Expressional Life The Morality of Roles in Public and Professional Life



ARTHUR ISAK APPLBAUM

ETHICS FOR ADVERSARIES

ETHICS FOR ADVERSARIES

THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE

ARTHUR ISAK APPLBAUM

PRINCETON UNIVERSITY PRESS

PRINCETON, NEW JERSEY

Copyright © 1999 by Princeton University Press Published by Princeton University Press, 41 William Street, Princeton, New Jersey 08540 In the United Kingdom: Princeton University Press, Chichester, West Sussex All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Applbaum, Arthur Isak.
Ethics for adversaries : the morality of roles in public and professional life / Arthur Isak Applbaum.
p. cm.
Includes bibliographical references and index.
eISBN 1-4008-0012-9
1. Ethics. 2. Professional ethics. 3. Political ethics.
4. Adversary system (Law). I. Title.
BJ1012.A64 1999 303.3'72—dc21 98-32010

This book has been composed in Palatino

http://pup.princeton.edu

For Sally

CONTENTS

Acknowledgments xi

PART I: NECESSARY OFFICES 1

CHAPTER ONE Arguments for Adversaries 3 Restricted Reasons and Permissible Violation 4 Précis 9 Philosophical Commitments 13

CHAPTER TWO Professional Detachment: The Executioner of Paris 15

The "Argument of the Guillotine" 16 Circa 1799 27

PART II: ROLES AND REASONS 43

CHAPTER THREE Doctor, Schmoctor: Practice Positivism and Its Complications 45

Schmoctoring 48 Ways of Moralizing Roles 51 Doctoring 58

CHAPTER FOUR

The Remains of the Role 61

Neutrality of Persons and Relativity of Roles 62 Personal, Professional, and Political Morality 67 Roles and Legitimate Authority 69 Roles and Political Obligation 71

CHAPTER FIVE

Are Lawyers Liars? The Argument of Redescription 76

The Strategy of Redescription77The Failure of Redescription89The Challenge of Practice Positivism98Are They Liars?104

viii contents

PART III: GAMES AND VIOLATIONS 111

CHAPTER SIX

Rules of the Game and Fair Play 113 The Argument from Consent 115 The Argument from Tacit Consent 118 The Argument from Fair Play 121

CHAPTER SEVEN

Are Violations of Rights Ever Right? 136

Nonviolation and Inviolability 138 Violating Persons and Violating Rights 141 Self-Defeating Constraints 145 Pareto-Inferior Constraints 150 Possible Consent and Reasonable Consent 152 Ex Ante Consent That Is Impossible to Endorse Ex Post 155 The Possibility of Permissible Violation 160 The Reasonableness of Permissible Violation 166

CHAPTER EIGHT

Ethics in Equilibrium 175

Redescribing Aims 177 False Prophets and Profits 181 The Invisible Hand 187 Adversary Equipoise and the Division of Moral Labor 197

PART IV: AUTHORITY AND DISSENT 205

CHAPTER NINE Democratic Legitimacy and Official Discretion 207 Three Examples 209 Mandates in Books or Mandates in Action? 214 Judgment or Authority: Who Is to Decide? 216 Three Tensions in a Constitutional Democracy 220 Lessons from Legislative Ethics 223 Lessons from Civil Disobedience 226 To Play or Not to Play? Four Conditions of Democratic Legitimacy 228 How to Play? The Strategies of Discretion 230 Matching Strategies to Conditions of Democracy 231 Objections and Refinements 236 CHAPTER TEN Montaigne's Mistake 240 Marbury v. Nixon 241 Haig v. Richardson 245 Richardson v. Bork 253 *Necessary Offices*? 257

Sources and Credits 261

INDEX 263

HIS BOOK was not written in haste, and over time I have been helped by many good people. Thank you.

Jean Dombrowski, Greg Dorchak, and Shari Levinson, professionals all, prepared uncounted drafts and tracked down shadowy sources with skill, dedication, and good cheer.

I have benefited from substantial comments on particular chapters—in some cases, on more than one—from Miriam Avins, Daniel Bell, Susan Cleary, Robert Darnton, Linda Emanuel, Richard Fallon, Robert Fullinwider, Michael Hardimon, Frances Kamm, John Kleinig, Frederick Kraus, Martha Minow, Lynn Peterson, Robert Rosen, T. M. Scanlon, Tamar Schapiro, Maureen Scully, James Sebenius, Seana Shiffrin, Daniel Wikler, Lloyd Weinreb, and Richard Zeckhauser. Elizabeth Kiss and Simon Schama each pointed me toward important sources. A number of my former graduate fellows in Harvard's Program in Ethics and the Professions—now colleagues and friends were especially generous with their red ink: Deborah Hellman, Stephen Latham, Karl Lauterbach, Petr Lom, Daniel Markovits, and Alec Walen. Though only a couple of pentimenti show, my earliest efforts on the ethics of adversaries were written with Harold Pollack, then a precocious graduate student, now a friend and peer.

I spent a memorable year working on this book at the Princeton University Center for Human Values as a Laurance S. Rockefeller visiting fellow. I am grateful to George Kateb and Amy Gutmann for assembling a cohort of colleagues whose influence on my work has been deep and enduring: Christine Korsgaard, Avishai Margalit, Arthur Ripstein, Jeff Spinner-Halev, and Michael Thompson.

I have presented parts of the book at various times to audiences at Harvard's John F. Kennedy School of Government, New York University, Harvard Business School, Harvard Law School, and Princeton University, and at meetings of the American Political Science Association, the Association for Practical and Professional Ethics, the Office of Government Ethics, and the American Medical Association. On these occasions I have learned much from the commentary of Robert Bennett, Harry Frankfurt, Amy Gutmann, Mark Kleiman, Sandra Lynch, Bernard Nussbaum, Arthur Ripstein, and David Wilkins.

Mark Moore, Frederick Schauer, and Kenneth Winston, my colleagues at the Kennedy School of Government, have read and perceptively commented on almost all of the chapters at one time or another. Michael Aronson, Mark Kleiman, Jane Mansbridge, Brian MacDonald, and Alan Strudler read the entire draft with care, and their wise advice helped with both unity and clarity. I am especially grateful to David Estlund both for many fruitful conversations along the way and for expert advice on the final draft. Working with Ann Himmelberger Wald, editor in chief at Princeton University Press, and her able staff has been a joy.

Howard Raiffa taught me by example that honesty and charity are intellectual virtues. Chapter 6 begins to make good on a long-standing promise to him to write about the ethics of negotiation.

Alan Wertheimer has fixed my arguments and prose so many times at so many different stages that he shares the blame for the result. In thinking about professional roles, I turn often to Montaigne. In thinking about Alan's friendship, I do the same.

To Dennis Thompson, I owe my calling. He took a chance when he picked me for the first class of faculty fellows in Harvard's Program in Ethics and the Professions. My fellow fellows, from whom I learned so much—Ezekiel Emanuel, Robert Massie Jr., and Robert Rosen—left at year's end, but I did not. The standing joke, stale but not without truth, is that Dennis would keep leaving me back until I got it right. Dozens of faculty and graduate fellows in ethics have now come and gone from Harvard on my watch, and most of them have read one chapter or another of this book in some form. Though I cannot name them all, I am grateful for their invigorating fellowship. Many of those whom I have already mentioned I know because of this rare intellectual community that Dennis directs with exacting standards and generous spirit. Without his deliberative engagement and steadfast encouragement, argument by argument and year after year, I could not have written this book.

Like the prospect of a guillotining, the expectation of twins succeeds marvelously in concentrating the mind. Each time Sophie and Emma kicked in their Mom's belly, they kicked their Dad in the pants as well. Now in early toddlerhood, they have utterly convinced me that William Godwin is wrong. There *is* magic in the pronoun "my."

Sally Louise Rubin has borne the trials of marriage to a ruminant writer with characteristic grace. Sally was my guide on all matters French, from the translation of sources to the navigation of Paris archives. More important, I have relied on her sound judgment and refined ear for matters large and small. She is my one true love, and to her I dedicate this book.

Little Deer Isle, Maine August 1998

PART I

NECESSARY OFFICES

Likewise in every government there are necessary offices which are not only abject but also vicious. Vices find their place in it and are employed for sewing our society together, as are poisons for the preservation of our health. If they become excusable, inasmuch as we need them and the common necessity effaces their true quality, we still must let this part be played by the more vigorous and less fearful citizens, who sacrifice their honor and their conscience, as those ancients sacrificed their life, for the good of their country. We who are weaker, let us take roles that are both easier and less hazardous. The public welfare requires that a man betray and lie and massacre; let us resign this commission to more obedient and suppler people.

Michel de Montaigne, "Of the Useful and the Honorable"