

Michigan Law Review

Volume 84
Issue 4 *Issues 4&5*

1986

Can a Good Lawyer Be a Bad Person

Stephen Gillers
New York University Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Stephen Gillers, *Can a Good Lawyer Be a Bad Person*, 84 MICH. L. REV. 1011 (1986).
Available at: <https://repository.law.umich.edu/mlr/vol84/iss4/45>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CAN A GOOD LAWYER BE A BAD PERSON?†

Stephen Gillers*

THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS. Edited by *David Luban*. Totowa, N.J.: Rowman & Allanheld. 1983. Pp. viii, 368. \$19.50.

THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE. By *Stephan Landsman*. Washington: American Enterprise Institute. 1984. Pp. 55. Paper, \$4.95.

ONE QUESTION

Assume a just legal system in a constitutional democracy. Assume a person wishing to achieve a lawful goal. Assume a lawyer who agrees to assist her. If the lawyer uses only legal means, can a coherent theory of moral philosophy nevertheless label the lawyer's conduct immoral? Can a good lawyer be a bad person?¹

Let us grant that laws may be inequitable or inequitably used in even the most enlightened society. These may allow unjust ends or the use of unjust means. *Legal* and *moral* are not congruent terms. Let us also agree that a person may be judged immoral though she pursues a legal goal in a lawful way; and conversely, that some illegal acts — civil disobedience at certain times — may be judged morally worthy. Let us finally assume that if a principal's lawful conduct may be immoral, so may the conduct of an agent who knowingly assists it.

Even so, is there something special about *legal* agents that exempts them from these precepts? Can lawyers say: "You are mistaken. I am a lawyer. Your judgments do not apply to me. To all the others, perhaps, but not to me."? Can they, as Murray Schwartz puts it in *The Good Lawyer*, "fil[e] a demurrer, rather than an answer, to the charge of immorality"?²

Those who answer "yes" may rely on attributes of the legal system

† Copyright 1986 by Stephen Gillers.

* Professor of Law, New York University Law School. — Ed.

I am grateful to the Filomen D'Agostino and Max E. Greenberg Research Fund of New York University Law School for generous financial assistance. I also wish to acknowledge the valuable comments of Professors Oscar G. Chase, Norman Dorsen, Monroe H. Freedman, and David A.J. Richards, and of Marvin E. Frankel, Esq., on various drafts of the manuscript.

1. The question presents a twist on Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976), which opens: "Can a good lawyer be a good person?"

2. P. 151 (quoting Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673-74 (1978)).

within which lawyers work, especially its adversary dimension. That system, they might contend, is so special that as long as a lawyer acts within it, he or she must be insulated from moral accountability or the system won't work as intended. Those who answer "no" or remain skeptical may question whether the legal system can offer an excuse in all cases. If a client cannot cite the lawfulness of his goals or tactics whenever the morality of either is challenged, why should the lawyer who helps the client achieve the goals or invoke the tactics fare better?

Advocacy advocates might reply that it is not the legality of the client's goals or tactics that the lawyer sets up in defense, but society's pledge that lawful endeavors will not be frustrated for want of the legal knowledge required to achieve them. In aiding a client, even one who proposes a lawful act for which he might be morally criticized, the lawyer fulfills the promise implicit in the fact that the client's conduct is lawful in the first place. The lawyer is unaccountable not because the client's ends or means are lawful, but because of the lawyer's instrumental status. One could say that the lawyer saves society from hypocrisy, at times with psychic cost to the lawyer, who personally, if tacitly, may reprobate the client's conduct.

Skeptics might call this explanation facile. No lawyer is required to accept a client and generally does so for no noble purpose. The lawyer's concern with helping society fulfill a promise is belied by the fact that clients unable to purchase the lawyer's time are ordinarily turned away. Shall a lawyer who accepts a disreputable client anticipating compensation enjoy immunity from moral contagion because of her instrumental purpose if that purpose played no part in her decision? Or, if lawyers *can* rely on an instrumental purpose, can others whose assistance facilitates the client's endeavor — for example, suppliers, advertising agencies, or lobbyists — do the same? If a product may lawfully be sold — let's say rubber bullets to the government of South Africa — suppliers might argue that a weapons manufacturer should not be stymied, whether because no lawyer will secure an export license or because no supplier will provide raw materials. What is so special about the lawyer's job that she is invulnerable to criticism while the supplier is not?

These issues have long been with us, perhaps since the first lawyer, or certainly the second. Lately, they seem to have won more attention. Not only lawyers but philosophers and lawyers philosophically inclined have shown interest in taking the moral measure of the bar.³

3. In addition to Professor Fried, *supra* note 1, and the contributors to *The Good Lawyer*, one thinks of Marvin E. Frankel, Geoffrey C. Hazard, Jr., and James Boyd White. See M. FRANKEL, *PARTISAN JUSTICE* (1980); G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* (1978); White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849 (1983); see also *Symposium on the Law Firm as a Social Institution*, 37 STAN. L. REV. 271 (1985).

TWO BOOKS

The Good Lawyer: Lawyers' Roles and Lawyers' Ethics, though a collection of essays, offers a well-integrated evaluation of the moral accountability of lawyers.⁴ Notably, nine of the book's sixteen authors are philosophers, at least one of whom, Richard Wasserstrom, is also a lawyer. The other contributors are lawyers, most of them law teachers (pp. 367-68). The sixteen essays are divided into five parts. The first part (pp. 25-79) examines whether and how the professional role may be a defense to a charge of immoral behavior. The second (pp. 83-187) takes up the same question in the narrower context of the adversary system. Does behavior that would otherwise be morally blameworthy escape condemnation if it is performed within a structure of adversary justice? Part Three, a catchall, assesses the morality of confidentiality (pp. 191-213); the lawyer's duty to represent all clients, "[r]epugnant and [o]therwise" (pp. 214-35); and professional responsibility in the essentially nonadversarial administrative law world (pp. 236-56). Part Four (pp. 259-314) contemplates an issue that has received (as it should) increasing attention: what is the effect of the lawyer's role, however powerful its justifications, on the men and women who occupy it? Do these people pay a price for living in a morally ambiguous world, a world in which they may have to assist in working great but legal "injustice" on others?⁵

In its fifth and final part (pp. 318-62), *The Good Lawyer* shifts to a different but related theme. Robert Condlin charges that despite good intentions, clinical legal education has not succeeded in teaching professional responsibility. Instead, Professor Condlin's

analysis of scores of hours of taped supervisory sessions between clinical students and their teachers [revealed to him] that . . . they . . . exemplified the patterns that [Richard] Wasserstrom identified as morally troubling. It began to look as though clinical teachers and students differ from traditional law teachers and students only in that they are even more zealous at modeling and imitating dominating and manipulative behavior. [p. 326]

In reply, Norman Redlich questions the factual basis for Condlin's conclusion. Then Dean Redlich argues that even assuming Condlin is correct, clinical legal education nevertheless remains valuable (pp. 350-58).

4. The reason the book is well-integrated is not hard to discover. All but one of its essays were "written specifically for" a "Working Group on Legal Ethics" of the Center for Philosophy and Public Policy at the University of Maryland at College Park. The group "met three times in 1981-82 to discuss" the papers. P. vii.

5. See, e.g., Elkins, *Rites de Passage: Law Students "Telling Their Lives,"* 35 J. LEGAL EDUC. 27 (1985); Gillers, *Great Expectations: Conceptions of Lawyers at the Angle of Entry,* 33 J. LEGAL EDUC. 662 (1983); Tomain, *False Idylls of Lawyering,* 35 J. LEGAL EDUC. 157 (1985); see also S. GILLERS & N. DORSEN, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 633-49 (1985).

One of the more fully realized contributions to *The Good Lawyer* is David Luban's essay, "The Adversary System Excuse" (pp. 83-122). Mr. Luban weighs the consequentialist and nonconsequentialist⁶ arguments in favor of adversary justice, finds all wanting, and concludes that in civil cases the system's only available justifications are pragmatic (pp. 111-17). It is refreshing to find a philosopher as practically attuned as Mr. Luban when he defends his assertion that pragmatic justifications suffice:

First, the adversary system, despite its imperfections, irrationalities, loopholes, and perversities, seems to do as good a job as any at finding truth and protecting legal rights. None of its existing rivals . . . are demonstrably better. . . . Indeed, even if one of the other systems were slightly better, the human costs — in terms of effort, confusion, anxiety, disorientation, inadvertent miscarriages of justice due to improper understanding, retraining, resentment, loss of tradition, you name it — would outweigh reasons for replacing the existing system.

Second, *some* adjudicatory system is necessary.

Third, it's the way we've always done things.

These propositions constitute a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have. [p. 112]

Although Mr. Luban accepts the pragmatic defense, he writes that it will not necessarily excuse all moral wrongs committed under the system's umbrella. Civil and criminal cases must be distinguished. In criminal cases, a "strong justification" (p. 115) for adversary justice springs from a "political theory" whose goals are "to curtail the power of the state over its citizens" and to preserve "the proper relation between the state and its subjects" (p. 92). Consequently, an "institutional excuse" (p. 115) may work in the criminal context. But in civil cases, the "institutional excuse based on political theory is unavailable" (p. 117). The pragmatic arguments that remain provide only "weak" (p. 118) justification for the adversary system. "What does all this mean in noncriminal contexts?" Mr. Luban rhetorically asks, and then tells us that the

answer, very simply, is this. The adversary system possesses only the slightest moral force, and thus appealing to it can excuse only the slightest moral wrongs. Anything else that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well. The lawyer's role carries no moral privileges and immunities. [pp. 117-18]

Stephan Landsman would disagree. His short book, *The Adversary*

6. Consequentialist arguments are "those claiming that the adversary system is the best way of accomplishing various goals [such as] ferreting out truth, . . . defending people's legal rights, and . . . safeguarding against excesses." P. 93. Nonconsequentialist arguments claim that the adversary system "is intrinsically good." *Id.*

System: A Description and Defense, stakes out an argument that is antecedent to the central debate of *The Good Lawyer*. Professor Landsman's book does not explicitly address the problem of role morality and adversary justice. Instead, it aims to establish that adversary justice, as it operates in the United States, is itself good. If it is, then the lawyer's place in that system should be held morally worthy.

Professor Landsman interweaves both goals of his subtitle. His book builds toward its argument: the adversary system is first defined (pp. 1-7), then historically explained (pp. 8-25). Next, Professor Landsman describes what he calls "Nonadversarial Elements" in the American system (pp. 26-33). One chapter explains, then rebuts, criticisms of the adversary system (pp. 34-43), and another describes the system's advantages as compared with other methods of settling disputes (pp. 44-51). The book concludes with a brief consideration of circumstances in which nonadversarial means of dispute resolution are preferable to adversarial ones (pp. 52-53).

The audience for Professor Landsman's book will in the main be persons who are not lawyers, or lawyers who have not had a chance fully to elaborate the justifications for the world in which they labor. Professor Landsman has not attempted to write a scholarly study or to further the academic or philosophical, as opposed to the informed public, debate on the issues he addresses. There was need for an introduction of this kind and, judged in light of its purpose, Professor Landsman has done a competent job. Nevertheless, the author is a partisan. His goal is not simply to describe but also to defend adversary justice in pretty much its undiluted form. In true adversary spirit, enlightened public debate would benefit from an equally informed, critical reply directed at the same audience.

Unfortunately, some of Professor Landsman's assertions are muddled. A sparsity of footnotes makes it difficult to confirm or even comprehend others. Do the following really reveal a "trend" toward "abandon[ing] adversarial techniques" (p. 28), as the author asserts: the harmless error rule (p. 32); exclusion of exculpatory hearsay in criminal cases (p. 28); denial of the right to free counsel on a second appeal (p. 32); filing fees in civil appeals (p. 32); restrictions on jury voir dire (p. 31); six-person juries (p. 31); the use of a testifying defendant's prior crimes for impeachment purposes (p. 28); and pretrial conferences and pretrial orders that seek to define the issues in a case (p. 30)? The argument that they do appears more than strained and of a piece with the following sentiment, from a chapter entitled "Nonadversarial Elements in the American Judicial System" (pp. 26-33):

The procedural and evidentiary rules governing the adversarial process have also been the target of reformers. A wide range of reforms have been adopted that sacrifice adversarial principles. Perhaps most significant is the large number of rules that enhance the discretionary

powers of the trial judge. Professor Maurice Rosenberg . . . has estimated that in as many as forty procedural situations the Federal Rules of Civil Procedure have been construed to allow for the exercise of judicial discretion. This sort of expansion of judicial discretion undermines the judge's passivity and reduces the ability of the advocates to direct the proceedings. Judicial discretion has also been expanded in the Federal Rules of Evidence. Material previously banned as prejudicial may now be admitted at the court's discretion. Further, changes in the evidence rules cede the trial judge increased power to control fundamental processes like cross-examination, determination of preliminary questions of fact, and the use of hearsay evidence. [pp. 31-32]

The implicitly pejorative reference to "reformers" and "reforms" exposes a crack in Professor Landsman's otherwise dispassionate tone. Exactly what he means by "[m]aterial previously banned as prejudicial" and why a grant of authority to admit this material should "sacrifice adversarial principles" is neither explained nor self-evident. And while it is true that some hearsay exceptions in the Federal Rules of Evidence give judges discretion,⁷ there is nothing revolutionary there. Judges established the rule against hearsay⁸ and many of its exceptions⁹ in the first place. Absent the Rules, federal judges would have been free to continue to fashion and develop hearsay exceptions in response to changing circumstances and new learning.¹⁰

The quoted paragraph and the book generally convey the author's suspicion of virtually all judicial discretion. Yet he offers no substitute on the matters he identifies. What is the preferred method for containing cross-examination, resolving preliminary questions of fact (e.g., the existence of a privilege), and determining the admissibility of hearsay? Would he choose nondiscretionary legislative rules of evidence and procedure, assuming they could be written? How is legislative intrusion less likely to "reduc[e] the ability of advocates to direct the proceedings" (p. 32)? An advocate may at least appeal to judicial discretion where it exists; legislative resolutions are necessarily inflexible. Or does Professor Landsman favor no rules at all?

Professor Landsman's book suffers most from its sketchiness and from the ambivalence of its tone — part studious, part exaggerated. For example, defending the requirement that lawyers represent their

7. See, e.g., FED. R. EVID. 803(6) (allowing admission of "business records" as an exception to rule against hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness").

8. MCCORMICK ON EVIDENCE 724-26 (3d ed. 1984).

9. See, e.g., the exception for declarations against interest. *Id.* at 822-24; see also *People v. Spriggs*, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964).

10. The Advisory Committee recognized this in proposing the residual hearsay exceptions: "It would . . . be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in [Rule 804(b)(5)] are accordingly included." FED. R. EVID. 803(24) advisory committee note.

clients zealously, though at times at a cost to truth, the author acknowledges that his support of zealous advocacy "does not mean that an attorney can never be required to act in ways that oppose his client's wishes" (p. 39). He cites the generally easy example of the prohibition against aiding a client's crime or fraud and summarily concludes: "The situations in which the attorney must reject his client's wishes should be clearly and narrowly defined, however, otherwise a chill will be cast over the relationship and over the entire adversary process" (p. 39). But that is merely the beginning. *How* narrowly should they be defined? Is there *any* lawful assistance that an attorney is morally (or should be ethically) required to decline? How much zealousness can be subtracted from the lawyer's role without destroying the essential character of the adversary system as we know it? These hard questions go unanswered in Professor Landsman's book. They are the subject of much of *The Good Lawyer*.

THREE HYPOTHETICALS

It was inevitable that moral philosophers should attend to legal "ethics," and it is beneficial that they have. It was inevitable because when the bar talks among itself about how its members ought properly to behave, and of rules it might enact to encourage such behavior, it cannot avoid adopting the language and invoking the concepts used by "real" ethicists and that, naturally, attracts the "real" ethicists' attention. It is beneficial because the lawyers' near-monopoly¹¹ on the scope of their professional duty has often resulted in narrow and self-interested resolutions. Although the recently adopted Model Rules of Professional Conduct¹² significantly improve upon the Model Code of Professional Responsibility,¹³ some of the new Model Rules stand as a sad monument to the selfishness of the legal enterprise.¹⁴ Having persons trained in moral philosophy (and other disciplines) watch over the bar's shoulder may not immediately alter the results — philosophers have not been invited on the governing boards of any bar groups

11. The ABA House of Delegates, all lawyers, adopted the Model Rules of Professional Conduct on August 2, 1983. *Bar Group Adopts Model Ethics Code*, N.Y. Times, Aug. 3, 1983, at A1, col. 1. State adoption depends on state bar or judicial approval or both. See, e.g., N.Y. STATE BAR ASSN., SUMMARY REPORT OF SPECIAL COMMITTEE TO CONSIDER ADOPTION OF ABA MODEL RULES OF PROFESSIONAL CONDUCT (1985); N.Y. JUD. LAW § 90(2) (McKinney 1983) (intermediate appellate courts authorized to discipline lawyers); Rules of Supreme Court, Appellate Division, First Department, N.Y. ADMIN. CODE tit. 22, § 603.2 (1985) (professional discipline defined in part as violation of Code of Professional Responsibility).

12. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

13. See generally Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).

14. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.5(b), 1.16(b) & 5.4, which respectively address client-lawyer fee agreements, withdrawal from a representation, and the prohibition of lay ownership or control of for-profit law firms. These provisions are criticized in Gillers, *supra* note 13, at 259-61, 266-72.

known to me — but it may help expose duplicity if the results are touted as publicly beneficial. Eventually, sunshine should nurture different values than seem to thrive in obscurity.

To advance that day, I suggest that we distinguish, first, between a client's ends and the means employed to achieve them; second, between the behavior of the bar as an enterprise engaged in rulemaking and the behavior of individual lawyers who are required to obey the bar's rules; and third, between rules that mandate conduct and those that merely authorize it. I do not expect that the following hypotheticals will address all cases or resolve all questions, but they should illustrate the utility of the proposed distinctions.

Hypothetical I

(a) A week before trial, the defense lawyer's examining physician tells the defense lawyer for the first time that the tort plaintiff's injuries are probably much worse than plaintiff believes them to be. The discovery rules do not require revelation of this information. Plaintiff then offers to settle for a sum based on his assumption that his condition is not serious.¹⁵

(b) In a tort action in which the plaintiff has suffered permanent injury, the plaintiff's lawyer learns a week before trial that the plaintiff has an unrelated terminal illness. The discovery rules do not require revelation of this information. The defendant then offers to settle for a sum based on his assumption that the plaintiff will reach the life expectancy identified in the mortality tables.

No ethical rule requires the lawyers in these examples to reveal the newly learned information. On the contrary, the rules forbid revelation.¹⁶ Yet we can foresee inequitable results. There will be settlements far lower or higher than the facts warrant. Does the lawyer who remains silent in these circumstances behave immorally? Is he or she a bad person? I believe the answer must be no, even though we may conclude that the client acts immorally by instructing the lawyer to conceal the same information.

The lawyer works within a system of rules, adopted and enforced by the state. These constrain his behavior on pain of discipline,¹⁷ which can amount to denial of his livelihood. Much can be said

15. These facts are based on *Spaulding v. Zimmerman*, 263 Minn. 346, 116 N.W.2d 704 (1962). Luban recounts them in *The Good Lawyer* and concludes that acceptance of the settlement offer cannot be justified. P. 115.

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983).

17. "The Model Code is designed to be adopted by appropriate agencies . . . as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1979). "The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983).

against these rules, but there they are. It is asking too much to expect lawyers to risk their careers in order to assure the result that most nearly comports with truth. While a lawyer also works within a civil litigation system that touts discovery of truth as a leading (some might say its only) goal,¹⁸ the system nevertheless, and for whatever reasons, pursues this goal through rules that at times operate to suppress truth. Here is a compromise we've made. It is not for the lawyer to decide in each representation whether the compromise ought to apply or whether its true intendment will be frustrated if it does. That resolution will often defy clear answer. Even philosophers disagree among themselves. Furthermore, there is moral value in having people honor their oaths to obey the bar's governing ethical document. And there is practical value in fulfilling the expectations of others, especially clients, that they will.

How then if the lawyer does not reveal the information but declines to continue the representation? This is the other way out. While it may sometimes not be possible, assume it is. We might then say that the lawyer acts immorally if he fails to withdraw instead of helping the client achieve a legal but immoral end. Another lawyer will then step in, but assume she also declines, as does the next and the next. Either all lawyers decline (because they subscribe to the same personal morality) and the client is unable to invoke his or her legal rights, or we require the "last lawyer in town"¹⁹ to accept the case. The last lawyer has two excuses to a charge of immorality: first, she had no legal choice;²⁰ and second, since she was the last lawyer in town, by accepting the client she fulfills the legal system's promise of representation, which is a value no predecessor lawyer could cite so long as there was one other lawyer to whom the client could turn.

This argument is too nice. It seems to me to amount to something else: namely, that the confidentiality rule on the facts of hypothetical I is wrong. For if the only reason the last lawyer in town must and morally may accept the case is so that the legal system can deliver on its promise, while everyone else can and morally must reject the case

18. Compare Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RESEARCH J. 543 (arguing that truth is the primary objective of civil litigation and that a lawyer is morally blameworthy if she seeks lawful but immoral ends for a civil litigant), with Ball, *Wrong Experiment, Wrong Result: An Appreciatively Critical Response to Schwartz*, 1983 AM. B. FOUND. RESEARCH J. 565, 570 (rejecting the "laboratory" metaphor for civil litigation and arguing that "the truth of the judicial process is the truth of art and right action, of aesthetics and ethics. Truth in litigation is not to be ascertained; it is to be performed . . .").

19. The concept and phrase belong to Professor Schwartz. *The Good Lawyer*, p. 168.

20. She could still decline, in an act of civil disobedience based on the moral repugnance of the client's case. If her refusal were in good faith, Professor Schwartz writes that "no important value of the system would seem to require enforced assignment of that lawyer" unless "refusals . . . became sufficiently widespread to threaten the assignment system," but this assumes "the probability that other lawyers would be willing to accept the assignment on grounds the recalcitrant lawyer found morally insufficient." P. 169. Consequently, the *last* lawyer in town would have to be sanctioned for her civil disobedience in order for the assignment system to work.

because the same promise works injustice, we should be examining the promise and not devising intricate but improbable stratagems to save us from our own handiwork. The real quarrel is with the profession that wrote the rule. The lawyer can set the rule up in defense but its collective author cannot. The bar must rely on a different order of argument, including arguments drawn from moral and political philosophy.²¹

Hypothetical II

(a) A man whose lifelong dream has been to open a restaurant persuades a wealthy cousin to lend him \$50,000. The man is unsophisticated in business matters while the cousin is not. The man signs a demand note for the loan and opens the restaurant. Food critics give it excellent reviews; great success is predicted. Seeing this, the cousin calls the note, then brings an action on it, intending to acquire the restaurant in a foreclosure sale. The man goes to a lawyer who sees improbable defenses on the merits and who proceeds to make a series of nonfrivolous procedural motions calculated to gain time for her client until either the restaurant's cash flow is great enough to pay the note or a bank loan can be obtained. The motions are either weak, with the lawyer expecting them to fail, or they are highly technical.

(b) While on her way home from a job as a housekeeper, a single mother of three children is hurt by falling debris at a construction site. She suffers permanent injuries that prevent her from resuming gainful employment. She sues the construction company. Its lawyer, recognizing only weak defenses on the merits, makes procedural motions of the kind described in II(a). These have the effect of increasing pressure on the financially desperate plaintiff to settle for a tenth of what she could reasonably expect to recover at trial.

Hypothetical II posits two situations in which lawyers, with no realistic defense on the merits, make weak or technical procedural motions in order to delay plaintiffs' efforts to vindicate their legal rights. Assume the motions are addressed to the sufficiency of service of process. One motion alleges that service was made by someone a month under eighteen years of age. If true, service was improper,²² but the motion must be counted as highly technical. Another motion makes a

21. I do not here argue that the confidentiality rules should be changed to permit or require revelation of the information described in hypothetical I. Perhaps the bar can defend its rule. The onus of defense rests with the bar, however, not the lawyer.

Professor Rhode makes a strong argument that such a defense is not possible. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 612-17 (1985); see also Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1172-73 (1985), recommending (a) that lawyers should "have a legal duty to disclose information obtained during the course of representation in order to prevent serious harm," and (b) an "extension of immunity laws to protect against violations of the client's right against self-incrimination that could result from an attorney's disclosure of information covered by that right." However, Professor Subin would limit the definition of "harm" to "conduct that would constitute a felony and the continuing consequence of any conduct that would constitute a felony."

22. FED. R. CIV. P. 4(c)(2)(A).

weak assertion that the agent served with process was not one identified in applicable law.²³

If the Code and the Rules mean to forbid this sort of "indirect" strategy, they certainly say so obscurely. I assume they permit the motions on the posited facts.²⁴ The rules that identify the minimum age of a process server and the agents eligible to receive service either mean what they say or they do not. If they do, then a defendant must be able to challenge service when there is reason to believe these rules were ignored. The right to challenge, furthermore, does not accrue only to those defendants who can, in good faith, demonstrate a probable defense on the merits.

Nevertheless, even if law and the governing ethical document permit the motions, does the lawyer who makes them act immorally by "frustrating an opposing party's attempt to obtain rightful redress or repose?"²⁵ I believe she does. On these facts, a good lawyer may be a bad person.

Hypotheticals I and II differ in two ways. Whereas hypothetical I addresses the propriety of inaction (silence) in accord with an express requirement of inaction,²⁶ hypothetical II addresses the propriety of taking action (making the motions) that neither the Rules nor the Code expressly requires.²⁷ To *infer* a requirement, one must argue

23. FED. R. CIV. P. 4(d)(1), (3).

24. The Model Rules forbid making the motion "unless there is a basis for doing so that is not frivolous." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983). The hypothetical assumes that basis. The comment to rule 3.1 ambivalently states that the "advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also has a duty not to abuse legal procedure." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment. The same comment characterizes an action as "frivolous" if it is "taken *primarily* for the purpose of harassing or maliciously injuring a person." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (emphasis added). Similarly, rule 4.4 forbids a lawyer to use "means that have no *substantial* purpose other than to embarrass, delay, or burden a third person." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (emphasis added). The emphasized words continue the ambivalence, as does the italicized phrase in rule 3.2, which requires a "lawyer [to] make reasonable efforts to expedite litigation *consistent with the interests of the client*." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (emphasis added). Drafts of the Rules referred to "the *legitimate* interests of the client." See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (Proposed Final Draft 1981) (emphasis added).

The comment to rule 3.2 contains the strongest, but still qualified, language forbidding the motions: "Delay should not be indulged *merely* for . . . the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 comment (emphasis added). Query whether making the motions is "delay" or the invocation of a right that has the effect of causing delay, and whether the advocate's purpose is "merely" to frustrate the opposing client's "attempt to obtain redress" or to afford his client the "fullest benefit," MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment, of the procedural rule. The Model Code contains parallel inconsistencies. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109, DR 7-102(A)(1), (2) (1979); see also FED. R. CIV. P. 11, which states that a lawyer's signature on motions and pleadings "constitutes a certificate" that the document is "not interposed for any improper purpose, such as . . . to cause *unnecessary* delay or *needless* increase in the cost of litigation" (emphasis added).

25. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 comment (1983).

26. See note 16 *supra* and accompanying text.

27. The Rules require a lawyer to "abide by a client's decisions concerning the objectives of

that a lawyer may not reject an effective and practical strategy if her only reason for doing so is that she finds the strategy morally objectionable. The duty to represent a client zealously, the argument might go, means at least as much.

I suggest, however, that neither the Rules nor the Code compels this inference.²⁸ Rather, a lawyer may refrain from making the motions, even if requested to do so by her client, without violating either document. Because the tactic is discretionary, the lawyer who invokes it by making the motions is as morally accountable as the client on whose behalf she acts. I do not mean to say that the lawyer who makes the motions will necessarily have acted badly, but only that she stands in no better position than her client. Whether the conduct of a lawyer and client may be morally criticized hinges on the entire factual context, including the particular circumstances of the case and the behavior of the opposition. It may be that the conduct in hypothetical II(a) can be defended, while the conduct in II(b) cannot.

In criminal cases, especially, a lawyer will usually act morally even though he delays trial by contending for nonfrivolous procedural rights. Some such contentions succeed. New rights are recognized, or old rights are applied, the better to contain prosecutorial enthusiasm or to honor a constitutional value. These rights will evolve or be enforced only if defense lawyers insist. Who else will do it? Further-

representation . . . and . . . consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983). At its most expansive, this language would require the lawyer to initiate the consultation about means. The comment, however, also says that "a lawyer is not required to . . . employ means simply because a client may wish that the lawyer do so." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment. The comment to rule 1.3 states that "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 comment.

A duty to make the motions is easier, though not easy, to infer from the Code. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8, 7-9, 7-10; DR 7-101(A) (1979).

28. See note 27 *supra*. Far from compelling the inference, a fair reading of both documents suggests that their collective authors preferred not to resolve the question, just as they preferred not to specify whether making such motions is ethically proper. See note 24 *supra*.

Professor Freedman believes that an "attorney acts unprofessionally and immorally by depriving clients of their autonomy, that is, by . . . preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions." So he would disagree with my conclusions in hypothetical II, though perhaps not as a matter of textual interpretation, but as a matter of what the rule should be. On the other hand, Professor Freedman states that because a lawyer is usually free at the outset to decline a representation, "others are entitled to judge and to criticize, on moral grounds, a lawyer's decision to represent a particular client." Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 204-05 (1978). In hypothetical II, unlike hypothetical I, the lawyer could have foreseen the need for the dilatory tactic before accepting the case. Consequently, he or she would have had discretion at that point, even under Professor Freedman's analysis, and would be subject to moral scrutiny for exercising his or her discretion to accept the case intending to engage in delay. Moral criticism based on the decision to accept a client is further discussed in connection with hypothetical III. See text following note 30 *infra*.

more, judges are less passive in criminal than in civil contests, and so better able to forestall specious delay strategies.

Hypothetical III

(a) A lawyer has grown wealthy representing defendants in major drug-importation cases. The defendants have no visible means of support, pay the lawyer large sums in cash, and have occasionally acknowledged their guilt. Many of the lawyer's clients are the same year after year. The lawyer scrupulously observes all of her obligations under the governing ethical document. Her effectiveness as an advocate before juries has resulted in a high acquittal rate.

(b) An American pharmaceutical company manufactures a drug that may not be sold in the United States except by prescription and when accompanied by extensive warnings. The company wants to export excess quantities of the drug to underdeveloped nations that lack prescription and warning requirements because of inadequate testing facilities. Labels on the exported drugs will contain no cautionary language. An American lawyer assists the company either by (i) bringing an action to declare invalid a government effort to block shipment of the drug; (ii) defending an injunctive action brought by an advocacy health law office that wishes to stop the client from exporting the drug; or (iii) preparing the legal documents required to effect export of the drug.²⁹

These examples switch to the morality of a lawyer's conduct as judged solely by the clients' goals. We assume that the lawyer in hypothetical III(a) knows that her clients earn their livelihood through large-scale drug trafficking and knows too that her legal assistance, though scrupulously ethical, enables them to continue to do so. Alternatively, in hypothetical III(b), we have a lawyer who assists a company wishing to export pharmaceuticals to underdeveloped countries for over-the-counter sale. The product may not be sold in the United States except by prescription accompanied by warnings that will not appear on the exported drugs.

If we apply the discretionary test used to distinguish hypotheticals I and II,³⁰ both lawyers will be morally accountable because each has freely accepted the particular representation. In this view, only if the lawyer had been assigned by a court or was "the last lawyer in town"³¹

29. Hypothetical III(b) embellishes on the testimony of Dr. Leslie Lueck of the Parke-Davis Company, given before the Senate Small Business Committee on November 29, 1967. Evidence at the time suggested that the company's antibiotic chloromycetin may have been responsible for several hundred deaths. Dr. Lueck testified that the Food and Drug Administration was justified in requiring that medical journal advertisements for the drug contain extensive warnings. A senator then asked a surprised Dr. Lueck why no such warnings appeared in British advertisements for the drug. Dr. Lueck's counsel, Lloyd N. Cutler, interjected that the British advertisement "meets all of what [the British] consider to be appropriate requirements." P. STERN, *LAWYERS ON TRIAL* 146-48 (1980).

30. See notes 27-28 *supra* and accompanying text.

31. See notes 19-20 *supra* and accompanying text.

could he or she escape moral responsibility. Yet I do not believe an unqualified discretionary test is appropriate when ends and not means are evaluated. A different calculus is needed.

Criminal matters are a special case. There are many systems for determining legal guilt. Our society has fashioned one that presupposes a precisely defined role for the criminal defense lawyer.³² Judgments about the defense lawyer's morality must be strictly circumscribed by the premises of the system and the role the lawyer plays within it. These tell us that the defense lawyer does not defend her client's criminal activity.³³ Rather, she defends the client against the *charge* of criminal activity. Although there may be a direct causal relationship in fact between the lawyer's aid and the success of an ongoing criminal enterprise, no causal relationship can exist in moral reasoning because the lawyer is fulfilling a public assignment, which we have plausibly assumed to be socially beneficial across the run of cases regardless of the consequence in any single case. Where a lawyer provides aid in observance of this assignment, there must be a complete break in the chain of moral responsibility.

Our system aims for the greatest number of accurate convictions while avoiding the greatest number of inaccurate ones and protecting other values, some of them more dear than convicting the guilty. We feel so strongly about these matters, and about the inability of the system to perform without the defense lawyer's presence, that our Constitution guarantees free counsel to indigent criminal defendants³⁴ but to almost no one else.³⁵ Not even in the most routine cases do we rely on the prosecutor to safeguard defendants' rights. The criminal defense lawyer keeps the government honest while it pursues those it most eagerly wants to convict. The more outrageous the alleged crime, the greater may be the state's temptation to cut corners, and so the greater the need for the defense lawyer's special knowledge. Prosecutorial excesses are hardly unknown.³⁶

Unless lawyers represent clients like those in hypothetical III(a),

32. The Model Rules recognize that role. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1, Rule 3.3 comment (1983); see also ABA STANDARDS FOR CRIMINAL JUSTICE 4-1.1 (2d ed. 1980) (adopted 1979). In the textual discussion that follows, I do not mean to suggest that all parts of our system for determining criminal guilt or civil liabilities and rights are beyond moral criticism. For example, the law prior to *Gideon v. Wainwright*, 372 U.S. 335 (1963), permitting an indigent accused felon to be tried without the aid of counsel, seemed morally indefensible even then. My focus is the morality of the lawyer working within an essentially just system, not the morality of each component of the system itself.

33. I exclude cases where the lawyer contends that the criminalized conduct is constitutionally protected.

34. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

35. See, e.g., *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981) (no automatic right to appointed counsel where hearing can lead to termination of parental rights and not to deprivation of physical liberty); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (no automatic right to appointed counsel at probation revocation proceedings).

36. The Supreme Court has acknowledged the risks. See, e.g., *Thigpen v. Roberts*, 468 U.S.

we would be unable to perform one of society's most central functions — adjudicating guilt — in the manner we have chosen to do so. We afford defense counsel immunity from moral criticism so that our system will work as conceived. The lawyer is not free of moral accountability; the lawyer-in-the-system is.

Hypothetical III(b) concerns civil representation. The lawyer is either bringing or defending a civil action, whose subject is the legality of the client's intention to ship potentially harmful drugs to underdeveloped nations, or he is helping the client with the legal paperwork required to effect the shipment. Assuming the client can be faulted for its conduct, can the lawyer be faulted too? I answer "no" where the assistance is in connection with a litigation, "yes" where it is not.

As plaintiff, the client has gone to court in order to overcome an otherwise insurmountable obstacle to its goal — government interference. As defendant, the client must go to court in order to avoid an equivalent obstacle — a judicial injunction. In either case, the sole question for the court, and a threshold question for the client, is whether the company may legally ship the drugs. Only courts may adjudicate the client's legal rights and (for practical or legal reasons) a lawyer must shepherd the client through the courts. The lawyer's specific institutional assignment is to secure the client's alleged *right* to ship the drugs, not to help it ship them. One might call lawyers appurtenant to the rights-adjudicating apparatus we've adopted to resolve civil disputes.

When lawyers act within the rights-adjudicating apparatus, its cloak of legitimacy should insulate them against charges of immorality based on a client's ends. As with the criminal system, the civil lawyer enjoys immunity from moral criticism because he works within a structure for determining rights, and not simply because he is a lawyer.

Why should this be so in civil cases? In the criminal context, the adversary system insulates the lawyer from criticism because of the social need for the system and the lawyer's essential position in that system. Since there may not be the same pressing need to adjudicate civil entitlements as there is to adjudicate criminal responsibility, one might ask why the rights-adjudicating apparatus should dispense a parallel immunity. Without trying to calibrate comparative social needs, I see a strong, although not as self-evident, public interest in full utilization of the rights-adjudicating apparatus such that lawyers should be protected from moral criticism for taking a claim through it.

Uninhibited utilization of the rights-adjudicating apparatus will shrink uncertainty and clarify options by stimulating fuller elaboration of rights and duties both generally and in particular. *Generally*, the

27 (1984) (presumption of vindictiveness if a defendant is charged with a more serious crime after exercising his right to a trial de novo).

drug export litigation may develop or amplify legal principles of import to other cases and contexts. Our law grows through controversy. Indifferent to the contestants, it thrives on their contests. *Particularly*, the litigation will likely have one of three outcomes. The drug company may lose, in which case it will be established that the law does not permit the export of drugs for sale elsewhere in ways prohibited here. Or the drug company may win, in which case we will be told why, and may choose to alter one or more of the legal principles in the court's sequence of reasoning. Or the drug company may have a partial victory, entitling it to make the shipment, perhaps, but under conditions that avert the moral quandary. If the company then proceeds, we will have encouraged commerce and made a presumably beneficial drug available to others without ethical compromise.

Civil litigation affords three other benefits that strengthen the argument for granting lawyers immunity from moral criticism for their clients' goals. First, litigation is a form of public education, an information window. Though this benefit is incidental, it will occasionally prove valuable. In the drug export case, for example, discovery and trial may lead to publicity about the international workings of domestic pharmaceutical companies. Second, litigation accompanied by compulsory process may unearth new facts, or new contexts within which to place known facts. These in turn can change our assessment of the moral issues. We may learn, for example, that the domestic prescription and warning requirements were imposed improperly or were based on fallacious experiments, or that experience with the drug since the requirements were imposed render their continuation ill-advised. Third, even if no new *fact* is discovered or disclosed, new or overlooked moral insights may be revealed in the public debate surrounding the litigation. Further, since law has moral force, the moral perception may be altered by the judge's explanation of the applicable legal rules and the reasons for them. Moral lessons from the public debate and the judge's opinion may even cause the drug company or its opponents to reexamine their positions.

Some of these arguments in support of the value of civil litigation derive from one antecedent proposition: the moral, factual, legal, and contextual perceptions of a dispute can change as the dispute moves through the courts. Litigation may color these perceptions either by bringing us new information or encouraging us to view known information differently. Of course, it may not do any of these things. It is the capacity of litigation as an inquiring process to reveal factual, moral, legal, and contextual truths, not the certainty that it will, that provides its value.³⁷

37. In Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), the author makes different but consistent arguments in criticizing efforts to encourage settlement through the "new movement" of "Alternative Dispute Resolution." From a perspective closer to mine, James Boyd White writes that

In hypothetical III(b)(iii), the lawyer, by preparing the legal documents necessary to effect export of the client's drug, helps the client implement its rights, not define them. His work is done outside the rights-adjudicating apparatus. Though no longer part of an immunizing structure, can he claim equivalent protection by virtue of his calling? I think not. On his own, the lawyer is as morally vulnerable as any agent who provides a skill or product essential to the client's purpose. There is no longer a strong social benefit that presses us to afford the lawyer an immunity denied others. If the drug company can be criticized for its contemplated shipment, so can its agents, including the lawyer. This means that clients may find their lawful purposes impeded for lack of legal help, or that a lawyer who helps a client lawfully attain a legal objective may nevertheless be charged with the immorality of the objective.

It might be argued that there is a difference between legal agents and others, like suppliers and shippers, such that even in hypothetical III(b)(iii) the lawyer ought to be immune to criticism. A lawyer helps a client meet an obstacle that our political and legal institutions have imposed (e.g., obtaining export documents) while other agents help the client overcome practical obstacles. The manufacturer of rubber bullets for sale to the South African government needs a rubber supplier because of the nature of its product, and it needs a shipping company because an ocean lies between its American plant and its Capetown customer. Where we have created a legal obstacle, the argument might run, we are obliged as a society to promote means to remove it, while we have no obligation with regard to practical impediments.³⁸ Lawyers therefore should be encouraged to accept clients with repugnant goals, though we do not similarly encourage other agents. And if in order to honor our social obligation we want lawyers to accept these clients, then we cannot criticize them for doing so.

This argument would give all legal representation the same immunity-granting power afforded by the criminal adversary system and the rights-adjudicating apparatus. A lawyer is insulated from criticism for goals he pursues through civil and criminal contests because these contests yield significant social benefits. Lawyers are not immune simply because they are lawyers. But should they be?

I think not. The effort to extend the immunity should fail for two reasons. First, a distinction between lawyers and other agents, based

in the law, our language of facts and law is constantly being tested against the real world, against common sentiment, against cases and argument, and remade in light of what is discovered. This means that the law is a way in which the community defines itself, not once and for all, but over and over, and in the process it educates itself about its own character and the nature of the world. The limits of our minds and imaginations are reached and tested, and a new step taken. This is what the law is about.

White, *supra* note 3, at 882.

38. Professor Fried seems to make this argument in Fried, *supra* note 1, at 1072-73.

on the kinds of obstacles each helps a client overcome, is weak. While lawyers sometimes remove legally imposed obstacles, often they do not. Writing a contract, for example, or conducting a title search, may be services a client desires or needs in order to achieve a goal — and so obstacles to it — but like the shipper's and the supplier's services, they are obstacles usually inherent in the nature of the client's purpose. They are not legally imposed preconditions. Conversely, some legally imposed preconditions can be performed only by nonlegal agents — for example, a requirement that an accountant certify financial statements in connection with a stock offering. The legal and nonlegal categories are thus more fluid than might first appear.

Second, it does not follow that because society has chosen to create a legal obstacle to the accomplishment of a goal it is obliged to encourage lawyers to be available to help remove the obstacle. The requirement of a prospectus containing designated information is a legal obstacle to the goal of issuing stock. Its office is to inform investors. If a company proposed to issue stock for a morally repulsive business — *e.g.*, the sale of magazines with nonobscene photographs of people in sexually degrading positions — and lawyers declined to assist it for that reason, the company might fail, but it would fail because of moral objection to its business and not because of moral objection to the required legal service. The reason for requiring the legal service and the reason to decline legal assistance are unrelated.

We would have a different situation if lawyers refused to perform a legally essential service because the service itself was morally problematic. Examples might be cross-examination of a truthful rape victim intended to convey the impression that she invented, imagined, or consented to the deed, or the forceful defense of a sadistic serial murderer, in each instance assuming that there is factual warrant to challenge the witness' credibility or the proof of the defendant's guilt. When society creates a legal need for a morally questionable service, it should be required to immunize lawyers so they are not hesitant to provide it. But in the magazine hypothetical, the lawyer does not decline to aid the client because preparation of a prospectus is a service that presents moral issues. He declines because of the client's goal. As such, the lawyer is in a position no different from the supplier who will not sell paper to the magazine company, or the writer who will not accept its assignment. Each declines otherwise neutral aid because of the company's immoral end and not because of the nature of its need.

If society has no obligation to encourage the availability of lawyers to remove legal obstacles to the accomplishment of a lawful goal, regardless of the goal, then lawyers cannot cite such an obligation in claiming moral immunity for aiding the immoral but lawful goals of their clients. The lawyer is on her own.³⁹

39. I do not pretend that my hypotheticals describe all cases. A harder case is presented by a

CONCLUSION

"Moral reasoning," writes Robert Condlin, "aims at a certain universality; it attempts to discover and appeal to norms that are binding on all agents, in all situations" (p. 326). He quotes Hannah Arendt's wise counsel that in order to reach this goal we must be able to "think . . . from the standpoint of somebody else."⁴⁰ Lawyers, by contrast, are constrained to regard a single "standpoint" — their clients'. In the much-quoted declaration of Lord Brougham: "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."⁴¹ In case there should remain any doubt, Lord Brougham immediately added that the "hazards and costs to other persons" are no concern of the lawyer, who "must not regard the alarm, the torments, the destruction which he may bring upon others. . . . [H]e must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion."⁴²

Here then is the dilemma. If moral value in the behavior of others, including clients, and lawyers when they are not acting for clients, requires willingness to "think . . . from the standpoint of somebody else," do lawyers as agents act morally when by design, not accident, they are blind to those standpoints? I have offered one, not definitive answer: *sometimes*. Certainly not always. And not automatically.

lawyer who is asked to enforce a claim for a money judgment where a knowledgeable plaintiff, say a door-to-door encyclopedia salesman, took apparent oppressive advantage of unworldly defendants, say a poor working couple with children. The law may not at the moment recognize the salesman's conduct as a defense. I have argued that the lawyer cannot be criticized for bringing the case, which may educate the public and spur appellate courts or the legislature to change the law. Also, the facts or context may turn out differently than they first appeared. But even if the lawyer is not morally accountable for bringing the action, does she also escape responsibility if the plaintiff wins and she enforces the judgment? Enforcing the judgment may be seen as akin to assistance with the paperwork in hypothetical III(b)(iii). *Alone*, it carries no special social benefit that should cause us to afford moral immunity. But it may enjoy a spillover immunity from the litigation. If the reasons to encourage litigation are valid, then the judgment must be enforced or the plaintiff will have no motive to bring the case in the first place.

40. P. 326 (quoting H. ARENDT, *EICHMANN IN JERUSALEM* 49 (1963)).

41. 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821), *quoted in* M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975), *and in* Fried, *supra* note 1, at 1060 n.1.

42. 2 TRIAL OF QUEEN CAROLINE, *supra* note 41, at 8.