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Edward F. Barrett

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## THE ADVERSARY SYSTEM AND THE ETHICS OF ADVOCACY

*Edward F. Barrett\**

The moral theologian, as St. Thomas Aquinas warns us,<sup>1</sup> "has to consider the circumstances" of a human act before he calls it "good" or "bad." The assumptions of our traditional Anglo-American adversary system of administering justice constitute the circumstances under which the trial lawyer works. A critique of the ethics of advocacy must constantly refer to them. Failure to do so results in misunderstanding and consequent cynicism about the morals of the advocate. Hence, the loaded questions which the puzzled layman puts to him: "Isn't it *wrong* to defend a man you *know* is *guilty*?" "Is it *right* to plead a *technical* defense against a *just* claim?" "Isn't it *plainly dishonest* to cross-examine a witness who *has told the truth*?" In the moral sciences such abstract questions divorced from the "circumstances" of a given case invite abstract answers. Small wonder that the answers rarely satisfy.

"The purpose of a lawsuit is," indeed, "to arrive at the truth of the controversy, in order that justice may be done."<sup>2</sup> Undoubtedly the courts of the Spanish Inquisition and the Supreme Court of the United States would alike assent to this. It is at least another of those "decencies of civilization that no one would dispute."<sup>3</sup> However, given the ideal and given also the inescapably human features of a lawsuit, how can the truth of the matter in dispute between the parties be most practically arrived at in order that justice (not justice in the abstract but justice according to law) may be done? We have no archangel on the bench. The jury is not drawn from a venire of Cherubim or Seraphim. The litigants, their lawyers and their witnesses are not saints. The trial of a lawsuit is a very human thing.

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\* B.A., M.A., LL.B., J.S.D.; Professor of Law, Notre Dame Law School; Member of New York Bar.

1 SUMMA THEOLOGICA I-II, 7-2 (in BASIC WRITINGS OF ST. THOMAS AQUINAS, ed. PEGIS, II, pp. 240-42).

2 McCARTY, PSYCHOLOGY & THE LAW 223 (1960).

3 Holmes, J., in Michigan Trust v. Ferry, 228 U.S. 346, 353 (1913).

Our adversary system is frankly based on the pragmatic assumption that the truth of the controversy between the parties to a lawsuit stands a reasonably fairer chance of coming out when each side fights as hard as it can to see to it that all the evidence most favorable to it and every rule of law supporting its theory of the case are before the court.<sup>4</sup> In this legal combat each litigant is entitled to an advocate professionally bound, on the one hand, to exhibit in his client's cause "entire devotion, warm zeal and the utmost skill,"<sup>5</sup> and on the other hand equally obligated as an officer of the court to discharge his trust "within and not without the bounds of the law," honorably resisting even in the heat of battle the temptation to win by foul means or by "any manner of fraud or chicanery."<sup>6</sup> The apparent ambivalence of this difficult ethic thus imposed by the assumptions of the adversary system and the ultimate purpose of a lawsuit is hopefully to be resolved by the advocate's obedience to "his own conscience and not the conscience of his client."<sup>7</sup> In our "contentious craft"<sup>8</sup> of advocacy the resolution is not always easy.

Quite different are the basic assumptions of our adversary system from those of the so-called inquisitorial method pursued elsewhere.<sup>9</sup> There it is believed that the truth of the controversy in a lawsuit is more likely to emerge through the independent inquiry of paid public officials owing no partisan allegiance to either side of the dispute. In the quest for the truth the main reliance is upon the competence, thoroughness and fairness of the public inquisitors. The advocate's role, so prominent with us, is secondary or auxiliary. Less value is placed on his contentious contributions. With us, however, much more is hoped for from the battle of the advocates in the total process of getting at the truth. Indeed, Lord Macaulay, no less a lawyer than a historian, once declared with his usual flair for antithesis and paradox that we obtain the fairest decision "when two men argue as unfairly as possible on opposite sides" for then "it is certain that no important considerations will altogether escape notice."<sup>10</sup>

In the pragmatic assumptions of our adversary system some<sup>11</sup> have noted a resemblance to the theory of the canonist's procedure which provides for a "promotor fidei" (the "devil's advocate" in familiar speech) charged with the duty to prepare and present all possible arguments, however seemingly slight,

4 Cf. FRANK, COURTS ON TRIAL 80 (1949).

5 American Bar Association Canons of Professional Ethics, Canon 15.

6 *Ibid.*

7 *Ibid.*

8 *In re Sacher*, 206 F.2d 358 (2d Cir. 1954) (Clark, J., dissenting) *rev'd sub nom Sacher v. Association of the Bar of the City of New York*, 347 U.S. 388 (1954).

9 GHEATHAM, CASES & MATERIALS ON THE LEGAL PROFESSION 229 (2d ed. 1955).

10 Quoted in FRANK, *op. cit. supra* note 4, at 92.

11 The adversary method has a counterpart in the procedure followed by the Church in the canonization of saints. When it is proposed that someone should be canonized, there is always appointed an official known as the "devil's advocate" whose job it is to think up all the reasons why the individual in question should *not* be canonized. The underlying theory of this procedure appears to be much the same as the underlying theory of the common-law adversary system, namely, that truth is best served by relying on the parties themselves to make their own case and to demolish that of their adversary.

O'Meara, Introduction to Law (unpublished transcript of lectures in course at the Notre Dame Law School, Fall Semester, 1958).

against a candidate proposed for beatification or canonization as a saint.<sup>12</sup> The adversary system has also been compared,<sup>13</sup> perhaps not invidiously, to the capitalist system of economic organization since both involve competition and lay stress upon self-interest and individual initiative in the achievement of their respective goals. In the adversary system some have seen the legal counterpart of economic laissez-faire.<sup>14</sup> Its undertones of "fight" and the trial lawyer's talk of "tactics" and "strategy" have suggested an ancestry for the system in the ancient trial by battle<sup>15</sup> wherein the truth of the controversy, so far as it was a relevant objective, was arrived at when armed bravos hired by the respective litigants fought each other until the skull of one was smashed or he "cried craven" before the sun went down. It has been remarked that few things are more embarrassing to mankind than the genealogy of its most cherished ideas. Such embarrassments are usually evaded by rationalizations more suited to the refined demands of later days.

Whatever then its lineage, whatever support its assumptions may derive from comparative law or comparative institutional studies, the adversary system as a human device for getting at the truth of disputed facts in a lawsuit is staked on the assumption that from the struggle between the litigants aided by their advocates, each with ardor presenting one side of the case and each with the utmost skill attempting to detect the weaknesses of his adversary's evidence or points of law, the jury which must choose between the conflicting versions of the truth, and the court which is to select the applicable rules of law will have before them, more often than not, the relevant material from which to fashion by their joint efforts a just decision. Such is the theory of the adversary system, and such are its assumptions.

Since the trial advocate's estimate of his moral obligations tends naturally to be conditioned by the assumptions of the system, his estimate will be modified as the system itself is altered. If the system is totally displaced by the inquisitorial method the ethics of advocacy will be radically different from what they are today.<sup>16</sup>

The adversary system and its assumptions are under widespread and vigorous attack. Some of these attacks are mistakenly directed to conditions which are not necessarily the result of our system and which its abolition would not necessarily remove. A congested trial calendar is due to other causes than the adversary system alone and there are better cures than a hasty scrapping of the system before the proposed substitute is identified and its implications explored. There are, of course, causes of "Popular Dissatisfaction with the Ad-

12 Cf. XI CATH. ENCYC. 364 (1907), *Beatification and Canonization*; I CATH. ENCYC. 168, *Advocatus Diaboli*.

13 CHEATHAM, *op. cit. supra* note 9, at 18.

14 FRANK, *op. cit. supra* note 4, at 92.

15 Cf. 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 632-34 (2d ed. 1898); FORSYTH, *THE HISTORY OF LAWYERS* 298-302 (1875).

16 The trial of the Nazi leaders after World War II furnished a striking comparison and reconciliation of the two systems. The four Allied powers who created the tribunal employ different systems, and it was difficult at first for the representatives to appreciate the assumptions and methods of one another's systems.

CHEATHAM, *op. cit. supra* note 9 at 229.

ministration of Justice" which are perhaps endemic in any human legal system, as Dean Pound noted sixty years ago.<sup>17</sup> Man's innate passion for justice sometimes leads him to demand from a human system of justice-according-to-law more than it can give. The attempt to realize through man-made law one's own conception of heaven on earth may produce a hell on earth. The impatient reformer easily sees the horrid gap between the defects of an existing institution and the dream of his ideal. He sweeps away the institution and is often chagrined when men find fault with what he offered them in its place. With a stubborn defiance of logic they would still have things both ways. Man's reach should exceed his grasp but the reach should not be confused with the grasp.

In these days of breath-taking advances in technology thanks to the development of the scientific method it is understandable that critics of the adversary system should compare unfavorably its methods and results with those of the physical sciences. To the scientific mind trained in the scientific method the assumptions of the adversary system must appear ludicrously out of date and tragic in their consequences if the object of a lawsuit is to get at the truth of the controversy. The next step is easily taken: the object of science is truth; the purpose of a lawsuit is truth; therefore let science displace the unscientific assumptions of the adversary system.

But a lawsuit is not a scientific investigation. One recalls the lamentation of Cardozo looking up from his labors as an appellate judge: "They do things better with logarithms."<sup>18</sup> The law is more than logarithms and a lawsuit is not a controlled experiment in a laboratory. Time does not run against the scientist patiently pursuing the verification of a hypothesis through the seemingly endless process of trial and error. He knows that if death overtakes him in his task others will continue his advance from the point of progress at which he stopped. But a lawsuit must be decided once and for all, here and now, with the material at hand, so that the litigants and the witnesses may take up their interrupted daily lives and the courts move on to other things.

The scientist observes immediately the data from which he draws his conclusions. In the trial of a lawsuit the court and jury are concerned for the most part with testimonial evidence, with the credibility of the witness narrating his present recollection of sensory perceptions registered months, if not years before. The triers of the facts do not see the plaintiff struck by the defendant's speeding car nor hear the shots which caused the homicide. They must do the best they humanly can with the data provided by fallible human memory. The scientist through the miracle of the microscope can see the death-dealing microbes presently at work. Witnesses are human beings, not particles of matter in a test tube. Lawsuits are controversies between human beings and the margin for error due to the vagaries of *homo sapiens* — his emotions, his imagination, his hopes, his fears, his ambitions and frustrations which must be allowed for in the very human context of the trial of a lawsuit — is negligible in the work of the physical scientist. The assumptions of our traditional adversary system

<sup>17</sup> Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

<sup>18</sup> CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 1 (1928).

flow from the frank recognition that a lawsuit is not a "controlled experiment," that "nicely accurate results cannot be expected; that society and the litigants must be content with a rather rough approximation of what a scientist might demand."<sup>19</sup>

Critics of the wholly unscientific assumptions of the adversary system and of the trial methods they induce offer the scientific method as a substitute in arriving at the truth of a lawsuit. They should make clear what their suggestion implies. It is not enough to take cover behind the magic word *Science*. The convenient vagueness of the term and the looseness of the demands made in its name connote the current idolatry of *Scientism*.<sup>20</sup> One recalls the by-gone clamor of other days for "more business in government" as the cure-all for our political ills. If the plea for more science in the trial of a lawsuit means that the inquiry into the truth of the controversy can be made a purely intellectual performance through the use of the scientific method followed to the limits of its possibilities by a board of scientifically trained inquisitors, the sacrifice of certain long-accepted values must be itemized as part of the total cost to be paid. The inquisitors would not be limited to the data presented by the litigants before them since surely nothing more unscientific could be thought of in a scientific search for truth than our traditional restriction of the trial of a lawsuit to the issues made by the pleadings, to cite one conspicuous example. The privilege against self-incrimination is not the product of the scientific method and could not long survive its devastating critique. The inquisitors, following the assumptions of *their method*, could not do otherwise than to make short work of such conceptual conundrums as the presumption of innocence, burden of proof, exceptions to the hearsay rule, or proof by fair preponderance of the evidence. The extension and application of Pavlov's theories of reflex action in the search for truth in a lawsuit would be more relevant to the exacting demands of the scientific method than Wellman's *Art of Cross-Examination*,<sup>21</sup> Goldstein's *Trial Technique*,<sup>22</sup> or similar classic guides for trial advocates working in the context of the adversary system and its assumptions. And, indeed, the truth arrived at might be a more scientific truth than the end product of the lame and halting processes of the adversary system. But one wonders whether it would be the kind of truth the community wants? Would the community accept without regret the intangible costs of the sacrifice? The democratic dogma itself was not discovered by use of the scientific method. Just as the jury system in civil as well as in criminal suits preserves the democratic link between the community and the administration of justice-according-to-law in its courts, the adversary system with all its assumptions and conditions, its

19 MORGAN, *Foreword to MODEL CODE OF EVIDENCE* 4 (1942).

20 Too many students of human society, intoxicated with the idea that they must be "scientific," have followed a false trail. Where that trail may take them appeared in the boast, not long ago, of a leading sociologist. "Sociology as a science," he said, "is not interested in making the world a better place in which to live. . . ."

FRANK, *op. cit. supra* note 4, 218.

21 WELLMAN, *THE ART OF CROSS-EXAMINATION: WITH THE CROSS-EXAMINATION OF IMPORTANT WITNESSES IN SOME CELEBRATED CASES* (4th ed. 1936).

22 GOLDSTEIN, *TRIAL TECHNIQUE* (1935).

weaknesses and its strengths, keeps the face of justice human. *Scientism* unrestrained, amoral, if not neutral in its moral connotations, would de-humanize the physiognomy of a trial.

To question the final wisdom of some of the implications of the sweeping claims made for the scientific method as a complete substitute for the adversary system in arriving at the truth of the controversy in a lawsuit, is not to deny a proper place for science<sup>23</sup> within the essential context of the assumptions of our system. The scientist continues to provide the tools of advocacy, affording new methods by which the failures of human memory may be checked, the mistaken witness corrected and the perjurer exposed. The blood test negatives the claim of paternity in a bastardy proceeding; the fluoroscope reveals the forged document. The basic assumptions of the adversary system are not displaced. In the current controversy over these assumptions, and the proposed abolition or sterilization of the adversary system, science needs more humility in its claims and the defenders of the adversary system less fear of the consequences of its progressive evolution.

A defense of the assumptions of the adversary system is consistent with support of the procedural reforms in the trial of a lawsuit which have come in recent years, and which are continuing. Pre-trial conferences which de-limit the issues to be tried and which save the time of judge and jury, and of litigant and lawyer in argument on the admissibility of evidence may dull the edge of the sword of surprise — an old and welcome weapon of some trial advocates. The essential assumptions of the adversary system still stand unimpaired. To limit the issues by pre-trial order is simply to do in the modern manner what the common law achieved by its own pre-trial paper pleadings in the better days before abuse made a vice of the virtue. The basic assumptions of the adversary system were never intended to include the further assumption that the trial of a lawsuit was a game between contending counsel or that the process of arriving at the truth of the controversy was a sporting event with victory going to him who played with greater skill. The sporting theory of justice in a lawsuit is a corruption of the assumptions of the adversary system; it is not their necessary consequence. We have been assured that in war there is no substitute for victory. Personal dishonor of the advocate as the price of winning a lawsuit is treason to his tradition, and the assumptions of the adversary system do not permit the stain to be transferred conveniently to the client on any easy theory that the advocate is merely his alter ego.

What then of the Ethics of Advocacy if the adversary system is to be continued with its essential assumptions unimpaired? It is relatively easy to set down abstract or generalized canons of conduct for the lawyer. Such codes have their value in asserting broad principles, or rules of narrower scope, readily applicable to specific situations of common or frequent occurrence in the advocate's day to day experience. Surely a lawyer "should not in any way communicate upon the subject of the controversy with a party represented by counsel,"<sup>24</sup> nor "purchase any interest in the subject matter of the litigation which he is

23 FRANK, *op. cit.* *supra* note 4, 220-21.

24 American Bar Association Canons of Professional Ethics, Canon 9.

conducting."<sup>25</sup> But "[N]o code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life."<sup>26</sup> What Mr. Justice Holmes once said in another context is particularly pertinent to the ethics of advocacy: "General propositions do not decide concrete cases. The decision will depend on a judgment more subtle than any articulate major premise."<sup>27</sup> At any point in the trial of a lawsuit ethical problems may confront the advocate. A few may be referred to here illustrating the subtle way in which the assumptions and conditions of the adversary system influence their resolution.

It is the advocate's duty to present the evidence most favorable to his client. Suppose, says the lay moralist, that he knows the facts of the case—the very truth of the controversy—are with the other side. How then can he as an honest man do otherwise than see to it that these facts are made known to the court? Is he not an "officer of the court" under a moral obligation which transcends every other to see that justice is done? The questions are not new although their phraseology is as various as the specific lawsuit situations which provoke them. The youthful Boswell, contemplating a career at the bar, questioned Dr. Johnson:

I asked him whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feelings of honesty. JOHNSON. "Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge." BOSWELL. "But what do you think of supporting a cause which you know to be bad?" JOHN-SON. "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it; and if it does not convince him, why, then, Sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion."<sup>28</sup>

Dr. Johnson's reply has not satisfied all of us.<sup>29</sup> It is not completely clear. What are the "facts" of a lawsuit? A respected moral theologian has written:<sup>30</sup>

The cases in which the lawyer's services may be employed are, in general, either civil or criminal. By civil cases are meant those in which the acquisition or the retention of property is at stake or some civil right is being litigated. The first principle to guide the lawyer in reference to such actions is that he may not undertake a civil case which he *knows to be unjust* on the part of the one who seeks his services. This principle holds even in the event that the lawyer is quite sure that the opposing party, though in the right, will not be

25 *Id.* Canon 10.

26 *Id.* Preamble.

27 Holmes, J., dissenting in *Lochner v. New York*, 198 U.S. 45, 76 (1905).

28 BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 333 (Mod. Lib. ed.).

29 Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

30 CONNELL, *MORALS IN POLITICS AND PROFESSIONS* 105-06 (1946).



able to prove his claim and will lose the case. When a lawyer is presented with such a case and has studied it sufficiently *to assure himself that it is unjust*, he must inform the prospective client of this fact, and decline to prosecute it.

The same learned writer goes on to note that under the "Catholic moral teaching . . . a lawyer who knowingly undertakes an unjust case shares with his client the obligation of making restitution to all who in consequence suffer unjustly."<sup>31</sup> But when a controversy has reached the litigation stage it has generally passed the point at which preliminary study or examination could have assured the advocate that the facts of the case — the very truth of the controversy (in the questioning layman's phrase), which are the *materiel* from which the just decision is to be shaped, are all on one side. In most cases the facts of a lawsuit consist of acts or events which occurred some time prior to the trial of the case. Witnesses are present to relate their recollections of these acts or events. The truth of the controversy which we try to arrive at is whether the acts or events did occur at a given past time or at a given place as the witnesses assert. Can the advocate know in advance of trial whether the adverse party or his witnesses had capacity and opportunity to see what happened and sufficient power of memory to recall with accuracy and under oath on the witness stand such long-past sensory impressions? Again, consider an action for damages for personal injuries sustained in a traffic accident. The case is on trial before judge and jury. The defendant's liability depends on whether he acted with the degree of care required in the circumstances by a reasonably careful man. Normally this is to be determined by the jury on all the evidence. How can the advocate know, before the jury returns its verdict on that issue, whether the defendant met the test on the occasion of the accident many months ago? Witnesses at the trial will give, under oath, completely conflicting versions of what happened (more accurately, what they now remember to have seen happen). Which version will the triers of the facts believe? Under the assumptions of the adversary system no ethical canon demands that the advocate impugn the credibility of his client or his client's witnesses when they have brought to light from the dark recesses of memory what they honestly believe to be the facts. The true function of the triers of the facts is to try the credibility of the witnesses. The critique of the ethics of advocacy should not stray beyond the context and conditions of the system in which the advocate performs his prescribed role.

Here also is the answer to the layman's puzzled query "Isn't it *dishonest* to cross-examine a witness who *has told the truth*?" The object of cross-examination is precisely to determine whether the witness *has* told the truth. When counsel is convinced that the witness has indeed told the truth, not ethics but trial tactics dictate that the cross-examination should be passed.

And so with the time honored query about defending in a criminal case a man you *know is guilty*. Equally time honored answers have been given, but the question is still popular at parties when the talk turns round to law and lawyers are present. No man is guilty of a crime under our law until proved so beyond a reasonable doubt after a trial consistent with constitutional require-

<sup>31</sup> *Id.* at 106-7.

ments. The advocate who defends a man accused of crime may indeed know, either from confidential communications from the client, from the statements of witnesses or from his own investigation, that the client has committed certain acts. If law is no more than prediction<sup>32</sup> of what the courts will do in fact, the advocate may predict that the client's conduct, if shown beyond a reasonable doubt to the satisfaction of twelve jurymen, will result in conviction and punishment for violation of a given section of the penal code. There is no other concept of "criminal guilt" known to the theory of our law. The accused is constitutionally entitled to counsel. The advocate's duty is to insist that the state sustain the burden of proof which the law imposes on it with regard to the defendant's guilt. Again, the evidence against him is testimonial. Even *real* evidence (the alleged murder weapon, the gun or the knife) is mute and of no probative effect until its relevance and significance are demonstrated through the testimony of a human witness under oath. The defendant may claim his constitutionally guaranteed privilege and refuse to testify in his own behalf. It is the state's case against the defendant and not the defendant's case against the state which is to be tried. The assumptions of the adversary system permit, nay rather, demand that the defendant's advocate use every skill he has in cross-examining the state's witnesses to test the accuracy of their testimonial evidence and their capacity to make or to have made the observations now recalled, and to call witnesses for his client who can truthfully dispute the version of the facts offered by the state — and all this while in possession of facts confided to him by the client which, if proved, should leave no doubt of the client's guilt.

Lay moralists are sometimes shocked when an advocate pleads for a client what the layman calls a "technical defense" against what he calls with equal inaccuracy a "just claim." One thinks here of the defense of the Statute of Frauds, for example. The Statute stops at the threshold of the court, actions on certain types of contracts not evidenced by writing signed by the party sought to be charged. The policy behind the Statute is to prevent false and perjured claims deemed likely to be made when the agreement between the parties is oral only. Of course it is hard to see how an advocate can in good morals prevent, by resort to this defense afforded by the positive law, the collection or payment of a debt or claim which was in fact incurred and which is now justly due. But more often than not the claim is based on oral conversations between the parties. Their meaning and extent are in dispute. The plaintiff asserts one version of these conversations; the defendant, another. What canon of ethics commands that the defendant's advocate subject his client's interests to the risk of plaintiff's recollections of these conversations — all the more uncertain because they are oral? To free the defendant from such risks is the policy and the purpose of the Statute. To invoke it in such cases is the right of the defendant. It may be equally the duty of the advocate to assert it for the client who retains him. The layman too often makes the mistake of thinking that a lawsuit is a black and white affair, the former being all on one

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32 HOLMES, COLLECTED LEGAL PAPERS 173 (1920): "The prophecies of what the courts will do in fact and nothing more pretentious is what I mean by the law."

side, the latter all on the other. Most lawsuits are not black and white, but dirty gray.

Critics of the adversary system point to the flood of manuals and textbooks on the tactics and strategy of trial advocacy as proof that the assumptions of the system lead necessarily to the fight or game theory of a lawsuit.<sup>33</sup> In such books the fledgling advocate may learn from the masters of his craft such matters as: how to disconcert a nervous or timid witness; when and how to hold back your surprises so that they may be sprung at the proper tactical moment to take an opponent off guard; how to force your adversary to make an opening statement; how to "bottle up" a defendant's closing argument by cleverly distributing your points for the plaintiff over your own opening and closing arguments, etc. In fairness be it noted that some of these criticisms fail to relate the suggestions on tactics and strategy to the assumptions and conditions of the adversary system. Others ignore the fact that many of the books in question do not purport to be treatises on the ethics of advocacy which they take for granted. There is no reason why the trial lawyer of the highest moral principles should not have at his skilled command the tested weapons of advocacy.<sup>34</sup> Good morals are no excuse for incompetence in any profession. The advocate uses the weapons of his craft as an advocate and not as an assassin. Strychnine is a poison and a medicine. Surprise as a trial tactic may be abused to pervert justice. It may also be used to pillory a perjurer.

Finally, under the assumptions of our system, the advocate does not merge his identity with his client or with his client's cause. He does not surrender his personal integrity as a man nor his own dignity as a human being. He cannot falsely state to the court a matter of fact or of law. He cannot knowingly induce or permit his client or his client's witnesses to lie.<sup>35</sup> It should not take a canon of ethics to remind him of the consequences of his refusal to represent a client and courageously defend every right afforded him under the law of the land, no matter who the client and no matter how disfavored his case or cause may be in the community. The very word "advocate" carries down the centuries the noblest connotations.

We have here attempted to re-examine the assumptions of the adversary system as a human device for getting at the truth in a lawsuit and to defend it against over-hasty abandonment or essential impairment. We have reviewed the ethics of advocacy in the light of the assumptions of the system. The truly great advocates of our history have resolved, even in the context of the adversary system, the apparent conflict between dedication to the ideal of justice and championship of a client's cause. They have remembered that conscience is the Supreme Court of Morals and that in the myriad of situations which no human code can reach, the ethics of advocacy rest upon "obedience to the unenforceable."<sup>36</sup>

<sup>33</sup> Barnett, *Bad Advice to Young Lawyers*, 22 ORE. L. REV. 182 (1943).

<sup>34</sup> Cf. KEETON, *Preface to TRIAL TACTICS AND METHODS* x-xi (1954).

<sup>35</sup> Cf. Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349 (1952).

<sup>36</sup> Moulton, *Law and Manners*, 134 THE ATLANTIC MONTHLY 1 (July 1924).