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# Christian Theories of Professional Responsibility

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# CHRISTIAN THEORIES OF PROFESSIONAL RESPONSIBILITY

THOMAS L. SHAFFER\*

Consideration of the religious and moral significance of legal practice is a subject to which too little attention has been paid in American legal education. Louis M. Brown has been one of those few engaged in the teaching of law who has explored the ethical components of lawyering; his example has been a great influence on many of us. It seems appropriate, therefore, in this tribute to Louis M. Brown, to consider the role which Christian values may play in producing lawyers who are well-developed in interpersonal as in professional skills.

It is possible that these reflections will advance religious discussion among lawyers, an effect which would do appropriate honor to a legal educator who is as dedicated as anyone to a profession made up of good persons. This little project might then end up making things better. But my motives are not reform; rather, the essay manifests a personal quest which Louis Brown will, I think, understand, because he knows of his own quest. He inspires more than he realizes by being loyal to it.

The fostering of ethical and religious concern among lawyers might be thought to be a task which belonged, long ago, to those who founded, maintained, and taught in Christian university law schools. But most of the law faculties at what were once thought to be the great Protestant Christian universities appear uninterested in their institutional heritage, if not ashamed of it.<sup>1</sup> Law faculties in Roman Catholic

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1. The new law school at Brigham Young University should be excepted from this observation. It is not a Protestant institution, but the reason for special treatment is not merely sectarian precision: the founding principles in that law school have been thoughtful, recent, and advertently religious, its beginning being attributed by its founders to specific divine direction. Its Christian religious witness remains to be experienced.

universities have rarely passed beyond fruitless phrases about natural law, which long ago became a banner rather than an idea, and is now neither banner nor idea.<sup>2</sup> There are few who have stubbornly and actively sought to retain the Christian character and heritage in teaching law.<sup>3</sup> Although Catholic lawyers and law students are frequently reminded that the poor must be fed and the persecuted delivered from their chains, most of our students and graduates, like most Christians in the American legal profession, remain committed to the defense of power and wealth.<sup>4</sup> Such legal assistance to the poor and powerless as has been provided arises from agnostic roots.<sup>5</sup> Christianity has had too little to do with what is hopeful in the American legal profession. I believe that a motivating reason for that failure is our diffidence in talking about religious commitment; when few talk about religion, personal value is inaccessible and public style becomes irreligious. Too many candles are under too many bushels.<sup>6</sup>

This essay will seek to relate Christian values to the American legal profession's most recent statement of ethical aspiration, the Code of Professional Responsibility.<sup>7</sup> In examining this relationship, four canons seem appropriate—those dealing with personal relationship,<sup>8</sup>

2. The problem of natural law as a religious idea is that it began to produce too few of what James might have called fruits for living, although it was often seen as a general inspiration for hard judicial or professional choices. See O'Meara, *Natural Law and Everyday Law*, 5 NATURAL LAW FORUM 83 (1960). The result was that natural law jurisprudence became a philosopher's euphemism for dogma. It might better have been called by its right name but for the fact that Catholic lawyers felt a need for some bit of professional theology of their own. The natural law tradition's most useful idea—that law has to take account of the way people are—tended to ignore any empirical base and even to discourage Aquinas-like (or Jung-like) introspection. I think the central idea remains useful, but the time has come when it does more harm than good to call it "natural law."

3. Report of the Committee on University Priorities, NOTRE DAME MAGAZINE, December 1973. See Shaffer, *Report of the Dean 1971-72*, 48 NOTRE DAME LAW. 232, 233 (1972); Shaffer, *Report of the Dean 1972-73*, 49 NOTRE DAME LAW. 214 (1973). See also Shaffer, *On Making Lawyers More Human*, THE STUDENT LAW., September 1972, at 16.

4. See Powledge, *Something For A Lawyer to Do*, THE NEW YORKER, October 25, 1969, at 63 *et seq.* [hereinafter cited as Powledge].

5. See *id.*; Interview with Michael Tigar in *A Lawyer for Social Change*, THE CENTER MAGAZINE, November-December 1971, at 27-35.

6. See *Matthew 25:15-16*.

7. AMERICAN BAR ASS'N CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as CODE; references to Ethical Considerations will be abbreviated "E.C.," to Disciplinary Rules "D.R."].

8. *Id.* Canon Four,

professional zeal,<sup>9</sup> reform,<sup>10</sup> and example.<sup>11</sup> For both Christian and non-Christian lawyers, it is my hope that this Article will encourage the humanistic lawyering which Louis Brown celebrates in his life and his work.

### I. PERSONAL RELATIONSHIP

Jesus' teaching about personal relationship was radical, uncompromising, and fearful:

The only place one can find the Father is in one's brother, and in the transaction of goods and services which will help that brother to become nourished and to grow.<sup>12</sup>

Christianity demands a posture toward other persons which resists the confines of rules—not so much because it wants to be free of rules, but because rules cannot contain it. A Christian who happens to be a lawyer—or a lawyer who proposes to be a Christian—is told to meet those with whom he has personal relationships in the spirit St. Paul invoked when he addressed the Christians in Corinth:

We need no letters of recommendation either to you or from you, because you are yourselves our letter, written in our hearts, that anybody can see and read, and it is plain that you are a letter from Christ, drawn up by us, and written not with ink but with the Spirit of the living God, not on stone tablets but on the tablets of your living hearts.<sup>13</sup>

These demands cannot be codified, but they may be applied to a lawyer's life in suggestive, exemplar, and specific ways. Canon Four<sup>14</sup> is such an application. The professional duty to respect confidences<sup>15</sup> expresses both a traditionally religious and a psychologically sophisticated social value. There is a strong secular ethic—patent humanism—in the underpinnings of the principle; it goes to the heart of the professional relationship and to the soul of lawyering as a worthy endeavor. The State, in its judicial robes, has decided that confidential

9. *Id.* Canon Seven.

10. *Id.* Canon Eight.

11. *Id.* Canon Nine.

12. J. BURTCHAELL, PHILEMON'S PROBLEM: THE DAILY DILEMMA OF THE CHRISTIAN 47 (1973) [hereinafter cited as BURTCHAELL]; see *Matthew* 25:31-46.

13. St. Paul's Second Letter to the Christians in Corinth, 2 *Corinthians* 3:1-3.

14. CODE, *supra* note 7, Canon Four: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

15. See C. MCCORMICK, EVIDENCE § 79 (2d ed. 1972).

counsel is more valuable than the discovery of truth. The evidentiary privilege enjoyed by a lawyer's client is the broadest of all evidentiary privileges and Canon Four makes it clear that the lawyer's duty to respect confidence is even broader than the privilege.

Suppose a man comes to me seeking divorce, and I discover that he has not lived in the state long enough to meet statutory residence requirements. I explain that he may not have a divorce—at least not yet—and he leaves in a huff. Consider the following situations:

- (1) I learn later that he has seen another lawyer and suspect that, having learned a recondite bit of law from me, he has lied about residence to the other lawyer.
- (2) I learn that the other lawyer has filed a petition for divorce on this client's behalf, and I *know* that the client has lied to the lawyer or that they have both lied to the court.
- (3) I learn that the client has been brought to trial for perjury and that my testimony would be useful to the prosecution.

In none of these three cases may I say what I know—not to prevent the abuse of my brother or sister lawyer; not to prevent a fraud on the court; not to assist in the administration of criminal justice. None of these reasons is as important to the State—to the law—as is my silence.

Every secular theory I can think of to explain this social preference seems somehow inadequate. The theories I have in mind can be summed up in three brief paragraphs.

*First*, the State may recognize that people need people. There is something about human beings, in their emotional need of one another, that the State cannot supplant or for which it can find no substitute. The best thing for the State to do is to respect the need, and to respect what people do in response to the need. My divorce client might have needed me, and I was obliged to be available to his need. A relationship between two people becomes a third personality.<sup>16</sup> And that third personality, so this first theory suggests, is beyond the power of the State, immune to the blunt instruments of government.

*Second*, the State has found a usefulness it decides to respect in the narrower relationship between a person who is suffering and a person who proposes to be helpful in easing the pain. There is social util-

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16. This truth was taught by Aquinas and later discovered by Jung. See T. SHAFER, *DEATH, PROPERTY, AND LAWYERS* ch. 7 (1970) [hereinafter cited as SHAFER].

ity in the "helping person" relationship. Just as a religiously-neutral government accords respect to religious schools because of their value to the secular good, respect is accorded "helping person" relationships because of their social utility.

*Third*, it is socially useful that human difficulties be resolved in the arena which involves the fewest people and the least social machinery. Aspirations aside, this is a principle of secular economy. A Christian who specially adheres to St. Paul's injunction against repairing to the courts saves the State time and money, as does a Jew who takes his quarrel to the rabbi. For example, the State has respected the dispute-settlement apparatus within a family by affording intra-family immunity in tort.<sup>17</sup> There is social value in mediation and conciliation, and therefore in whatever machinery for reconciliation men invent. The professional interaction between lawyer and client is one such mediating relationship.

Any of these three theories could provide justification for a paraphrasing of Canon Four: *our duty not to speak of what our clients tell us is as broad as the need which brings people to us*. This duty has social value; our function as professionals depends on it, because our function as professionals requires that we learn the truth as often as we can. Because our social function is valuable, the means we must have to perform it well are also valuable. I reflect, for example, on cases in which I have represented indigent criminal defendants and prisoners in the Indiana State Prison. My recurrent problem has been to convince the client in that situation that I am on his side. He sees me as part of the machinery which put him behind bars. He tells me what he thinks the judge wants to hear. Canon Four seeks to provide lawyers with the means to encourage free and truthful communication, whenever possible.

Although theories of social utility thus may seem to be sufficient to explain Canon Four, they cannot provide the moral foundation for lawyering that this Article seeks to explore. Secular inspiration usually is thought to be adequate justification for any phenomenon because Americans tend to abandon rationale once social utility is served. One

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17. See *Dean v. Smith*, 106 N.H. 314, 316, 211 A.2d 410, 413 (1965). Intra-family immunity is only now breaking down as it becomes apparent that its family-harmony purpose is no longer served. There is a line of New Hampshire cases which attempted to balance this traditional respect for internal government in the family against the fact that modern liability insurance practices have made some family disputes entirely fictional. See cases cited in *id.*

feels the need, however, to seek out the *moral* value in confidentiality, even if the State doesn't need moral reasons, or doesn't think it does. A moral reason for confidentiality may be professionally important, because the Code tells lawyers that their duty is not summed up in the rule of evidence which prevents testimony about what a client says.<sup>18</sup> Consideration of a Christian theory of the lawyer-client relationship, therefore, might provide a perspective on this moral dimension of legal practice.

A Christian justification of confidential relationships will likely start with an approach relating to the Christian theory of human personality, which sees man and woman as children of God. This moral justification for confidentiality is a theological justification; another human person is an unfathomable mystery, indivisible, and infinitely valuable. One's entry into the hidden corners of another person's life is a sacred entry into what must always remain unknown. The teachings of Jesus assure Christians that God comes to us in other people, including clients.

This teaching leads to several observations that might help one recognize the moral ramifications of the lawyer-client relationship. One observation is that the *expression* of the human need which brings a person to a lawyer is often an incidental product of the client's perception of what the professional is good at doing. For instance, people in business may tend to go to lawyers with the problems which send non-business people to doctors or clergymen. A person in need tends to define his difficulty in terms of the helper's expertise. The same person may tell an internist he has stomach-aches, a psychiatrist he is nervous, a clergyman he is guilty, and then talk to a lawyer about executing a new will,<sup>19</sup> all in connection with the same problem. The les-

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18. See CODE, *supra* note 7, E.C. 4-1.

19. Church, *People Come to Lawyers Wanting a Good Parent, Magical Bodyguard, and Political Ally with Muscle*, THE STUDENT LAW., December 1973, at 10.

The fact that a client first seeks you, an attorney, rather than a minister, marriage counselor, psychologist, therapist, or doctor, may have little to do with the nature of his underlying problem (or even with the best means of effectively resolving it). More likely, he will choose a lawyer because of his stereotypes of the other helping professions in relation to his self image, or his view of the lawyer as an authoritative, rational, and respected power source.

Dr. Church's view is not exactly the one I advance here, but is one I respect and one which has been considered by Louis Brown and Robert S. Redmount. See Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98 (1969); *Marriage Problems, Intervention, and the Legal Professional* (manuscript). See also C.A. WISE, PASTORAL COUNSELING: ITS THEORY AND PRACTICE (1951) [hereinafter cited as WISE]. I have been guided at several points in this essay, including this one, by Professor Morton Kelsey's lecture notes on pastoral counseling [hereinafter cited as Kelsey].

son in this curious fact is not that clients are childish; it is that those of us who propose to help people as a profession have divided ourselves into recondite subspecialties and then have built walls to separate us from one another. We have deluded ourselves into supposing that our specialties have reality. The talent called for in helping someone in pain is the same talent whether it is present in a physician, therapist, social worker, clergyman, or lawyer. In each situation the client responds to a sign of hope in his need. Both the sign and the response are more interpersonal than our professional trade-union rules admit. The client's choice of professional is then the incidental effect of an interpersonal moment. He chooses the lawyer as a person, not just as a professional. The appropriate response to the client therefore must be a reciprocal personal choice. That response requires an interest in him which is greater—and *more manifest*—than interest in his ideas, his problems, or the professional challenge he presents to the lawyer.

The skill I need, before I can begin to use my lawyer skills, is what Morton Kelsey calls *approachability*.<sup>20</sup> A client who comes to me when he might as well have gone to his pastor or to a psychologist may be responding to something in me which has little to do with my being a lawyer. It is that something—my approachability—on which I might usefully seek to build my relationship with him.<sup>21</sup>

Another observation is that the relationship of lawyer and client produces *legal* decisions. Most legal decisions are made outside of courts; many are made in lawyers' offices. A decision made in a lawyer's office is as fully a legal decision as if it were made by a judge. In fact, a law-office decision will probably affect the life of the client who makes it more than any decision of any court. Moreover, such a decision can have far-reaching effects on other people: the will of a patriarch, the collective-bargaining agreement between the United Auto Workers and General Motors Corporation, or a loan agreement which will finance housing for hundreds of thousands of people can have wide-spread social repercussions.<sup>22</sup>

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20. Kelsey, *supra* note 19:

When men try to get hold of the secret of your life, no friendship, no kindness, can make you show it to them unless they evidently feel as you feel that it is a serious and sacred thing. There must be something like reverence or awe about the way they approach you.

21. This is the central thesis of J. SIMONS & J. REIDY, *THE HUMAN ART OF COUNSELING* (1971), and is explored in J. SIMONS & J. REIDY, *THE RISK OF LOVING* (1968). Both authors have had deep influences on me and on many of my students.

22. Brown & Shaffer, *Toward a Jurisprudence for the Law Office*, 17 AM. J. JURISPRUDENCE 125 (1972).

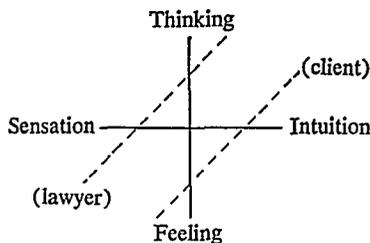
The facts in these legal decisions are not like facts in courts. Facts in law-office decisions include feelings such as love, hate, rivalry, and compassion. The climate tends to be volatile and emotional and to call upon psychological functions lawyers have not been trained to use. Jung hypothesized that the vertical thinking-feeling axis and the horizontal sensation-intuition axis are the two coordinates of human interaction.<sup>23</sup> Lawyers tend to operate at the thinking (what things are) end of the vertical axis and at the sensation (perception) end of the horizontal axis. Clients, because they are perhaps less "logical" people, tend to operate more toward feeling (not what things are but what things are worth), and intuition (not perception but insight or, as Jung said, "seeing around corners").<sup>24</sup>

One consequence of this comparison of the two people in a lawyer-client relationship is the insight that clients are valuable resources in the solution of their own problems because clients habitually exercise functions lawyers do not exercise, or do not exercise as well.<sup>25</sup> The Code bids us to respect these relatively internal, interpersonal, eccentric processes of decision.<sup>26</sup> Canon Four—confidentiality—helps us learn what these processes are. Most theology tells us the same thing because only God can understand another human heart, even when our interest and God's appear to be the same.

There is more here for a Christian than the normal uncertainty

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23. C.G. JUNG, *ANALYTICAL PSYCHOLOGY* 10-20 (1968). The idea of this paragraph and the next might usefully be put in a diagram:



24. *Id.*

25. I am uncomfortable about the use of the word "problem" to describe what a client brings to a lawyer—conscious of Erikson's saying that the trick is not to learn how to face a problem but to learn how to face a face. See generally E. ERIKSON, *YOUNG MAN LUTHER* (1958). The accommodation to recommend between problem-centered counseling and person-centered counseling is a troublesome one; Hunt, *Problems and Processes in the Legal Interview*, 50 ILL. B.J. 726 (1962) [hereinafter cited as Hunt], is helpful and empirically useful.

26. See Code, *supra* note 7, E.C. 7-7, 7-8. See also text accompanying notes 52-59 *infra*.

and humility in trying to understand another. There is more even than the respect—unconditional positive regard<sup>27</sup>—that a humanistic counselor hopes to bring to his work. The theological heart of the point is that God reveals Himself through other people, prototypically through Jesus, but also through here-and-now other people. At the same time, every person—not point of view, but person—is a mystery. A respect for the standpoint of another person, and the consequent practice of moving from his standpoint to one's own, is a window into mystery. And "mystery" means

not unintelligibility but inexhaustible intelligibility, for the search from person to person involved in the process of passing over from standpoint to standpoint reveals each person as inexhaustible, incapable of being reduced to a single standpoint or to any sum of standpoints.<sup>28</sup>

The lawyer's professional skill involved here is a habit in which "I effectively hold myself open toward mystery," that is, toward God in another person, and toward the discovery and the deepest value of myself.<sup>29</sup>

In order to work with my client in this setting, I must be free to choose an atmosphere of *trust*. Canon Four turns on trust. In a functional sense, trust as a factor in a lawyer's professional success means that the client will "follow his advice"—*i.e.*, will avail himself fully of his lawyer's learning and experience. It also means that the client will *want* a human relationship with the lawyer; he will want, for instance, to come to see the lawyer again. Trust, in other words, has a dimension which centers on the *problem* and a dimension which

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27. See C. ROGERS, *CLIENT-CENTERED THERAPY* 20-22 (1965) [hereinafter cited as ROGERS].

28. J. DUNNE, *A SEARCH FOR GOD IN TIME AND MEMORY* 7 (1969) [hereinafter cited as DUNNE]. Dunne discusses learning about God and about oneself as a matter of shifting points of view. "No standpoint," he says, "is true in itself."

29. *Id.* Kelsey, *supra* note 19, expands this idea in terms of growth. Concern about a person includes concern about his health and his adjustment to life. Issues of skill, opportunity, and tactics may follow, but the fundamental issue is concern. This issue suggests a consequent interest in helping with another person's growth. One of the central questions in legal counseling is whether change in the environmental situation is ever useful without change in the person. The law is woven into the client's environment, but the law also runs deeper. This has something to do with Sullivan's observation that "for a great majority of our people . . . the stresses of life distort them to inferior caricatures of what they might have been." One may need to train oneself as lawyer to notice this pathos and do what he can about it. "Most men think everyone is getting on quite well but them." Kelsey, *supra* note 19.

centers on the *person*. Research indicates that these dimensions of trust will be expressed in the client's feeling that he and the lawyer are making progress, in the freedom of expression the client feels with the lawyer, in the client's perception that the lawyer is interested in what the lawyer is doing, and in a free flow of communication between the lawyer and the client.<sup>30</sup> These are the things I find hard to establish when my client is in the Indiana State Prison.

It is evident, I suppose, that Canon Four exists for the client rather than for the lawyer, but that observation becomes deep and moving when the client is seen as a child of God, as a letter of recommendation from Christ. Then it is evident that trust defines the dimensions and the purpose of Canon Four. Trust becomes religiously profound to lawyers when it is seen as a means for them to bring divine compassion into the world. A theology of legal counseling might suggest that compassion (which means "suffering with") is an expression, through lawyers, of God's concern for clients. One's lawyer self tends to judge other people, but one's Christian self warns of danger in judgment and promises redemption in unconditional acceptance. The goal of the law of which St. Paul speaks, the goal of what Louis M. Brown calls *lawyer-ing*, is the administration of innocence.<sup>31</sup> The Christian idea is that Jesus brought man to a point of acceptability, not so much by suffering himself as by agreeing to bear the human lot, whatever it is.<sup>32</sup> Christ's mission of compassion is also the Christian lawyer's mission; it is a way to justify other men, to declare them innocent, rather than to judge them. And it is a way, too, to accomplish the even more difficult task of justifying oneself—of declaring oneself innocent. It is a way to forgive oneself and get along.<sup>33</sup>

## II. PROFESSIONAL ZEAL

### Students in a first-semester law course in professional responsibility

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30. Hunt, *supra* note 25, at 32-35.

31. St. Paul's Second Letter to the Christians in Corinth, 2 *Corinthians* 3:7-12, which contrasts the law by which men are found guilty with the law by which men are found innocent.

32. DUNNE, *supra* note 28, at 41. Professor Kelsey points out that guilt is a fairly useless counseling device since most people already feel guilty enough. Kelsey, *supra* note 19.

33. C.P. SNOW, *THE LIGHT AND THE DARK* (1947). Professor Kelsey notes the significant difficulties in counseling when either party is unable to cope with himself. Kelsey, *supra* note 19. One way to analyze that difficulty is to consider it in terms of the blurred emotional boundaries between the two parties that arise from their differing role perceptions. See SHAFFER, *supra* note 16, ch. 7.

tend to react with surprise, and not necessarily pleasant surprise, to the image of themselves as lawyers. They discover ambivalence in their feelings about lawyers, and, sometimes, a bit of fear in the idea that they soon will be lawyers. One student said to me after several weeks of study in the Code: "I liked lawyers better before I started reading this stuff." To know lawyers, after several weeks of pondering our expressed professional ideals, is not to love them; to consider a lawyer's life with his clients is not necessarily to look forward to it. These are ominous thoughts<sup>34</sup> which center in a conflict between *role* and *identity*.<sup>35</sup> The ability to live through this conflict and to grow in it with clients may suggest a meaning for Jesus' aspiration to *complete* the law in order to give it meaning.<sup>36</sup> Therefore, for a Christian lawyer to give meaning to the law, he must pursue the professional life of reconciliation which St. Matthew's Jesus enjoined upon the lawyers of his day. This life of reconciliation may require the lawyer to reconcile within himself the conflict between role and identity. These concepts—conflict, role, identity, growth, completing the law, and a life of reconciliation—suggest some religious reflections on Canon Seven, which exhorts the lawyer to exercise zeal on behalf of his client.<sup>37</sup>

#### A. THE CONCEPT OF ROLE

If I close my eyes and imagine a lawyer, I expose myself to a *role*. If I close my eyes and see me, I expose myself to an *identity*. And if I close my eyes and see myself as a lawyer, I expose myself to the conflict between my role and my identity. The role concept is sociological—seen from the outside in; the identity concept is psychological—seen from the inside out. The conflict is existential, of course, and perhaps best approached in the context of the lawyer acting in the lawyer-client relationship. The lawyer receiving a client sees his client

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34. See Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL ED. 1 (1963) [hereinafter cited as Watson, *Responsibility*]; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968) [hereinafter cited as Watson, *Quest*]; Shaffer, *Collaboration in Studying Law*, 25 J. LEGAL ED. 239 (1973).

35. J. DONNELL, *THE CORPORATE COUNSEL* (1970) [hereinafter cited as DONNELL], sets out the role and identity research models and uses them in analyzing in-house corporate legal departments. See Shaffer, Book Review, 46 IND. L.J. 562 (1972).

36. *Matthew* 5:17-25. Note that St. Matthew's Jesus is the most radical and uncompromising in the New Testament and is also the most frequently celebrated in modern popular drama—e.g., *Godspell* and the Pasolini film *The Gospel According to St. Matthew*.

37. CODE, *supra* note 7, Canon Seven: "A lawyer should represent his client zealously within the bounds of the law."

and he sees himself; he sees his client looking at him and he sees himself looking at the client. He has expectations of himself and he knows that the client has expectations of him. In trying to discover what those two sets of expectations are, he asks himself, "What does a lawyer do now?" That is the role question.

The American educational process is filled with role-associated answers to the role question. To explore the dimensions of the roles assumed by lawyers I created a "role-playing" device for a class in professional responsibility. One member of the class was to assume the role of lawyer, while another was to be a client, and the two "role played" an interview in the plausible context of our teaching law office.<sup>38</sup> The class watched the interview on closed-circuit television. Members of the class acted as observers and commented on the interview. I noted their comments and arranged them into the two categories which are suggested by the concept of role—the client looking at the lawyer and the lawyer looking at the lawyer.<sup>39</sup> My notes revealed that:

- (1) Lawyers are perceived as people who:
  - are honest and thoughtful.
  - know the law.<sup>40</sup>
  - yell at people on the telephone.<sup>41</sup>
  - tell people what to do.
  - control the time and place in which they deal with clients.<sup>42</sup>
  - are all business.
  - take over.
  - make decisions.
  - sit behind the desk.
  - pay attention.

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38. This was Louis M. Brown's Carl Tonio problem which raised the moral dilemma of whether to assert the Statute of Frauds as a defense. He devised it for one of his roving-professor excursions into a contracts class at the University of Southern California Law Center.

39. The students were not asked to comment specifically upon their role-related observations but merely reacted to a performance while I took notes.

40. See generally Reisman, *Some Observations on Law and Psychology*, 19 U. CHI. L. REV. 30 (1951) [hereinafter cited as Reisman].

41. Arnold: . . . I'm trying to put you in *touch*, Murray . . . with *real things*. Murray (angrily): You mean *real things*, like this office? The world could come to an end and you'd find out about it on the telephone.

Gardner, *A Thousand Clowns*, in *THE BEST PLAYS OF 1961-62*, at 229 (H. Howes ed. 1963).

42. See generally Steele, *Physical Settings and Organizational Development*, in H. HORNSTEIN, B. BUNKER, W. BURKE, M. GINDES, & R. LEWISKI, *SOCIAL INTERACTION* 244-54 (1971).

- are interested in facts.<sup>43</sup>
- are very careful.
- do battle for clients.
- avoid moral questions.
- resolve moral questions.<sup>44</sup>

- (2) Clients are perceived as people who want lawyers to:
- give them a sense of security.
  - tell them the answers.
  - lay everything out.
  - take care of their troubles.
  - make them feel trusting and dependent.

These perceptions do not accord precisely with abstract sociological dimensions of professional role, but they are congruent. Commonly accepted sociological theory views professional role as involving (1) special knowledge of “the law”; (2) provision of services which are too complex for a layman to understand or evaluate; (3) clearly valuable service; and (4) an organized professional peer group which justifies its franchise by policing itself. The perceptions my students generated, and the words they used to describe them, are more immediate expressions of the role concept than these abstract specifications.<sup>45</sup>

## B. CONFLICTS BETWEEN ROLE AND IDENTITY

These immediate and conflicting perceptions of role create anxiety in students and thoughtful practitioners over one's ability to be honest, thoughtful, knowledgeable, dependable, dominant, attentive, and careful. The anxiety turns on the fact that the lawyer constructed through these images is not real. What is real is the whole person, a reality more grand than the subject of a role because it involves aspiration. This illustrates the distinction between role and identity. The concept

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43. J. CASNER & B. LEACH, *CASES AND TEXT ON PROPERTY* ch. 1 (2d ed. 1969) contains a model of the property lawyer which explicates this insight. See T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* ch. 1 (1972).

44. See DONNELL, *supra* note 35, on the threat represented by clients who seem to want moral guidance. Compare *id.*, with WISE, *supra* note 19.

45. Immediacy in abstracting discoveries about people is a useful and neglected art. See E. BERNE, *GAMES PEOPLE PLAY* (1965). Lawyers often suppose that clients want result-oriented competence—and, of course, clients *do*—but research indicates that clients also place high value on approachability. Both factors are expressed in these student perceptions of the lawyer's role. Grismer & Shaffer, *Experienced-Based Teaching Methods in Legal Counseling*, 19 CLEV. ST. L. REV. 448 (1970) [hereinafter cited as Grismer & Shaffer].

of role arises from viewing the lawyer from the outside; identity, on the other hand, is a matter of the lawyer looking out from the inside. He sees himself as a *Student* and as a complex *Person*, and in these capacities he looks afresh at his *Lawyer* dimension. All three dimensions—Student, Person, Lawyer, and probably more—are encompassed in the notion of identity. This multi-dimensional characteristic of identity becomes even more complex when the lawyer perceives the client also observing all three of these dimensions.

Thus, the lawyer-client interaction becomes considerably more complex for the lawyer when perceived in terms of identity rather than role. This multi-dimensional identity, like role, is not free from internal conflicts, some of which have emerged in discussions of professional responsibility with students. A few can be suggested here.

### 1. *Constant Conflict of Interest*

Conflicts of interest for lawyers are both professional and personal. A trial lawyer who specializes in plaintiffs' personal-injury cases, for example, although called to zeal for his client by Canon Seven, experiences a conflict in his relationship with persons "on the other side." He has many cases, most of which he will compromise; his livelihood, in fact, depends on the outcome of all of his compromises because the persons with whom he negotiates tend to be the same from case to case. A busy lawyer, for another example, is a person often torn between his life with his family (personal fulfillment) and his devotion to his clients (professional responsibility). The telephone is a ubiquitous and tyrannical symbol of that conflict. Lawyers who aspire to the development of their resources as counselors are brought into conflict with the reality of hourly rates, the economic expectations of partners, office overhead, and the moral entropy represented by time records. Lawyers in their identity have clear and even unique personal needs,<sup>46</sup> yet they are often frustrated in their attempts to satisfy these personal needs in their professional lives. The consequence of seeking need satisfaction in the practice of law is not as congruent with professional ideals as the aspirations of the Code suggest. Ideals may in fact aggravate the role-identity conflict.<sup>47</sup> Thus, personal and professional need satisfaction often creates identity conflicts when juxtaposed against the exhortation of Canon Seven to exercise zeal on behalf of one's clients.

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46. See Lette, Francia, & Strawser, *A Look at Lawyers' Need Satisfaction*, 57 A.B.A.J. 1193 (1971).

47. See Watson, *Responsibility*, *supra* note 34. This aggravation of the role-identity conflict is commonly experienced by idealistic law students.

## 2. *Lawyering Self-Image*

Aspirations for the law as a social force conflict with the harm lawyers sometimes seem to cause in people's lives. The portraits which adorn law school walls—portraits of Cardozo, Coke, and More—are tangible influences to most law students and to many lawyers. They are not vapid; they are often not as remote as common cynicism about professional hagiography supposes. But students are confronted, within days of beginning their professional lives in school, with other images—images of the police-court lawyer who allows the morals of the marketplace to erode his ideals; images of the senior partner who expects his associates in the practice to produce money for him. Both sets of images are real and influential, and these images evoke identity conflicts in the student viewing himself as lawyer.

## 3. *Personal Self-Image*

The lawyer's sense of himself as a person is broader and deeper than his sense of himself as a lawyer. Members of a discussion group of four students in one of my legal-counseling courses remarked to one another that they did not like law students. The entire legal counseling class along with this discussion group spent two or three hours analyzing this discovery, resolving the "problem" by establishing the fact that the people these students disliked did not exist. One way we reached this result was to establish our own diversity. Each of us was less law student than other things. We had in our class several artists, some musicians, a number of parents, many spouses, a gourmet or two, a couple of skiers, Jews, Christians, atheists, and one physician. In working this "problem" through in these terms we perhaps convinced one another that there were no law students left to dislike. Perhaps we also discovered that what we disliked in each other was a projection—a part of ourselves we had first cast out, then noticed elsewhere, and finally come to despise. In a sense, we managed to reintegrate the law student part of us by deciding to like it after all; what we first exorcised and then reintegrated was the *role* which threatened our *identity*. In this way, an understanding of the relationship of our legal roles and our personal identity was the key to clearing away obstacles to our working with one another.

## 4. *Vague Models*

It is generally true that many students come to law school without knowing well even one lawyer, and many young lawyers enter the prac-

tice without knowing well any lawyers but their law school teachers. Both facts were true in my case. Idealized visions of Webster, Darrow, John W. Davis, and Brandeis are remote. Judges are of questionable value as models for law students because most of us do not think of ourselves as judges, or if we do we are, because of it, poorer lawyers. Although professors inevitably are models for professional conduct,<sup>48</sup> they are often inadequate in this regard because they are not *in* professional practice; they are not perceived by students as having experienced or anticipated the role-identity conflict discussed here. Women are particularly victimized by the vague-models phenomenon; none of the pictures on the law school wall are pictures of women. Few of the professors are women, and the blind Lady Justice is not a true woman either. The lawyer as student is faced with the conflict of becoming a lawyer without a clear idea of how a lawyer behaves.

### C. RESULTS OF THE ROLE-IDENTITY CONFLICT

These instances of conflict combine with a traditional bias for academic discourse in law schools to produce stress, unmet needs, frustrations, and unclear anticipations. One result of this is a sense in students that they are being manipulated by teachers; *i.e.*, "I don't know what is happening to me, but they do, and they are making it happen." The common condemnation of the Socratic Method in legal education is usually less a disapproval of a style of teaching than disapproval of secretive manipulation.<sup>49</sup>

Another result of these emotional currents is the formation of psychological defenses. In what psychiatry thinks of as reaction formation, for example, a student avoids the role-identity conflict by shouting it down. He thereby develops, perhaps, the occupational disease of lawyer cynicism. He suppresses the conflict in the values presented to him by a profession which itself has been unable to resolve the conflict.

This suppression takes many forms. Teachers of legal counseling see this in student interviews, when the student playing the "lawyer" role adopts a "whatever you want" demeanor, and seems to have no conscience of his own.<sup>50</sup> Some students profess no interest in consider-

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48. See Redmount, *A Clinical View of Law Teaching*, 48 S. CAL. L. REV. 705, 706 (1975).

49. See Watson, *Responsibility*, *supra* note 34; Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444 (1970).

50. See Shaffer, *Estate Planning Games*, 47 NOTRE DAME LAW. 865 (1972).

ations of moral values. "I only want to learn the law" and "If you don't have morals by the age of 22, you will never have them" are common examples.

Others regard conscience as a private matter and insist that stated rules of professional conduct (which seem to them inadequate and even hypocritical) are matters of conscience. Conscience, they say, is none of the profession's business, and it is either not proper or futile for law schools to require its study. Other defenses involve denial ("Hell no, I'm not worried") or avoidance.

Within the legal profession, lawyers in the "silk stocking" practice deny these moral conflicts by refusing to deal with the human problems which present conflict in an unattractive setting, such as criminal defense, divorce, and personal bankruptcy. When moral conflict does arise in the vaguer and sometimes more subtle contexts in which these lawyers practice, they cloud it behind the motives and ambitions of their clients.<sup>51</sup>

#### D. THE PATERNAL IMAGE OF THE LAWYER

It is reasonable to suspect that the image lurking behind most of this role-identity conflict is an image of the lawyer as a parental, dominating figure—someone who has to *know*, to *do*, to *tell*, and to *be responsible for*. It is an ironic image when one approaches the Code as expressing professional consensus among lawyers. Our ethical aspirations insist that the law is something the lawyer helps his client with, and that the determination of what to do with the law is for the client, not the lawyer.<sup>52</sup>

Lawyers are expected to be expert at finding out what the law says, but:

In the final analysis . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.<sup>53</sup>

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51. This perception is suggested by experience, observation (*see generally* E. SMIGEL, *THE WALL STREET LAWYER* (1964)), and the insightful lawyer fiction of Louis Auchincloss.

52. CODE, *supra* note 7, E.C. 7-1:

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.

53. CODE, *supra* note 7, E.C. 7-8.

The fact persists, however, that many lawyers see themselves as telling their clients what to do. Their successors in law schools see themselves as having to learn how to tell people what to do. The assumption that a lawyer has to be what I have elsewhere called a "wise papa"<sup>54</sup> is perhaps the source of the querulous terror with which a young lawyer contemplates his professional life with clients. The paternal image tempts him to dread one of the greatest of his life's adventures, to mistrust the human experience Jesus identified as the source of his salvation: the experience of enjoying companionship with another person, walking in his shoes, and living in his world.

The case against the paternal image of a lawyer would be difficult to make if it required an argument against the economic realities of the practice of law. Law professors tend to attempt this argument, and consequently they are ignored even when their urging is consonant with a comfortable material life.<sup>55</sup> But research on this point, as well as reflection, suggests that the parental model of lawyering—the model I suggest to be the least Christian and therefore the least human—is also the least profitable.

Douglas Rosenthal interviewed lawyers and clients in a sample of litigation involving automobile accidents in Manhattan.<sup>56</sup> He assembled data from records, from interviews with clients and lawyers, and from judgments made by a panel of expert trial lawyers. He then applied his data to a series of propositions about lawyering.<sup>57</sup>

Rosenthal employed two models in the analysis of his data. One model, which he classified as "traditional," assumed that the client is best advised to be docile and dependent on the lawyer. The alternative model, which he called "participatory," assumed that the lawyer-client relationship is collaborative and that the client should be an active partner. It is the latter model which seems to follow the ethical

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54. Shaffer, *Models for the Estate-Planning Counselor*, 6 INSTITUTE ON ESTATE PLANNING ch. 72-11 (1972).

55. See J. CARLIN, *LAWYERS ON THEIR OWN* (1962), for a description of legal practice which seems to me both joyless and mean.

56. D. Rosenthal, *Client Participation in Professional Decision: The Lawyer-Client Relationship in Personal Injury Cases* (doctoral dissertation, Yale University, 1970). For an elaboration of this thesis in book form, see D. ROSENTHAL, *LAWYERS AND CLIENTS: WHO'S IN CHARGE?* (1974).

57. These propositions involved appropriate client behavior in the relationship, the quality of professional ideals and practices of the lawyers who worked in the cases, and measures of professional competence.

aspirations of the Code and the professional ideals which follow upon religious reflections on St. Matthew's Gospel. Rosenthal classified the cases he studied within one or the other of these models, submitted the cases to a panel of trial lawyers for evaluation, and compared the panel's figure for monetary recovery in each case with the actual amount awarded. From this he determined that the participatory model yielded consistently higher settlement recoveries than the traditional model. With all this authority—professional, religious, and empirical—the point that it is better to be a companion than a parent is made perhaps more solidly than other points in this essay. If that is so, it might be useful to look at more detailed aspects of the two models employed by Rosenthal.

Under the traditional model, clients are expected to be passive. Legal problems generally have only one best solution, and lawyers are seen as more likely to be competent in arriving at it than laymen; the model assumes that professional competence is a difficult thing to judge, and that only lawyers can do it well. The traditional model also assumes that professional service by lawyers is usually competent, that it is readily available to persons of modest wealth, and that ethical standards are high and consistently enforced. Fees, according to this model, should be set by the lawyer, and second lawyer opinions are not usually advisable.<sup>58</sup>

In the participatory model, clients are expected to be active rather than passive. It is considered proper for the quality of professional service to be low at times, second lawyer opinions are thought to be valuable, and legal problems are viewed as complex and amenable to a layman's common sense. The participatory model assumes that lawyers are not often able to be disinterested, that fees should be negotiated, that laymen can judge the quality of professional services, that the middle class in America is often not able to get good legal service, and that ethical standards are unclear and, even when clear, not consistently enforced. Rosenthal recorded what lawyer and client in each case said to him about their experience and placed each case in the "traditional" or "participatory" column. As might be expected, most of the cases fell into the "traditional" model, and in those cases clients felt more oppressed and consistently recovered less money.

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58. Similar empirical research generated similar results in probate practice. See generally M. SUSSMAN, J. CATES, & D. SMITH, *THE FAMILY AND INHERITANCE* (1970); Shaffer, Book Review, 18 U.C.L.A.L. REV. 844 (1971).

Neither Rosenthal nor I believe that the choice of model is necessarily the lawyer's choice. Clients often want to be treated as children and resist attempts to make them responsible for themselves. A lawyer should insist on a collaborative relationship with his clients and should terminate the relationship when clients refuse to deal with him on those terms. But the choice of a traditional or parental model is almost always a shared choice.<sup>59</sup>

#### E. PROSPECTS FOR RESOLUTION OF THE ROLE-IDENTITY PROBLEM

A change of assumptions in professional relationships among lawyers and clients will be a formidable enterprise, involving legal education and the development of new professional skills.<sup>60</sup>

A change of this nature would be a change toward professional *integration*—the practice of law in such a way that lawyer role and lawyer identity are functionally joined in the law office. The insights of the Christian religion and the discoveries of 20th-century depth

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59. There may be here a subtle question about how parental a lawyer can be in refusing to be parental. See generally WISE, *supra* note 19, which discusses an analogous problem in professional counseling. Avoidance of the parental approach is the central issue on which Rogerian counseling is founded. ROGERS, *supra* note 27. It is a rewarding experience to listen to Carl Rogers, on tape or in one of several counseling films, doggedly avoid the dominant posture in therapy.

Dogged avoidance may also illuminate an exchange between Louis M. Brown and me on the early draft of Part I of this essay. Brown wrote (Oct. 23, 1973):

There is a distinction between seeking a lawyer's advice and employing a lawyer to do an act, *e.g.*, file a tax return. The lawyer can keep confidential an inquiry as to whether an item is taxable income, but after the client has related facts and made the inquiry, a lawyer who prepares the tax return must report the item on the tax return. The lawyer has a curiously difficult dual position which precludes absolute confidentiality.

His observation overlooks another option. A lawyer may refuse to play when the context is fraud, disabling dependence, or injustice. There are many circumstances in which a lawyer may not invoke the law against a client. In this respect, we enjoy—or, rather, the client enjoys—a special license. I am exempt, for the benefit of my client, from the normal duties a citizen has to assist on the enforcement of the law; I am also privileged to encourage a parental dependence and to countenance inequity. But in each case I am not relieved of my conscience and my best judgment, and in no case am I relieved of the ability to refuse to do something I regard as destructive for myself, the client, or the community. In Brown's example I can preserve integrity and confidentiality by refusing to prepare the return.

60. The educational answer to the conflict between role and identity is training in human relations—training which emphasizes the pedagogical relevance of self-awareness and awareness of others. See Grismer & Shaffer, *supra* note 45. Such training is an affective enterprise whose curricular principle is that feelings are relevant to learning. Its professional objective is broadened interpersonal presence, so that both client and lawyer are more present to one another and more open to one another.

psychology provide sources of encouragement. Jung talks of personal integration as a process which requires two people; Freudian psychoanalysis turns on the advertent development of personal dependence; Carl Rogers and modern non-directive counseling aim at a climate of interpersonal acceptance essential to counseling;<sup>61</sup> and the "human potential" movement has as its governing dogma the belief that most persons contain within themselves the resources they need to resolve problems of identity.<sup>62</sup> The tenets of all these schools of thought can be presented rather simply by reducing their significance for legal education to four basic principles: (1) one's feelings are an essential part of what one needs to learn about, because much of learning how to be a lawyer is learning how to be oneself; (2) one needs, for obvious reasons, to learn about people; (3) one's best resource for learning about people is himself; (4) one's next best resource for learning about people, and thus for learning about himself, is other people.

My frustration in promulgating these thoughts—to students, to my colleagues in teaching, and to the practicing profession—is that the articulation falls short of reality and seems barren of content. Much of Louis M. Brown's achievement has been to succeed at giving content to insights such as these, as reflected both in the substantive law and in the tangible practitioner's skills legal education talks about.<sup>63</sup> The following are two illustrative principles suggested by his example.

### 1. *Policy of Settlement*

Settlement with one's brother is a modern professional ideal. Although scriptural injunctions against lawsuits have often been used as injunctions against the legal profession, that criticism of the profession is not appropriate in modern times. The literature of preventive law, and other legal literature which does not use that term, accepts as a modern norm for lawyers what I have given my students as the Third Principle of the Common Law: "Avoid Litigation." Most legal problems, even "litigation" problems, are compromised short of the court-

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61. SHAFER, *supra* note 16, compares these theories of integration. See also A. WATSON, *PSYCHIATRY FOR LAWYERS* (1968).

62. See generally J. HOWARD, *PLEASE TOUCH* (1971) [hereinafter cited as HOWARD]; JAMES & JONEGEWORD, *BORN TO WIN* (1971) [hereinafter cited as JAMES & JONEGEWORD]; T. HARRIS, *I'M OKAY, YOU'RE OKAY* (1969) [hereinafter cited as HARRIS].

63. See, e.g., L. BROWN, *PREVENTIVE LAW IN THE LAWYERING PROCESS* (1963); L. BROWN, *MANUAL OF PREVENTIVE LAW* (1950). See also L. BROWN, *PLANNING BY LAWYERS* (1967); L. BROWN, *ARTICLES ON PREVENTIVE LAW* (1969); Passamaneck & Brown, *The Rabbis—Preventive Law Lawyers*, 8 ISRAEL L. REV. 538 (1973).

house. Lawsuits are preferable to chaos, but they have limited social utility beyond that. The art of mediation, compromise, and negotiation are, in this modern ideal, analogues to the knowledge of evidence, civil procedure, and trial tactics, traditionally considered to be the prerequisites for legal practice. Few in legal education yet regard these arts—these interpersonal skills—as essential to preparation for practice, even though many lawyers now grudgingly concede that instruction in such arts is acceptable as an elective option in the law school curriculum. Most of those who believe in the utility of these interpersonal skills have come to this conclusion through Louis M. Brown's relentless influence. These skills turn on an ability fundamental to counseling—the ability to understand people and to create climates in which people can call upon their own creative resources. That skill is largely a matter of self-awareness and awareness of others, which could in itself be a religious reflection on Canon Seven: zealous representation of clients requires skills for reconciliation. The aspiration behind Canon Seven is that clients will, through effective and affective counseling, make their own fundamental choices. Mutual respect for personhood in the lawyer-client relationship gives meaning to the law and to the practice of law.

## 2. *Interpersonal Skills*

Interpersonal skills, often learned inadvertently, are essential to professional success. Simplifying somewhat the need hierarchy of Abraham Maslow, R.S. Hunt has argued that clients form global judgments about lawyers—judgments that transcend the dimensions of the difficulties clients bring with them.<sup>64</sup> These judgments provide answers to two fundamental questions: (1) do I want to follow his advice? (2) do I want to come back to him? The first is a problem-centered judgment. Our professional preparation advertently and exhaustively prepares lawyers to respond to the client's concern—by being sharp, analytical, informed, influential, and articulate.<sup>65</sup> The second is a person-centered judgment; our professional preparation tends to leave its resolution to chance, etiology, and the Holy Ghost. And yet, as Hunt demonstrates and as the Missouri Bar Survey documents, personal relationship has everything to do with success in the practice *and* with success in "solution of the problem."<sup>66</sup> This latter point is a subtle one,

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64. See note 25 and text accompanying notes 39-45 *supra*.

65. See note 43 *supra*.

66. See note 45 *supra*; Turner, *What Your Client Thinks of You*, 29 ALA. LAW. 132 (1968).

for it is not immediately apparent why interpersonal skills should contribute to narrow success—*i.e.*, to “winning cases.” The answer seems to lie in two facts: (1) most cases are not won in trial by combat, but are settled through compromise; (2) the ethical practice of law turns on the lawyer’s ability to help clients arrive at essential choices, not on the ability to make choices for clients.

I suspect that adherence to the letter and spirit of Canon Seven requires an accommodation of the role-identity conflict. Although professional zeal may appear to be in conflict with some personal and professional needs and goals, a view of lawyer-client interaction as a “participating” relationship provides the basis for an accommodation of professional zeal with these needs and goals. By recognizing the worth of the client as a human being, the lawyer takes the first step in ordering his own needs and goals in a way which will be consistent with the purposes of Canon Seven.

### III. REFORM

Canon Eight—*a lawyer should assist in improving the legal system*—corresponds in a seminal way to St. Paul’s great statement on love:

I may have the gift of inspired preaching; I may have all knowledge and understand all secrets; I may have all the faith needed to move mountains—but if I have not love, I am nothing. . . . I may give away everything I have, and even give up my body to be burned—but if I have not love, it does me no good . . . . [Love is] patient and kind; love is not jealous, or conceited, or proud; love is not ill-mannered, or selfish, or irritable; love does not keep a record of wrongs; love is not happy with evil, but is happy with the truth.<sup>67</sup>

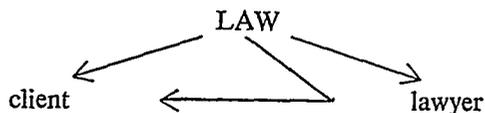
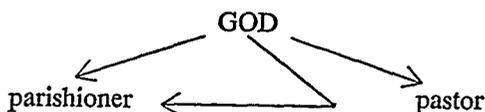
#### A. CLIENT PERCEPTION OF LAW

“Law” is an awesome word for lawyers. Holmes scoffed at this awe when he talked about law as the “brooding omnipresence in the sky.” Nevertheless, the awesome word “law” is to lawyers what “God” is to the pastoral professions and “health” to the healing professions. In each case the awe affects the professional and often explains why he chose his profession.<sup>68</sup> Feelings about awesome words also act on the perceptions which the person seeking help brings to the professional.

67. St. Paul’s First Letter to the Christians in Corinth, 1 *Corinthians* 13:2-6.

68. Feifel, *Physicians Consider Death*, PROCEEDINGS OF THE 75TH ANNUAL CONVENTION, AM. PSYCHOLOGICAL ASS’N 201 (1967).

The client's own personal response affects his perception of his reason for seeking help. His feelings, in other words, help to define his "problem." The personal relationships peculiar to each profession are therefore substantially related to each profession's awesome word—even when the human facts which give rise to the "problem" are the same.<sup>69</sup> In each case the mood of the professional relationship will be affected by the feelings which make it awesome. This may be seen by three relational charts:



Law seems to be an influence deep in the psyche: beyond statutes and cases there is the law within us.<sup>70</sup> The Freudian thinks of the law within us as the presence of early attitudes toward the father, while the Jungian thinks of it as archetypal, as something in the collective unconscious which traces not only to childhood and to parents but to the dim origins of the race.<sup>71</sup> Similarly, the Rogerian thinks of the law within us as a source of punitive self-judgment of badness or stupidity which makes adult self-reliance difficult.<sup>72</sup> The transactional analyst<sup>73</sup> will say that the law within us symbolizes paren-

69. See note 19 and accompanying text *supra*.

70. This idea, and an unpublished elaboration of it, entitled *The Law Within Us*, come from Dr. Robert S. Redmount. See also Shaffer, *Some Hard Truths About the Administration of Justice*, RES GESTAE, August 13, 1973. A similar assessment of the source of the law's power is contained in Professor Rodes' conception of "natural law" as intuitive. Cf. RODES, *THE LEGAL ENTERPRISE*, to be published this year by Dunellen Press, New York [hereinafter cited as RODES].

71. These philosophies are discussed in SHAFER, *supra* note 16, ch. 7.

72. See generally E.H. PORTER, JR., *AN INTRODUCTION TO THERAPEUTIC COUNSELING* (1950).

73. See E. BERNE, *TRANSACTIONAL ANALYSIS IN PSYCHOTHERAPY* (1961); HARRIS, *supra* note 62; JAMES & JONEGEWORD, *supra* note 62.

tal influence, a source of the "I'm not okay, you're okay" feelings which disable objective, adult judgment.

All these associations are negative; they all suggest law as oppressive authority. These negative feelings coincide with observations in the literature of counseling which suggest that the person being helped is likely to have negative feelings about this brooding omnipresence, at least at first.<sup>74</sup> The professional is called upon to create a climate in which these associations become positive, as a necessary condition for the client's growth and sense of responsibility. Put another way, the persistence of disabling dependence in the person being helped is a function of the persistence of negative associations to the will of God, the threat of death, or the oppression of the law, depending upon which professional is being dealt with.

There are some alternative ways in which law as brooding omnipresence influences the lawyer-client relationship, none of which seem to explain matters as well as does the concept of law as oppressive authority. One alternative is to perceive law as an avenging force, rather than as oppressive authority. I suspect, however, that this perception is more likely to come from reading the newspaper than from dealing with a lawyer. The perception is certainly fundamental to the law's ability to maintain public order—to be an alternative to chaos—but, again, that importance seems to be traceable more to a broad public demand for redress of evil than to the "solution of a legal problem" for which a person seeks professional assistance.

The Charles Manson trial in Los Angeles is a good example of the significance of law as an expression of revenge. From the perspective of a newspaper reader, that process was a process of revenge—necessary revenge in the face of the horrors of the crimes of which Manson and his "girls" were accused—but a revenge which lies deeper in instinct and intuition than any mere argument for criminal justice. The prosecutor was a champion. The defense lawyer was an obstruction—although perhaps a necessary one so that the revenge would be perceived as "just" by the newspaper reader. The members of the jury were sources of objectivity; the judge was a representative of the power of the State; and the defendant himself was almost all projection: Manson was pure evil. I have never read in the press of anyone who seemed so clearly to be the devil himself—not even Hitler, who was always enigmatic as well as evil.

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74. ROGERS, *supra* note 27,

In a second alternative characterization, the brooding omnipresence of law might be experienced as *security and order*—as what prevents collisions between cars and discourages burglars. This perception seems cordial to Freudian analysis; the law does for me what my father once did. Clients see lawyers in reference to the law as protector, but they seem to hold this view only when the protection of the law is doubted or unsure. One way of characterizing this client feeling is to say that the client is in some way fearful or skeptical of the law. Clients seeing lawyers about the law as protector, in other words, are more like parishioners seeing pastors about the will of God, or patients seeing healers about the threat of death. There is a negative or fearful tone to the awesome word.

In another alternative, law might be experienced as *unoppressive power*—a way to make things happen, to push people around, or, in Auden's phrase, to trudge on time to a tidy fortune.<sup>75</sup> But even here the law as experienced in a lawyer-client relationship is different. There is reason to doubt the power of the law—to fear that it might not assist after all—and that doubt is the reason the client consults a lawyer. If he were sure of the assistance of the law, he would need no acolyte to assure it.<sup>76</sup> Here, too, the law is oppressive or awesome, just as the will of God or the threat of death is awesome.

## B. LAWYER PERCEPTIONS OF LAW

Complicated client perceptions of law—as something which threatens even while it avenges, protects, or secures—are probably even more complicated when seen by the lawyer, whose perspective is deeper and

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75. W.H. AUDEN, *THE AGE OF ANXIETY* (1947). Gulley Jimson, Joyce Cary's character, had a compassionate simile for law as power which did not oppress the people who had the power. J. CARY, *THE HORSE'S MOUTH* 63 (1944) [hereinafter cited as CARY]:

But when I saw them all so serious and reverent, and even the police with their hats off as if ready for prayer, I said to myself: Don't be a fool, Gulley, they're doing their best and they couldn't do any better. They know it isn't justice and they know there can't be any such thing in this world, but they've got to do their job which is to keep the handles turning on the old sausage machine, and where would the world be without sausages?

76. "Justice" is not the awesome word here; "law" is. Justice—the feeling of the word—is more remote and is usually not so oppressive; it is like "love" to Christians. See note 91 *infra*. But even "justice" has a special force in the lives of lawyers, a force laymen often do not understand because they confuse it or combine it with "truth":

I am happy I was given the privilege of meddling with impunity in other people's affairs without really doing any harm by belonging to that avocation whose acolytes have been absolved in advance for holding justice above truth. I have been denied the chance to destroy what I loved by touching it.

W. FAULKNER, *THE MANSION* 363 (1965).

narrower and perhaps more terrifying. Like the client, the lawyer sees "the law," but he also simultaneously sees himself seeing the law, the client seeing him, and the client seeing the law.<sup>77</sup> The lawyer's perception is thus more complex than the client's; for him the law may be alternatively characterized as a *solution* or a *home*.<sup>78</sup>

### 1. *Solution*

Physicians are widely thought to have chosen their profession because they have an abnormally acute fear of death, psychological healers because they are moved more than most of us by emotional disturbance, and clergymen because they experience Graham Greene's kind of disturbing God more than most people do. Watson suggests that lawyers choose their profession out of an abnormally high need for order and for orderly dominance—*i.e.*, out of a predilection for verbal aggression.<sup>79</sup> Law is in this sense a solution. To the extent that law tends to provide solace from anxiety over disorder or unclear expression, lawyers may revere law rather more than other people do. Lawyers also experience feelings of awe at the word "law," which many people, who think of traffic signs and income-tax returns more readily than of Lord Coke and the Constitution of the United States, do not experience.

We lawyers turn to "the law" for sustenance; we enjoy a "good legal problem," a fine conceptual discussion, or an evening of keen logic chopping. We also enjoy our flirtations with ambiguity. Thus, in one sense, law is a solution for lawyers who seek to fulfill their need for order.

### 2. *Home*

Law also provides a haven, a barricade, and a status, three ideas which might be organized under the single heading: Home. Home is a place to get away to. It becomes apparent that law is being used in this sense when a judge finds an answer—as Holmes is quoted as saying—not so that he can do justice, but just so that he can administer the law. Justice is too vast a concept to be tolerated all of the time. On most occasions law alone will have to do.

Law serves as a barricade as well. The real estate broker who

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77. See text following note 37 *supra*.

78. Those words are more signals for feelings than they are concepts.

79. See Watson, *Quest*, *supra* note 34.

10 years ago opposed an open-housing ordinance because, he said, "You cannot legislate morals," may today find it comforting to point to the same ordinance as a reason for refusing to cooperate with his seller's racial discrimination. To say "the law requires it" is a way not to pass moral judgment on the seller; the legislation then seems not to be an imposition of morals but rather a way to avoid moral discourse. Law in a religiously plural society serves this function well—hence the notion of "neutral principles."<sup>80</sup> Lawyers often allude to the law in this sense ("I'm sorry, but that's the law"), and thus find in the law a barricade against their duty to shoulder responsibility for the way things are.

Finally, law is, for the lawyer, a status. He is a priest in a mysterious and respected ritual; people need him, and they respect him because they need him. He is proud of his status; it is like a mansion on the hill.<sup>81</sup>

### C. CONTEMPLATING THE IRRATIONAL IN MAN

It is too simplistic to talk about law in this bifurcated way—law to people who seek the assistance of lawyers as distinct from law to lawyers. Reality is more complex because the omnipresence broods on both lawyer and client, and its brooding is perceived both directly and through the other party to the relationship. The force of law in the relationship in the final analysis is a hard thing to describe, but a few less obvious possibilities can be suggested.

Law in the relationship is something we use. Law is a sanctioned, relatively safe way to push people around. For example, the "War on Poverty" has as one of its most prominent results the development of legal services for the poor,<sup>82</sup> and in this context law restores a measure of coercive power to oppressed people. Law to the 19th-century business baron, on the other hand, was a way to do what he wanted. To Huey Long law at one time was a source of oppression, then a source of annoyance, and finally a source of incredible personal

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80. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

81. See generally Reisman, *supra* note 40.

He's a lawyer, and to a lawyer, if it aint complicated it dont matter whether it works or not because if it aint complicated up enough it aint right and so even if it works, you dont believe it.

W. FAULKNER, *THE TOWN* 296 (1957).

82. Cf. Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

power.<sup>83</sup> Law as something to be used is also sometimes an excuse; the traffic policeman says he means nothing personal when he gives me a ticket. Finally, law may be a sanction for what might otherwise be seen as shabby; "continuance" sounds better than either "delay" or "neglect."

Law, in the relationship, may lose its rationality since law sometimes has to be more or less than rational.<sup>84</sup> Analysis of this notion requires a search for the law-office analogue for Holmes' famous judicial observation that the life of the law has not been logic, but experience.<sup>85</sup> Perhaps it lies in part in E.B. White's complaint that lawyers never write anything you can read; when you show them a piece of plain English, they say it doesn't mean anything.<sup>86</sup> This irrationality often is evident in the preparation and execution of wills. Clients rarely read their wills; when they do read them, they profess not to understand them, and when they are asked to make rational judgments about the text, they ask, "What do I have a lawyer for?" The lawyer's work thus is seen as ritualistic; it need not be understood as a rational act. A less cynical characterization of this perception is that the law inevitably expresses the history and aspirations of the community and that these are never wholly accessible to reason.

Legal rationality and irrationality may also provide a useful focus for the difference between lay perception and lawyer perception of law as an awesome word. The pretension of lawyers is that they are more rational, at least in professional matters, than laymen are; it is just as likely, however, that rationality is just a lawyer's *style*, and that realization of the aspiration of Canon Eight—reform sufficient to assure citizen respect for law—lies in conforming law to the irrational in man. Religion is the means most people have used to give meaning to the irrational in man and to nature, which is grander than human reason. Therefore, Christian faith may provide a critical element necessary to fulfill one's responsibility under Canon Eight, and it may support one's efforts to develop the leadership which Canon Eight demands.

Lawyers are no more rational than anyone else in their use of the law. For example, an Indiana bar association ethics panel criticized a member of the bar for his efforts to *rationalize* the loss of a case

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83. See T. WILLIAMS, HUEY LONG (1970).

84. See generally W. BARRETT, IRRATIONAL MAN (1958).

85. O.W. HOLMES, THE COMMON LAW 1 (1881).

86. E. WHITE, THE SECOND TREE FROM THE CORNER 87 (1953).

by personal attacks on the judge.<sup>87</sup> The lawyer was not, however, attempting to behave reasonably. He was explaining a phenomenon never wholly accessible to reason (judicial judgment), and was improperly using a selfish and biased bit of irrationality. He was *irrationalizing* something that was partially *unrational*. Rationalization is not something lawyers *do*; it is something they *affect*. Both lawyers and clients are often unrational in their lives under the awesome word law; to put it in a positive way, there is more to people, to life, and to law, than reason. If we pretend that it is a rational system, our efforts should tell us more about ourselves than about the law.

This is not to deny that lawyers are especially qualified to notice a need for reform, and to initiate reform, in the law.<sup>88</sup> Nor does my point deny that lawyers should be peculiarly dedicated to improvement in the legal system.<sup>89</sup> Lawyers are best qualified to initiate legal reform because they share a greater fascination with the awesome word law, a consequently larger amount of information on its process, and somewhat more dependable intuition on what decisionmakers will do than do lay people. But when all is said and done—in decisions on questions of law as well as fact—it is quite possible that our lay fellow citizens may have greater wisdom on the reforms themselves.

Christian philosophy regards love as the key to human understanding.<sup>90</sup> I doubt that we can learn to respect the unrational in ourselves, in our brothers and sisters, and in the law, without love. Rationalization is a lawyer's style and pretense, and thus a way to live under the shadow of the awesome word law. It is a defense. Perhaps with love the lawyer can lower his defenses long enough to be useful to the community. And that, of course, is where the most famous of the Pauline letters and Canon Eight come together—in the acceptance of our need to rationalize our need for the law, in our compassion for the client who experiences the law as oppressive, and in our celebration of the common and unrational humanity, in both lawyer and client, which the law expresses, calls to goodness, and protects.

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87. INDIANA CONTINUING LEGAL EDUCATION FORUM, THE CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 222 (1973).

88. CODE, *supra* note 7, E.C. 8-1.

89. CODE, *supra* note 7, E.C. 8-2.

90. I mean nothing fanciful when I use the word; *cf.* Kelsey, *supra* note 19:

When we examine ourselves we find that there is an emotion which fits [St. Paul's] description which we have toward those that we love the most. The startling thing about Christianity is that we are expected to have this emotion toward all men.

See St. Paul's Second Letter to the Christians in Corinth, 2 *Corinthians* 3.

St. Paul's denial of the relationship between love and evil, and his celebration of the relationship between love and truth,<sup>91</sup> is thus a religious reflection on Canon Eight. Neither love nor law needs to rejoice in condemnation. The practice of law can be, as St. Paul elsewhere says, the means for finding men innocent, and therefore of finding them good even when—or especially when—they are irrational.<sup>92</sup> Law need neither ignore the facts of human nature, any more than love ignores them, nor oppress relationships. Law's ability to transcend condemnation, however, may depend—as love's ability to transcend depends—on accepting both the rational and irrational in humankind.

Part of the truth within a human being is that much of his deepest life, a depth the law reaches rarely and lawyers reach often, is not rational. Improvements in the legal system, our duty under Canon Eight, will come more quickly if we contemplate this irrational, Christian-Jewish-Pauline religious reality. In this way Canon Eight is inextricably bound up with St. Paul's message of love.

#### IV. EXAMPLE<sup>93</sup>

One surprise we received in our reviving the course in professional responsibility in the first year at Notre Dame was that students have refused to regard the rules as rules. They insist on merely consulting

91. 1 *Corinthians* 13:2-6.

92. See note 85 and text accompanying notes 23-26 *supra*.

93. Canon Eight deals with systems, Canon Nine with personal example. Neither involves—in the present context—law as a moral guide. It seems hard to avoid the common sense observation that the law is both an expression of moral consensus and, in a Sartrean way, an inevitable tutor of morals. See generally RODES, *supra* note 70. Jurisprudes have made hard going of the principle, but it is obvious to me that we make the law express a moral consensus, at least the moral consensus of our power holders. And we accord a certain moral authority to law by virtue of its being law.

If that's the law, I reckon there aint nothing for a law-abiding feller like me to do but jest put up with it. Because if folks dont put up with the law, whats the use of all the trouble and expense of having it?

W. FAULKNER, *THE MANSION* 29 (1955). See generally P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1955); Levi, *The Collective Morality of a Maturing Society*, 30 WASH. & LEE L. REV. 399 (1973) [hereinafter cited as Levi]. The relevant focus for this issue in the present context is *the lawyer* as moral tutor, a point to which Louis M. Brown has devoted attention. Probert & Brown, *Theories and Practices in the Legal Profession*, 19 U. FLA. L. REV. 447 (1966-67). Empirical evidence suggests good reasons for consideration of the question. Lawyers are moral leaders, especially in America, for good (the "civil rights revolution") or ill (Watergate). See DONNELL, *supra* note 35. President Levi argues, in reference to the formation of public policy by judges, that government must be patient about the developing conscience of the people if it proposes not only to rule but to foster goodness among them. Levi, *supra* at 430. My point in calling the situation Sartrean is that government fosters moral conduct—*chooses* to foster goodness or evil—and cannot avoid doing so. At this point, I think Louis Brown would

them as situational guidelines. For example, in the case of the divorce client who left his lawyer and then lied about his residence,<sup>94</sup> many students were horrified in class, and persisted into error on the examinations, rejecting the rigid and explicit demands of Disciplinary Rule 4-101(c), which forbids disclosure in any of the three circumstances noted, on pain of disbarment. A part of the reason for this phenomenon in today's law students—and it occurred in relation to other professional rules as well as to Canon Four—is a rebellion at rigid moral rules and preference for options in behavior. The broader culture has come to call this preference an adherence to "situation ethics."<sup>95</sup> The rebellion of our students seems healthy, and it is perhaps a reflection of this rebellion that the Code, particularly in its distinction between Ethical Considerations (aspirations) and Disciplinary Rules (minimum levels of acceptable conduct), tries to accommodate personal ethical freedom.<sup>96</sup>

Beyond situation ethics, however, looms a larger theory.<sup>97</sup> The thesis that law is an unfitting metaphor for the moral choices Jesus talked about expresses the older existential insight of choice.<sup>98</sup> I choose,

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say that more law is made in law offices than in courts or legislatures, and that moral leadership of the law, *for the most part*, is carried out by lawyers in private encounters with clients. See Reisman, *supra* note 40. One might then adapt President Levi's point and suggest to lawyers, as leaders, a patience for the developing conscience of their clients, without forsaking or ignoring the lawyer's moral influence, achieved through an ability to see more clearly than the client the tendency and the desirable direction of a developing moral decision.

94. See text following note 15 *supra*.

95. See generally J. FLETCHER, *SITUATION ETHICS* (1966).

96. But in narrow detail these students seek to apply "situation ethics" with a rigor which the profession will not accept. I will talk here mainly about the idea of moral options in what I perceive to be my own growth as a lawyer and a Christian, but I should note that my students disappoint me when they carry perception of options to the point of rejecting minimum rules of conduct. They seem to me to quibble over and re-evaluate the trivial; their fault is that they are as mired in rigid morality as the rigid moralists are. They strain at a gnat (*e.g.*, the legally safe option of keeping silence when the rules say one should) and swallow a camel (*e.g.*, the failure of their elders as lawyers to feed the poor, to relieve the persecuted, to bear witness against injustice).

97. See Daube, *Pauline Contributions to a Pluralistic Culture: Re-Creation and Beyond*, in II JESUS AND MAN'S HOPE 223 (1971), making the point that St. Paul's purpose in Corinth was to keep a praiseworthy notion from becoming a fetish. The test, in Professor Daube's view, was whether it was beneficial to the individual Christian to follow the rule, and whether following it tended to build up others, and the church. This larger theory is borrowed from James Burtchael's new book, *Philemon's Problem*, especially its third and fourth chapters. BURTCHAELL, *supra* note 12.

98. "What is not possible is not to choose. I can always choose, but I ought to know that if I do not choose, I am still choosing." J.P. SARTRE, *EXISTENTIALISM* 48 (Philosophical Lib. ed. Frechtman transl. 1947).

as Satre said, even when I seem not to choose. I choose by not choosing. In either event, I choose what I am to be.<sup>99</sup> In this life of inevitable choice I make myself into a person who is or is not able to respond to God.

The purpose of Canon Nine<sup>100</sup> is example, but, more than any of the other canons, it fails to justify itself intellectually. Ethical Consideration 9-6 suggests some possible justifications, but they are little more than hints:

Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof . . . to act as a member of a learned profession, one dedicated to public service . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public. . . .<sup>101</sup>

The codifiers quote the Illinois Supreme Court in a footnote, but again the intellectual context is more form than substance:

The lawyer assumes high duties, and has imposed on him grave responsibilities. He may be the means of much good or much mischief. Interests of vast magnitude are entrusted to him; confidence is reposed in him; life, liberty, character, and property should be protected by him. He should guard, with watchfulness, his own reputation, as well as that of his profession.<sup>102</sup>

Aspirations of that sort imply a strong, trusted personal reputation and a respected profession, and they imply that the reason to guard this position is to assure that the community will be able to grow. But fulfillment of these aspirations is left to the individual abilities of lawyers to make the choices of behavior which will make strength and growth possible.<sup>103</sup> In this respect Canon Nine resembles St. Matthew's Gospel, where it describes the separation of the sheep and the goats at the Last Judgment.<sup>104</sup>

King Jesus spoke of judgment without law. He condemned men

99. See generally J. WILD, *EXISTENCE AND THE WORLD OF FREEDOM* (1963).

100. "A lawyer should avoid even the appearance of professional impropriety."

101. CODE, *supra* note 7, E.C. 9-6.

102. *People ex rel. Cutler v. Ford*, 54 Ill. 520, 522 (1870).

103. Only the narrowly specific injunctions in D.R. 9-101 and 9-102 on conflicts of interest between public and private functions and handling of clients' money are exceptions to the self-governance generally accorded to lawyers in interpreting the general injunction of Canon Nine.

104. *Matthew* 25:31-46,

who were surprised to have been condemned—surprised, one supposes, because these men had obeyed the law. When they asked wherein they had offended, Jesus said, "Go away from me with your curse upon you . . . for I was hungry . . . thirsty . . . a stranger . . . naked . . . sick and in prison."<sup>105</sup> They said they didn't see Him in these moments of distress, and therefore didn't help Him, and Jesus said, "In so far as you neglected to do this to one of the least of these, you neglected to do it to me."<sup>106</sup> One of the most striking things about that scene is that Jesus did not curse the condemned; He noticed that they had cursed themselves—"go away with *your* curse upon you," He said. They were sent away, not for what they had done, or even failed to do, but for what they had chosen to be. They had chosen to be people who could not see God in their brothers. The story compares interestingly with St. Luke's story of Lazarus and the rich man.<sup>107</sup> The rich man was condemned because he did not see the beggar at his door. He was in hell and looked across the great gulf which separated him from Lazarus, the beggar, in heaven. The rich man saw Abraham there and asked him for relief, which was refused. He then asked that Lazarus be sent back among the living to warn the rich man's brothers. "If someone comes to them from the dead," he said, "they will repent."<sup>108</sup> But Abraham refused to send the beggar, whom all six brothers had already not seen. "If they will not listen to Moses or to the prophets, they will not be convinced even if someone should rise from the dead."<sup>109</sup>

Christians believe in a God whose love is limitless, and in a human condition which God Himself was willing to bear. They believe in a law by which men are found innocent and in a final judgment which is the consequence of what men choose to be.<sup>110</sup>

What is essential is that [a man] grow to fullest human stature, that he become a man who loves heartily. At death time will end, growth will cease. What he has become, that he will remain forever. At death he confronts God. If he is a man who has grown into love, he will draw near and cleave to him—as he has gone out of himself to his brothers before death. If he has only become

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105. *Matthew* 25:41-43.

106. *Matthew* 25:45.

107. *Luke* 16:19-31.

108. *Luke* 16:30.

109. *Luke* 16:31.

110. St. Paul's Second Letter to the Christians in Corinth, 2 *Corinthians* 3:7-12; *John* 8:15,

wrapped up in himself, then he will come face-to-face with the Lord, but not notice him any more than he has noticed his brothers.<sup>111</sup>

The Christian imperative here seems to be a life of choosing either to discover and notice the beggar Lazarus at the door or to submit to creeping penury of trade unionism in the legal profession.<sup>112</sup> Active love, like that of Jesus, is most sensitive, and discovers, without being told who is suffering, who lies neglected.<sup>113</sup> A person's morality

111. BURTCHAELL, *supra* note 12, at 67. See CARY, *supra* note 75, at 223, 311:

Progress isn't done by governments or spirits, but by chaps. A few rich chaps gambling on their fancy and a few young chaps backing them up in order to give papa and mama a shock. It's just the same in art . . . . What keeps it moving is not a big public shoving its little foot forward, but a little mosquito biting a big public behind. If you left the world to itself . . . it would die of fatty degeneration in about six weeks. It would lie down in the nice rich mudbank where it finds itself and close its eyes and stuff its ears and let itself be fed to death down a pipeline. But God, not intending to lose a valuable pedigree hog that way, has sent the mosquito to give it exercise, and fever and the fear of death.

. . . .  
 . . . go love without the help of anything on earth and that's real horse meat. A man is more independent that way, when he doesn't expect anything for himself.

Burtchaell also quotes Rose Macaulay, who reflects, on reading the inscription on a tomb, that sin is a matter of not noticing—"A confused sort of twilight in which everything is blurred . . . because right and wrong have become things you do not look at . . ." until, as Father Burtchaell puts it, "by doing unloving things they had become unloving, to their surprise."

112. BURTCHAELL, *supra* note 12, at 71. Louis M. Brown's wife, Hermione K. Brown, is a distinguished Beverly Hills lawyer whose moral outlook is vigorous. See her statement in Brown, *Responsibilities of the Taxpayer*, 15 U. So. CAL. 1963 TAX INSTR. 1, 4, 8, 10, 16 (1962):

I'd like to keep from getting in trouble with the authorities and I'm grateful that there's a way to keep out of trouble. \* \* \* As far as I'm concerned, there's a real difference between the person who openly takes a position and one who does it secretly. The fact that the law sets its own sanctions isn't justification for surreptitious non-compliance. \* \* \* I feel that everyone should pay no more than is required, and no less. . . . That's why I support a competent, adequately compensated Internal Revenue Service. Only through good government can I be assured others are treated equally. . . . [I]t's part of my overall citizenship responsibility to see that obedience to law is accomplished.

113. I leave aside in the text the public thrust of Canon Nine, but not without noticing that the public thrust is rich and important, especially in an era which has recently seen lawyers in positions both of conspicuous moral rebellion (the "civil rights revolution," the "war on poverty," and the movement against the military adventure in Vietnam), and conspicuous moral decay. Lewis, *The Profession of Law*, N.Y. Times, July 6, 1971, at 25, col. 1; Ostrow, Matthews, *Watergate a Lawyers' Scandal*, Chicago Sun-Times, July 26, 1973, at 60, col. 3; Waltz, *Lawyers on Trial*, Chicago Tribune, Nov. 18, 1973, § 9 (Magazine), at 32. I have often thought that lawyer roles are usefully distinguished into counselor, manipulator, advocate, and revolutionary. The last is in most respects a unique professional calling, and a calling which I find consistent with the oldest and best in the American legal tradition. Canons Eight and Nine cautiously invoke this tradition. It is possible also to Christianize it, or perhaps to reassert its orig-

—his efforts to make himself and his profession honorable and open to change—defines his existence. In a person's life as a lawyer he can easily enter upon a course of conduct which seems to involve no significant moral choices by simply walking down the street and not looking. He can live unwillingly, as others seem to expect him to live, and his oblivious, undiscovering conduct will define everything that is important about him. He will be destroyed by his moral blindness and will have made himself blind without noticing. It will never have occurred to him to see.<sup>114</sup>

The social side of this ethic of choosing a life of discovery is that decisions which change society are individual and even eccentric.<sup>115</sup> They are not objectively self-evident. Jesus could have chosen not to be murdered, Thomas More could have found his way out of the Act of Supremacy,<sup>116</sup> and Dr. Thomas Dooley could have gone on practicing middle-class, domestic medicine. No one could have demanded of these individuals the life-defining decisions they made, but they were compelled by the nature of the person each of these men chose to be.<sup>117</sup> Senator Harold Hughes chose recently to leave the Senate for full-time religious work; one can as easily conceive of a religious worker deciding to run for the Senate. These choices have in common an import for society (and for professions) and a unique individuality; that is, they are not decisions of time and mores, but decisions a person makes in the solitude of his own conscience. They are decisions taken by one who "cannot expect society around him to be virtuous, so that his integrity may come easily."<sup>118</sup>

More's life, in this respect, can be contrasted to the life of his successor, Francis Bacon. Bacon was probably a brighter man; he had

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inal Christianity; I have tried to do that with students by suggesting that it involves (1) a passion for change, (2) a responsibility (the ability to respond) toward human need, and (3) compassion (the ability to share suffering).

114. See notes 98 and 99 and accompanying text *supra*.

115. Witness, for example, the lives of Jesus, St. Thomas More, and Dr. Thomas Dooley.

116. Robert Bolt saw Thomas More as a man who defined himself through personal choices. See generally R. BOLT, Preface to *A MAN FOR ALL SEASONS* (1962) [hereinafter cited as BOLT]. Another thoughtful view of More can be found in Hesburgh, *The Moral Basis of Personal Commitment*, 44 *NOTRE DAME LAW*. 1082 (1969). See generally R. CHAMBERS, *THOMAS MORE* (1935).

117. "All I mean by truth," Holmes said, "is the road I can't help travelling." I HOLMES-POLLOCK LETTERS 100 (M. Howe ed. 1941).

118. BURCHHELL, *supra* note 12, at 97. T.S. Eliot painted a grim alternative in *The Cocktail Party*:

certainly a better education, more money, and more power. More is a saint, though, and a model unlike any other for lawyers. Bacon is remembered in our profession as a judge who took bribes. "The tragedy," I wrote several years ago, "is that Bacon, as the legal profession sometimes does, fell short of a realizable ideal."<sup>119</sup> Today, a similar shortcoming to that of Bacon can be observed in a legal profession whose best men are "exclusively in the defense of the powerful, to the detriment of individuals less powerful and, ultimately, to the detriment of the entire society."<sup>120</sup>

What seems to bind together these instances of failure at example—those who did not see Jesus in the poor in St. Matthew's Gospel, Bacon, and the modern American lawyers I think of as Bacon's heirs—is that they did what everyone else was doing. In every instance the plea in defense is *vitia temporis* (everybody's doing it). And in every instance the moral destination of these undistinguished, unchosen professional lives is loss of responsibility and even of the ability to respond. This is the estate which is evil. These were the men whom Jesus judged—who seemed to have condemned themselves, rather than to have been condemned. They were unable to respond to God when God chose to seek response among men, and they were therefore unable to respond to God in more ethereal garb, when he proposed to welcome them to immortality.<sup>121</sup>

What seems to bind together the instances of success at example—Jesus, More, those who saw God in the poor, and those in our profession today who choose to lead us out of blindness—is the moral habit

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Most of the time we take ourselves for granted As we have to, and live on a little knowledge About ourselves as we were. Who are you now? You don't know any more than I do, "But rather less. You are nothing but a set Of obsolete responses.

T.S. ELIOT, *The Cocktail Party*, in *THE COMPLETE POEMS AND PLAYS* 307-08 (1962).

119. Shaffer, Book Review (of C. BOWEN, *FRANCIS BACON: THE TEMPER OF A MAN*, 1963), 73 *YALE L.J.* 533, 540 (1964).

Some of the intrinsic goodness of a good deed must seep into the motive, and some of the bad of a bad deed. Keep doing good deeds long enough, and you'll probably turn out a good man.

L. AUCHINCLOSS, *THE RECTOR OF JUSTIN* 333 (1964).

120. *Id.*

121. Bolt's More seems to sense the ordinariness of evil in this sense. See BOLT, *supra* note 116, at 85.

JAILER (Reasonably): You understand my position, sir, there's nothing I can do; I'm a plain, simple man, and just want to keep out of trouble.

MORE cries out passionately: Oh, Sweet Jesus! These plain, simple men!

The point seems almost as banal as the human lives it despairs of, but ordinariness explains a great deal about dead Jews in Nazi concentration camps and about starving Irishmen in 1850—more than any amount of calculation or ominous rhetoric.

of unique choice. These examples of good example are imitable only in their courage. Their decisions are not imitable because each of them chose to be somebody whom his society and his times could not have produced.<sup>122</sup> Robert Bolt said of More that he was "a man with an adamant sense of his own self."<sup>123</sup> And of those who would, in the present historical and social context, decline the opportunity to be examples—*i.e.*, decline to notice something worth bearing witness over—he says:

[W]e fly from the idea of an individual to the professional describers, the classifiers, the men with the categories . . . . Both socially and individually it is with us as it is with our cities—an accelerating flight to the periphery, leaving a center which is empty when the hours of business are over.<sup>124</sup>

Bolt's More "knew where he began and left off . . . and . . . at length he was asked to retreat from that final area where he located his self . . . and could no more be budged than a cliff."<sup>125</sup>

We can, in Bolt's view, yearn for More's sense of selfhood, but we can hardly yearn for More's self, which was his own. Each of us has the harder choice of his own self, and each of us is free to choose against his self. We tend to choose better when we choose with advertence, and to choose poorer professional lives, and a worse profes-

122. BURTCHAELL, *supra* note 12, at 93 quotes Hillaire Belloc:

I think when people come to die it is not so much the memory of good deeds that can support them as the memory of decisions taken. They are the structure of perseverance. They are creative. And they are in communion with the ruling and directive power of Almighty God.

123. BOLT, *supra* note 116, at xiii.

124. *Id.*

125. *Id.* Morton Kelsey, *supra* note 19, says:

Courage is the determination to continue true to what one stands for even though everything outside the individual deny what we hold and even when we are assailed by doubts and uncertainty and revolt within ourselves. Spiritually, courage is living by the spirit in a world which denies the spirit, in a self which depreciates and revolts against the spirit.

It is not necessarily an intellectually sophisticated virtue. See generally G. ZAHN, IN SOLITARY WITNESS: THE LIFE AND DEATH OF FRANZ JÄGERSTÄTTER (1964), for the story of a modern Thomas More who was also a simple and even simple-minded man. One senses a yearning, amidst disenchantment with doctrine, for an old Christian spirit in the American ethos, and I suggest that much of the yearning is for the sort of religious, moral courage we celebrate in More and Jägerstätter. Walker Percy's character Williston Bibb Barrett said: "I unite in myself the new American lewdness with the old American cheerfulness. All I lack is Christianity. If I were a Christian as well as being lewd and cheerful, I'd be the new Johnny Appleseed." W. PERCY, THE LAST GENTLEMAN 293 (1966).

sion, when we choose by not choosing. The important thing about Canon Nine is that our choices define ourselves and all that is defined in America by the legal profession.