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in Honor of Takao Tanase

Comments on
Professor Takao Tanase's
“Invoking Law as Narrative:
Lawyer's Ethics and the
Discourse of Law”

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Comments on Professor Takao Tanase's “Invoking Law as Narrative: Lawyer's Ethics and the Discourse of Law”

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I am most grateful to Harry Scheiber for the invitation to be here this morning. I found Professor Tanase's chapter on legal ethics and narrative theory most illuminating and I am honored to have the opportunity to comment on it.

I will begin by offering a brief exposition of what I take to be the core argument and contribution of Professor Tanase's paper. And then I thought I would raise some conceptual issues to provide a basis for further discussion.

Summary of Professor Tanase's Argument

Professor Tanase begins by pointing out the division among American ethicists over the legitimacy of the adversary ethic – the view that a lawyer's primary obligation is to her client. There are two essential components to this view: (1) a lawyer should be willing to serve the client irrespective of the moral worth of the client's ends, as long as those ends are lawful; (2) a lawyer should seek the client's ends with zeal – indeed, she should privilege the client's ends over her own interests and the interests of third parties who may be harmed by what the client wants.

As Professor Tanase describes, scholars such as David Luban have insisted that this account of the lawyering role is morally bankrupt, client-centered rather than justice-centered, and pernicious, at least when employed outside the sphere of criminal representation. Lawyers do things for their clients which they could not justify doing for themselves, and lawyers mobilize the law for ends that are socially repugnant.

In Professor Tanase's register, this is a debate between those who view lawyering as a role grounded in deference to the autonomy of clients and those who see it as a role grounded in moral appropriateness. The debate itself is likely as old as the legal profession. Professor Tanase's unique contribution, perhaps the most significant aspect of the paper, is to show that this debate is not merely a division over the lawyer's role but rather a contest between two ways of seeing the modern self and the relationship between the modern self and liberal democratic commitments.

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Many lawyers and scholars have written about the adversary ethic. Few have realized that arguments about the role of the lawyer in liberal democratic regimes invariably reflect background assumptions about personal identity, political identity, and political legitimacy. Put another way, Professor Tanase understands that one cannot adequately theorize about the lawyering role without interrogating rule of law values and the relationship between the individual and the state.

Thus, he rightly turns from the stalemate in the American debate to a broader consideration of the social and political assumptions underlying the adversary ethic.

While the adversary ethic at least outwardly professes to be committed to maximizing the client's interests, Tanase argues that clients in fact lose their autonomy as their interests and needs are translated into the language of the law. This is less a result of dynamics internal to the lawyer-client relationship than the nature of law itself – put in the most concise terms, Professor Tanase contends that the formal autonomy of law trumps the autonomy of clients in the very process thought to maximize it. The law treats individuals as abstract, formally equal rights-holders, and it treats rights as distinct from moral interests and understandings. Morally rich understandings of the self and social action, or “meanings” as Professor Tanase describes, are sharply circumscribed in the domain of the private and subjective, rigidly distinguished from operational preferences that can be expressed as legal rights.

Lawyers working from such a conception of law are blind to the full meaning of their client's goals. Legally cognizable claims are substituted for the client's true goals, and rights assertion, the very process that ought to secure the freedom of individuals, instead becomes a process of subjection and alienation. Instead of offering a tool for self-realization, the adversary ethic divorces the client from her true goals and thrusts her into a narrowly legalistic process of rights definition. Even if she wins, then, the victory may well be hollow. As Professor Tanase puts it:

Behind goals involving the securing of interests through the law lie many embedded meanings associated with the act of invoking law in that way here and now. When those [meanings] are radically abandoned, clients start to feel a certain indifference towards the results of such invocation in the law, because those [results] are no longer their own.²

In its most pernicious form, the narrowly legalistic approach to problem solving begins to dissolve the morally rich sphere of meaning by reproducing the

² Tanase, Chapter 5, at 19.

self as nothing more than the formally equal, abstract rights-holder the law imagines. Both lawyer and client become “slaves of the perspective peculiar to jurists.”³

The second part of Professor Tanase’s work offers an imaginative alternative by showing that a more complex understanding of law holds the promise of a more attractive conception of lawyering. Narrative, Professor Tanase suggests, is central to the operation of law. If this is so, then like all other narrative acts, legal reasoning is inescapably bound up with moral description, and adjudication is a process by which different morally bound narratives are resolved. Perhaps even more importantly, the legitimacy of law, our willingness to accept adjudicative outcomes, turns on its “expressivity” – the extent to which law both reflects and reconciles ascriptions of meaning beyond the sphere of narrow rights. Law, in short, is not autonomous from moral understandings of the world or the self.

This means, as Professor Tanase contends, that in order to *represent* clients rather than subordinate them, lawyers must be able to see “the world as seen by the person invoking the law.”⁴ (And this, in turn, requires “listening first to clients’ stories, and not forcing the framework of the law onto them,” or as he elsewhere describes, “descending as far as possible to the same line of sight as their clients.”⁵

Critique and Comments

This is a provocative thesis, especially because it views legal ethics through the lens of legal thought – an approach I take to be essential to produce a rich and convincing normative account of lawyering.

I have three observations:

First, I wonder how robust the explanatory power of the autonomy of law argument is. It is undoubtedly relevant to the authority of lawyers in the attorney-client relationship. But perhaps a more significant problem is that lawyers are lead by self-interest to privilege their own interests over the interests of their clients. After all, a lawyer who fails to come down to the same line of sight as her clients can hardly be described as genuinely client-centered – indeed, it may be more accurate to say that she has deviated from the requirements of the adversary ethic, that she is not client-centered at all. Genuine partisanship would require her

³ Tanase, Chapter 5, at 18.

⁴ Tanase, Chapter 5, at 22.

⁵ Tanase, Chapter 5, at 25.

to be sure she understands the full range of her clients' interests and needs before translating them into the law.

At least in the American context, when we look to concrete examples of professional failure, it readily appears that lawyers often go astray because their own interests have overtaken their clients' interests. This is surely the case in many fee-for-service attorney-client relationships where the lawyer's avarice clouds her perception of what the client truly needs and should seek from the law. But it is also the case in many contexts in which lucrative fees are absent – crushing caseloads, the lawyer's desire to establish transformative precedent, and the lawyer's convictions about the legitimacy of the client's ends may all cloud her understanding of those ends and impede her ability to achieve them.

On this account, clients experience alienation because self-interest prevents lawyers from seeing and acting on their clients' interests. Clients are treated not only as abstract rights-holders, but as means to the lawyer's ends. Add to this the fact that self-interest leads most lawyers to utterly ignore the needs of impecunious clients and we can see that people are not just alienated by the law, but from it.

This suggests that even a theory of law and lawyering that rejects or overcomes law's autonomy must confront the possibility that the lawyering role will be corrupted by the personal interests of the lawyer.

Second, in the adversary ethic, the exclusion of moral questions, or questions of appropriateness, is most often thought to be a concern because we want the lawyer to say no to the client. I think its quite revealing that the example Professor Tanase chooses in the second part of his paper (a race-based police stop) presents the opposite problem – a lawyer whose failure to raise questions of appropriateness leads her to do less for his client. Full understanding of the client's experience at the hands of the police, Professor Tanase rightly suggests, would put the lawyer in a position to enable the client, perhaps irrespective of whether the law recognizes the client's claim of racism.

This is a deeply attractive view of the lawyering role. But I wonder whether a narrative approach would have equal force in contexts where Luban and others want the lawyer to exercise prohibitory, rather than enabling, authority. Would understanding the client's full story make it easier to say no to the client? Would it increase the likelihood that the client will obey by increasing the lawyer's moral authority in the eyes of the client who feels the lawyer truly understands her situation? I suspect the answer is yes, but these are important questions if one thinks the primary defect in the adversary ethic is that it is too enabling for some clients and inadequately prohibitory.

My final comment goes to a premise in the first part of the paper. Following Stephen Pepper's work, Professor Tanase argues that the adversary ethic is abstractly justified by reference to the client's autonomy – the client's

right to seek her interests within the bounds of the law even if it violates other community norms. Deference to client autonomy is in turn justified by the view that questions of appropriateness are both private and radically subjective. Narrativity, by contrast, holds the promise of reintegrating private understanding with public rights by exposing the common terms that shape the construction of facts and law in adjudication. If this is correct, narrativity may require a different adversary system, not just a different adversary ethic. For the autonomy of law affects not only the lawyering role, but rules of evidence and procedure which purport to distinguish permissible from impermissible legal narratives.

Let me conclude by emphasizing that I hope Professor Tanase's argument finds the audience among lawyers and legal scholars in America it so richly deserves.