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ARTICLE

FITTING LYING TO THE COURT INTO THE CENTRAL MORAL TRADITION OF LAWYERING

Fred C. Zacharias[†]

A wise man once said that “the whole point of applied ethics is to see where we stand and how we might act in the real world . . . we have yet to get the paradigm straight.”¹ In discussing Lord Brougham’s paradigm, which many people consider the core of the adversary system—that “An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client”²—the same wise man reached this conclusion: “Lord Brougham . . . uttered hyperbolic nonsense.”³

For this scholar, the real question for practicing lawyers and students of law was:

How should the lawyer behave given that particular role as ‘champion’ within the context and confines of the adversary system of justice? In other words, what means are appropriate to ends that often seem, and indeed often are, inconsistent

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¹ Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 312–13 (1990).

² 2 TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale ed., London, Albion Press 1821).

³ Lawry, *supra* note 1, at 319.

with justice or good morals as those terms are generally understood by the average good and reasonable citizen.⁴

The wise man whom I have quoted is Professor Robert Lawry, the honoree of today's public lecture.⁵ He expressed these points of view in an important article in 1990 entitled *The Central Moral Tradition of Lawyering*.⁶ Professor Lawry understood that being a lawyer—being a good and upstanding lawyer—is difficult business. Having a little bit of the philosopher in him, Professor Lawry resisted the proposition that lawyers' moral dilemmas can be resolved uniformly by resort to a simple formula, like Lord Brougham's prescription. That is a lesson Professor Lawry helped teach me, and it is one that has been prominent in my own writings.⁷ I thank him for that.

What I would like to do today, in Professor Lawry's honor, is to spell the complication out a bit, to move closer to "getting the paradigm right"—or rather to getting the paradigms right.⁸ I will suggest that unitary or single-minded approaches to legal ethics simply cannot and do not provide all the answers.

Let me start by introducing the issue with a bit of background for the uninitiated. The professional responsibility world divides itself into three camps.⁹ Some scholars adhere to the ultra-adversarial norm proposed by Lord Brougham and sponsored most fiercely in modern times by Monroe Freedman.¹⁰ For them, the adversarial ethic governs

⁴ *Id.* at 320.

⁵ This lecture was presented as the Robert P. Lawry Lecture in Legal Ethics at the Case Western University Law School on September 26, 2007, in honor of the retirement of Professor Lawry.

⁶ Lawry, *supra* note 1.

⁷ See, e.g., Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 278–91 (2006) (discussing varying interpretations that can be ascribed to permissive ethics rules); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 838–63 (2002) (discussing ways legal ethics regulation oversimplifies).

⁸ See generally Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73 (2007) (describing a series of images, or paradigms, of lawyers that all underlie legal ethics regulation).

⁹ See Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 2 (2005) (identifying two sides in the debate over advocacy ethics and suggesting that a third view exists); see also W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 367 (2004) (describing one view as arguing "that a lawyer should always act on the balance of first-order moral reasons" and the other as arguing "that a lawyer is prohibited from taking into account certain ordinary first-order moral reasons because of some feature of the lawyer's role, such as the obligations of partisanship and neutrality").

¹⁰ See, e.g., MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 72 (3d ed. 2004) (adopting the Brougham view); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 342 (1994) (arguing against modern ethics rules limiting partisanship and asserting that these rules are "[d]rafted by attorneys who are frequently insensitive to the dynamics of the adversarial

everything else. Lawyers must abide by the law and codes of ethics—which provide some rules for the adversarial game.¹¹ But even these rules should be read and interpreted in light of, and as furthering, a lawyer's overriding obligation to serve his client's interests.¹²

At the other extreme is a camp that assumes legal ethics regulation implements the Brougham-Freedman approach—which scholars in this camp call “the Dominant View” of legal ethics.¹³ These scholars question the appropriateness of the Dominant View. The camp's adherents, originating with David Hoffman in the 1800's and led by David Luban and William Simon today, distrust justifications for lawyer conduct based on the adversary system.¹⁴ They suggest, in differing ways, that lawyers should exercise broad moral discretion that trumps norms of role-differentiated behavior.

The third camp, into which I and others fall, suggests that the world is more complicated than that. We accept the existence and benefits of the adversary system but argue that, in practice, the American legal system is not as one-dimensional as Freedman claims or the other camp assumes.¹⁵ Ted Schneyer, in a seminal article in the *Wisconsin Law Review*, illustrated the indisputable point that the

process.”).

¹¹ Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319, 1323 (2006) (“no one—not Brougham nor anyone else—has ever suggested that zealous advocacy is not limited by duties imposed by law.”).

¹² See, e.g., Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 774 (2006) (quoting the scope section of the Model Rules of Professional Conduct for the proposition that the ethics codes are “rules of reason” that should be interpreted “with reference to the purposes of legal representation and the law itself.”).

¹³ See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS* 8 (1998) (identifying a “dominant view” of legal ethics); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xix–xxi (1988) (positing a “standard conception of the lawyer's role”).

¹⁴ See, e.g., David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83, 85–105 (David Luban ed., 1984) (questioning the force of adversarial justifications for some types of ultra-aggressive lawyer conduct); William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988) (arguing that “[t]he lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice.”); see also DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 67 (2000) (arguing that lawyers “cannot simply rely on some idealized model of adversarial and legislative processes” and that “reference to broader moral principles is necessary.”).

¹⁵ See, e.g., Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1543 (arguing that the “Standard Conception is really only one, and never a completely dominant, strand of thought in a vague and sometimes contradictory field”); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 554 (1991) (arguing that adversarial ethics envisions moral legal practice); Zacharias & Green, *supra* note 9, at 44–56 (challenging the traditional views of advocacy ethics); see also Lawry, *supra* note 1 (identifying a tradition of lawyering that is inconsistent with uniform partisanship).

modern legal ethics codes—which set the boundaries for the system—already allow lawyers to exercise a significant measure of moral discretion.¹⁶ Bruce Green and I, in an article published last year, have tried to show that, historically, there always has been a give and take between legal ethics regulation and judicial regulation of lawyers which has produced a standard for advocacy that accepts neither the Brougham-Freedman nor the Hoffman-Luban view.¹⁷ Rather, there is a middle-ground based on professional norms, understandings, and conscience that limit lawyers' unquestioning adherence to client interests while still incorporating the basic elements of role-differentiation.¹⁸

That is the starting point. So let us move from there to Professor Freedman's most recent illustration of how he believes legal ethics should work. For all my disagreements with him¹⁹—which incidentally are probably not as significant as Freedman himself believes²⁰—I have to admit that Professor Freedman is always provocative. His latest paper has made me think. I hope you too will enjoy contemplating his claims.

This is Freedman's question: should lawyers ever intentionally lie to a court?²¹ Such lies are absolutely forbidden by all professional codes.²² Most judges and lawyers would be horrified by the notion that the prohibition is defeasible. Yet Professor Freedman concludes that "there are circumstances in which zealous representation . . . can require a lawyer to make a false statement to a court or to a third

¹⁶ Schneyer, *supra* note 15, at 1544–50.

¹⁷ Zacharias & Green, *supra* note 9, at 36–65.

¹⁸ *Id.* at 57 (arguing that there are areas of professional conscience that the codes recognize and in which they expect discretion to be exercised non-idiosyncratically).

¹⁹ See generally Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 170–172 (1996) (questioning the paradigm underlying the professional codes of the unsophisticated defendant requiring an ultra-aggressive advocate); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (empirical study questioning the assumptions underlying extremely strict attorney-client confidentiality rules).

²⁰ See, e.g., Fred C. Zacharias, *Five Lessons for Practicing Law In the Interests of Justice*, 70 FORDHAM L. REV. 1939, 1940 (2002) ("When one practices in an adversarial system—and I have no expectation that America will scrap the adversarial system anytime in the near future—I think that one has to accept most of Monroe Freedman's premises."); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1319–20 (1995) (describing the importance of Freedman's work in the development of American legal practice and the regulation of lawyers).

²¹ Freedman, *supra* note 12, at 772 (arguing that circumstances exist in which a lawyer should "make a false statement to a court").

²² See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2007) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal"); see also *id.* R. 8.4 ("It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

person, or to engage in other conduct involving dishonesty, fraud, deceit, or misrepresentation.”²³

Here is Freedman’s most interesting illustration, and the one I want to focus on. Suppose a judge routinely calls criminal defense attorneys to the bench prior to trial and says “Let’s move this along. Did he do it or didn’t he?”²⁴

Obviously, this puts the lawyer in a terrible position. If the lawyer’s client is guilty and the lawyer says so, he breaches confidentiality and undermines his client’s interests. If the client is innocent, and the lawyer declines to say so with a comment like “I can’t answer that question,” the judge may assume the client is guilty and hold it against the client. Freedman’s answer is that the judge has acted improperly—a proposition with which we probably all can agree—and that therefore the lawyer is justified in always answering “I have no doubt that my client is not guilty,” even if the opposite is true.²⁵

As I started thinking about Professor Freedman’s hypothetical, my initial reaction to his conclusion was sympathetic. After all, lawyers ordinarily should not act against their clients’ interests, especially in situations in which their very function is to act as an advocate. Confidentiality rules are designed to allow clients to give their lawyers information about their guilt or innocence with the assurance that the lawyers will not reveal it.²⁶

But then I started considering the ramifications of Freedman’s conclusion. Suppose the lawyer tells this judge that his guilty client is innocent, and always acts this way. When the question is later asked about an innocent client, the lawyer’s word will mean much less. In effect, the lawyer has thrown one set of clients under the bus for another.

²³ Freedman, *supra* note 12, at 772.

²⁴ *Id.* at 773.

²⁵ *Id.* Freedman suggests that this double negative—denying doubt that the “client is not guilty”—is less of a lie than saying the “client is innocent” because the client is cloaked with the presumption of innocence. *Id.* at 777. That distinction seems meaningless, unless the wording is designed to alert, and has the effect of alerting, the judge to the fact that the lawyer is providing a non-responsive answer. Interpreting the response that way, however, robs Freedman’s hypothetical of its force and the very point about client-orientation that Freedman tries to make. So interpreted, the response would be close to the more candid but equally non-responsive answer that I propose below. If, in contrast, the response is designed to serve the client-oriented function that Freedman champions, then it is intended to mislead the court and is tantamount to falsely asserting the client’s innocence.

²⁶ See MODEL RULES OF PROF’L CONDUCT 1.6 cmt. (“[Confidentiality] contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”).

That, of course, is not a new conundrum. What should a lawyer do when a prosecutor offers plea deals for two clients—one of which is very favorable, the other of which is unfavorable—and makes them contingent on both clients accepting the offers? Or—and this is something I frequently did as a defense attorney—should a lawyer whose word is considered trustworthy go to a prosecutor or sentencing judge and volunteer his personal view that a client is a good risk for a particular type of diversion or probation? Like in Freedman's hypothetical, the failure to do the same for a less appealing client suggests to the prosecutor or the court that the client is unworthy. Conversely, making the same type of appeal for all clients leads prosecutors and the court to distrust the lawyer's word, even when the client deserves the benefit of the doubt.

Lord Brougham and Professor Freedman probably would say that the lawyer must always do what is best for the client, acting in the moment in which the lawyer represents that client. But let me hearken back to our wise man, Professor Lawry. He has suggested that "there is no such thing as a 'client' without a legal system within which the words 'lawyer' and 'client' have meaning."²⁷ When Lord Brougham said a lawyer must know no person other than his client, he assumed that the lawyer has but one client, while in fact most lawyers have many clients and must serve all of those clients in the context of a continuing legal system. Brougham also assumed that the legal system in which representation occurs allows a lawyer to act in the prescribed way—that it does not assume, anticipate, or require representation that incorporates process-based or "officer of the court" limits on the lawyer's behavior, including speaking the truth or making sure that the system works appropriately.²⁸

Professor Freedman's response to the hypothetical is unsatisfying for similar reasons. His response is based almost entirely on this axiom: "For more than a century, the lawyer's ethic of zeal has *required*, and has inspired, entire devotion to the . . . client. . . ."²⁹

²⁷ Lawry, *supra* note 1, at 319.

²⁸ In his autobiography, Brougham subtly amended the paradigm in his famous quotation, stating that the lawyer's obligation to his client "is the highest and most unquestioned of his duties," rather than his "first and only duty." 2 HENRY LORD BROUGHAM, *THE LIFE AND TIMES OF HENRY LORD BROUGHAM, WRITTEN BY HIMSELF* 308–09 (William Blackwood and Sons, Edinburgh and London 1871). If intentional, this change may have reflected a new (or newly-acknowledged) appreciation for the systemic constraints on lawyers that limit unfettered advocacy. See Fred C. Zacharias & Bruce A. Green, *Anything Other than a Deliberate and Well-Considered Opinion—Henry Lord Brougham, Written By Himself*, 19 GEO. J. LEGAL ETHICS 1221, 1224 (2006) (discussing the possibility that Lord Brougham may have reconsidered his paradigm late in life).

²⁹ Freedman, *supra* note 12, at 771 (emphasis added).

Given this unitary and tautological description of the lawyer's ethic, Freedman has no problem concluding that the lie to the court is "*The response . . . that is consistent with zeal, confidentiality, competence, and the Fifth Amendment [privilege against self-incrimination].*"³⁰ The lawyer cannot "lead the client to believe that she is 'acting solely in [the client's] interests'" and then, in response to a judge's question, become essentially 'an agent of the State'"³¹ While Freedman correctly notes, as many scholars in many fields have noted, that there are degrees of lying and that sometimes shading the truth can be morally justified,³² virtually his only support for the notion that *in this case* the lawyer's lie is "morally justifiable equivocation" is the lawyer's supposed role as an advocate and the fact that the court has acted wrongfully.³³

Freedman fails to discuss why the ethics codes include strict prohibitions against lying. He assumes the prohibitions to be secondary to Brougham's single ethic of devotion to the client. That may not be correct, either as a descriptive or prescriptive matter.

First, no ethics code ever has adopted Brougham's proposition as *the* definition of a lawyer's role. The codes regulate lawyers in all their functions—not just their functions as trial advocates in criminal cases. However strong the justifications for Brougham-like advocacy might be in that one context, for lawyers who serve as advisors, counselors, negotiators, and facilitators of cooperative ventures, the ethic often seems out of place.³⁴

More to the point is the fact that, from the 1908 Canons of Ethics forward, the legal ethics codes have always advised lawyers that they sometimes do need to know persons other than their client—for example, in refraining from suborning perjury. The reason the early codes recognized alternative interests was that, historically, the codes took their cues from judicial regulation of lawyers. Judges universally perceived the function of lawyers as helping courts identify the

³⁰ *Id.* at 773 (emphasis added).

³¹ *Id.* at 774 (quoting *Estelle v. Smith*, 451 U.S. 454, 467 (1981)).

³² *Id.* at 776–77; see generally SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* xvii–xviii (1978) ("reasons to lie occur to most people quite often"); Arnold Isenberg, *Deontology and the Ethics of Lying*, in *ETHICS* 163, 183 (Judith J. Thomson & Gerald Dworkin eds., 1968) (discussing the inherent wrongness of lying in the context of a person who lures a child from the edge of a cliff by falsely stating that he has candy to give to the child); IMMANUEL KANT, *LECTURES ON ETHICS* 227 (Louis Infield trans., 1978) (noting circumstances in which false speech should not be considered to be lying).

³³ Freedman, *supra* note 12, at 777.

³⁴ See Zacharias, *supra* note 8, at 81 (noting that the adversarial paradigm "ignor[es] the reality that some representation takes place in the absence of a contest or an adversarial arbitration process.").

truth.³⁵ Over time, as the philosophical debate about the adversary system matured, the professional codes became more important in the setting of rules for lawyers, but the connection between professional and judicial regulation continues today.³⁶ Never once has the package of ethics regulation explicitly or implicitly adopted the unitary view of the lawyer's role that Freedman claims is overriding. As John Adams once said, "facts are stubborn things."³⁷

The codes actually recognize several roles for lawyers other than being clients' champions. The most obvious alternative is the role as officer of the court which, again, stems from the long tradition of judicial regulation of lawyers.³⁸ We have already noted that lawyers are not supposed to lie to the court, but there are many other duties stemming from this role—a number of which are directly contradictory to serving the client's interests. The lawyer may not introduce false evidence.³⁹ He must advise a court of controlling precedent.⁴⁰ He may not make frivolous claims.⁴¹ He must obey discovery rules.⁴² The list goes on.⁴³

There is another role, which one could consider either part of the officer-of-the-court function or a separate role, to make sure the legal system operates in its intended fashion. This obligation may be more significant for prosecutors than defense attorneys,⁴⁴ but private lawyers share the obligation as well. A lawyer may not communicate

³⁵ Zacharias & Green, *supra* note 9, at 37.

³⁶ *Id.* at 60–64 (discussing the continuing relationship between professional and judicial regulation).

³⁷ The Quotations Page, <http://www.quotationspage.com/quote/3235/html> (last visited Sept. 7, 2007) (quoting John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials* (Dec. 1770)).

³⁸ The officer-of-the-court notion often is downplayed in the literature because it seems like a fuzzy term that might be used haphazardly to undermine the advocate's function. The term disappeared in the 1969 Model Code of Professional Responsibility, but reappeared in the 1983 Model Rules. MODEL RULES OF PROF'L CONDUCT Preamble (1983) ("A lawyer . . . is an officer of the legal system and a public citizen having special responsibility for the quality of justice"); MODEL CODE OF PROF'L RESPONSIBILITY (1969) (omitting the term "officer of the court"). The concept actually encompasses very concrete duties, some of which are noted above.

³⁹ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (1983).

⁴⁰ *Id.* R. 3.3(a)(2).

⁴¹ *Id.* R. 3.1.

⁴² *See id.*, R. 3.4(c)–(d).

⁴³ Consistent with his approach of interpreting the codes through the lens of Brougham's paradigm, Professor Freedman suggests that "in a free society the lawyer's function, as an officer of the court, is to serve the undivided interests of the individual client." FREEDMAN & SMITH, *supra* note 10, at 10. That account of the officer-of-the-court role, however, does not comport with the specific obligations contained in the professional codes or those historically imposed by judicial regulators.

⁴⁴ *See, e.g.*, Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice; Can Prosecutors Do Justice?*, 44 VAND L. REV. 45, 85–102 (1991) (arguing that prosecutors have a special obligation to ensure that the criminal justice system is operating in its intended fashion).

with a represented party,⁴⁵ thus preserving the adversary's ability to use her lawyer as the system envisions. A lawyer may need to inform the opposing lawyer of inadvertently disclosed documents,⁴⁶ so that the opponent can raise possible legal claims to get the documents back.⁴⁷ Under the old Code of Professional Responsibility, the lawyer must advise the court of even an opposing witness's perjury,⁴⁸ so that the judge can address the problem and the system can operate on the basis of truthful testimony. It is impossible to reconcile these obligations with the Brougham model, because they require lawyers to act specifically to preserve the interests of third parties in a properly functioning legal process. The lawyer must know someone other than his client.

Professor Lawry has suggested that "the lawyer's *first* obligation is to the system of law itself, its processes, procedures and institutions."⁴⁹ For Lawry, "if the primary duty of the lawyer is to the processes, procedures, and institutions of the law, the lawyer is the client's 'champion' only within that realm and only in ways the laws, social mores, and moral traditions of lawyering within that realm allow."⁵⁰ I do not know whether I agree that the obligation to the institutions of law is the lawyer's *first* obligation, but it clearly is *one* of the functions which legal ethics—particularly that part of legal ethics stemming from judicial regulation—has always recognized and emphasized. Professor Lawry is at least correct in concluding that, if a lawyer "truly [is] an officer of the law . . . until we say clearly what we expect from the various officers of the law, we invite . . . chaos."⁵¹

So there is the first questionable aspect of Freedman's position on the lying lawyer: the notion that there is a single role for lawyers. In fact, there are several. They are not always consistent. There is nothing in the codes, nor in any uncontroversial principle, that allows us to assume Freedman's position that the champion's role controls in the event of a conflict.

⁴⁵ MODEL RULES OF PROF'L CONDUCT R.4.2 (1983).

⁴⁶ This obligation is codified for the first time in the new Model Rules. *Id.* R. 4.4(b).

⁴⁷ Professor Freedman challenges this obligation, again based on the theory that devotion to a client overrides the duty to preserve the system. Monroe H. Freedman, *Erroneous Disclosure of Damaging Information: A Response to Professor Andrew Perlman*, 14 GEO. MASON L. REV. 179, 181–82 (2006) ("if the client's decision is to use the information to its greatest effect, the lawyer should not say anything about the information to the other side until it is tactically desirable to do so (e.g., at a deposition or on cross-examination).").

⁴⁸ MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(b) (1969).

⁴⁹ Lawry, *supra* note 1, at 335 (emphasis added).

⁵⁰ *Id.* at 320–21.

⁵¹ *Id.* at 326.

A second, partially-connected consideration is the fact that the requirement that lawyers tell the truth—in court and elsewhere—serves an important value that would be diminished if lawyers routinely lied in Freedman's hypothetical. Namely, truth-telling by lawyers is economically and administratively efficient. It would be possible to develop a legal system in which everyone assumes that lawyers always lie in their clients' interests—in court, in negotiations, in conversation. The ramification of that system would be *caveat emptor*—distrust lawyers at all times. Check the facts, obtain full discovery before settling, and be prepared to challenge every statement the adversary makes!

A legal world based on such a regime seems frightening. The inefficiencies inherent in that world are part of the reason courts and code drafters have insisted that lawyers always be candid. Lawyers may avoid answering some questions. They may draw inferences from the facts. They even may engage in puffing in negotiations. But when a lawyer speaks, we want to be able to rely on his word.

That is why, when I used to assure prosecutors that *I* had checked and a client *was* in a position to fulfill certain promises, the prosecutors would believe me. That is why my arguments at sentencing meant something to the court. The ability to trust the lawyer's statement is important for clients, lawyers, and judges alike. A desire to maintain that ability to trust also causes most lawyers and judges to avoid abusing their relationships by asking questions of the sort the judge in Freedman's hypothetical asks; they know such questions improperly try to force a breach of confidentiality.

Thus far, I have suggested that lawyers play multiple roles in the system. They have some obligation to keep the institutions of the system working properly. And the obligation of truth-telling is efficient and helpful to those institutions.

But now we come to perhaps the most important consideration that is missing in Freedman's analysis. Legal ethics—the codes and other constraints on lawyer behavior—encompass not just multiple roles for lawyers, but also many values other than client and systemic interests. Consider, for example, exceptions to attorney-client confidentiality, such as the old code's permission to disclose client confidences to prevent crimes⁵² and the new code's permission to disclose to prevent harm.⁵³ These exceptions are based on third-party interests that trump

⁵² MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (1969).

⁵³ MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(3) (2007).

the principle of zeal.⁵⁴ Similarly, ethics code provisions that encourage lawyers to discuss moral and political considerations in advising clients recognize independent goods.⁵⁵ Prohibitions against lying and dishonesty are based on general moral precepts.

There are different kinds of integrity rules.⁵⁶ One set essentially reminds lawyers that their activities are bounded not only by ethics codes, but also external constraints. Lawyers, for example, are subject to criminal law, so code provisions that say lawyers may not assist a client in committing criminal conduct and may reveal confidences to prevent crime make it clear to lawyers that they should not overdo the commitment to zeal. The second set of integrity rules do not necessarily correspond to external law, but rather correspond to general moral principles that bind everyone, including lawyers. The principles may not be absolute, any more than moral principles are absolute for non-lawyers. Nevertheless, the lawyer codes recognize that there are some general principles for behavior that lawyers should ordinarily adhere to, even when that contradicts the ethic of zeal.

For example, lawyers are told they may not mislead unrepresented third parties.⁵⁷ Lawyers are enjoined not to harass third parties for the client's benefit.⁵⁸ Model Rule 8.4 contains a series of provisions forbidding lawyers to engage in deceit and other dishonest acts.⁵⁹ These and other provisions clarify that the lawyer's role does not automatically require lawyers to cede common courtesy, civility, and moral behavior on the basis of their obligation to champion their clients' interests. Ethical boundaries relating to personal and professional conduct co-exist with the rules of role.

This is not the time or place to get into the details of these rules. It is enough for our purposes to note that a range of ethics rules exist that encourage well-intentioned lawyers to honor moral values and inform them that they cannot resolve all dilemmas with single-minded

⁵⁴ See Fred C. Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1397 (2004) ("All American jurisdictions recognize that society's need to prevent particular kinds of client conduct sometimes trumps the client's interests in confidentiality and his lawyer's loyalty.").

⁵⁵ E.g., MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007) (requiring lawyers to exercise "independent professional judgment" and allowing lawyers rendering advice to "refer not only to law but to other considerations such as moral, economic, social and political factors").

⁵⁶ See generally Fred C. Zacharias, *Integrity Ethics* (discussing ethics provisions that implement general moral principles) (forthcoming; on file with author); cf. Stier, *supra* note 15, at 565-67 (discussing rules that encourage lawyers to exercise moral discretion).

⁵⁷ MODEL RULES OF PROF'L CONDUCT R. 4 (2007).

⁵⁸ *Id.* R. 4.4(a).

⁵⁹ *Id.* R. 8.4.

devotion to the advocate's ethic. Lawyers must consider how the system needs them to act, but they also must consider universal principles of integrity—including the principle that lawyers, like everyone else, ordinarily should not lie.

So back to our lawyer confronting the judge who has asked him whether the client is guilty. How should he act? It is not enough to conclude, as Freedman does, that lying helps the client. Nor does the fact that the judge acted improperly resolve the issue: why, exactly, should two wrongs make a right?

The lawyer needs to balance a series of partially conflicting values: loyalty to the client; systemic interests in reassuring all clients that lawyers will act in their interests; systemic interests in having clients, lawyers, and judges be able to trust the lawyer's word; Professor Lawry's obligation to "the processes, procedures, and institutions" of the law; lawyers' personal interests in not telling lies simply for pragmatic ends; and universal ethical principles.

Freedman's proposed lie serves only the first two values—loyalty and ensuring that clients will trust lawyers to act in their interests. Telling the truth serves only the last two values—preserving the lawyer's integrity and acting consistently with the general ethic against lying—as well as some aspects of the obligation to legal institutions; telling the truth serves the efficiency of judicial administration but not necessarily the client-centered core of the adversary process.

That brings us back to the third option, which begins to appear more appealing: informing the judge, politely, that the question is inappropriate—undermining confidentiality and the lawyer's role—and that you, the lawyer, will not answer the question for reasons of principle. This enables the lawyer to tell the truth and preserves the system as it is intended to operate. If it is the right answer to give, it also is an answer that is loyal to the client, in the same way that refusing to suborn perjury is consistent with loyalty. The client may not like it, but constraints on loyalty are part of the rules of the game. The client cannot expect representation to mean that his lawyer will dishonor legal limits on client advocacy.

But that answer, again, is too simple and glib. Because I have ignored the innocent client—the one who would be helped by the *honest* response that "my client did not do it," in the same way that my own clients sometimes were helped by my conversations with prosecutors vouching for them. Within the concept of loyalty, do these clients not have a right to expect the giving of a truthful answer that will serve their cause? If their lawyers insist on telling the judge

“the question is inappropriate and I will not answer it,” are the lawyers now not throwing the innocent clients under the bus in favor of the guilty ones?

There is an answer, and it lies in the words of Professor Lawry that I quoted before. But I am not sure I am comfortable with the solution, nor am I sure that Lawry himself would apply his words to this situation. Yet here is what I glean from his observations. If the lawyer’s *first* obligation truly is to the processes and institutions of the legal system, and if the lawyer “is the client’s champion only within that realm,” then the duty to serve the interest of the innocent client by volunteering the truth is trumped. For the system’s sake, the lawyer must make sure that lawyers both speak accurately and that judges do not undermine confidentiality and the advocate’s role by asking the inappropriate question. Once lawyers universally decline to answer the question, judges will see no further point to the inquiry. Ergo, the innocent client’s interest must be subordinated to the legal system’s interest in preventing judges from destroying the system.

Interestingly, though Professor Freedman no doubt would be horrified by this response, I think that his approach of lying ultimately reaches exactly the same result. If lawyers always answer “my client is innocent” for both guilty and innocent clients, then the judges asking the question will soon get tired of the answer and will stop asking the inappropriate question. The downside to Freedman’s method of reaching this outcome is that, in the process, the lying lawyer also will have undermined everyone’s ability to trust his word—including, incidentally, the client who has observed the lawyer lie.⁶⁰

Having offered this proposal, I have to confess to a crisis of conscience. Was I acting improperly as a defense attorney when I vouched for my worthy clients to prosecutors in plea bargaining or judges at sentencing?

Here is my thought on that. Under the professional rules and common law in most jurisdictions, lawyers are forbidden to vouch for their clients at trial.⁶¹ They may not, for example, express their personal opinion about a case to a jury in closing argument; however strongly lawyers may attempt to persuade the jury of the client’s

⁶⁰ See *infra* text accompanying note 76.

⁶¹ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.4 (e) (2007) (forbidding lawyers to “state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused”). For a discussion of vouching and its costs, see generally Kevin Cole & Fred C. Zacharias *The Agony of Victory and the Ethics of Lawyer Speech*, 69 SO. CAL. L. REV. 1627, 1665–66, 1668–75 (1996).

innocence, they may not say, "I believe my client did not commit the crime." The main reason for this principle is the one I have already mentioned. If lawyers were allowed to vouch, but forbidden to lie for guilty clients, savvy jurors would be able to tell from lawyers' arguments which clients deserve to be convicted. In the end, the regulators have concluded that lawyers should follow basic principles of integrity by not lying for guilty clients, but at the same time should not throw the guilty clients under the bus by vouching for the innocent.

So is the situation any different when a lawyer vouches for a client in plea bargaining or at sentencing? Perhaps a bit. That is because, as a practical matter, prosecutors assume that all defendants are guilty and unworthy. For the most part, this is the legitimate starting point for judges at the point of sentencing as well.⁶² The guilty defendant, or the one who the lawyer believes cannot comply with unusual conditions of diversion or probation, is not put into a worse position when the lawyer fails to extol her non-existent virtues; she will be treated fairly in the world assumed by the prosecutor and judge. In contrast, the innocent or capable defendant *will* be treated unfairly if the lawyer remains silent and fails to contradict the prosecutor's or the judge's assumption that the defendant is unworthy.

In one sense, this approach treats clients unequally. If extended too far, it might even be unconstitutional, because every defendant is entitled to aggressive counsel. But the reality is that aggressiveness takes many forms. Lawyers can never do the exact same thing for each client. What they can accomplish is limited both by the client's factual situation and by the rules governing the lawyer's behavior. The good defense lawyer is not the one who vouches for every client equally regardless of whether the situation calls for it, but the one who always tries to maximize the client's rights and interests given the systemic constraints on what the lawyer can and may do.⁶³ Integrity rules—such as the prohibition against lying—are part of those constraints.

Nevertheless, I still do not feel sanguine about where my discussion has led, because it seems so counter-intuitive that a lawyer

⁶² After conviction, the presumption of innocence disappears. Judges thus assume a different posture towards defendants, for example in setting bail conditions. *See, e.g.*, 18 U.S.C. § 3143 (a)–(b) (2000) (providing presumptions that convicted defendants be detained without bail pending sentencing and appeals).

⁶³ *See* Fred C. Zacharias, *Five Lessons for Practicing Law in the Interests of Justice*, 70 *FORDHAM L. REV.* 1939, 1940 (2002) ("a lawyer should strive to do at least one thing to improve the lot of each client that other lawyers might not do.").

should avoid informing a judge, truthfully, that his client is innocent. Yet the only other truthful response—actually saying “my client is innocent” to the judge at the pre-trial stage—presents exactly the same danger as vouching in closing arguments. Pre-trial, judges (like jurors) are still supposed to be *presuming* innocence for *all* clients. When the hypothetical judge inquires about the defendant’s culpability, there is nothing wrong with pointing to evidence supporting the client’s innocence or reminding the judge of the presumption of innocence. However, because her question is designed to eliminate the presumption for guilty defendants, the lawyer should not be a party to making the question effective. The duty to preserve the system seems to require a response that hurts the lawyers’ innocent clients in the same way as refraining from vouching in summations.⁶⁴

One attraction of the so-called Brougham principle is that it simplifies lawyers’ lives.⁶⁵ If a lawyer’s ethic of zeal requires “entire devotion to the client”—meaning that all considerations must give way before this “entire devotion”—then the lawyer does not need to balance, accommodate, or choose among competing values. Nor does the lawyer need to contextualize; he can follow the same exclusive principle in giving advice, negotiating, and engaging in cooperative transactions. The lawyer’s life is not that simple, however, and the

⁶⁴ Assuming that the innocent client is not entitled to an assertion of her innocence by a truthful lawyer, would the innocent client prefer Professor Freedman’s approach—having an untruthful lawyer say all clients are innocent—to the truthful non-responsive answer? On an extremely short-term view—that is, resolving the issue as if the lawyer appears before the judge only one time and has not yet appeared on behalf of a series of clients—perhaps so. In that unlikely scenario, the judge might believe the (untruthful) lawyer or at least would not be able to draw any inference of this client’s guilt. In the more realistic situation in which the lawyer has repeat business before the judge, however, the innocent client is worse off because she will want to rely on the lawyer’s credibility in future appearances. The lawyer’s practice of lying undermines that credibility.

Moreover, if the client is not the lawyer’s first, her case may be the straw within the series of innocence protestations that breaks the proverbial camel’s back. At some point, the court will tire of the protestations and become especially likely to assume that the defendant before the court is guilty. The innocent client is just as likely to be the unfortunate victim of this reality as the lawyer’s other, guilty clients. On balance, therefore, an innocent client with a lawyer who has (and knows) other clients or with a lawyer who will make future appearances is safer being represented by someone who declines to answer the culpability question on the explicit basis of principle.

⁶⁵ There is some dispute about what Lord Brougham himself actually meant by his prescription. Compare Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213 (2006) with Zacharias & Green, *supra* note 28. There is no doubt, however, that in modern times Brougham’s statement has been treated as the personification of the adversarial ideal. Cf. generally Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDUC. 29 (1991) (debating the modern significance of the Brougham approach).

legal ethics standards, including judicial regulation, have never treated it as simple.

Professor Freedman seems to recognize as much. In trying to justify a departure from the unambiguous ethics rules that forbid lawyers to lie, he states “there are moral and ethical considerations beyond the rules themselves that should inform the lawyer’s professional conduct.”⁶⁶ This frees Freedman to refer to a series of biblical illustrations which suggest that, under some circumstances, a lie can be morally justified. That relatively uncontroversial conclusion should have left Freedman in the same quandary I find myself—with the task of accommodating the conflicting values and considerations that affect lawyers. It should have left him with an answer, whatever it might be, that feels unsettling and unsatisfying.

Unfortunately, Freedman jumps from the conclusion that lying by lawyers sometimes might be justifiable back to the comfort zone of the simple, single ethic. Lying by the hypothetical lawyer is, for Freedman, “a form of morally justifiable equivocation.”⁶⁷ “It is technically accurate,” Freedman asserts, “because the client is presumed to be innocent.”⁶⁸ The lawyer owes his client devotion and therefore should tell the lie-that-is-no-lie.

With all due respect, I cannot agree that this syllogism is an exercise in “moral philosophy.”⁶⁹ To the contrary, it looks like word-play that avoids the very issue that Professor Freedman has done us the favor of presenting.⁷⁰ Freedman’s assumption that the Constitution mandates his view is equally tautological.⁷¹ The Constitution is not clear on what the guarantees of effective assistance of counsel, due process, and the privilege against self-incrimination entail. The extent of the protections depends on what the system requires; they do not themselves define a single role for lawyers within the system. In the end, by relying on his exclusive paradigm of

⁶⁶ Freedman, *supra* note 12, at 775.

⁶⁷ *Id.* at 777.

⁶⁸ *Id.*

⁶⁹ Freedman suggests that resort to moral philosophy supports his position, but his references to moral philosophers are mostly limited to St. Augustine and biblical texts. *Id.* at 782.

⁷⁰ See *supra* note 25.

⁷¹ Freedman, *supra* note 12, at 773 (relying on the constitution to establish the lawyer’s role). In the particular context of the lawyer’s response to the judge’s question about his client’s guilt, Freedman’s self-incrimination argument has some force, because the Fifth Amendment does seem hostile to the compelled revelation of the client’s admission. See Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 152–61 (2008) (spelling out the self-incrimination argument in the client perjury context). That conclusion, however, does not militate in favor of lying by the lawyer so much as his refusal to answer the judge’s question.

the lawyer's functions, Freedman obviates serious consideration of how the lawyer should accommodate the *various* roles that ethics codes and judicial regulators have always recognized.

Let me digress for a moment from the narrow focus of how lying fits legal ethics regulation and consider the issue of lawyers and lying more broadly. I mentioned "moral philosophy" earlier because that is a source that Professor Freedman suggests should inform the debate. The question of when it is appropriate to lie is not a new one for moral philosophers. Indeed, it has been the subject of books.⁷²

In her most famous work, Sissela Bok—a Swedish philosopher who also happened to marry a dean of the Harvard Law School⁷³—considered lying from a myriad of different angles.⁷⁴ One of her approaches was to look at how lying affects the various actors involved in the lie—the recipient of the lie, the person who may be harmed or helped by it, and the liar himself. It is worth considering those perspectives here.

We have considered the system's interest in truth-telling by lawyers. But what about the interests of the individual judge? Sooner or later she will suspect that the lawyer has lied, particularly when the lawyer tells her in case after case that his client is innocent. At this point, the judge will not only distrust this lawyer, but likely other lawyers as well—and not only in the narrow context of the guilt-innocence question. When the lawyer tells the judge that his client—perhaps the very client the judge has asked about—is not a flight risk, cannot post bail, is willing to enter a rehabilitation facility, or has no criminal record, the judge will not believe a word the lawyer says. In Bok's terms, "we, when lied to, have no way to judge which lies are the trivial ones."⁷⁵ She concludes, from the perspective of the person deceived, that "[t]here must be a minimal degree of trust in communication for language and action to be more than stabs in the dark. This is why some minimal level of truthfulness has always been seen as essential to human society, no matter how deficient the observance of other moral principles."⁷⁶

Then there is the client who has watched the lawyer declare her innocence, knowing that she has told the lawyer she is guilty as sin.

⁷² See, e.g., BOK, *supra* note 32; SISSELA BOK, SECRETS ON ETHICS OF CONCEALMENT AND REVELATION 6 (1982) (distinguishing lying from concealing secret information)

⁷³ See Wikipedia, http://en.wikipedia.org/wiki/Sissela_Bok (last visited on September 7, 2007).

⁷⁴ See generally BOK, *supra* note 32.

⁷⁵ *Id.* at 21.

⁷⁶ *Id.* at 18.

The client certainly will be grateful to the lawyer who knows no one but the client. But will she trust the lawyer in the future—which is after all the goal of convincing the client that the lawyer is her ally? Perhaps not. The lawyer has lied to the judge's face. He may lie to the client too.

What's more, the lawyer has made it clear to the client that lying to the court is part of the game. Obviously criminal defendants already have incentives to lie themselves—in testimony, sentencing, or to their probation officers. But society does harbor the hope that sometimes they will be honest, particularly having taken an oath to tell the truth. Why *should* they, however, after their lawyers make it clear that truth-telling is discretionary?

The most important perspective that I have not yet mentioned is that of the lying lawyer himself. As a criminal defense attorney, he can perhaps be proud that he has vindicated Brougham's ideal. But not so proud that he will tell his mother the story over tea. As Bok puts it, "Liars usually weigh only the immediate harm to others from the lie against the benefits they want to achieve. The flaw in such an outlook is that it ignores or underestimates two additional kinds of harm—the harm that lying does to the liars themselves and the harm done to the general level of trust and social cooperation."⁷⁷

Lying comes at a personal cost not only to how the lawyer must think of himself, but also to his sense of being part of the community. He cannot help but feel isolated. The only ones who will understand him—even if he acted correctly—are other lawyers. As Bok says, "A liar often does diminish himself by lying, and the loss is precisely to his dignity, his integrity."⁷⁸

Moreover, there is the slippery slope. Bok asks us to consider this: "if lawyers become used to accepting certain lies, how will this affect their integrity in other areas?"⁷⁹ She suggests that the risks of harm arising from lying are increased by "the fact that so few lies are solitary ones."⁸⁰

If lying is appropriate in the hypothetical, in what other circumstances does the adversarial ethic mandate it? Professor Freedman suggests negotiations and settlement conferences, on the theory that judges and adversaries expect lawyers to puff and that negotiating conventions anticipate deceit.⁸¹ But there is a flaw in that

⁷⁷ *Id.* at 24.

⁷⁸ *Id.* at 46.

⁷⁹ *Id.* at 163.

⁸⁰ BOK, *supra* note 32, at 25.

⁸¹ Freedman, *supra* note 12, at 780–81.

reasoning. Client-oriented advocacy at trial is justified mainly on the theory that the competition between advocates is overseen by neutral fact-finders who sift the conflicting arguments, identify misstatements, and impose an appropriate result. There are no similar safeguards for good results when lawyers lie in negotiations. Here, as elsewhere, if conventions and client-orientation is all that guides lawyers, lawyers really cannot know whether lying is morally justified. And Bok suggests that “after the first lies . . . others can come more easily. Psychological barriers wear down; lies seem more necessary, less reprehensible.”⁸²

The personal and psychological perspectives of the actors just discussed all militate against allowing lying in our hypothetical. It is, again, only when we consider the one remaining actor that the issue becomes complicated—the innocent defendant. From his perspective too, lying is bad; the lawyer’s willingness to lie in general would have a negative effect on this client. But that is because the innocent client, with justification, wants the benefit of having a lawyer who can tell the truth and will be believed.

If we accept the position that I have tentatively proposed—that the lawyer should decline to answer the judge’s question regarding innocence—this client is harmed not by a lie, but by the lawyer’s failure to volunteer the whole truth. Psychologically, this client may trust the lawyer less in the future and certainly will have less faith in the justice system. Whether the lawyer can explain his rationale—the obligation to keep the system functioning well for all clients, guilty and innocent alike—is a challenge to the lawyer’s persuasiveness.

So even the counsel of philosophers, like Bok, does not lead to an easy solution to our hypothetical. Yet moral philosophy can help us understand the consequences of lying in a way that resort to a simple rule or adversarial ethic cannot. Bok resolves her own attitude toward the complex issues like this:

[T]rust in some degree of veracity functions as a foundation of relations among human beings; when this trust shatters or wears away, institutions collapse. . . . Such a principle need not indicate that all lies should be ruled out But it does make at least one immediate limitation on lying: in any situation where a lie is a possible choice, one must first seek truthful alternatives.⁸³

⁸² BOK, *supra* note 32, at 25.

⁸³ *Id.* at 31.

That is what I have tried to do.

In my remarks, I have taken the name of our wise man in vain several times. I hope that I have not mischaracterized his views. I do not know how Professor Lawry would resolve the specific issue that I have addressed. But I am fairly certain of this: he would not consider the question one that can be resolved mechanically.

Commenting upon the public's attitude toward lawyers, Professor Lawry had this to say: "[In popular literature], the lawyer's role as advocate is similar to that of the lone gunfighter who, against all odds, restores peace and establishes justice by slaying the forces of evil. Reality is more complex and far less dramatic than that."⁸⁴ Lawry noted further that "the system itself is designed to have lawyers perform *a variety of tasks* for a variety of clients in a variety of settings. The ethical responsibilities of lawyers change depending on the type of task, the client, and the setting."⁸⁵

Professor Lawry, in his career, never tried to answer all the hard questions that lawyers might face. To my knowledge, he never considered the lying issue that I have discussed today.⁸⁶ But I think he might share my instinct that discarding the lawyer's obligation of candor in favor of the ethic of zeal has serious costs for the institution of the law. Professor Lawry wrote: "the lawyer's primary obligation to the legal system is an affirmative one; it is not another way of saying the lawyer's obligation is to the client as prescribed by the law."⁸⁷ He also said, "I believe that if lawyers were more committed to their primary obligation of playing by the rules, many of the major problems of distortion would be eliminated. . . . if lawyers made it a practice to play 'tough but fair,' I believe the best traditions would be revitalized."⁸⁸

Earlier, I identified the various "camps" within the field of professional responsibility. Much of what scholars in each of those camps focus on is justifying ways lawyers should act within the adversary system. The hypothetical I have discussed is a specific illustration of how the debate may play out. Freedman, assuming Brougham's ethic is controlling, suggests a prescription for how lawyers should deal with a rule that forbids lying. The Hoffman camp

⁸⁴ Lawry, *supra* note 1, at 336–37.

⁸⁵ *Id.* at 336.

⁸⁶ He has, however, considered related subjects, at times challenging Professor Freedman's ultra-adversarial approach to legal ethics. *See, e.g.*, Robert P. Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 654 (arguing that "no lawyer may allow a [client's] lie to corrupt the adversary system").

⁸⁷ Lawry, *supra* note 1, at 336.

⁸⁸ *Id.* at 344.

might suggest that lawyers be guided by their personal consciences, or other case-specific moral considerations bearing on when lying is appropriate.⁸⁹ I have suggested an approach that also is contextual, but which identifies competing values in the legal ethics codes and addresses the conflicting institutional interests that need to be accommodated.

Although the hypothetical is, I think, an interesting intellectual exercise, I doubt that the specific issue it raises has enduring significance. All participants in the system usually understand their core functions and avoid putting the other participants in situations that undermine their functions. Judges, in other words, are unlikely to ask the question the hypothetical posits. If they do, judges will quickly take the hint that it is unreasonable.

The intellectual exercise itself, however, has some importance because it highlights the different ways one might think about the lawyer's role, or roles. I have suggested that lawyers have multiple functions, and conflicting obligations, that cannot be resolved simply, by resort to a single paradigm. Professor Lawry, again, had it right when he said "'reform' or 'modification' of lawyers' ethics within the adversary system is a secondary challenge to the task of getting the central idea of lawyering straight to begin with."⁹⁰

⁸⁹ William Simon, for example, has suggested that "[p]opular and professional moralists have a tendency to over-condemn lying." William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433, 433 (1999). Simon concludes, partly in conflict with Bok, that "[i]n situations where honesty conflicts with other important values, there is no reason to presume that honesty should prevail." *Id.* at 463.

⁹⁰ Lawry, *supra* note 1, at 363.

