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# ADVOCACY AS MORAL DISCOURSE

THOMAS L. SHAFFER†

The freedom in which, in his distress, every man stands before God must not be disturbed. If, therefore, he is persuaded to overthrow the results of his reckoning without being first persuaded of the wrongness of his manner of reckoning; if his earnest determination be deprived of its objects without first being provided with its proper object; if he is made superficial and careless and muddleheaded where he had previously been strict and precise; then he is simply disturbed and led astray and hardened, and stumbling blocks and occasions of falling are piled up in his path. What he needs, however, is to be persuaded to break through, with the same earnestness and with the same determination to the place where—to the pure all things are pure.<sup>1</sup>

Advocacy at its best is a form of reconciliation. It reconciles the advocate with those whose champion he proposes to be. It reconciles the advocate with his hearers. It reconciles the person whose cause is advocated with the persons who hear advocacy. It brings to community life a new sense of the interests of those the community neglects. It seeks to make things better. It is moral discourse.

After King David took Bathsheba, the wife of Uriah the Hittite, and arranged the murder of Uriah, the Lord God sent his prophet Nathan to the king. Nathan was sent to decry the injustice David had done to Uriah. "The sword shall never depart from your house," Nathan said to David. God, he said, would "raise up evil against you out of your own house; and . . . take your wives before your eyes, and give them to your neighbor . . . . Because by this deed you have utterly scorned the Lord, the child that is born to you shall die."<sup>2</sup> But before

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I am grateful for the advice and assistance of Professors Larry Churchill (Medicine, University of North Carolina), Donald S. Klinefelter (Philosophy, University of Tennessee at Chattanooga), Stanley Hauerwas (Theology, University of Notre Dame), and Robert E. Rodes, Jr. (Law, University of Notre Dame); and to Mr. Daniel M. Snow (Class of 1979, Notre Dame Law School). Portions of this article were given as a Roswell Gallagher Lecture to the American Society for Adolescent Medicine in December 1976.

1. K. BARTH, *THE EPISTLE TO THE ROMANS* 518 (6th ed. 1968).

2. 2 *Samuel* 12:10-14.

Nathan spoke in this judicial fashion, he engaged the conscience of David. He told him a story:

There were two men in a certain city the one rich and the other poor. The rich man had very many flocks and herds; but the poor man had nothing but one little ewe lamb, which he had bought. And he brought it up, and it grew up with him and with his children; it used to eat of his morsel, and drink from his cup, and lie in his bosom, and it was like a daughter to him.

Now there came a traveler to the rich man, and he was unwilling to take one of his own flock or herd to prepare for the wayfarer who had come to him, but he took the poor man's lamb and prepared it.<sup>3</sup>

When King David heard Nathan's story, he was angered at the injustice done by the rich man; David condemned the rich man, and then Nathan said to King David,

You are the man. . . . [God] anointed you king over Israel, and . . . delivered you out of the hand of Saul; and . . . gave you your master's house, and your master's wives into your bosom, and gave you the house of Israel and of Judah; and if this were too little . . . would add to you as much more. Why have you despised the word of the Lord, to do what is evil in his sight?<sup>4</sup>

The result of Nathan's advocacy was that David condemned himself. He prayed for relief from the Lord's judgment, and when the judgment came anyway, he acknowledged the justice of it. In the end, David was reconciled, "and," the scriptures say, "the Lord loved him." Bathsheba bore him a second son, Solomon, whose name means peace.<sup>5</sup>

The greatest advocates of our century—people such as Martin Luther King, Jr., or Mohandas Gandhi—have been Nathans. What made these advocates unique was their concern with goodness. They insisted on being concerned with the goodness even of the power brokers to whom they appealed. They based their advocacy on the goodness in those who were their clients. They appealed not to power but to conscience.<sup>6</sup> Their advocacy tended to reconcile people rather than defeat them, as David was reconciled rather than defeated.

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3. *Id.* 12:1-4.

4. *Id.* 12:7-9.

5. *Id.* 12:24.

6. My colleague, Professor Robert E. Rodes, Jr., raises a difficulty with this sentence: "Advocacy is addressed to people, not qualities, and if a person didn't have both of these [power and conscience], advocacy addressed to him would be fruitless. If the person of power had no conscience, you couldn't move him. If the person of conscience had not power, moving him wouldn't further your cause." I think, first, that it is possible to move decisionmakers by appeals to authority, to profit, and to values such as order, which are effective, or not, without regard to the conscience of the decisionmaker. That is what I mean by appeals to power. The mark of appeals to

This article will examine advocacy in two contexts. The first is advocacy to an institution, conducted in the name of justice or the welfare of the community; one might call this first category "public interest advocacy." The second is advocacy as a lawyer more normally practices it, before judges and on behalf of a particular client. In both cases, advocacy is different when pursued as moral discourse.

## I. ADVOCACY TO AN INSTITUTION

A friend, an academic philosopher, related two experiences: First, he was employed on a grant to set up and, as they say, coordinate a series of community discussions of morals in banking, with particular emphasis on the distribution of capital by banks so that the poor get a share. Second, he spoke, by invitation, to a group of executives from a manufacturing company on the subject of moral reasoning in business. In the first case he noticed that the most coherent moral challenge to the banks came from an articulate, young, legal-services lawyer. The philosopher was impressed by the lawyer, but was dismayed to report that the lawyer's challenge had been ineffective. The bankers who heard the challenge were not influenced by it. In the second case, the philosopher had a similar experience himself; his coherent presentation of ethical insight was not heard.

The advocacy that failed here is common in America. It has occurred recently in the massive civil rights movement after 1954, in resistance to the Vietnam War, and in argument for better treatment of the poor, the mentally retarded and disturbed, prisoners, the handicapped, women, and even animals, mountains, rivers, and trees. Several preliminary observations about the nature of this advocacy are important.

*It is almost always moral advocacy.* The claims it makes are moral claims. If one were to state these claims in terms of principles, the principles would be moral. So, for example, the advocate argues from fairness, equality (an almost unquestioned moral value in America), the plight of the disadvantaged (no man is an island), the welfare of future generations, or that people are the stewards of nature. These claims are often legal as well as moral, but their force in law is consequential to their moral force; their legal character is consequent on the tendency of

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conscience is that they seem interested—*really* interested—in the moral conversion of the decisionmaker. King, Gandhi and Nathan sought to lead, or push, the decisionmaker to "the place where—to the pure all things are pure." One result of living in that place is that one is reconciled to those he has, or might have, wronged.

public moral problems in America (slavery, abortion, racial discrimination, experimentation on live fetuses) to become legal problems.

*It is not prophetic.* Although this public interest advocacy probably cannot be said to be prophetic, it certainly *seems* prophetic: The advocate is making a moral claim; he is calling upon bankers to think of the poor, and upon business people to think of the employees and customers in their enterprises as their most important asset. In both cases, as is perhaps more typical of law-reform lawyers and philosophers than of lawyers in private practice, the advocates have decided not to use appeals to gain, even though other advocates of the same objectives use appeals to gain. Thus, while one could argue that concern for the poor is "good banking" in the profit-and-loss sense, or that sound human-relations programs in business produce profits, it is more characteristic of a prophet to disdain such argument and argue instead in terms of duty or goodness. A final aspect in which these advocates seem to be prophetic is that they do not mind being irritators. They have decided to take the risk of irritation. A characteristic of the prophet is that he puts himself at this risk.<sup>7</sup>

In all of these ways, the legal-services lawyer and the philosopher seem to be prophetic, but in other ways they are not, as, in contrast, Nathan, Gandhi, and Martin Luther King, Jr., were. They are not usually, for example, really *at personal risk*. Prophets (in the Old Testament mode anyway) are confrontive, uncivil, and direct. They seem less to persuade than to invoke the wrath of God (or deliver it). Nathan engaged the conscience of the king, a persuasive device, but he also said boldly, "*You are the man.*" Gandhi told the English judges who sat on cases in which he was accused that they had only one choice—to send him to jail, or to come down from the bench and join him in his cause. King defied unjust law by breaking it and inviting the consequences. He sought to illustrate injustice by forcing his persecutors—the persecutors of his "clients," American black people—to stand up for unjust law. In all of these ways prophets seem to be not merely irritating but uncivil. Prophets also depend in some way on transcendent verification.<sup>8</sup> Nathan spoke for God; King called on God.

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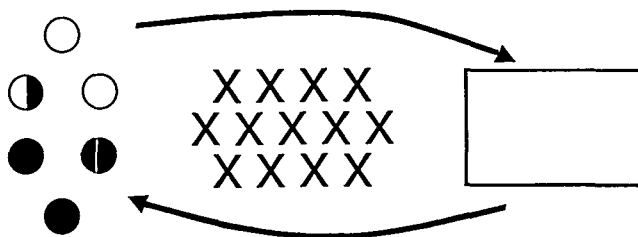
7. Vawter, *Introduction to Prophetic Literature*, in THE JEROME BIBLICAL COMMENTARY 227 (R. Brown, J. Fitzmyer & R. Murphy eds. 1968) ("[t]he fearless revelation of the moral will of Yahweh"). "It would be impossible to find a non-Israelite court prophet who would speak to his king as Nathan did to David . . . ." *Id.* at 229.

8. Another way to say this is that the words of the prophet are greater than the prophet, but are still the words of the prophet himself. "The prophetic word lives a life of its own once it has emanated from the prophet, and the prophet is very much identified with the word that he has

Even democratic prophets—Gandhi is perhaps an example—call on the transcendent truth that is seen to have been vested in a people. Prophets speak in the name of this transcendence, more than in the name of reason. (It seems that either sort of discourse can be moral, that is, can be an appeal to conscience.) The legal-services lawyer and the philosopher called on reason more than on transcendence, and in this way, too, seem not to have been prophetic, even when they were advocates to conscience, seeking to persuade by addressing conscience.

*It is ineffective.* The legal-services lawyer and the philosopher were ineffective because they did not, as Nathan did, first engage conscience. They seem not to have known how conscience is addressed when decisionmakers act in groups—as they usually do when the issue is a public issue and the moral claims are made in the name of the community. Effective advocacy of the sort being attempted seems to require both a certain closeness to the decisionmaker (a shared vision perhaps<sup>9</sup>) and a certain detachment.<sup>10</sup>

My reaction to my friend's stories was an image:



uttered. . . . [The prophet] was personally involved in the word, . . . lived for it and was prepared to die for it." *Id.* at 237.

9. Father Vawter noticed that the prophets (1) insisted on the connection between religion and morality, although they were not usually religious leaders (*i.e.*, priests); (2) were connected with power (in Israel with the monarchy); but (3) were not political: "They inculcated a known morality or at least one that should have been known." *Id.* at 229-33. An advocate could argue to conscience and still not be a prophet in the other senses noted here. The difference may be personal risk. I doubt that an advocate can be a prophet unless he puts himself at risk.

10. The "classical" Old Testament prophets were almost deviant in their ecstatic or charismatic character, and at some times even affected distinctive dress. The Hebrew word for prophet means "one made to speak." The very fact of their speaking *for* someone (the Latin root for the word) also gives them detachment. In some cases Old Testament prophets were aliens—for example, the prophet Balaam in *Numbers* 22-24. Vawter, *supra* note 7, at 223-29.

The image represents a moral encounter that involves social justice. The arrows suggest apparent communication from the advocate (the square) to the decisionmakers (the circles) and back again, with the public (cross marks) turning its attention one way and then the other, as if watching a tennis game. This is the way a public moral debate looks when one reads about it in the newspapers: The lawyer accuses the banks of denying loans to the poor; the banks answer with economic and social data, or with folk wisdom. The philosopher tells the corporate managers about Aristotle and Aquinas and the moral shallowness of utilitarian argument. And they, if they reply at all, tell him about income statements and the barbarity of competition. Neither side appears to convince the other; neither appears to bring the other to pause or reflection. This is a debate; it does not look like moral discourse, because it does not seem possible that those who are accused will stop and say, "Gee, maybe you're right." They are, in Barth's phrase, being disturbed, led astray, and hardened.

It seems even less likely that the accuser will stop and say "Gee, maybe *I'm* mistaken." This is an important point. It seems necessary to moral discourse that the advocate himself be willing to be persuaded. When Thomas Aquinas talks about "fraternal correction,"<sup>11</sup> or Karl Barth about "conditional advice," each of them emphasizes this quality of openness in the advocate. Barth, for instance, says:

He who takes the risk of counseling must be prepared to be counseled in turn by his brother if there is need of it. Such mutual counseling in a concrete situation is an event. It is a part of the ethos which is realized ethics. . . . The ethos of the ethicist implies that he refrain from attempting too much and becoming thereby a lawmaker.<sup>12</sup>

This risk of being persuaded is corollary, perhaps, to the risk the prophet takes when he speaks boldly and risks his life.

The uncolored figures (little uncolored circles in the big circle, and the square on the right) are people who are or might join the advocate in being irritators; they might even become prophets.<sup>13</sup> The difference between those in the circle and the square is the difference between being involved with power and being alienated from power. The

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11. II ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* 1333-41 (Fathers of the English Dominican Province trans. 1947).

12. K. BARTH, *THE HUMANITY OF GOD* 86-87 (1960). Barth speaks of discourse among theologians as one in which the theologian "waits for them [other theologians] and asks them to wait for him." *Id.* at 95.

13. The closeness of the prophet, note 9 *supra*, would be more likely for the circles than for the advocate.

square is alien here in two senses of the word. He is excluded by the group, and he chooses to be excluded. He is perhaps a deviant, in Kai Erikson's analysis of deviance—as Ann Hutchinson was in colonial Massachusetts, to use one of Erikson's cases;<sup>14</sup> or as many of the early Abolitionists were to the American commercial enterprise that nurtured slavery.<sup>15</sup> The suggestion of deviance is useful here because there seems to be a connection between being alienated from the decisionmakers and being ineffective in making moral claims on the decisionmakers. The square, which represents the legal-services lawyer in the banking story and the philosopher in the corporation story, is an irritator and a maker of moral claims, but he is ineffective—ineffective but visible, visible and sad. He is *ineffective* because the circle is impervious to his moral claim on it. He is *sad* in that preparation, good intention, and even rightness ought to have influence on those who wield power, but do not. Examples are sometimes tragic (Jesus before the resurrection, Socrates) and sometimes pathetic (the character representing William Jennings Bryan in "Inherit the Wind"). The result is personally sad, too, because the most admirable effort is often also the most intense effort; effort approaches tragedy as it becomes intense and nonetheless fails. Finally, he is *visible*, which is important because private failure seems more like frustration than like tragedy. This ineffectiveness is hard work, made visible, but come to naught.

The colored figures are the people who exercise power. They are among the circle of those who decide, but they are more influenced than influencing. In relatively organic groups (for example, some academic faculties), these are the elders. In boards of directors, they are the insiders. In business there may be only one such person, but usually, even when the corporation appears to be an autocracy, decisions are made in a group. In academic power groups, these exercisers of power are a minority of those who hold authority collectively. In some informal groups they are transient in membership but stable in their loyalty to a coherent tradition. While this group may sometimes be referred to as an "inner circle,"<sup>16</sup> the existence of a core of power in such groups is more circumstantial than organizational: When it is a group rather than an individual, it is not chosen by anyone, not even itself; its authority is not usually planned. Its power is not formal, not

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14. K. ERIKSON, *WAYWARD PURITANS* 71-107 (1966).

15. See generally S. MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 518-24 (1965).

16. See generally G. DOMHOFF, *THE BOHEMIAN GROVE AND OTHER RETREATS* xiii-xiv (1974); G. DOMHOFF, *THE HIGHER CIRCLES* (1971); G. DOMHOFF, *WHO RULES AMERICA* (1967).



negotiated. It does not show up on an organization chart. Such a group is not nearly as active as naive people suppose it to be; it often does not, for example, meet at all. It does not expressly decide, let alone articulate its decision, even when everybody knows what it will do. Its power, which is always real, is sensed by its own members most of all, and sensed to a lesser extent by social scientists and investigative reporters.

There is a distinction between the colored circles and the uncolored ones, but a person who is one can become the other. Change from one status to the other is probably the most common transience in groups that exercise power and is at the heart of their closed politics.<sup>17</sup> What is distinctive about the uncolored circles is that they are eligible to be irritators and are therefore potential prophets. In business, they are the people who are chosen as targets by those who want to influence, change, or coerce corporate behavior. The Securities Exchange Commission thus makes demands regarded as drastic on "outside" corporate directors, or on independent auditors, or on lawyers retained to advise corporations. Professional groups, and those who think of themselves as articulators of the public interest, make similar demands on those members of the circle who think of themselves as professionals. Lawyers and accountants are clear examples.<sup>18</sup> There are transitions toward professionalism by other members of the circle. An example is the public-relations professional, who is more clearly dominated by managers than lawyers and accountants are, but who is beginning to insist upon an extra-corporate professional (and moral) identity.<sup>19</sup> In my image, the uncolored circles might be an accountant and a lawyer, and the half-colored circle a public-relations officer.

The uncolored circles are not only those on whom moral demands from outside are made; they are also those who are, ex-officio, eligible to make these moral demands on themselves, and, through themselves, on the organization. They are potential moral irritators who can be effective. They are more likely to be prophets than outsiders are.<sup>20</sup>

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17. An example in fiction is C. SNOW, *THE MASTERS* (1960).

18. See, e.g., Crock, *S.E.C. to Consider Rule Requiring Lawyers to Disclose Fraud by Corporate Clients*, Wall St. J., Aug. 3, 1978, at 5, col. 2.

19. See Montgomery, *In Public Relations, Ethical Conflicts Pose Continuing Problems*, Wall St. J., Aug. 1, 1978, at 1, col. 1.

20. That is, they are more likely than outsiders to (1) speak from a shared morality; (2) use arguments that are self-evidently valid; (3) identify personally with their moral claims (which lawyers, as lawyers, rarely do); (4) be close to power but not political; (5) speak for someone outside (or for God); and (6) by the very nature of things be at personal risk. See notes 8-10 *supra*.

That is why the outside world—the SEC, bar associations and investigative reporters—puts moral demands on them: Moral discourse is more likely to take place *within* the circle than between the circle and the square. Irritators from outside might better aim at initiating this moral discourse, and nourishing it with thought and concern, than at making moral demands on the organization as if the organization were monolithic. The organization is not monolithic.<sup>21</sup> It in fact contains within itself the machinery for moral discourse and a way to conduct or discourage moral challenges that it has not yet considered. Moral arguments are heard there; more of them would be heard, and heard more carefully, if those who make moral demands on organizations understood the way moral discourse works in organizations. For examples:

The moral demand that women should have more status, pay, and responsibility is, in the political society, an argument from distributive justice. The moral discourse within the organization is more likely to be in terms of injuries to particular people and in terms of resources lost to the organization because of these injuries. At its most effective this argument turns on making partners of people who are otherwise dependents. The former demand, which is a demand from principle, makes decisionmakers defensive. It pulls the colored circles and the uncolored circles together in opposition to the demand. It tends to resolve itself, if at all, in coercion—usually in a lawsuit. The latter personal demand sounds and feels more like a wrong. If one thinks of himself as an advocate for women who should be advanced, he will do better to argue for *them* than for their *cause*. The uncolored circles tend to understand this; the square appears not to understand. An experienced trial lawyer would understand this point better than the young legal-services lawyer, or the philosopher, did.

The moral demand that corporate lawyers should call for independence from the chief executive officers who are their employers is a demand in principle.<sup>22</sup> It turns on an idea about what corporate lawyers are; it turns, that is, on a role model. Proponents of that view might better ask what it is they want to accomplish (for example, more honesty in disclosure statements) and let the lawyer decide where best to initiate moral discourse. The lawyer, when he acts, might act more as business colleague, coreligionist, or friend than as lawyer.

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21. For example, appellate courts may act as if they were monolithic, but notice evidence to the contrary, such as the common didactic advice to students in law school moot court programs to put one point in the brief for each of the judges who will hear the case.

22. See Palmieri, *Officers of the Board*, Wall St. J., Aug. 14, 1978, at 12, col. 3.

Moral claims about environmental pollution or exploitation of the poor seem least effective when irritators argue about the welfare of society and most effective when they make an argument, like the Prophet Nathan's, that says to the decisionmaker, "What are you doing?" It seems more effective to make the evil personal and personally discovered than to appeal to a general sense of responsibility. An accusation like Nathan's is less likely to be met with a utilitarian answer than is an appeal to civic responsibility.<sup>23</sup>

All of this suggests that advocacy as moral discourse is not like advocacy as an alternative to warfare. It is different, tactically and dynamically. One should conduct it differently. Advocacy as moral discourse is more private (even intimate), quiet, and personal. It turns less on principles than on the story of the individual or the enterprise on whom moral claims are made.<sup>24</sup>

## II. LAWYERS' ADVOCACY: *SUPERINTENDENT OF BELCHERTOWN STATE SCHOOL V. SAIKEWICZ*<sup>25</sup>

When, in April 1976, Joseph Saikewicz was found to have terminal leukemia, he was sixty-seven years old and had been for fifty-three years a resident in Massachusetts state institutions for the mentally retarded; he had an intelligence quotient of ten and a mental age of three years.<sup>26</sup> The prognosis was that he would soon die, but that chemotherapy might prolong his life by two months to a year. The chances of even that limited success were less than half, but most people who are able to make a choice for or against chemotherapy in this situation

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23. Also, it seems important that Nathan had intimate access to the king; he was a member of the king's circle. See note 9 *supra*. It is important to emphasize that the moral irritator and the prophet are *at risk*. Professor Rodes suggested that my examples in text accompanying note 20 *supra* illustrate my claim better than other examples would. He mentioned Jesus' treatment of the Pharisees, William Lloyd Garrison, the Vietnam War protestors, and those bearing witness against the regime in Rhodesia. "There are," he said, "cases where you cannot be taken seriously unless you show that your claim transcends civility." I agree; the open (uncolored) circles in my image would be at greater personal risk in the cases Professor Rodes puts. They would also, probably, be less civil.

24. Other examples would be less intimate and less quiet, such as Gandhi and King, or the cases suggested in note 23 *supra*. Professor Stanley Hauerwas and I have urged that there is a difference, relevant on this point, between what the advocate does and what the "powers of this world," provoked to violence or fear, do in reaction to the advocate. Hauerwas & Shaffer, *Hope Meets Power: Thomas More and the King of England*, 61 SOUNDINGS 456 (1978) (also to be published as Hauerwas & Shaffer, *Hope in the Life of Thomas More*, NOTRE DAME LAW. (forthcoming)).

25. — Mass. —, 370 N.E.2d 417 (1977). For a contemporaneous discussion of the case, see N.Y. Times, July 14, 1976, at 26, col. 2; N.Y. Times, Dec. 1, 1977, at A18, col. 6.

26. — Mass. at —, 370 N.E.2d at 420.

choose chemotherapy.<sup>27</sup>

The treatment is unpleasant but does not produce side effects that are unusual; Saikewicz had probably endured all of them. The usual side effects were nausea, vomiting, bladder irritation, numbness, and a tingling sensation in his hands and fingers.<sup>28</sup> Because the drugs are administered intravenously, and because Saikewicz would remember the side effects between treatments, the doctors expected resistance from him and planned to strap him to a hospital bed.<sup>29</sup> A doctor who knew him said, "When you approach him, he flails at you and there is no way of communicating with him, and he is quite strong; so he will have to be restrained and that increases the chance of pneumonia."<sup>30</sup> (Pneumonia was only a slight risk; the other risks were not unlike those parents choose every day when they offer up their children for hospital treatment.)

The alternative was, as the medical ethicists tend to put it, to "let him die." The superintendent of the Belchertown State School, where Saikewicz had lived since 1928, decided, probably from parental as well as medical premises (he is a physician), to give Saikewicz chemotherapy. He also decided, probably after talking to the school's lawyer, to seek a court order to that effect.<sup>31</sup>

The probate judge appointed a lawyer to represent Saikewicz. The lawyer at first assumed that this was a case for arguing "the right to treatment," an idea new in the law, as health care for the retarded is new in medicine. At this point, Saikewicz had the benefit of the aspirations of both professions. His advocates sought for him both prolonged life and the same care that moneyed, nonretarded people can obtain.

But Saikewicz's lawyer found that there were physicians in Belchertown who were against treating Saikewicz. Under their influence, the lawyer abandoned the "right to treatment" argument (even though the judge at first agreed with it) and argued instead that his client should be allowed to die.<sup>32</sup> This lawyer said that Saikewicz would not be able to understand the discomfort and side effects of

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27. *Id.* at —, 370 N.E.2d at 421.

28. *Id.* at —, 370 N.E.2d at 421.

29. *Id.* at —, 370 N.E.2d at 421 n.5.

30. N.Y. Times, July 14, 1976, at 26, col. 2.

31. — Mass. at —, 370 N.E.2d at 419.

32. *See id.* at —, 370 N.E.2d at 419. Although the case did not begin as a true adversary proceeding, it took on that characteristic when Saikewicz's lawyer began arguing against the right to treatment.

chemotherapy. Saikewicz himself, to the slight extent he could be consulted, would obviously resist treatment. This lawyer and the doctors on his side tried to decide what Saikewicz would want, and then tried to follow his "decision." That is also what the courts did. The probate judge and the justices of the Supreme Judicial Court of Massachusetts decided to let Saikewicz die without chemotherapy.<sup>33</sup> The local judge remarked that if he had been Saikewicz he would have preferred to die without treatment.

The advocacy that was used began with a consideration of what the client wanted—not what was best for him, but what he wanted.<sup>34</sup> And it proceeded in a moral discourse, between lawyer and physicians, that disregarded the professional ideals of prolonged life and the right to treatment. The opposing argument, made by the attorney general of Massachusetts, was that the interests of the state required chemotherapy for Saikewicz.

Saikewicz died in September 1976. It is not possible to know if his death was painless, but the physicians had predicted that it would be; the probate judge had ordered, in innocent but ironic evidence of the delusions of power, that Saikewicz be allowed to die "peacefully and comfortably."<sup>35</sup> The order of the Supreme Judicial Court had been entered in July,<sup>36</sup> but its opinion was delayed until the end of November, nearly three months after Saikewicz's death, so that the court could receive briefs on the issues and prepare an opinion that spoke to the difficult policy issues involved. Either because of the memory of what they thought in July, or out of judicial habit, their opinion is an example of moral discourse in appellate literature: The judges had become advocates.

The court's opinion is a remarkable and largely positive example of moral discourse. It is revealing in the way advocates and judges attempted to understand Saikewicz, and in their assertion of the minimum worth of a human being. It also reveals, curiously enough, a lot about the results of lawyer-dependent moral decisions by showing how our profession makes moral judgments for its clients when they are able to speak for themselves, as Saikewicz was not.

The main argument these lawyers, doctors, and judges used was Saikewicz himself; they refused to argue from an egalitarian category

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33. *Id.* at —, 370 N.E.2d at 435.

34. *Id.* at —, 370 N.E.2d at 431.

35. N.Y. Times, Dec. 1, 1977, at A18, col. 6.

36. — Mass. at —, 370 N.E.2d at 419-20.

(all people are alike), which here would have led to chemotherapy since most people with Saikewicz's disease choose chemotherapy.<sup>37</sup> The court talked at some length about *In re Quinlan*,<sup>38</sup> and found that case less difficult because the New Jersey judges had had the benefit of the testimony of Miss Quinlan's father, who spoke from "many years of what was apparently a close and affectionate relationship with her."<sup>39</sup> The *Saikewicz* court struggled in an obviously sincere way to provide for itself a substitute for Mr. Quinlan's testimony without surrendering to "objective criteria." That meant that the court had to attempt to explicate reasons, personal to Saikewicz, against choosing a longer life. The court said that the value of life carried the same weight for Saikewicz as for any other person, but Saikewicz was different in that he would not understand the pain of treatment and could not therefore *choose to suffer*.<sup>40</sup> That bit of human nobility had been denied him.<sup>41</sup> He could not cooperate with his doctors and therefore giving and receiving comfort was denied him. "He . . . would experience fear without the understanding from which other patients draw strength. The

37. It has been frequently argued elsewhere that cases of "substituted judgment" for the mentally incompetent, and other treatment of such people in the judicial process, has to proceed in terms of what "most people" would do. See, e.g., *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969). Elsewhere, the law seems unable to act when the person before it cannot behave as "most people" behave. See, e.g., *Jackson v. Indiana*, 406 U.S. 715 (1972); *State v. Lang*, 26 Ill. App. 3d 648, 325 N.E.2d 305 (1975), discussed in Myers, *The Strange Case of Daniel Lang*, 64 A.B.A.J. 1198 (1978); Annot., 38 A.L.R. Fed. 238 (1978).

38. 70 N.J. 10, 355 A.2d 647 (1976).

39. — Mass. at —, 370 N.E.2d at 430.

40. *Id.* at —, 370 N.E.2d at 430-31.

41. Self-determination seems necessary before one can talk of suffering as constructive. L. McCullough, *Pain, Suffering, and Euthanasia* (undated and unpublished) (Professor McCullough is in the Department of Philosophy at Texas A & M University).

[W]hat distinguishes suffering from pain is its personal quality. . . . [I]t may be that the function of medicine is to relieve painful suffering which makes it impossible for us to claim suffering as our own. . . . [W]e do not experience suffering until we know how to name it and we must be taught how to do that. . . . For suffering to be recognized, i.e. named, involves an interpretive context, then the very interpretation seems to carry a "point." The interpretation at least places the suffering in a narrative context . . .

S. Hauerwas, *Reflections on Suffering, Death, and Medicine* (undated and unpublished) (Professor Hauerwas is in the Department of Theology at the University of Notre Dame). Karl Barth gives Christian expression to this idea:

In the Spirit, we are enabled to know the meaning of our life, as it is manifested in suffering. In the Spirit, suffering, endured and apprehended, can become our advance to the glory of God. This revelation of the secret, this apprehension of God in suffering, is God's action in us.

K. BARTH, *supra* note 1, at 301. Apprehension of God in suffering was apparently not available to Saikewicz, although a Christian must suppose that other means to apprehension of God were available to him, as the text on which Barth commented would imply: "[W]e suffer with him, that we may be also glorified together." *Romans* 8:17. The Massachusetts court's sense of wonder about Saikewicz's hidden personality is born of reflection on his suffering. Christian theology retains a similar sense of wonder about the hidden personality of Jesus.

inability to anticipate and prepare . . . leaves room only for confusion and disorientation."<sup>42</sup>

The probate judge had premised his decision in part on "the quality of life possible for [Saikewicz] even if the treatment does bring about remission." The Supreme Judicial Court refused that reason "to the extent that this formulation equates the value of life with any measure of the quality of life," but it suggested that the judge may only have intended to take "special care . . . to respect the dignity and worth of Saikewicz's life precisely because of his vulnerable position."<sup>43</sup> People might very well be equal before the law, but they are never equal before one another, and the law had best take account of the fact that some of us are aggressive and many are victims. When advocacy argues from the person of its client, rather than from his interests or his cause, it can take account of his vulnerability.<sup>44</sup>

The paternalistic arguments were arguments from professionalism—that is, prolongation of life and right to treatment. In many ways, the task of Saikewicz's lawyer was to defeat professionalism. In this case, professionalism, in serving power, argued from the interests of the state—notably for the preservation of (right to) life, and the ethical integrity of the medical profession. These arguments are of two rather different kinds. One was from equalitarian premises (apparently for Saikewicz's benefit but without regard for who he was); the other asserted the interests of third persons (Saikewicz should be kept alive in order that the interests of the medical profession would be served). The court decided, first, that the state cannot require a person to bear "the traumatic cost of [the] prolongation" of life unless he chooses to do so. "The value of life . . . is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice."<sup>45</sup> Second, the court noted that the prevailing ethical practice seems to recognize that the dying are more in need of comfort than treatment. It was not "necessary to deny a right of self-determination to a patient in order to recognize the interests of doctors." If it ever

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42. — Mass. at —, 370 N.E.2d at 432.

43. *Id.* at —, 370 N.E.2d at 432.

44. My favorite example before the *Saikewicz* case was *Thompson v. Louisville*, 362 U.S. 199 (1960).

45. — Mass. at —, 370 N.E.2d at 425-26. The court extended to the incompetent whatever rights the competent have: "We recognize a general right in all persons to refuse medical treatment in appropriate circumstances. The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both." *Id.* at —, 370 N.E.2d at 427.

becomes necessary, the law will come down on the side of patients.<sup>46</sup>

The *Saikewicz* case is an example of the reconciliation of the person whose cause is advocated with those who listen to advocacy. Reconciliation in this case was both easier and harder than it is in more usual cases: easier because the court's view of the "substituted judgment" doctrine required it to look as deeply as it could at the personality before it; and harder because this sort of care tempts judges to take the comfort of egalitarian solutions—to take a poll,<sup>47</sup> decide from conventional premises,<sup>48</sup> or let themselves be governed by professionalism.<sup>49</sup> The remarkable nature of the case is garnished by three facts that suggest how vulnerable conscience is in moral discourse: (1) Saikewicz's lawyer first argued for the right to treatment, then, upon reflection and after *moral* discourse with doctors, changed his mind and argued against the right to treatment. (2) The probate judge first decided to order treatment, then changed his mind. (3) The original order in the Supreme Judicial Court noted dissenting votes, but the final opinion as published is unanimous.

### III. CONCLUSION: MORAL DISCOURSE AND THE COMMUNITY

Advocacy as moral discourse reconciles advocate to client, advocate to those who listen to advocacy, and those who hear advocacy to the client. It does this through exalting care over professionalism, through arguing to the consciences of those it addresses, and through arguing from the persons of those it advocates.<sup>50</sup> Advocacy radiates

46. *Id.* at —, 370 N.E.2d at 427. This reasoning was not applied by the Supreme Court of the United States to unborn children in the abortion cases because the Court did not extend the definition of "person" to the unborn child. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 158 (1973).

The criticism that the *Saikewicz* decision arrogates power to judges, and takes it away from doctors, seems to me to miss the point that the Massachusetts court made—that patients should not be forced to suffer for the dignity of the medical profession. The point is the preservation of moral discourse in these "bioethical" cases. The Massachusetts court did that in *Saikewicz*; the Supreme Court of the United States refused to do it in *Roe v. Wade*. In both cases it was apparent that the medical profession had not preserved moral discourse. The court in *Saikewicz* took nothing away; it filled a vacuum. See MacIntyre, *Patients as Agents*, in 3 PHILOSOPHICAL MEDICAL ETHICS: ITS NATURE AND SIGNIFICANCE 197 (S. Spicker & H. Englehardt eds. 1977).

47. See O'Meara, *Natural Law and Everyday Law*, 5 NAT. L.F. 83 (1960); Note, *Naturalization—Good Moral Character as a Prerequisite*, 34 NOTRE DAME LAW. 375, 380 (1959). Both argue against measurement of public opinion as a solution to moral problems in the law; both essays refer to the "good moral character" cases in immigration law.

48. See, e.g., *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969).

49. The recent judicial immunity case is an example. See *Stump v. Sparkman*, 433 U.S. 349 (1978).

50. It perhaps, finally, serves the way people are. We seem to yearn for relationships, to overcome the alienation that professionalism only aggravates. See Kaplan, *Martin Buber and the Drama of Otherness: The Dynamics of Love, Art, and Faith*, 27 JUDAISM 196 (1978).



into the community, into consideration of social justice, because of four features that distinguish moral discourse from adversary discourse: (1) Moral discourse is interpersonal; (2) Moral discourse argues from the person of the client; (3) Moral discourse is addressed to the conscience of those who hear it; (4) Moral discourse, because it is a form of reconciliation, binds the community together.

*Interpersonal.* The *Saikewicz* case was unusual in method as well as in substance. It was different in medicine because many of the doctors involved argued against medical treatment. It was different for law because ordinary legal methodologies did not suit the case. The court pointed beyond ideas of health, or ideas of right, to Joseph Saikewicz himself. The judges decided he would be better off if our professions left him alone. What that poor man needed, as he ended more than half a century in a school for the retarded, was a friend as he died. The court could not explain his needs in terms either of health or of rights. It had to explain them in reference to Saikewicz himself.

Advocacy as moral discourse begins in the person of the client. The advocate has to cultivate an examination of conscience in which he asks himself where his advocacy does *not* begin. In the spirit of those little prayerbook questions we Catholics used to read before we went to confession, the first question is whether I have violated professional consensus. If what I am doing would be generally approved by my professional colleagues, it may be wrong—it may be more professional than personal. We lawyers have had some of our best moments when we were made uncomfortable by renegades such as William Kunstler and Michael Tigar. Maybe doctors have their best when they are challenged by renegades such as Thomas Szasz and the physicians at Belchertown who thought that the frail dignity of Joseph Saikewicz was more important than medical expertise. Advocacy as moral discourse seems to require humility, and the least likely humility is humility in a professional group.<sup>51</sup>

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51. This is not to suggest that violation of professional consensus is some sort of *test* of the quality of moral discourse, but it is an important question, because people as part of professional groups seem more vulnerable to self-deception than people taken one at a time. The object, as Barth put it:

We stand in need, not of patience, but of the impatience of the prophets, not of well-mannered pleasantries, but of a grim assault, not of the historian's balanced judgement . . . but of a love of truth which hacks its way through the very backbone of the matter, and then dares to bring an accusation of unrighteousness against every upright man.

K. BARTH, *supra* note 1, at 395; see Hauerwas & Burrell, *Self-Deception and Autobiography: Reflections on Speer's Inside the Third Reich*, J. RELIGIOUS ETHICS, May 1974, at 2, reprinted in S. HAUERWAS, TRUTHFULNESS AND TRAGEDY 82 (1977).

Another test is whether we annoy our governors. When the community says that we are overstepping our bounds—that it is not a doctor's job to advocate, nor a lawyer's job to talk about what should be done for the sick—we are probably doing something right. We professionals have franchise and power, but we pay a price for it. The price is that we are expected to subordinate our personal sense of good to our expertise. The world needs to keep its experts in their place. Experts, as someone said, are supposed to be kept on tap, not on top. When we are on tap we are easy to predict. We annoy the world when we become unpredictable.

*The person whose cause is advocated.* Advocates of this sort find their mission in the unique personality of the client, and then hold that unique personality up as their strongest argument for change. They advocate a person more than a cause. Professionalism gets in the way here, too. It shows up in the legal profession in the nearly universal tendency to let adversary ethics, rather than the persons of clients, control advocacy.<sup>52</sup> We lawyers use the adversary system to avoid moral discourse. We use it to hide all our great moral questions—the problem of the guilty client, the problem of assisting evil people to advance evil designs, and the ultimate problem of whether lawyers are of value either to their clients or to the community.<sup>53</sup> We are rarely caught in our evasion because we are attracted to it as a competitive game and we become good at the game. We come to think that it has validity. Stephen Wexler, a poverty lawyer, gives this example from a courtroom exchange several years ago:

[The case involved] a soldier who wanted to get out of the Army for religious reasons. His petition for *habeas corpus* was denied, and his attorney asked the court to prohibit the Army from transferring him to Vietnam pending the filing of an appeal. The Assistant United States Attorney on the case looked, for all the world, like an ordinary human being; yet, when the soldier's attorney asked for the stay of transfer orders . . . , the Assistant United States Attorney said "I'm afraid we'd have to oppose that."

No one even checked with the Army to see if it would cause a

52. E. CHEATHAM, A LAWYER WHEN NEEDED (1963), has this bias. I argue, in Hauerwas & Shaffer, *supra* note 24, and in Shaffer, *Justice in Everyday Life*, 22 RES GESTAE 394 (1978), that adversary ethics is the ethics of fear.

53. Shaffer, *Guiltily Clients and Lunch with Tax Collectors*, 37 JURIST 89 (1977), is a clumsy beginning for discussion, and one I hope to rethink, on the guilty client problem and, through that problem, on the value of lawyers to clients. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975), is a persuasive analysis of the ethics of role in the legal profession. See also Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975).

problem. The delay was opposed because within the lawyer's game it could be opposed. One little piece on the board was the U.S. Army, the other was the soldier; and the soldier's lawyer had just drawn a card which said: "ON HIS NEXT TURN THE OTHER PLAYER MAY MOVE YOUR PIECE TO VIETNAM."<sup>54</sup>

One reason this sort of thing happens in the legal profession is the phenomenon of imputed competence. A client is not really allowed to think about the competence of his lawyer. He is to assume it. The professional is the one who knows how to move the pieces. This idea persists despite persuasive evidence that it is morally and fiscally untrue.<sup>55</sup>

Our profession sometimes grows ashamed of its arrogance, but when it does it tends to turn clients into bureaucrats, as members of committees, instead of going back and looking at them as the reasons for the enterprise. In the legal world Mr. Wexler wrote about—poverty law—the profession decided that the solution to professional arrogance was to require the participation of the poor—not in the cases, but in the supervision of law offices. The clients were to become powers in the bureaucracy. Art Buchwald reports an interview he was inspired to give after the government and the legal profession made this decision. He finally located a man who would admit he was poor:

I asked him if he thought he would like to serve on a committee to see what could be done about poverty.

"Mister, if I had any ideas what to do about poverty, I wouldn't be poor."

"But there is a school of thought in Washington that poor people are the only ones who know the real problems of the poor, and they should be strongly involved in the program to formulate and implement antipoverty programs."

"I wouldn't serve on a board unless they paid me," he said.

"Oh, I'm sure they would pay you. If they agreed to pay you, what is the first thing you would do?"

"I'd move out of the neighborhood."

"But if you did that, you would lose contact with poor people and you would no longer be able to speak for them."

"Exactly. Poor people don't want to be spoken for. They just want to get the hell out of the neighborhood."<sup>56</sup>

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54. Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1060 (1970).

55. See generally D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974). An interesting insight into this view of lawyers—and an interesting challenge to it—is a prescriptive list from the National Organization of Women for women seeking divorce lawyers. T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING* 142-43 (1976).

56. Buchwald, *A Penny for His Thoughts*, L.A. Times, Sept. 12, 1976, § V, at 2, col. 2.

Participation by the poor does not work. The reason it does not is that poverty in America is a moral question, as well as a political question. The advocacy that poor people need includes advocacy that requires the rest of us to look at poor persons, and to think about each of them, and to feel ashamed of ourselves for allowing such misery in the midst of plenty. Mr. Buchwald's point was that it will not do to tell the poor to take our money and go do something about themselves. What we should have learned was something about ourselves: We don't want to help the poor unless they fit our definitions.<sup>57</sup>

*The conscience of the hearer.* The greatest example in Christian literature of advocacy to conscience is the story of Jesus and the woman taken in adultery: Some law professors brought the woman to Jesus, hoping to confound him and establish his disregard for the law. In the process they proposed to give the woman her just deserts. "Teacher," they said to Jesus, "this woman was caught in the very act of committing adultery. In our Law Moses gave a commandment that such a woman must be stoned to death. Now, what do you say?" St. John reports that Jesus wrote on the ground with his finger for a while, and then said, "Whichever one of you has committed no sin may throw the first stone at her." He returned to his writing and the law professors left. The woman stayed behind and held moral discourse with the Founder of Christianity.<sup>58</sup>

The story illustrates how group consensus is an obstacle both to advocacy and to justice. There was no doubt about the rightness of a rule against adultery; Jesus, who was himself a teacher of Mosaic law, did not argue about that. He did not even argue about the sanction. But the rule and the sanction had hidden the reason for the enterprise, which was the goodness of people like that woman. Sometimes one has to bear witness against the rules in order to give purpose to the rules.

Dr. Larry Churchill, a medical ethicist, argues this way with reference to ethical rules in the medical profession: Professional ethics become accountable when they include within them "the capacity for self-restriction and self-criticism" on grounds other than those which currently undergird the profession.<sup>59</sup> "The absence of such a self-critical principle makes all questions raised by the public seem to be an

57. Moral advocacy for the poor has political implications, no doubt; what interests me at the moment is that political advocacy for the poor seems most feckless when it is not grounded in moral discourse.

58. *John* 8:3-11 (American Bible Society).

59. Churchill, *The Professionalization of Ethics: Some Implications for Accountability in Medicine*, 60 *SOUNDINGS* 40, 44-45 (1977).

attack and makes the healer's mantle an aegis from the variety of values held by his patients. It makes the physician an adversary of his patient instead of an advocate."<sup>60</sup> Dr. Churchill argues that doctors should develop a morality of self-accepted moral principles and move beyond a morality of conventional role conformity.<sup>61</sup> "The transition . . . is blocked when there is confusion between group loyalty and the validity of the moral principles the group holds."<sup>62</sup> The same argument applies concerning the adversary ethic in the law. The idea, as Churchill puts it, is "awareness of oneself as an autonomous agent, able to judge the morals of his group for himself."<sup>63</sup> Theories of health and theories of human rights would be enriched by that sort of moral enterprise. The enterprise becomes advocacy when we translate it into discourse outside the professional group. When advocacy begins, we will discover that we have become committed to something greater than our professions.

This process of seeking the conscience of the hearer involves a succession of steps. In the first step, the advocate points to rights, to principles that promise a benefit for his client. In the second step, he takes his client by the hand and makes personal claims on the decisionmaker, claims of conscience that do not rest on professionalism, but rest on the fact that we people are all in this thing together.<sup>64</sup> And then the dialogue, the discourse, becomes one in which people encounter people, and negotiate on the basis of what they need from one another and what they owe to one another.<sup>65</sup>

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60. *Id.* at 45.

61. *Id.* at 50.

62. *Id.*

63. *Id.*

64. The idea is so ordinary that it takes professionalism to obscure it. Galsworthy makes fun of the obscuring of interpersonal claims when he has Soames Forsyte say to his daughter Fleur, who is the defendant in a jury-tried libel case, "'The great thing is to keep still, and pay no attention to anything. They'll all be behind you, except the jury—and there's nothing in them really. If you look at them, don't smile!'" J. GALSWORTHY, *THE SILVER SPOON* 235 (1976).

65. This idea of law is developed in R. RODES, *THE LEGAL ENTERPRISE* (1976), and is suggested a bit in L. FULLER, *THE MORALITY OF LAW* (1964); Professor Fuller seemed, though, unable to get beyond applications to procedure. In *The Republic*, Plato had Thrasymachus assert that justice is the interest of the stronger. "[I]n all states there is the same principle of justice, which is the interest of the government; and as the government must be supposed to have power, the only reasonable conclusion is, that everywhere there is one principle of justice, which is the interest of the stronger." 1 *THE DIALOGUES OF PLATO* 603 (B. Jowett trans. 1892). Socrates insisted that the way to talk about justice is without reference to power. He insisted that this form of discourse will unite content (the issue of what justice is) and process (the concern of the discussers for one another): "[I]f we proceed in our enquiry as we lately did, by making admissions to one another, we shall unite the officer of judge and advocate in our own persons." *Id.* at 613; see notes 11 & 12 and accompanying text *supra*.

*Moral discourse reconciles: it binds together the hearer, the advocated and the advocate.* Three of the four heroes recommended here (Gandhi, King, and Nathan) were not lawyers, and the behavior of the fourth (Saikewicz's lawyer) was not traditional lawyer behavior. These facts suggest that there is a difference between advocacy as moral discourse and adversary discourse as it is traditionally described by the legal profession and as it is distilled into principles, aspirations, and inspiration in the American Bar Association's Code of Professional Responsibility.<sup>66</sup> It seems that there are differences, but that moral discourse and adversary discourse are not in all respects opposites. The differences are more tendencies than categories. For examples:

(1) Adversary discourse seems to involve ideals of dignity, image, influence, and survival in the professional group, the legal profession.<sup>67</sup> Moral discourse tends more to the development of a compassionate community. It tends to look beyond the group, and even beyond the state.<sup>68</sup> Both forms of discourse are advocacy; that is, each is addressed to decisionmakers and wielders of power. King, Nathan, and Gandhi addressed power as much as modern American lawyers do; Saikewicz's lawyer addressed power both as lawyers do and as King, Nathan, and Gandhi did. The difference seems to inhere in images—the roles, if you like—that members of professional groups have.

(2) Adversary discourse emphasizes uprightness, respectability, and moral independence in individual practitioners;<sup>69</sup> moral discourse emphasizes the moral claims of clients, and, more than is true in adversary discourse, identifies with the moral claims of clients. Moral discourse makes this identification with clients advertently, but it does not necessarily lose its identification with power groups as it does so: Saikewicz's lawyer did not surrender his status at the Bar; King steadily gained influence among powerful groups in America; Nathan, as prophet, both confronted the king and was a member of the king's

66. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement: "The Code is designed to be adopted by appropriate agencies . . . as an inspirational guide to the members of the profession . . ."

67. See note 69 *infra*.

68. The distinction between community (he says "nation") and state is elaborated in J. MARITAIN, *MAN AND THE STATE* 1-27 (1951).

69. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 1 ("A Lawyer Should Assist In Maintaining The Integrity And Competence Of The Legal Profession"). This is related to the individual practitioner in EC 1-5: "A lawyer should maintain high standards of professional conduct . . . be temperate and dignified, . . . refrain from all illegal and morally reprehensible conduct." EC 3-1 and 3-2 and Canon 6 apply these ideals more specifically, in terms of competence and responsibility.

court.<sup>70</sup>

(3) Adversary discourse seems to concentrate on loyalty to the client as its governing ethical principle; it exalts loyalty as a virtue.<sup>71</sup> Moral discourse is based less on loyalty to the client than on the goodness of the client.<sup>72</sup> King's leading the civil rights movement in prayer for its oppressors is an example of that—if one believes, as Dr. King did, that a believer seeks to rise to the aspirations of his prayers.

(4) Adversary discourse, in the Code's explication of loyalty as a virtue, comes to define its goal in terms of service to the government.<sup>73</sup> The reason for loyalty, as the Code explains it, is that loyalty will lead to more acceptable service to the judicial system (that is, to the government). Moral advocacy explains itself more in terms of service to the person; it radiates into the community because it is interpersonal, because it argues from the person of the client, because it is addressed to conscience, and because it seeks reconciliation rather than victory.<sup>74</sup> Its heroes are heroes of reconciliation, and that means that moral discourse does not serve power; it does not seek to justify itself in terms of power. This is a significant difference:

Justice is not the result of power. It is not the result of force. The idea that governments provide goodness—that power provides justice—is where tyranny begins.

We lawyers should be sober and watchful about the horrors of what people have done to one another in the name of the law. These horrors occur when people begin to believe that good can be achieved with power. The holocaust is one example. The crucifixion is another.

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70. Charles Morgan is another, almost prophetic, example. See Powledge, *Something for a Lawyer to Do*, NEW YORKER, Oct. 25, 1969, at 63.

71. ABA CODE OF PROFESSIONAL RESPONSIBILITY, canon 5 ("A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client"); EC 5-1 ("Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client"); canon 4 (confidentiality); and canon 7 (zealous representation).

72. See Shaffer, *supra* note 52.

73. Canon 2 ("A Lawyer Should Assist The Legal Profession In Fulfilling Its Duty To Make Legal Counsel Available"); EC 7-18 (lawyers should not communicate directly with clients of other lawyers because "the legal system . . . functions best when persons in need of legal advice or assistance are represented by their own counsel"); EC 8-1 (lawyers should propose and support legislation to improve the legal system).

74. Tillich has said:

[T]he ambiguities of competition . . . work continuously for inequality in the encounters of people in daily life, in the stratification of society, and in the political self-creation of life. The very attempt to apply the principle of equality, as contained unambiguously in the acknowledgement of the person as person, can have destructive consequences for the realization of justice.

3 P. TILlich, *SYSTEMATIC THEOLOGY* 80-81 (1963).

The S.S. officer in "The Holocaust" did not set out to do evil. He did evil because he set out to do good with force and came to believe that force was the way to goodness. . . . It is probably a good thing for a nation to be saved, but it is corrupt and fatal to suppose that power can save a nation.<sup>75</sup>

The Code tends to celebrate advocacy in the service of power. This is, to be sure, only a tendency. The Code is not palpably hostile to the sort of advocacy discussed in this article, but it neglects it. The tendency and the neglect might be illustrated with two texts from the Code. One, under canon 7 ("A Lawyer Should Represent A Client Zealously Within The Bounds Of The Law"), deals with the situation in which Joseph Saikewicz's lawyer found himself:

If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client.<sup>76</sup>

That aspiration, by turning more on the *interests* of the client than on the *person* of the client, tends toward argument for the right to treatment and against arguments that are based on a compassionate view of the client's situation. In *Saikewicz*, it was the proponents of chemotherapy who argued from Saikewicz's *interests*; the lawyer who argued for Saikewicz himself, and, ultimately, the judges in the case, grounded their decisions in something more human than interests.

A broader example is the final, summary ethical aspiration in the Code, under canon 9 ("A Lawyer Should Avoid Even The Appearance Of Professional Impropriety"). It illustrates that the Code's governing moral principles are loyalty to clients and service to power:

Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also

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75. Shaffer, *supra* note 52, at 397.

76. EC 7-12.



the appearance of impropriety.<sup>77</sup>

By contrast, the examples used here as ideals share a tendency to reconciliation and disdain a tendency to support for power, professional honor,<sup>78</sup> and protected membership in a protected group. Martin Luther King's earliest public advocacy, in the bus boycott in Birmingham, started with his knowing the black people in the back of the bus. It proceeded with his holding up those people until the white citizens were ashamed of themselves.<sup>79</sup> It ended with people being brought back together—the advocates, the advocated, and the decisionmakers. That was Dr. King's usual procedure. In the heat and turmoil and cruelty of Selma, King gathered his followers together and prayed *for the police*. He talked to his followers about redemptive love—*for the police*.<sup>80</sup> His was like the procedure Gandhi used when he told the English judges that they had a choice—to uphold unjust laws and send Gandhi and his followers to prison, or to come down from their benches and join Gandhi in his witness against injustice. That is moral discourse—an interpersonal thing—a thing grounded in the person of the client, a plea to conscience, and a form of reconciliation.

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77. EC 9-6. The reference to "brother lawyers" will strike many as uncommonly insensitive in a document drafted 10 years ago. That insensitivity and the Code's repeated celebration of the dignity of the profession are, I think, related.

78. See Lewis, *Christianity and Culture*, in CHRISTIAN REFLECTIONS 12 (W. Hooper ed. 1967).

79. Of course, the bus company lost money, but that was not the essence of the matter, even from a power-politics point of view.

80. One is tempted, in such a dramatic case, to see an opposition between love and justice; the opposition is useful in thinking about Dr. King's social witness. Dr. King might have admitted, though, that in the final analysis he sought a just order between the police and the people of Alabama:

[T]he basic ontological order is love, then justice; but in terms of the gradual achievement of order, the order may be [but was not in Selma] justice, then love.

. . . .  
 . . . That love is indeed great—that considers whatever is here and now obstructive to one's neighbor and the community as no longer a right at all, demonstrative legal title and honest acquisition to the contrary notwithstanding. For love there is a clear distinction between abstract right and the actual need for that right.

. . . .  
 . . . Before God, the duties of love are no less binding than the duties of justice. . . . [T]he duties of love are measured by the progress of the person in good.

Haring, *Justice*, in 8 NEW CATHOLIC ENCYCLOPEDIA 68, 69-70 (1967).