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Joseph P. Tomain

*University of Cincinnati College of Law*, [joseph.tomain@uc.edu](mailto:joseph.tomain@uc.edu)

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# ON CHOOSING CLIENTS AND CAREERS: A SPECULATIVE ESSAY ON THE PROBLEMS OF INITIAL CHOICE

JOSEPH P. TOMAIN\*

## THE TALE OF THE YOUNG LAWYER

And it came to pass that the young lawyer from a distinguished law school was confronted with a dilemma. Should he<sup>1</sup> become associated with the large and venerable law firm of Staid & Stolid or accept a “lesser”<sup>2</sup> position with a neighborhood legal services organization? As a law student, he had studied hard and been rewarded by membership on the Law Review and in the Order of Coif. He had achieved success according to the standards of the educational system that trained him, and he yearned to be tested again by the best that practice had to offer. Throughout his formal training, moreover, he had been enamored of the law and its potential role in bringing about significant changes in broad political and economic policies. The firm of Staid & Stolid seemed to be the ideal place for the lawyer to pursue these goals.

Yet, while attracted to those practitioners whose power and influence enabled them to accomplish great things, the young lawyer also was impressed by the law’s promise of substantive justice and its application to social welfare. Moreover, he harbored a deep concern that he would contribute to the maldistribution of legal services if he were to work for Staid & Stolid. He was also afraid of becoming locked into a legal system of which he was suspicious by taking a job within that firm. As appealing as he found Staid & Stolid, he was fearful of losing his values and his identity.

When the young lawyer looked at colleagues it was painful to see some classmates happily choosing the “lesser” employment opportunities. These people were not engaging in the contest; they were not testing themselves; they were not being aggressive enough; they were not competitive enough; they might not become good lawyers. Or would they? Is there

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\* Associate Professor of Law, Drake University School of Law; A.B., University of Notre Dame, 1970; J.D., George Washington University National Law Center, 1974.

<sup>1</sup> The choice of the masculine pronoun has not been an easy one.

<sup>2</sup> The term “lesser” is used in a relative sense. The paradigm of success after graduation continues to be the large private firm, which traditionally pays the highest starting salaries. Any other job is “lesser” measured against this standard.

another path toward becoming a good lawyer? If the young lawyer chose Staid & Stolid, could the young lawyer be a good person as well as a good lawyer?<sup>3</sup>

### INTRODUCTION

This paper deals with the moral dimensions of initial choices of careers and clients. Although the foregoing tale is addressed to the initial choice of career, similar considerations enter into the initial choice of clients. Indeed, the parable's application to the initial choice of clients can be illustrated merely by replacing Staid & Stolid with a corporation seeking legal advice on how to avoid compliance with anti-pollution laws. The problems of initial career choice were highlighted because they are more immediate to law students.<sup>4</sup> In addition, one's choice of career may have a significant effect on future choices of clients.<sup>5</sup>

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<sup>3</sup> There are a number of moral issues in the hypothetical. Can lawyers be good people? See notes 59-60 and accompanying text *infra*. Can one live a life in law? See Allen, *The Law as Path to the World*, 77 MICH. L. REV. 157 (1978); Cox, *The Lawyer's Independent Calling*, 67 KEN. L.J. 5 (1978); Elkins, *The Paradox of A Life in Law*, 40 U. PITT. L. REV. 129 (1979).

<sup>4</sup> The following passages exemplify the concerns of law students with the legal profession. The quotes are used with permission and appear in a working draft of a book being written by the Project for the Study and Application of Humanistic Education in Law at Columbia University Law School.

Today I am in the process of choosing a career. I'm in the process because being in law school hasn't led me to the career I want to choose. The law school offers me a straight line. This gatekeeper of the legal profession has not been useful to my thinking about what I want to do as a lawyer. The model of a legal career that I have felt the school dangled before me from the first day would have landed me in work I distinctly do not want to do. I still feel hostile towards the school for this. I object to having to hustle to discover for myself the alternative ways to practice, because the school makes it so very easy to follow their straight line and I feel like I just barely escaped falling into step.

The danger in the dangling of the model, for me, was that if I accepted it, everything could be so much easier; easier to know then what a lawyer is, without figuring out much about who I as a lawyer could be.

Another student states:

I've recognized two factors that played an important role in my losing touch with why I came to law school. One is the constant emphasis among students on the jobs they'll hold or would like to hold when they leave. The focus is always on the jobs that exist out there and whether we'll be judged suitable for them. In that atmosphere it is easy to forget to go inside, decide what we want, and then look for a job to match. The other factor is the message I received from my first year professors: wipe your slate clean, we are here to make you into lawyers. I did wipe my slate clean and in the process I lost my own goals.

Law students experience considerable anxiety over choice of career, which apparently is exacerbated by law schools and their placement services. See Phelps, *Law Placement and Social Justice*, 53 N.Y.U.L. REV. 663 (1978).

<sup>5</sup> See, e.g., J. GOULDEN, *SUPERLAWYERS* 51-52 (1971). The choice of career itself presents another range of issues, to wit: What is the associate-firm relationship concerning the associate's freedom to decline to serve certain clients? How many times, if any, may an associate

In order for a lawyer to make an initial choice of either career or client, moral questions of the first rank must be answered. The purpose of this paper is to discuss these questions and the means by which they may be answered. First, the American Bar Association Code of Professional Responsibility (the Code) will be examined in order to illuminate the ethical foundations of the lawyer's relationship to society and clients. This examination will be followed by a discussion of the moral foundations of lawyer-society and lawyer-client relationships.<sup>6</sup> The paper will conclude with suggestions for resolving the moral problems encountered by young lawyers.

Certain aspects of the problems of initial choice are beyond the scope of this paper. It appears, for example, that there is an institutional bias in the legal profession favoring jobs with large metropolitan law firms. While this bias surely causes law students anxiety, the paper will not attempt an empirical study of that anxiety.<sup>7</sup> It also appears that, having chosen a particular job, the young lawyer's choice of client problems will be complicated by his sense of loyalty to his employer and his need to earn a living.<sup>8</sup> Although these factors no doubt affect normative decision making, they will not be discussed. Further, any suggestion that economic considerations serve as the sole basis of normative decision-making is unacceptable. Finally, in discussing initial choice of clients, this paper will focus on the lawyer as adviser rather than as advocate.<sup>9</sup>

#### INITIAL CHOICES AND THE CODE OF PROFESSIONAL RESPONSIBILITY

In discussing the degree to which a lawyer's personal ideology should

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decline? Does the associate have any say in the management of the firm? In the selection of his work schedule? In the selection of his caseload? Or in the selection of the type and quantity of work in which he will be engaged? The young lawyer's moral problems may be complicated significantly by loyalty to the firm and the need to earn a living.

<sup>6</sup> Today, the subject of lawyering is one of academic respectability. See G. BELLOW & B. MOULTON, *LAWYERING PROCESS* (1978); L. BROWN & E. DAUER, *PLANNING BY LAWYERS* (1978); M. SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION* (1979).

<sup>7</sup> The assertion that law students experience anxiety over choice of careers is not intended to imply that the blame should be placed solely on law schools. It is quite possible that tension results from the confrontation between ideals and reality that inevitably takes place when students are faced with entering the real world.

<sup>8</sup> See, e.g., Bresnahan, *Ethical Theory and Professional Responsibility: Possible Contributions of Religious Ethics to Dialog About Professional Ethics of Attorneys*, 37 *THE JURIST* 56, 60-74 (1977). Ethical principles, Bresnahan argues, must be tested against reality. The formulation of these principles must be a living experiment, and their formulation is a developmental process. *Id.* Thus, ethical means and ends are not independent of each other; rather, they are interdependent and constitute a set of means-ends complexes such as that developed by Lon Fuller. See Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 *HARV. L. REV.* 433, 438-39 (1978).

<sup>9</sup> Professor Schwartz has argued that moral values enter into the choice of client only when the lawyer is to serve as adviser and that the nature of the adversary system precludes holding the lawyer morally accountable for his choice of clients as an advocate. See Schwartz, *The Professionalism and Accountability of Lawyers*, 66 *CAL. L. REV.* 669 (1978).

affect his professional life, commentators have observed that “[n]o disciplinary rule governs acceptance of a case and the relevant ethical considerations only caution against refusal for improper reasons.”<sup>10</sup> The drafters of the Code apparently were not concerned with the problems of initial choice. If the failure of the Code to provide specific rules seems alarming, however, an examination of it reveals that many of its disciplinary rules addressing other situations are virtually incapable of actual enforcement. For example, one such rule prohibits a lawyer from representing a person if the lawyer “knows or it is obvious” that the person wishes to

[b]ring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.<sup>11</sup>

The pitfalls that exist in attempting to apply this section seem insurmountable. First, one must overcome the argument that it is epistemologically impossible to establish what the lawyer “knows.” Assuming that what the lawyer knows or should have known would be “obvious” to any reasonable disciplinary board, it also must be proved that this action was taken “merely for the purpose of harassment or maliciously injuring [another].”<sup>12</sup> This latter requirement may prove particularly onerous, since the Code also provides that a lawyer should offer his client “zealous” representation.<sup>13</sup> Although few would deny that the Code should serve a disciplinary function, the foregoing example suggests that certain aspects of a lawyer’s practice defy discipline.<sup>14</sup>

The Code also serves nondisciplinary functions which may aid in the development of the individual lawyer’s moral principles. Indeed, the Code provides ethical and moral guidance in two broad areas to the young lawyer grappling with the problems of initial choice: availability and quality of legal services. Although these principles overlap somewhat, the principle of availability is general and addresses the relationship of lawyers to society, while the principle of quality is personal and addresses the relationship of a lawyer to his client.

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<sup>10</sup> G. BELLOW & B. MOULTON, *supra* note 6, at 55.

<sup>11</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109(A)(1) [hereinafter cited as CODE]. The legal profession is starting to reevaluate the basic premises upon which the Code was drafted. It may be that different sets of ethics are required by different practitioners. See, e.g., R. POUND, AMERICAN TRIAL LAWYER FOUNDATION, ETHICS AND ADVOCACY (1978); Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337 (1978).

<sup>12</sup> CODE, *supra* note 11, DR 2-109(A)(1) (emphasis added).

<sup>13</sup> *Id.* Canon 7. See also *id.* EC 7-4. For a discussion of the Code’s internal conflicts, see M. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM (1975).

<sup>14</sup> It may be argued that a disciplinary code that cannot be enforced is a sham. See J. BRILLOFF, CODES OF CONDUCT: THEIR SOUND AND THEIR FURY, in ETHICS, FREE ENTERPRISE, AND PUBLIC POLICY 264 (R. De George & J. Pichler eds. 1978). If the Code is of only questionable value as a disciplinary tool, it may still deter wrongful conduct and provide justification for turning away prospective clients, and perform an educative function. Schwartz, *supra* note 9, at 682.

### *The Ethical Principle of Availability*

Lawyers are indeed a privileged lot. Their power and authority has been chronicled by eminent writers such as de Tocqueville<sup>15</sup> and by contemporary critics such as Jimmy Carter<sup>16</sup> and Alexander Solzhenitsyn.<sup>17</sup> In view of the power enjoyed by lawyers, it is not surprising that the Code imposes certain social obligations on them. Foremost among these obligations is the responsibility of lawyers to make their services generally available:

A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent services of a lawyer of integrity and competence.<sup>18</sup>

The Code elsewhere emphasizes that a lawyer "should assist" the profession in making legal services available.<sup>19</sup> Although this provision is less a mandate than a guiding principle,<sup>20</sup> the Code suggests that a lawyer can comply with it by participating in public information programs to educate the public about the availability of legal services.<sup>21</sup>

One aspect of a lawyer's duty to make his services available that is particularly relevant to the problems of initial choice concerns the indigent. To what extent, if any, does an individual attorney have to make legal services available to people who cannot pay? The Code's treatment of this question suggests that there can be no clear cut answer:

The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.<sup>22</sup>

This provision creates a dilemma for lawyers. While a lawyer must charge for his services in order to earn a living, on occasion he may be required to provide services gratis.<sup>23</sup> However, the provisions relating to free legal serv-

<sup>15</sup> See A. DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (1862).

<sup>16</sup> Address by President Jimmy Carter, Los Angeles County Bar Association, *reprinted in* 14 *PRESIDENTIAL DOCUMENTS* 834 (No. 18, May 8, 1978).

<sup>17</sup> Address by Alexander Solzhenitsyn, Harvard University commencement, June 1978, *reprinted in* 44 *VITAL SPEECHES OF THE DAY* 678 (No. 22, Sept. 1, 1978).

<sup>18</sup> CODE, *supra* note 11, EC 1-1.

<sup>19</sup> *Id.* Canon 2.

<sup>20</sup> "Canons" are intended as "general concepts," rather than as enforceable rules. *Id.* Preliminary Statement.

<sup>21</sup> See *id.* EC 2-1 to 2-5. The United States Supreme Court recently ruled that lawyers may advertise their services, subject to certain guidelines. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>22</sup> CODE, *supra* note 11, EC 2-16.

<sup>23</sup> Canon 2 of the Code easily can be interpreted to impose the obligation to make services

ices need not be taken seriously, since no disciplinary rules force individual attorneys or law firms to take non-paying clients.<sup>24</sup> Rather, individual lawyers can avoid this problem by arguing that the profession and not individual attorneys should remedy this situation.

In addition to recommending that legal services be made available to those unable to pay, the Code advocates making legal services available to persons with unpopular causes.<sup>25</sup> Although an attorney is under no obligation to represent every person who wishes to be his client, this right of refusal must not be taken too lightly. Therefore, the Code encourages a lawyer to accept his share of "unattractive" cases.<sup>26</sup> Interestingly, there has been no demonstrated showing that clients with unpopular causes have been unable to attract lawyers, nor does the Code provide standards on unattractiveness. In reality, some lawyers dedicate their careers to unpopular causes.<sup>27</sup> Nonetheless, where a lawyer's feelings are so intense that they pose a threat to his effectiveness, the Code provides that he should decline employment.<sup>28</sup>

Although the Code does not enforce the foregoing principles through disciplinary rules, the principles can give guidance to the lawyer with problems of initial choice. The Code recognizes that the lawyer has a relationship to society in general. The individual lawyer then, is required to define the scope and extent of that relationship and may find that he owes some obligation to the society that conferred a privilege on him. Since the Code contains no strict mandate, however, the individual lawyer who fails to make his services available is exonerated as long as services are provided by the bar or society. The hero of the parable is not forced by the Code to take one job or the other. It is my position that a lawyer cannot formulate even a tentative answer to the question whether a particular case or client should be taken without additional information. In order to develop an approach to resolving this question, the lawyer must understand the lawyer-client relationship, as governed by the ethical principle of quality as well. Moreover, the Code's lack of disciplinary bite forces lawyers to examine the moral principles discussed below.

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available, if such an obligation exists, on the profession rather than the individual attorney. See *id.* Canon 2.

<sup>24</sup> The Code contains provisions advocating reasonable attorneys' fees, see *id.* EC 2-17 to 2-23, and there is at least one section stating that the individual lawyer has the responsibility of providing free representation to those unable to pay for it, see *id.* EC 2-25. Interestingly, however, the disciplinary rules following these sections are addressed to such matters as publicity, see *id.* DR 2-101, letterheads and law lists, see *id.* DR 2-102, and solicitation, see *id.* DR 2-103 to 2-105.

<sup>25</sup> *Id.* EC 2-26 to 2-29.

<sup>26</sup> *Id.* EC 2-26.

<sup>27</sup> William Kunstler and Charles Garry are perhaps the most notable of lawyers who make careers out of "unattractive" cases. Yet, there are numerous lawyers, such as ACLU contributing attorneys, who handle such cases as a normal part of their caseload.

<sup>28</sup> CODE, *supra* note 11, EC 2-30.

### *The Ethical Principle of Quality*

The ethical principle of quality is derived from portions of the Code that address the relationship between a lawyer and his client. A fundamental tenet of the Code is that no lawyer need agree to represent every person who enters his office.<sup>29</sup> Indeed, several sections set forth circumstances under which a lawyer is permitted or required to decline employment. As earlier noted, a lawyer is prohibited from taking a case for the purpose of harassing or maliciously injuring another person,<sup>30</sup> and he should not take a case if he fears that his own prejudices will have an adverse effect on its outcome.<sup>31</sup> The Code also requires a lawyer to avoid conflicts of interest<sup>32</sup> and any matters that he knows or should know he is not competent to handle.<sup>33</sup> Finally, in an attempt to assure consumers that legal services will be of sufficient professional quality, the Code urges lawyers to assist in the prevention of the unauthorized practice of law.<sup>34</sup>

The ethical principle of quality can guide a lawyer in developing a highly personal view of the lawyer-client relationship. In essence, every lawyer must provide competent service and put his clients' interests above his own. Therefore, once a lawyer takes on a client, he must represent that client zealously and within the bounds of law.<sup>35</sup> This requirement permits a lawyer serving as an advocate to assert any construction of the law favorable to his client that is not frivolous.<sup>36</sup> When serving as an advisor, however, a lawyer has a more sensitive role:

In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.<sup>37</sup>

This provision requires that a lawyer act "in a manner consistent with the best interests of his client,"<sup>38</sup> without inflicting "needless harm."<sup>39</sup>

Thus, the ethical principle of quality is client-centered. It looks to service of the interests of the client, unhampered by conflicts, personal feelings, or incompetence. It can guide lawyers in their development of a personal view of the lawyer-client relationship. Nevertheless, no provision in the Code requires a lawyer to choose one career over another or one client

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<sup>29</sup> *Id.* EC 2-26.

<sup>30</sup> *Id.* EC 2-30. *See also id.* DR 2-109.

<sup>31</sup> *Id.* EC 2-30 & EC 5-2.

<sup>32</sup> *Id.* Canon 5. *See also id.* DR 5-101.

<sup>33</sup> *Id.* DR 6-101. Note, however, that a lawyer may handle cases in areas in which he intends to become proficient. *Id.* EC 6-1.

<sup>34</sup> *Id.* Canon 3. For a discussion of moral bases for the canons, see Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975).

<sup>35</sup> CODE, *supra* note 11, Canon 7.

<sup>36</sup> *Id.* EC 7-4; *accord, id.* DR 7-102.

<sup>37</sup> *Id.* EC 7-8.

<sup>38</sup> *Id.* EC 7-9.

<sup>39</sup> *Id.* EC 7-10.



over another. Final resolution of these conflicts requires an understanding of the moral corollaries to the ethical principles.

#### INITIAL CHOICES AND MORAL PRINCIPLES

Although the Code provides some ethical guidance in the area of initial choice of career and clients, the lawyer interested in constructing a moral code also may benefit from an examination of certain moral principles. The discussion of the Code merely sets the tone for the elaboration of the moral principles. For purposes of this discussion, ethical principles are distinguished from moral principles by the arguments used to support each. Ethical principles are based on and supported by the Code. The moral principles herein examined are based on arguments outside the Code. The moral principles neither have nor are intended to have any disciplinary function. Rather, they are intended to serve as the basis for developing a personal moral code by which lawyers may be guided.<sup>40</sup>

#### *The Moral Principle of Availability*

There has been considerable controversy over the duty of lawyers to make their services available to society at large. Professor Bresnahan, for example, contends that lawyers should make themselves freely available: "The human community within which the vocation is pursued must be conceived as universal . . ."<sup>41</sup> Professor Fried, in contrast, believes that lawyers are entitled to make any initial choice they wish because of the nature of the lawyering profession:

The lawyer's liberty — moral liberty — to take up what kind of practice he chooses and to take up or decline what clients he will is an aspect of the moral liberty of self to enter into personal relations freely.<sup>42</sup>

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\* Several choices other than those discussed in this article also may have moral dimensions. As a student, for example, a person must make the choices of going to law school, staying there until graduation and practicing law after graduation. Once a job or client is taken, moral issues surround the theory and handling of a case and the decision whether to litigate or settle. Moral problems also are involved with the decision to withdraw services once engaged. These problems each have moral dimensions that may be distinct from the Canons, ethical considerations and disciplinary rules in the Code.

<sup>41</sup> Bresnahan, *Theology and Law: A Deeper Understanding of Vocation*, 7 *CAP. U.L. REV.* 25, 56 (1977).

<sup>42</sup> Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1078 (1976). See also Freedman, *Personal Responsibility in a Professional System*, 27 *CATH. U.L. REV.* 191 (1978). Freedman agrees with Fried that a lawyer must have great latitude in making initial choices:

In short, a lawyer should indeed have the freedom to choose clients on any standard he or she deems appropriate. As Professor Fried points out, the choice of client is an aspect of the lawyer's free will to be exercised within the realm of the lawyer's moral autonomy.

*Id.* at 199. Fried and Freedman base their position on a concept of "freedom" that seems problematic in two respects. First, it is standardless. Second, freedom carries with it responsibility, and some moral guidance is necessary. See, e.g., F. BERGMANN, *ON BEING FREE* (1977).

Although the views of Professors Bresnahan and Fried are at opposite extremes,<sup>43</sup> each view enjoys some support in the Code. Because both viewpoints are supported by the Code this leads to a paradox relative to the problems of initial choice: A lawyer cannot serve everyone or any selected group at the same time and be morally correct doing so. This apparent paradox complicates a lawyer's problems of initial choice, but may be resolved through an appreciation of the moral principles of availability and quality.<sup>44</sup> It is submitted that the views of both Bresnahan and Fried place excessive weight on the issue of availability and that, therefore, they are flawed because the ethical and moral principles only describe the lawyer-society relationship. A lawyer must also have an understanding of the lawyer-client relationship in order to make sound initial choices. Neither author discusses this relationship, except insofar as it affects a lawyer's conduct *after* he has become engaged by a client.

#### THE BRESNAHAN APPROACH

Professor Bresnahan apparently believes that the lawyer must open up his services to the whole world. This position finds some support in the Code<sup>45</sup> and, while extreme, may be explained by way of the following argument. In this country there is a maldistribution of wealth and resources. Lawyers are in a unique position to understand clearly and to influence the policies contributing to these inequities<sup>46</sup> and, by virtue of their training, possess special skills enabling them to assist people to understand and correct this imbalance. In today's increasingly complex society, access to legal services is a necessity. Therefore, it is argued, the lawyer has a moral obligation either to help restructure society<sup>47</sup> so as to ensure that all persons will be treated with equal dignity and compassion or, at the very least, not to aid in the perpetuation of the maldistribution of wealth and power.

The foregoing argument raises two interrelated questions. First, is there something special about the legal profession that morally requires an individual lawyer to make his services available to society at large? Secondly, should the burden to make legal services available be imposed on

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<sup>43</sup> It is not intended for this article to examine Professor Fried's and Professor Bresnahan's articles critically, nor is it asserted that the quotations present the totality of their viewpoints. The passages that are quoted have been selected because they represent the extreme ends of a continuum.

<sup>44</sup> Obviously, if all people had equal access to the legal system, it would make no difference whom a lawyer chose to represent. I accept the argument that equal access does not exist. See, e.g., J. AUERBACH, *UNEQUAL JUSTICE, LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); J. GOULDEN, *supra* note 5; M. GREEN, *THE OTHER GOVERNMENT (THE UNSEEN POWER OF WASHINGTON LAWYERS)* (1975); LAW, *AFTERWORD: THE PURPOSE OF PROFESSIONAL EDUCATION, IN LOOKING AT LAW SCHOOL* 205, 210-11 (S. Gillers ed. 1977).

<sup>45</sup> See notes 14-24 and accompanying text *supra*.

<sup>46</sup> Law, *supra* note 44, at 205-07.

<sup>47</sup> See *id.* at 212-13.

the legal system as a whole rather than on the individual lawyer?<sup>48</sup> Bresnahan presumably would maintain that the young lawyer, being a member of a privileged lot, owes a moral duty to the society that sustains him. In essence, then, the Bresnahan view embodies a quid pro quo: Society conferred a privilege on the lawyer, and now the lawyer must repay that debt by extending aid to all who seek it.

Although the ends of the Bresnahan extreme seem just, this approach might restrict the lawyer's moral autonomy by forcing him to make a choice that he might not make otherwise. Why, for example, should a young lawyer feel morally obligated to take a job with neighborhood legal services in order to help correct the imbalance of wealth and power in the United States?<sup>49</sup> It is submitted that there are at least three problems with the Bresnahan model. First, many young lawyers have taken jobs with neighborhood legal services organizations lacking an appreciation of the kinds of problems that they will face and eventually have left in order to pursue careers of greater intellectual interest.<sup>50</sup> Second, it is possible that, by increasing the availability of legal services in a society nearly overwhelmed by legalisms and formalities, neighborhood legal services organizations actually may polarize people further and exacerbate, rather than correct, the imbalance of wealth and power.<sup>51</sup> Finally, the Bresnahan mandate does not afford the young lawyer any freedom of choice.<sup>52</sup> Thus, to argue that it is morally appropriate to choose a job in the area in which the greatest need for legal services exists, which is a response to the problem of availability, assumes that such services are effective in alleviating this maldistribution. It might well be that if our young lawyer had chosen Staid & Stolid instead and became actively involved with a bar association or other public service group interested in equal justice he may have been able to more effectively reach these ends without serving these clients directly.

The adoption of the Bresnahan approach to availability would have ominous consequences. Given society's great need for legal services, lawyers forced to make themselves freely available constantly would be overextended. Paradoxically, there is no guarantee that free availability would

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<sup>48</sup> Fried, *supra* note 42, at 1079-80; see note 21 *supra*.

<sup>49</sup> Interestingly, a recent study suggests that there are not enough public interest jobs to satisfy the demand for them among young lawyers. See Erlanger, *Young Lawyers and Work in the Public Interest*, 1978 AM. B.F. RES. J. 83 (No. 1, 1978).

<sup>50</sup> Sandalow, *The Society of Jurists*, 23 LAW QUADRANGLE NOTES, 11, 13 (No. 1, Fall, 1978).

<sup>51</sup> Bellow, 2 N.I.C.M. JOURNAL 62 (Summer 1977).

<sup>52</sup> Another troublesome issue with the Bresnahan position is that in an overly litigious society, the last thing needed is more lawsuits. Indeed, the proliferation of lawsuits would be counterproductive if it resulted in clients being treated as "legal problems" rather than as individuals. It is submitted that an impersonal advocacy system would further perpetuate the social imbalance. See, e.g., Ayer, *Do Lawyers Do More Harm than Good*, 65 AM. B.J. 1053 (1979); Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 4 NLADA BRIEFCASE 106 (1977); Tribe, *Too Much Law, Too Little Justice: An Argument for Delegalizing America*, ATLANTIC 25 (1979).

result in either effective advocacy or a redistribution of wealth and power. Alas, it appears that society would fare no better if the legal system were to follow the opposite extreme, espoused by Professor Fried.

#### THE FRIED APPROACH

Professor Fried contends that it is morally permissible for a lawyer to choose clients based on wish or inclination and that the lawyer does a morally worthy thing given whomever he chooses.<sup>53</sup> In essence, he believes that since a lawyer cannot make his services available to everyone, his first duty is to himself. Although some support for this position may be found in the Code,<sup>54</sup> it is submitted that it does not follow from the arguments on which it is based. Fried claims, for example, that the moral foundation of the lawyer-client relationship is based on an analogue of friendship and a conception of self that requires individual moral autonomy. He further maintains that it is morally correct for a lawyer to represent clients of his own choosing since the right to make a choice is required by the nature of the profession. This argument goes too far, because it assumes that the advocacy system is fair and workable and that everyone has equal access to legal services. Moreover, it relies on the lawyer-client relationship as it exists after the initial choice is made. Fried's hypothesis therefore offers the young lawyer no assistance in making initial choices. Indeed, Professor Fried recognizes this shortcoming, but attempts to minimize it:

So much for the integrity of the relation once it has taken hold. But what of initial choice of client? Must we not give some thought to efficiency and relative need at least at the outset, and does this not run counter to the picture of purely discretionary choice implicit in the notion of friendship? The question is difficult but before considering its difficulties we should note that the preceding argumentation has surely limited its impact. We can now affirm that whatever the answer to this question, the individual lawyer does a morally worthy thing whomever he serves and, moreover, is bound to follow through once he has begun to serve.<sup>55</sup>

To say that "we can now affirm" that "the individual lawyer does a morally worthy thing whomever he serves" is to make a bare assertion.

It is submitted that Fried's analysis is flawed fatally in two respects. First, inadequate discussion is given to the concept of self, which is necessary for the development of the moral principle of quality. Second, the Fried position is based on a utilitarian argument that focuses too narrowly on the relationship of a lawyer to society.

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<sup>53</sup> Fried apparently places a high premium on a lawyer's freedom to choose clients according to his own wishes: "Indeed, when we speak of the lawyer's right to represent whomever he wishes, we are usually defending his moral title to represent whoever pays." Fried, *supra* note 42, at 1074. Similarly, "[j]ust as the principle of liberty leaves one morally free to choose a profession according to inclination, so within the profession it leaves one free to organize his life according to inclination." *Id.* at 1078.

<sup>54</sup> See CODE, *supra* note 11, EC 2-16 to 2-23; EC 2-26.

<sup>55</sup> Fried, *supra* note 42, at 1077-78.

By framing the problem of initial choice in utilitarian or quasi-utilitarian terms, the problem becomes merely one of availability. Using such language as "maldistribution,"<sup>56</sup> "efficiency and relative need"<sup>57</sup> and "the greatest good of the greatest number,"<sup>58</sup> Fried tailors his arguments so as to preordain their outcome. Even if it is conceded that a single lawyer cannot affect the maldistribution problem to any meaningful degree, however, the moral problems of initial choice persist. Although it is possible that a young lawyer can do more "good" for a "greater number" and be more "efficient" by working for a large metropolitan law firm than by working for neighborhood legal services, it is equally possible that the greatest good can be accomplished working for neighborhood legal services. Fried's analysis of initial choice is based on a conception which allows a lawyer to order his professional life according to any inclination because whomever the lawyer chooses is the morally correct choice. This argument is at best simplistic. Fried's approach could aid in the redistribution of legal services only if all persons had equal access to the legal system, in which case redistribution would be unnecessary.

It is not satisfactory to cast the moral principles of initial choice in terms of availability which examines only the lawyer's relationship to society under the approaches of either Bresnahan or Fried. The Bresnahan extreme could make lawyers so "available" that they would be ineffective, while the Fried extreme could perpetuate the current problems of maldistribution. Since it is obvious that a lawyer cannot both make himself available to everyone and exercise sole discretion, the moral principle of availability provides little guidance in the area of initial choice. It is suggested that the resolution of problems of initial choice can be aided greatly by an examination of the moral principle of quality.

#### THE MORAL PRINCIPLE OF QUALITY

As earlier discussed, it appears that the problems of initial choice cannot be resolved by looking solely at the lawyer's relationship to society. To cast these problems in utilitarian terms is to miscast the question. Any attempted resolution along these lines will lead to results reached by Bresnahan and Fried. In order for our young lawyer to fully evaluate his choices, he must examine the lawyer-client relationship and inquire into the lawyer's identity and role.<sup>59</sup> The moral principle of quality therefore is concerned with both need and effectiveness. It is intended to help the

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<sup>56</sup> *Id.* at 1076.

<sup>57</sup> *Id.* at 1077.

<sup>58</sup> *Id.* at 1061.

<sup>59</sup> See, e.g., Himmelstein, *Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U.L. REV. 514 (1978); Shaffer, *supra* note 34, at 731-37; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS L. REV. 1 (1972).

young lawyer determine at what job and with which clients he can be most effective as a lawyer and person.<sup>60</sup>

In addressing the problems of choice, several commentators have argued that a respect for the dignity of each member of society is essential to society in general and to the lawyer-client relationship in particular.<sup>61</sup> Although certain of these commentators would give the lawyer absolute moral autonomy,<sup>62</sup> all appear to agree that in order for a lawyer to respect his clients, he must first respect himself. These analysts of the lawyer-client relationship argue against paternalism and against the moral dominance of clients by lawyers.<sup>63</sup> All, however, discuss the role of the lawyer only as it exists after the lawyer-client relationship has been formed and, therefore, fail to address the problems of initial choice encountered by young lawyers. What is it about lawyering that places people in the uncomfortable position faced by our young lawyer?

By virtue of their roles in our increasingly complex society, lawyers frequently are confronted with disturbing choices.<sup>64</sup> Society has placed the lawyer in a delicate position: The majesty of the law promises substantive justice, but the reality of the legal system seems to deny attainment of that end.<sup>65</sup> Young graduates are predisposed to believe that the ideal law practice is the large private firm with large corporate clients. This ideal presents a confusing picture to young lawyers and causes conflicts.<sup>66</sup> It has been observed, for example, that due to the nature of being a professional, lawyers may engage in "role-differentiated behavior"<sup>67</sup> and exhibit a duality of personalities.<sup>68</sup> Lawyers often perceive a distinction between their roles and identities<sup>69</sup> and, as a consequence, remove moral decision-making from the lawyering process.

It is submitted that the lawyer as professional is not and should not be distinct from the lawyer as person. A lawyer cannot be of sound moral

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<sup>60</sup> See generally C. ROGERS, ON BECOMING A PERSON (1961). Although this article does not address directly whether or not a lawyer can be a good person, the tenor of the article is that this possibility is not excluded. It is further suggested that one way of being both a good lawyer and a good person is for the lawyer to have a congruence between his personal self and his professional self. See Tomain, *Book Review*, 53 N.Y.U.L. REV. 692 (1978).

<sup>61</sup> See generally Bresnahan, *supra* note 41; Freedman, *supra* note 42; Fried, *supra* note 42; Shaffer, *supra* note 34.

<sup>62</sup> See Freedman, *supra* note 42, at 199; Fried, *supra* note 42, at 1074.

<sup>63</sup> Shaffer, *supra* note 34. See also Brown & Shaffer, *Toward a Jurisprudence for the Law Office*, 17 AM. J. JURIS. 125 (1972).

<sup>64</sup> See notes 4 & 44 *supra*.

<sup>65</sup> Law, *supra* note 44.

<sup>66</sup> See, e.g., T. SHAFFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* (1977); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968); Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J.L. REF. 248 (1975); Lamb, *Professional Schools: Cram Courses in Tension and Trauma*, N.Y. Times, Nov. 20, 1977, § 6 (Magazine).

<sup>67</sup> See Wasserstrom, *supra* note 59.

<sup>68</sup> See Himmelstein, *supra* note 59.

<sup>69</sup> See Shaffer, *supra* note 34.

fibre in his professional life unless he conducts his personal life according to high moral standards. This does not necessarily mean, however, that a lawyer cannot do something for a client that he would not do for himself. Indeed, a lawyer has no right to bind clients to his own highly stylized and concrete moral precepts. Recognizing that a truly workable code is fluid and process-oriented, rather than static, the moral principle of quality asserts that a lawyer acts morally when he actively seeks to lead a moral life.

Upon completion of his studies, the young lawyer has no clients and no job. What he needs at this point is a moral basis upon which to make initial choices as to both. It is suggested that the lawyer must engage in the process of reflection and introspection by asking himself certain questions. What is my role as a person? What is my identity as a person? What is my role as a lawyer? What is my identity? Are these facets of my life congruent? Should they be? Can they be?<sup>70</sup> What do lawyers do? How do I, as a lawyer, as a person, fit into the socialization process?<sup>71</sup> What are my goals, talents, ideals, values, aspirations as a person and as a lawyer? Is there a need for my services? What services can I render? What services can I render effectively, efficiently? If I do not have answers to some of these questions, do I want answers? If I do not want answers, why do I not want them? If I do want answers, when, how and where will I get them? Although the task of answering these questions may be enormous, it is submitted that the exercise is worthwhile because its primary value lies in ensuring that the questions actually be asked. It is doubtful that definitive answers will come, and those that do will change as circumstances change. The important thing is to engage in an active search in formulating moral questions and in attempting to answer them rather than hiding behind the moral shield lawyers sometimes call their "professional role."

Next, the lawyer must examine and question his relationship to others. How do I relate to others as a person? How do I relate to others as a lawyer? How committed am I to others? Do I respect the views, values, goals, talents and aspirations of others? Am I willing to be responsible to others and willing to make them responsible for themselves? Am I committed to their growth or only my own?

To complete this process, the lawyer's self-inquiry should be completed with an examination of his relationship to society as both a professional and a person. How do I view my relationship to society at large? To my community? Do I have a sense of obligation beyond myself, family, friends, or clients? How do I see myself as a member of society, as a lawyer, and as a person?

The problems of initial choice are not morally neutral. They cannot be resolved by reference to "any standard." Choices cannot be made with-

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<sup>70</sup> Professor Freedman argues in favor of role differentiation. See Freedman, *supra* note 42, at 196.

<sup>71</sup> See G. BELLOW & B. MOULTON, *supra* note 6, at 1-34.

out considering how they will affect the self, others, and society generally. Lawyering is the rendering of personal services which means interpersonal relationships. Although it has been argued that lawyers must know themselves first,<sup>72</sup> it is submitted that one can only know himself if he also knows his neighbor and vice versa. One can know himself and his neighbor, therefore, only if he attempts to achieve both ends simultaneously.<sup>73</sup> One thus neither presupposes a concern for self to the exclusion of others nor vice-versa. The lawyer-client relationship is a synergistic one. A lawyer who respects himself and chooses a career and clients he can respect will benefit himself and society as a whole: The whole is greater than the sum of the parts.

What guidance does the moral principle of quality give the young lawyer? In essence, it assures him that if he makes decisions out of respect for himself and his clients, and with a view toward personal and interpersonal growth, he will be following an approach that is highly moral.<sup>74</sup> Rather than addressing the lawyer's relationship to society, which is the pitfall of the moral principle of availability, the moral principle of quality requires the lawyer to engage in the process of integrating his professional and personal selves so as to understand his relationship to clients and society. When faced with problems of initial choice, therefore, a lawyer should seek to determine which career and clients will enable him to make optimal use of his talents, grow in a personal sense and develop interpersonal relationships with clients which allow both parties to understand their values. Those clients and those careers that assist the lawyer's development of his person and enable the lawyer to assist clients in the development of their person are the right clients and careers in the moral sense.

The moral principle of quality, then, asserts the following: It is morally required of the lawyer when faced with problems of initial choice that

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<sup>72</sup> Professor Fried stresses the need of a lawyer to know himself:

Before there is morality there must be the person. We must attain and maintain in our morality a concept of personality such that it makes sense to posit choosing, valuing entities-free, moral beings. But the picture of the moral universe in which my own interests disappear and are merged into the interests of the totality of humanity is incompatible with that, because one wishes to develop a conception of a responsible, valuable, and valuing agent and such an agent must first of all be dear to himself. It is from the kernel of individuality that the other things we value radiate. The Gospel says we must love our neighbor as ourselves, and this implies that any concern for others which is a *human* concern must presuppose a concern for ourselves. The human concern which we then show others is a concern which first of all recognizes the concrete individuality of that other person just as we recognize our own.

Fried, *supra* note 42, at 1068-69 (footnotes omitted).

<sup>73</sup> A possible objection to this argument is that people cannot move along two paths at the same time and that one must therefore know himself before he can know someone else. It is suggested, however, that this assertion ignores reality. The young lawyer is not starting with a *tabula rasa*. Rather, he has at least 25 years of experience in trying to know himself and others.

<sup>74</sup> See, e.g., C. ROGERS, *ON BECOMING A PERSON* (1961); T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 234-76 (1976).



choices be made which best enable the lawyer to grow in a personal sense and which best enable the lawyer to grow in interpersonal relationships which allow both lawyer and client to realize their search for values and meaning. This principle encourages the lawyer to engage in a search for values and meaning in relationships with others. Clearly there can be no concrete answer to the questions posed by initial choice. The guiding principle is the willingness of the lawyer to be open to growth in the personal, interpersonal, and transcendent senses. Likewise, it is morally inappropriate to choose a client or career which threatens growth.<sup>75</sup>

### CONCLUSION

Is the lawyer morally at fault if he does not lead his life in this way? The best that can be said is that the lawyer is living amorally. Is moral blindness a defense? I would argue that the lawyer acts immorally when he refuses to be cognizant of these moral issues.

Let us return to our tale. The outcome of choosing a career as a poverty lawyer in a neighborhood legal services program is not of necessity worthy of moral approbation anymore than one can say that choosing a career as a Wall Street lawyer is immoral. Either choice is moral or immoral depending on how it was reached. Let us give our young lawyer more of a personality. He is a member of the board of editors of his Law Review and a member of the Order of the Coif. He received the highest grades in the law school in every tax course he chose. He is an extremely shy individual, afraid to address people. His work experience includes two summer clerkships with private firms similar to Staid & Stolid. He never took any trial advocacy courses nor has he any demonstrated advocacy skills. Rather, he shows an aptitude for rigorous, thorough research. As far as values and interests, the young lawyer is adept at perceiving and analyzing rather complex business deals and believes in a strong system of laissez-faire capitalism. The young lawyer is less comfortable solving trial-type prob-

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<sup>75</sup> An obvious objection to this part of the analysis is that during representation a client may ask a lawyer to do something that the lawyer finds morally reprehensible, such as disinherit a child. The mere fact that the lawyer has chosen the client does not absolve the lawyer from future moral decision-making. See note 40 *supra*. Nonetheless, the moral code described here is not a code of fixed rules. Rather, this code is based on the precept that the lawyer respects himself and his client and that the lawyer has chosen to live an active moral life. This active moral life respects the person and values of the client. Decision-making during the period of representation is process-oriented. It involves a moral dialogue similar to that described by Shaffer. See Shaffer, *supra* note 34. It is devoid of paternalism or moral dominance. Its hallmark is collaboration rather than control. Thus, the lawyer who believes that it would be morally wrong for him to disinherit a child does not impose this belief on his client. Rather, he acts morally when he explores, together with the client, the reasons and consequences of such a plan. Thus, the end is less relevant than the means chosen. The moral principle of quality simply requires the lawyer to lead an active moral life, respecting the client and himself. See Cox, *supra* note 3, at 13-14 (1978-1979). If irreconcilable moral conflict should arise between the lawyer and client, resignation may be the only alternative, assuming that there are other attorneys available to represent the client. See *id.* at 22-23.

lems and shows an irritability with mundane legal issues. The point is simply that our young lawyer might very well commit a moral transgression by taking a job as a litigator with neighborhood legal services. The job with neighborhood legal services may put the lawyer in an environment that inhibits his personal growth, hampering his ability to help clients, which in turn interferes with both the lawyer's and clients' search for values and meaning in their lives. Such a career can become a block to the attainment of the lawyer's highest aspirations, since it would not make effective use of the lawyer's talents and would prevent the lawyer from pursuing his values. A career becomes, in effect, something worse than "just a job." By involving the lawyer with tasks with which the lawyer has no empathy or understanding of his clients, the job becomes a career, destined to constrict personal and interpersonal moral development.

He may have a strong moral conviction favoring redistribution of legal services to people who do not have ready access, yet he may be more effective by working through other channels. Perhaps as an effective Wall Street lawyer the young man is in a better position to exercise his talents toward the social ends he seeks. By choosing neighborhood legal services as a career, the lawyer may be wasting his talents and may be placing himself in a situation where little or no growth is possible. Contrariwise, a position with Staid & Stolid may have very positive effects.

No one can claim to know what motivates initial choices. The Wall Street-bound lawyer may decide after two years of large firm practice to change to neighborhood legal services. This may be tempting fate; it may be trying to get the camel through the eye of the needle—I do not know what the particular individual's talents, interests, or values are. Nor may the individual himself know these things. This makes the choices more difficult, more subtle, and more sophisticated. It also leaves more room for moral decision-making. However, the fact that numerous possibilities exist does not negate the argument that the problems of initial choice are moral ones, the resolution of which depends not on the question of allocation alone but on an assessment of one's unique talents, desires, motivations and values, together with a commitment to refine those talents, desires, motivations and values vis-a-vis a relationship with one's clients. The fundamental moral determinant, then, is one's commitment to a search for values. This search takes into account one's own unique talents and an assessment of how an individual can develop those talents through one's career and client choices. This reflects a process of developing one's moral code and a commitment to help others develop theirs. As lawyers we are members of a helping profession, and possess skills necessary for an understanding of legal processes. We as lawyers can realize the aspirations of this helping profession if we make a commitment to use our skills and talents in a manner that also helps the client reach his aspirations. People are resources to each other and the lawyer who chooses to live his life according to individual inclination has denied others access to this resource and has denied himself an opportunity to utilize these talents to their fullest ad-

vantage. For a lawyer to decide to take a client or a job without reference to how his talents can best be used and moral goals realized is to waste a valuable resource, as well as a denial of the lawyer's moral worth.