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PROFESSIONAL ETHICS, SOCIAL MORALITY: A REPLY TO PROFESSOR HAZARD

Patrick Wiseman†

In *My Station as a Lawyer*,¹ Professor Hazard paints an unpleasant picture of the practicing lawyer as someone who must be partisan, aggressive, and even deceptive in zealously representing a client's interests. Reading his account, one begins to understand why lawyers have historically been held in such low esteem.² This low estimation of lawyers occurs because, from the perspective of conventional morality, much of what lawyers do appears to be immoral. From the perspective of the lawyer, however, the same conduct is frequently not only right, but required by the lawyer's code of professional ethics.³ Does this difference in perception betray a weakness in conventional morality or in the ethics of the legal profession? According to Professor Hazard, the failure is in conventional morality.⁴

Professor Hazard draws his inspiration from F.H. Bradley, an English Hegelian of the late nineteenth and early twentieth century. In *Ethical Studies*,⁵ Bradley included an essay entitled "My Station and Its Duties."⁶ Professor Hazard derives from this essay a moral theory in which morality is entirely relative to one's role or station.⁷ According to Professor Hazard, conventional

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1. Hazard, *My Station as a Lawyer*, 6 GA. ST. U.L. REV. 1 (Fall 1989).

2. See A. ROTH & J. ROTH, *DEVIL'S ADVOCATES: THE UNNATURAL HISTORY OF LAWYERS* (1989). The book "uncovered the 3,000 year-old tradition of lawyer-hating" and "gathers history's best anecdotes, satires, poems and sayings directed against the lawyer." *Id.* at Introduction.

3. I speak here of the often unspoken lawyers' code, not the Lawyer's Code promulgated in the MODEL RULES OF PROFESSIONAL CONDUCT or the MODEL CODE OF PROFESSIONAL RESPONSIBILITY.

4. Hazard, *supra* note 1, at 7.

5. F. BRADLEY, *My Station and Its Duties*, in *ETHICAL STUDIES* 98 (R. Ross ed. 1951) (originally published 1876).

6. In the collection's earlier essays, Bradley rejected the moral philosophies of Mill (*Pleasure for Pleasure's Sake*) and Kant (*Duty for Duty's Sake*). In *My Station and Its Duties*, Bradley sets forth an alternative to Mill and Kant. *Id.*

7. Hazard, *supra* note 1, at 7.

morality, as propounded from the podium and preached from the pulpit, presupposes that there are moral rules which are universal in scope, concrete in content, and equally applicable to all people in all circumstances.⁸ But, he argues, no rule works that way in practice.⁹ The universal rules of conventional morality are subject to qualification whenever applied by particular people in particular situations.¹⁰

This qualification of universal rules necessarily occurs because moral rules are inherently relative to role, and are applied only by people acting in a particular role.¹¹ Professor Hazard illustrates the latter claim using an example of the commandment: "Thou shalt not kill."¹² This is all very well, he suggests, as an abstract proposition, but it becomes qualified the moment it is applied by a particular agent playing a particular role.¹³ This qualification of universal rules, says Professor Hazard, is a function of one's role.¹⁴ But surely in this he is mistaken.¹⁵ The qualification of the rule against killing another human being is not justified by reference to the role of lawyers in society; rather, the role of lawyers in society is justified by a societal recognition that rules, such as the one prohibiting killing, are not absolute. In other words, the rule is qualified from a broader societal perspective, not from the narrower role-bound perspective of the lawyer.

Professor Hazard's relativism is far more radical than Bradley's. According to Professor Hazard, each of us, because each has a unique combination of roles, is profoundly isolated.¹⁶ "Every individual has a distinctive place-perspective and from that station has unique duties that are a function of that position."¹⁷ This, he says quite accurately, is a "radically relativistic"¹⁸ moral position.

8. *Id.*

9. *Id.*

10. *Id.*

11. I have paraphrased Professor Hazard, but I believe I have understood his central thesis.

12. *Romans* 13:9.

13. Hazard, *supra* note 1, at 8.

14. *Id.*

15. It is in the nature of Replies such as this to stress areas of disagreement with the paper to which one is replying. I agree, however, with Professor Hazard's view that it is high time to reexamine the rules governing lawyers' conduct; the reexamination must acknowledge the uniqueness of the lawyer's role.

16. Hazard, *supra* note 1, at 8.

17. *Id.* at 7-8.

18. *Id.* at 8.

Morality is indeed "relative" for Bradley: relative from one time to another, and from one culture to another,¹⁹ but not from one station to another.²⁰ It is essential to Bradley's scheme that each sphere of conduct be subordinate to a higher sphere, our station as citizen perhaps being the highest.²¹ It is our membership in a social order which defines our role, establishes the rules of role, and the duties of station. For Bradley, one's social role is dependent on one's social order, and the individual is meaningless without reference to the social order of which he or she is a member.²² Bradley would reject Professor Hazard's notion that we are profoundly isolated; he would insist that our lives are meaningful only insofar as we are profoundly connected as members of a social order.

This suggests that any reexamination of the rules of the lawyer's role must be conducted, not from the isolated and narrow perspective of the lawyer, but from the larger perspective of the social order of which the lawyer is a member, and in the absence of which, the lawyer's station makes no sense. Therefore, while lawyers may be uniquely well equipped to conduct the rules of the role of member-of-a-social-order because they live on a daily basis with the rules of their role, the reexamination must be conducted from the larger perspective.

19. F. BRADLEY, *supra* note 5, at 124.

It is abundantly clear that the morality of one time is not that of another time, that the men considered good in one age might in another age not be thought good, that what would be right for us here might be mean and base in another country, and what would be wrong for us here there might be our bounden duty.

Id.

20. *Id.*

Morality is "relative," but is nonetheless real. At every stage there is the solid fact of a world so far moralized. There is an objective morality in the accomplished will of the past and present, a higher self worked out by the infinite pain, the sweat and blood of generations, and now given to me by free grace and in love and faith as a sacred trust. It comes to me as the truth of my own nature, and the power and the law, which is stronger and higher than any caprice or opinion of my own.

Id. at 125.

21. "The universal to be realized is no abstraction, but an organic whole; a system where many spheres are subordinated to one sphere, and particular actions to spheres." *Id.* at 112-13.

22. "The 'individual' man, the man into whose essence his community with others does not enter, who does not include relation to others in his very being, is . . . a fiction. . . ." *Id.* at 105.

"Justice is the first virtue of social institutions . . ." ²³ Lawyers, because of their role, are especially well situated to serve justice. This is especially true for the lawyer-advocate. Legal practice is essentially argumentative, ²⁴ and so it is appropriate that, in pursuit of justice, a lawyer perform the advocate's role. And it is undoubtedly the case, as Professor Hazard suggests, that in the performance of this role, the lawyer will be required to do things condemned by conventional morality. ²⁵

It is true that the ethics of the legal profession may require lawyers to do things which, from the conventional moral perspective, are immoral. From the broader perspective of social morality, however, the lawyer's conduct may well be morally required. Thus the failure of conventional morality is that it does not speak from this broader perspective.

At the conclusion of his spoken remarks (although not in writing), Professor Hazard said that acceptance of one's station as a lawyer suggested this question: Are the rules of role fitting rules, all things considered? This is indeed a provocative and important question, but it is not a question which can be fully answered from the lawyer's perspective. The lawyer's station is but one of many interconnected and interdependent roles. What a lawyer must (or may) do depends on the lawyer's place in the larger whole, and only from the broader societal perspective can the question be properly answered.

23. J. RAWLS, A THEORY OF JUSTICE 3 (1973).

24. See R. DWORKIN, LAW'S EMPIRE 13 (1986).

25. Hazard, *supra* note 1, at 7.