occur in the invisible behavior that comprises virtu-

253. See Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POLICY 835 (1998); Craig Bradley, *The Rule of Law in an Unruly Age*, 71 IND. L.J. 949 (1996); Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479 (1995); Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589 (1998).

254. See Vairo, *supra* note 253.

ally all lawyers do, then the ability of judges to influence and supervise such behavior is almost nil.

Beyond the largely theoretical topic of what a reformed, empowered, and expanded judiciary could or should do, is the need to be honest about what judges most likely would do. There is, for example, an inherent conflict between the perspectives of most judges and those of zealous advocates representing unpopular causes. The American judiciary already has an enormous amount of discretionary power. Granting judges greater discretion than they currently possess creates a significantly increased opportunity for political abuse of that discretion. The image of a judicial bench filled with black-robed “philosopher-judges” bears little relationship to the reality of the judiciary. Too many judges simply want cases settled regardless of concerns of fairness and justice, and they don’t want to put up with unpleasant and “uncivil” lawyers in their courtrooms.

Another serious problem is judicial self-interest. On the state level, too many judges depend on lawyers’ contributions to their campaign funds. They aren’t going to come down very hard on lawyers who are capable of causing them serious political trouble within the relevant political party or who can deny them campaign financing and political support. Even federal judges tend to be people who have very carefully exploited the political patronage system to achieve favor with whatever political party happens to be in power. The fact of life tenure and somewhat higher credentials than are often found on the state level may buffer the political nature of the federal judiciary but should not cause us to forget the highly political way in which federal judges are selected.

The ability and willingness of judges to lead a real movement toward improving the legal profession is quite limited. The American judiciary represents an incestuous old-boy network, even with the addition of women to the bench. Judges are part of the system and not reformers, no matter what they profess. Nearly all judges depend on the support of political parties and have carefully worked their way through the party system to obtain support for initial candidacy and retention. They have also practiced law in the same manner as that which they would now have to sanction in order to create serious momentum to clean up the system. So even though judges have some legal power to manage the litigation process in ways that would improve the level of lawyers’ professionalism and performance, they generally find it far safer to lament the decline of professionalism in Law Day speeches than to confront the problem. I have always found it ironic to listen to both state and federal

judges attack the lack of competence of lawyers who appeared before them, and then ask how many of those incompetent lawyers those same judges referred to disciplinary committees.

C. *Law Schools' Contempt for the Legal Profession*

While I am not writing a direct critique of legal education, a few useful points can be made because law schools possess the ability to do much more to increase and deepen the awareness of aspirants to the legal profession concerning the trust they are accepting for another's fate.²⁵⁵ It might be hoped that the concerted energies and intellect of the more than 6,000 faculty who populate American law schools might somehow be productively brought to bear on helping improve the legal profession. This essay is not directly about what law schools can do to fulfill their higher responsibility in educating law students, but it is useful to remember management guru Peter Drucker's warning:

Education that does not strive for the "good man" is ignoble and cynical. Anyone as highly equipped with knowledge, with ability to learn, and with ability to do—and with income—as is the [modern] educated man . . . is equipped with so much power as to be a menace, if not a monster, unless he have virtue.²⁵⁶

Nothing in legal education prepares the prospective law graduate for the responsible use of power or the need for accountability. Indeed, people who can escape the pressures of being held accountable are happy to do so. The legal profes-

255. Law schools, however, tend to be populated with people who have contempt for the legal profession. The stress between the real and the ideal is a constant factor for those who would change the world. J.H. Hexter, writing about Thomas More and the decision whether to become a King's councilor or offer his insights from outside the seat of power, speaks to questions nearly every intellectual must address at some point.

In his moments of doubt and despair he [More] was but suffering the inevitable lot of the unattached intellectual innovator. Rarely can such men altogether free themselves from the persistent and ungentle ministrations of a *Doppelgänger*, who measures the state of things as the innovators envisage them against the state of things as they are, and notes the peculiar disparity between their ideal and a reality not perceptibly altered by the spate of words they have poured forth.

HEXTER, *supra* note 54 at 124.

256. DRUCKER, *supra* note 32, at 137. He adds: "Education is for somebody, not for something. The product of education is not knowledge or learning; it is not skills, ability or virtue, jobs or success, dollars or goods. It is always a person . . ." *Id.* But what kind of person is it realistic to expect will develop through the combination of the experiences, obligations, and culture of law practice?

sion's monitoring, disciplinary, and sanctioning institutions provide very little oversight and guidance for lawyers. Nor do they create the fear of apprehension and sanction that would be needed to make lawyers responsible actors from concern for their continuing ability to practice law if they fail to honor their obligation to their clients. This means that if we are to increase the chances of a responsible and principled use of power by lawyers, the profession and law schools must confront much more directly and vigorously the questions of how to educate aspiring lawyers to accept greater accountability, how to refashion legal institutions in ways that encourage greater accountability on the part of lawyers, and how to improve the quality of legal representation generally.²⁵⁷

The goal of producing the "good person" through education seems one worth pursuing, but there are serious problems with the ability and willingness of law faculty to make real contributions. One reason is that many faculty have sold out to the system. In an op-ed piece in the *Wall Street Journal*, Arthur Schlesinger described several functions served by intellectuals. They included servicing the controlling power system to help it advance its aims; becoming an "agent and apologist" for the system; becoming "irrelevant" by hiding away in the ivory tower of academia; or by engaging in "prophetic confrontation" through speaking "truth to power."²⁵⁸

The failure of law faculty to add some kind of positive virtue to the lives of lawyers is, however, further exacerbated by the fact that many law teachers have contempt for the practice of law and those who engage in it. The combination of many law professors' typically slight experience in actual private practice, and the desire not to have the "stuff" of practice intrude too greatly into the law schools, has created among many law faculty a contempt for law practice and for the work of lawyers. This means there is limited understanding and appreciation of the conditions of law

257. I discuss some of the options in the concluding sections of this essay, and have made some suggestions in other works. See David Barnhizer, *Of Rat Time and Terminators*, 45 J. LEGAL EDUC. 49 (1995).

258. Schlesinger, *supra* note 52. One problem may be caused by the perceived contrast between use of the mind in law practice and academia. Richard Hofstadter observes that "[i]n most professions intellect may help, but intelligence will serve well enough without it." RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 26 (1970). He continues: "The work of lawyers . . . though vitally dependent upon ideas, is not distinctively intellectual. . . . The heart of the matter . . . is that the professional man lives off ideas, not for them. His professional role, his professional skills, do not make him an intellectual. He is a mental worker, a technician." *Id.*

practice and has too often led to the belittlement of the functions and importance of law practice and lawyers.²⁵⁹

The importance of understanding this situation is that pronouncements on professional morality and ethics delivered from the dizzying heights of academia by refugees who have fled the world of law practice tend to lack a sufficiently strong connection with reality to be either accurate or useful. While law schools have become the “gateway” to the legal profession for a million graduates, practicing lawyers have been left with an inherently contradictory system of beliefs and internally inconsistent moral systems. Part of their confused belief system requires them to commit their lives to the service of interests whose behaviors and goals are ones with which they often may not agree. Another part requires them to be subtly ashamed of the actions they must take to serve those interests.

Rather than help lawyers who are caught in a conflicted moral state to more fully understand the terms and consequences of their neo-Faustian bargain, neither legal scholars nor the intellectual leaders of the organized legal profession have ever come to grips with the reality of law practice.²⁶⁰ The scholars have not adequately grappled with the reality and morality of law practice because they intuitively perceive the lawyer’s reality as “dirty” and don’t want to be tainted by the knowledge. The organized legal profession has avoided honest treatment of the nature and consequences of ordinary law practice because the truth is more than it wants to admit, either to itself or the public.

The desire to avoid such knowledge and not be responsible for taking the actions required to deal with intense human disputes explains a phenomenon such as religious monasticism and other “retreat from the world” strategies. We are unquestionably living in a world that increasingly overwhelms us. The connecting values of community have largely evaporated to the extent that, as described by Daniel Boorstin: “Perhaps what ails us is not so much a vice as a “nothingness.” . . . What is remarkable is not only that we manage to fill experience with so much emptiness, but that we manage to give the emptiness such appealing variety.”²⁶¹ This world is so amorally harsh that many seek academia—the modern equivalent of the cloistered life—in an attempt to shut out the world and insulate themselves against the effects of its “impurities.”

259. See MAYER, *supra* note 11, at 118.

260. David Riesman’s observation, though almost 35 years old, still carries considerable force. See *id.* at 119.

261. BOORSTIN, *supra* note 40, at 60.

For legal scholars and many other university faculty, the flight to the academic ivory tower is an attempt to be free of the confusion, chaos and temptation of the everyday world. But flight from the world often renders the academic irrelevant and self-indulgent.²⁶² J.H. Hexter, writing about Thomas More and the decision whether to become a King's councilor or offer his insights from outside the seat of power, speaks to questions nearly every intellectual must address at some point:

In his moments of doubt and despair he [More] was but suffering the inevitable lot of the unattached intellectual innovator. Rarely can such men altogether free themselves from the persistent and ungentle ministrations of a Doppleganger, who measures the state of things as the innovators envisage them against the state of things as they are, and notes the peculiar disparity between their ideal and a reality not perceptibly altered by the spate of words they have poured forth.²⁶³

The stark cultural and experiential contrast between the academic and real worlds produces a harsh tension between legal academics who have absented themselves from the cacophony of real life, and practitioners who cannot escape it or who even thrive on its stresses and opportunities. Lawyers develop a variety of coping mechanisms and rationalizations that allow them to deal with its demands. This has changed little over the past thirty years. "With a few exceptions," says UCLA's Murray Schwarz, "people are law professors because they tried practice and didn't like it. You can't expect them to orient their teaching toward the practice of law."²⁶⁴ Mayer adds, "At bottom, the problem of the law school is that startlingly little is known systematically about the real world of the lawyer, and even less is known about the purposes the society wishes the lawyer to serve in the latter years of the twentieth century."²⁶⁵ David Riesman still "despises the childishness of the law schools—the joking about Yale and Harvard—the self-preening complacency of the law school professors. But there's a nice thing about law schools: I was a full professor of law at the age of twenty-seven."²⁶⁶ I would note that Plato's philosopher king required a lengthy period of real world experience in human affairs before reaching the point of wisdom.

262. See Schlesinger, *supra* note 52.

263. HEXTER, *supra* note 54, at 124.

264. MAYER, *supra* note 11, at 117 (quoting Schwarz).

265. *Id.* at 120.

266. *Id.* at 117 (quoting Riesman).

There are few positions in the world more privileged than that of the American law professor. With the great freedom the position allows, and the fact that the law schools have been allowed to become the exclusive gateway to the legal profession—comes responsibility. While this responsibility has several elements, perhaps the one that has been fundamentally breached by the law schools has been that owed to the profession. Whether the obligation is “to” the profession directly, or to the profession “on behalf of the society” the profession claims to serve is irrelevant—because the schools have failed both. Rather than run from the complexity and concerns the issues raised in this essay represent, legal scholars are responsible for pursuing the answers, even if the answer may well be that not much can be done. Discussions of ethics and professional responsibility that avoid the nature and depth of the reality of human nature as it unfolds in the context of law practice are simply too thinly textured to be of much use to lawyers who strive to preserve their integrity in a challenging and contradictory environment.²⁶⁷ Law students who are sent out into this dark world without any understanding of what awaits them are easily overcome by its power.

Most students—particularly those who go to law school straight from college—have virtually no preparation for what awaits them. Mayer relates:

“I’m always wary about sending students out just to get exposure,” says Howard Sacks of Northwestern, director of the . . . “professional responsibility” project. “They get upset, confused, disillusioned.” But there may be something to be said for giving students a chance to become upset, confused and disillusioned before rather than after they leave law school. What the law professors offer in their courses is the best quality of education in America—but in a professional school educational excellence may not be enough.²⁶⁸

Law students are in far too many instances like butterflies emerging from a cocoon completely altered from their crawling caterpillar forms to what they hope will be the elegant butterfly existence of the professional. Instead of elegance, they find a dirty world of conflict, argumentation and power, balanced against one of helping people advance, get their lives in order, solve problems, and many other positive activities from which one can derive a feeling of reward and contribution. The law

267. See WHITBECK, *supra* note 123.

268. MAYER, *supra* note 11, at 118.

can be a rewarding career, but it is also one that rewards certain kinds of behaviors while shaping who we are as people. Cherniss explains:

One source of those [idealized professional] expectations is something that I've come to call "the professional mystique"—a set of beliefs that we as a society or culture have about professionals and their work. We expect, for instance, that once a professional finishes training and earns credentials, he or she is going to be competent.²⁶⁹

Preparing students to understand enough about the culture they will be entering after admission to law practice is not easy. Many of the most difficult issues of professional responsibility can and should be raised intellectually, but cannot be really learned unless and until the person confronts them and is required to deal with their demands.²⁷⁰ After law school, for example, I started work in a legal services office in Colorado. Like virtually all law schools of that long-ago era the school from which I received my law degree offered no instruction in professional responsibility. There were virtually no courses that would be considered skills-based. The curriculum and methods were ones that would have been familiar to Christopher Langdell a century earlier.²⁷¹ Consequently, when I entered the practice of law less than three months after graduation, I can objectively say that I was almost completely unprepared for what I confronted.

Perhaps my law school wanted to spare me a too-early exposure to the taint of law practice. Or perhaps dealing with material that represented virtually all that I and other graduates would predictably be doing on behalf of clients during our professional lives simply was not regarded as sufficiently intellectual. Of course I do not actually believe that, and it is somewhat amazing that law schools are still struggling to work out the nature of their obligation to educate students for the profession of law.

The problem with my lack of preparation for the role, skills, and dilemmas of law practice is that the situations were not hypothetical. Numerous clients depended on me for the successful conduct of their cases. I was twenty-five years old and largely "clueless" about being a lawyer. I knew a great deal of subject matter of the kind studied in law school, and was well-versed in

269. Cherniss, *supra* note 202.

270. See, e.g., WHITBECK, *supra* note 123; Kenneth Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981).

271. See David Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109 (1989).

the methods of doctrinal analysis. A month and a half of studying for the Colorado bar examination provided some knowledge of legal variations peculiar to that state. But while in law school I had performed only one fifteen minute direct examination of another law student who was serving as an expert witness in a poorly run law school course on trial advocacy. I knew nothing about client or witness interviewing; and was completely ignorant about counseling, negotiation, case evaluation and diagnosis, drafting, strategy, evidence development, local procedure, investigation, real discovery, or professional responsibility. My level of knowledge was not unusual for law graduates of that time.

The problem with this degree of inadequacy is that many of the most important problems of professional responsibility are ones that are consequences of the application of lawyers' skills. Even today, the legal profession's recent rush to require the law schools to give courses on the rules of professional responsibility and adoption of a national examination on professional responsibility is a pitiful substitute for preparing students to understand and deal with the real challenges that lawyers face. The technical rules of professional responsibility of the kind tested and taught are reasonably obvious. The consequences of manipulation, concealment and deception, use of power, and choices made on a client's behalf under the pressures of competitive advocacy are far more fundamental and morally challenging.

