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Ethos and Conscience—A Rejoinder

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Abstract

In “Wanted: An Ethos of Personal Responsibility,” Professor Kleinberger sought to prompt debate about the moral preconceptions of the legal profession. Professor Morawetz responded in his essay, “Layers and Conscience.” This article responds, commenting on Morawetz’s arguments that (1) excessive pessimism about lawyer morality is unfounded and counterproductive; (2) the public’s antipathy toward lawyers is inevitable given the role lawyers play in our society; (3) codes of ethics can and do have an uplifting influence on the morals of lawyers; and (4) law schools can and do train moral judgment.

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ETHOS AND CONSCIENCE—A REJOINDER

by Daniel S. Kleinberger

In "Wanted: An Ethos of Personal Responsibility" I sought to prompt debate about the moral preconceptions of our profession. Professor Morawetz has been good enough to begin that debate with his essay, "Lawyers and Conscience."[1] I wish now to continue the discussion by responding to what I see as Professor Morawetz's four main substantive[2] points: (1) excessive pessimism about lawyer morality is

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1. Morawetz, *Lawyers and Conscience*, 21 CONN. L. REV. 383 (1989).

2. Professor Morawetz also criticizes two parts of my analysis from a technical perspective. He terms paradoxical the use of Hobbes and his theory "to illustrate the need for moral reflection," and he characterizes the campaign manager analogy as "peculiar" and unpersuasive. *Id.* at 292-93. The Hobbes problem is, I think, a minor one. I chose Hobbes for his descriptions of the uncivilized state, which have always seemed to me especially evocative and scary. The descriptions lend color and emotional content to more intellectual formulations such as "ensure the domestic tranquility." I do not seek to make any other use of Hobbes' theory.

The issue of the campaign manager analogy is more significant. Professor Morawetz asserts that "the processes and values [involved in lawyering and campaign managing] are too dissimilar" for the comparison to be persuasive. *Id.* at 393. He supports this conclusion by asserting that the services of the campaign professional are essential to an effective use of the democratic decisionmaking process, and that, consequently, the technical experts "should forestall prejudging" their principals because "withholding resources from candidates based upon moral preconceptions can be compared to a kind of censorship." *Id.* Morawetz's thesis is precisely analogous to what I have termed the "servant of civil liberties" argument. *See* Kleinberger, *Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*, 21 CONN. L. REV. 365 (1989). Lawyers, it is claimed, should forestall prejudging their principals, because lawyer assistance is essential to effective use of the legal system, and withholding resources from clients comes dangerously close to the suppression of civil liberties.

There are of course differences in the values reflected in the legal system and those which are reflected in the electoral system, e.g., due process vs. the sovereignty of the people. There are also differences in the nature of the decisionmaking process within the two systems, e.g., in the legal system, argument based on formal reasoning and formal determination of facts; in the political system, no formal fact-finding, argument often based on ideology, opinion or worldview. But these differences do not undercut the fundamental parallel between the two systems. Each system constitutes a system for making decisions. The decisions made in the respective systems, and the very process of decision-making in both systems, embody the most cherished values of our society. In both the legal and the electoral systems, the process of decision-making has become so complicated that lay participants *must* have the assistance of technical experts. If it is logical for lawyers to use the system they serve to justify ethical neutrality, it is likewise logical for campaign managers to do so. In our culture, however, we associate the campaign professional with the ends he or

unfounded and counterproductive; (2) the public's antipathy toward lawyers is inevitable given the role lawyers play in our society; (3) codes of ethics can and do have an uplifting influence on the morals of lawyers; (4) law schools can and do train students in moral judgment.[3]

I. PESSIMISM VS. REALISM

Professor Morawetz warns of the danger of: "see[ing] lawyers as beyond change and beyond redemption, [of] see[ing] the members of the profession as self-selected for moral unresponsiveness. Under such an assumption, there is no reason to urge reform or to admonish lawyers to heed morality since lawyers are assumed to be incapable of doing so."[4]

It would be self-contradictory, I agree, to preach redemption to those for whom sin is inevitable. But it would be comparably useless to preach virtue without taking into account the very real, deeply rooted aspects of our profession that conduce toward sin.

As I have tried to show, the profession's ideology invites moral insensitivity.[5] Training in the profession's academies tends to mothball and to devalue whatever inclination would-be lawyers might have had toward thinking in moral terms.[6] In what is increasingly the business rather than the profession of law, economics makes moral awareness a costly inconvenience.[7]

These observations do not mean that lawyers cannot be moral. They do, however, point to ideological, institutional and material impediments to lawyer morality. They warn, I believe, that mere proselytizing will not work.[8] To make sustainable improvements, we must address the underlying impediments.

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she chooses to serve.

3. Morawetz, *supra* note 1.

4. *Id.* at 387.

5. Kleinberger, *supra* note 2, at 368-69.

6. *Id.* at 378-80; *see also infra* note 30.

7. *Id.* at 377-78.

8. Concern over lawyers' ethics has produced a considerable amount of such proselytizing. For instance, in August 1988, the ABA recommended that local bar associations consider adopting creeds of professionalism. American Bar Ass'n Annual Meeting, 57 U.S.L.W. 2094, 2095 (Aug. 16, 1988). The President of the ABA opened the new year by calling "professionalism issues . . . nearly a universal concern." Raven, *Professionalism: Meeting the Challenge with New Resolve*, 75 A.B.A. J. 8 (1989).

II. THE PUBLIC'S INEVITABLE ANTIPATHY

Professor Morawetz also cautions against overemphasizing the popular disenchantment with lawyers. As Morawetz states, the "unpopularity of lawyers is endemic to the role they play, and the role is, in turn, endemic to organized society."[9]

With this observation I agree, but it seems to me that the observation leaves unexplained the profession's own recognition that "things are getting worse."[10] Moreover, the public's antipathy seems to be changing character. Ethics complaints are mounting, as are malpractice claims against attorneys.[11]

Perhaps these objective manifestations result from the "specific cultural, social, and economic conditions" that Professor Morawetz considers at least partially beyond the profession's control.[12] Equally likely, however, is that lawyer conduct has changed. Concern for one's standing with colleagues used to function as a check on abusive conduct. Today, the explosive increase in the size of the bar has virtually eliminated professional reputation as a safeguard in most communities.[13]

At the same time, the temptations toward abusive conduct have increased. The "cuckoo of acquisitiveness" is truly out, and lawyers increasingly and consciously shape their conduct in reference to "the bottom line."[14] There is also the problem of increasingly abusive tactics of litigation. Although frivolous lawsuits may result in Rule 11 sanc-

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9. Morawetz, *supra* note 1, at 395.

10. *See* Leighton, *Incivility Breeds Disrespect*, 45 BENCH & B. MINN. 3 (July 1988); Miner, *Lawyers Owe One Another*, Nat'l L.J., Dec. 19, 1988, at 13 ("lawyer to lawyer dishonesty seems to be on the rise").

11. Kleinberger, *supra* note 2, at 365-66. Legal malpractice claims were relatively rare until the mid-1970s. Since that time, "there have been as many reported legal malpractice decisions as in the entire history of American jurisprudence. In fact, during the last ten years there have been four times as many decisions as in the previous decade." Mallen, *The Profile of Legal Malpractice Liability*, in LAW FIRM LIABILITY INSURANCE CRISIS: PRACTICAL APPROACHES FOR A DIFFICULT MARKET 3 (1986).

12. Morawetz, *supra* note 1, at 395.

13. Leighton, *supra* note 10, at 3.

14. The distorting influence of the "bottom line" is so great that at least one law firm has found it necessary to remind itself in writing that: "We reject . . . the concept that the practice of law is to be shaped by a profit orientation which diverts and obstructs us from the achievement of our professional goals." Gering, *Law Firms Adopt Credos*, 75 A.B.A. J. 56, 57 (1989). The statement is from the firm credo adopted by the Seattle law firm of Ryan, Swanson & Cleveland. The credo goes on to state: "We view our ultimate objective as the rendering of service, and the making of profit is only a component, albeit an important component, in the pursuit of that objective." *Id.*

tions,[15] it may take a saint (or at least someone morally aware) to eschew the tactics of "hard ball" and "scorched earth."[16]

I do not contend that greed and professional "hard ball" are new to the profession. I do suggest that they may be more prevalent today, and that, to growing numbers of lawyers, greed as an element of professional decisionmaking and "Rambo" as a model of professional conduct are coming to be viewed as *legitimate*. If the temptation toward misconduct is greater, and if the social restraints are less than heretofore, then the moral sensitivity of individual lawyers is now more important than ever.[17] Indeed, the public's dislike of lawyers is fundamentally more than a reflection of "the role they play."[18]

III. THE EFFICACY OF CODES

Professor Morawetz strongly disputes my contention that codes of ethics are largely ineffective in stimulating moral sensitivity. Morawetz argues that "[t]he effect of codes is not necessarily exhausted by the process of disciplinary enforcement and the rules are not necessarily moral minima. At least for some lawyers, codes will affect attitudes, and therefore behavior, by defining a standard of conscientiousness and exhorting lawyers to follow it."[19]

In theory, I agree, but in practice, Professor Morawetz's theory is rarely realized. Lawyers, even those most centrally involved in debates on lawyer morality, tend to regard codes as mere rules of conduct. For example, Professor Geoffrey Hazard, Reporter for the Kutak Commis-

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15. *See* Oliphant, *Rule 11 Sanctions and Standards: Blunting the Judicial Sword*, 12 WM. MITCHELL L. REV. 731 (1986). Some commentators believe that Rule 11 may be chilling valid claims. *See* Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems In the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987).

16. Judge Miner recently wrote: "[M]y teeth are set on edge by the Wyoming lawyer who said that his object is battle, and by the Cleveland lawyer who said that today 'litigation is war, the lawyer is a gladiator, and the object is to wipe out the other side.' " Miner, *supra* note 10, at 14 (quoting Margolick, *At the Bar: Rambos Invade the Courtroom*, N.Y. Times, Aug. 5, 1988, at B5, col. 1). Even though the majority of lawyers are not litigators, the profession still takes its tone from the litigation context. Kleinberger, *supra* note 2, at 367 n.12. As Professor Morawetz states, "The theme of legal representation is that of victory and defeat, rather than that of harmony and cooperation." Morawetz, *supra* note 1, at 394.

17. J. KULTGEN, ETHICS AND PROFESSIONALISM 62, 77-78 (1988) (the professional ideal of service is an important counterforce to the self-interested individualism flourishing in society).

18. Morawetz, *supra* note 1, at 395. *See also* Reavley, *A Perspective on the Moral Responsibility of Lawyers*, 19 TEX. TECH L. REV. 1393 (1988) (public disfavor is in part justified by improper tactics and by a disregard for "the larger moral obligations to society").

19. Morawetz, *supra* note 1, at 386-87.

sion, recently discussed the propriety of an ex parte communication by a lawyer to the judge in the Drexel Burnahm Lambert, Inc. litigation.[20] Although noting that the judge considered the phone call clearly improper, Professor Hazard turned a lawyer's eye on three separate codes of conduct and concluded: "When these rules are carefully *parsed*, the perhaps surprising conclusion is that the lawyer's call to Judge Pollack was not a violation of the professional rules."[21]

In my experience as a member of a local bar disciplinary committee, Professor Hazard's approach is far more recognizable than Professor Morawetz's aspirations.[22] Similarly, most law schools approach the subject of ethics from a practical angle: "Few [professional] schools devote entire courses to professional ethics. The major exceptions are law schools, but the emphasis is on [the] ABA's disciplinary rules, which have the force of law rather than of conscience."[23]

Professor Morawetz himself provides the best evidence for the proposition that codes of ethics rarely inspire. He notes that the ABA's 1969 Code of Professional Responsibility contains not only disciplinary rules but also ethical considerations. He implies that the existence of formal ethical considerations "makes clear" that a code of ethics can rise above the minimalist level, and can elucidate, define and exhort.[24] Even assuming that the Code and its "ECs" once served such a function, the Code is old news. The profession's most recent distillation of its ethical ideals is the Model Rules of Professional Conduct, and the Rules have done away with the ethical considerations of the Code.[25]

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20. Hazard, *Ex Parte Talk Isn't Always Plainly Wrong*, Nat'l L.J., Nov. 21, 1988, at 15.

21. *Id.* (emphasis added).

22. It is true that the ABA has called upon local bar associations to adopt creeds of professionalism, but the very resolution that did so "carefully point[ed] out . . . that such a creed would neither supersede existing disciplinary codes or the ABA's own Model Rules of Professional Conduct nor alter existing standards of conduct for imposing negligence liability on lawyers." American Bar Ass'n Annual Meeting, 57 U.S.L.W. 2094, 2095 (Aug. 16, 1988). Even when lawyers talk of aspirations, their thoughts are never far from questions of enforceable sanctions.

23. J. KULTGEN, *supra* note 17, at 151. The profession itself has perhaps inadvertently reinforced this "minimalist" orientation by requiring that students pass a multiple choice exam on lawyers ethics as a prerequisite for bar admission. Success on the exam requires an understanding of the rules stated in the Code of Professional Responsibility and the Model Rules of Professional Conduct. Students, naturally enough, seek law school ethics courses that will prepare them to take the exam. I overheard a student in my law school recently advising a colleague to avoid taking Professional Responsibility with Professor X. "S/he asks a lot of uncomfortable questions about what you think is right, and never spends any time teaching you the rules for the exam."

24. Morawetz, *supra* note 1, at 386 n.17.

25. The Rules do contain Comments, but the Comments do not play the same supplemental, admonitory role as did the Ethical Considerations of the Code. "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are

IV. THE MORAL EDUCATION OF LAW STUDENTS

The "de-moralizing effect" of a law school education has little, if anything, to do with "teachers who are committed to an amoral model and who teach evasion" or with "students [who] normally lack misgivings or conscience."[26] The impediments to moral sensitivity result—almost as a byproduct[27]—from the traditional law school curriculum and pedagogy.

In the "Ethos" essay, I suggested that law schools could contribute to the moral development of their students by letting "the skills of fact determination, analysis, analogy, and distinction focus for a time on the profession itself."[28] Here I want to give some examples of how this focus might work. First, however, I would like to note an additional impediment to effective moral discourse with law students. Most students, I believe, arrive at law school with very little experience or expertise in the rigorous discussion of moral issues.[29] What students do feel relatively confident about is their ability to do "book reports"—i.e., to read the assigned text and then report back a summary of the important points. For many students this type of confidence is central to their self-concept; skills of this sort are part of the reason they (and their friends and families) believe they will be good lawyers.

In the first weeks of law school, however, this confidence disappears. "Book reports" that would suffice in college are shown in the law school classroom to be shallow, inapposite or simply wrong. Even if the professor takes care to make the disabusing process as gentle as possible, analysis becomes an arena of anxiety rather than confidence. It is no longer safe to assume one's competence in intellectual discourse. Clearly this is no time to start voicing opinions about morality, an area in which the typical student has little analytic expertise.

Despite this problem, and others discussed in the "Ethos" essay,[30] there are at least two ways in which law schools can effectively help students scrutinize their future profession and their future roles. Most

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intended as guides to interpretation, but the text of each Rule is authoritative." MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983).

26. Professor Morawetz states that my "description [of law school education] sometimes comes close to embodying these assumptions." Morawetz, *supra* note 1, at 387.

27. This "by-product" argument is rather mild compared to, for example, the comments of Karl Llewellyn pertaining to the function of the first year of law school. *See* Kleinberger, *supra* note 2, at 378 n.67.

28. *Id.* at 381.

29. *Id.* at 380 n.73.

30. *Id.* at 378-80.

directly, the schools can teach courses about the role of the lawyer. Such courses would be an amalgam of sociology, psychology and philosophy. An example is provided by the "Work of the Lawyer" seminar developed by Professors Hamilton and Janus and now taught in several sections at the William Mitchell College of Law.[31] That course encourages students to recognize the moral issues inherent in professionalism and to pay attention to their own moral sensibilities.

Courses about the role of the lawyer can also adopt a more traditional approach, focusing on legal doctrines. While a law student, I had the good fortune to take a seminar, taught by Professor Jay Katz, on the law of informed consent. The seminar addressed the relevant legal doctrines in both the doctor-patient and lawyer-client contexts. While legal principles typically provided the starting point for discussion, just as typically the discussion expanded to consider moral questions such as autonomy, paternalism, and the obligations inherent in expertise. The "consciousness raising" accomplished by that course continues to influence the way I approach my clients and my profession.[32]

As Professor Morawetz notes, it is also important to integrate the discussion of moral issues into traditional classes.[33] I tried that recently in a class on Business Organizations. We had been discussing the traditional corporate law doctrine that holds that directors of a corporation should concern themselves with making profits for the shareholders, and not with making the world a better place in which to live.[34] I posed this hypothetical:

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31. According to its most recent syllabus, the course studies "the often conflicting moral, professional, financial, personal and political imperatives inherent" in the work of the lawyer. Syllabus for *Work of the Lawyer*, William Mitchell College of Law, Spring Semester 1989. Topics include: the law school experience, methodology of examining the lawyering experience, paternalism, problems of control and manipulation, women in the law, lawyers and social justice, and lawyer and self.

32. For reasons explained previously, *see supra* notes 20-21, I do not regard the existence of separate courses on ethics as especially promising.

33. Morawetz, *supra* note 1, at 388.

34. *See, e.g.*, Dodge v. Ford Motor Co., 204 Mich. 459, 507, 170 N.W. 668, 684 (1919) (unlawful to withhold dividends so as to support the controlling shareholder's benevolent wish to make cars affordable for the average American). This doctrine, however, has been gradually eroding. *See, e.g.*, Shlensky v. Wrigley, 95 Ill. App. 2d 173, 181, 237 N.E.2d 776, 780 (1968) (refusal to play night baseball because it would be "bad for baseball" not actionable unless decision involves fraud or waste). In fact, in at least one jurisdiction, statutory change has abolished the doctrine. *See* MINN. STAT. § 302A.251(5) (West Supp. 1989) (in making decisions the directors may consider "the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders").

Assume you are counsel to a multinational corporation which is incorporated in a state which follows the traditional doctrine. The chair of the Board of Directors seeks your help, telling you that: (1) the Board believes that the corporation's commercial involvement in the racist South African economy is morally wrong; (2) the Board wishes to pull the corporation out of South Africa without delay; (3) the Board's best economic estimate is that, both in the short and long term, such a pullout would cost the corporation money. The chair tells you that she and her fellow directors are willing to divest, but they do not want to be exposed to personal liability in a shareholders derivative suit.[35] The chair asks you whether you would help put together a disingenuous paper trail so that the directors' collective act of conscience will not open them to personal liability. Assuming that you agree with the chair about the immorality of economic involvement in South Africa, should you agree to help?

One student quickly and emphatically answered yes. To that student I then posed the following hypothetical:

Assume you are a lawyer advising the National Security Council. A dedicated Marine Colonel, who is attached to the Council, seeks your help and tells you that (1) Congress has shortsightedly chosen to abandon a group of Central American freedom fighters whose continued viability depends on receiving support from the U.S.; (2) by the time Congress recognizes the error of its ways the cause of freedom will have suffered significant injury; (3) he and several colleagues have devised a method of providing stop-gap aid to the freedom fighters. The Colonel asks your help in providing a disingenuous paper trail which will protect the plan from premature disclosure, and his colleagues and himself from personal liability. Assuming that you agree with the Colonel's views on the importance of the freedom fighters and the errors of the Congress, should you provide the Colonel the assistance he seeks?[36]

The resulting discussion used the full panoply of techniques of legal analysis, and did more than merely illustrate the complexity of the

35. The theory behind such a suit would be as follows: by considering morality instead of the economic best interests of the corporation, the directors will have breached their duty of care (and possibly loyalty) to the corporation; that breach will have damaged the corporation. Shareholders, acting on behalf of the corporation, will seek to recover from the directors the damages proximately caused by the directors' breach of duty.

36. The two hypotheticals are not completely analogous. As the student who responded to the South Africa hypothetical pointed out, there is a difference between lying to cover up conduct which is improper under the civil law, and lying to cover up criminal conduct. Still, enough parallels exist to provoke thoughtful discussion.

means-ends debate. When a substantive course devotes the scarcest of resources, class time, to a discussion of moral concerns, the message sent is that such concerns are worthy of attention in the study and, impliedly, in the practice of law.

CONCLUSION

The best way to conclude is to thank Professor Morawetz for his comments and to state a principle on which he and I clearly agree: "All of us are responsible for the consequences of our conduct. If we play a role in a larger system, we must be able to justify both the role and the system."[37]

37. Morawetz, *supra* note 1, at 395.

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