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Lawyers as Professionals: Some Moral Issues

In this paper I examine two moral criticisms of lawyers which, if well-founded, are fundamental. Neither is new but each appears to apply with particular force today. Both tend to be made by those not in the mainstream of the legal profession and to be rejected by those who are in it. Both in some sense concern the lawyer-client relationship.

The first criticism centers around the lawyer's stance toward the world at large. The accusation is that the lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind.

The second criticism focuses upon the relationship between the lawyer and the client. Here the charge is that it is the lawyer-client relationship—which is morally objectionable because it is a relationship in which the lawyer dominates and in which the lawyer typically, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion.

To a considerable degree these two criticisms of lawyers derive, I believe, from the fact that the lawyer is a professional. And to the extent to which this is the case, the more generic problems I will be exploring are those of professionalism generally. But in some respects, the lawyer's situation is different from that of other professionals. The lawyer is vulnerable to some moral criticism that does not as readily or as easily attach to any other professional. And this, too, is an issue that I shall be examining.¹

Although I am undecided about the ultimate merits of either criticism, I am convinced that each is deserving of careful articulation and assessment, and that each contains insights that deserve more acknowledgment than they often receive. My ambition is, therefore, more to exhibit the relevant considerations and to stimulate additional reflection, than it is to provide any very definite conclusions.

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As I have indicated, the first issue I propose to examine concerns the ways the professional-client relationship affects the professional's stance toward the world at large. The primary question that is presented is whether there is adequate justification for the kind of moral universe that comes to be inhabited by the lawyer as he or she goes through professional life. For at best the lawyer's world is a simplified moral world; often it is an amoral one; and more than occasionally, perhaps, an overtly immoral one.

To many persons, Watergate was simply a recent and dramatic illustration of this fact. When John Dean testified before the Select Senate Committee inquiring into the Watergate affair in the Spring of 1973, he was asked about one of the documents that he had provided to the Committee. The document was a piece of paper which contained a list of a number of the persons who had been involved in the cover-up. Next to a number of the names an asterisk appeared. What, Dean was asked, was the meaning of the asterisk? Did it signify membership in some further conspiracy? Did it mark off those who were decision makers from those who were not? There did not seem to be any obvious pattern: Ehrlichman was starred, but Haldeman was not; Mitchell was starred, but Magruder was not. Oh, Dean answered, the asterisk really didn't mean anything. One day when he had been looking at the list of participants, he had been struck by the fact that so many of them were lawyers. So, he marked the name of each lawyer with an asterisk to see just how many there were. He had wondered, he told the Committee, when he saw that so many were attorneys, whether that had had anything to do with it; whether there was some reason why lawyers might have been more inclined than other persons to have been so willing to do the things that were done in respect to Watergate and the cover-up. But he had not pursued the matter; he had merely mused about it one afternoon.

It is, I think, at least a plausible hypothesis that the predominance of lawyers was not accidental—that the fact that they were lawyers made it easier rather than harder for them both to look at things the way they did and to do the things that were done. The theory that I want to examine in support of this hypothesis connects this activity with a feature of the lawyer's professionalism.

As I have already noted, one central feature of the professions in general and of law in particular is that there is a special, complicated relationship between the professional, and the client or patient. For each of the parties in this relationship, but especially for the professional, the behavior that is involved is to a very significant degree, what I call, role-differentiated behavior. And this is significant because it is the nature of role-differentiated behavior that it often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive. Some illustrations will help to make clear what I mean both by role-differentiated behavior and by the way role-differentiated behavior often alters, if not eliminates, the

significance of those moral considerations that would obtain, were it not for the presence of the role.

Being a parent is, in probably every human culture, to be involved in role-differentiated behavior. In our own culture, and once again in most, if not all human cultures, as a parent one is entitled, if not obligated, to prefer the interests of one's own children over those of children generally. That is to say, it is regarded as appropriate for a parent to allocate excessive goods to his or her own children, even though other children may have substantially more pressing and genuine needs for these same items. If one were trying to decide what the right way was to distribute assets among a group of children all of whom were strangers to oneself, the relevant moral considerations would be very different from those that would be thought to obtain once one's own children were in the picture. In the role of a parent, the claims of other children vis-à-vis one's own are, if not rendered morally irrelevant, certainly rendered less morally significant. In short, the role-differentiated character of the situation alters the relevant moral point of view enormously.

A similar situation is presented by the case of the scientist. For a number of years there has been debate and controversy within the scientific community over the question of whether scientists should participate in the development and elaboration of atomic theory, especially as those theoretical advances could then be translated into development of atomic weapons that would become part of the arsenal of existing nation states. The dominant view, although it was not the unanimous one, in the scientific community was that the role of the scientist was to expand the limits of human knowledge. Atomic power was a force which had previously not been utilizable by human beings. The job of the scientist was, among other things, to develop ways and means by which that could now be done. And it was simply not part of one's role as a scientist to forego inquiry, or divert one's scientific explorations because of the fact that the fruits of the investigation could be or would be put to improper, immoral, or even catastrophic uses. The moral issues concerning whether and when to develop and use nuclear weapons were to be decided by others; by citizens and statesmen; they were not the concern of the scientist *qua* scientist.

In both of these cases it is, of course, conceivable that plausible and even thoroughly convincing arguments exist for the desirability of the role-differentiated behavior and its attendant neglect of what would otherwise be morally relevant considerations. Nonetheless, it is, I believe, also the case that the burden of proof, so to speak, is always upon the proponent of the desirability of this kind of role-differentiated behavior. For in the absence of special reasons why parents ought to prefer the interests of their children over those of children in general, the moral point of view surely requires that the claims and needs of all children receive equal consideration. But we take the rightness of parental preference so for granted, that we often neglect, I think, the fact that it is any-thing but self-evidently morally appropriate. My own view, for example, is that careful reflection shows that the degree of parental preference systematically encouraged in our own culture is far too extensive to be morally justified.

All of this is significant just because to be a professional is to be enmeshed in role-differentiated behavior of precisely this sort. One's role as a doctor, psychiatrist, or lawyer, alters one's moral universe in a fashion analogous to that described above. Of special significance here is the fact that the professional *qua* professional has a client or patient whose interests must be represented, attended to, or looked after by the professional. And that means that the role of the professional (like that of the parent) is to prefer in a variety of ways the interests of the client or patient over those of individuals generally.

Consider, more specifically, the role-differentiated behavior of the lawyer. Conventional wisdom has it that where the attorney-client relationship exists, the point of view of the attorney is properly different—and appreciably so—from that which would be appropriate in the absence of the attorney-client relationship. For where the attorney-client relationship exists, it is often appropriate and many times even obligatory for the attorney to do things that, all other things being equal, an ordinary person need not, and should not do. What is characteristic of this role of a lawyer is the lawyer's required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance. Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established. The question, as I have indicated, is whether this particular and pervasive feature of professionalism is itself justifiable. At a minimum, I do not think any of the typical, simple answers will suffice.

One such answer focuses upon and generalizes from the criminal defense lawyer. For what is probably the most familiar aspect of this role-differentiated character of the lawyer's activity is that of the defense of a client charged with a crime. The received view within the profession (and to a lesser degree within the society at large) is that having once agreed to represent the client, the lawyer is under an obligation to do his or her best to defend that person at trial, irrespective, for instance, even of the lawyer's belief in the client's innocence. There are limits, of course, to what constitutes a defense: a lawyer cannot bribe or intimidate witnesses to increase the likelihood of securing an acquittal. And there are legitimate questions, in close cases, about how those limits are to be delineated. But, however these matters get resolved, it is at least clear that it is thought both appropriate and obligatory for the attorney to put on as vigorous and persuasive a defense of a client believed to be guilty as would have been mounted by the lawyer thoroughly convinced of the client's innocence. I suspect that many persons find this an attractive and admirable feature of the life of a legal professional. I know that often I do. The justifications are varied and, as I shall argue below, probably convincing.

But part of the difficulty is that the irrelevance of the guilt or innocence of an accused client by no means exhausts the altered perspective of the lawyer's conscience, even in criminal cases. For in the course of defending an accused, an attorney may have, as a part of his or her duty of representation, the obligation to invoke procedures and practices which are themselves morally objectionable and of which the lawyer in other contexts might thoroughly disapprove. And these situations, I think, are somewhat less comfortable to confront. For example, in California, the case law permits a defendant in a rape case to secure in some circumstances an order from the court requiring the complaining witness, that is the rape victim, to submit to a psychiatric examination before trial.² For no other crime is such a pretrial remedy available. In no other case can the victim of a crime be required to undergo psychiatric examination at the request of the defendant on the ground that the results of the examination may help the defendant prove that the offense did not take place. I think such a rule is wrong and is reflective of the sexist bias of the law in respect to rape. I certainly do not think it right that rape victims should be singled out by the law for this kind of pretrial treatment, and I am skeptical about the morality of any involuntary psychiatric examination of witnesses. Nonetheless, it appears to be part of the role-differentiated obligation of a lawyer for a defendant charged with rape to seek to take advantage of this particular rule of law—irrespective of the independent moral view he or she may have of the rightness or wrongness of such a rule.

Nor, it is important to point out, is this peculiar, strikingly amoral behavior limited to the lawyer involved with the workings of the criminal law. Most clients come to lawyers to get the lawyers to help them do things that they could not easily do without the assistance provided by the lawyer's special competence. They wish, for instance, to dispose of their property in a certain way at death. They wish to contract for the purchase or sale of a house or a business. They wish to set up a corporation which will manufacture and market a new product. They wish to minimize their income taxes. And so on. In each case, they need the assistance of the professional, the lawyer, for he or she alone has the special skill which will make it possible for the client to achieve the desired result.

And in each case, the role-differentiated character of the lawyer's way of being tends to render irrelevant what could otherwise be morally relevant considerations. Suppose that a client desires to make a will disinheriting her children because they opposed the war in Vietnam. Should the lawyer refuse to draft the will because the lawyer thinks this is a bad reason to disinherit one's children? Suppose a client can avoid the payment of taxes through a loophole only available to a few wealthy taxpayers. Should the lawyer refuse to tell the client of a loophole because the lawyer thinks it an unfair advantage for the rich? Suppose a client wants to start a corporation that will manufacture, distribute and promote a harmful but not illegal substance, e.g., cigarettes. Should the lawyer refuse to prepare the articles of incorporation for the corporation? In each case, the accepted view within the profession is that these matters are just

of no concern to the lawyer *qua* lawyer. The lawyer need not of course agree to represent the client (and that is equally true for the unpopular client accused of a heinous crime), but there is nothing wrong with representing a client whose aims and purposes are quite immoral. And having agreed to do so, the lawyer is required to provide the best possible assistance, without regard to his or her disapproval of the objective that is sought.

The lesson, on this view, is clear. The job of the lawyer, so the argument typically concludes, is not to approve or disapprove of the character of his or her client, the cause for which the client seeks the lawyer's assistance, or the avenues provided by the law to achieve that which the client wants to accomplish. The lawyer's task is, instead, to provide that competence which the client lacks and the lawyer, as professional, possesses. In this way, the lawyer as professional comes to inhabit a simplified universe which is strikingly amoral—which regards as morally irrelevant any number of factors which nonprofessional citizens might take to be important, if not decisive, in their everyday lives. And the difficulty I have with all of this is that the arguments for such a way of life seem to be not quite so convincing to me as they do to many lawyers. I am, that is, at best uncertain that it is a good thing for lawyers to be so professional—for them to embrace so completely this role-differentiated way of approaching matters.

More specifically, if it is correct that this is the perspective of lawyers in particular and professionals in general, is it right that this should be their perspective? Is it right that the lawyer should be able so easily to put to one side otherwise difficult problems with the answer that these are not and cannot be any concern as a lawyer? What do we gain and what do we lose from having a social universe in which there are professionals, such as lawyers, who, as such, inhabit a universe of the sort I have been trying to describe?

One difficulty in even thinking about all of this is that lawyers may not be very objective or detached in their attempts to work the problem through. For one feature of this simplified, intellectual world is that it is often a very comfortable one to inhabit.

To be sure, on occasion, a lawyer may find it uncomfortable to represent an extremely unpopular client. On occasion, too, a lawyer may feel ill at ease invoking a rule of law or practice which he or she thinks to be an unfair or undesirable one. Nonetheless, for most lawyers most of the time, pursuing the interests of one's clients is an attractive and satisfying way to live in part just because the moral world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life. There is, I think, something quite seductive about being able to turn aside so many ostensibly difficult moral dilemmas and decisions with the reply: but that is not my concern; my job as a lawyer is not to judge the rights and wrong of the client or the cause; it is to defend as best I can my client's interests. For the ethical problems that can arise within this constricted point of view are, to say the least, typically neither momentous nor terribly vexing. Role-differentiated behavior is enticing

and reassuring precisely because it does constrain and delimit an otherwise often intractable and confusing moral world.

But there is, of course, also an argument which seeks to demonstrate that it is good and not merely comfortable for lawyers to behave this way.

It is good, so the argument goes, that the lawyer's behavior and concomitant point of view are role-differentiated because the lawyer *qua* lawyer participates in a complex institution which functions well only if the individuals adhere to their institutional role.

For example, when there is a conflict between individuals, or between the state and an individual, there is a well-established institutional mechanism by which to get that dispute resolved. That mechanism is the trial in which each side is represented by a lawyer whose job it is both to present his or her client's case in the most attractive, forceful light and to seek to expose the weaknesses and defects in the case of the opponent.

When an individual is charged with having committed a crime, the trial is the mechanism by which we determine in our society whether or not the person is in fact guilty. Just imagine what would happen if lawyers were to refuse, for instance, to represent persons whom they thought to be guilty. In a case where the guilt of a person seemed clear, it might turn out that some individuals would be deprived completely of the opportunity to have the system determine whether or not they are in fact guilty. The private judgment of individual lawyers would in effect be substituted for the public, institutional judgment of the judge and jury. The amorality of lawyers helps to guarantee that every criminal defendant will have his or her day in court.

In addition, of course, appearances can be deceiving. Persons who appear before trial to be clearly guilty do sometimes turn out to be innocent. Even persons who confess their guilt to their attorney occasionally turn out to have lied or to have been mistaken. The adversary system, so this argument continues, is simply a better method than any other that has been established by which to determine the legally relevant facts in any given case. It is certainly a better method than the exercise of private judgment by any particular individual. And the adversary system only works if each party to the controversy has a lawyer, a person whose institutional role is to argue, plead and present the merits of his or her case and the demerits of the opponent's. Thus if the adversary system is to work, it is necessary that there be lawyers who will play their appropriate, professional, institutional role of representative of the client's cause.

Nor is the amorality of the institutional role of the lawyer restricted to the defense of those accused of crimes. As was indicated earlier, when the lawyer functions in his most usual role, he or she functions as a counselor, as a professional whose task it is to help people realize those objectives and ends that the law permits them to obtain and which cannot be obtained without the attorney's special competence in the law. The attorney may think it wrong to dishonor one's children because of their views about the Vietnam war, but here the attorney's complaint is really with the laws of inheritance and not with his or

her client. The attorney may think the tax provision an unfair, unjustifiable loophole, but once more the complaint is really with the Internal Revenue Code and not with the client who seeks to take advantage of it. And these matters, too, lie beyond the ambit of the lawyer's moral point of view as institutional counselor and facilitator. If lawyers were to substitute their own private views of what ought to be legally permissible and impermissible for those of the legislature, this would constitute a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers. For given the fact that lawyers are needed to effectuate the wishes of clients, the lawyer ought to make his or her skills available to those who seek them without regard for the particular objectives of the client.

Now, all of this certainly makes some sense. These arguments are neither specious nor without force. Nonetheless, it seems to me that one dilemma which emerges is that if this line of argument is sound, it also appears to follow that the behavior of the lawyers involved in Watergate was simply another less happy illustration of lawyers playing their accustomed institutional role. If we are to approve on institutional grounds of the lawyer's zealous defense of the apparently guilty client and the lawyer's effective assistance of the immoral cheat, does it not follow that we must also approve of the Watergate lawyer's zealous defense of the interests of Richard Nixon?

As I have indicated, I do not think there is any easy answer to this question. For I am not, let me hasten to make clear, talking about the easy cases—about the behavior of the lawyers that was manifestly illegal. For someone quite properly might reply that it was no more appropriate for the lawyer who worked in the White House to obstruct justice or otherwise violate the criminal law than it would be for a criminal defense lawyer to shoot the prosecution witness to prevent adverse testimony or bribe a defense witness in order to procure favorable testimony. What I am interested in is all of the Watergate behavior engaged in by the Watergate lawyers that was not illegal, but that was, nonetheless, behavior of which we quite properly disapprove. I mean lying to the public; dissembling; stonewalling; tape-recording conversations; playing dirty tricks. Were not these just effective lawyer-like activities pursued by lawyers who viewed Richard Nixon as they would a client and who sought, therefore, the advancement and protection of his interests—personal and political?

It might immediately be responded that the analogy is not apt. For the lawyers who were involved in Watergate were hardly participants in an adversary proceeding. They were certainly not participants in that institutional setting, litigation, in which the amorality of the lawyer makes the most sense. It might even be objected that the amorality of the lawyer *qua* counselor is clearly distinguishable from the behavior of the Watergate lawyers. Nixon as President was not a client; they, as officials in the executive branch, were functioning as governmental officials and not as lawyers at all.

While not wholly convinced by a response such as the above, I am prepared to accept it because the issue at hand seems to me to be a deeper one. Even if

the involvement of so many lawyers in Watergate was adventurous (or, if not adventurous, explicable in terms of some more benign explanation) there still seems to me to be costs, if not problems, with the amorality of the lawyer that derives from his or her role-differentiated professionalism.

As I indicated earlier, I do believe that the amoral behavior of the *criminal* defense lawyer is justifiable. But I think that jurisdiction depends at least as much upon the special needs of an accused as upon any more general defense of a lawyer's role-differentiated behavior. As a matter of fact I think it likely that many persons such as myself have been misled by the special features of the criminal case. Because a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrongdoing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused—without regard, so to speak, for the merits. This coupled with the fact that it is an adversarial proceeding succeeds, I think, in justifying the amorality of the criminal defense counsel. But this does not, however, justify a comparable perspective on the part of lawyers generally. Once we leave the peculiar situation of the criminal defense lawyer, I think it quite likely that the role-differentiated amorality of the lawyer is almost certainly excessive and at times inappropriate. That is to say, this special case to one side, I am inclined to think that we might all be better served if lawyers were to see themselves less as subject to role-differentiated behavior and more as subject to the demands of the moral point of view. In this sense it may be that we need a good deal less rather than more professionalism in our society generally and among lawyers in particular.

Moreover, even if I am wrong about all this, four things do seem to me to be true and important.

First, all of the arguments that support the role-differentiated amorality of the lawyer on institutional grounds can succeed only if the enormous degree of trust and confidence in the institutions themselves is itself justified. If the institutions work well and fairly, there may be good sense to deferring important moral concerns and criticisms to another time and place, to the level of institutional criticism and assessment. But the less certain we are entitled to be of either the rightness or the self-corrective nature of the larger institutions of which the professional is a part, the less apparent it is that we should encourage the professional to avoid direct engagement with the moral issues as they arise. And we are, today, I believe, certainly entitled to be quite skeptical both of the fairness and of the capacity for self-correction of our larger institutional mechanisms, including the legal system. To the degree to which the institutional rules and practices are unjust, unwise or undesirable, to that same degree is the case for the role-differentiated behavior of the lawyer weakened if not destroyed.

Second, it is clear that there are definite character traits that the professional such as the lawyer must take on if the system is to work. What is less clear is that they are admirable ones. Even if the role-differentiated amorality of the

professional lawyer is justified by the virtues of the adversary system, this also means that the lawyer *qua* lawyer will be encouraged to be competitive rather than cooperative; aggressive rather than accommodating; ruthless rather than compassionate; and pragmatic rather than principled. This is, I think, part of the logic of the role-differentiated behavior of lawyers in particular, and to a lesser degree of professionals in general. It is surely neither accidental nor unimportant that these are the same character traits that are emphasized and valued by the capitalist ethic—and on precisely analogous grounds. Because the ideals of professionalism and capitalism are the dominant ones within our culture, it is harder than most of us suspect even to take seriously the suggestion that radically different styles of living, kinds of occupational outlooks, and types of social institutions might be possible, let alone preferable.

Third, there is a special feature of the role-differentiated behavior of the lawyer that distinguishes it from the comparable behavior of other professionals. What I have in mind can be brought out through the following question: Why is it that it seems far less plausible to talk critically about the amorality of the doctor, for instance, who treats all patients irrespective of their moral character than it does to talk critically about the comparable amorality of the lawyer? Why is it that it seems so obviously sensible, simple, and right for the doctor's behavior to be narrowly and rigidly role-differentiated, *i.e.*, just to try to cure those who are ill? And why is it that at the very least it seems so complicated, uncertain, and troublesome to decide whether it is right for the lawyer's behavior to be similarly role-differentiated?

The answer, I think, is twofold. To begin with (and this I think is the less interesting point), it is, so to speak, intrinsically good to try to win every lawsuit or help in no comparable way as it intrinsically good to try to win every lawsuit or help every client realize his or her objective. In addition (and this I take to be the truly interesting point), the lawyer's behavior is different in kind from the doctor's. The lawyer—and especially the lawyer as advocate—directly says and affirms things. The lawyer makes the case for the client. He or she tries to explain, persuade, and convince others that the client's cause should prevail. The lawyer lives with and within a dilemma that is not shared by other professionals. If the lawyer actually believes everything he or she asserts on behalf of the client, then it appears to be proper to regard the lawyer as in fact embracing and endorsing the points of view that he or she articulates. If the lawyer does not in fact believe what is urged by way of argument, if the lawyer is only playing a role, then it appears to be proper to tax the lawyer with hypocrisy and insincerity. To be sure, actors in a play take on roles and say things that the characters, not the actors believe. But we know it is a play and that they are actors. The law courts are not, however, theaters, and the lawyers both talk about justice and they genuinely seek to persuade. The fact that the lawyer's words, thoughts, and convictions are, apparently, for sale and at the service of the client helps us, I think, to understand the peculiar hostility which is more than occasionally uniquely directed by lay persons toward lawyers. The verbal, role-differentiated

behavior of the lawyer *qua* advocate puts the lawyer's integrity into question in a way that distinguishes the lawyer from the other professionals.³

Fourth, and related closely to the three points just discussed, even if on balance the role-differentiated character of the lawyer's way of thinking and acting is ultimately deemed to be justifiable within the system on systemic instrumental grounds, it still remains the case that we do pay a social price for that way of thought and action. For to become and to be a professional, such as a lawyer, is to incorporate within oneself ways of behaving and ways of thinking that shape the whole person. It is especially hard, if not impossible, because of the nature of the professions, for one's professional way of thinking not to dominate one's entire adult life. Thus, even if the lawyers who were involved in Watergate were not, strictly speaking, then and there functioning as lawyers, their behavior was, I believe, the likely if not inevitable consequence of their legal acculturation. Having been taught to embrace and practice the lawyer's institutional role, it was natural, if not unavoidable, that they would continue to play that role even when they were somewhat removed from the specific institutional milieu in which that way of thinking and acting is arguably fitting and appropriate. The nature of the professions—the lengthy educational preparation, the prestige and economic rewards, and the concomitant enhanced sense of self—makes the role of professional a difficult one to shed even in those obvious situations in which that role is neither required nor appropriate. In important respects, one's professional role becomes and is one's dominant role, so that for many persons at least they become their professional being. This is at a minimum a heavy price to pay for the professions as we know them in our culture, and especially so for lawyers. Whether it is an inevitable price is, I think, an open question, largely because the problem has not begun to be fully perceived as such by the professionals in general, the legal profession in particular, or by the educational institutions that train professionals.

II

The role-differentiated behavior of the professional also lies at the heart of the second of the two moral issues I want to discuss, namely, the character of the interpersonal relationship that exists between the lawyer and the client. As I indicated at the outset, the charge that I want to examine here is that the relationship between the lawyer and the client is typically, if not inevitably, a morally defective one in which the client is not treated with the respect and dignity that he or she deserves.

There is the suggestion of paradox here. The discussion so far has concentrated upon defects that flow from what might be regarded as the lawyer's excessive preoccupation with and concern for the client. How then can it also be the case that the lawyer *qua* professional can at the same time be taxed with promoting and maintaining a relationship of dominance and indifference vis-à-

vis his or her client? The paradox is apparent, not real. Not only are the two accusations compatible; the problem of the interpersonal relationship between the lawyer and the client is itself another feature or manifestation of the underlying issue just examined—the role-differentiated life of the professional. For the lawyer can both be overly concerned with the interest of the client and at the same time fail to view the client as a whole person, entitled to be treated in certain ways.

One way to begin to explore the problem is to see that one pervasive, and I think necessary, feature of the relationship between any professional and the client or patient is that it is in some sense a relationship of inequality. This relationship of inequality is intrinsic to the existence of professionalism. For the professional is, in some respects at least, always in a position of dominance vis-à-vis the client, and the client in a position of dependence vis-à-vis the professional. To be sure, the client can often decide whether or not to enter into a relationship with a professional. And often, too, the client has the power to decide whether to terminate the relationship. But the significant thing I want to focus upon is that while the relationship exists, there are important aspects in which the relationship cannot be a relationship between equals and must be one in which it is the professional who is in control. As I have said, I believe this is a necessary and not merely a familiar characteristic of the relationship between professionals and those they serve. Its existence is brought about by the following features.

To begin with, there is the fact that one characteristic of professions is that the professional is the possessor of expert knowledge of a sort not readily or easily attainable by members of the community at large. Hence, in the most straightforward of all senses the client, typically, is dependent upon the professional's skill or knowledge because the client does not possess the same knowledge.

Moreover, virtually every profession has its own technical language, a private terminology which can only be fully understood by the members of the profession. The presence of such a language plays the dual role of creating and affirming the membership of the professionals within the profession and of preventing the client from fully discussing or understanding his or her concerns in the language of the profession.

These circumstances, together with others, produce the added consequence that the client is in a poor position effectively to evaluate how well or badly the profession performs. In the professions, the professional does not look primarily to the client to evaluate the professional's work. The assessment of ongoing professional competence is something that is largely a matter of self-assessment conducted by the practicing professional. Where external assessment does occur, it is carried out not by clients or patients but by other members of the profession, themselves. It is significant, and surely surprising to the outsider, to discover to what degree the professions are self-regulating. They control who shall be admitted to the professions and they determine (typically only if there

has been a serious complaint) whether the members of the profession are performing in a minimally satisfactory way. This leads professionals to have a powerful motive to be far more concerned with the way they are viewed by their colleagues than with the way they are viewed by their clients. This means, too, that clients will necessarily lack the power to make effective evaluations and criticisms of the way the professional is responding to the client's needs.

In addition, because the matters for which professional assistance is sought usually involve things of great personal concern to the client, it is the received wisdom within the professions that the client lacks the perspective necessary to pursue in a satisfactory way his or her own best interests, and that the client requires a detached, disinterested representative to look after his or her interests. That is to say, even if the client had the same knowledge or competence that the professional had, the client would be thought to lack the objectivity required to utilize that competency effectively on his or her own behalf.

Finally, as I have indicated, to be a professional is to have been acculturated in a certain way. It is to have satisfactorily passed through a lengthy and allegedly difficult period of study and training. It is to have done something hard. Something that not everyone can do. Almost all professions encourage this way of viewing oneself, as having joined an elite group by virtue of hard work and mastery of the mysteries of the profession. In addition, the society at large treats members of a profession as members of an elite by paying them more than most people for the work they do with their heads rather than their hands, and by according them a substantial amount of social prestige and power by virtue of their membership in a profession. It is hard, I think, if not impossible, for a person to emerge from professional training and participate in a profession without the belief that he or she is a special kind of person, both different from and somewhat better than those nonprofessional members of the social order. It is equally hard for the other members of society not to hold an analogous view of the professionals. And these beliefs surely contribute, too, to the dominant role played by a professional in any professional-client relationship.

If the foregoing analysis is correct, then one question that is raised is whether it is a proper and serious criticism of the professions that the relationship between the professional and the client is an inherently unequal one in this sense.

One possible response would be to reject the view that all relationships of inequality (in this sense of inequality) are in fact undesirable. Such a response might claim, for example, that there is nothing at all wrong with inequality in relationships as long as the inequality is consensually imposed. Or, it may be argued, this kind of inequality is wholly unobjectionable because it is fitting, desired, or necessary in the circumstances. And, finally, it may be urged, whatever undesirability does attach to relationships by virtue of their lack of equality is outweighed by the benefits of role-differentiated relationships.

Another possible response would be to maintain that all human relationships of inequality (again in this sense of inequality) are for that reason alone objectionable on moral grounds—any time two or more persons are in a rela-

tionship in which power is not shared equally, the relationship is on that ground appropriately to be condemned. This criticism would solve the problem by abolishing the professions.

A third possible response, and the one that I want to consider in some detail, is a more sophisticated variant of the second response. It might begin by conceding, at least for purposes of argument, that some inequality may be inevitable in any professional-client relationship. It might concede, too, that a measure of this kind of inequality may even on occasion be desirable. But it sees the relationship between the professional and the client as typically flawed in a more fundamental way, as involving far more than the kind of relatively benign inequality delineated above. This criticism focuses upon the fact that the professional often, if not systematically, interacts with the client in both a manipulative and a paternalistic fashion. The point is not that the professional is merely dominant within the relationship. Rather, it is that from the professional's point of view the client is seen and responded to more like an object than a human being, and more like a child than an adult. The professional does not, in short, treat the client like a person; the professional does not accord the client the respect that he or she deserves. And these, it is claimed, are without question genuine moral defects in any meaningful human relationship. They are, moreover, defects that are capable of being eradicated once their cause is perceived and corrective action taken. The solution, so the argument goes, is to "deprofessionalize" the professions; not do away with the professions entirely, but weaken or eliminate those features of professionalism that produce these kinds of defective, interpersonal relationships.

To decide whether this would be a good idea we must understand better what the proposal is and how the revisions might proceed. Because thinking somewhat along these lines has occurred in professions other than the law, e.g., psychiatry, a brief look at what has been proposed there may help us to understand better what might be claimed in respect to the law.

I have in mind, for example, the view in psychiatry that begins by challenging the dominant conception of the patient as someone who is sick and in particular need of the professional, the psychiatrist, who is well. Such a conception, it is claimed, is often inadequate and often mistaken. Indeed, many cases of mental illness are not that at all; they are merely cases of different, but rational behavior. The alleged mental illness of the patient is a kind of myth, encouraged, if not created, by the professionals to assure and enhance their ability to function as professionals. So, on this view, one thing that must occur is that the accepted professional concepts of mental illness and health must be revised.⁴

In addition, the language of psychiatry and mental illness is, it is claimed, needlessly technical and often vacuous. It serves no very useful communicative purpose, but its existence does of course help to maintain the distinctive status and power of the psychiatric profession. What is called for here is a simpler, far less technical language that permits more direct communication between the patient and the therapist.

Finally, and most significantly, the program calls for a concomitant re-
 placement of the highly role-differentiated relationship between the therapist and
 the patient by a substantially less differentiated relationship of wholeness of
 interaction and equality. There should not, for instance, be mental hospitals in
 which the patients are clearly identified and distinguished from the staff and the
 professionals. Instead, therapeutic communities should be established in which
 all of the individuals in the community come to see themselves both as able to
 help the other members of the community and as able to be helped by them. In
 such a community, the distinctions between the professionals and the patients
 will be relatively minor and uninteresting. In such a community the relationship
 among the individuals, be they patients or professionals, will be capable of being
 more personal, intimate and complete—more undifferentiated by the accident of
 prior training or status.

Now, if this is a plausible proposal to make, it is possible that it is because
 of reasons connected with therapy rather than with the professions generally.
 But I do not think this is so. The general analysis and point of view is potentially
 generic; and certainly capable, I think, of being taken seriously in respect to the
 law as well as in respect to psychiatry, medicine, and education. If the critique is
 extravagant even when applied to psychiatry, as I think it is, I am more im-
 pressed by the truths to be extracted from it than I am by the exaggerations to
 be rejected. For I do think that professionals generally and lawyers in particular
 do, typically enter into relationships with clients that are morally objectionable
 in virtue of the paternalistic and impersonal fashion in which the client is viewed
 and treated.

Thus it is, for example, fairly easy to see how a number of the features
 already delineated conspire to depersonalize the client in the eyes of the lawyer
qua professional. To begin with, the lawyer's conception of self as a person with
 special competencies in a certain area naturally leads him or her to see the client
 in a partial way. The lawyer *qua* professional is, of necessity, only centrally
 interested in that part of the client that lies within his or her special competency.
 And this leads any professional including the lawyer to respond to the client as
 an object—as a thing to be altered, corrected, or otherwise assisted by the
 professional rather than as a person. At best the client is viewed from the
 perspective of the professional not as a whole person but as a segment or aspect
 of a person—an interesting kidney problem, a routine marijuana possession
 case, or another adolescent with an identity crisis.⁵

Then, too, the fact already noted that the professions tend to have and to
 develop their own special languages has a lot to do with the depersonalization of
 the client. And this certainly holds for the lawyers. For the lawyer can and does
 talk to other lawyers but not to the client in the language of the profession. What
 is more, the lawyer goes out of his or her way to do so. It is satisfying. It is the
 exercise of power. Because the ability to communicate is one of the things that
 distinguishes persons from objects, the inability of the client to communicate
 with the lawyer in the lawyer's own tongue surely helps to make the client less a
 person in the lawyer's eyes—and perhaps even in the eyes of the client.

The forces that operate to make the relationship a paternalistic one seem to
 me to be at least as powerful. If one is a member of a collection of individuals
 who have in common the fact that their intellectuals are highly trained, it is very
 easy to believe that one knows more than most people. If one is a member of a
 collection of individuals who are accorded high prestige by the society at large,
 it is equally easy to believe that one is better and knows better than most people.
 If there is, in fact, an area in which one does know things that the client doesn't
 know, it is extremely easy to believe that one knows generally what is best for
 the client. All this, too, surely holds for lawyers.

In addition there is the fact, also already noted, that the client often estab-
 lishes a relationship with the lawyer because the client has a serious problem or
 concern which has rendered the client weak and vulnerable. This, too, surely
 increases the disposition to respond toward the client in a patronizing, pater-
 nistic fashion. The client of necessity confers substantial power over his or her
 wellbeing upon the lawyer. Invested with all of this power both by the individual
 and the society, the lawyer *qua* professional responds to the client as though the
 client were an individual who needed to be looked after and controlled, and to
 have decisions made for him or her by the lawyer, with as little interference
 from the client as possible.

Now one can, I think, respond to the foregoing in a variety of ways. One
 could, to begin with, insist that the paternalistic and impersonal ways of be-
 having are the aberrant rather than the usual characteristics of the lawyer-client
 relationship. One could, therefore, argue that a minor adjustment in better legal
 education aimed at sensitizing prospective lawyers to the possibility of these
 abuses is all that is required to prevent them. Or, one could, to take the same
 tack described earlier, regard these features of the lawyer-client relationship as
 endemic, but not as especially serious. One might have a view that, at least in
 moderation, relationships having these features are a reasonable price to pay (if
 it is a price at all) for the very appreciable benefits of professionalism. The
 impersonality of a surgeon, for example, may make it easier rather than harder
 for him or for her to do a good job of operating successfully on a patient. The
 impersonality of a lawyer may make it easier rather than harder for him or for
 her to do a good job at representing a client. The paternalism of lawyers may be
 justified by the fact that they do in fact know better—at least within many areas
 of common concern to the parties involved—what is best for the client. And, it
 might even be claimed, clients want to be treated in this way.

But if these answers do not satisfy, if one believes that these are typical, if
 not systemic, features of the professional character of the lawyer-client rela-
 tionship, and if one believes, as well, that these are morally objectionable fea-
 tures of that or any other relationship among persons, it does look as though
 one way to proceed is to "deprofessionalize" the law—to weaken, if not excise,
 those features of legal professionalism that tend to produce these kinds of
 interpersonal relationships.

The issue seems to me difficult just because I do think that there are

important and distinctive competencies that are at the heart of the legal profession. If there were not, the solution would be simple. If there were no such competencies—if, that is, lawyers didn't really help people any more than (so it is sometimes claimed) therapists do—then no significant social goods would be furthered by the maintenance of the legal profession. But, as I have said, my own view is that there are special competencies and that they are valuable. This makes it harder to determine what to preserve and what to shed. The question, as I see it, is how to weaken the bad consequences of the role-differentiated lawyer-client relationship without destroying the good that lawyers do.

Without developing the claim at all adequately in terms of scope or detail, I want finally to suggest the direction this might take. Desirable change could be brought about in part by a sustained effort to simplify legal language and to make the legal processes less mysterious and more directly available to lay persons. The way the law works now, it is very hard for lay persons either to understand it or to evaluate or solve legal problems more on their own. But it is not at all clear that substantial revisions could not occur along these lines. Divorce, probate, and personal injury are only three fairly obvious areas where the lawyers' economic self-interest says a good deal more about resistance to change and simplification than does a consideration on the merits.

The more fundamental changes, though, would, I think, have to await an explicit effort to alter the ways in which lawyers are educated and acculturated to view themselves, their clients, and the relationships that ought to exist between them. It is, I believe, indicative of the state of legal education and of the profession that there has been to date extremely little self-conscious concern even with the possibility that these dimensions of the attorney-client relationship are worth examining—to say nothing of being capable of alteration. That awareness is, surely, the prerequisite to any serious assessment of the moral character of the attorney-client relationship as a relationship among adult human beings.

I do not know whether the typical lawyer-client relationship is as I have described it; nor do I know to what degree role-differentiation is the cause; nor do I even know very precisely what "deprofessionalization" would be like or whether it would on the whole be good or bad. I am convinced, however, that this, too, is a topic worth taking seriously and worth attending to more systematically than has been the case to date.

NOTES

1. Because of the significance for my analysis of the closely related concepts of a profession and a professional, it will be helpful to indicate at the outset what I take to be the central features of a profession.

But first there is an ambiguity that must be noted so that it can be dismissed. There is one sense of "professional" and hence of "profession" with which I am not concerned. That is the sense in which there are in our culture, professional athletes, professional actors, and professional beauticians. In this sense, a person who possesses sufficient skill to engage in an activity for

money and who elects to do so is a professional rather than, say, an amateur or a volunteer. This is, as I have said, not the sense of "profession" in which I am interested.

I am interested, instead, in the characteristics of professions such as law, or medicine. There are, I think, at least six that are worth noting.

(1) The professions require a substantial period of formal education—at least as much if not more than that required by any other occupation.

(2) The professions require the comprehension of a substantial amount of theoretical knowledge and the utilization of a substantial amount of intellectual ability. Neither manual nor creative ability is typically demanded. This is one thing that distinguishes the professions both from highly skilled crafts—like glassblowing—and from the arts.

(3) The professions are both an economic monopoly and largely self-regulating. Not only is the practice of the profession restricted to those who are certified as possessing the requisite competencies, but the questions of what competencies are required and who possesses them are questions that are left to the members of the profession to decide for themselves.

(4) The professions are clearly among the occupations that possess the greatest social prestige in the society. They also typically provide a degree of material affluence substantially greater than that enjoyed by most working persons.

(5) The professions are almost always involved with matters which from time to time are among the greatest personal concerns that humans have: physical health, psychic well-being, liberty, and the like. As a result, persons who seek the services of a professional are often in a state of appreciable concern, if not vulnerability, when they do so.

(6) The professions almost always involve at their core a significant interpersonal relationship between the professional, on the one hand, and the person who is thought to require the professional's services: the patient or the client.

2. *Ballard v. Superior Court*, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966).

3. I owe this insight, which I think is an important and seldom appreciated one, to my colleague, Leon Letwin.

4. On this, and the points that follow, I am thinking in particular of the writings of Thomas Szasz, e.g., *T. S. Szasz, The Myth of Mental Illness* (1974), and of R. D. Laing, e.g., R. D. Laing & A. Esterson, *Sanity, Madness and the Family* (1964).

5. This and other features are delineated from a somewhat different perspective in an essay by Erving Goffman. See *The Medical Model and Mental Hospitalization: Some Notes on the Vicissitudes of the Tinkering Trades* in E. Goffman, *Asylums* (1961), especially Parts V and VI of the essay.