

Images and Aspirations: A Call for a Return to Ethics for Lawyers

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I. INTRODUCTION

In 2007, Fred Zacharias published an article entitled *The Images of Lawyers (Images)*, in which he identified nine separate popular conceptions or images of lawyers, arguing that each one had some degree of accuracy in the real world and, perhaps more significantly, that if anyone “were to suggest to an audience of lawyers and experts in the legal profession that one of the resulting paradigms is false, at least some in the audience would protest.”¹ Let me list the nine without, for the moment, further comment:

- (1) LAWYERS AS CROOKS
- (2) LAWYERS AS LEGALLY HONEST BUT SELF-INTERESTED INDIVIDUALS
- (3) LAWYERS AS HONEST AND WELL-MEANING, BUT NEEDING GUIDANCE
- (4) LAWYERS AS HIGHLY RESPECTABLE, SELF-REGULATING PROFESSIONALS
- (5) LAWYERS AS CLIENT PROTECTORS
- (6) LAWYERS AS INDEPENDENT, OBJECTIVE MONITORS OF THE SYSTEM AND OF CLIENT BEHAVIOR
- (7) LAWYERS AS ORDINARY AGENTS
- (8) LAWYERS AS OFFICERS OF THE COURT
- (9) LAWYERS AS BUSINESSPERSONS²

Fred’s purpose in compiling this list was to offer advice to those who draft lawyers’ ethics codes. He said they would be misguided in their efforts if they failed to see that each one of these images somehow had to be taken into account in the drafting process, less the results prove ineffective, unenforceable, or socially unacceptable.³ The article itself is subtle and complex. It offers axioms and postulates for taking account of these nine different images in the drafting process. The thrust of Fred’s position is twofold: (1) to decry any attempt to use one of these images as *the* model in code drafting and (2) to identify which image of lawyering is being used in drafting a given particular provision. Although sympathetic with the spirit of this attempt, I am deeply concerned that identifying so many various, and contradictory, images as separate models distorts what I believe is a true central paradigm, but one that is

1. Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 85 (2007).

2. *Id.* at 76–85.

3. *Id.* at 100.

very different in kind from any of the nine images that Fred has identified. Long ago I identified that paradigm as the central moral tradition of lawyering (central tradition).⁴ In contrast to Zacharias, I think it ill-conceived, and perhaps impossible, to attempt to take one of these narrow, fragmented images and point to it as the justification for a given code provision. Surely, the basic modern ethics code—the *ABA Model Rules of Professional Conduct (Model Rules)*—was drafted initially as disciplinary “law for lawyers” and is, in almost all particulars, a quasi-criminal code.⁵ So every provision is at once an image of LAWYERS AS CROOKS, whatever policy impulse or other “image” may have driven its adoption. Needless to say, the image of LAWYERS AS CROOKS is hardly one that any lawyer or citizen would want as the dominant one in an ethics code. The problem is that enforceability has been an overriding theme in code drafting at least since the revision to the 1908 *Canons*, which produced the ABA’s *Model Code of Professional Responsibility* in 1969.⁶ Subsequently, it became necessary to draft with the idea that those who do not abide by the rules might be disciplined. Hence, the quasi-criminal nature of the ethics codes. The deeper problem has been the transformation of codes of ethics into rules of law. Whatever else it does, it wipes aspiration away.⁷ Minimal standards of conduct are all that can be reasonably expected when enforceability is the end game. However, what Fred Zacharias was battling mightily against in his *Images* article was a larger and more fundamental issue. He called it the tendency in modern professional responsibility scholarship to fight fiercely over *the* single proper image of lawyering. For Zacharias, no single image captures the complexity of lawyering, but while admitting that the code drafters have never really adopted a unitary model, “except by omitting direct statements to the contrary,”⁸

4. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990). My argument is that the central moral tradition is a rich and complex set of practices and beliefs, best described in the *Joint Report*, *infra* note 36.

5. See generally MODEL RULES OF PROF’L CONDUCT (1984). The phrase “law for lawyers” is found in L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 639 (1977). Zacharias disagrees with my suggestion that the *Model Rules* are quasi-criminal in nature. See Zacharias, *supra* note 1, at 75.

6. MODEL CODE OF PROF’L RESPONSIBILITY (1979); see Fred C. Zacharias, *The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787, 787 (1998).

7. In the *Model Code*, however faulty the outcome, there was a theoretical attempt in the “Ethical Considerations” to provide a higher minimal standard. See MODEL CODE OF PROF’L RESPONSIBILITY, preliminary statement.

8. Zacharias, *supra* note 1, at 93.

he nevertheless thought they were in error in not being more explicit about how these images shaped specific provisions. Nevertheless, he did seem to think that image number five on his list—LAWYERS AS CLIENT PROTECTORS—was favored in some way.⁹ Interestingly, when Zacharias came to talk directly about the scholarly fight over images, he dropped the notion of a plethora of nine competing ones and offered, instead, three “camps” to describe how the players were aligned.¹⁰

The dominant camp embraced what has been called, unfortunately, the “standard conception of the lawyer’s role.”¹¹ This conception emphasizes the lawyer as the aggressive and single-minded champion of the client. Its standard bearer is Monroe Freedman.¹² The second camp is less easily described but is characterized by a tendency toward a justice model. William Simon is the exemplar here.¹³ What is striking about these two camps is the willingness of at least Freedman and Simon to espouse actions that would clearly go beyond the traditional ways in which lawyers felt themselves constrained in conducting themselves for clients. For example, each, for very different reasons, would permit lawyers to “lie”: Freedman to stay true to the client,¹⁴ Simon to see that justice might be done.¹⁵ I choose the example of lying for reasons that will become obvious later in this Article. I think it is a telling critical point against those whose views are extreme.

Zacharias explicitly identified himself as a scholar who fell into a third camp.¹⁶ The dominant idea in this camp was its rejection of the extreme one-dimensional positions of the first two camps. Although he kindly credits me with helping him to see that “lawyers’ moral dilemmas” cannot “be resolved uniformly by resort to a simple formula,”¹⁷ he does

9. See, e.g., *id.* at 92. Image number five is the “standard conception of the lawyer’s role” by another name. See *infra* note 11 and accompanying text.

10. Fred C. Zacharias, *Fitting Lying to the Court into the Central Moral Tradition of Lawyering*, 58 CASE W. RES. L. REV. 491, 492 (2008).

11. David Luban is often credited with first using this phrase. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xix–xxi (1988); see also Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 3 n.4 (2005).

12. See MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975).

13. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998).

14. Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771 (2006).

15. William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433 (1999).

16. Zacharias, *supra* note 10, at 493.

17. *Id.* at 492.

not go so far as to endorse my notion that there is a central tradition.¹⁸ What keeps us in the same camp is a healthy respect for the complexity of lawyering, particularly as the moral challenges change depending on the tasks in which the lawyer engages—advocate, negotiator, counselor, draftsman, et cetera.¹⁹ Nevertheless, because Zacharias is so concerned with the plight of those who draft lawyers' codes, he takes competing images, true or useful in one context or another, and suggests there is no single paradigm. The best we can do, he seems to say, is to identify where each image has the most relevance and use it as a way to draft an appropriate provision. We part company here. The difference between us lies in what he sometimes calls an image, sometimes a popular conception, sometimes a paradigm.²⁰ We agree that no simple image or popular conception can possibly capture the complexity of lawyering. We disagree about paradigms. He seems to think a paradigm must be simplistically conceived. I believe paradigms can be complex.²¹

A second issue that divides us is the object of our individual scholarly efforts. Accepting the status quo with its diverse quarreling over what should be the single dominate image of lawyering, Fred at least wants to get the drafting right. I want to get the paradigm right and keep it before us whether drafting codes or practicing law. He accepts that we must draft law for lawyers. Surely that is the current reality. I argue, however, that we must fight against this trend. We need to return to a model code of ethics, not law. Why should lawyers, or any other group, draft laws to govern themselves? We can and should draft a code of ethics, for that is central to the contract any truly professional group makes with the larger society.²² In exchange for a monopoly and the guardianship of one

18. Although Zacharias is clearly sympathetic to my position, he seems unwilling to endorse it at least by not agreeing with my notion that the lawyer's primary obligation is to the system of law itself, its processes, procedures, and institutions. *Id.* at 499.

19. Compare Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 186–90 (1997), with Lawry, *supra* note 4, at 336.

20. See Zacharias, *supra* note 1.

21. In matters such as these, the dictionary is not much help. A common definition would be: "an example serving as a model; pattern." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1406 (2d ed. unabridged 1987).

22. It is inevitable that the issue of professionalism be squarely raised in discussions such as these. I am content with Pound's widely cited definition: "[A] group of men pursuing a learned art as a common calling in the spirit of public service." ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953). Neil Hamilton has recently and eloquently expounded on the social contract theme embedded within the idea of professionalism. See Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW., no. 4, 2008 at 4, 4–5.

important aspect of community life, the professional group pledges a higher standard of conduct—in traditional terms, a code of ethics, not law. Perhaps it is too late to reverse the historical trajectory. But I believe if we can show more and more examples of how the best lawyers practiced law within the historic central tradition, we might begin to reverse the trend.

Images of lawyers abound. The Zacharian nine is only one way to frame them, and Fred himself indicated there were others, even some that he himself identified.²³ Some years ago, an intriguing empirical study was conducted, which resulted in the conclusion that there were really just three dominant images of lawyers: Trickster, Hero, and Helper.²⁴ The authors of the study briefly defined these terms as follows:

The Hero is aggressive, self-confident, competitive, energetic, successful, and looked up to. (He is also active and intelligent.)

The Trickster is tricky, evasive, manipulative, overbearing, greedy, and cold (plus intimidating, unethical, egotistical, and condescending).

The Helper is helpful, likable, cooperative, broadminded, understanding, and informal (as well as accommodating and fair).²⁵

Although acknowledging that the three images or “types” were abstractions, the authors emphasized that they were “durable and vivid pictures in people’s minds that occur in the *form* of concrete real types.”²⁶ Interestingly, these types were impervious to experience: “Comments about lawyers in the Bible, in fourteenth- and sixteenth-century England, in Renaissance Europe, and in America from the colonial period down to the present show a remarkably constant picture: a mixture of honorable distinction and popular dislike.”²⁷ Thus, the Hero is about solving problems, the Trickster is about winning or making money, and the Helper is about helping people.²⁸ Real lawyers are surely a mix of all three,²⁹ but they often self-identify with one of these three, and people generally label lawyers as one of these three.³⁰ Although the study is rich and complex, I want to focus only on one aspect of it, which demonstrates the difficulties all of us have with lawyering images, none of which conform to reality, but that are deeply embedded in our collective and personal psyches. The problem, of

23. See Zacharias, *supra* note 1, at 74 & n.6 (citing his own earlier work).

24. Marvin W. Mindes & Alan C. Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177, 179.

25. *Id.* at 180 (footnote omitted).

26. *Id.* at 181.

27. *Id.* at 184.

28. *Id.* at 186.

29. *Id.* at 219.

30. *Id.* at 178.

course, is the adversary system of justice.³¹ As so many scholars have pointed out, “the central role model for American lawyers is their participating in the clash of interests and doctrines in adversary contest or trial.”³² But as any lawyer knows, “such focus on the dramatic court encounter is largely Walter Mitty-like dreamwork rather [than] a description of occupational reality.”³³ Worse, although most of us really do know better, the preoccupation with lawyers in a criminal trial is the dominant image of the dominant image of lawyers at work. Surely it has made much more difficult the effort to make rules or suggest models of behavior for lawyers as they engage in other work.³⁴ Zacharias struggles mightily with this problem, but because he is trying to help us draft better rules, he simply urges us to see how other images might better guide us in the effort. Because I decry the effort of drafting law for lawyers, I want to suggest a different strategy.

The key to my approach is twofold: (1) it initially centers on an examination of my notion of a central tradition,³⁵ as best expressed by Lon Fuller and John Randall in the 1958 *Report of the Joint Conference (Joint Report)*,³⁶ and (2) it examines concrete stories of lawyers, as they exemplify that central tradition. I believe we need to move explicitly toward aspirations, or we will be forever caught in the messy compromises entailed by efforts to legislate rules. I think the debate about the rules themselves must be shelved. When they are revisited after we examine carefully and deeply the central tradition and good stories about good people, perhaps the rules will more resemble true ethics codes, and we will be back on the road to a realistic sense of what lawyering can and should be.³⁷

31. *Id.* at 220.

32. *Id.*

33. *Id.* at 220 n.121.

34. *Id.*

35. See *supra* note 4 and accompanying text.

36. Joint Conference on Prof'l Responsibility of the Am. Bar Ass'n & Ass'n of Am. Law Sch., *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958) [hereinafter *Joint Report*].

37. I use the word *realistic* intentionally. I have been a lawyer and around lawyers for well over forty years. In my experience there are many more lawyers who practice law more or less within the central tradition than there are lawyers who do not.

II. THE JOINT REPORT

A. Introduction

Like the authors of *Trickster, Hero, Helper*,³⁸ and like everyone who tries to make sense of lawyers' ethics, the problem starts and ends and gets hopelessly entangled in the definition and meaning of the adversary system of justice.³⁹

The authors of the *Joint Report* preface their statement by saying that "the chief obstacle" to "bringing home to the law student, the lawyer and the public an understanding of the nature of the lawyer's professional responsibilities" is "the adversary system."⁴⁰ The authors did not attempt to define what is meant by the term but simply used it broadly as a way of talking about all of the "special services" the legal "profession renders to society."⁴¹ The *Joint Report* thus implicitly understands that the lawyer holds a special office in society, presumably as a result of the professional social contract previously mentioned. It states at the outset: "When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective."⁴² The *Joint Report* does not further elucidate the meaning of what this social contract is, nor does it attempt to narrow the definition of "the adversary system." Rather, it simply talks of the various duties and functions of lawyers, as if these fundamental matters were impliedly understood. All that is needed is a concise description of and reasoned justifications for the lawyer's duties and functions. The effort is to describe and to justify a fairly well-understood tradition, but one that had been lived and accepted, rather than thought through and written about in detail. That is why, when I first read the *Joint Report* and pondered it, I perceived it to be uniquely descriptive of the best traditions of lawyering I had been taught and had observed after some years of practice. Of course, as the authors also said in their preface: "It is not expected that all lawyers will agree with [every] detail of the statement, particularly in matters of emphasis."⁴³ It was clearly assumed, however, that all good lawyers would easily assent to the broad principles and general mapping of their professional responsibilities. No doubt there was and will always be some dissent with respect to the *Joint Report*. And, as Fred Zacharias points out, there is clearly some

38. See Mindes & Acock, *supra* note 24.

39. See, e.g., *supra* notes 11–13

40. *Joint Report*, *supra* note 36, at 1159.

41. *Id.*

42. *Id.*

43. *Id.*

vigorous—but, I would add, some very modern—scholarly and professional debate about these matters.⁴⁴ Nevertheless, I cheerfully offer the main points of the *Joint Report* and the stories I will tell as confirmation that the central tradition is alive and well. Even if I am wrong, I will still point to the *Joint Report* and to these stories as valuable aspirations and things not to be submerged and ignored as we continue to discuss what it means to be a good person and a good lawyer. The modern debate should be “paused” to listen to its own traditional stories. New directions in drafting then might be found. For now, drafting issues must be left for another day. First, let me dig into the substance of the *Joint Report* and then tell some stories.

The heart of the document lies in an overview, description, and justification for the three major services the professional lawyer performs: (1) advocate and counselor in the administration and development of the law; (2) one who designs a framework for collaborative effort; and (3) one serving the public directly.⁴⁵

B. Advocate and Counselor

“The lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client’s interest.”⁴⁶ This is standard fare. However, the justification offered for this descriptive statement is not the standard one.⁴⁷ The justification for this most basic statement is that it allows the arbiter to stay neutral in assessing the matter, forbidding a hasty assessment of the kind we are all prone to make.⁴⁸ Moreover, because of the necessary proceedings prior to trial, an orderly shaping of issues

44. See Zacharias, *supra* note 10, at 492–94.

45. *Joint Report*, *supra* note 36, at 1160.

46. *Id.*

47. Metaphor rather than justification is what is usually offered. See MARVIN E. FRANKEL, *PARTISAN JUSTICE* 11 (1978) (suggesting the Adam Smith theory of adjudication is a “grimly combative proposition”).

48. “What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence . . .” *Joint Report*, *supra* note 36, at 1160. This is not necessarily a matter of prejudice. It is a psychological reality. The point is this: “An adversary presentation seems the only effective means for [combating] this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.” *Id.*

occurs, which allows a truly public trial to take place.⁴⁹ In perhaps the most contested part of the *Joint Report*, the authors go on to say this:

The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.⁵⁰

Despite the snickers of many litigators, is this not the public good we as members of society—not as self-interested players—want from our lawyers and our court system? Is that not the goal we ought all to be striving to obtain?

Law compliance is the first goal of lawyers as counselors.⁵¹ Moreover, by reminding the client of long-run costs, “the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.”⁵² Contrasting the role of advocate with that of counselor, the *Joint Report* suggests that the benefit of the doubt given to clients and their causes by the partisan lawyer in open court is “inappropriate when the lawyer acts as counselor.”⁵³ Moreover, “[t]he reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality.”⁵⁴ Here is where professional detachment is most important. In the central tradition, it is simply confusion of role and function that collapses the advocate into the counselor. Although the norm has been abused in recent times, it is still commonplace to assert that the lawyer can and ought to be trying to bring clients into compliance with the law.⁵⁵ Again, if skeptical eyebrows are raised, it is not because these are not appropriate aspirations but because of the suspicion that too many lawyers act otherwise. Also, important as it is, yet how can one possibly pass an enforceable rule on

49. *Id.*

50. *Id.* at 1161. David Luban contests some of the psychology behind these views of the adversary system, which he largely attributes to Lon Fuller. See David Luban, *Rediscovering Fuller's Legal Ethics*, 11 *GEO. J. LEGAL ETHICS* 801 (1998). He also contests the reality of some of the assertions made in the *Joint Report*. *Id.* at 821–22. To respond to any of his criticisms in this Article would push us too far afield. It is enough here to underscore that he endorses much of the *Joint Report* as worthy of aspiration. *Id.* at 829.

51. See *Joint Report*, *supra* note 36, at 1161.

52. *Id.*

53. *Id.*

54. *Id.*

55. See generally Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 *CONN. L. REV.* 1185 (2003).

the lawyer's counseling function? It must remain aspirational, even as it must play a crucial role in every lawyer's day-to-day work.

C. *Lawyer as Designer of Collaborative Frameworks*

One of the first assignments I had as a young lawyer was to draft a lease agreement. After several drafts, the partner in charge approved, and it was signed. When I was next in his office, he showed me the signed lease and told me we would not know for ten years whether the lease was well drafted. That was because, he said, if it is clear and fair, there will be no trouble about it. "Clear and fair"—that does not sound like partisanship to me. But it sounds like what the drafters of the *Joint Report* had in mind when they reminded us that "the great bulk of human relations are set, not by governmental decree, but by the voluntary action of the affected parties."⁵⁶ Individuals form corporations and partnerships, conclude leases and contracts, and enter into innumerable transactions, large and small, "by which their rights and duties toward one another are defined."⁵⁷ Lawyers do the formal work here, "anticipating and forfending against possible disputes, and generally providing a framework for the parties' future dealings."⁵⁸

Again, extreme partisanship does not get these jobs done. As the *Joint Report* expresses it: "[T]he good lawyer does not serve merely as a legal conduit for his client's desires, but as a wise counselor, experienced in the art of devising arrangements that will put in workable order the entangled affairs and interests of human beings."⁵⁹

D. *Lawyer in Direct Public Service*

In this section of the *Joint Report*, a number of specific areas are explored. Each of them expounds on a particular way that the lawyer makes a direct contribution to the public good. Here one is reminded of the salient fact of professionalism: public service is the lawyer's professional goal—before self, before profit, and in setting the kind of constraints on partisanship that are reasonable and necessary for the system to function as it should.⁶⁰ The items listed are seven in number.

56. *Joint Report*, *supra* note 36, at 1161.

57. *Id.*

58. *Id.*

59. *Id.* at 1162.

60. *See* Hamilton, *supra* note 22.

I will be brief in describing the central object of, as well as the reasoned justification offered for, each:

1. *Private Practice*

The point was made before. “[P]artisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts and obfuscates”⁶¹ It is also useful when what is learned as a partisan can be utilized to change the law for the better, even if that law had previously been used to the advantage of a client.⁶²

2. *As Guardian of Due Process*

“The lawyer’s highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions.”⁶³ The lawyer is a true guardian of the law and its processes. The statement goes on: “All institutions, however sound in purpose, present temptations to interested exploitation, to abusive short cuts, to corroding misinterpretations.”⁶⁴ Process, therefore, has a larger meaning in the document. It is a way of making clear that the end does not justify the means.⁶⁵ That is surely one of the reasons why even the *Model Rules* assign the lawyer the right to determine the “means” of delivering legal services to clients.⁶⁶

3. *Making Legal Services Available to All*

Equality under the law is an empty phrase unless legal representation is provided to those who cannot afford to pay.⁶⁷ “[P]ro bono publico service is one of the bar’s proudest boasts,” even if the need has always exceeded the supply.⁶⁸

61. *Joint Report, supra* note 36, at 1162; *see also supra* text accompanying note 50.

62. The example used is of Thomas Talfourd, who won a case on the basis of what he considered an unjust law and got it changed later as a member of Parliament. *Joint Report, supra* note 36, at 1162.

63. *Id.*

64. *Id.*

65. *Id.* at 1216.

66. Under Model Rule 1.2, the lawyer shall abide by a client’s decision concerning the objectives of representation but need only “consult with the client as to the means by which they are to be pursued.” MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2010).

67. *Joint Report, supra* note 36, at 1216.

68. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 16.7.1 (1986).

4. *The Representation of Unpopular Causes*

The *Joint Report* proclaims that representing those “whose causes are in disfavor with the general public” is a particularly important service the legal profession provides.⁶⁹ This is because “the process of adjudication is surrounded by safeguards”⁷⁰:

They are predicated on the assumption that to secure for any controversy a truly informed and dispassionate decision is a difficult thing, requiring for its achievement a special summoning and organization of human effort and the adoption of measures to exclude the biases and prejudgments that have free play outside the courtroom. All of this goes for naught if the man with an unpopular cause is unable to find a competent lawyer courageous enough to represent him.⁷¹

John Adams’s finest public moment came not as a founding father of the Republic but as a lawyer, representing the hated British soldiers who killed colonists in the infamous Boston Massacre.⁷² This example is particularly apposite here because it took place almost 250 years ago, showing the tradition deeply embedded even then.

5. *The Lawyer and Legal Reform*

The lawyer has “the best chance to know when the law is working badly.”⁷³ The lawyer also is the one who has “the special competence to put it in order.”⁷⁴ Therefore, it is inherent “in the nature of his calling” for the lawyer to take responsibility for law reform.⁷⁵

6. *The Lawyer as Citizen*

Lawyers have duties not only to make law substantively better but also to do so as public citizens, skilled in knowing if and how a particular solution to a problem might work.⁷⁶ The “procedures and institutional arrangements” require the expertise of the lawyer for sound

69. *Joint Report*, *supra* note 36, at 1216.

70. *Id.*

71. *Id.*

72. In his old age, his pride in what he had done, which at the time lost him half his practice, was recorded in these words: “[My] part in the defense was ‘one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my county.’” DAVID MCCULLOUGH, *JOHN ADAMS* 68 (2001).

73. *Joint Report*, *supra* note 36, at 1217.

74. *Id.*

75. *Id.*

76. *Id.*

implementation.⁷⁷ Anthony Kronman's call for the lawyer-statesman has particular relevance in this setting.⁷⁸

7. *The Lawyer as Public Prosecutor and Legislator*

These two public positions carry special obligations. A prosecutor's duty to justice requires "partisan advocacy" to be "severely curtailed."⁷⁹ And the lawyer-legislator has a particularly difficult set of conflict of interest concerns. The *Joint Report* adds the caveat that every lawyer faces conflicts, often of time and energy, and it cautions that every client and every matter deserves the lawyer's best professional effort.⁸⁰

E. *Conclusion*

Even though I have offered many quotations from the *Joint Report*, there is no substitute for reading and studying the full document. Although too brief itself, it nonetheless provides the willing student an abundance of insights into the central tradition, which can be found nowhere else. The point of the study and the point I am striving to make is that these aspirational statements must find a significant place within any discussion of lawyers' professional responsibilities, whether in the classroom, at the drafter's or the scholar's table, or in practice itself. When the *Model Rules* were being debated and the move to a Restatement of Law format was not yet inevitable, there were still those who argued that the move to "minimal standards" alone would not "describe the kind of lawyering toward which the profession aspired."⁸¹ That argument failed. As it stands now, we are in great danger of becoming quibblers. We need a bigger picture. Aside from a deep study of the *Joint Report*, another way to enlarge our vision is by telling and retelling our best stories. I conclude this Article by the retelling of three

77. *Id.*

78. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 3 (1993). Kronman could have written the final paragraph of the *Joint Report*'s section on "The Lawyer as Citizen":

Out of his professional experience the lawyer can draw the insight needed to improve public discussion of political and economic issues. Whether he considers himself a conservative or a liberal, the lawyer should do what he can to rescue that discussion from a world of unreality in which it is assumed that ends can be selected without any consideration of means. Obviously if he is to be effective in this respect, the lawyer cannot permit himself to become indifferent and uninformed concerning public issues.

Joint Report, *supra* note 36, at 1218.

79. *Id.*

80. *Id.*

81. WOLFRAM, *supra* note 68, at 62.

such stories, trying from time to time to tie the stories directly back to the central tradition, as that tradition is expounded in the *Joint Report*.

III. LINCOLN THE LAWYER

In his *Notes on the Practice of Law*, Abraham Lincoln advised his audience of lawyers: “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the *nominal* winner is often a *real* loser—in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man.”⁸²

There are many stories that confirm that Lincoln practiced what he preached. My favorite is this one, told by an early biographer, Frederick Trevor Hill.⁸³ Lincoln was approached by a prospective client to sue another man for defamation. After an investigation into the matter, Lincoln told the man he had a good case but recommended that the client not pursue the matter. It seems the would-be defendant was the client’s brother-in-law. It was characteristic of Lincoln to “discourage[] litigation,” sometimes by even turning down a case, good on the law and the facts because of the distress the suit would cause, perhaps also because he thought the proposed suit was “not morally right.”⁸⁴ In the present instance, however, he did not turn the case down but proceeded upon the client’s insistence. Initially, the case was dismissed because Lincoln had filed a defective pleading. Lincoln was not pleased but withdrew the papers and refiled with an advocate’s determination.

82. ABRAHAM LINCOLN, *Notes on the Practice of Law*, in SPEECHES AND WRITINGS 1832–1858, at 245–46 (1989).

83. FREDERICK TREVOR HILL, *LINCOLN THE LAWYER* 243–44 (1906). I have taken some dramatic license with the story as Hill recounts it but not in any way that is inconsistent with Hill’s understanding of who Lincoln was and what he was about.

84. *See id.* at 239–40. Lincoln’s words as reported by Herndon, his last law partner, say all that needs to be said:

“Yes . . . we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children, and thereby get for you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember, however, that some things legally right are not morally right. We shall not take your case, but we will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man. We would advise you to try your hand at making six hundred dollars in some other way.”

Id.

“Now I *will* beat you!” he said to his opponents.⁸⁵ And beat them he did, the jury verdict amounting to “a large sum.”⁸⁶ Nevertheless “Lincoln was not satisfied with the result.”⁸⁷ Recalling Lincoln’s words, Hill went on: “*As a peacemaker the lawyer has a superior opportunity of being a good man,*’ [Lincoln] had written as a theorist, and in practice he was still able to see that money damages do not heal family feuds.”⁸⁸

After the verdict, Lincoln turned on his counseling skills again and persuaded the client not to collect the damages awarded. Instead, the plaintiff settled the matter with the defendant paying only “costs and lawyers’ fees.”⁸⁹ Taking his responsibilities for peacemaking further, Lincoln asked that the adversaries should together fix his fee. They declined, but Lincoln accomplished his larger task: a reconciliation had taken place. He suggested that he had “honestly earned” a fee of “twenty-five dollars.”⁹⁰

This is a remarkable story. First of all, it shows Lincoln as an enlightened counselor, always looking for the long-term good of the client both before and even after winning advocacy had taken place. The *Joint Report* suggests the lawyer should remind the client of “long-run costs,” even when legally in the right.⁹¹ These costs obviously also include the damage done to others involved in the process—in this case, a sister and, no doubt, a whole family. Secondly, it shows Lincoln as a committed, partisan advocate. Although he discouraged the litigation, once engaged in it, he was determined to *win* the day. Thirdly, his efforts as *peacemaker* went well beyond his own financial well-being. He requested his *fee* be determined by the two estranged litigants, in order that their reconciliation be complete. In matters of fees generally, Lincoln was as good as his word. In his notes, he had admonished his colleagues never to charge “[a]n exorbitant fee.”⁹² In practice, he reportedly refused to accept a fee from a referring lawyer until the total “fee had been reduced to what he deemed a reasonable amount.”⁹³ One of his law partners was “highly indignant” and said: “‘Lincoln, you are impoverishing the bar by your picayune charges.’”⁹⁴ Lest any reader believe Lincoln was not interested in receiving a just fee, let him be reminded that Lincoln once sued a client, the Illinois Central Railroad,

85. *Id.* at 244.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Joint Report*, *supra* note 36, at 1161.

92. LINCOLN, *supra* note 82, at 246.

93. HILL, *supra* note 83, at 242.

94. *Id.* at 242–43.

for failure to pay a \$5000 “bill for services rendered.”⁹⁵ But let it also be noted that at trial, no one appeared for the railroad, and Lincoln received a default judgment. Nevertheless, he agreed the case should be reopened and tried to verdict, which it was: \$5000 for Mr. Lincoln. Even here, Lincoln agreed to have the verdict reduced to \$4800 because he had received a \$200 retainer in the matter.⁹⁶

In his Pulitzer Prize winning biography of Lincoln, David Herbert Donald summarized the key features of his subject’s professional reputation, two of which bear emphasis here. The first was his reputation for honesty. It was in “handling hundreds of cases in the circuit courts” that Lincoln first became known as “‘Honest Old Abe’—the lawyer who was never known to lie.”⁹⁷ The second, as we have seen in the *Illinois Central Railroad* case, he “was also noted for his fairness to his opponents.”⁹⁸ Unless the issue was absolutely crucial to the success of his case, he rarely objected to evidence or challenged a judge’s rulings.⁹⁹ The *Joint Report* is littered with references to the lawyer’s obligations to fairness.¹⁰⁰ On the issue of honesty and of lying, I will defer comment until later in this Article.

IV. ATTICUS FINCH

In 1960 Harper Lee published her singular novel, *To Kill a Mockingbird*, to astonishing critical and commercial success. It was honored by four major book clubs and won the Pulitzer Prize for fiction in 1961.¹⁰¹ In 2010, fifty years after its first publication, it still sells “nearly a million copies every year.”¹⁰² When asked in 2006, “‘Which book should every adult read before they die?’” British librarians voted the book their top choice.¹⁰³ “The Bible was number two.”¹⁰⁴ In 1962,

95. *Id.* at 252.

96. *Id.* at 253.

97. DAVID HERBERT DONALD, LINCOLN 149 (1995).

98. *Id.*

99. *Id.* at 149–50.

100. The partisan advocate is admonished not “to muddy the headwaters of decision,” while the counselor is urged never “to participate . . . in a line of conduct that is immoral, unfair, or of doubtful legality.” *Joint Report*, *supra* note 36, at 1161.

101. Timothy Hoff, *Influences on Harper Lee: An Introduction to the Symposium*, 45 ALA. L. REV. 389, 389–90 (1994).

102. MARY McDONAGH MURPHY, *Part 1: Scout, Atticus, and Boo*, in SCOUT, ATTICUS, AND BOO 1, 7 (2010).

103. *Id.*

104. *Id.*

the film version of the book won the Academy Award as best screenplay, and Gregory Peck, who played Atticus, was the Academy's choice for best actor.¹⁰⁵ In 2003 the American Film Institute named Atticus Finch as the "Greatest Movie Hero of the 20th Century."¹⁰⁶

The book and its lawyer-hero are not just wildly popular with book readers and film enthusiasts. In 2008, the American Bar Association asked a dozen prominent lawyers to name "The 25 Greatest Legal Movies."¹⁰⁷ Number one on the list was *To Kill a Mockingbird*.¹⁰⁸ Lawyer and novelist, Scott Turow sums up what many young people said to themselves as they contemplated becoming a lawyer: "I promised myself that when I grew up . . . I would try to do things just as good and noble as what Atticus had done for Tom Robinson."¹⁰⁹

What were the *things* Atticus did for Tom Robinson? How do they—and other things Atticus said and did throughout the book—relate to the *Joint Report* and to the central tradition? Before attempting to answer those questions, a brief synopsis of the novel is in order.

Before it is a lawyer's story, *To Kill a Mockingbird* is a child's story about "[growing] up good."¹¹⁰ Indeed, the author sets us up for reflecting on both of these matters, by placing the following epigram by Charles Lamb at the beginning of the novel: "Lawyers, I suppose, were children once."¹¹¹ The narrative is told through the eyes of Jean Louise Finch, "Scout," Atticus's daughter. The authorial voice is both that of a fully mature woman reflecting upon an important time in her childhood and that of Scout as she was during those times. In Harper Lee's words, *To Kill a Mockingbird* is "[a] love story pure and simple,"¹¹² the story of a daughter's love for her father and his for her and her brother, Jeremy Atticus Finch, "Jem" to all.¹¹³

The story is set in and around the year 1935,¹¹⁴ in a fictional rural town, Maycomb, Alabama, which is also the county seat. I say "in and around" because the novel encompasses nearly three years, from Scout's sixth until nearly her ninth birthday. Her brother is four years older than

105. Hoff, *supra* note 101, at 390.

106. MURPHY, *supra* note 102, at 34.

107. Richard Brust, *The 25 Greatest Legal Movies*, A.B.A. J., Aug. 2008, at 38, 38.

108. *Id.* at 39.

109. MARY McDONAGH MURPHY, *Scott Turow, in SCOUT, ATTICUS, AND BOO*, *supra* note 102, at 194, 196–97.

110. See Thomas L. Shaffer, *Growing Up Good in Maycomb*, 45 ALA. L. REV. 531, 532 (1994).

111. HARPER LEE, *TO KILL A MOCKINGBIRD* (unpaginated preface) (Harper Perennial 2002) (1960).

112. MURPHY, *supra* note 102, at 41.

113. See Hoff, *supra* note 101, at 392 & n.19 (quoting Harper Lee's editor).

114. See THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 3 (1985).

she. Atticus Finch is around fifty years old, a widowed father of two, a country lawyer, and a member of the state legislature. Much of the novel concerns the antics of Scout, Jem, and their odd little friend Dill, who lives next door only during the summertime. We see with Scout and Jem how it was to grow up in the deep, racist South of the 1930s, but also how it was to grow up in a real community under the watchful eyes of many, but under the special, loving, and virtuous tutelage of an uncommonly good and sensitive single parent. One of the important virtues Atticus teaches by word and by example is “integrity”: that one must strive to live the same way in town and in the home.¹¹⁵ For lawyers I think this means—because of the way the story is told—that you ought to practice law as if one’s children knew what you were doing and understood and approved of it all. Central to the lawyer’s story in *To Kill a Mockingbird* is the appointment of Atticus by the local judge to defend Tom Robinson, a Black man, who is accused of raping a poor White woman, Mayella Ewell, who is perhaps nineteen years old. In the real world of law at that time would have been the decision of the United States Supreme Court in *Powell v. Alabama* in 1932, holding “that impoverished black defendants in capital rape trials were entitled to the effective assistance of counsel.”¹¹⁶ That case is not mentioned in the novel but might have played its part in Harper Lee’s decision to have the judge ask Atticus to take the case. The townsfolk may or may not have known about *Powell*, but they certainly did not grasp what it meant for a lawyer to represent an *unpopular* client. As one townsfolk said to another: “Lemme tell you somethin’ now . . . you know the court appointed him to defend this nigger.” And the reply obviously represented the average citizen of Maycomb’s thoughts: “Yeah, but Atticus aims to defend him. That’s what I don’t like about it.”¹¹⁷

In defending Tom Robinson, Atticus goes the extra mile in every way. Before the trial begins, Atticus sits in front of the jail, and with the aid of the children, particularly Scout, he causes a mob of country folks to go back to their homes and not lynch the Black defendant. In court, he

115. LEE, *supra* note 111, at 51 (“Atticus Finch is the same in his house as he is on the public streets.” (internal quotation marks omitted)). Atticus says often what he says near the end of the book: “I can’t live one way in town and another way in my home.” *Id.* at 314 (internal quotation marks omitted).

116. SHAFFER, *supra* note 114, at 4–5 (citing *Powell v. Alabama*, 287 U.S. 45, 72–73 (1932)).

117. LEE, *supra* note 111, at 186 (internal quotation marks omitted).

demonstrates clearly that Tom Robinson could not have committed the crime because a birth defect had rendered his left hand unusable, and a left-handed person was responsible for Mayella's external injuries. The jury is out for two hours but cannot overcome the prejudice they feel deep in their hearts. Tom Robinson is convicted and, shortly afterward, is shot dead by prison guards as he tries to escape.

The climax of the book comes when Jem and Scout are attacked by Bob Ewell, the shamed father. During the attack, Ewell is killed by Boo Radley, a recluse, who has secretly taken a liking to the children. Boo, a withdrawn and frightened man, is a key figure in the book. The children begin by committing pranks, trying to get him to "come out" of the house.¹¹⁸ At book's end he is no longer an object of curiosity and ridicule but an individual human being, entitled to respect, gratitude, and friendship—and the right to be let alone. The sheriff decides not to tell the community that Radley killed Ewell but to say that Bob Ewell "fell on his knife."¹¹⁹ At first, Atticus protests the fact that the sheriff proposes to lie to the community because he believes his son killed Ewell in self-defense. The father wants to help his son work through this painful experience, as they both stand up for truth. In the end, Scout draws the moral as to why the sheriff's solution is best. "Well, it'd be sort of like shootin' a mockingbird," she says, alluding to a lesson in *noblesse oblige* that Atticus taught her.¹²⁰ Now, after much experience in the world, she has learned it. She learned that Boo Radley was like a mockingbird, an innocent. She learned the use of metaphor, as accurately applied in the living world. She was a good reader and a good person. She grew up good.

These are the basic facts, but they are not the whole story by any measurement. To tell the whole story, I would have to replicate Harper Lee's novel, word for word. You would have to feel empathy for the myriad characters in the book and get a deep sense of the American South during the depression years. You would have to see and feel the love story, the story of the children growing up good;¹²¹ the story of a lawyer/father/gentleman who tries to be the same person in town as he is in his own home;¹²² and the story of a man who tries to walk around in

118. *Id.* at 1.

119. *Id.* at 314.

120. *Id.* at 317 (internal quotation marks omitted).

121. Shaffer, *supra* note 110, at 532.

122. *See supra* note 115 and accompanying text.

the skin of the countless others who cross his path—and to teach that morally imaginative trick to his children.¹²³

For purposes of this Article, much of the story cannot be examined. What I do want to examine are some of the things that inspired Scott Turow to want to emulate Atticus Finch in his defense of Tom Robinson. First of all, Atticus accepted the assignment of the Robinson case from the judge, knowing full well that it would be an ordeal the likes of which he had hoped he would never have to face. A colloquy with his brother Jack expresses this perfectly:

Atticus: “I’d hope to get through life without a case of this kind, but [Judge] John Taylor pointed at me and said, ‘You’re It.’”

His brother: “Let this cup pass from you, eh?”

Atticus: “Right. But do you think I could face my children otherwise? You know what’s going to happen as well as I do, Jack, and I hope and pray I can get Jem and Scout through it without bitterness, and most of all, without catching Maycomb’s usual disease. Why reasonable people go stark raving mad when anything involving a Negro comes up, is something I don’t pretend to understand”¹²⁴

As a lawyer, Atticus was thrust into a role he did not want, mostly because he knew it would put his children in moral danger. Would they grow up good, without bitterness, and without becoming racists? It is noteworthy that the allusion to Christ’s suffering in the Garden of Gethsemane¹²⁵ is made. Atticus is human. He does not want the pain or the danger to those he loves. But, he must use this case as a teachable moment for his children because, as a lawyer, he cannot do otherwise than to accept this case. He acts within the central tradition because he represents an indigent who cannot pay for legal help, and he represents the most unpopular of clients¹²⁶: a Black man in the racist South of the 1930s who is accused of raping a White woman. Recall that John Adams lost half his practice in representing British soldiers over the Boston Massacre. Yet for Adams, it was one of his finest moments.¹²⁷ It was the same for Atticus. In a nutshell, these are things that everyone

123. Early in the novel, Atticus says: “You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.” LEE, *supra* note 111, at 33 (internal quotation marks omitted).

124. *Id.* at 100–01.

125. See *Luke* 22:39.

126. See *Joint Report*, *supra* note 36, at 1216–17.

127. See *supra* note 72 and accompanying text.

admires about Atticus Finch as a lawyer. Over and above those things, Atticus puts his own physical well-being on the line by sitting outside the jailhouse the night before Tom Robinson's trial. Like Lincoln, Atticus was not narrow in his understanding of his role as a lawyer, although it went well beyond what anyone could reasonably expect even a *good man* to do. Moreover, although the novel does not tell of Atticus's other efforts on behalf of the Black members of his community, we know there were many. When Jem and Scout attend services in the local Black church, the minister says to them: "We were 'specially glad to have you all here This church has no better friend than your daddy.'"¹²⁸ We are not given specifics, but we know that Atticus was a true lawyer-statesman, one who was elected to the state legislative year after year, even after he represented Tom Robinson.¹²⁹ He was a community leader who strove to help the poor and the despised. And he was a man described as receiving the highest tribute a community can bestow: "We trust him to do right," says Miss Maudie. "It's that simple."¹³⁰

Although Atticus has his critics,¹³¹ he is universally admired for the *things* he did as a lawyer for Tom Robinson. He is also universally admitted for his parenting skills.¹³² Only one aspect of the Atticus Finch we have come to know and love in *To Kill a Mockingbird* has been the source of real moral criticism, even from some of his most ardent admirers.¹³³ Recall the scene near the end of the book, where the sheriff, Heck Tate, engages Atticus in a heated debate over Heck's decision to tell the community that Bob Ewell "fell on his knife," although there is clear evidence that Boo Radley killed him with a kitchen knife.¹³⁴ Still thinking that Jem killed Bob Ewell, Atticus offers a passionate argument:

128. LEE, *supra* note 111, at 140 (internal quotation marks omitted).

129. *Id.* at 279.

130. *Id.* at 269 (internal quotation marks omitted).

131. See Monroe Freedman, *Atticus Finch, Esq., R.I.P.*, LEGAL TIMES, Feb. 24, 1992, at 20, 21 (arguing that Atticus was not a good role model because he accepted the underlying racism of his time and place). Freedman's blast engendered a huge response in support of Atticus, "the hero." See David Margolick, *At the Bar*, N.Y. TIMES, Feb. 28, 1992, at B7. Freedman mostly stuck to his guns but acknowledged that no writing of his had triggered such a "fulsome response," condemning Freedman's position and supporting Atticus as a role model. See Monroe Freedman, *Finch: The Lawyer Mythologized*, LEGAL TIMES, May 18, 1992, at 25, 25.

132. See, for example, the extraordinary set of testimonials on both scores collected in the celebration of the fiftieth anniversary of the publication of *To Kill a Mockingbird*. MURPHY, SCOUT, ATTICUS, AND BOO, *supra* note 102, at 43–214.

133. See, e.g., SHAFFER, *supra* note 114, at 9–18; Tim Dare, *Lawyers, Ethics, and To Kill a Mockingbird*, 25 PHIL. & LITERATURE 127, 127–28 (2001).

134. See LEE, *supra* note 111, at 314–17.

“If this thing’s hushed up it’ll be a simple denial to Jem of the way I’ve tried to raise him. . . . Before Jem looks at anyone else he looks at me, and I’ve tried to live so I can look squarely back at him”

... “Jem and Scout know what happened. If they hear of me saying downtown something different happened—Heck, I won’t have them any more. I can’t live one way in town and another way in my home.”

... “I won’t have it.”¹³⁵

Heck’s rejoinder was equally passionate: “*God damn it, I’m not thinking of Jem!*”¹³⁶ Confused and shaken, Atticus grew silent and “made his way to the [front porch] swing and sat down.”¹³⁷ Then Heck says: “It ain’t your decision, Mr. Finch, it’s all mine. It’s my decision and my responsibility. For once, if you don’t see it my way, there’s not much you can do about it. If you wanta try, I’ll call you a liar to your face.”¹³⁸ The sheriff continues, finally convincing Atticus that Boo Radley did the killing and appealing in the end to Atticus’s own deep belief that it would be like killing a mockingbird to drag Boo into the spotlight, where he would be subject to:

“All the ladies in Maycomb includin’ my wife . . . knocking on his door bringing angel food cakes. To my way of thinkin’, Mr. Finch, taking the one man who’s done you and this town a great service an’ draggin’ him with his shy ways into the limelight—to me, that’s a sin.”¹³⁹

Now the acquiescence of Atticus Finch in this public falsehood disappoints Tom Shaffer, perhaps Atticus’s most ardent admirer. Because Shaffer believes Atticus to be a man deeply committed to truth, he called this acquiescence, a “moral mistake.”¹⁴⁰ Nevertheless, Shaffer claims that Atticus remains a champion of truth telling, even as he participated in the lie Heck Tate told to the community. Shaffer’s argument is subtle and complex. I am not certain I understand it completely. In one sense Shaffer posits that the complicated and corrupt world all mature people come to know requires judgments to be made that cannot be reduced to matters of rules and principles. This makes

135. *Id.* at 314–15.

136. *Id.* at 315 (internal quotation marks omitted).

137. *Id.* at 316.

138. *Id.* (internal quotation marks omitted)

139. *Id.* at 317.

140. SHAFER, *supra* note 114, at 15.

him a proponent of virtue ethics, of the Aristotelian notion of *phronesis*.¹⁴¹ Practical reasoning and practical judgments are so complex, we cannot simply apply general principles to concrete cases. Instead we need to trust the wise and good and mature person whose judgment we respect, even if we do not quite understand where it came from.¹⁴² Indeed, Shaffer says:

One thing you could say about Atticus is that he had *character*.

... We say that a good person has character, but we do not mean to say only that he believes in discernible moral principles and, under those principles, makes good decisions. We mean also to say something about who he is and to relate who he is to his good decisions. When discussion proceeds in this way, principles need not even be explicit. We can say, "How would Atticus *see* the situation?" or "What would Atticus do?" rather than, "What principles apply?"¹⁴³

But I think it clear that Shaffer really is not quite the Aristotelian this passage would seem to indicate. Shaffer wants to ground Atticus in his own place, time, and community. Of the decision in question, Shaffer claims Atticus often sees the community's delusions, but he is also implicated in them.¹⁴⁴ Shaffer thinks Atticus makes a moral mistake in going along with Heck's decision to lie to the community. Atticus is sometimes blinded by his own identification with the community. So, he does not applaud the decision. Still, Shaffer refuses to accept the proposition that the decision pitted one principle—truth telling—against another—protecting the weak and vulnerable—with the latter having more weight in this case than the former. Because Atticus's commitment to truth was "so pristine that he was willing to see pain come to his . . . son rather than tell a lie" and because "he saw protection of the weak so pristine that it seemed to demand from him the surrender of his honesty," Shaffer concludes that Atticus expressed "devotion to both of these values."¹⁴⁵ Put that way, I agree, but I do not see how this successfully resolves the moral dilemma Shaffer himself concludes resulted in Atticus's moral mistake—that he was complicit in a lie.

Although the philosophical debate on these matters is interesting and important in its own right, what is crucial for us are the implications of this issue for understanding Atticus Finch as a lawyer, working within the central tradition. I see two issues, each of which is related to the

141. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. VI, at 179–80 (Christopher Rowe trans., Oxford Univ. Press 2002) (c. 384 B.C.E.).

142. This analysis follows Tim Dare's. See Dare, *supra* note 133, at 132.

143. THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* 7 (1987).

144. SHAFFER, *supra* note 114, at 34.

145. *Id.*

other. The first is the question of role and responsibility. The second relates to the difference between truth telling and lying.

Firstly, it is beyond dispute that the decision whether to tell the community that Bob Ewell fell on his knife lay initially with the sheriff, Heck Tate. It was not the responsibility of Atticus Finch. Lawyers have different roles to play both within a representation—advocate, counselor—as well as in society at large—prosecutor, legislator. Heck tells Atticus in no uncertain terms that this decision is his to make. “It ain’t your decision, Mr. Finch,” he says. “[I]t’s all mine.”¹⁴⁶ It is not at all clear that it was Heck’s to make. In modern times, there would probably be an inquest or perhaps, the district attorney would decide whether or not to prosecute Boo Radley. But in that time and place, it may well have been Heck’s decision. Recall at the trial that the prosecutor was a man named Mr. Gilmore and that he was not from Maycomb but from Abbottsville.¹⁴⁷ In all probability Maycomb did not have its own prosecutor but shared one with another community. So, it may well have been Heck’s decision, as the story itself seems to indicate. What might have happened next? Well, Heck would have announced the death of Bob Ewell, reported on the attacks, and told the community that the assailant, who was drunk, fell on his knife. Atticus may have raised some kind of fuss, but how? to whom? in what way? to what end? Remember, Heck tells Atticus that he would be willing to call Atticus a liar to his face.¹⁴⁸ Under the circumstances, would the ensuing row be worth it to the community? So, my guess is that Atticus would just remain silent, and the incident would pass away, justice having been done, although not in an official way. As Heck says: “[T]here’s not much you can do about it.”¹⁴⁹ The decision was not in the hands of Atticus Finch, and nothing he could have done would have changed the legal outcome. From the perspective of the central tradition, Atticus would have wisely accepted his role and not interfered.

Secondly, there is an enormous difference between lying and not forcing the community to listen to the fullness of truth. Lawyers should not engage in the former. They should engage in the latter, only in circumstances when it is absolutely required or when good judgment and moral courage demand it.

146. LEE, *supra* note 111, at 316.

147. *Id.* at 189.

148. *Id.* at 316.

149. *Id.*

Lawyers should not lie. This means that lawyers should never make a false statement of law or fact.¹⁵⁰ Silence is another matter. Confidentiality requires silence often. Mature discretion requires silence as often. Interestingly, Fred Zacharias addressed this issue and tried to guess what a lawyer self-consciously working in the central tradition would do if asked an inappropriate question by the court. His answer was that the lawyer could not lie, even to help his client. The best he could do was to remind the court that it was inappropriate to ask such a question.¹⁵¹ It is clear to me that Atticus Finch would never say, “Bob Ewell fell on his knife.” Rather, Atticus would probably say, “The sheriff says Bob Ewell fell on his knife.” This kind of distinction may not satisfy every moralist, but it is second nature to lawyers. Moreover, ordinary morality would dictate the same in a plethora of cases. Is telling the truth always a requirement of good morals? I think the answer is “no.” Why, then, should blurting out the truth to no good end be a mandate even for—maybe especially for—a lawyer-statesman?

Atticus Finch rightly is admired by Tom Shaffer and others because he was bound and determined to have the truth told in the courtroom in Tom Robinson’s case. This is so firstly because Tom Robinson was innocent of the crime charged, and the prosecution witnesses were lying about the underlying events. So, a good defense lawyer would surely work passionately to see the truth come out in those circumstances. Of course, there is another dimension to the case. Atticus was also determined to try to help cure “Maycomb’s usual disease.”¹⁵² As Atticus so eloquently put it in his summation to the jury:

“[T]here is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller That institution, gentlemen, is a court. . . . Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.”¹⁵³

After a little more of the same, Atticus looks his fellows in the eye and reminds them that “[a] court is only as sound as its jury, and a jury is only as sound as the men who make it up. . . . In the name of God, do your duty.”¹⁵⁴ So the public problem of virulent racism needs to be cleansed by the acid of bitter truth.

But not always. Atticus does not tell old, cranky, racist Mrs. Dubose what he thinks of her racism. Nor does he tell her how he admires her

150. MODEL RULES OF PROF’L CONDUCT R. 4.1(a) (2010).

151. Zacharias, *supra* note 10, at 502–03.

152. LEE, *supra* note 111, at 100.

153. *Id.* at 233.

154. *Id.*

courage—an opinion he does share with his children—to make them see exactly what the virtue of courage is about. Instead, he sweeps his hat off his head when he passes her house, gallantly saying things like: ““Good evening, Mrs. Dubose! You look like a picture this evening.””¹⁵⁵ Thus, despite Shaffer’s insistence that Atticus was a truth teller *par excellence*, it is perfectly clear that Atticus’s conduct was in keeping with his idea of a southern gentleman, not a passionate crusader, who turns the world upside down by telling the truth at all times and in all places. No society could stand such a thing. No serious moralist could ever demand it. To me, this wise restraint under the circumstances only enhances Atticus as a lawyer and a person worthy of emulation.

V. THOMAS MORE

Thomas More was a prominent historical figure, perhaps the quintessential Renaissance Man. As Robert Bolt puts it:

[H]e was . . . almost indecently successful. He . . . distinguished himself first as a scholar, then as a lawyer, was made an Ambassador, [and] finally Lord Chancellor. A visitors’ book at his house in Chelsea would have looked like a sixteenth-century *Who’s Who* He corresponded with the greatest minds in Europe as the representative and acknowledged champion of the New Learning in England. He was a friend of the King [Henry VIII] He adored and was adored by his own large family.”¹⁵⁶

He was also a fierce polemicist against “heretics,” that is, Martin Luther, William Tyndale, indeed all who threatened his Catholic Church during those early days of the Protestant Reformation.¹⁵⁷ Through the years, More has been lauded by many, both for his obviously remarkable achievements as well as for his wit, his love of family, and his gift for friendship.¹⁵⁸ He has also been subject to harsh criticism for his religious intolerance and his scathing invective against his religious

155. *Id.* at 115. Scout perceptively notices that Atticus never says “like a picture of what.” *Id.*

156. ROBERT BOLT, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* xv (Vintage Books 1990) (1960).

157. JAMES WOOD, *Sir Thomas More: A Man for One Season*, in *THE BROKEN ESTATE: ESSAYS ON LITERATURE AND BELIEF* 3, 3–15 (1999); Richard Marius, *A Man for All Seasons*, in *PAST IMPERFECT: HISTORY ACCORDING TO THE MOVIES* 70, 73 (Mark C. Carnes et al. eds., 1995).

158. See generally PETER ACKROYD, *THE LIFE OF THOMAS MORE* (1998); JOHN FARROW, *THE STORY OF THOMAS MORE* (1954).

opponents.¹⁵⁹ I have no desire—nor any need—to enter into a detailed discussion about all aspects of the life of such a man. Instead, I will focus on More as a lawyer and, for a variety of reasons, on the Thomas More drawn by Robert Bolt in his award-winning play, *A Man for All Seasons*.¹⁶⁰ I do so because this fictionalized version of Thomas More is both easily accessible to all and is more likely to be the *image* of the man that most people carry with them, at least if they have seen or read the play or the Academy Award-winning movie version, also written by Bolt. The play was first staged in London in 1960. It won a Tony Award on Broadway in 1962, and the film version won the Academy Award for best picture in 1966 and the British equivalent, the BAFTA, in 1968.¹⁶¹ Paul Scofield, a most distinguished British actor, won best actor awards for his portrayal of More both on the stage and on screen.¹⁶² He was to Thomas More what Gregory Peck was to Atticus Finch: the living embodiment of the character and a hero to the public and to lawyers everywhere. Recent revivals of the play have been staged in both the West End—in 2006, starring Martin Shaw—and on Broadway—in 2008, starring Frank Langella.¹⁶³ *A Man for All Seasons* gives us what we need to continue our study of lawyers in the central tradition, worthy of emulation. It is as historically accurate as our Lincoln story and as self-contained and vivid as our portrait of Atticus Finch.

Bolt's drama centers on the period of time just before More's appointment as Lord Chancellor until his death. Historically, that period would have encompassed roughly a six-year span from 1529 to 1535. The centerpiece is More's trial, which resulted in his conviction for high treason on July 1, 1535. He was beheaded five days later.¹⁶⁴ In writing his play, Bolt scrambled some historical events and sometimes altered events for dramatic effect, but he used More's actual words as often as possible¹⁶⁵ and recreated much of the trial scene from what reliable written evidence we have.¹⁶⁶

159. RICHARD MARIUS, *THOMAS MORE: A BIOGRAPHY* xxiv (1984); Marius, *supra* note 157, at 73.

160. BOLT, *supra* note 156.

161. For the play and movie, see *A Man for All Seasons*, WIKIPEDIA, http://en.wikipedia.org/wiki/A_Man_For_All_Seasons (last updated Dec. 13, 2010, 7:06 PM).

162. See generally, Benedict Nightingale, *Paul Scofield, Actor of Stature and Mystery, Dies at 86*, N.Y. TIMES, Mar. 21, 2008, at B8.

163. *A Man for All Seasons*, *supra* note 161.

164. *Thomas More*, WIKIPEDIA, http://en.wikipedia.org/wiki/Thomas_More (last updated Dec. 30, 2010, 1:54 PM).

165. BOLT, *supra* note 156, at xvii–xx.

166. See *The Trial of Sir Thomas More*, 1 How. St. Tr. 385 (1535); J. Duncan M. Derrett, *The Trial of Sir Thomas More*, 79 ENG. HIST. REV. 449 (1964).

The essential background facts are these. King Henry VIII had married his older brother's widow, Catherine, after receiving a dispensation to do so by the Pope. For many years the marriage was reasonably successful, but the King desperately wanted a male heir and had none. He wished to divorce Catherine and marry the youthful and wily Anne Boleyn with whom he was sure he could become the father of a male child to succeed him. The Church refused to dispense with its prior dispensation. In due course, Henry broke with the Church, divorced Catherine, and married Anne. Unable to reconcile all these events with his position as Lord Chancellor, Thomas More resigned, went silent on crucial matters, and hoped to live out his retirement away from court and from trouble.¹⁶⁷ Alas, it was not to be.

The nub of the legal and moral problem for More was his refusal to take the oath attached to the Act of Succession of 1534. Although More could, and did, acknowledge that Parliament had the power to declare who shall succeed Henry as king,¹⁶⁸ he would not sign the oath because it contained language that would have forced More to recognize both that the King's marriage to Anne Boleyn as legitimate and that Henry was the Supreme Head of the Church in England. Each recognition would have meant that Thomas More was no longer a good son of the Roman Catholic Church, for neither the marriage nor Henry's title were considered legitimate by that body. Therefore, More would accept neither one.¹⁶⁹ Although he steadfastly refused to say why he would not sign the oath, because he would not sign he was imprisoned in the Tower of London. He was sentenced to death, however, under the Act of Treason of 1534 because he allegedly broke his long-held silence on the subject of Parliament's power to declare Henry the Supreme Head of the Church. On this subject, and the legality of the marriage, More had adamantly maintained his silence both as a matter of law and of conscience. However, at More's trial, Richard Rich, later a Lord Chancellor himself, said that More did orally deny Parliament's competence to declare the King Supreme Head of the Church. Rich testified these treasonous words were spoken by More when Rich visited More in the tower to take away his books. More denied Rich's assertions and offered a stinging rebuttal to the testimony. It did him no

167. BOLT, *supra* note 156, at vii–x; see ACKROYD, *supra* note 158, at 330.

168. BOLT, *supra* note 156, at 139.

169. *Id.* at 159–60.

good, and Rich's perjury was enough to allow the House of Lords to take More's life.¹⁷⁰

Before examining More's handling of the charges against him at his famous trial, I want to look briefly at another part of the play that has long enthralled lawyers. Before More's resignation as Lord Chancellor, there is an awkward exchange between More and Richard Rich, pictured as an ambitious young man who was also seeking More's patronage. When Rich leaves, More is assailed by his wife, Alice; his favorite daughter, Meg; and her soon-to-be husband, Will Roper, to the effect that Rich should be arrested because he is a bad man. More responds, "There is no law against that."¹⁷¹ Shortly thereafter the following colloquy ensues:

ALICE (*Exasperated, pointing after RICH*) While you talk, he's gone!

MORE And go he should, if he was the Devil himself, until he broke the law!

ROPER So now you'd give the Devil benefit of law!

MORE Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER I'd cut down every law in England to do that!

MORE (*Roused and excited*) Oh? (*Advances on ROPER*) And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? (*He leaves him*) This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? (*Quietly*) Yes, I'd give the Devil benefit of law, for my own safety's sake.¹⁷²

In the aftermath of the first staging of *A Man for All Seasons*, it was said that "lawyers and judges from Australia to Washington, in big rooms and little rooms" both loved and quoted that speech.¹⁷³ Surely it is a powerful statement of a lawyer's commitment to due process of law. As the *Joint Report* has it: "The lawyer's highest loyalty . . . runs, not to persons, but to procedures and institutions."¹⁷⁴ Robert Bolt's Thomas More tells those dearest to him that God's laws are for God to enforce; for him, he will trust in English law. He will hide himself and his loved ones in the thickets of those laws. "[T]here I'm a forester," he says. "I

170. *Id.* at 156.

171. *Id.* at 65.

172. *Id.* at 66.

173. Thomas L. Shaffer, *More's Skill*, 9 WIDENER J. PUB. L. 295, 297 (2000).

174. *Joint Report*, *supra* note 36, at 1162.

doubt if there's a man alive who could follow me there."¹⁷⁵ As we shall see, his trust in law may not have saved him in the end, but perhaps it could have, were it not for the cowardice of those charged with upholding it and interpreting it.

Robert Bolt was attracted to write about Thomas More for a variety of reasons. First of all, here was a man who "seized life in great variety and almost greedy quantities."¹⁷⁶ He was also attracted to More because of "his splendid social adjustment."¹⁷⁷ He was not only "utterly absorbed in his society," but he also tried hard to cling to all that he had achieved and all that he was a part of, continuing "to the end to make familiar and confident use of society's weapons, tact, favor, and, above all, the letter of the law."¹⁷⁸ Nevertheless, the key quality that Bolt marveled at was More's "adamantine sense of his own self."¹⁷⁹ Bolt continued in this way:

He knew where he began and left off, what area of himself he could yield to the encroachments of his enemies, and what to the encroachments of those he loved. It was a substantial area in both cases, for he had a proper sense of fear and was a busy lover. Since he was a clever man and a great lawyer he was able to retire from those areas in wonderfully good order, but at length he was asked to retreat from that final area where he located his self. And there this supple, humorous, unassuming and sophisticated person set like metal, was overtaken by an absolutely primitive rigor, and could no more be budged than a cliff.¹⁸⁰

Bolt was "not a Catholic nor even in the meaningful sense of the word a Christian."¹⁸¹ So, he asks, "[W]hy do I take as my hero a man who brings about his own death because he can't put his hand on an old black book and tell an ordinary lie?"¹⁸² The answer is complicated, no doubt, and Bolt could not begin to understand it in all its complexity because he was neither a believer, as he acknowledges, nor a lawyer, something I would suggest Bolt would not even begin to consider as part of the equation. But Lincoln was "Honest Abe" when he rode circuit,¹⁸³ and, as Calpurnia, the Finches' cook, said: "Mr. Finch couldn't say somethin's

175. BOLT, *supra* note 156, at 66.

176. *Id.* at xiii.

177. *Id.* at xv.

178. *Id.*

179. *Id.* at xii.

180. *Id.*

181. *Id.* at xiii.

182. *Id.*

183. DONALD, *supra* note 97, at 149.

so when he doesn't know for sure it's so.'"¹⁸⁴ Lawyers do not make false statements.¹⁸⁵ So too with Thomas More. When More begged the King to permit him to stand aside on the subject of his majesty's divorce, especially because Henry had so many who saw things the King's way, More responded: "Then why does Your Grace need my poor support?" And Henry said: "Because you are honest. What's more to the purpose, you're known to be honest."¹⁸⁶

Lawyers in the central tradition do not make false statements. Nevertheless, they sometimes remain silent—Atticus Finch, when Heck Tate decided to lie about who killed Bob Ewell.¹⁸⁷ And Thomas More, firstly because he believed the law was on the side of silence. No one could be found guilty of treason if he held his tongue on the subject.¹⁸⁸ Moreover, in open court, More argued famously that his silence should be construed as giving assent. When Cromwell, as prosecutor, argues that More's silence on the Supremacy question was "most eloquent denial," More has the lawyer-like comeback that a lay person might construe as "lying," but as an advocate in open court understands very well: "Not so, Master Secretary, the maxim is 'qui tacet consentire.' (Turns to COMMON MAN) The maxim of the law is (*Very carefully*) 'Silence gives consent.' If, therefore, you wish to construe what my silence 'betokened,' you must construe that I consented, not that I denied."¹⁸⁹ The rest of the exchange on this point must be reproduced:

CROMWELL Is that what the world in fact construes from it? Do you pretend that is what you *wish* the world to construe from it?

MORE The world must construe according to its wits. This Court must construe according to the law.

CROMWELL I put it to the Court that the prisoner is perverting the law—making smoky what should be a clear light to discover to the Court his own wrongdoing!

(CROMWELL'S *official indignation is slipping into genuine anger and MORE responds*)

MORE The law is not a "light" for you or any man to see by; the law is not an instrument of any kind. (*To the FOREMAN*) The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely.¹⁹⁰

184. LEE, *supra* note 111, at 269.

185. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2010).

186. BOLT, *supra* note 156, at 55.

187. LEE, *supra* note 111, at 313–17.

188. BOLT, *supra* note 156, at 68, 95.

189. *Id.* at 152.

190. *Id.* at 152–53.

These are not the words of a lawyer who “misleads, distorts [or] obfuscates” the adjudicatory process¹⁹¹ but rather are of one lawyering within the central tradition, trying hard to save the life of his client, even as that life happened to be his own. So More’s silence was caused firstly because he believed the law was on his side if he maintained his silence. Rich’s perjury, not More’s silence, undid him. Of course, the fact that he would not lie initially, not swear an oath to something he did not believe, is also why he maintained his silence. Larger issues of personal virtue and religious belief, no doubt, explain that initial silence well enough for most. But if habit is virtue, as Aristotle said,¹⁹² and lawyers do not make false statements of fact, then More’s being a lawyer also had something to do with his refusal to swear an oath he did not believe. Or so I believe.

VI. CONCLUSION

As the authors of the *Joint Report* said in their introduction to that document, “It is not expected that all lawyers will agree with [every] detail”¹⁹³ in this report. It is enough that fair-minded students and practitioners of the law can assent to the thrust of its aspirational intent and acknowledge that Lincoln, Finch, and More are worthy of adulation. As is evident in the stories I have told, no person is simply a lawyer, who does or does not do one thing or another, that is, lie. The person is also a moral agent, who does not abdicate conscience in taking on the professional role. That is part of the central tradition as well. That is the way we used to talk too,¹⁹⁴ but it is a topic that must be left for another day. At this moment it is enough that we recapture a tradition in which we once implicitly believed. Then we can restart the discussion of where other images have led us and get ourselves back on track.

I began this Article, focusing on, then departing from, some of the work of my friend and colleague, Fred Zacharias.¹⁹⁵ I end it in simple tribute to that wide-ranging and prolific scholar and fair-minded thinker who would have understood the spirit of this enterprise. We agreed often, and we disagreed often enough. I think he would have said of this

191. *Joint Report*, *supra* note 36, at 1162.

192. *See Dare*, *supra* note 133, at 132.

193. *Joint Report*, *supra* note 36, at 1159.

194. MODEL CODE OF PROF'L RESPONSIBILITY Canon 15 (1983), *available at* http://www.abanet.org/cpr/mrpc/model_rules.html.

195. Zacharias, *supra* note 10; Zacharias, *supra* note 1.

particular effort of mine, “Sure, sure, Bob, that’s all well and good, but” Let the discussion continue in his honor.