An Essay on the Dilemma of "Honest Abe": The Modern Day Professional Responsibility Implications of Abraham Lincoln's Representations of Clients He Believed to Be Culpable

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There is a danger when we enshrine our heroes, when we lift them onto pedestals and lay wreaths at their feet. We can, by the very process of elevating them, strain the connection between them and the palpable, fleshy, sometimes mean concerns of our lives. It would be a terrible shame to lose Lincoln that way. To make him a celebration but not an instruction, a memory but not a model, a legend but not a lesson... [Lincoln] worked within the hard, sometimes discouraging, sometimes terrifying, limits of time and place and chance. And by our so remembering, he can again begin to light our minds and move our hearts.1

I. INTRODUCTION

Whether residing in Springfield, Illinois, where Abraham Lincoln practiced law for over twenty years, Lincoln, Nebraska, or elsewhere, one easily can revel in the memory of a person many consider to be the finest President in the history of this nation.2 Some remember Lincoln as the self-educated, hard-working, rail-splitting frontiersman who, against all odds, was elected President of the United States. Others think of Abraham Lincoln as the President who ended slavery.3 Still more revere Lincoln for his role in saving the Union. These descriptions, although arguably accurate, are woefully incomplete; they presume that Lincoln's life became meaningful only upon his assumption of the Presidency in 1861.

In fact, over the course of more than two decades before taking the Oath of Office, Lincoln became known as one of the most able trial lawyers in Illinois.4 His clients ranged from huge railroads,5 to local citizens with small claims,6 to accused murderers.7 Lincoln worked in the trenches, and as such had to make many difficult choices, some of which many attorneys face even today.

2. See, e.g., Clinton Should Stick to Election Themes, USA TODAY, Jan. 14, 1993, at 15A (quoting John P. Sears as saying, "By far, the greatest president was Abraham Lincoln."); see also DAN W. BANNISTER, LINCOLN AND THE COMMON LAW 1 (1992).
3. In fact, a great debate on this point rages amongst the public at large. For opposing perspectives on the issue of Lincoln's role in ending slavery, see Hans L. Trefousse, Teach 13-Year-Olds Lincoln Freed Slaves, N.Y. TIMES, Nov. 8, 1987, at s.4 p.24 (letter to the editor)(arguing that Lincoln's role in ending slavery was significant); see contra Joseph L. Whitney, Confederate Flag: Don't Tear it Down, WASH. POST, Feb. 20, 1988, at A22 (letter to the editor)(arguing that the Emancipation Proclamation was a purely military measure, and had the South immediately surrendered thereafter, slavery might still exist in the U.S.).
4. See infra notes 109-15 and accompanying text. Lincoln also participated in well over three hundred cases before the Supreme Court of Illinois. BANNISTER, supra note 2, at 1.
6. Id. at 39.
7. See infra notes 31-50 and accompanying text.
One such decision that faced Lincoln was what to do when, during the course of representing a client, he came to believe that his client was in the wrong. Today lawyers can turn to detailed rules of professional responsibility to assist in resolving the dilemmas that arise in the practice of law. The person we now know as "Honest Abe," however, had to make his decisions without the aid of intricate guidelines on professional conduct. Those choices, made by a person regarded so highly for his integrity, are instructive as to how the modern legal profession could revise its expectations of attorneys who represent clients they believe are culpable.

Part II of this article briefly examines the formation of Lincoln's reputation for honesty and integrity before he began his legal practice. Part II then explores Lincoln's philosophy regarding honesty in the practice of law, and reviews historical accounts of the level of zeal Lincoln exercised in representing clients he came to believe were culpable. Next, Part III.A scrutinizes the zealous advocacy requirements of the Model Code of Professional Responsibility and the Model Rules of Professional Conduct as they would have related to Lincoln's representation of such clients. Part III.B then suggests rethinking the philosophical underpinnings of the Model Code and Model Rules approach to zealous advocacy in the adversarial process. Finally, Part III.C posits possible alternatives to the current understanding of zealous advocacy that would give today's attorneys the choice to conform their conduct more closely to Lincoln's personal resolution of the issue.

II. HISTORY

A. The Pre-Attorney Lincoln

Before endeavoring to examine Abraham Lincoln's character both before and during his membership in the Illinois Bar, it must be said that any effort to describe Lincoln is only as reliable as the biographers it cites. In fact, as one Lincoln scholar noted:

Many of the stories relating to cases supposed to have been tried by Mr. Lincoln, which have been told by his biographers and others, cannot now be

8. See infra notes 31-63 and accompanying text.
10. The American Bar Association adopted the first canons of legal ethics at its thirty-first annual meeting on August 27, 1908. See AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS (1908).
11. See infra notes 16-21 and accompanying text.
12. See infra notes 22-63 and accompanying text.
13. See infra notes 64-108 and accompanying text.
15. See infra notes 140-66 and accompanying text.
verified or disproved. . . . [T]he records and files of cases, other than such as found their way into the Supreme Court, contain nothing more than the formal documents. There were in those days no stenographic reports of the proceedings, and accounts given after the lapse of years and solely from memory are not always reliable, however honest the narrator may be.\textsuperscript{16}

Hopefully, by relying on a diversity of sources, this article will succeed in painting a picture of Lincoln the lawyer, if only in broad strokes.

No such portrait of Lincoln would be complete without briefly referring to the formation of his reputation for honesty. The great renown Lincoln enjoyed for his integrity originated many years before he began his illustrious career as an attorney. As one prominent biographer told it, Lincoln was quite unusual in that he acted honestly even in his boyhood.\textsuperscript{17} As a young man when Lincoln worked tending counter in a New Salem store, he walked six miles to return a six and a quarter cents overpayment a customer made on a dry goods purchase.\textsuperscript{18} Not to detract from his ability to keep shop, but on more than one occasion Lincoln honorably went to great lengths to correct errors he made in favor of the store.\textsuperscript{19}

Within the small community in which he lived, Lincoln's reputation for honesty quickly spread.\textsuperscript{20} One commentator noted:

It is a significant fact that in a community where crime was virtually unknown, where plain, straightforward dealing was assumed as a matter of course, and credit was fearlessly asked and given, Lincoln won an enviable reputation for integrity and honor. . . . [T]he fact is that “honest Abe” was a tribute, not a nickname.\textsuperscript{21}

Thus, the adage that “honesty is the best policy” was more than just a cliche to young Lincoln—it was a way of life.

\textsuperscript{17} 1 Carl Sandburg, Abraham Lincoln: The Prairie Years 50 (1926). Sandburg wrote:

[ Lincoln's stepmother] said Abe was truthful; when Tilda Johnston leaped onto Abe's back to give him a scare on a lonely timber path, she brought the big axman to the ground by pulling her hands against his shoulders and pressing her knee into his backbone. The ax-blade cut her ankle, and strips from Abe's shirt and Tilda's dress had to be used to stop the blood. By then she was sobbing over what to tell her mother. On Abe's advice she told her mother the whole truth.

\textit{Id.}

\textsuperscript{18} Id. at 138.

\textsuperscript{19} Sandburg wrote of one such example when, “finding he weighed tea with a fourounce weight instead of an eight, [Lincoln] wrapped up another quarter of a pound of tea, took a long walk and delivered to the woman the full order of tea she had paid for.” \textit{Id.}

\textsuperscript{20} Frederick T. Hill, Lincoln the Lawyer 31 (1912).

\textsuperscript{21} \textit{Id.}
B. Lincoln, Honesty, and the Law

1. The Best Policy . . .

Despite the oft repeated jokes about honest attorneys (or, rather, the lack thereof), the high regard for Lincoln's character was not lost upon his induction into the Bar. Lincoln, whose legal practice researchers believe to have been the largest in Illinois at the time, remained true to his belief that people should be honest in all facets of their lives. Lincoln himself, in noting the "vague popular belief that lawyers are necessarily dishonest," argued in notes prepared for a law lecture that attorneys should "resolve to be honest at all events," and that "if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave." Lincoln's philosophy regarding honesty in the practice of law transcended mere words—it informed and guided his every action both inside and outside the courtroom. When Lincoln believed that a prospective client was seeking his representation to advance a false claim or defense, Lincoln always would refuse the representation.
Those who anoint Lincoln as a God among mere mortals, however, overlook a fascinating aspect of Lincoln’s legal career. Like many attorneys, in mid-trial Lincoln sometimes formed the opinion that he had erred in assessing a client’s character. How Lincoln handled these situations says much about Lincoln as a lawyer and a human being, and as this article later will discuss, raises novel issues regarding the nature of attorneys’ professional responsibilities when representing clients in courtroom settings.

2. ... but Best for Whom?

As the following examples illustrate, Lincoln’s honesty occasionally came at the expense of his clients. Albert A. Woldman in his book Lawyer Lincoln provided an in-depth examination of Lincoln’s behavior in a murder trial, People v. Patterson. Woldman vividly set the scene:

The case of People vs. Patterson was on trial in the Circuit Court of Champaign County. The large white-walled courtroom of unpainted woodwork and pine floors was crowded to capacity. ... Patterson, the accused murderer, pale as cellar-grown grass from long confinement in the county prison, huddled shrinkingly in his chair. His eyes gazed blankly upon the floor. Now and then he raised them and seeing the sheriff close by disconsolately let them fall again to the floor.

Lincoln, thinking Patterson was innocent, had agreed to represent him with Leonard Swett and Henry C. Whitney. As the trial proceeded, however, the two State’s attorneys prosecuting the case me-

29. For further commentary on this phenomenon, see supra note 1 and accompanying text.
30. See infra notes 31-63 and accompanying text.
31. ALBERT A. WOLDMAN, LAWYER LINCOLN (1936).
32. See Id. at 179-82.
33. Id. at 179.
34. Id.
thodically put on evidence demonstrating the guilt of Patterson. Lincoln, seriously doubting the innocence of his client, "appeared gloomy and dejected. Judge Davis, presiding, observed that the enthusiasm and buoyancy which marked his friend's countenance at the beginning of the trial was now gone."

Lincoln, well known for his spirited defenses, was adrift without moral force for his argument. As witnesses testified to the details of the killing, motive, and intent, Lincoln's renowned skill at cross-examination caused great anticipation amongst those present. Much to the surprise and chagrin of the audience, "for the most part his cross-examination of these witnesses was weak and spiritless. His lack of fighting spirit was a mystery to the courthouse crowd. They craved excitement, but the redoubtable Lincoln appeared submissive and destitute of enthusiasm or aggression." Thus proceeded the first two days of the Patterson murder trial.

After the close of the second day of trial, Lincoln and Swett had a candid discussion regarding the case in their hotel room. Lincoln, believing that he would injure Patterson's case by further participation in the trial, implored Swett to take Lincoln's place as lead counsel. When Swett demurred, Lincoln stated, "I am satisfied that our client is guilty and that the witnesses for the State have told the truth. It is my opinion that the best thing we can do for our client is to have him plead guilty to the lowest punishment." Swett remained immovable on the point, and then Lincoln, Swett, and Whitney agreed that Lincoln would give the closing argument.

Lincoln's decision to give the closing argument resulted in disaster for Patterson. Lincoln knew that his honesty, a trait that usually brought him great success in trials, was the kiss of death when he believed his clients to be culpable. Woldman detailed the ensuing events:

At length when it came time to argue the case to the jury, Swett, a very effective jury advocate, made a touching appeal for the acquittal of Patterson. Despite his protest, Lincoln was induced by his associates to make the closing argument.

35. Id. Or, as Woldman more eloquently put it, "Orlando B. Ficklin and Ward H. Lamon, the State's attorneys, called witness after witness to the stand and adroitly wove a web of evidence which soon broke down the 'presumption of innocence' which cloaked the prisoner." Id.
36. Id.
37. Id. at 179-80.
38. Id. at 180.
39. Id. at 180.
40. Id. at 181 ("'Swett,' [Lincoln] said pleadingly, 'the man is guilty. You defend him. I can't.'").
41. Id.
42. Id. at 181-82.
43. See infra note 61 and accompanying text.
'His logically honest mind chilled his efforts,' Whitney believed. 'While he made some good points, the honesty of his mental processes forced him into a line of argument and admission that was very damaging.

Lincoln's feeble, spiritless defense was useless. As he had predicted, the jury found Patterson guilty. Lincoln, Swett, and Whitney each received two hundred dollars as a fee.44

Other biographers described the events surrounding the Patterson case in essentially the same manner.45

Lincoln scholars also have described other courtroom conduct by Lincoln similar to his behavior in Patterson. For example, Frederick Hill reported that in another trial with Whitney,46 this time involving a charge of manslaughter, Lincoln lost interest in the case after hearing the prosecution witnesses' testimony.47 Lincoln was unable to de-

44. WOLDMAN, supra note 28, at 181-82 (footnote omitted). Some biographers have claimed that Lincoln abandoned the case and took no fee after forming a belief in Patterson's guilt, but John Duff, explained that error:

Thanks to Whitney, one of the myths put out by the early Lincoln idolaters, concerning [the Patterson] case, was shown up for the fabrication it was. "I have noticed in most of the 'Lives of Lincoln' which have fallen under my notice," wrote Whitney, "this pretty story: that in the case of Patterson, who was tried for murder in Urbana, Lincoln said to Swett: 'The man's guilty—you defend him; I won't;' and Swett took the whole fee, Lincoln refusing any part of it,... The facts are these: I was the first lawyer employed in the case, and was instructed to employ any one I deemed needful for the best defense. I accordingly wrote to both Swett and Lincoln, and employed them. We each got $200.00, and each kept what he got. Lincoln remained in the case till the end, making the last speech."

JOHN J. DUFF, A. LINCOLN: PRAIRIE LAWYER 282-83 (1960), quoting HENRY C. WHITNEY, LIFE ON THE CIRCUIT WITH LINCOLN (1940). Or, as Whitney again wrote:

I have mentioned a murder case in which he acted badly toward Swett and I and his client, as I thought, but he did not abandon the case or refrain from arguing it (though we would have let him off) or decline his fee, but he simply argued very feebly and brought disaster to some of our effective—but illegitimate—arguments. I note that Lamon and other biographers state that he declined his fee and wouldn't argue it. I know he did argue it, and he and Swett and I, each got two hundred dollars.

WHITNEY, supra at 240.

45. See, e.g, Willard L. King, Lincoln the Lawyer, in LINCOLN FOR THE AGES 92 (Ralph G. Newman, ed. 1950). King concisely described the affair:

Another eminent quality of Lincoln's was his conscientiousness. He was a poor lawyer in a case in which he did not believe.... The outstanding example is the Patterson homicide case in Champaign, which Lincoln, with Swett and Whitney, was defending.... As the trial went on, Lincoln became more and more convinced that his client was guilty. Lincoln tried to beg off from making the closing argument, but his colleagues insisted. Afterward they agreed that he made a poor argument.

Id.

46. Whether this truly is a separate example is discussed infra at note 50.

47. HILL, supra note 20, at 237-38. Hill wrote:

Lincoln was not considered a formidable opponent in the criminal courts, however, unless he thoroughly believed in the justice of his cause. Mr. Whitney reports that on one occasion when he was defending a man charged with manslaughter, the testimony demonstrated that his client
liver an effective closing argument, and as a result his client was convicted and imprisoned.\footnote{48} Whitney, disturbed by the events, characterized Lincoln's conduct as "atrocious."\footnote{49} Guilt-ridden, within a year Lincoln petitioned for and received from the governor a pardon of his client.\footnote{50}

ought to have been indicted for murder in the first degree, whereupon Lincoln instantly lost all interest in the case. He did not actually abandon the defense, but he could not cooperate effectively with his associates, who were endeavoring to acquit the defendant, and one of them states that when Lincoln addressed the jurors he disparaged the effort which had been made to work upon their feelings and confined himself to a strictly professional argument along conventional lines, with the result that the defendant was found guilty and sentenced to three years' imprisonment. This fairly disgusted Mr. Whitney, who was anxious to have the murderer acquitted, and he does not hesitate to characterize Mr. Lincoln's conduct as "atrocious."

\textit{Id.}

\footnote{48. Id.}

\footnote{49. Id.}

\footnote{50. 2 SANDBURG, \textit{supra} note 17, at 48. Sandburg explained that: Leonard Swett and Whitney had spoken for the defence, and believed they would get a verdict of acquittal. Then Lincoln spoke to the jury, took up the facts and the evidence, and was all of a sudden making arguments and admissions that spoiled the case for the prisoner at the bar. The jury came in with a verdict that sent the client to the penitentiary for three years.

And the case got to working in Lincoln's mind. Somehow he hadn't done just right. Having helped get the man in the penitentiary, he worked to get him out, and in a year handed him a pardon from the governor of the state.

\textit{Id.}

Whether the story outlined by Hill and Sandburg is distinct from the \textit{Patterson} case is less than clear. The only explicit information available to this author with regard to that question is the following passage from Woldman's biography:

In another murder case, Swett pleaded with the jury to acquit the defendant because he was the father of several small children and his wife was about to give birth to another. Whitney says that Lincoln too adverted to the prisoner's family, 'but only to disparage it as an argument, saying that the proper place for such appeals was to a legislature who framed laws, rather than to a jury who must decide upon evidence. In point of fact, our client was found guilty and sent to the penitentiary for three years; and Lincoln, whose merciless logic drove him into the belief that the culprit was guilty of murder, had his humanity so wrought upon that he induced the governor to pardon him after he had served one year.'

\textit{WOLDMAN, \textit{supra} note 28, at 183} (footnote omitted). Because this passage immediately precedes Woldman's discussion of \textit{Patterson}, see \textit{id.} at 179-82, Woldman clearly believed that the two cases were distinct. Admittedly, however, the two cases share the similarities of being murder trials, having the same three co-counsel, and Lincoln engaging in similar conduct during the trial. \textit{See supra} notes 31-45 and accompanying text. Because of the poor state of records available, unless the Lincoln Legal Papers project or other historians discover new information on this point, the real answer likely is lost to the ages. \textit{See Mitgang, \textit{supra} note 24, at A12.}
In fact, some commentators have noted that Lincoln sometimes entirely would abandon cases in mid-trial.\textsuperscript{51} Carl Sandburg, who penned an authoritative six-volume biography of Lincoln,\textsuperscript{52} referred to "three or four [such] cases."\textsuperscript{53} Frederick Hill detailed one case in which, when testimony unfolded that Lincoln's client had committed fraudulent practices, Lincoln stormed out of court and refused to continue; when the judge sent a messenger to fetch him, Lincoln told the messenger to "[t]ell the judge that my hands are dirty and I've gone away to wash them."\textsuperscript{54}

Lincoln's peers illuminated the rationale for Lincoln's courtroom conduct when he developed the belief that his clients were culpable. Judge David Davis, whose knowledge of Lincoln's life as a lawyer was second only to Lincoln's twenty-year partner William Herndon,\textsuperscript{55} stated that "[t]he frame-work of [Lincoln's] mental and moral being was honesty, and a wrong cause was poorly defended by him. In order to bring into full activities his great powers it was necessary that he should be convinced of the right and justice of the matter which he advocated."\textsuperscript{56} Whitney shared Judge Davis's perspective, contending that "[n]o man was stronger than [Lincoln] when on the right side, and no man weaker when on the opposite."\textsuperscript{57}

\begin{footnotes}
\footnotetext{51.}{\textit{But see}} \textit{Whitney, supra} note 44, at 241. Whitney noted:
\begin{quote}
I find, however, that biographers, in a gush of enthusiasm incline to inculcate the idea that Lincoln was wont to retire from every case in which he found himself to be wrong and to surrender up his fees, and to try both sides of his cases. As it has been heretofore indicated, such is by no means the case. In a clear case of dishonesty he would hedge in some way so as to not, himself, partake of the dishonesty. In a doubtful case of dishonesty, he would give his client the benefit of the doubt, and in an ordinary case he would try the case, so far as he could, like any other lawyer . . . .
\end{quote}
\textit{Id.} (emphasis added). Of course, as noted throughout Part II, Lincoln, when he developed the belief that his client was culpable, simply \textit{could not} try cases like any other lawyer.
\footnotetext{52.}{\textit{See}} \textit{Sandburg, supra} note 17; \textit{Carl Sandburg, Abraham Lincoln: The War Years} (1926).
\footnotetext{53.}{\textit{2 Sandburg, supra} note 17, at 60.}
\footnotetext{54.}{\textit{Hill, supra} note 20, at 239. Sandburg described the events similarly:
\begin{quote}
When a rapscallion claimed money was owing him and hired Lincoln to prove it, the opposition lawyer brought in a receipt showing the money had been paid. Lincoln left the courtroom and was sitting in the hotel office with his feet on the stove when word came that he was wanted at court. "Tell the judge," he said, "that I can't come; I have to wash my hands."
\end{quote}
\textit{2 Sandburg, supra} note 17 at 60-61.}
\footnotetext{55.}{\textit{See}} \textit{Hill, supra} note 20, at 178.
\footnotetext{56.}{\textit{Rexford Newcomb, In the Lincoln Country} 144 (1928).}
\footnotetext{57.}{\textit{Woldman, supra} note 28 at 181 (quoting Whitney). Whitney also stated:
\begin{quote}
[I]t was morally impossible for Lincoln to argue dishonestly; he could no more do it than he could steal; it was the same thing to him, in essence, to despoil a man of his property by larceny, or by illogical or flagitious
mond attributed Lincoln’s lack of success in representing clients Lincoln believed were culpable to the “inward struggle” between loyalty to his client and doing justice.58

Some of the most telling observations come from Lincoln’s long-time partner William Herndon. Herndon believed that “[t]wo things were essential to [Lincoln’s] success in managing a case. One was time; the other a feeling of confidence in the justice of the cause he represented. . . . But if either of these essentials were lacking, he was the weakest man at the bar.”59 Herndon also criticized Lincoln’s “extreme conscientiousness and disregard of the alleged professional cloak,” noting that a client retaining Lincoln as defense counsel “did not prevent him from throwing it up in its most critical stage if he believed he was espousing an unjust cause.”60

Lincoln himself explained why his courtroom skills suffered when he came to believe his clients were culpable. He explained that he tried not to represent those with bad cases in equity and justice, revealing that “I couldn’t do it [win the case]. . . . All the time while standing talking to that jury I’d be thinking, ‘Lincoln, you’re a liar,’ reasoning: and even to defeat a suitor by technicalities or by merely arbitrary law, savored strongly of dishonesty to him. He tolerated it sometimes, but always with a grimace.

WHITNEY, supra note 44, at 239. Further supporting the point, Whitney added:

Truth is polygonous, and the average mind can see only the nearest side perfectly, the nearest oblique sides imperfectly, and the rear not at all; but Lincoln possessed that kind of mental eyesight (if I may use that expression) that saw all sides and angles of every moral proposition inherent in his law or politics, and hence he knew both sides; and if he acted at all, must state his convictions to all whom it might concern, even if it brought disaster to his side of the case.

Id. at 239–40.

58. WOLDMAN, supra note 28, at 183 (footnote omitted). Woldman quoted Judge Drummond as saying:

Such was the transparent candor and integrity of his nature that he could not well or strongly argue a side or a cause that he thought wrong. . . . Of course, he felt it his duty to say what could be said, and to leave the decision to others; but there could be seen in such cases the inward struggle of his own mind.

Id.

59. 2 WILLIAM H. HERNDON & JESSE W. WEIK, HERNDON’S LINCOLN: THE TRUE STORY OF A GREAT LIFE 337-38 (1890). For further confirmation of this point, see S.C. Parks, Lecture at the University of Michigan, in MOORE, supra note 28, at 25 (Lincoln “was intellectually honest. He would not advocate a cause in which he did not believe. He was the easiest lawyer to beat when he thought he was wrong that I ever knew.”).

60. 2 HERNDON & WEIK, supra note 59 at 326. Although Herndon believed that Lincoln’s conduct, “robbed him of much so-called success at the bar,” id., one should not take Herndon’s criticisms as a sign of disrespect for Lincoln’s stature as an attorney. Not only is the title of his book telling (Herndon’s Lincoln: The True Story of a Great Life), but Herndon went on to say that when his “righteous indignation” was aroused in trial, “he was the most fearless man I ever knew.” id. at 328.
and I believe I should forget myself and say it out loud.”61 Lincoln’s statement explains why “[w]hen on the right side of a case which might enlist personal feeling, he was terrible as an army with banners; but on the wrong side he was frequently an injury to his case.”62 Unlike other lawyers of his time (and ours), Lincoln simply could not argue effectively for a client he believed was culpable.63

III. THE PROFESSIONAL RESPONSIBILITY IMPLICATIONS OF LINCOLN’S CONDUCT

The usually complacent Lincoln appeared greatly perturbed. He had accepted a fee to defend Patterson. He had believed in the accused’s innocence and now he was firmly convinced the man was guilty. The discovery unnerved him.

What should he do? Abandon the case or go on with the defense? His conscience bothered him. It cried out that the cause he was advocating was contrary to justice. His duty, he felt, was loyalty to his client. But how far must this fidelity go? He had entered upon the case and had learned the innermost secrets of his client. Apparently Patterson had not told him all the facts. And yet the accused murderer’s liberty, perhaps his life, depended upon the lawyer’s faithfulness, his eloquence and skillful advocacy. Was the lawyer honor-bound to stick by his client at all costs? Would it be right for him to forsake the accused man now?

The question was indeed perplexing.64

61. Woldman, supra note 28 at 181 (quoting Lincoln). One of Lincoln’s associates reported a very similar statement made by Lincoln.

Soon after beginning to practice, I was employed to defend a man charged with larceny and Mr. Lincoln was employed to assist me. I really believed at the beginning of the trial that the man was not guilty. But the evidence was unfavorable, and at its close Mr. Lincoln called me into the consultation room and said: “If you can say anything that will do our man any good, say it. I can’t. If I say anything the jury will see that I think he is guilty and will convict him.”

Parks, supra note 28, at 25.


63. Woldman, supra note 28, at 181. Woldman noted:

Swett, Whitney, and other lawyers of their circuit could argue a bad case nearly as well as a good one. But not Lincoln. When his own conscience, acting as judge and jury, determined the client’s guilt, or told him that he was on the wrong side of justice, he could not feign enthusiasm for the cause. He could not argue the case and convince the jury to do that which he himself felt was wrong.

Id. Francis Browne quoted S.C. Parks in the same vein:

“[F]or a man who was for a quarter of a century both a lawyer and a politician he was the most honest man I ever knew. He was not only morally honest, but intellectually so. He could not reason falsely; if he attempted it, he failed. . . . [W]hen he thought he was wrong, he was the weakest lawyer I ever saw.”


64. Woldman, supra note 28 at 180.
A. The Principle of Zealous Advocacy in the Model Rules and the Model Code

The above passage clarifies the difficult questions regarding zealous advocacy that faced Abraham Lincoln well over a century ago and that still face lawyers today. Attorneys in the 1990s, however, have more professional guidance than had those practicing in Lincoln’s era. In Lincoln’s day, there were no written rules of professional conduct, and in fact the first article written in the United States regarding the principle of zealous advocacy was written in 1860, only slightly before Lincoln ceased practicing law. Thus, the following exercise hardly could be considered an affront to Lincoln; Lincoln probably was the attorney most concerned with acting ethically in his time, and this article has no intention of disparaging his memory (and, in fact, intends quite the opposite).

Nevertheless, comparing Lincoln's conduct in defending clients he believed to be culpable to the standards of zeal enumerated in the Model Code of Professional Responsibility (Model Code) and the Model Rules of Professional Conduct (Model Rules) is a useful exercise in analyzing the utility of those provisions. The Model Code addresses zealous representation generally in Canon 7 (“A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”), and specifically in DR 7-101, entitled “Representing a Client Zealously.” DR 7-101(A)(1) requires that “[a] lawyer shall not intentionally ... [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules ....”

At best, DR 7-101 taken alone is imprecise. The inclusion of the word “reasonably” raises the question of whether reasonably is an objective or subjective standard. EC 7-1 of the code informs on this point in its provision that “[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law ....” A footnote to this provision further supports the

65. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (2d ed. 1860); see CHARLES WOLFRAM, MODERN LEGAL ETHICS 578 (1986).
66. See supra notes 31-63 and accompanying text.
69. MODEL CODE Canon 7.
70. Id. at DR 7-101.
71. Id. at DR 7-101(A)(1)(footnotes omitted).
72. Id. at EC 7-1 (footnote omitted). See also THOMAS D. MORGAN & RONALD D. ROTUNDA PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY, 23 (5th ed. 1991) (“One of the prime professional obligations of the Code is to represent [a] client zealously within the bounds of the law [']. . . . The lawyer must serve his or
objective interpretation of "reasonably," quoting a federal district court opinion that explained, "[W]hen defense counsel . . . admits that his conscience would not permit him to adopt certain customary trial procedures, this extends beyond the realm of judgment and strongly suggests an invasion of constitutional rights."\textsuperscript{73}

The \textit{Model Code} clarifies this notion further in EC 7-19, which points out that the duty of zealous advocacy is owed not just to the client, but to the legal system as well.\textsuperscript{74} By zealously advocating their clients' positions, attorneys enable judges and juries to render judgment based on an analysis of the forceful arguments of both sides.\textsuperscript{75} Allowing attorneys subjectively to determine when certain means are reasonable would undermine the systemic interest in a sound trial process, and the \textit{Model Code} therefore intends to impose upon attorneys an objective standard of zeal.\textsuperscript{76}

One commentator nicely summarized this level of zeal prescribed by the \textit{Model Code} as consisting of two central ideas:

(i) \textit{Partisanship}: the lawyer's sole allegiance is to the client. \textit{Within}, but all the way \textit{up to}, the limits of the law, the lawyer is committed to the aggressive and single-minded pursuit of the client's objectives.

(ii) \textit{Neutrality}: once he has accepted the client's case, the lawyer must represent the client, or pursue the client's objectives, regardless of the lawyer's opinion of the client's character and reputation, and the moral merits of the client's objectives.\textsuperscript{77}

Lincoln's pursuit of clients' interests was not single-minded, but rather guided by his conscience, and was not neutral, as his opinion of his client's character affected his representation. Were Lincoln practicing today, his conduct would be considered less than zealous under the \textit{Model Code}.

The same result would follow under the \textit{Model Rules}. Rule 1.3 requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."\textsuperscript{78} Although the word "zeal" does not appear in the actual rule,\textsuperscript{79} Comment 1 to Rule 1.3 notes that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."\textsuperscript{80} Comment

\textsuperscript{73.} Id. at n.3, quoting Johns v. Smyth, 176 F. Supp. 949, 952 (E.D. Va. 1959). The constitutional aspects of zealous advocacy are beyond the scope of this essay.

\textsuperscript{74.} \textit{Model Code} EC 7-19.

\textsuperscript{75.} Id.

\textsuperscript{76.} \textit{See infra} notes 98-101 and accompanying text.


\textsuperscript{78.} \textit{Model Rules} Rule 1.3.

\textsuperscript{79.} \textit{See id.}

\textsuperscript{80.} Id. at cmt. 1. The \textit{Model Rules} omitted the word "zeal" from the text of Rule 1.3 for fear that it could be construed as "overzeal." Ronald D. Rotunda, \textit{Ethical}
1 adds the vague statement that “a lawyer is not bound to press for every advantage that might be realized for a client,”81 but this provision should not be interpreted as departing from the requirement of zealous representation. In simplifying the language of the Model Code, Rule 1.3 was not intended to reduce the level of zeal required of attorneys embroiled in adversarial proceedings, and Lincoln would have no greater ease in arguing for a subjective standard of zeal under the Model Rules.82

Thus, zeal is measured objectively—but what is zeal? Although “zeal” is somewhat abstract taken in isolation, the philosophical underpinnings of zealous advocacy help to clarify the term. Zealous advocacy in both the Model Code and Model Rules is grounded in the notion of role differentiation,83 an idea that academicians have explained at length.84

Role differentiation is, as Charles Wolfram put it, when the same person marches to the beat of different professional and personal drummers.85 According to this view, the requirement of zeal does not dictate that attorneys agree on a moral level with what they advocate, but rather that they advocate it to the best of their abilities.86 Other

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82. WOLFRAM, supra note 65, at 578-79. See also MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 72-73 (1990). Freedman wrote:

Despite the apparent depreciation of zealous representation in the Model Rules, there is reason to hope that they will be interpreted to include the pervasive obligation of zealous representation that its drafters scanted. ... [T]he Reporter to the Model Rules ... has explained that although “[t]he Model Rules contain no single Rule that explicitly posits the lawyer’s duty to the client in such sharp terms [as in DR 7-101], ... the overall approach has not changed.”


83. See infra note 86 and accompanying text.

84. See infra notes 85-101 and accompanying text.

85. WOLFRAM, supra note 65, at 584.

86. Linda E. Fisher, Truth as a Double-Edged Sword: Deception, Moral Paradox, and the Ethics of Advocacy, 14 J. LEGAL PROF. 89, 102 (1989); Postema, supra note 77, at 73. See also STEPHEN GILLERS & NORMAN DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 457 (1989). Gillers and Dorsen noted:

Many think of the advocate as amoral, and many advocates accept this characterization. An advocate may concede that she means to win all or as much as possible for her client, regardless of who is right. The advocate may deny that it is possible to talk about “right.” You are right if you win; you don’t win because you are right. The advocate may see herself as an agent of the client in an artificial, highly structured combat system called litigation. Her job is to use all available legal and ethical means to achieve her client’s goal, subject only to her client’s willingness and ability to pay the cost, which includes the advocates’s fee. It matters not that a particular strategy might encourage the “wrong” result, be-
commentators have described role differentiation similarly, as the decision to pursue a client's moral choices, rather than substituting the attorney's personal morality, without actually abdicating the attorney's own beliefs. Lawyers are viewed as "actors putting on the transitory character and the moral stance required by their professional work and then readily shedding that role to walk away from it and resume an integral life as a nonprofessional person in family, business, and other personal roles." Although some commentators believe that zealous advocacy requires attorneys actually to become fully emotionally committed to their clients' position, most believe that the Model Code and Model Rules merely require detachment.

But how does that detachment translate into the representation of a client an attorney later comes to believe is culpable? Role differentiation requires that once attorneys take cases, they must use their eloquence or other skills to defend their clients regardless of the attorneys' personal beliefs relating to guilt or fault. Richard Wasserstrom described this notion:

For what is probably the most familiar aspect of this role-differentiated character of the lawyer's activity is that of the defense of a client charged with a crime. The received view within the profession... is that having once agreed to represent the client, the lawyer is under an obligation to do his or her best to defend that person at trial, irrespective, for instance, even of the lawyer's belief in the client's innocence.... [It] is thought both appropriate and obligatory for the attorney to put on as vigorous and persuasive a defense of a client believed to be guilty as would have been mounted by the lawyer thoroughly

cause just as there is no "right," there is no "wrong," except by reference to how the system resolves the issue.

Id.

87. Fisher, supra note 86, at 99. Even under the role differentiation perspective, an attorney may not rely on every moral choice made by a client; lawyers are limited by rules of professional conduct that trump the wishes of their clients. See, e.g., Model Rules Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous....").

88. Wolfram, supra note 65, at 584.

89. See Gray Thoron, A Course in the Dynamics of Professional Responsibility, in Education in the Professional Responsibilities of the Lawyer 88, 93 (Donald T. Weckstein ed., 1970). A major problem with this perspective, aside from the practical difficulty of becoming so fully committed to a client's position, is that it is emotionally schizophrenic. See Wolfram, supra note 65, at 585. In such a case:

The lawyer's emotions are severed from the lawyer's consciousness. Putting one's emotions out for hire to someone whose objectives the lawyer despises is the sort of professional debasement that may predictably lead to professional burnout and withdrawal and stagnation in law practice. Or, if pressed, it may lead to profound moral skepticism, an utter insensitivity to the human qualities of persons—clients and opponents alike.

Id. These problems are not so distant from those caused by role differentiation. See infra notes 120-36 and accompanying text.

90. Id. at 587.

91. Wolfram, supra note 82, at 587.
convinced of the client's innocence.\textsuperscript{92} But how can an attorney, who knows in her mind that her client is culpable, justify continuing that representation without blindly basing that decision on rules of professional conduct—rules that were unavailable in Lincoln's day?\textsuperscript{93}

One possible answer to that question is that attorneys never really know whether their clients are guilty or at fault.\textsuperscript{94} That knowledge is gained only when a judge or jury renders the final decision in a case.\textsuperscript{95} This epistemological justification, however, is unsatisfying to the practicing attorney. For instance, a lawyer never truly could "know" whether her client intended to commit perjury, and the interests of the judicial system would be subjugated to those of the client.\textsuperscript{96} In fact, attorneys never would have sufficient "knowledge" to refuse a client seeking representation, undermining the entire notion of attorneys screening potential clients.\textsuperscript{97} Finally, on a more personal level,

\textsuperscript{92} Richard Wasserstrom, \textit{Lawyers as Professionals: Some Moral Issues}, 5 \textbf{HUMAN RIGHTS} 1, 6 (1975). Or, as put in a different context:

\begin{quote}
Now you're standing there tongue tied
You'd better learn your lesson well
Hide what you have to hide
And tell what you have to tell
You'll see your problems multiplied
If you continually decide
To faithfully pursue
The policy of truth.
\end{quote}


\textsuperscript{93} \textit{See supra} note 65. This question is not meant to deride attorneys who abide by the rules of the jurisdictions in which they practice. Rather, the question merely probes the rationale for those rules.


\textsuperscript{95} \textit{Id.} at 52. Freedman illustrated this notion by quoting Dr. Samuel Johnson: "In response to Boswell's question: 'But what do you think of supporting a cause which you know to be bad?' Dr. Johnson replied: 'Sir, you do not know it to be good or bad till the Judge determines it.'" \textit{Freedman, supra} note 94, at 51, quoting 2 J. Boswell's \textit{Life of Samuel Johnson} 47 (G.B. Hill ed., 1887)(footnote omitted)("Thus, Dr. Johnson said: 'A lawyer is not to tell what he knows to be a lie . . . ' In the same sentence, however, he added: ' . . . he is not to usurp the province of the jury and of the Judge and determine what shall be the effect of evidence . . .' "). \textit{Id.} at 53.

\textsuperscript{96} Although there is wide agreement that in civil cases attorneys should reveal the perjury of their clients to the court, a great debate exists over whether lawyers have a similar obligation when representing a criminal defendant. \textit{See, e.g.}, \textit{Model Rules} Rule 3.3 cmts. 7-10. The perjury issue, however, is beyond the scope of this essay.

\textsuperscript{97} Say, for example, that Plaintiff comes to Attorney seeking representation in a breach of contract case against Defendant. Plaintiff tells Attorney at the outset, "I breached the contract, but I want to claim that Defendant breached the contract." Because neither a judge nor a jury has held against Plaintiff yet, Attorney cannot "know" that Plaintiff breached the contract. Attorney therefore has no rational reason to turn down the representation. Thus, any screening benefits
an attorney like Lincoln would say that he can "know" with a degree of moral certainty whether a client was in the wrong, and that justifying continued representation through an overly formalistic theory of knowledge would be an abdication of moral responsibility.

Although the epistemological justification for role differentiation is unsatisfying, a second, more widely accepted rationale for role differentiation is grounded in the systemic interest in the adversarial process. Our society has chosen the adversarial process as its system of determining guilt and fault, and a key aspect of that process is having equally committed, if not equipped, advocates using every legal and ethical means of advancing their clients' causes. Although an attorney may decide whether to represent a prospective client based on whether she believes the client is culpable, once the adversarial process has begun, society's interest in maintaining the integrity of that process prevents the attorney from engaging in less than zealous representation. This understanding of role differentiation underlies the current usage of the term "zealous representation."

that attorneys currently provide would be obliterated under the epistemological approach, a result that the already overworked judicial system cannot tolerate.

98. See Freedman, supra note 94, at 53.
99. Id. Freedman expressed this point as follows:

There is yet another way, one that I believe is more honest and more useful, of understanding what is meant when one says that the lawyer does not know that the client is guilty.... [T]he lawyer is told: "You, personally, may very well know the truth, but your personal knowledge is irrelevant. In your capacity as an advocate (and, if you will, as an officer of the court) you are forbidden to act upon your personal knowledge of the truth, as you might want to do as a private person, because the adversary system could not function properly if lawyers did so."

Id. In representing a client, Freedman wrote, "it is not the role or function of the advocate to act upon conclusions of ultimate facts such as guilt or innocence. That function is assigned to the judge or jury, which bases its decision on the adversaries' presentation of their clients' cases." Id. at 57.

100. See Gillers & Dorsen, supra note 86, at 457 (A lawyer "may, of course, reflect on the rightness of a client's case before accepting it and decline cases she finds repugnant.... Once she has taken an assignment, she acts as though the client's cause were her own."). This notion also was articulated compassionately by Lord Brougham in the Trial of Queen Caroline:

[An] advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expeditious, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the harm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

Trial of Queen Caroline 8 (1821), quoted in Freedman, supra note 82, at 65 (footnote omitted).

101. See Freedman, supra note 82, at 65. Freedman noted that lawyers have an "obligation to give 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost
Lincoln's conduct in representing clients he believed were culpable certainly would violate this modern understanding of zealous advocacy. In his representation of Patterson, Lincoln's belief that Patterson was guilty forced Lincoln's honest mind into a series of damaging admissions during his closing argument.\(^\text{102}\) In another case, Lincoln failed to give an enthusiastic closing argument for precisely the same reason.\(^\text{103}\) Lincoln's marching out of court and discontinuing his representation when he discovered a client's dishonesty hardly helped the client's cause.\(^\text{104}\) All of these actions created an uneven playing field in the courtroom, and judged by today's standards are inconsistent with the common formulation of zealous advocacy and the adversarial process.\(^\text{105}\)

To condemn Lincoln's conduct merely because it is inconsistent with modern standards, however, would be unfair.\(^\text{106}\) To say that Lincoln's conduct was not zealous as zeal is understood today is accurate, but says nothing of whether there is room in the concept of zealous advocacy for the type of conduct practiced by Lincoln when he believed his clients to be culpable. Zeal, after all, is a flexible concept—learning and ability'... [which] has been traced back more than a century, and zealousness continues today to be 'the fundamental principle of the law of lawyering,' and 'the dominant standard of lawyerly excellence.' "\(^\text{Id.\, (footnotes omitted)(quoting ABA Cannons of Professional Ethics 15 (1908); HAZARD & HODES, supra note 82, at 11; Report from the Center for Philosophy and Public Policy 1, 4 (vol. v, no. 1, Winter, 1984).}\)

\(^{102}\) See supra notes 41-45 and accompanying text.

\(^{103}\) See supra notes 46-50 and accompanying text.

\(^{104}\) See supra notes 51-54 and accompanying text.

\(^{105}\) See supra notes 69-101 and accompanying text.

\(^{106}\) After all, as previously noted, Lincoln had neither the Model Rules nor the Model Code to serve as his guides. See supra note 65 and accompanying text. In fact, in 1836 Professor David Hoffman of the University of Maryland published for his students a set of "Resolutions in Regard to Professional Deportment," in which Resolution 33 recommends that an attorney's conscience be her "sole guide." See RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 10 (3d ed. 1992); see also MORGAN & ROTUNDA, supra note 72, at 280 (noting that Hoffman went so far as to refuse to plead the Statute of Limitations as a defense when it was the sole defense available to his client). Hoffman's work greatly influenced likely Professor and Judge George Sharswood, and Resolution 33 likely inspired Sharswood to write the following in 1859:

"Counsel have an undoubted right, and are in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which offends his sense of what is just and right. ... [I]t would be on his part an immoral act to afford that assistance, when his conscience told him that the client was aiming to perpetrate a wrong through the means of some advantage the law may have afforded him.

SHARSWOOD, supra note 65, at 39-40; see also MORGAN & ROTUNDA, supra note 72, at 280. Thus, Lincoln's courtroom behavior was in accord with the thinking of the best known commentators of his day; perhaps the time has come for dialogue on the extent to which the changes the legal profession has undergone since the days Lincoln practiced law are indeed improvements."
the conventional notion of zealous advocacy allows attorneys ethically to choose not to pursue certain legal means of representing their clients. For example, lawyers ethically may accede to adversaries' requests for extensions of time, or may agree to stipulations of fact. Thus, the true issue is whether the notion of zeal should be modified to permit, in some form, the type of representation Lincoln provided clients he came to believe were guilty or at fault.

B. The Argument for Expanding the Notion of Zealous Advocacy

A very down to earth justification for expanding the the accepted realm of zealous advocacy is that as an empirical matter, the discovery of Lincoln's conduct in representing clients he came to believe were culpable cannot deny his great achievements as an attorney. Lincoln experienced much success as a direct result of abiding by his strict moral code. One commentator explained that “[t]o Lincoln’s indefatigable pursuit of the truth, his candor, and his fidelity to his convictions can be attributed much of his success at the bar,” and that “[w]hen a case engaged his moral sense, no matter if the law was clearly against him, his dynamic power of conviction and extraordinary sincerity often enabled him to overwhelm all the technicalities of the law, win over both judge and jury, and secure the verdict.”

107. See MODEL RULES Rule 1.3 cmt. 1.
108. See MODEL CODE DR 7-101(A)(1); MODEL RULES Rule 1.2 cmt. 1.
109. See infra notes 110-15 and accompanying text.
110. WOLDMAN, supra note 28, at 184. S.C. Parks concurred:

[Lincoln] was a great advocate and more successful at the Bar than many men who knew more law than himself. . . . For this there were two reasons. One was that he was naturally fair minded, and, as a rule, would not advocate any cause which he did not believe to be just. Owing to this characteristic he would not knowingly take a case that was wrong, and if he ignorantly got into such a case he would generally refuse to prosecute or defend it after he had ascertained his mistake.

Parks, supra note 28, at 25 (ellipses in original). Emanuel Hertz described a similar incident:

A.H. Chapman has told of one instance in which Lincoln, convinced of the innocence of his client, relied mainly on one witness to clear him. The witness told, under oath, what Lincoln knew to be a lie, although no one else knew it. Lincoln rose when the testimony was concluded. “Gentlemen,” he began, “I depended on this witness to clear my client. I now ask that no attention be paid to his testimony. Let his words be stricken out. If my case fails, I do not wish to win it by a falsehood.”

His frankness, followed by a magnificent summing up of the merits of the case, brought a verdict of acquittal.

Hertz, supra note 27. Woldman also revealed a case in which Lincoln's conduct worked out for the best:

In a case where one of his own witnesses was evasive in his replies on cross-examination, Lincoln arose, and by permission of the trial judge, publicly and severely reprimanded the reluctant witness. "It was a dangerous experiment which might have brought discredit on our most important witness," said Anthony Thornton, who was Lincoln's associate in
This success at winning cases was due not only to Lincoln's skill in arguing a morally justifiable case, but also to his unwillingness to defend clients he believed to be culpable. S.C. Parks noted that "[o]wing to this habit of not advocating a bad case he had the advantage of feeling that he ought to gain the cases that he did advocate. He also had the advantage of having the confidence of the court and jury at the outset and the fairness and skill to keep it to the close."\(^{111}\) Staying true to his ideals therefore gave Lincoln a psychological advantage in defending clients in whose innocence or lack of fault he believed.\(^{112}\)

As a normative matter, Lincoln's courtroom conduct should not detract from his stature as an attorney. In fact, quite the opposite is true. It is because of Lincoln's honesty, not despite it, that his peers greatly respected him\(^{113}\) and he is remembered so favorably today, which demonstrates that Lincoln's ethical system is not mutually exclusive with success in the practice of law.\(^{114}\) One of Lincoln's colleagues best summed the pearl in the oyster that was Lincoln's integrity:

> It is common to have intellectual power. Webster had that in a marked degree, but he was not intellectually honest, and hence we find him in history advocating free trade in 1816, and a high tariff in 1836. . . . That "honesty is the best policy" was well established in the . . . greatest of men intellectually and essentially feeble morally: and in the career and fruitful results of the life of Abraham Lincoln, as seen in his great mission, its faithful performance and his immortal fame. A man of the former class, of which, alas! there are too

\(^{111}\) Parks, supra note 27, at 25.

\(^{112}\) Id.

\(^{113}\) As Francis Browne reported:

> Judge Sidney Breese, Chief Justice of Illinois [said]: "For my single self, I have for a quarter of a century regarded Mr. Lincoln as the finest lawyer I ever knew, and of a professional bearing so high-toned and honorable, as justly, and without derogating from the claims of others, entitling him to be presented to the profession as a model well worthy of the closest imitation."

BROWNE, supra note 63, at 141. The fact that imitating Lincoln would be considered unethical by today's standards should give all defenders of the modern notion of zealous advocacy pause.

\(^{114}\) As Hill wrote in explaining Lincoln's conduct in his defense of clients he believed to be culpable:

> These and similar actions have been characterized by one highly respectable authority as "admittedly detracting from Lincoln's character as a lawyer," but no member of the profession who has the best interests of his calling at heart will accept such a conclusion. On the contrary, it is because he had the courage and character to uphold the highest standards of the law in daily practice that Lincoln is entitled to a place in the foremost rank of the profession. He lived its ideals and showed them to be practical, and his example gives inspiration and encouragement to thousands of practitioners who believe that those things which detract from the character of the man detract from the character of the lawyer.

HILL, supra note 20, at 240-41.
many in our history, is equally at home in arguing either in unison with, or contrary to his convictions; it is simply a little more difficult to argue dishonestly than honestly—that is all with him. But it was morally impossible for Lincoln to argue dishonestly; he could no more do it than he could steal.

Although building a reputation for honesty similar to Lincoln's may be more difficult in today's substantially larger cities, shouldn't we allow, if not encourage, attorneys to attempt to do so?

Some modern commentators have advanced an alternative to the role differentiation model of zealous advocacy, known as the truth model, that would allow precisely such attempts. The truth model holds that a merely legal claim or defense does not necessarily constitute a moral one, and if the attorney determines that the representation would be immoral, she should refuse to accept or should terminate the representation. Lawyers who subscribe to the truth model accept the adversarial process as important, but subjugate the interests of a particular client to the overarching values of truth and integrity.

One reason for the growing support for the notion of truth seeking in advocacy is the theory of counter-attitudinal advocacy that has developed from social psychological literature. This theory holds that when a person's beliefs are different from what she must advocate, the mind may seek to reduce the inner conflict between the two positions by becoming more favorably disposed to what the person is advocating. This phenomenon can be explained in part by cognitive disso-

115. Whitney, supra note 44, at 239.
116. For an interesting method of engineering a successful adversarial system that allows for such conduct in representation, see infra notes 155-66 and accompanying text.
118. Kathleen S. Bean, A Proposal for the Moral Practice of Law, 12 J. Legal Prof. 49, 52 (1987). Kathleen Bean described the model as follows:

At the other end of the spectrum are the lawyers who carry their personal moral standards for truth and integrity into the practice of law, and practice law in accordance with that personal code of ethics. Underlying this view is the assumption that the lawyer will, and should, recognize that what is legal representation is not always moral representation. Simply because a client has a legal cause of action or defense does not mean that the lawyer is bound to assist the client with his or her cause. In fact, if the ultimate goal is immoral, the moral truth and integrity lawyer is required to refuse assistance to the client. In addition, the integrity lawyer remains morally accountable for acts committed in the role of lawyer, just as if the lawyer committed the same act outside of his or her lawyer role.

Id. at 53.
119. Id. at 53.
120. Erwin Chemerinsky, Protecting Lawyers from their Profession: Redefining the Lawyer's Role 5 J. Legal Prof. 31, 32 (1980).
121. Id. See also GILLERS & DORSEN, supra note 86, at 458 ("For some lawyers, the
nance theory, which holds that an individual experiencing inconsistent thought will act to reduce the dissonance.\textsuperscript{122} Although the phenomenon makes advocacy easier on the psyche, the attorney's true beliefs are subjugated to those of the client.\textsuperscript{123} In effect, an attorney may sacrifice part of her identity, and at least her judgment, in attempting to represent a client.\textsuperscript{124}

An alternative way the mind may reduce cognitive dissonance is by adopting "an unquestioning acceptance of the duties and responsibilities of one's role."\textsuperscript{125} An attorney who adopts this cynical form of role differentiation performs her role merely \textit{because she is a lawyer}, without looking for any deeper explanation.\textsuperscript{126} Such a phenomenon occurs often with military personnel, following orders \textit{because} they are soldiers, without ever thinking to question the morality of the orders.\textsuperscript{127} The lawyer who adopts this attitude risks, as Postema put it, "a severe impoverishment of moral experience."\textsuperscript{128} Thus, regardless of whether the mind reacts to cognitive dissonance by adopting the client's belief or by unquestioningly accepting the role, the attorney's senses of responsibility and judgment are detached from their personal experience.\textsuperscript{129}

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\textsuperscript{122} Chemerinsky, \textit{supra} note 120, at 32. Two other theories that have been advanced to explain counter-attitudinal advocacy are incentives and behaviorism. \textit{See id.} at 33-34. The incentive explanation contends that by accepting an advocacy role, an attorney creates an incentive to answer all opposing points, and if answers are unavailable, to suppress the points. \textit{Id.} at 33. The behaviorism explanation is based on self-perceptions; people form beliefs based on their own overt behavior, and when advocating a position, attorneys may derive their personal beliefs from that behavior. \textit{Id.} at 33-34.

\textsuperscript{123} Or, as less delicately put by Gerald Postema, the lawyer becomes engaged in "moral prostitution" and "self deception." Postema, \textit{supra} note 77, at 79.

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.} at 75.

\textsuperscript{126} \textit{Id.}


\textsuperscript{128} Postema, \textit{supra} note 77, at 78.

\textsuperscript{129} \textit{Id.} at 75. In fact, the common conception that professional integrity corresponds directly with personal integrity compounds this problem:

[S]ince professional integrity is often taken to be the most important mark of personal integrity, a very likely result is often that a successful lawyer is one who can strictly identify with this professional strategy of detachment. That is, the standard conception both directly and indirectly \textit{encourages} adoption of one or the other of the extreme strategies of identification. But, as we have seen, both strategies have in common the unwanted consequence that practical deliberation, judgment, and action \textit{within} the role are effectively cut off from ordinary moral beliefs, attitudes, feelings, and relationships—resources on which responsible judgment and action depend. This consequence is very costly in both personal and social terms.

\textit{Id.} at 78. One commentator has made the converse argument, contending that
The costs of this detachment are high indeed. First, and somewhat ironically, the effects of counter-attitudinal advocacy may actually impair some attorneys' abilities to effectively represent their clients. Moral arguments certainly have a place in the law, and attorneys who are distanced from their personal morality have one less arrow they might draw from their quivers during the course of litigation.

Additionally, attorneys cut off from their personal morality may be unable to see the forest for the trees. More practically put, in ethical close calls lawyers sometimes must shoot from the hip and rely on their common sense, but the moral detachment counter-attitudinal advocacy may produce might completely undermine this professional judgment.

Third, attorneys' relationships with their clients outside of the courtroom may suffer because of detachment. By leading to adoption of clients' morality or to extreme moral distance, counter-attitudinal advocacy may inhibit attorneys' ability to give personal moral advice. The attorney may become useful only as a hired gun with the concept of attorney as advisor undermined by the process of advocating a cause contrary to belief.

Finally, and not unsubstantially, attorneys owe it to themselves to protect their core beliefs from detachment. Lawyers should be entitled, on issues truly integral to their notions of self, to protect the integrity of their convictions. After all, we are what we believe (not, as the saying goes, what we eat), and demanding counter-attitudinal advocacy not only requires that lawyers act like automotons, but that they actually become automotons.

Lawyers can be zealous advocates without the "benefits" that dissonance provides. See William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083 (1988).

130. Id. at 79.
131. Id.
132. Id.
133. Id. at 80-81.
134. See supra notes 120-29 and accompanying text.
135. Postema, supra note 77, at 80-81.
136. As suggested by one commentator:

The consequences of arguing against one's beliefs are so substantial that a lawyer has every obligation to avoid doing so. A lawyer should not argue positions which are at odds with views important to him or herself. . . . Each person must decide which beliefs are important enough that they should not be jeopardized. . . . Few decisions are as important as each individual's definition of what kind of person to be. This choice shapes most of what will be experienced throughout life. One's beliefs are integral to that self-definition. It should not be arrived at inadvertently or by accident. If a lawyer's role is seen as representing any client, unintended belief changes will alter personal and professional behavior. Only by making the attorney's obligation to self dominant can it be assured that such choices will be, as much as possible, intentional. Chemerinsky, supra note 120, at 34-35.
These four interests in attorneys maintaining independence of moral judgment form a substantial basis on which the truth model rests. There is, however, another explanation for the defections from the strict interpretation of zealous advocacy, namely the challenge to the assumption that the adversarial process is the most reliable method of dispensing justice. One commentator noted:

No empirical evidence has demonstrated that [the adversary system] obtains better results than another type of system. It assumes relative equality of opposing counsel. Therefore, it disproportionately favors the wealthy, who can afford superior representation. In addition, it is a formalistic justification because it assumes without proof that feeding disputes into its machinery and procedures will produce just results by rational application of law to fact. . . . [W]e know that this is not necessarily the case.

Ultimately, there is no proof that the adversary system is the best conceivable, or that it justifies the lawyer's amoral role as expressed in the standard conception [of the system].

Other scholars have become similarly disenchanted with the current state of the adversarial system, a dissatisfaction that only heightens the concern that the harms of counter-attitudinal advocacy may outweigh the benefits of the adversarial system as it presently exists.

C. Alternatives to the Current Understanding of Zealous Advocacy

Even if the truth model is theoretically sound, the question remains as to how that model could be utilized to determine a satisfactory level of zeal in the adversarial process? One possible, although

137. See, e.g., Fisher, supra note 86, at 104-05. In fact, the Model Code explicitly states the assumption:

Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of the facts and law, enables the tribunal to come to the hearing with an open mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

MODEL CODE EC 7-19 (footnotes omitted).


139. See, e.g., MARVIN E. FRANKEL, PARTISAN JUSTICE 18 (1980). Frankel wrote:

Because the route of a lawsuit is marked by a running battle all the way, the outcome is nothing like the assuredly right result imagined in our dream that “justice will out.” In that dream, neither eloquence nor lawyers’ techniques nor cunning has much place. The person who is “right” should win. But that is very far from assured in the kind of contest we’ve been considering. Where skill and trickery are so much involved, it must inevitably happen that the respective qualities of the professional champions will make a decisive difference. Where sheer power and endurance may count, the relative resources of clients become vital.

Id.
extreme, alternative is to eliminate the zealous advocacy requirement altogether—to "deprofessionalize" attorney's roles.140 This solution, similar to what one commentator called the "discretionary approach" to advocacy,141 would require attorneys to be fully responsible for deciding the minimum level of zeal to use in the course of representing their clients.142 Minimal zeal would be defined by each attorney in the exercise of their "professional duty of reflexive judgment."143

This alternative, however, is impractical. First, there is some benefit to the adversarial system, namely giving the finder of fact an opportunity to hear conflicting sides in a matter.144 Eliminating the zealous advocacy requirement entirely would allow every attorney, for any reason, to reduce or abandon efforts to assist their clients, undermining the adversarial process.145 Society would have no means of protecting its interest in the integrity of the judicial system.146

Additionally, potential clients justifiably would be quite nervous about retaining an attorney. If any attorney, without warning, could provide less than strenuous representation, why risk retaining an attorney at all?147 People likely would attempt to represent themselves, for they know that they will be zealous in their own defense. Most such persons, although certainly full of zeal, would lack the technical skills to survive in a courtroom.148 The inequality between advocates that admittedly can exist in the present system would be greatly exacerbated without any zealous advocacy requirement for attorneys. Given our societal ambition for justice, an alternative that eliminates the requirement of zeal is an unacceptable option.

140. See Simon, supra note 129, at 1083 (advocating discretion in ethical decision making as a replacement for the categorical rules of codes of professional responsibility); see also Postema, supra note 77, at 71 (describing but not advocating deprofessionalization).
141. Simon, supra note 129, at 1090.
142. See Simon, supra note 129, 1092-119 (attorneys should go forth and "seek justice.").
143. Id. at 1083; see also Postema, supra note 77, at 71.
144. See Wolfram, supra note 65, at 581. Wolfram noted, however, that the United States is the most vigorous of any nation in its zealous advocacy requirement. Id.
145. See Postema, supra note 77, at 81-82. Postema explained:

Deprofessionalization, however, would involve a radical restructuring of the legal system, reducing the complexity of the law as it currently exists so that individuals could exercise their rights without the assistance of highly specialized legal technicians. But, setting aside obvious questions of feasibility, to discredit this proposal we need only recall that deprofessionalization ignores the significant social value in a division of moral and social labor produced by the variety of public and professional roles.

146. For a solution to this problem of unfair surprise, see infra notes 155-66.
147. Another commentator similarly criticized Professor Simon's suggestion, noting that it "leaves too much room for rationalization of self-interest without external checks on behavior." Fisher, supra note 86, at 108 n.60.
148. See Postema, supra note 77, at 82.
Another alternative to the current conception of zealous advocacy, which Gerald Postema has proposed, is the "recourse model" of professional responsibilities.149 The recourse model holds that attorneys must look beyond the explicit duties set forth in codes of professional responsibility, "carry[ing] out those duties in keeping with the functional objectives of the role."150 Attorneys must neither adopt the morality of their clients nor fully distance themselves from their personal morality,151 but instead must rely on their judgment to tailor their conduct to best comply with society's expectations.152 A lawyer could, relying on her own moral sensibilities, terminate her relationship with her client because she comes to believe that the client is culpable.153

Although Postema raised and answered a number of objections to the recourse model,154 one difficulty with the theory not addressed in his article was that it risks collapsing into deprofessionalism. If each rule of professional conduct is the mere "letter of the law" to be interpreted by each attorney according to their own personal morality, those provisions would cease to be rules at all. The limiting function of standards of professional conduct would be lost to the subjective interpretations of lawyers acting as "mini-judges."

A final, and I would contend most desirable, alternative to zeal as we understand it today is based on an analogy to conflicts of interest.155 Rule 1.7 of the Model Rules requires that attorneys "not represent a client if the representation of that client may be materially limited... by the lawyer's own interests, unless... the client consents after consultation."156 The Model Code contains a similar provision, requiring that "[e]xcept with the consent of his clients after full disclosure, a lawyer shall not accept employment if the exercise of his pro-

149. Id. at 83.
150. Id.
151. See supra notes 120-29 and accompanying text.
152. Postema, supra note 77, at 83.
153. See id. at 85:

Thus, in cases in which the Code permits the lawyer to refuse employment, the rationale seems to be that a lawyer who has scruples about the client's proposed legal action is not likely to be able adequately to serve his client. And such scruples generally are not permitted at all once the attorney agrees to represent a client. This point of view encourages the lawyer to steel himself against such scruples and to view them as strictly personal feelings which have no place in professional behavior—a kind of unbecoming moral squeamishness. It is hard to dismiss the thought that this reaction is at bottom morally cynical.

154. Those arguments were based on the paternalism of the model, the lack of a need for a change, and the model's denial of client's autonomy. See id. at 84-89.
155. For an interesting look at how the logistics of the conflict of interest model would work, see Bean, supra note 118, at 70-73.
156. MODEL RULES Rule 1.7(b).
fessional judgment on behalf of his client will be or reasonably may be
affected by his own financial, business, property, or personal inter-
ests."157 Thus, both the Model Rules and Model Code contemplate an
attorney gaining the consent of her prospective clients if the attorney
believes that her personal interests may interfere with the
representation.

Could not this reasoning apply to lawyers who know in advance
that the quality of their representation is likely to suffer if they come
to believe that their clients are culpable?158 Given the psychological
harm attorneys may suffer as a result of counter-attitudinal advocacy,
is it really so far-fetched that some attorneys' interests in protecting
their consciences could rise to the level of conflicts of interest? I
would suggest that it is not far-fetched at all.

The attorney advising her potential client of the possible conflict
could say something to the effect of the following:

I pride myself on my truthfulness and integrity in the practice of law, and I do
not abandon that part of me when I become your advocate. Some attorneys
may be able to represent you effectively regardless of whether they believe
that you were in the right or wrong. I cannot, and my representation may
suffer if I come to believe that you were in the wrong. Although you are al-
ways free to retain other counsel, doing so in the middle of litigation may do
more harm than good. This aspect of my personality is a benefit to me in
representing clients I believe are in the right, but you should be aware that
the opposite can occur before deciding whether you want me as your represen-
tative. Do you understand?159

Of course, some potential clients may be scared off by this ap-
proach.160 Others, however, may not, and those are the clients attor-
neys subscribing to the truth model seek to represent in the first place.

In fact, the conflicts model best parallels Lincoln's situation. Although there is no record of Lincoln warning potential clients of his ineffectiveness in representing those he came to believe were culpable, Lincoln's reputation for honesty was known across Illinois at the time he practiced law.¹⁶¹ Those who sought to retain Lincoln as their counsel certainly were familiar with his style of representation, and were more than willing to take the risk that Lincoln might begin to doubt their innocence or lack of fault. Lincoln's clients did not formally waive the conflict in the manner discussed here, but the similarity to the conflicts model is notable nevertheless.

This conflict of interests approach, practiced more explicitly but nonetheless similarly to Lincoln's style of representation, has several benefits. First, it eliminates the possibility of unfair surprise.¹⁶² Some potential clients who seek a "role differentiation zealous advocacy" lawyer today may unknowingly retain an attorney who subscribes to the truth model of advocacy.¹⁶³ The way the Model Rules and Model Code currently are understood, the client in such a situation may be dissatisfied greatly with her counsel's representation, and the attorney may be faced with disciplinary action by the Attorney Registration and Disciplinary Committee. Under the conflicts approach, however, attorneys fully would inform potential clients at the outset of the possible conflict, and clients either would consent to the possible conflict or would seek different counsel.

Another benefit of the conflicts approach is the moral comfort provided to truth model attorneys. Today, attorneys inclined to accept the truth model must either engage in counter-attitudinal advocacy, with its corresponding risks,¹⁶⁴ or face the shame and risk involved in violating accepted norms of professional conduct.¹⁶⁵ By accepting the truth model in conjunction with informing potential clients of the possible conflict as an acceptable form of zealous advocacy, truth model attorneys would be freed emotionally to practice their brand of advocacy unaccompanied by the stresses of the current system.

The conflicts approach likely would provide a final benefit, namely

¹⁶¹. See supra notes 55-63 and accompanying text.
¹⁶². See Bean, supra note 118, at 70.
¹⁶³. Id.
¹⁶⁴. See supra notes 120-29 and accompanying text.
¹⁶⁵. See, e.g., MODEL RULES Rule 8.4
increased satisfaction with attorneys from the public at large. It is no secret that attorneys today suffer from a negative public image, a fact due largely to the impression that attorneys are almost by definition dishonest. Although the profession need not foist the truth model of advocacy upon every attorney (nor should it—there should be room in the legal profession for both those comfortable with the status quo and those who subscribe to the truth model), public perceptions of lawyers may improve significantly if attorneys at least are provided a means of practicing law in accordance with their consciences.

IV. CONCLUSION

Should lawyers be required to compromise their ethical principles to practice law? Many jokingly have commented that attorneys' professional responsibility is an oxymoron, but that surely is an unfair generalization. One commentator noted that “[a]s long as there has been an adversary system, there has been dispute regarding advocates' conflicting loyalties to their clients and to the public . . . .” Left out of this calculus, however, has been attorney's loyalties to themselves, or more specifically, to their consciences. As a result of the rigid no-

166. A humorous flier entitled “Attorney Season and Bag Limits” has come to the attention of this author. The flier, which notes in provision one that “[a]ny person with a valid State of Illinois Hunting License may harvest attorneys,” goes on to list the bag limits for different types of attorneys. Tellingly, the category “Honest Attorney” is listed as “EXTINCT.” See generally Shulamith Gold, Lawyer Bashing? Objection! Evidence Mounts that Attorneys are Being Targeted as Never Before, CHI. TR., July 23, 1993, § 2, at 1-2 (one of the ten most common stereotypes of lawyers, according to lawyers, is that “[t]hey're hired guns who represent scum. ‘Lawyers operate in their own moral universe, and a lot of people don't like or understand it,' said Wendy Kaminer, a lawyer . . . .”).

167. As one commentator suggested:

To suggest that inflexible integrity is indispensable to the make-up of a great lawyer is, of course, to challenge the sneer or the smile of the cynically minded. The jests about honest lawyers have become classic, and they will forever continue to delight. Yet, despite the humorist and the cynic, there is probably no profession in the world which makes greater demands upon integrity, or presents nicer questions of honor, or offers wider opportunities for fairness, than the profession of the law. The fact that many distinguished practitioners have not maintained the highest standards of the calling, that most of them have compromised for monetary or momentary success, that a few have actually abused their great opportunities, does not in the least impeach the proposition that extraordinary integrity, honor, and fairness are the essential qualities of a great lawyer. It merely demonstrates how rare great lawyers are.

HILL, supra note 20, at 31-32.

168. Edwin H. Greenbaum, Attorneys' Problems in Making Ethical Decisions, 52 IND. L.J. 627, 627 (1977). This essay does not suggest that lawyers who have resolved this conflict in favor of role differentiation are morally bankrupt. In fact, quite the opposite is true—they have found a way to represent their clients within the currently accepted scope of professional conduct. Attorneys who favor the truth model, however, should be no less free to engage in the practice of law.
tion of zealous advocacy found in the *Model Code* and *Model Rules*, much dissatisfaction with lawyers exists both inside and outside of the profession. In fact, if 160 years ago Abraham Lincoln would have been held to today's standard of zealous advocacy, Honest Abe's conscience may have prevented him from becoming an attorney. Let us hope that our profession can remove its eyes from the hypnotic allure of the adversarial process, if only briefly, to consider providing some latitude to those aspiring to Lincoln's high ideals.