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Does a Lawyer's Character Matter?

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Lawyers sometimes find themselves in the unenviable position of offering what appears to be a farfetched rationale for their conduct. They say that in performing their professional tasks they are required to act in ways that are morally questionable—for example, vigilantly protecting clients they know to be in the wrong. Yet they claim that in so doing they attain morally important ends, and that there are no better ways in which they could secure these ends. The story sounds disingenuous for we are being told that, at times, good can be accomplished in this profession only by acting badly.

I first indicate how lawyers fall into morally compromising positions. In particular, certain aspects of what lawyers are asked to do, the training that prepares them for their work, the conception governing their professional activities, and the problems they meet in certain areas of legal practice draw them into dubious conduct. I then suggest that recognizing the forces that make lawyers susceptible to morally suspect attitudes and actions does not remove all our worries over the profession. I finally identify legal situations in which it is easier to see that lawyers cannot justifiably engage in squalid conduct. Here lawyers directly encounter issues that arise in other areas of public life, and whose resolution calls for various excellences of character. If lawyers were generally guided by a conception of their role suited to these settings, they might be able to avoid many of the dangers now attending their work.

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I

To understand the lawyer's ways, it is useful to notice a few obvious features of the lawyer's work that do not figure in other professional work in which the important responsibilities also involve rendering direct service to individuals. For one thing, the interests that the lawyer serves are not always good.[1] (This is, I think, connected to Hume's thought, which I here leave unexamined, that particular acts of justice are not always good.)[2] In this respect, the lawyer's role is suspect from the start in a way in which, say, the doctor's is not. For generally, unless the doctor uses his skills to serve nonmedical purposes, the interests he protects are unquestionably good. This difference between the doctor's and lawyer's roles is often concealed by characterizing the interests that the lawyer safeguards as the client's legal rights. But the interests that the lawyer protects may not be legal rights at all. Further, in an unjust legal system a person may not be morally entitled to his legal rights. Even in a just legal system, it is sometimes wrong to exercise one's legal rights. Another way in which the lawyer's position differs from the doctor's is that typically the way in which a lawyer promotes a client's interests has direct consequences on the interests of others. Not infrequently, a lawyer may be able to further the client's interests only by obstructing or defeating the interests of other persons. Unless a doctor works either in a society in which there are grave distributive injustices in medical services or in emergency situations such as wars, famines, and earthquakes, he can provide professional services to a patient without having to do anything that worsens the conditions of other patients. Thus the kind of interests that lawyers are asked to serve and the characteristic ways in which they offer service make them vulnerable to wrongdoing.

Formal education in the law does not prepare lawyers for the moral perils of the profession. Irrespective of its content, the ultimate aim of legal training is to enable the student to become an able advocate.[3] That legal education fosters the skills and attitudes of advocacy may not be evident from a consideration of many of the subjects covered in a law school curriculum. The analysis of statutes or high court decisions is not obviously geared to the extrinsic aim of cultivating the art of advocacy. In the examination of the structure and rationale of legal rules from an economic or historical perspective, the law is treated much like any other academic subject. Yet, even in its more academic dimensions, legal training does not serve the usual aims of scholarship. Students are not encouraged or expected to master the procedures and traditions that define law as an academic subject. Relatedly, law professors do not address their students as future law teachers or scholars. The main objective of theoretical and practical instruction in the law is to prepare the student for the quite different role of advocate. Knowledge is important therefore insofar as it serves what adroit advocacy requires

above all: the ability to make a convincing case for any side in a dispute. What this sort of learned cleverness does not require is either a developed capacity to judge what is right or a disposition to seek it. Indeed moral insight may get in the way of cleverness and hinder the capacity to determine and carry out the best means to given ends with worldly disregard for whether the ends are worthy or unworthy.

The moral liabilities of the lawyer's work and education are exacerbated by the adversarial conception of the role. Under this conception, the lawyer is required to present the client's case in the best possible light. This in turn requires indifference to the moral merits of the client's interests so that the lawyer's zeal is not tempered by his personal attitude toward the client's cause. The adversarial lawyer is required, moreover, to place the client's interests ahead of the interests of the adversary and of third parties, as well as of public values such as justice. He is required to assume the risk of infringing upon legitimate interests in serving the client's interests. In short, the adversarial lawyer must take sides in social disputes, without being disquieted by the possibility of landing on the morally worse side. The adversarial conception of the lawyer thus transforms the role's unfortunate hazards into its virtues.

Certain areas of legal practice—notably criminal defense—encourage the curious moral stance of the adversarial lawyer. Criminal conviction is a very serious matter. The public censure of one's conduct cannot be reasonably welcomed by anyone. The condemnation is made in an arena open to public view in which wider attention is drawn to a person's failings than in personal rebuke; as a result, the ill-effects are more likely to resound throughout an individual's life. And since the person is condemned by the impersonal authorities of the state, who are presumably uninfluenced by personal bias and partiality, condemnation carries a great deal of weight. Besides, the impersonal authorities issuing the verdict are largely ignorant of the details of the life of the condemned and are only marginally concerned with the effects of condemnation on the general course of the individual's life. In criminal conviction, therefore, an individual is censured in a manner that is designed to have wide consequences on his life by persons whose judgment is invested with authority but who know or care little about the effects of their judgment on the individual.

The penalties visited upon those convicted of crimes, even in societies that take pride in describing themselves as civilized, have few defenders. Prison inmates are subjected to treatment that is cruel and humiliating by most standards of decent conduct. So even if we are certain that, in particular cases, the public censure of convicted individuals is deserved, it is hard to see how we can go on to justify exposing them to the treatment accorded in most penal institutions. Nor does the humiliation of the criminally convicted terminate upon completion of the term of imprisonment. Those who have paid the penalties of the law often

continue to be deprived of their liberties in such matters as choice of occupation and residence. Criminal conviction thus inflicts deep and long-standing evils on an individual. If the individual convicted of a crime happens to be innocent, the evil suffered is, of course, incalculably greater.

The state enjoys extensive powers in the general activity of controlling crime and in the particular practice of convicting and punishing criminals. The police and other investigative agencies of government possess considerable authority and force to detect criminal activity and to gather evidence in support of their findings. And once the individual is in the clutches of the state, the state's authority and power to treat him in any way it pleases is virtually limitless. The ordinary citizen, however resourceful, cannot hope to match the imposing force that the efficient state can legitimately invoke.

Against this background, it is possible to understand how the adversarial lawyer can be reasonably countenanced. In light of the perils of criminal conviction, lawyers need not worry much over the merits of their clients' interests. For, in protecting a criminal defendant, the lawyer can rest assured that he is promoting an individual's worthy aims to remain free and to avoid cruel and degrading treatment. Someone might object to this by denying that the defendant has these aims. It is sometimes argued, typically in Idealist social theory, that the individual who has committed an offense has a desire or, more extravagantly, a right to be punished in order to repent or to make amends. Now, if criminal defendants are innocent, this objection would not apply to them. And since there is no reliable general method of discriminating between the innocent and the guilty, the lawyer cannot adopt a policy of trying to establish whether what seem to be important and pressing aims of criminal defendants are not shared by a particular client. This course would be particularly treacherous since criminal defendants are often in such distress that even the innocent occasionally "confess" to committing crimes and express a desire to be punished. Even if a guilty defendant does have a manifest desire to repent and make amends, there is no obvious reason to assume that this desire should be satisfied in the manner provided by the system of criminal justice. In any case, penalties are imposed on the convicted irrespective of their willingness or unwillingness to accept them. There is therefore reasonable assurance that in criminal defense the lawyer would be advancing a worthy cause. Accordingly, the criminal defense lawyer is rightly free of anxiety over the moral propriety of the interests of a particular client.

The partisan posture of the adversarial lawyer is also appropriate in criminal defense. Given the state's powerful interest and formidable authority in criminal punishment, it is difficult to see how it is in need of the defense lawyer's assistance and cooperation. And unless the state's justifying aim in criminal punishment is set implausibly high as being, say, that of eliminating crime or establishing the truth in questions of

guilt and innocence, these is no common good that would justify the defense lawyer's support of the interests of the state. Further, the good of other parties is not usually as urgently imperiled as the good of the defendant. These are compelling reasons for giving special weight to the client's interests.

In sum, then, the general character of the lawyer's work, the nature of legal training, and the rather special problems of criminal defense together encourage and strengthen adversarial attitudes. Indeed, these attitudes continue to inform and guide a lawyer's activities in functions that are removed from the contentious setting of litigation: lawyers serving as advisers, for example, tend to seek arrangements that would avoid litigation against their side or that would place potential adversaries at a disadvantage should litigation transpire.[4]

II

Appreciating the various forces that make adversarial advocacy the pervasive conception of lawyering does not relieve our moral discomfort over the profession. The source of this discomfort can be brought to light by considering a simple and plausible hypothesis in moral psychology that John Rawls formulates.

> When an individual decides what to be, what occupation or profession to enter, say, he adopts a particular plan of life. In time his choice will lead him to acquire a definite pattern of wants and aspirations (or the lack thereof), some aspects of which are peculiar to him while others are typical of his occupation or way of life.[5]

In the proficient performance of the duties of the role, the lawyer cannot altogether avoid doing unsavory acts, acquiring unattractive traits, and developing dubious aspirations. Effective adversarial advocacy on behalf of a criminal defendant demands measures that are unacceptable from a moral point of view. For example, it may not be enough to show that the defendant has some worthy aims or that the prosecutor has not met the burden of proof: the lawyer may have to deliberately convey the impression that the client is completely innocent of wrongdoing; the lawyer may conclude that it is crucial to discredit an opposing witness whose testimony is known to be truthful, or to be less than forthright about information damaging to the client's case. Protracted engagement in these and similar practices must leave its trace on a person. And since the practices are undertaken as part of an accepted and socially rewarded professional calling, there is little to encourage the lawyer either to retain character traits contrary to these actions or to resist the cultivation of traits corresponding to them. A firm and settled disposition to truthfulness, fairness, goodwill, and the like would thwart the lawyer's capacity to do his tasks well. To excel as a lawyer, combative character traits such as cunning are most beneficial. In this

way, the conduct required of an adversarial lawyer gradually produces undesirable features on his character.

The moral damage to character that lawyers in time tend to sustain in executing their important professional tasks can vary in degree and kind. Persons of good character who resort to the shady means of their trade while managing to maintain a lively picture of the justified, ultimate aims of their vocation will no doubt regret their infidelity to truth and justice as well as their unfairnes to particular individuals. Remaining attached both to the ultimate aspirations of their office and to their good character, they cannot serenely undertake the everyday tasks that seem to go against their own personal and social ideals. Such persons would suffer the strain born of the knowledge that living fully and well the kind of life that they have chosen cannot yield a life that is of a piece: their moral integrity is constantly imperiled. Others who have less self-mastery and a less firm attachment to ideals are more likely to lose sight of the more distant justifying aims of the profession. Instead, they shift their attachments to more immediate goods such as the wealth and status with which society rewards the successful exercise of their combative skills. Still different lawyers may acquire unworthy aspirations: they prize the acts of cunning, manipulation, and humiliation for their own sake. For them, the satisfactions of the profession consist in the enjoyment of the spectacle of others being subject to their power.

I do not, of course, mean to suggest that adversarial lawyers can be neatly classified into the three groups. What is outlined is a rough and crude classification of types of character that could be acquired upon entering the adversarial role. Accordingly, it is possible that a lawyer in his professional life would progress through the different types or oscillate between types at different stages of life. It is clear, for example, that the first type of character is unstable. Nagging feelings of regret and self-contempt may inhibit these lawyers' adversarial instincts. And since succumbing to these feelings might be entirely incapacitating, they may react by retreating from the ideals that engender them. Such lawyers may decide to throw themselves into the adversarial role, switching their allegiance to its social rewards. Nor are inner collision and instability excluded by the other types of character. For instance, self-deception could arise in the second type of character as a result of what might be called the "halo effect."[6] The halo effect is produced when a person makes himself believe that worldly success in a profession or a way of life is a sure sign of success in other dimensions that are less accessible to public appreciation and appraisal.

An objection to this grim portrait of how a lawyer's conduct affects his character might be mounted by challenging the psychological hypothesis on which it rests. Conceding that effective adversarial lawyers have to engage in shabby conduct, one may nevertheless deny that their professional conduct shapes their personal attitudes and aspirations. It might be suggested that once lawyers step out of the legal sphere, they

resume their ordinary personal character.[7] Among family members and friends, they see what they do in their work much in the way that we do. In short, character is screened from professional conduct. Now, for such screening to be possible, lawyers must adopt a rather strange attitude toward their work: they must see what they do professionally as a form of acting. And there are, of course, aspects of the lawyer's work that lend themselves to a portrayal of the lawyer as actor. Effective adversarial representation can require self-identification with clients and their plight. To win the sympathies of those sitting in judgment, it may be essential for lawyers to enact what they have identified with in imagination. The element of performance is highlighted by the fact that stylized display of the lawyer's combative and persuasive skills—including those involving cunning and deception—is institutionally taught and openly practiced.

Notwithstanding the part that pretense plays in advocacy, the conception of the adversarial lawyer as actor and the division between personal character and professional conduct that it yields is unconvincing. It is true that theater can exert deep and lasting influence on our emotions and beliefs. In a particular performance, we sympathize and empathize with some of the characters while being repelled by others. If the characters are in conflict, we may even find ourselves taking sides. Still, a sharp gulf separates us from a stage performance: there is no decision we can make or action we can take that would alter the characters' fate. And it is in just this crucial respect that the lawyer's representation departs from the actor's. The lawyer's effort to make a client appear to be innocent or a witness to be a liar is intended to secure judgments that affect the lives of individuals. In the light of the practical consequences of such conduct, the lawyer's claim to be merely acting rings hollow: there is no way in which the official words and deeds can be fastened to the role. And if, barring elaborate self-deception, the lawyer cannot convince himself that the beliefs he asserts and the actions he takes belong to the role, it is hard to know what supports the screen separating self from conduct.

There is another quite different counter to the claim that the lawyer's conduct corrupts his character. In Book III of the *Nichomachean Ethics*, which has the virtue of courage as one of its subjects, Aristotle considers how courage figures in the man of complete virtue and then says: "It is quite possible that the best soldiers may not be men of this sort [i.e., completely virtuous] but those who are less brave and have no other good; for these are ready to face danger, and they sell their life for trifling gains."[8] It is important to be clear on just how the best soldiers fall short of complete excellence. Aristotle does not subscribe to the modern view that some acts of state necessitate viciousness; he does not ascribe vices to his good soldiers. Nor is he suggesting that the best soldiers lack virtue: they have not yielded to their baser desires and passions; they are not deflected from what they judge to be the

right course by an infirm will; they do not choose the noble and just only upon subduing unruly desires and feelings. Unlike these types wanting in virtue, persons of moderate virtue do not have dispositions falling outside a mean. Rather, their fault consists in cherishing certain aims too highly. It is their judgment of ends that is unsound, and it is on account of this very defect that Aristotle concludes that they are better suited to certain tasks than men of superior practical judgment. So Aristotle's thought is that those of moderate virtue make the best soldiers because they zealously pursue ends for which those of higher moral vision cannot muster enthusiasm. And the thought appears to rest on an unexceptionable psychological insight: if his gaze were fixed on the sun above, it is unlikely that the man chained down in Plato's Cave could be lured by the sight of the flickering shadows before him.

After the model of Aristotle's good soldier, we can form a more attractive image of the lawyer. In doing disagreeable acts under the adversarial procedure, lawyers are not simply giving in to their baser desires and feelings. Nor are they being steered from right choices and acts because the procedure somehow saps the strength of their will. On the Aristotelian interpretation, the adversarial procedure forces lawyers to lower their sights. By adhering to the procedure, lawyers withdraw their vision from the higher aims of justice, such as whether the decision sought makes good law or whether it results in the wicked receiving the punishment they deserve. Instead, the lawyer's focus descends to the humbler good ends of a client's triumph and an opponent's defeat. These aims, which would not move someone commanding an exalted perspective, draw the zeal of the person with a modest professional calling. And lawyers need not apologize for the modesty of the objectives to which their attention is exclusively devoted. For one might say that the aims of justice as they pertain to disputants in law are in fact humble. Justice here does not aim to bring about some outcome that improves everyone's lot or to establish a more equal social arrangement. Here justice dictates, crudely, that individuals stay out of each other's way, and when their paths cross, it determines who should have the right of way. If the demands of justice in the settlement of legal conflict are of this order, by having his sights lowered the lawyer's energies are not only properly harnessed, they are also thereby rightly channeled.

Although the present image of the good lawyer is faithful to the Aristotelian model of the good soldier, it does not vindicate the lawyer: the trouble is that Aristotle's conception of the good soldier is, I think, seriously defective. In the first place, Aristotle's conclusion that men of less than complete virtue make the best soldiers is based on too narrow a construal of aims. Many actions—such as making a drawing, winning a battle, taking a trip—are comprised of a host of interrelated ends. So, in executing these complex actions, we are not always accurately described as striving after what seems to be our then immediate end: sketching the hand, taking this bridge, crossing that ridge. These immediate ends

are pursued as constituents of the larger and more remote aims, though how they fit into the final end may be unclear to the agent or others before, during, or after the project. But if this is so, it will not do to say, from some lofty perspective, how nice it is that these soldiers risk so much only to take a bridge or a hill, for it is not their intention to do merely that. Save the vicious and reckless, nobody would willingly face fire to capture Dien Bien Phu with utter disregard for the objectives of the conquest.

If aims are conceived more generously, say, to cover the objectives of a war, it is still not obvious that Aristotle can maintain that those of moderate virtue make the best soldiers by pointing to how inconsequential a war can be: this judgment would be unduly influenced by the importance of outcomes. People take great risks in combat not only when they believe that winning the contest is of paramount importance; they may also sacrifice themselves to help their comrades. Moreover, we can unexpectedly encounter formidable hardships in the pursuit of what we take to be humble ends, and in meeting them we may well have to display great courage. But, then, there is little reason to think that persons of less, rather than more, virtue make the best soldiers. More generally, there is no good deed that can always be better accomplished by a person of less virtue.

The difficulties attending the Aristotelian notion of military courage arise in the conception of the lawyer as combatant. The lawyer's aims cannot be confined to the immediate goal of seeing that the client prevails. Since the lawyer is in a particularly good position to know that this goal is often futile or wrong, he must see it as part of a wider system of aims. To envision the lawyer as always engaged in the single-minded pursuit of the client's triumph, we would have to endow lawyers with a psychology far more impoverished than that of most people. Even if the lawyer's aims are so implausibly diminished, to reach them may require being able to overcome formidable hazards and temptations: for instance, unsparing pursuit of the client's aims may bring grave harm to the lawyer. So in the proper pursuit even of modest aims, the lawyer may need the various excellences of character.

The problems in the conception of the lawyer as combatant are connected to the problems of seeing a legal system, or indeed a legal contest, as a game. Most games are carefully segregated from the moral world. In games, the aims of the activity as well as the proper and improper ways in which they are to be attained are defined by the rules of the game. Within these rules, the players can give free play to their talents, skills, and ingenuity without having to deliberate about the worth of their ends or the moral propriety of their means. Though there may be rational disagreement over how much of morality and which dimensions of it figure in the law, there is little doubt that the law, even in its mundane moments, is not, like a sport or an Aristotelian skirmish, an institution sealed off from moral life.[9] Accordingly, lawyers

cannot use the permissible skills of their trade with ruthless efficiency for the sake of the client's triumph without working wrong.

At any rate, if lawyers were to succeed in the unlikely course of fashioning themselves after the Aristotelian soldier, they would rescue their characters from the corrupting influence of professional conduct only at a high price: they would have to be engulfed in their role.[10] The lawyer's personal character cannot then be tainted by his professional conduct because he is practically without a personal character. Whether or not it is worse to be without a personal character than to be saddled with a corrupt one, deprivation of character cannot be an enticing feature of a profession.

It is perhaps not startling that it should turn out that the lawyer's personal life and character cannot be immune to the harmful influences of his important professional conduct. Isn't it too much to expect that doing what is most rational in an occupation or a way of life would always yield a life and character that one can live with and prize? John Rawls entertains the thought that a man cannot be deeply dissatisfied with having led a life that on the most accurate available information about himself and his circumstances he had selected as the rationally best life.[11] Rawls urges that even if the rationally best life turns out to be miserable, the person can find solace in the true belief that the misery is not of his own making: he cannot reasonably blame himself, for, after all, he could not have done better. Still, Rawls admits that the man who, because he has lived the justified life, cannot have moral or rational regret may nevertheless feel the natural regret of having lived at all.[12] But this is a rather crippling concession, for in the face of this fundamental natural regret the freedom from moral regret cannot be much consolation. And viewed prospectively, it is obscure where the person who has lost the motivation to live can find the motivation to live the rationally best life.[13] Wouldn't this person lack Rawls's basic good of self-respect or the sense that it is possible and worthwhile to live out one's life? The lawyer living up to his adversarial station is, in a way, in a worse predicament. In doing what is required, he would be undertaking morally questionable acts and acquiring unattractive traits of character; and this occasions not just natural regret, it would be good grounds for moral regret.

III

It is possible to allow that the adversarial lawyer cannot avoid doing damage to his character and nonetheless to deny that this seriously matters. Anyone who is not in the grip of some unworldly perspective cannot fail to recognize that realizing some important social goals compels personal sacrifice. And since lawyers choose their occupation, we are not in the awkward position of having to ask some to sacrifice themselves for the good of others or for the common good. The lawyer's loss of

good character is a case of self-sacrifice. Toward himself, the self-sacrificing lawyer's attitude would be analogous to that expressed by Lenin upon listening to Beethoven's *Apassionata:*

> Astonishing superhuman music. . . . What miracles people can do. . . . But I can't often listen to music, it affects my nerves, makes me want to say kind stupidities, and pat the little heads of people who, living in a dirty hell, can create such beauty. But now one must not pat anyone's little head . . . they would bite off your hand, and one has to beat their little heads, beat mercilessly, although ideally we are against any sort of force against people. Hmm—it's a devilishly difficult task.[14]

Toward others who are discontented with such choices, the lawyer may feel the contempt that some have for those who, confronting important and urgent social tasks, are preoccupied with the purity of their own souls.

I do not wish either to challenge the importance of the practical views and attitudes underlying this objection or to underestimate their force when fundamental social values are in jeopardy. Rather, I shall suggest a few reasons why it would be bad for lawyers, in particular, to relinquish their good characters. There are significant legal situations in which the adversarial stance of the lawyer is inappropriate and where the combative traits and skills, fitting in that role, are obstacles to performing professional functions well. The lawyer's self-sacrifice of good character would not then be merely the loss of a personal good, but the loss of important public goods as well.

To see how a lawyer's character matters it is important to guard against a narrow interpretation of the purposes of legal action. The object of legal suits is not always to resolve factual disputes between private parties under clear and settled laws. In a wide range of cases—both criminal and civil—litigation is sometimes aimed at bringing about changes in the law. Decisions that result in legal change have far-reaching effects: their direct consequences are not confined to the parties to the suit. A striking example of this kind of litigation is provided in suits seeking to rectify institutional wrongs such as racial discrimination in schools or official lawlessness and brutality in police departments.[15]

In litigation directed against institutional wrongs, the defendants—the principal of a school or an officer of a police force—may not be charged with or be guilty of intentional wrongdoing. The real target of the suit is the institution that produces structural injustice. And the defendants may have little or no responsibility for establishing or maintaining the institution that brings about the social wrongs. Accordingly, the remedy sought is some form of institutional reform that would bring the institution in line with the public values upheld in the legal system—a remedy that the defendants are not in a position to provide. Similarly, the individuals bringing the suit may not be the victims of the institutional wrong. If the plaintiffs happen to be victimized by the institution, vast numbers of victims may not be parties to the suit. Indeed, in some

cases, such as racial discrimination, it would be very difficult to identify those unjustly treated by an institution of the state. Finally, neither the plaintiffs nor the victims may be the actual beneficiaries of the remedies sought in the way of institutional reform. The only possible or fair rectification could consist of forward-looking measures designed to protect persons in the future from the institutional injustice in question.

In legal disputes over institutional wrongs, lawyers cannot maintain their adversarial role. The first problem is captured in a question that Abram Chayes poses:

> [I]n the absence of a particular client, capable of concretely defining his interest, can we rely on the assumptions of the adversary system as a guide to the conduct and duty of the lawyer?[16]

The adversarial lawyer is supposed to take the client's interests as given and to further them zealously in legally permissible ways. But there seems to be no clear or sensible way in which the lawyer representing those seeking to rectify institutional wrongs can follow this procedure. The identities of the parties and the nature of their interests may be difficult to determine, and it is not obvious that the lawyer is in an especially favorable position to make such a determination. Even if the lawyer successfully disentangles these problems, he may find that different parties of those opposed to the institutional wrong suffer different kinds of harms to their interests at the hands of the institution. The lawyer then has to ascertain which of the conflicting interests of the victims should be represented, and this decision cannot be easy or noncontroversial. It would not be reasonable to represent the interests of the most numerous, the most vocal, or the most powerful. A decision among competing interests along these dimensions cannot, for example, be determinate or credible in respect to the interests of future persons. Confronted with these problems, the lawyer cannot sidestep a deliberation on the merits of the interests at stake in the specific institutional wrong he aims to correct, and deliberation cannot go very far without appeal to relevant interest-independent principles.

The lawyer would run into similar difficulties in attempting to strike a partisan posture. In litigation directed at institutional wrongs, there may be deep differences over the reforms desired. For instance, those aspiring to abolish racial discrimination in schools may disagree on whether equal access to schools or equal access to minimally decent education contributes to a more just arrangement.[17] And if it were established that the parents of minority children prefer a decent education to an integrated school, the lawyer would have to consider if the interests of future schoolchildren and future generations as a whole would be served well by racially divided educational institutions. Hence in deciding what institutional reform to advocate, the lawyer does not have ready-made interests to champion. And a responsible decision must look beyond the conflicting interests to the underlying public values of the legal system.

It would be misleading, of course, to think that the lawyer engaged in legal action against institutional wrongs is an officer of the court whose overriding professional goal is to advance the cause of legal justice. Like the judge, the lawyer is independent of the state. And this independence is here especially important since the legal action is taken against the institutions of the state. But unlike the judge, the lawyer is not exempted from the responsibility of representing certain interests. The difficulty is that the lawyer cannot properly discharge these representative duties by adhering to an adversarial role.

Perhaps a better way of understanding the conduct and responsibility of a lawyer acting against institutional injustices would be under the traditional conception of fair political representation. Fair political representation has at least three distinct justifying aims. First, since public decisions promote the interests of some and obstruct those of others, fair representation of all affected by a decision is required to ensure that the interests of those excluded are not disregarded. Second, public decisions are principled, and people seek decisions that best realize the principles to which they subscribe. Fair representation is required to make certain that views that would lead to decisions that better satisfy the shared principles do not go unheard. Third, public decisions must result in practical arrangements that those participating in them can endure. Fair representation is required to guarantee that personal or social circumstances that would make abiding by a decision a severe strain do not pass unnoticed.

An ideal of representation needs to satisfy all three aims. Attention to the first form in isolation creates the risk that the decision reached will favor the strongest interests over the most legitimate. The second aim alone could lead to decisions that are principled only relative to the interests of those who happen to be represented.[18] Without the third, there is the danger that the decisions reached cannot be followed with ease by those to whom they are addressed. For example, an impartial, principled policy of nationalization in land reform or busing in school desegregation may be impracticable. But the third form of representation by itself may lead to feasible and even harmonious social arrangements that are seriously wrong.

In litigation intended to secure institutional reform, the lawyer should attempt to realize all three aims embodied in the ideal of fair representation. He must see that no important interests that are affected by the decision of the court are excluded from consideration. In arriving at a judgment on the right remedy to plead, the lawyer must find out the considered opinions of those he represents and weigh them carefully. In addition, by seeking the advice and organized participation of interested parties, the lawyer should make sure that the proposed institutional reform would not impose needless psychological and sociological stress on the beneficiaries and others. Even if some of these duties of representation are shared by the attorney for the state, by

lawyers representing special interests and, most importantly, by the judge, our lawyer would bear heavy responsibilities. And what it would take to carry them out with excellence may well be difficult to specify, at least in the form of a body of specific rules of conduct. But without going into the details, it is not hard to see that the adversarial lawyer is not well suited to live up to the ideal of fair political representation. A hardhearted person, armed with entrenched combative traits and perhaps suffering from feelings of self-contempt, cannot be expected either to attend to the interests and ideals of others with sympathy or to follow the dictates of principle with care. If we need someone to represent us well in cases concerning public values, we had better look for a lawyer equipped with different character traits and talents.[19]

Lawyers guided by a conception of their role as political representatives would perform the valuable service of extending the institutional scope of democratic ideals in public life. The importance of the lawyer's office as political representative and the urgency of training lawyers with character traits and talents tailored to this office are more likely to be felt if two general beliefs about modern society are well founded.[20] First, in modern societies many of the basic goods of social life—health; education; transportation; defense from external attack; security against personal injury, unemployment, and the infirmities of old age—are increasingly provided by public institutions. Second, legislatures in modern societies do not afford strategic or fair protection against the invasion of fundamental public values by powerful public institutions.

Notes

1. Richard Wasserstrom draws attention to this feature; he also makes the point, which I discuss later, that the criminal defense lawyer is a rather special case in "Lawyers as Professionals: Some Moral Issues," *Human Rights* 5 (1975): 1–24. See also David Luban, "The Adversary System Excuse," Chapter 4, this volume.

2. "[I]f we examine all the questions, that come before any tribunal of justice, we shall find, that, considering each case apart, it would as often be an instance of humanity to decide contrary to the laws of justice as conformable to them. Judges take from a poor man to give to a rich; they bestow on the dissolute the labour of the industrious; and put into the hands of the vicious the means of harming both themselves and others." David Hume, *A Treatise of Human Nature*, edited by L. A. Selby-Bigge (Oxford: Clarendon Press, 1960), p. 579.

3. I have benefited from the interesting discussion of the limits of legal education in Anthony T. Kronman, "Foreword: Legal Scholarship and Moral Education," *Yale Law Journal* 90 (1981): 955–69; and Robert Condlin, "The Moral Failure of Clinical Legal Education," Chapter 14, this volume.

4. Luban, "The Adversary System Excuse," this volume.

5. John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972), pp. 415–516. The claim that social positions shape the psychological make-up of individuals is a constant theme in the writings of Karl Marx. For an interesting discussion of the theme in Marx's early writings, see Gerald A. Cohen, "Bourgeois and Proletarians," *Journal of the History of Ideas* 29 (1968): 211–20. In his defense of liberty and his arguments for representative government, John Stuart Mill relies on psychological considerations similar to that expressed in Rawls's hypothesis. *On Liberty*, edited by Currin V. Shields (Indianapolis: Liberal Arts, 1956); *Considerations on Representative Government* (South Bend, Ind.: Gateway, 1926), p.

62. A clear example of an application of these considerations is found in his *The Subjection of Women*, edited by Sue Mansfield (Arlington Heights, Ill.: Crofts, 1980), p. 62. A novel and interesting interpretation of Mill that stresess the importance of psychology for his moral views is offered in Richard Wollheim, "John Stuart Mill and Isaiah Berlin: The Ends of Life and the Preliminaries of Morality," *The Idea of Freedom: Essays in Honor of Isaiah Berlin*, edited by Alan Ryan (Oxford: Oxford University Press, 1979), pp. 253–69.

6. The "halo effect" figures importantly in Marx's analysis of alienation and fetishism. Robert Nozick discusses it briefly in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 243 n.

7 See Gerald Postema's discussion of what he calls the "Montaigne strategy" in "Moral Responsibility in Professional Ethics," *New York University Law Review* 55 (1980): 63–89; and Chapter 13, this volume.

8. *Ethica Nichomacea*, translated by W. D. Ross (Oxford: Clarendon Press, 1925), 1117 b 17–19.

9. Lord Devlin considers the analogy between adversarial advocacy and military combat in *The Judge* (Oxford: Oxford University Press, 1979), chap. 3.

10. Engulfment in roles is discussed in Gerald A. Cohen, "Beliefs and Roles," *Proceedings of the Aristotelian Society* 67 (1966–1967): 17–34.

11. Rawls, *A Theory of Justice*, pp. 421–22. More generally, Rawls thinks that the rights of equal citizenship are an adequate social basis of self-respect; other personal and social misfortunes cannot seriously undermine self-respect. I try to cast doubt on this view in "Contractarianism and the Scope of Justice," *Ethics* 85 (1974): 38–49.

12. Missing, lacking, or losing some good, or doing what is thought undesirable occasions natural regret; a person feels moral regret if he feels he is to blame for his unfavorable actions and circumstances. For discussions of the relation between natural and moral feelings, see *A Theory of Justice*, pp. 440–46; Bernard Williams, "Ethical Consistency," *Problems of the Self* (Cambridge: Cambridge University Press, 1973), pp. 173 ff.

13. In a number of suggestive essays, Bernard Williams shows the importance of desires that propel us forward into the future (categorical desires), and he argues that impersonal conceptions of rationality and morality cannot easily find room for categorical desires. For example, see "The Makropulos Case: Reflections on the Tedium of Immortality," in Williams, *Problems of the Self*, pp. 82–100; "Persons, Character and Morality," in *The Identities of Persons*, edited by Amélie Oksenberg Rorty (Berkeley: University of California Press, 1976), pp. 197–216. In developing the arguments in this section, I have benefited from his "Politics and Moral Character," in *Public and Private Morality*, edited by Stuart Hampshire (Cambridge: Cambridge University Press, 1978), pp. 55–73.

14. Cited in Peter Reddaway, "Literature, the Arts and the Personality of Lenin," *Lenin: The Man, The Theorist, The Leader*, edited by Leonard Schapiro and Peter Reddaway (New York: Praeger, 1967), p. 56.

15. For excellent discussions of this form of litigation, see Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (1976): 1281–316; and Owen M. Fiss, "The Supreme Court, 1978 Term—Foreword: The Forms of Justice," *Harvard Law Review* 93 (1979): 1–58. Ronald Dworkin remarks on the relevance of this form of adjudication to his theory of law in "Seven Critics," *Georgia Law Reveiw* 11 (1977): 1257–58. H. L. A. Hart suggests that this kind of adjudication is peculiar to American courts in "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream," *Georgia Law Review* 11 (1977): 969–89.

16. Chayes, "The Role of the Judge," p. 1291.

17. See Derrick A. Bell, Jr., "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," *Yale Law Journal* 85 (1976): 470–516.

18. Brian Barry draws attention to principled decisions that are group-relative in a discussion of the right to equal representation in *The Liberal Theory of Justice* (Oxford: Clarendon Press, 1973), p. 136. A detailed examination of interest-relative agreements and their importance to liberal and Marxian political theory is provided in an unpublished essay by Joshua Cohen, "Marxism and Politics: Or, Trouble in Paradise."

19. This is a difficulty for the Leninist revolutionary as well. His austere and combative attitudes may be essential in the struggle to capture state power from the enemy, but quite different character traits are appropriate in relations with comrades in the revolutionary struggle and with citizens in the postrevolutionary state. This is an aspect of the notorious problem of succession in socialist states. I discuss the nature and importance of the various excellences of character in "Character, Virtue, and Freedom," *Philosophy* 57 (October 1982): 495–513.

20. The first belief is so deeply entrenched in sociological thinking—in theories as different as those of Max Weber and Karl Marx—that it is practically a dogma of modern sociology. The second is more controversial because of conceptual unclarity surrounding the notion of representation and important empirical differences among legislatures in different democratic societies. Owen M. Fiss defends both beliefs in "The Supreme Court, 1978 Term."