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Philosophical Legal Ethics: Ethics, Morals, and Jurisprudence

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FORUM

Philosophical Legal Ethics: Ethics, Morals and Jurisprudence

Introduction

Christine Parker

This Forum consists of seven short papers from an exciting plenary session held at the fourth International Legal Ethics Conference, which took place at Stanford University in July 2010. Seven legal ethicists, representing both the older and newer generations of legal ethics scholarship, were asked to respond to the following provocation:¹

Is it possible to rescue the concept of role-differentiated morality from the seemingly devastating criticisms leveled at the 'standard conception' of legal ethics as amoral lawyering? The famous question posed by Charles Fried, 'Can a good lawyer be a good person?'² accepted the premise that 'good lawyers' are professionally obligated to pursue the interests of their clients even when doing so would 'use the law to the prejudice of the weak or the innocent' and detract from the common good. Fried argued that the lawyer's role as partisan advocate for her clients is morally justified by the relationship between the person and the legal system; each of us should be free to pursue lawful purposes, and can indeed claim a right to be free to act as we choose within the 'bounds of the law'.

Some legal ethicists who initially responded to Fried (or like Wasserstrom³ wrote contemporaneously with him) argued that the idea of legal boundaries provides inadequate protection against the harm lawyers cause others in the pursuit of their clients' interests. Partisan duty infuses the way lawyers interpret the 'bounds of the law', pushing legal limits past their ordinary meaning and intended purpose to embrace any colourable interpretation that the law could sustain.

¹ The provocation was put together by Katherine Kruse, Brad Wendel and Alice Woolley. The session was moderated with characteristic generosity, wit and intelligence by David Luban.

² Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060.

³ Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights Quarterly* 105.

Other legal ethicists have rejected the premise that lawyers' ethical duties demand instrumentalist partisan interpretation of the 'bounds of the law', and have looked increasingly to jurisprudential and political theory to explore the interpretive stance that it is appropriate for lawyers to take with respect to the 'bounds of the law'. This re-animation of the debate in philosophical legal ethics has motivated more general scholarly interest and attention.

Is the concern of legal ethics the morality of lawyers, the morality of clients, or the morality of laws?

The panel participants each prepared a short paper for presentation and discussion at the conference. Since the conference, they have revised their papers and they are published here. These seven papers give a succinct and engaging 'state-of-the-art' on the renaissance of philosophical legal ethics in the second decade of the twenty-first century.

We begin with Alice Woolley's contribution, which nicely sets out the task for legal ethics, as it has traditionally been understood. Whatever approach is taken, Woolley points out, the legal ethicist must be multi-faceted in his or her attention to both practical problems and unconstrained philosophical thinking in relation to the morality of law, the actions of clients and the actions of lawyers. She goes on to describe how the various predominant approaches to legal ethics address these issues in multi-faceted practical and philosophical ways.

The second contribution to the Forum is that of one of the founders of the legal ethics literature, Stephen Pepper, who re-states and nuances the 'standard conception' of lawyers' ethics as based on their role of providing access to law for those who cannot access it without assistance. Yet, even as Pepper restates the standard conception of legal ethics, he also points out that across all the views represented in the panel discussion at the conference (and in this Forum) all presenters conceived morality in law and lawyering as involving a two-way conversation between lawyers and clients, at least in the first instance.

Tim Dare's contribution to the Forum follows on from Pepper's by defending the morality of a modified version of the standard conception. Dare argues that standard conception has been mischaracterised (and perhaps mis-applied) as requiring 'hyper-zeal'. An obligation of 'mere-zeal', rather than hyper-zeal, can be morally justified on his view.

In the fourth contribution to the Forum, Katherine Kruse gives a more personal account of the relationship between philosophy and the practical problems of justice in lawyering. She argues for the standard conception of lawyering on the basis of empirical evidence regarding the sad reality of much lawyering, and observes that 'over-zealous partisanship occurs too infrequently among lawyers whose clients are unable to pay handsomely for hourly work; and it is received with too much suspicion by even well-heeled clients when they get their billing statements'.

Brad Wendel's contribution to the Forum eloquently summarises his new and alternative account of the ethical significance of lawyering as revolving around law's political authority as a way of coordinating compliance with the demands of morality in complex communities. This requires lawyers to maintain 'fidelity to law' as a moral enterprise in and of itself. This ethical approach puts the morality of law at the centre, as opposed to both traditional formulations of the standard conception that put client autonomy and access to law at the centre of the lawyer's role and traditional critiques of the standard conception that argue for general accounts of justice and morality to trump the lawyer's role as partisan.

In contrast to Wendel's approach, Bill Simon, in the sixth contribution to the Forum, further develops his contextual view of legal ethics, based on what justice requires.⁴ Simon argues that whatever one's substantive approach, lawyers' ethics should be based on principles that set out moral values and can be contextually applied to different situations using moral judgment, rather than an application of rules. He suggests that even accounts of lawyers' ethics that are based on the morality of the law should concern themselves more with the general principles of what makes law moral than with a legalistic rule-based account of professional conduct.

Daniel Markovits's contribution provocatively concludes the Forum by arguing that legal ethics scholarship to date has been asking the wrong question. Markovits suggests that rather than asking how lawyers should behave, legal ethics scholars should concern themselves with more philosophically interesting questions such as: What kind of a practice is lawyering? What are lawyering's immanent norms and how are these related to other moral ideals? How does lawyering fit into modern ethical life more generally? On this view, philosophical scholarship on legal ethics has only just begun—and has the potential to raise many deeper challenges for social scientists, practitioners and the teachers of professional conduct to grapple with.

⁴ William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 1998).

1. The Legitimate Concerns of Legal Ethics

Alice Woolley*

Pooh always liked a little something at eleven o'clock in the morning, and he was very glad to see Rabbit getting out the plates and mugs; and when Rabbit said, 'Honey or condensed milk with your bread?' he was so excited that he said, 'Both', and then, so as not to seem greedy, he added, 'But don't bother about the bread, please'.⁵

A recent article in the *New York Times* distinguished between the practice of philosophy and the practice of law.⁶ It suggested that the concerns of philosophy are by their very nature unconstrained by the dictates of time or by community conventions and norms. The philosopher may be in the world, but he is not of the world. The lawyer, by contrast, can escape neither time nor the facts and vagaries of the world; her task is to use whatever skills she has to make the most of them.

Whatever the (in)accuracy of this exercise in stereotyping, lawyers who think about philosophy, or philosophers who think about lawyers, have neither the posited philosopher's luxury of time, nor the posited lawyer's ability to ignore broader or more abstract implications of her daily work. Accomplishment of the exercise requires bringing abstraction and thoughtfulness to bear on questions that are fundamentally practical and of 'this world'.

For the purposes of this session, which is intended to allow reflection on a set question—*Is the concern of legal ethics the morality of lawyers, the morality of clients, or the morality of laws?*—the significance of this observation is that it indicates, and explains, the multi-faceted nature of legal ethics and, hence, the necessarily multi-faceted concerns it must have. Whether, and in what way, legal ethics should be concerned with the morality of lawyers, clients or laws depends on why it has chosen to concern itself—what practical question or inquiry is the exercise in more abstract or unconstrained thinking to illuminate? Further, in 'this world' most questions, most of the time, cannot be satisfactorily resolved through a single analytical framework. Legal ethics does not have a concern, it has concerns and, much of the time, the morality of many things must be considered for its concerns to be meaningfully illuminated.

Before I defend that position, I wish to make a preliminary observation: legal ethics should never be concerned with the morality of *lawyers* or of *clients*; rather it should be concerned only with the morality of the acts lawyers or clients do (or propose to do). Or, to put it slightly differently, to the extent that legal ethics focuses on lawyers or clients, the concern must be with what lawyers and clients do, not with who they are. This is for several reasons that I have set out in more detail elsewhere⁷ and will only allude to here. First, to the

* Associate Professor, Faculty of Law, University of Calgary, Canada.

⁵ AA Milne, *Winnie the Pooh* (1926).

⁶ Simon Critchley, 'What is a Philosopher?' Opinionator Blog, *New York Times*, 16 May 2010.

⁷ Alice Woolley, 'The Psychology of Good Character: The Past, Present and Future of Good Character Regulation in Canada' (with Jocelyn Stacey) in Kieran Tranter *et al* (eds), *Re-Affirming Legal Ethics* (Routledge, 2010)

extent that moral character exists it is not easily identified.⁸ Single or even several instances of behaviour do not necessarily indicate whether a person has the virtue (or vice) associated with that behaviour. Thus, saying that we only want lawyers to represent clients with honest characters would not give much indication to lawyers as to which clients they should represent. Second, even if moral character does exist, it correlates poorly with conduct across circumstances; requiring that lawyers have honest characters would not ensure honest actions in the various circumstances of legal practice. Third, with perhaps an exception or two, the majority of the practical questions with which legal ethics concerns itself—such as what should a lawyer do?—focus squarely on acts of the lawyer or client. Given that, to the extent that morality is relevant, it is the morality of the act, not of the actor, that matters.

That observation merely reframes the question, of course. It does not change my answer, which is, first, that whether, and in what way, legal ethics should be concerned with the morality of laws, or of the acts of lawyers or clients, depends on why it has concerned itself; and, second, that, much of the time, the morality of all of those things must be considered, to answer a question in a satisfactory way.

Consider this example. In Alberta, the Code of Conduct states that when a client discloses an intention to commit suicide, the lawyer must treat that disclosure as confidential unless either the lawyer has some reason, other than the suicide intention itself, to question the client's mental capacity, or unless some other exception to confidentiality applies, such as client consent.⁹ For a legal ethicist, this provision, and the scenario it addresses, raises a number of questions. When faced with a suicidal client, what should a lawyer do? What facts or principles are properly relevant to the lawyer's decision? Is the regulation a good one, or should the obligation be different—eg one of disclosure? If a lawyer does not disclose the threat, as the rule requires, can the lawyer view her actions as consistent with a life well-lived?

Considering how an ethicist might answer these different questions indicates, I think, that an answer that views the question from only one of the proffered perspectives (lawyer, client or law) might miss something important. Moreover, which perspective will be the most relevant and useful depends on which question is asked. This is the case regardless of the specific position one takes on the controversies and debates of the philosophical legal ethics literature.

This is because, as was noted at the outset, philosophical legal ethics exists at the intersection between the abstraction of philosophy and the tangible problems of the real

165–87; Alice Woolley, 'Legal Ethics and Regulatory Legitimacy: Regulating Lawyers for Personal Misconduct' in Francesca Bartlett *et al* (eds), *Alternative Perspectives on Legal Ethics: Reimagining the Profession* (Routledge, 2010) 241–68; Alice Woolley, 'Tending the Bar: The Good Character Requirement for Law Society Admission' (2007) 30 *Dalhousie Law Journal* 27–78.

⁸ By moral character I mean (channeling MacIntyre) a collection of virtues or vices that enable or inhibit the accomplishment of good conduct. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 1981) 178. See generally Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press 1999); Michael Slote, *From Morality to Virtue* (Oxford University Press 1992).

⁹ Alberta Code of Professional Conduct, Ch 7, Commentary to Rule 8(e), www.lawsocietyalberta.com/files/regulations/Code.pdf.

world. So that when it answers questions like ‘what should the lawyer do’, it must account not only for abstract principles (whatever those may be), but also for the intersection between those abstract principles and the circumstances in which they actually apply. Its position on the abstract debate does not eliminate the tangible manifestation of the questions it is asking (just as the tangible manifestation does not necessarily indicate the abstract principles necessary to answer the question).

Thus, that a lawyer faced with a suicidal client will consider what the law requires or permits, suggests that a legal ethicist employing abstract principles to think about what the lawyer should do must consider the morality of the laws that govern the lawyer’s conduct. *How* the legal ethicist considers the morality of laws will properly vary with the abstract principles the ethicist employs. Ethicist A may emphasise the morality of the legal system as a whole, including the lawyer’s role within the system, rather than the morality of the particular law. What the lawyer should do will simply follow from what the law permits or requires, provided the legal system is a moral one. Ethicist B may emphasise analysis of the law without distinction from morality; that ethicist might identify what the lawyer should do through identifying what the law truly requires, in a Dworkinian sense.¹⁰ Ethicist C may assess the morality of applying the law so as to preclude disclosure. Ethicist C’s concern is with the relationship between legality and morality in a particular situation where they may be in conflict, and the answer to what the lawyer should do will depend on whether morality or legality is identified as the pre-eminent value in that instance. One way or another, though, a legal ethicist thinking about what the lawyer should do will think about the morality of law. The need to consider the morality of the law follows from the practical problem posed; how the morality of law is analysed follows from the abstract principles embraced.

The lawyer faced with the suicidal client, though, will not stop at identifying her legal obligations. If she has any moral sensitivity or judgment at all, she will go on to think about the apart-from-legality moral implications of following the law in this instance. What if the client dies? What if the lawyer could, with one phone call, have prevented the client from losing what life might have provided, and also prevented injury to his spouse, children and friends? Those questions will occur to the lawyer, and that means that they should also occur to and be considered by the legal ethicist who advises her. What, apart from legality, does morality require in this situation? If ordinary morality would require disclosure, or some other helping behaviour, then that must have implications for how the legal ethicist thinks about the problem. That implication will, again, vary with the abstract principles embraced by the ethicist. Ethicist A may thus propose the idea of a moral remainder—the irreducible cost that arises from choosing when personal and professional morality conflict in a particular circumstance. Ethicist B may simply have incorporated the morality of the lawyer’s act into the Dworkinian analysis. Ethicist C may argue that the law should be ignored in this particular situation. But none of A, B or C can assert that the morality of the lawyer’s action

¹⁰ Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986) 97 (‘Justice is a matter of the correct or best theory of moral and political rights ...’).

plays no part in the analysis, because the lawyer's legitimate concern with the morality of non-disclosure (or disclosure) requires that the ethicist account for it too.

Further, when one thinks about the problem from the perspective of the lawyer, it may be that some accounts of how morality matters appear more compelling than others. Telling a lawyer about moral remainders, for example, might sound a bit like saying, 'drag, huh?' rather than providing analysis or guidance of use to the lawyer struggling with the dilemma.

Finally, if a lawyer (or ethicist) has a position on the morality of suicide *per se*, the morality of the client's conduct in intending to commit suicide may also be a relevant aspect of the analysis. If the lawyer (or ethicist) believes that suicide is not immoral, but is rather a matter of personal conscience and choice, or that suicide is permissible in this instance because the client has a terminal illness and no children, that will affect how the lawyer perceives the situation and, again, will need to be accounted for by a legal ethicist analysing what a lawyer should do if faced with that situation.

What if the question asked of the legal ethicist is, instead, whether the regulation is a good one, or should be different? In this instance the abstract principles of philosophy intersect with the concerns of the real world in a different way, with the result that the shape and necessity of considering different perspectives changes. An ethical assessment of regulation will consider the morality of law, but not in terms of the relationship between the morality of law and individual action. The analysis will, instead, be more jurisprudential, assessing the meaning and validity of the law in relation to the selected jurisprudential framework.

Thus, a formalist approach to the law governing lawyers would require consideration of whether the law in its current form coheres to the internal rationality of the law governing lawyers. A rule that is incoherent given that internal rationality would be suspect.¹¹ A democratic legitimacy approach would consider the process and substance of the rule in light of democratic norms, and assess whether the law can be considered to be legitimate given those norms.¹² A natural law approach would consider the relationship between the law and the substantive morality the law is to reflect, either finding the content of the law in that substantive morality, or questioning the law's legitimacy given its inconsistency with the requirements of substantive morality. And a positivist approach would simply involve determining whether the rule is recognisable as law, without much consideration of its morality, one way or another.

Would the morality of the actions of the lawyer or the client be a concern when considering the legitimacy of the rule prohibiting disclosure of a client's suicide attempt? It would be in a natural law analysis, where the analysis of the law's morality incorporates ordinary moral values. However, for jurisprudential theories that orientate not towards the moral content of the law, but towards the legitimacy of the law as assessed from the law's

¹¹ I discuss a formalist approach to legal ethics in A Woolley, 'If Philosophical Legal Ethics is the Answer, Then What is the Question?' (2010) 60 *University of Toronto Law Journal* 983–1001.

¹² I have argued that this is the approach that should be used for analysing the regulation of lawyers. See Woolley, 'Legal Ethics and Regulatory Legitimacy' (n 7).

internal moral structure,¹³ or its secondary rules,¹⁴ it is less obvious that the morality of the lawyer or client has any relevance. The analysis of democratic legitimacy, for example, focuses on the morality of the process of law-making, and on the moral norms that a system of laws embodies as a whole, rather than on ordinary moral values, such as those that one would employ if talking about the morality of the lawyer or of the client *per se*. The Alberta rules governing disclosure of client suicides is not democratically legitimate (or illegitimate) because it balanced correctly the competing moral values of harm prevention and respect for autonomy; it is legitimate (or illegitimate) because of the process through which it was enacted, and its consistency with the norms embodied elsewhere in the legal system. Similarly, while a formalist analysis might articulate a moral grounding for the internal rationality of a legal doctrine (Weinrib's notion of corrective justice in tort law, for example¹⁵), that morality is internal to the legal system, and cannot be derived from analysis of extra-legal moral values.

This does not, though, make the morality of the lawyer or client irrelevant. It rather directs how the morality of the lawyer or client should be considered in assessing the validity of the regulatory norms with which lawyers must comply. With respect to formalism, for example, the central features of the law governing lawyers are client determination of ends, lawyer assistance in the pursuit of client ends, and the constraint of legality. Each of these features makes moral demands of, or moral claims about, lawyers and clients. That means that a formalist analysis of whether the rule prohibiting lawyer disclosure of client suicide is a good one necessarily includes an analysis of lawyer and client morality. That analysis is constrained—it is not every aspect of the lawyer or client's morality that is relevant—but it does take into account the aspects of lawyer or client morality that have been identified as relevant to the question of the rule that should govern lawyer behaviour in these circumstances. Similarly, to the extent that a theory of democratic legitimacy invokes thick concepts of legitimacy, and invokes the moral values embedded in the legal system as a whole, as well as the process through which a law was derived, it will also permit consideration of the morality of lawyers or clients to the extent that the legal system itself views that morality as important.

This observation suggests again, though, a set of evaluative criteria for the different jurisprudential theories used to analyse the merits of a regulatory approach. Laws do not exist in the air; they apply to real people in real circumstances, who are affected by their terms. Assessing the validity of a law with clear moral implications for those to whom it applies, without fully considering the morality of the actions that would follow from compliance with that law, arguably misses something fundamental. Theories like formalism, or democratic legitimacy, arguably constrain the analysis to the point where the assessment

¹³ For the formalist or legitimacy theorist.

¹⁴ For the positivist—I am not suggesting that all positivism follows Hart's idea of secondary rules, but simply wish to invoke the idea of rules that permit one to recognise what constitutes law without asserting that law is necessarily a moral idea. HLA Hart, *The Concept of Law* (Clarendon, 1961).

¹⁵ Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

of whether the regulation is a good one involves not talking about what really matters, which is what happens when that regulation operates to affect the lives (or deaths) of suicidal clients and their lawyers.

Jurisprudential theories have an additional ‘real world’ challenge. Although distinct from the question of whether one should consider the morality of law, lawyers or clients, claims about what constitutes a legitimate law, or an internally coherent one, can appear abstracted from the practice of law-making. Law-making rarely satisfies, for example, Habermas’s criteria for legitimate deliberation¹⁶; jurisprudential theories applied to the content of the law governing lawyers have to grapple with the difference between the idea of legitimacy and the practice of it. To the extent that jurisprudential approaches make a claim to our attention they must—as Brad Wendel has done in his contribution to this debate—have some way to account for what an authority claim looks like in the real world.

This comment has been deliberately agnostic on the questions that animate much of the disagreement within philosophical legal ethics—how one should determine the right thing to do and the right rules to have. That is not because I have no opinion on those matters. It is because I do not think in a deep sense that the opinions and disagreements we have on these questions matter all that much. Much of the time they lead to the same destination. They are almost certain never to be resolved. Each of them, in some way or another, will focus on one part of the story while having insufficient answers for other parts. What matters—what is essential—is that the project of philosophical legal ethics never obfuscate the difficulty of what it has undertaken. We can never be purely pragmatic, but neither can we ever pretend that what we are saying abstracts from the real world concerns of those to whom it applies. The strengths (and weaknesses) of any ethical theory will depend on how well it has captured the theory and practice of law, of lawyers, and of clients.

¹⁶ Jürgen Habermas, ‘Popular Sovereignty as Procedure’ in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997).

2. Locating Morality in Legal Practice: Lawyer? Client? The Law?

Stephen Pepper*

When practising lawyers, law professors and scholars in our field speak of ‘legal ethics’, they almost always are thinking about the ethics of the practice of law, the ethics involved in accomplishing legal work for clients. For that reason, I think it more precise and helpful to refer to our field of inquiry as ‘lawyers’ ethics’, and thus to phrase our question as: ‘Is the concern of lawyers’ ethics the morality of lawyers, the morality of clients, or the morality of laws?’ I would guess that all eight¹⁷ of us think that the answer is ‘all three’, and, as I have rephrased it, I would say ‘all three’ with a possibly decreasing degree of directness. I discuss each in turn below.

Morality of Lawyers (1)

‘Can a good lawyer be a good person?’ What are the foundations from which we determine and structure our understanding of right and wrong with regard to the professional conduct of lawyers? Law is intended to be a public resource, available to all. That means we all have something like an entitlement to know and use the law that limits, channels and empowers us. The basic function of lawyers, of the legal profession, is to provide access to law for those who cannot access it without assistance. We presume that law is created and intended to have a positive effect (although this is a controvertible claim, appropriate for the third aspect of our question), and that it is intended to be available to all. By providing access to this ‘good’, lawyers in the aggregate perform a morally justifiable (and arguably admirable) function. This functional foundation for the ethics (and consequent morality) of lawyers is structural, institutional and general.

But what about the retail level? Lawmakers create law intended to have a positive effect. But what they create is general, usually relatively rough, often rules of thumb. Even if we are willing to presume that in the aggregate law has a good or positive effect, we know that often in the specific it does not. Law (particularly facilitative law such as contract or corporate) is often a neutral tool; it can be used to good or bad effect. (The exclusionary rule, to take an example from a quite different field, shields the guilty along with the innocent.¹⁸) At the level of the specific usage of the law by the client enabled by the lawyer, can we still conclude that the lawyer’s function is morally justifiable? Should we create an ethical structure for lawyers in which law is not generally available, in which each lawyer in each instance

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¹⁷ Seven speakers plus David Luban as facilitator.

¹⁸ The exclusionary rule prevents use of illegally discovered information as evidence in a criminal trial. See Wayne R LaFare, *Search and Seizure: Volume 1*, section 1.1 (West, 4th edn) (discussing the origins and purpose of the exclusionary rule).

functions as a gatekeeper to determine whether or not the specific use of the law is allowable or not? Or is how and whether to use the law a choice to be made by each of us, perhaps with the assistance, guidance and advice of a (preferably ethical) lawyer? (See ‘*Morality of Lawyers (2)*’ below.) Are lawyers primarily in service to clients, facilitating access to law? Or are they primarily delegated agents of the state, making law on a situation by situation basis?¹⁹

The values of equal access to law and the autonomy of each individual suggest that each lawyer ought not to be making law for each situation. In addition, clients, particularly individual clients, are often dependent and vulnerable in relation to their lawyers, and lawyers are in a position to be tempted to exploit that vulnerability by making choices that serve the lawyer’s interests rather than the client’s. (There are also practical problems with the alternative. Consider for a moment the lawyer as arbiter model. Would we not have some entrepreneurial law student develop a website to match sophisticated clients with morally, policy or politically like-minded lawyers to avoid the problem of moral screening of otherwise lawful conduct? Would powerful, sophisticated corporations even need such a website to locate lawyers likely to approve usages of the law facilitative to their purposes and goals?) On the level of the particular instance, providing ‘neutral’ access to law is thus morally justifiable and arguably admirable, although often more problematic than at the remove of the general, structural and institutional. I have made this argument more elaborately before,²⁰ and, as might be expected, I disagree with the opening premise of our topic that the criticisms of this understanding and role are ‘seemingly devastating’.²¹

Imagine for a moment the well-known example of a debtor who admits to his lawyer that he owes a substantial amount of money. The client debtor is significantly better off financially than the creditor and the debt is currently due and unpaid. This is a ‘just’ debt, with no obvious reason or justification for not repaying. The lawyer’s consideration of the surrounding facts reveals that there is a statute of limitations or statute of frauds defence that will prevent court enforcement of the debt—it is a just and admitted debt, but unenforceable under the law. There is a general moral consensus in our society that, all other things being equal, one should pay one’s just debts. If one has borrowed and used someone else’s money under promise of repayment, one ought as a matter of common morality to repay. Should the lawyer enforce this consensus moral understanding on the client, and refuse to plead the technical defence if the matter goes to litigation? Should the lawyer, perhaps, not even inform the client of the existence of the valid defence? The lawmakers (legislative and judicial) have chosen a bright line rule, knowing that it will sometimes result in injustice. Should our regime of lawyers’ ethics change that bright line to an ‘under all the

¹⁹ For a recent exchange on this issue, see Stephen Pepper, ‘Integrating Morality and Law in Legal Practice: A Reply to Professor Simon’ (2010) 23 *Georgetown Journal of Legal Ethics* 1011, responding to William H Simon, ‘Role Differentiation and Lawyers’ Ethics: A Critique of Some Academic Perspectives’ (2010) 23 *Georgetown Journal of Legal Ethics* 987, 996–1003.

²⁰ Stephen L Pepper, ‘The Lawyer’s Amoral Ethical Role: A Defence, A Problem, and Some Possibilities’ [1986] *American Bar Foundation Research Journal* 613.

²¹ Consider Stephen L Pepper, ‘A Rejoinder to Professors Kaufman and Luban’ [1986] *American Bar Foundation Research Journal* 657, 662–73; and whether the critique, or the critique of the critique, is more persuasive.

circumstances' moral decision by the particular lawyer? (Similarly, should the choice of whether or not to invoke the exclusionary rule in a criminal proceeding be an all things considered, under these particular circumstances, moral decision by the lawyer?) I have suggested above that (a) law as a public good, (b) the importance of open access to that public good, (c) the autonomy of individuals, (d) the vulnerability of clients to their lawyers, and (e) the natural tendency of lawyers to take advantage (intentionally or inadvertently) of their client's vulnerability, all suggest that these decisions should be for the client, not for the lawyer.

Morality of Lawyers (2)

Thus the general role (the structural or institutional role) of the lawyer's function is directly concerned with the morality of lawyers. There is a second dimension on which lawyers' ethics (aka 'legal ethics') can be (and I would suggest ought to be) quite directly concerned with the morality of lawyers. When the client's access to or use of the law is morally problematic, the lawyer ought to counsel the client concerning that problem. If the lawyer has concluded that the client's use of the law may be morally wrongful, that ought to be made clear to the client. The lawyer can counsel the client that it will be the client, and not the lawyer or the law, who will be primarily responsible for a morally wrongful but lawful use of the law.²²

In the just debt/technical defence situation, for example, the lawyer might ask why it is that the client is considering resisting paying an admitted debt, or is seeking advice about that possibility. Or she might find some other gentle, respectful way to initiate moral deliberation with the client regarding the debt and its repayment. The lawyer would explore with the client the fairness, justice, and morality aspects of the situation and options. Depending on the client's response to the 'why' question, she might ask whether the client thinks it is 'right' or 'fair' for the creditor not to be repaid the money he gave to the client and that the client has used. These are difficult conversations to contemplate, but with skill and sensitivity perhaps not so difficult to accomplish. The lawyer can assist the client to draw out and clarify his values. The lawyer can respectfully influence client choice and conduct without manipulating or dominating it. The interchange can, and should, run both ways. It is quite possible that the client will persuade the lawyer that what she first thought was morally wrongful is in fact justifiable. (Instruction in legal writing for law students is required for

²² 'It ought to be part of the lawyer's ethical obligation to clarify that merely because one has a legal right to do x, doing x is not necessarily the right thing to do. The lawyer ought to ensure that the client is aware that x, though lawful and otherwise advantageous to the client, may well be morally unjustifiable.' Stephen L Pepper, 'Lawyers Ethics in the Gap between Law and Justice' (1999) 40 *South Texas Law Review* 181, 190–1. In that article, I elaborate on the justification for such an obligation and suggest spectra of appropriateness for it in different factual contexts. A number of ethics scholars have argued for this role for lawyers in different ways: see eg Deborah L Rhode, 'Moral Counseling' (2006) 75 *Fordham Law Review* 1317; Bruce A Green and Russell G Pearce, 'Public Service Must Begin at Home: The Lawyer as Civics Teacher in Everyday Practice' (2009) 50 *William and Mary Law Review* 1207.

accreditation of law schools, and instruction in written and oral advocacy is usually included for first year students. Instruction in the arguably more basic and fundamental lawyering skill of counselling is, unfortunately, not required and commonly not provided.)

Lawyers too often repress their moral perception and intuition. To the extent that they choose to engage in this aspect of the ethics of lawyering, they can exercise, develop and refine their moral perception, intuition, reasoning and counsel. To the extent that lawyers, to the contrary, repress this aspect of their understanding and do not develop these skills, they contribute to the moral coarsening of our common culture. The unstated or background message between lawyer and client can be quite influential in this regard. Imagine two different lawyers' reactions to the client's hesitation at repaying the 'just debt'. One lawyer, taking the 'bad man' or 'hardball' approach to law and human relations, suggests, either implicitly or explicitly, that if the law does not require repayment, only a 'sap' would part with money he does not have to. Another lawyer, more along the lines I have suggested in the paragraph above, wonders whether it is 'right' or 'fair' for the creditor not to be repaid the money owed, even if the law will not require it. Will the difference in attitude of these two lawyers on occasion influence the attitude, and consequent choices, of the client? Which of these two lawyers would you prefer as your legal counsel?

It is worth noting a somewhat surprising consensus in this regard that arose at the panel presentation. Professor Luban's initial questions for the participants concerned Professor Woolley's example of the Alberta lawyers' Code of Conduct, which specifically prohibits disclosure of a client's intention to commit suicide. If I heard correctly (and it is possible that listener bias may have had an effect), those who spoke appeared essentially to be in agreement that dialogue was an appropriate first step. An attempt to determine the motivation and thought underlying the decision; to learn the immediacy or seriousness of the intention; to explore alternatives that might be considered or pursued by the client; to possibly suggest or make referral to a professional with training more appropriate for the problem, were raised as possibilities. And, again if I recall correctly, there were no objections from this varied group to this course of conduct.

In addition, the wide variation in possible surrounding circumstances was raised as relevant to the lawyer's choice of conduct. The lawyer might justifiably choose to act differently if the client were a teenager disappointed in love rather than an elderly, seriously ill, thoughtful adult. Again, there seemed to be no disagreement. No one suggested that the rule should be followed—confidentiality must be kept—period. No one argued that either specific circumstances or morality were irrelevant to the decision.

Had we developed the scenario with thicker, more specific description of the particular situation and pushed toward a more specific answer to the question 'What should a lawyer do under these particular circumstances' (or, what would you do under these circumstances), some disagreement likely would have developed. But it seems to me that agreement on the initial approach and on what would be relevant to a decision is significant and worth noting.

Morality of Clients

With this possibility of respectfully influencing the choices and conduct of the client through lawyer-client deliberation and moral counsel, we connect to the second topic of our question and have a bridge joining the morality of clients with the morality of the practice of law. Years ago I wrote that '[m]orality comes through the door with the client'.²³ The lawyer can attempt to bring out and develop that morality, and can also bring her own moral perception and understanding of the situation to the table. Tom Shaffer thinks lawyers should be less concerned with client autonomy and more concerned with client goodness.²⁴ I think lawyers should be concerned with both. Autonomy trumps—it is the client's life and law is a publicly available resource that frequently requires the assistance of a lawyer—but there is a large potential role for moral influence. With both our students and practising lawyers this is a dimension of law practice that we should teach, encourage, and try to model. (Client autonomy trumps, that is, unless the lawyer decides that she is unwilling to assist the particular morally problematic client conduct at issue. Issues relating to when and whether withdrawal from the matter, or from assisting the client altogether, is ethically appropriate are beyond the range of this brief essay.)

The corporation as a client is particularly problematic in this regard. What is the morality coming through the door with the corporate client? What is it that the lawyer is drawing out? Here we have the risk of amoral ethics squared. The corporate executive's defined institutional role is to maximise shareholder value or profit; the lawyer's is to provide access to the law; each has a defined role morality that arguably subordinates, or is at least significantly different from, ordinary morality. Neither 'amoral' role need be exclusive, however. Corporate management can choose to repay the just debt, and it will not be considered a waste of corporate assets despite the available legal defence. The lawyer can remind the client of values that may be implicated in addition to the usually presumed ones of maximising either material welfare or freedom.²⁵ It may not be the defined professional role of either to figure out what is the morally right thing to do, all things considered, but being concerned with that question is not outside or contrary to either role.²⁶ In fact, deliberation concerning the 'all things considered' ordinary morality question is likely to enhance both roles. It would leaven business/legal decisions with a moral dimension too often minimised or repressed, and would certainly improve the moral aspect of the professional lives of both lawyers and executives.

²³ Pepper (n 20) 627.

²⁴ Thomas L Shaffer and Robert F Cochran, Jr, *Lawyers, Clients, and Moral Responsibility* (West, 2nd edn 2009) 45–46.

²⁵ Pepper (n 22); Katherine R Kruse, 'Beyond Cardboard Clients in Legal Ethics' (2010) 23 *Georgetown Journal of Legal Ethics* 103; Katherine R Kruse, 'Fortress in the Sand: The Plural Values of Client-Centered Representation' (2006) 12 *Clinical Law Review* 369, 431–4.

²⁶ See American Bar Association (ABA), *Model Rules of Professional Conduct* (2003), Rule 2.1.

Morality of Law

As enacted, a legal provision is a generality, often a rule of thumb, intended in the aggregate to serve particular policy and moral purposes. (And, as Brad Wendel has emphasised, these purposes are often compromises of contending values and moral understandings.²⁷) The lawyer, however, is present at a specific potential application of that legal provision. At that point application of the law may or may not serve those moral or policy purposes and values, the compromise intention may have little or no connection to the specific facts, or the legally directed or facilitated result may be perverse in relation to generally accepted values or the particular values underlying the legal provision. A statute of frauds or limitations embodies an awkward policy and value compromise. It contemplates and tolerates just debts being extinguished, but it does not seem quite accurate to say that that is its purpose. A legal provision's moral/policy compromise is up in the air and abstract; lawyer and client are down on the ground, where the law's effect will be concrete and specific. At that point—where it is not abstract—lawyer and client can measure and evaluate all the actual circumstances and potential effects involved in whether or not and how to use the law. Lawyer and client can discuss and consider all this and reach a decision reflecting the client's values and interests (as partly refined and developed by that conversation).

These values and interests should at least take into consideration those embodied in the legal provision, but they are unlikely to be the only ones implicated in the decision, and certainly not always the most important.²⁸ The lawyer can inform the client of the purposes of the statute of frauds or the statute of limitations, and how those purposes are inapposite to the circumstances of the admitted just debt. One can imagine the multiple factors that might be relevant to a corporation's decision as to whether or not to assert the defence in a particular situation, including the nature of the client and the creditor, their relationship, and management's view of the values and value compromises instantiated in the applicable legal provisions and the overall situation.

I am inclined to think that the 'morality of the law' is best incorporated in the practice of law through day-to-day counselling, education and deliberation between lawyer and client; and I envision that process as very much a two-way conversation. The lawyer should, when practicable, provide the client with a full spectrum view of the law: (1) the straight, neutral or objective application of the law to the situation (the on the surface, most obvious, or most likely intended or understood meaning); (2) the more capacious alternative understandings or applications of the law as it could be interpreted, argued or manipulated (by both 'sides' if this is a contested or negotiated matter); and (3) the purposes of the law or the values and policies it is designed to serve. This counselling may well be part of, or

²⁷ Brad Wendel, 'Civil Obedience' (2004) 104 *Columbia Law Review* 363.

²⁸ Consider the examples and the discussion in Stephen L Pepper, 'Why Confidentiality' (1998) 23 *Law and Social Inquiry* 331, 332–4: 'All law is not analogous to a criminal provision prohibiting conduct that is manifestly a serious moral wrong. And people do not come in two categories, those intending to obey the law, and those inclined to violate it.' *Ibid*, 334.

inextricable from, the broader moral conversation described above in '*Morality of Lawyers (2)*'. Through this process the morality of the law can interact with the morality of the client and that of the lawyer.

Conclusion

All of this assumes a greater degree of moral consensus than many of you may believe exists. Here, I think, we tend to exaggerate fundamental differences. For most questions that arise in day-to-day legal practice, I would guess that there is a fair amount of agreement on the morally right conduct. In the just debt example, all other things being equal, most agree that one ought to repay what one has borrowed on the promise of repayment. (The recent ferment in the United States over strategic mortgage default arises from the unease of not repaying balanced against factors that suggest all other things are not equal: the expectation of the parties may not have included further repayment beyond giving up the home upon default, and there may be far less than clean hands on the part of the financial institutions that initiated and now hold the debt.) We tend to agree that it is morally wrong to cause needless pain, suffering or harm; that it is better to be generous than selfish; better to be kind than hurtful; and so on. Moral deliberation between lawyer and client is likely to draw more attention to that agreement and to some extent actualise it.²⁹ It is also a part of the ethics of lawyering that can enable and enliven morality in the lawyer, in the client, and in the law.

Rules and Principles—A Brief Addendum

Professor Simon's contribution to this discussion directs our attention to a further issue: whether regulatory guidance for lawyers should be in the form of rules or principles. For me the answer depends on what aspect of legal practice one is attempting to regulate or what issue is to be addressed. But to the extent that a more general answer can be given, my tentative preference is somewhere in between rules and principles: strong, but rebuttable, presumptions.³⁰ On the central issues of lawyers' ethics, such as client allegiance (the client's lawful choices, following deliberation and counselling, ordinarily trump) and confidentiality, a rule-like formulation subject to defeasibility based on *articulable* and arguably *compelling* circumstantial justification would probably be where I would come down. (And thus Professor Simon is correct in his surmise that I would be more inclined toward rules,

²⁹ One might wonder to what extent corporate executives would disagree, and assert that such common values do not translate into business settings and decisions. My experience suggests that most would not take that position if the issue arose in a setting conducive to honest deliberation, but that context and setting have a very large effect. See Stephen L Pepper, 'How to Do the Right Thing: A Primer on Ethics and Moral Vision' in J O'Toole and D Mayer (eds), *Good Business: Exercising Effective and Ethical Leadership* (Routledge, 2010).

³⁰ See Stephen L Pepper, 'Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering' (1995) 104 *Yale Law Journal* 1545, 1598–600; Pepper (n 21) 659–62.

although the defeasibility of the rule-directed answer would seem to move a substantial way toward his preferred mode.)

What would justify the defeasance of the rule? What would suffice to rebut the strong presumption? There are lots of possibilities, including the following: (a) the underlying justification for the rules might not correspond well with the actual facts in the particular situation; (b) client conduct to be facilitated by the lawyer following the rules would involve substantial injury to innocent third parties that could not be morally justified aside from the existence of the rule; (c) whatever—the vast multitude of situations that can make a rule directed answer just plain wrong under the circumstances. For individual clients I would intend the rule-like formulations to provide strong protection against the lawyer's natural inclination to serve her own interests or those of powerful or influential others (including popular, elite or professional opinion). If the client is corporate, however, I would be inclined to consider the presumption as somewhat less strong—the corporate nature of the client would itself be a factor possibly weighing toward defeasance of the rule's obligations.

Professor Simon brings up the issue of the ability of lawyers to engage in the complex contextual judgment that would often be involved in rebutting the rule's presumptive directive. Professor Kruse's observation in this forum that this is difficult for all of us—clients and lawyers alike—seems quite correct and important to me. With regard to lawyers, however, in addition to ability we should add concern about the lawyer's interest in or willingness to pursue such complex reflection (as opposed to simply finding and following the rules), as well as her motivation and incentives to do so (including the client's willingness to pay for the time or the lawyer's willingness not to be paid). The rules at least give the lawyer a place to start, presumptive guidance and limitation; the option to rebut provides flexibility for those able or inclined to use it.³¹ This may be impractical, wishful thinking, but perhaps not.

³¹ I am reminded of Karl Llewellyn's observation that the less able judge is more bound by precedent than the more able one. Karl N Llewellyn, *The Bramble Bush: On our Law and its Study* (Oxford University Press, rev edn 1960) 66–70.

3. The Ethics in Legal Ethics

Tim Dare*

The panel discussion document begins with one question: ‘Is it possible to rescue the concept of role-differentiated morality from the seemingly devastating criticisms leveled at the “standard conception” of legal ethics as amoral lawyering?’, and ends with another: ‘Is the concern of legal ethics the morality of lawyers, the morality of clients, or the morality of law?’ For the most part, I address the first question, summarising a defence I have offered of a modified version of the standard conception of the lawyer’s role that answers ‘yes’ to a (moralised) version of that question.³² I hope to generate an answer to the second question as I do so.

The critique of the current reading of the standard conception is wide ranging and claims at least that lawyers acting under the standard conception are alienated from ordinary morality; are invited to deny responsibility for the things they do (and so to deny their status as moral agents, capable of choosing to do otherwise); are rendered morally insensitive in ways which impair their ability both to live a satisfactory life outside of their professional roles and to perform their professional roles adequately; and are likely to find their work deeply unsatisfying because of the sometimes striking discord between the apparently obvious concern of law and lawyers with justice and morality, and the reality of practice under a conception which separates the moral obligations of the lawyer from those of the rest. Commentators responding to this critique have sought in various ways to make the lawyer’s role more directly amenable to the demands of ordinary morality. I argue that that is a mistake: that a modified version of the standard conception is essentially the right way to conceive of the ethical obligations of lawyers.

The strategy is straightforward. I argue that lawyers have *moral* grounds for regarding themselves as having duties to their clients which may allow or require them to act in ways which would be immoral were they acting outside of their professional roles. (Hence I think that the description of the lawyer’s role so conceived as ‘amoral’ is a mistake. It is a deeply moral, albeit morally autonomous, role). Roughly, I rely on an account of the role of law in modern liberal communities according to which its primary function is to mediate between reasonable but inconsistent views about what we ought to do, and in which it does that by allocating rights to settle ‘what will we do’ questions, without purporting to settle ongoing debate about what we ought to do.³³ If the moral justifications of the lawyer’s role can be defended, many of the criticisms of the standard conception fall away. Most generally, if

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³² Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer’s Role* (Ashgate, 2009).

³³ Conceiving of law in terms of this role leads me to have doubts about Dworkinian accounts of the role of principles in judicial reasoning. I think such accounts undercut the capacity of law to mediate between reasonable but inconsistent views about how we should live. Even if one accepts some such account in judicial contexts, where judges are required to give reasons and are subject to appeal and review, however, it seems more troubling to encourage lawyers to adopt the approach given the absence of opportunity for public review.

there are moral reasons for taking the standard conception seriously, then we should not too readily accept the claim that the conception alienates lawyers from morality, or overdraw the conception's break between 'personal' or 'ordinary' morality on the one hand and professional morality on the other. An adequate personal or ordinary morality will entail a proper respect for the moral demands and permissions of professional roles.

The moral argument also suggests a solution to the crisis of morale supposedly generated by the standard conception. I argue that the standard conception recognises the vulnerability of clients within client/professional relationships, and that contemporary liberal communities rely to a considerable extent upon the practice of law as conceived by the standard conception. Law so practised allows people who are committed to a range of diverse but reasonable views about how we should live to form stable and just communities. The lawyer's role so conceived is one in which lawyers should derive a good deal of satisfaction. The crisis of morale that troubles so many commentators is attributable, I suggest, to a failure to appreciate the moral justification for the role rather than to any general licensing of immoral professional conduct.

Further, and crucially, once the moral arguments for the standard conception are made explicit, those arguments themselves suggest limits to the things lawyers may justifiably do within their professional roles. The moral implications of the standard conception are often mischaracterised. Commentators suggest that the conception requires lawyers to secure any advantage the law can be made to give—to be what I call hyper-zealous—and many of the most trenchant criticisms of the standard conception are responses to hyper-zeal. But I argue that the standard conception, understood in light of its proper moral justification, requires no such thing: it justifies a more limited and moderate sphere of professional conduct than is commonly supposed, requiring lawyers to be what I have called merely-zealous, zealously pursuing only their clients' legal entitlements (as opposed to mere advantages).³⁴ The idea, put in the terms of the question with which the panel document begins, is that restricting legitimate advocacy to mere-zeal will go some way toward reducing the 'use [of] the law to the prejudice of the weak or the innocent' and addressing the interpretation of 'partisan duty' which leads lawyers to 'interpret the "bounds of the law" [in ways which lead them to] push legal limits past their ordinary meaning and intended purpose to embrace any colourable interpretation that the law could sustain'.³⁵

³⁴ It may seem that this feature of the model requires a theory of interpretation, to explain how lawyers are to know when an advantage offered by a rule is a 'right' or a 'mere advantage' (without, as Steve Pepper put it, seeming to 'pull the rabbit out of the hat' at the crucial point). I think the objection is less troubling than it might at first appear. I offer the analogy of the jurisdiction to prevent 'abuse of process'. Abuse of process is defined functionally: an abuse is the use of legal proceedings for purposes other than those for which those processes were intended. Identifying abuses requires just the sort of reasoning through the point of laws and legal processes which I argue underpins the distinction between 'legal rights' and 'mere advantages'. So, for the moment at least, I offer an ostensive response to the interpretative objection: 'How do we draw the distinction? Like that!'

³⁵ The distinction between mere-zeal and hyper-zeal leads me to reject at least a simple version of the idea, attributed to Fried (n 2) in the question for the panel, that 'each of us should be free to pursue lawful purposes, and can indeed claim a right to be free to act as we choose within the "bounds of the law"'. We need to spell out 'lawful purposes' more carefully. Some of our purposes are lawful only 'accidentally' or 'collaterally' and, on my account, we cannot always insist on the help of lawyers to pursue such purposes.

I go on to argue that my approach allows us to accommodate and explain an important feature of ethical legal practice. I make use of John Rawls's distinction between constitutive and practice rules³⁶ to defend the claim that role-differentiated obligations are possible, and to show how an institution and the roles it supports might be designed with reference to the resources of broad based morality and yet it be the case that the occupants of those institutional roles are not at liberty to appeal to broad based morality from within their roles. Rawls's model allows us to maintain a 'clean break' between role morality and broad based morality without making it the case that standards of ordinary morality have no place in the evaluation of professional conduct.³⁷ Conceptualising the lawyer's role in these Rawlsian terms, this is to say, contributes to the argument, alluded to in the previous paragraph, that the break between role morality and ordinary morality should not be overdrawn.

It also has another function. According to the model, a lawyer noticing, for instance, that a statute of limitations or current rules or practices of cross examination have produced results regrettable from the perspective of ordinary morality cannot act, *qua* advocate, other than as the existing rules of the practice recognise. The role is constituted by those rules and the actions available to her are settled by the role. I argue however, that the model allows us to see, more clearly than we otherwise might, how role occupants are able to move between roles. The relevant move here is between the role of advocate and that of 'reformer'. The Rawlsian model makes very clear how and why we might conceive of lawyers as subject to an obligation to work to improve the fit between role and ordinary morality where, in some respect, the institution, built with reference to the resources of ordinary morality, has come apart from ordinary morality. *Qua* advocates, lawyers confronted with such a case will normally have to stick with their clients, helping the client secure their rights under the law. When the client's case is complete, however, the lawyer may well bear a responsibility to take on the role of law-reformer, arguing for reform which their legal expertise and familiarity with the particular case may have made especially clear.

Some of the most troubling strands of the critique of the standard conception raise concerns about the ways in which the conception calls upon professionals to distance themselves from their lay-persona, from the claims of ordinary morality, from the circumstances in which they act, from the people they engage with when acting as role-occupants, and so sacrifice their integrity. I attempt to address these concerns about integrity on a number of fronts. As a conceptual matter, I defend an account of integrity according to which it rests on a commitment to critical reflection upon one's role(s) and a readiness to follow the implications of that reflection.³⁸ I attempt to tie this account of integrity to my

³⁶ John Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3.

³⁷ Using Rawls's distinction in this way requires a response to Arthur Applbaum's powerful argument that the distinction in fact shows us that the conduct of role occupants cannot (without some fancy moves involving enduring descriptions) be the subject of moral criticism from outside the role. See AI Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton University Press, 1999).

³⁸ The development of this account of integrity is a medium-term research project. I am interested in whether relatively recent work on 'the narrative sense of the self' might provide the material for a richer treatment (see eg Peter Goldie, 'One's Remembered Past: Narrative Thinking, Emotion, and the External Perspective' (2003) 32 *Philosophical Papers* 301).

substantive account of the lawyer's role by suggesting that some such account should be accepted by the reflective lawyer. The account addresses the substantive threats to integrity in a number of ways: it seeks to minimise the conflict between the demands of role morality and those of ordinary or broad based morality by limiting the excesses of advocacy; it offers a model of professional roles which, while insisting on a 'clean break' between role morality and broad based morality, nonetheless recognises the contribution of ordinary morality at the point of institutional design; it offers a moral argument for the particular role-differentiated demands of the lawyer's role, suggesting that there are reasons of ordinary morality to take those demands seriously; and it shows that lawyers have a professional moral obligation to engage in a constant process of law reform, aimed at promoting fit between the lawyer's role morality and broad based morality.

I do not imagine that any of this amounts to a knock-down response to the critique of the standard conception, or that there is not more which needs to be addressed. I do think it goes some way to responding to the critique of the standard conception, though, and suggests that it is 'possible to rescue the concept of role-differentiated morality from the seemingly devastating criticisms leveled at the "standard conception" of legal ethics as amoral lawyering'.

What does it suggest in response to the second question in the panel discussion document, whether 'the concern of legal ethics is the morality of lawyers, the morality of clients, or the morality of law'? Most obviously, I think that it is none of them alone, and all of them in some sense and to some extent. Law's primary role, the claim goes, is to mediate between inconsistent but reasonable moral views. It does so most obviously by allocating legal rights, often reflecting compromises between (ordinary or general or 'broad-based') moral positions, which settle what may be done in areas in which there may be contest or disagreement. The role of lawyers is to see that law serves that primary function, facilitating client access to legal rights. The content of that part of lawyers' professional ethics which governs their conduct as lawyers is set by this professional role. However, lawyers have other roles too. A full professional ethics will call upon the good lawyers to work to improve the law, to promote better compromises and better fit with ordinary morality, where they can do so consistently with their primary obligation as lawyers. On this account there can be conflict between 'personal' and 'professional' morality: a lawyer's professional ethic might call upon her to do things, to help clients access rights, which she would prefer they could not access. But we should not overdraw this contrast. If the moral justification of the role of law and so the lawyer's role succeeds, an adequate personal or ordinary morality will entail a proper respect for the moral demands and permissions of professional roles, holding out the possibility of personal integrity in the face of conflicting roles. And now all of the options featuring in the panel's 'second question' have a place: legal ethics is about none of them alone, and all of them in some sense and to some extent.

4. Client-Centred Answers to Legal Ethics Questions

Katherine Kruse*

When I was a senior in college, I faced a moral dilemma: I wanted desperately to go to philosophy graduate school, but I was not sure it was possible for me to be a good philosopher and a good person. I got to the moment of decision by a circuitous route. After drifting through the first two years of college, I withdrew from school and spent a year supporting myself as a cook and a bank teller in Boston. During that year, I encountered people with various kinds of troubles—from criminal charges to immigration problems—and I came to see myself as relatively privileged. I also came to understand that, if properly directed, my natural intelligence could position me to make a tangible difference to the lives of others. I went back to college because I saw education as a tool that would enable me to help people less fortunate than myself. In that year off, I had decided to become a lawyer.

When I returned to college and engaged in my studies with this new sense of purpose, I fell accidentally in love with the study of philosophy. But with all the need in the world, I did not think I could morally justify devoting my life and my talents to the academic pursuit of abstract ideas. Hence, I found myself faced with a dilemma that was to shape the contours of the rest of my career: whether I should follow my heart to philosophy graduate school or honour my values of service to others by pursuing the profession of law. I made what I perceived at the time to be a selfish choice: I went to philosophy graduate school.

But I was fooling myself. In my second year of philosophy graduate school, I attended a talk given by an appellate public defender about what he did for a living. He said he lost about 90 per cent of his cases, but he went to prison every month and sat across the table from his clients—most of them young black men serving very long sentences—people society had given up on, locked away, and wanted to forget. He said his job was to tell his clients' stories in ways that would make people listen and care. Listening to him talk about his work re-awakened the values of service to others that I seemed to have lost in my pursuit of an academic career. I transferred to law school the next year. After graduating, I followed a path similar to his, working and teaching in a prison legal assistance clinic. But I was fooling myself again. It took 11 years, but eventually I realised that to flourish fully as the person that I am, I needed to find a way to honour my passion for academia as well as my moral impulse to put my talents to use in concrete service to others. I have spent the rest of my career insisting that it is possible to do both.

This story from my life helps explain my answers to the questions posed to this panel about the proper subject of legal ethics and the morality of lawyers, clients and the law. Moral reasoning can be complicated: it is difficult to understand and prioritise our own values; our duties to ourselves and others conflict; our duties to the common good are difficult to define and even more difficult to implement in our life choices; it is way too easy to

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rationalise selfish impulses; and what seems right (or wrong) in the moment may utterly fail the test of time. Moral complexity faces lawyers in their choice of clients and careers, it is embedded in the matters that clients bring to lawyers for legal assistance and representation, it is reflected in the microcosm of the lawyer-client relationship, and it is woven into the very fabric of the law.

With regard to the morality of lawyers, it should come as little surprise that the question whether a good lawyer can be a good person has never been very interesting to me. The answer has always seemed so obviously to be 'yes'. It has been especially peculiar for me to see philosophers in legal ethics so obsessed with doubt over the moral goodness of lawyers, because my own life has been dominated by the question of whether life in the ivory tower is a life well-lived on moral terms. I think now that the more interesting question is not whether lawyers or philosophers *can* be good persons, but *how* lawyers or philosophers—or any human beings—can best use their talents, experiences, expertise and social position to improve the lives of others and to add value to the world. I do not see this as a central question for legal ethics; I see it as a central question of basic human flourishing. We face that question, not as lawyers but as persons, and we answer it with a lifetime of moral and spiritual experience.

On most of the other moral questions in legal ethics, I gravitate to essentially client-centred answers. In part, that is because the morally problematic behaviour of over-zealous partisanship captured in the moral philosopher's 'standard conception of legal ethics' has never struck me as properly diagnosed when viewed as a problem of lawyers who weigh their duties to clients too heavily. Such over-zealous partisanship occurs too infrequently among lawyers whose clients are unable to pay handsomely for hourly work; and it is received with too much suspicion by even well-heeled clients when they get their billing statements. Social scientists almost invariably view lawyers as jockeying for status and protecting their own interests rather than putting their clients' interests at the forefront: classic examples include Blumberg's analysis of plea bargaining as a 'confidence game';³⁹ Sarat and Felstiner's study of the way divorce lawyers talk to their clients;⁴⁰ and Langevoort and Rasmussen's model explaining why business lawyers 'skew the results' by overestimating legal risk.⁴¹ I am inclined to view Luban's famous 'adversary system excuse'⁴² as a mask behind which lawyers hide the pursuit of their own interests at the expense of their clients and the public, a perversion of lawyers' partisan duties, rather than a fulfilment of them. To address the problem of over-zealous partisanship, in my view, partisanship must be re-conceptualised to curb lawyer self-interest and put clients more truly at the centre of legal representation.

³⁹ Abraham S Blumberg, 'The Practice of Law as a Confidence Game: Organizational Cooptation of A Profession' (1966) 1 *Law & Society Review* 15.

⁴⁰ Austin Sarat and William LF Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (Oxford University Press, 1995).

⁴¹ Donald C Langevoort and Robert K Rasmussen, 'Skewing the Results: The Role of Lawyers in Transmitting Legal Rules' (1997) 5 *Southern California Interdisciplinary Law Journal* 375.

⁴² David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 19–64 (ch 1: 'The Adversary System Excuse').

With respect to the morality of clients, lawyers should facilitate their clients' decision-making in ways that honour their clients' values, long-term interests and relationships with others in addition to protecting their clients' legal interests.⁴³ This is harder than it sounds. Lawyers are professionally socialised to 'issue-spot' their clients by honing in on the legally relevant facts and constructing their clients' objectives in terms of possible legal claims and remedies. The professionalised construction of clients as walking bundles of legal interests emphasises what clients are entitled to get from the law and de-emphasises concerns that carry normative content, such as the client's values, the client's reputation and standing in the community, and the preservation of the client's relationships with others. It takes studied effort to look carefully and listen attentively for how the client's legal issues interact with the larger context of their situation. It is much easier to fish out the facts that will help define a client's objectives based on pre-existing legal categories. But the legal aspects of a client's situation are only one facet of a larger and more complex situation in which legal interests and entitlements interact with financial, reputational, political, moral and other non-legal concerns. At the core of a truly client-centred approach to legal representation is humility born of the realisation that lawyers are experts only on the law; clients are the experts on their own lives.

The primacy of client decision-making, however, should not lead lawyers to take a 'hands-off' approach as legal technicians simply implementing their clients' stated objectives. The underlying value of client autonomy need not be equated with getting a client what the client says he or she wants in the moment. Autonomy—broadly understood as the capacity and opportunity to be the 'author of one's own life'—often requires forgoing one's immediate desires to serve one's longer-term interests or to honour one's deeper-seated values. People do not seek legal advice from lawyers on most matters, nor do they pursue legal intervention to resolve most disputes. When clients come through the door of a lawyer's office, they are often in the grip of anger, fear, disappointment or betrayal, any of which can affect sound moral decision-making just as they affect prudent self-interested judgment. When lawyers represent clients, they bring the law to bear on a client's affairs, imposing the formality and finality of legal structures onto the resolution of a dispute or the planning of a venture. Enhancing a client's autonomy through legal representation thus requires lawyers to help their clients foresee the ways in which potential plans, settlements or legal structures will honour the things that will matter the most to the client over time.

Some legal ethicists have called on lawyers to engage their clients in 'moral dialogue' as an integral part of legal representation.⁴⁴ If 'moral dialogue' means simply that lawyers

⁴³ I have developed the ideas laid out in the remainder of this paper more fully in a series of three articles: see Katherine R Kruse, 'Beyond Cardboard Clients in Legal Ethics' (2010) 23(1) *Georgetown Journal of Legal Ethics* 103; Katherine R Kruse, 'Fortress in the Sand: The Plural Values of Client-Centered Representation' (2006) 12 *Clinical Law Review* 369; Katherine R Kruse, 'The Jurisprudence of Lawyers in the Shadow of the Law' (2011) 53 *Arizona Law Review* (forthcoming, summer 2011).

⁴⁴ Monroe H Freedman, 'Personal Responsibility in a Professional System' (1978) 27 *Catholic University Law Review* 191, 199–204; Stephen L Pepper, 'Lawyers' Ethics in the Gap Between Law and Justice' (1999) 40 *South Texas Law Review* 181, 190–6; Shaffer and Cochran (n 24) 46–53; David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988) 160–74.

should go beyond legal issue-spotting to help clients make decisions in the context of the clients' own long-term interests and deeper values, I join them whole-heartedly. However, legal ethicists who propose moral dialogue are often calling for lawyers to play a more robust role in shaping a client's decisions, with the goals of morally educating the client, preventing the client from harming others, or making the client a better person through moral conversation. In pursuing these additional goals, a lawyer becomes something more than a lawyer: she becomes a friend,⁴⁵ a minister,⁴⁶ a statesman,⁴⁷ or a moral activist.⁴⁸ These additional roles assume a moral expertise that lawyers do not possess and threaten the 'rule-of-law' values at the heart of legal representation, which promise clients that the pursuit of their objectives will be limited by the law, not by the personal or political values of the lawyers who happen to represent them.

With respect to the morality of law, lawyers have both the expertise and are better situated than their clients to understand and invoke the morality found within the law as a constraint on the pursuit of their clients' objectives. The jurisprudential bane of legal ethics is the legal realist conception of law as indeterminate, manipulable and nothing more than the prediction of official behaviour, which has been identified as the implicit operating jurisprudence of practising lawyers. The realist conception of law is seen as an invitation to lawyers to 'game' the law in pursuit of their clients' selfish interests. (Or, if you take the more cynical view of the legal profession, as an opportunity for lawyers to further their own interests at the expense of clients and the public.) However, legal realism also provides the conceptualisation of lawyers as lawmakers by positing that the 'law in action' includes the behaviour of lower-level legal officials who apply and enforce law. The lawmaking role of lawyers in advising and counselling their clients 'in the shadow of the law' forms a theoretical basis for establishing lawyers' jurisprudential duties to interpret the law responsibly. The conceptualisation of lawyers as lawmakers or law interpreters is an important plank in the theoretical platform on which jurisprudential theories of legal ethics are built: Simon's view that lawyers have a jurisprudential duty to interpret law according to its internal principles of justice;⁴⁹ and Wendel's view that lawyers have a duty of fidelity to positive law as society's resolution of contested moral issues.⁵⁰

Although my own views on the jurisprudence of legal ethics are not yet fully formed, I question the conceptualisation of lawyers as lawmakers (or law interpreters) in the shadow of the law. This conceptualisation creates a lawyer-centred mechanism for determining the legitimacy of law, in which lawyers screen out interpretations of law that meet or do not meet operative criteria of legitimacy. While information about law's purposes and likely

45 Shaffer and Cochran (n 24) 42–50.

46 Thomas L Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (Brigham Young University Press, 1981) 35–36.

47 Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1993) 109–62.

48 Luban (n 44) 160–74.

49 Simon (n 4).

50 W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press, 2010).

enforcement are matters of legal expertise, assessments of law's legitimacy—whether to respect the law or how much respect to accord the law—are lay judgments that more properly belong with clients. I view the 'shadow of the law' as a testing ground where law interacts with social norms and earns legitimacy. Legitimacy is earned as people accept law as an authoritative source of normative guidance and respect its limits; legitimacy is not earned to the extent that people reject law as nothing more than power backed by sanctions and seek to avoid its reach. Lawyers have jurisprudential duties in the shadow of the law, but they are not duties of correct or legitimate interpretation. Rather, lawyers have duties to situate their clients to make appropriately informed assessments about the legitimacy of law by explaining law's scope and enforcement in the context of a sympathetic account of law's underlying purposes.

5. Razian Authority and its Implications for Legal Ethics

W Bradley Wendel*

The question considered in this session is whether the concern of legal ethics is the morality of law, the morality of clients, or the morality of lawyers. The response I have been pursuing, in my recent book and elsewhere,⁵¹ is that all of these moral concerns are tied together in the lawyer's role. The morality of law, clients and lawyers are interrelated, but the political perspective is primary. The law serves a political purpose, of making public life possible despite first-order moral pluralism. When people disagree, either at the level of moral principles or over the facts that bear on the resolution of some issue, they can resolve their disagreement by force, deception or coercion; by an ongoing process of debate (as deliberative democrats recommend); or by using some kind of procedural mechanism to establish a collective resolution of the problem, which supersedes the considerations over which there was disagreement. Public life in a liberal democracy is largely structured by the framework of legal norms and institutions that enables citizens to coexist and cooperate, despite their disagreements. Of course, there are many considerations apart from law to which people refer in their dealings with one another. To the extent that the *lawyer's* role has any normative significance, however, its significance is bound up with the law's function of settling moral and empirical conflict.

The concept that knits the concerns of morality and public life together is political authority. Two other concepts, legitimacy and obligation, play a role in this analysis, so it is important to first show how they are related.⁵² Although there can be theoretical authorities who alter the reasons one has for believing something, for our purposes we are concerned with practical authorities, who give reasons that serve as premises in practical inferences.⁵³ That an authority has said 'do such-and-such', or 'don't do such-and-such', is a reason for the subject of authority. In this way, the authority has normative power over its subject. Significantly, the directive of an authority is a second-order reason—that is, a reason to act, or not to act, on other reasons.⁵⁴ It excludes reference to one's judgment of the merits of the case for acting. To accept a directive as authoritative means to treat it not as another reason to be factored into the balance of first-order reasons that bear on decision-making, but to regard it as pre-empting that kind of decision-making process altogether.⁵⁵ Why on earth

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⁵¹ See Wendel (n 50) 86–121 (ch 3: 'From Neutrality to Public Reason Moral Conflict and the Law').

⁵² For a helpful overview and clarification of these concepts, see Tom Christiano, 'Authority', *Stanford Encyclopedia of Philosophy* (2004), <http://plato.stanford.edu/entries/authority>. Legal theorists tend to run them all together in practice. See eg Dworkin (n 10) 191. Dworkin argues that '[a] state is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them'.

⁵³ Joseph Raz, *The Authority of Law* (Oxford University Press, 1979) 10.

⁵⁴ *Ibid.*, 17.

⁵⁵ *Ibid.*, 27.

should anyone accept an authoritative directive as exclusionary? It would indeed be irrational to follow the commands of an authority unless the authority were legitimate.⁵⁶ A legitimate directive, however, is issued by an authority with the right to rule. This right correlates with duties on the part of the subject. These can be strong duties, such as the obligation of obedience, or something weaker, such as a duty of non-interference or to respect the law.

Joseph Raz has argued that the normal way of justifying authority—that is, establishing that it is legitimate—is to establish that following authority is likely to enable the subject to do better at complying with the reasons that would have applied to her anyway.⁵⁷ There is a deep connection between legitimacy and democracy, because Raz also argues that the primary function of political authorities is to serve the governed.⁵⁸ In a liberal democracy, legitimacy requires that government authorities issue directives that are rooted in considerations that may be endorsed by all affected citizens, as free and equal co-participants in governance.⁵⁹ I have argued that, in a liberal society, these considerations are the fact of reasonable pluralism, disagreement that cannot be settled by reasoning alone, and the need to settle on a basis for mutually beneficial cooperation. I have referred to this as a coordination problem, but it is not coordination in the game-theoretic sense (in which the substance of the solution is a matter of indifference, and it is important only that one solution be found and that it be exclusive of others). Rather, I mean to invoke the sense of the coordination as used by John Finnis, who argues that all individuals have an obligation to comply with the demands of morality, but that coordinating compliance with the demands of morality *in communities* necessarily requires an authority.⁶⁰ He puts the dilemma starkly: ‘There must be either unanimity, or authority. There are no other possibilities.’⁶¹ (There is another possibility, namely chaos, but then there would not be a stable community.) If reason alone is insufficient to secure unanimity, and I believe it is,⁶² then the only possibility for citizens who are bound to comply with the requirements of morality in a community is to follow the directives of an authority. For the purposes of legal ethics, the relevant reasons for lawyers are given not by ordinary morality, but by the law.

On the Razian conception of authority, the directives of an authority are based on reasons that apply in any event to its subjects. They sum up and replace the so-called dependent reasons that would have been taken into account by subjects, but it is not for the subjects of authority to reconsider whether the authority has correctly reflected these dependent reasons.⁶³ The directives of authority give content-independent reasons for action. Reasons that could have been relied upon before the authority issued its directive are

⁵⁶ See generally A John Simmons, *Political Philosophy* (Oxford University Press, 2008) 40–45; Joseph Raz, *Ethics in the Public Domain: Essay in the Morality of Law and Politics* (Clarendon, 1994) 212 (ch 10: ‘Authority, Law, and Morality’).

⁵⁷ Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 53.

⁵⁸ *Ibid.*, 56.

⁵⁹ John Rawls, *Political Liberalism* (Columbia University Press, 1993) 393 (in ‘Reply to Habermas’).

⁶⁰ John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 246.

⁶¹ *Ibid.*, 232.

⁶² For reasons well summed up by Rawls’s burdens of judgment or Waldron’s circumstances of politics. See Rawls (n 59) 54–58; Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 101–2.

⁶³ Raz (n 57) 47.

pre-empted or excluded from the deliberation of subjects, and can no longer be relied upon.⁶⁴ The reason for precluding reconsideration is that the benefit of having an authority would be lost if subjects were permitted to go back and re-open the controversy that the authority was meant to settle. This conception of authority puts some normative pressure on the process by which disagreements are resolved. If a would-be authority purported to establish norms for the guidance of its subjects by throwing darts at a dartboard, or by taking bribes, then its directives would be based not on dependent reasons, but on whim or corruption. Critics of this account of authority, or at least my appropriation of it for legal ethics,⁶⁵ have argued that the mere fact of something's being a law is no assurance that it satisfies the normal justification thesis. In particular, we have no reason to believe that the law-making process has taken due account of dependent reasons.⁶⁶

One of the subjects discussed incidentally by the panel was an Alberta rule of professional conduct requiring lawyers to report credible threats by their clients to commit suicide. Most of the panelists were willing to grant the authority of this rule, for the reasons given in the American Restatement of the Law Governing Lawyers:

Typically, such rules [of professional conduct for lawyers] are formulated on the basis of extensive consideration of what conduct is practical and desirable for lawyers, including consultation involving the bench and bar and comparison with similar standards adopted in other jurisdictions.⁶⁷

Our Alberta lawyer panelist assured us that this description was accurate regarding the process of adopting the suicide rule.⁶⁸ But is it really a necessary condition of legitimacy that a law be adopted only after extensive consultation with all those who would be affected? The process behind the enactment of many laws does not satisfy the idealised picture of engaged, open debate. Provisions are tucked away in the final draft of gargantuan bills exceeding 1,000 pages in length as a favour to special interest groups, and in these cases it is likely that other legislators never even knew of the existence of the language in question, let alone had a chance to debate about it.⁶⁹ Even in the absence of any kind of skulduggery, much law-

⁶⁴ Raz, 'Authority, Law, and Morality' in *Ethics in the Public Domain* (n 56) 213.

⁶⁵ Bill Simon raised this objection in the panel discussion.

⁶⁶ This discussion presupposes that lawyers and citizens have adequate reasons to justify their actions in legal terms. See Mortimer R Kadish and Sanford H Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (Stanford University Press, 1973) 4. Kadish and Kadish consider that 'why, or whether, a person ought to seek to justify his actions before the law is a very different question from how he is to justify his actions before the law'. I have argued elsewhere that justifying one's actions in legal terms is a way of showing respect for one's fellow citizens, and I will not repeat that argument here: see also Wendel (n 50).

⁶⁷ Restatement (Third) of the Law Governing Lawyers, § 52, cmt (considering the admissibility of rules of professional conduct to show breach of the standard of care in a civil action for damages).

⁶⁸ See also Ted Schneyer, 'Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct' (1989) 14 *Law & Society Inquiry* 677. Schneyer describes the law-making process in this case as involving 'the most sustained and democratic debate about professional ethics in the history of the American bar'.

⁶⁹ A notorious example, of which most people are aware only because of the role of credit-default swaps in the financial industry meltdown, is legislation introduced by Senator Phil Gramm to ensure that CDSs were treated neither as financial derivatives nor as insurance contracts by regulators. See eg Eric Lipton and Stephen Labaton, 'Deregulator Looks Back, Unswayed' *New York Times*, 16 November 2008, A1.

making goes on at several levels of remove from citizen input. Administrative agency regulations, for example, are often the product of intensive lobbying by affected industries, but ordinary people whose interests may be profoundly affected have little effective input into the process of drafting regulations. The more we consider the reality of the law-making process, keeping in mind Bismarck's dictum about laws and sausages,⁷⁰ the weaker the case appears to be for authority along the lines of Raz's normal justification thesis.

A great deal depends on how we understand the idea of 'taking into account' dependent reasons. I have argued for a thin procedural conception of legitimacy, in which the necessary democratic justification is supplied by political institutions and procedures that enable affected citizens to do tolerably well at making their views known and having their positions considered as an input into the ultimate settlement of a controversy.⁷¹ The resolution of disagreement must acknowledge citizens as free and equal, in that everyone is able to do the best she can hope to, by way of influencing the substance of laws. This is not a very demanding criterion in practice, however, because 'the best one can hope to do' is not much in a society of 275 million people. All of us are affected in some way by the myriad federal and state statutes and administrative agency regulations promulgated every day, to say nothing of common-law decisions, local ordinances, and enforcement decisions made by police officers and other officials. We may care deeply about the substance of some of these laws, but even in the case of a maximally motivated citizen, very few are able to do more than vote, write letters to legislators, donate to political campaigns, join interest groups, write blog postings, demonstrate, or maybe appear at a town hall meeting. It seems too strong to deny authority to laws that are enacted without every affected citizen being able to participate in the enactment process in a fuller way.⁷² If the necessary conditions for authority are too strong, then it is hard to see which laws enacted through the democratic process could possibly be legitimate. I had no direct or indirect input into the new health care reform legislation in the US, nor the enhanced regulation of the financial services industry, but I assume I have an obligation to comply with them, to the extent they affect me. Note that although the procedural standard for legitimacy need only be satisfied, it may suggest improvements in procedures to make them more responsive. Perhaps reforming campaign finance, or invigorating the press corps, are recommended. Even if these steps would be desirable, however, they should not be deemed *necessary* to the legitimacy of resulting laws.⁷³

⁷⁰ The saying that 'laws are like sausages—it is best not to see them being made' is often attributed to Bismarck.

⁷¹ Wendel (n 50) 98.

⁷² One of my colleagues related that his nine-year-old son was quite troubled that the federal government's 'cash for clunkers' program, which sought to take old, fuel-inefficient cars off the road, had a profoundly deleterious effect on the supply of old beat-up cars available to participate in the annual demolition derby at our local fair. My colleague's son was particularly upset that no one in the government took the interests of demolition derby fans into account when deliberating about the program. This is obviously a silly example, but it does illustrate that many laws have wide-ranging effects, and taking into account the position of all affected citizens would be such a cumbersome process that it would be impossible to regulate many activities.

⁷³ This may be a kind of reflective equilibrium argument, in that it begins with the assumption that most citizens regard most democratically enacted laws as legitimate, and thus any theory of legitimacy that states necessary conditions which would exclude these laws must be mistaken.

The position I am defending here is one in which the reasons for lawyers to act are given by the law, not considerations of justice or ordinary morality. In a classic book by Mortimer and Sanford Kadish, this distinction is expressed in terms of propositions of merit and propositions of appropriateness.⁷⁴ One feature that I object to in most theoretical legal ethics scholarship is the presumption that fully justifying one's action as a lawyer, acting in a representative capacity, is a matter of merit, with considerations of appropriateness either obscured or collapsed into considerations of merit. Kadish and Kadish note that, in some social roles, it is appropriate for an actor to have recourse to the end the role is designed to accomplish. More specifically, 'recourse roles' are those in which an actor may permissibly conclude that she is permitted to depart from the obligations of the role because following the obligations of the role will result in a deviation from the role's prescribed ends.⁷⁵ This is really the heart of Bill Simon's argument for the Contextual View.⁷⁶ The role of the lawyer is defined in terms of the end of ensuring that the legal rights of citizens are determined with reference to considerations of justice. If something a lawyer does, in accordance with the obligations of her role, would result in injustice, then the lawyer should be permitted to depart from these obligations in the service of the end of the role. Notice, however, that everything here turns on the assumptions one makes about the prescribed ends of the role. Granting the Kadishes' conception of recourse roles, one is justified in disregarding the actions required by a role only where those actions would subvert the ends of the role. For Simon, the purpose for which the role of lawyer is constituted is obtaining substantial (moral) justice. On that conception of the role's purpose, fairly frequent opting-out might be expected, since there are many actions required by the lawyer's role that serve procedural, not substantive justice, or which protect the client's interests without necessarily resulting in justice from some impartial point of view.

If, on the other hand, the ends of the role are understood differently, lawyers will be less frequently justified in disregarding the obligations of the role. The conception of the lawyer's role defended here draws from the way Finnis understands the authority of law, deriving as it does from the demand that all moral agents engage in practical reasoning about the relationship between their own well-being and the well-being of others.⁷⁷ Although people can agree on the importance of certain basic values at a high level of generality, everyone must determine what these moral values mean in terms of concrete, practical action. One's reasoning about the demands of morality must be coordinated with that of others; without this coordination, we cannot be said to be acting in a community.⁷⁸ Acting in communities with others, when one's actions affect the interests of others, necessarily requires thinking about what morality demands while also being sensitive to the possibility that others might disagree with one's specification of concrete principles for action, and how completing

⁷⁴ Kadish and Kadish (n 66) 7–12.

⁷⁵ *Ibid.*, 29, 35.

⁷⁶ Simon (n 4).

⁷⁷ Finnis (n 60) 134.

⁷⁸ *Ibid.*, 147–50.

principles should be weighted and prioritised. The role of the law, on this version of a social contract theory of obligation, is coordination, in the thicker sense of coordinating with others one's own obligation to reason about the demands of morality in a political community.⁷⁹ If this is the end of the legal system, then one important end of the role of lawyer is to facilitate this coordination, by advising clients and acting on their behalf with respect to the legal entitlements that have been established in the name of the political community. Understanding this role as a recourse role shows that lawyers are very seldom justified in acting on the basis of what they take to be the substantive justice of a situation, because substantive justice is one of the things people disagree about.

Obviously one may not accept my characterisation of the ends of the legal system and the role of lawyer, but the virtue of the recourse role approach is that it focuses analysis of what lawyers should do in particular cases on the ends of the role, rather than the rights and wrongs of actions in ordinary moral terms. Returning to the Alberta suicide example, there are reasons one might favour a rule requiring lawyers to disclose credible threats of suicide, but there are also reasons one might prefer a strict confidentiality norm with no permission or requirement to disclose. I have argued that whatever rule of professional conduct is adopted by a state court (in the United States) or a provincial law society (in Canada) ought to have authority for lawyers, notwithstanding an individual lawyer's belief that the result in some cases would be unjust.⁸⁰ The rule is legitimate as long as it is adopted using tolerably fair procedures which permit affected parties to have some voice in the law-making process, as is generally the case with respect to professional disciplinary rules. Citizens whose views are not reflected in the final settlement will inevitably complain that the process was defective, but all that is required is that the procedures be good enough, under the circumstances.⁸¹ There is still an obligation to comply with unjust laws, and those laws enacted by imperfect procedures. The law's function is to supersede disagreement about which procedures are good enough and what rights and obligations citizens ought to have. It could not fulfil this function if the professionals who administer it were permitted to act on the basis of reasons that were superseded by the law. Thus, the recourse role conception of the lawyer's obligation does not permit departure from the norms of the role. Whatever is required in the suicide example—disclosure or non-disclosure, depending on the state or province—remains an obligation despite the lawyer's belief that it is wrong.

This is really a defence of the principle of majority rule, and much of the criticism of this position can be understood as concern about the situation of 'discrete and insular minorities', as American constitutional lawyers would put it. The argument for thin procedural criteria of legitimacy is, essentially, that this is the best we can do. Rawls notes that hypothetical consent to a constitution which embodies the principle of majority rule would be based on three considerations: (1) among the limited set of alternatives that have any

⁷⁹ *Ibid*, 246–8.

⁸⁰ Wendel (n 50) § 3.2.2.

⁸¹ John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 353.

chance of being accepted by the contracting parties, there is none that would always yield results with which one agrees; (2) consent to some procedure is preferable to no agreement at all; and (3) it is likely that, in the long run, the burden of injustice is more or less evenly distributed over different groups in society.⁸² It is tempting to set up a conception of recourse roles so that a legal norm would not be legitimate (and thus would create obligations for lawyers) if it appears to create greater injustice for a less powerful group in society. As Rawls argues, we would not deem legitimate a legal system which recognised ‘slavery and serfdom, religious persecution, the subjection of the working class, the oppression of women, and the unlimited accumulation of vast fortunes’.⁸³ As I have argued, however, the American legal system accepts many instances of what one might characterise as the subjection of the working class (laws that make union organising highly burdensome, for example), religious persecution (the Supreme Court’s prohibition on prayer in public schools, as seen through the eyes of some religious fundamentalists), the oppression of women (for instance, the legal permissibility of much pornography), and the accumulation of vast fortunes (protected by the relatively low progressivity of our tax system). Moreover, there may be some entrenched political minorities who would use to their unfair advantage any opportunity they had to challenge as unjust a law enacted by a political majority.⁸⁴ Depending on one’s position on the left-right political spectrum, one may believe that in the United States, for example, evangelical Christians, corporations, teachers’ unions, people of colour, or GLBT citizens enjoy ‘special rights’ that are too easily asserted against the interests of electoral majorities.⁸⁵ The reason to favour thin criteria of legitimacy is that, due to reasonable moral pluralism, there may be reasonable positions on both sides of a dispute. As against the claim, for example, that the legal permissibility of pornography contributes to the oppression of women, there is a long history in the United States at least, of judicial decisions protecting unpopular, even reprehensible expression for reasons relating to distrust of state power and

⁸² *Ibid.*, 354–5.

⁸³ Rawls, ‘Reply to Habermas’ (n 59) 431.

⁸⁴ Rawls (n 81) 357.

⁸⁵ In other words, minority status is itself a contestable concept. Richard Abel provides a nice example in his history of the reform of the regulation of the Law Society of England and Wales. A candidate for the presidency appealed to the fears of the dominant group in the profession:

[The candidate] inverted the roles of oppressor and victim through typical Orwellian double-speak. Christians, not homosexuals, were being ‘treated with contempt’; prohibiting discrimination against homosexuals was ‘special legislation’, the ‘high watermark of bigotry’, which failed to recognize the ‘right of conscientious objection’. Homosexuals pretended to be a ‘beleaguered’ ‘weak, oppressed minority’ in order to win sympathy but actually had the ‘power and influence’ to make the Metropolitan Police adopt ‘a more “user friendly” approach to ‘gays importuning in public lavatories’.

Richard L Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford University Press, 2003) 157. Abel’s use of the adjective ‘Orwellian’ shows that he thinks this is a bogus appeal to minority status, but a very similar style of discourse in the United States around the issue of same-sex marriage appears to reflect a sincerely held belief on the part of many conservatives that they are the beleaguered minority. In any event, it would be impossible to use dialogue alone when participants engage in a debate from such incompatible perspectives.

official orthodoxies of belief.⁸⁶ We should be very hesitant to proclaim a law illegitimate because it appears unjust by our lights. In the domain of politics, a citizen must think of her 'own uncompromising convictions about justice as just one set of convictions among others' and be 'willing to address, in a relatively impartial way, the question of what is to be done about the fact that people like [herself] disagree with others in the society about justice'.⁸⁷

There may be circumstances under which these conditions do not hold. Pervasive failure of the legal system to recognise political liberties, such as free speech and assembly, may render laws illegitimate.⁸⁸ One should be very hesitant, however, to permit a lawyer to regard laws as non-obligatory merely because the lawyer believes (sincerely and in good faith) that they are unjust. Many laws are unjust from the point of view of affected citizens, but this does not mean they are illegitimate. Perhaps the position defended here is cynical. In an ideal political system, citizens, legislators, judges and lawyers could be expected to adopt a public-minded point of view, pursue impartial justice, and not simply pursue their own interests.⁸⁹ But, I do not necessarily think that it is cynical to believe that well-intentioned citizens will disagree about what justice requires. Even those of my fellow citizens with whom I disagree most strongly (say, those who believe that extending the Bush tax cuts on the wealthiest 1 per cent of American families is a good idea) may be motivated by sincerely-held beliefs concerning the functioning of markets, distributive justice, and property rights. It seems to me that the role of lawyer must be defined and regulated in terms of fidelity to enacted, positive law, not to the underlying principles of justice that are superseded by the law. Otherwise, there is no way out of the endless disagreement that characterises public life in a pluralist society.

It should be emphasised, in closing, that this is an account of the ethics of lawyers in a basically just society. Some critics of this approach may find it alienating or dehumanising that a person, a moral agent, is turned into the instrumentality of something abstract and disembodied like 'the law' or 'the state'. That reaction may be due, in part, to the horrors of the twentieth century, when people too easily became agents of collective atrocities and enabled them by simply continuing to do their jobs. Consider figures like Adolf Eichmann, or Maurice Papon, a former Vichy official convicted of complicity in crimes against humanity for signing papers ordering the deportation of French Jews.⁹⁰ A person fulfilling

⁸⁶ For cases protecting insulting or offensive speech, see eg *RAV v City of St Paul*, 505 US 377 (1992) (cross burning); *Texas v Johnson*, 491 US 397 (1989) (flag burning); *Hustler Magazine v Falwell*, 485 US 46 (1988) (offensive parody ad); *Cohen v California*, 403 US 15 (1971) (jacket bearing the words 'fuck the draft'). Cases distinguishing obscenity from protected sexually explicit expression include *Renton v Playtime Theatres*, 475 US 41 (1986); *Young v American Mini Theatres*, 427 US 50 (1976). There are, of course, myriad exceptions for things like 'fighting words', *Chaplinsky v New Hampshire*, 315 US 568 (1942); speech that is likely to be overheard by children, *FCC v Pacifica Foundation*, 438 US 726 (1978) (George Carlin's 'seven dirty words' routine); and some expressive conduct, eg *Barnes v Glen Theatre, Inc*, 501 US 560 (1991) (nude dancing); *United States v O'Brien*, 391 US 367 (1968) (burning draft card).

⁸⁷ Waldron (n 62) 160.

⁸⁸ Rawls (n 81) 356.

⁸⁹ *Ibid*, 360.

⁹⁰ See Adam Gopnik, *Paris to the Moon* (Random House, 2000) 106–22 (chapter entitled 'Papon's Paper Trail').

a social role can also be ‘the instrument by which the French state casually delivered children to their murderer’.⁹¹ Lawyers can be the instrument of great evil as well as participating in the system that contributes to social solidarity. I would never deny the truth of this observation, yet would contend that little follows from it, in terms of understanding the normative significance of the legal profession as it exists in modern, essentially just societies like the United Kingdom, Canada, Australia, New Zealand, and even the United States. As Larry Alexander and Fred Schauer have pointed out, ‘[t]o design a system of authority around *Dred Scott* (or Nuremberg), rather than around the views of contemporary politicians about abortion or school prayer, is to make a decision-theoretic choice that is far from obvious’.⁹² This is not a denial of the possibility of grave injustice, even evil, that is accomplished through the willing participation of agents acting in social roles. When a role enables someone to become the instrumentality of evil, none of the authority claims defended here hold. The important word, however, is ‘evil’, not merely the sort of ordinary injustice that may be expected even in an otherwise just political order. The discussion among the panelists in this session concerns injustice, not evil, and the ethics of lawyers in those cases is appropriately oriented toward the settlement and coordination function of the law.

⁹¹ *Ibid.*, 111.

⁹² Larry Alexander and Frederick Schauer, ‘On Extrajudicial Constitutional Interpretation’ (1997) 110 *Harvard Law Review* 1359, 1383.

6. Legal Ethics Should be Primarily a Matter of Principles, Not Rules

William H Simon*

The most basic division among legal ethicists is about whether legal ethics practice norms should take the form of rules or principles. Not all scholars address this issue, and no one has comprehensively analysed it. Yet, it seems to be the concern that most drives differences in both specific conclusions and general perspectives.⁹³

The relevant distinction between rules and principles is Ronald Dworkin's.⁹⁴ The distinction does not turn on degree of specificity or manner of enforcement. Rather, it turns on the nature of the judgment the norm calls for. A rule dictates specific action in the presence a limited and explicit list of contingencies. It either applies or it does not. A principle sets out a value to be vindicated in the circumstances in which the decision maker finds herself. It weighs in favour of certain actions, but this presumption can be outweighed by competing values.

Legal ethics theory often begins by elaborating a master value and then deriving a more specific set of practical norms from it (more often than not, something that looks a lot like the ABA Model Rules). A key issue in this move is whether the specific norms the master value generates are rules or principles. Does the master value give us a set of more specific considerations that the practitioner is to weigh in the circumstances of the particular case? Or does it give us a set of rules that dictate conduct even in the face of (what the lawyer strongly believes) are weightier competing considerations?

Consider the contributions of Steve Pepper, Brad Wendel and Daniel Markovits to this debate.

For Pepper the master values are access-to-law and liberty. According to Pepper, they translate into norms of strong client loyalty. But what happens when client loyalty does not serve any client interest that we could associate with liberty or access-to-law and *infringes* the liberty or access-to-law interests of another person? Say the client X has assaulted Y. Y has filed a claim that X privately concedes is valid, but Y has filed mistakenly in the wrong jurisdiction. If the lawyer for X does not inform Y of her mistake, the statute of limitations will expire and Y will have no remedy.

For Wendel, the master value is coordination. Coordination translates into values of respect for law, purposively understood, and a more limited client loyalty. But what happens in situations where respect for law *impedes* coordination? (Such situations are very common. What the French call the 'strike of zeal' and what Bob Kagan and Eugene Bardach call 'going by the book' refer to the use of law enforcement to disrupt social coordinaton.⁹⁵) For

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⁹³ For a fuller development of the arguments here, see Simon (n 4).

⁹⁴ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 14–80.

⁹⁵ Eugene Bardach and Robert Kagan, *Going by the Book: The Origins of Regulatory Unreasonableness* (Temple University Press, 1982).

example, Kansas and some other states have laws that preclude automobile sellers who do not have an in-state sales facility from delivering a new car to a purchaser within the state. Everyone concedes that the statute is an act of naked rent-seeking on the part of Kansas retailers. Should a lawyer assist a client in evading (or outright violating) this statute? (I can think of reasons not to, including the possibility of getting in trouble and deference to the democratic authority of the legislature, but the reasons have nothing to do with coordination. Coordination tends toward favouring violation, at least if we can do it secretly, so we do not have to worry about a slippery slope.)

For Markovits, the master values are client/citizen self-assertion and political legitimacy. For the lawyer, they translate into norms of strong client loyalty. But what should the lawyer do when the client wants to take an aggressive position for reasons that will *reduce* the legitimacy of the outcome (as the client herself and others perceive it)? Say the client wants the lawyer to impeach a truthful witness in order to help establish a claim she does not believe is valid. She thinks that the legal system is corrupt and incompetent and her success will confirm that view.

If I understand them, all these theorists seem committed to rule-type answers to these questions. They do not want lawyers to make fully contextual judgments. They see legal ethics norms as typically ‘exclusionary’ in the sense that they forbid the lawyer to take full account of the full range of relevant circumstances. But the move from master value to the commitment to rules to guide practice usually occurs tacitly. Even where recognised, it does not receive sustained analysis.

In all three cases, it would be possible to assert an interpretation of the master value (liberty, coordination, legitimacy) that simply tracked the conduct required by the more specific rules. So liberty and political legitimacy means just whatever you can get when your lawyer follows the Model Rules; coordination is just whatever happens when people obey the law. Of course, this is circular reasoning. I do not expect any of my three friends to embrace it explicitly, but if they respond to my hypotheticals by trying to show that there is no tension between the specific practices I mention and their master values, then I will suspect them of tacitly moving toward this position.

Once we recognise that the commitment to rules requires the lawyer to make decisions that, all things considered, are individually bad, the proponent needs to explain why all-things-considered norms have costs large enough to require us to embrace the rule form. Of the arguments one hears (and heard at the conference), three strike me as patently bad (at least when made—as they usually are—categorically and without evidentiary support). The fourth has more facial plausibility, but it has more serious problems than the proponents usually acknowledge.

First, it is suggested that an ethics of principles would require the lawyer equivalent of Dworkin’s Herculean judge, who has prodigious analytical capacities and virtual factual omniscience, or at least a lot of time on her hands to do the required analysis and research.⁹⁶ But in fact, a plausible ethic of principle would not require the lawyer to do any more

⁹⁶ Dworkin (n 94) 105–30.

research than she would be required to do under any other regime. All it would necessarily require is that the lawyer make full use of the information she has. An ethics of principle rejects 'exclusionary' norms that demand that the lawyer ignore pertinent information. To the extent that the lawyer lacks information, she needs to fall back on presumptions, including presumptions that require deference to other actors (the client, the court) with more information.

Second, it is said that the ethic of principle involves the lawyer in usurping the authority of either the client or the court (or some other public authority). Law creates zones of autonomy, Pepper emphasises, in which individuals should be free to make their own choices.⁹⁷ Lawyers should not use their influence over the client to narrow this range. Yet, Pepper agrees that the law limits the client's autonomy, and that the lawyer has responsibility to ascertain and respect those limits. His assertion that those limits take the form of rules and not principles seems to rest on nothing more than undefended assumption of the sort Dworkin criticised in 'The Model of Rules'.⁹⁸ (Positivist legal philosophers deny that they assume or accept the premise that law inherently takes the rule form, but Pepper and other legal ethicists do.) Moreover, to assert that the lawyer, in defining the limits of advocacy in terms of principles, usurps the role of the judge is simply another way of begging the question. Everyone agrees that the lawyer's role in litigation is ideally to facilitate decision by the trier. The argument from principle is that she facilitates it best when she defines her role in terms of principles.

Wendel has a slightly different version of the usurpation theme.⁹⁹ He emphasises the role of law in coordinating social interaction, and he worries that contextual judgment will introduce idiosyncrasy that will subvert coordination. For coordination purposes, it is sometimes more important that a matter be settled definitely than that it be settled correctly. Rules may be useful for establishing conventions that mesh actions, even when they do not produce optimal results in individual cases. The point is valid in the abstract, but Wendel exaggerates the extent to which law can be understood as a mechanism of coordination. A pure coordination norm is like the rule that mandates driving on the right. My complying with the norm is socially useful only to the extent that others do so. But the most important legal norms are not like that. They are more like the prohibition of battery. Every particular act of compliance has value independent of whether others occur or not. Where this type of norm governs, a lawyer who exercises principled judgment to resolve things correctly in the particular case does not have to fear that her achievement will be undermined by what happens in other cases.

Third, it is argued that the principles view is naïve in relying on voluntary compliance by lawyers, whereas effective regulation requires coercive enforcement. But the main limitation on coercive enforcement of practice norms is the fact that deviance is so often shielded by confidentiality norms. A lawyer confident that he will not be called to account

⁹⁷ Pepper (n 20).

⁹⁸ Ronald Dworkin, 'The Model of Rules' (1967) 35(1) *University of Chicago Law Review* 14.

⁹⁹ Wendel (n 27).

for his conduct will violate a rule as readily as a principle. The only respect in which rules facilitate enforcement is that, when ostensible deviance is detected and prosecuted, there is less room to dispute whether the governing norm has been violated when it is a rule than there is when it is a principle. But of course this saving comes at the cost that compliance in a rule-based regime is likely to be less valuable because the conduct involved will be more discrepant with the underlying social purposes.

The most troubling argument for rules is the fourth. The claim here is that lawyers are not good at principled judgment. Lawyers may be prone to biases or may lack information. Or individual lawyers faced with comparable circumstances will decide inconsistently, and hence, introduce inequity. Or lawyer decisions, even when justifiable in isolation, may trigger cascades of unjustifiable behaviour that would send us down a slippery slope. Note that, to advance the case for rules, the argument has to assert a systematic tendency on the part of individual lawyers to make bad judgments. There's no reason why an individual lawyer making a contextual judgment could not take into account such matters as the limits of her knowledge and capacities, the danger of a slippery slope, and the danger of inconsistency. The claim on behalf of rules has to be that, in general, lawyers will make such judgments badly.

I think there are three core problems with the argument based on the lawyer's limited capacity for principled judgment:

1. The claim about the unreliability of individual lawyer judgment must be a comparative one. Individuals have limited information and competence with respect to the circumstances and effects of individual judgments. Compared to what? Presumably compared to the information and competence centralised rule-making institutions have with respect to general circumstances and aggregates. Although this position seems clearly entailed by the rules view, I have yet to see anyone make a serious case for it. Perhaps individual lawyers will often mis-estimate the effects of refusing to cross-examine a truthful witness, but do we really think that, in the aggregate, their judgments will be less reliable than a rule-making body trying to decide the aggregate effects of a rule forbidding or requiring lawyers to do so?
2. If lawyers are bad at contextualised judgment, what are they good at? Ambitious visions of professionalism have consistently portrayed contextualised judgment as the core skill of the professional. As the American Bar Association put the point in rationalising lawyers' monopoly over complex legal tasks, '[t]he essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client'.¹⁰⁰ No one would ever think of defining the duty of care to clients in terms of Dworkinian rules. Duties owed to non-clients, of course, are weaker than duties owed to clients. But the issue is not the strength of the duty, but the form it should take—rules v principles. If lawyers' duties to clients are premised on a highly developed capacity for complex judgment, I do not see how the design of duties to strangers could be premised on the lack of such capacity.

¹⁰⁰ American Bar Association (ABA), Model Code of Professional Responsibility, EC 3–5.

3. The arguments do not take account of the moral cost of rules in alienating the lawyer from the values underlying the norms pertinent to her situation and hence from the larger conception of law that gives meaning and dignity to her role. The most appealing promise of professionalism is to reconcile individual creativity and public service, personal ambition and social need. Rules, even if justified in some long-term aggregate sense, betray this promise. A lawyer forced by a rule to cross-examine a truthful witness is at best like Bernard Williams' Jim, forced to shoot a hostage in order to save the lives of others.¹⁰¹

¹⁰¹ See Bernard Williams, 'A Critique of Utilitarian Ethics' in Bernard Williams and JJC Smart, *Utilitarianism: For and Against* (Cambridge University Press, 1973) 77–151. Williams is extensively discussed in Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press, 2008).

7. Not Morality at All, and Certainly Not Morality as Regulative Ideal

Daniel Markovits*

Philosophical legal ethics should abandon what most have taken to be its central task—the effort to develop moral principles capable of guiding and indeed of regulating lawyers’ professional lives. Philosophers who engage the practice of law should instead seek to reconstruct the contribution that this practice makes to the political authority of retail dispute resolution.

To begin with, the quest for a regulative moral ideal that might guide lawyers’ professional conduct is not philosophically very interesting. Lawyering is not in the end a distinctive moral practice. Rather, it is simply one case among many of moral conduct in the shadow of partial and hence potentially agent-relative reasons. This broader class of cases spans promise at the thin end (promisors acquire obligations to perform even when it is not best overall that they do so) to the affective relations associated with love at the other. A lawyer’s obligations to her client fall somewhere in between, in a space that these obligations share, roughly, with the obligations of agents and fiduciaries more generally. There are philosophical things worth saying about all of these cases, but they have mostly already been said. And whatever they are, they apply to lawyers, who are not special in respect of their partiality, in the usual way. I take this to be as true of my previous efforts to discuss lawyerly partiality as of anyone else’s.¹⁰² Although I perhaps wrote as if lawyers are special, they are not. Everything that I said (at least everything true that I said) applies with very little modification to other agents. Once again, there is nothing to see here; legal ethics should move on.

Legal ethics should avoid the quest to govern lawyers’ professional conduct through regulative moral ideals for another reason also. Philosophical ethics is quite generally not well-suited to producing regulative guides to moral life.

This is, to be sure, decidedly the minority view. Ever since Plato’s peculiar introduction of ethics in *The Republic*—through reporting Socrates’ question ‘How should one live?’ and then recounting a series of efforts to go about answering it—the dominant tradition of moral philosophy has taken the subject to possess a recursive structure. Rational reflection about the good life, Socrates’ question suggests, might be expected to produce regulative principles for living—rules for how one should live—which might themselves be rationally applied and pursued.

Moral philosophy is thus brought, simply in virtue of the question from which it begins, into a very close connection with its subject, that is, with morality itself. Given the question

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¹⁰² See Markovits (n 101); Daniel Markovits, ‘Further Thoughts about “Legal Ethics from the Lawyer’s Point of View”’ (2004) 16 *Yale Journal of Law & the Humanities* 85; Daniel Markovits, ‘Legal Ethics from the Lawyer’s Point of View’ (2004) 15 *Yale Journal of Law & the Humanities* 209.

that he takes as his starting point, it is natural—*necessary*, really—for Socrates also to say, as he famously did, that the unexamined life is not worth living. Moreover, it is natural and necessary that he means by this that the living and the examining—reflection and self-reflection—should employ the same, rational, faculty. The good man, after all, is one in whom the rational part of his tri-partite soul dominates the other two.

There is, however, no reason to think, as a general and purely formal matter, that normative ethics *must* have this recursive structure. To the contrary, there are good reasons to think that it need, and perhaps even should, not do. Perhaps most immediately, normative ethicists are conspicuously *not* better people than others, and legal ethicists are conspicuously not more ethical lawyers. This is probably most often explained, among philosophers, by observing that although philosophical understanding does indeed render a person better able accurately to discern principles for living well, it does not enable her better to live by the principles that she adopts. This, philosophers say, is because moral philosophy does not decrease immoral appetites or increase self-control.

That is plainly not a good explanation. For one thing, if moral philosophy really could produce even this narrowly cabined moral improvement, then moral philosophy surely would help the moral philosophers who pursue it to be on balance more moral than others. They would not, to be sure, require less self-control or possess more; but they would deploy whatever self-control they do possess in directions that more accurately track flourishing. And, relatedly, it would render moral philosophers useful to others interested in how they should live, because philosophers might help to guide others concerning the regulative principles that they should adopt for themselves, even if they do not always manage to live by them and even if philosophers cannot close the gap between ambition and achievement. In fact, however, moral philosophers are not better than other people even in this weak and narrow way; rather they are *no* better than others.

Moreover, it is highly doubtful that moral philosophers actually do enjoy even the narrowly cabined, and practically impotent, advantage in living well that they sometimes claim. Non-philosophers notoriously do not seek philosophical advice for living, in an effort to leverage philosophers' theoretical understanding in their own efforts to live well. Applied ethics is a vanishingly small and un-influential field compared to economics, psychology, management studies, religion, and even self-help. And where applied ethicists do gain influence, they tend to stray from their philosophical activities, which is why applied ethics is held in relatively low esteem within the philosophy profession. Indeed, common opinion probably holds that ethics is an area in which reflection on balance destroys knowledge, or at least in which those who reflect too much, at least about regulative principles, cannot be good *naturally*.

Another class of reasons against the necessity of beginning from Socrates' question arises from the fact that other areas of philosophy—including areas located near normative ethics—reject that question's recursiveness. *Meta*-ethics is one example: any number of meta-ethical views ascribe a rational status to their own propositions that they deny to the ethical propositions whose nature they study. Moreover, another field in the general theory

of value, *aesthetics*, expressly abandons recursiveness even in its normative mode. Even aestheticians who take themselves to be elaborating normative principles that explain what beauty is (rather than just meta-aesthetic ideas concerning the nature of claims about beauty) do not take themselves to be explaining how to produce beauty. Indeed, an essential part of being a self-respecting aesthete nowadays is to deny that one is developing regulative principles for making art. And ethicists, their express methodological commitments to the contrary notwithstanding, implicitly make a similar concession. Moral philosophy, after all, is identified in distinction to philosophy of mind, say, or metaphysics, and not to immoral philosophy.

Happily, Socrates' question is not, in fact, the only properly philosophical question that one might ask about ethics. Rather than asking how one should live, one might ask: 'what is a good life like?' This question is clearly amenable to the methods of philosophy. It is, after all, no different formally from any number of other plainly philosophical questions, ranging from metaphysics ('what is substance like?') to philosophy of mind ('what is intention like?') to philosophy of language ('what is reference like?'). And in this formulation, the basic question of ethics leaves open whether or not understanding philosophical answers to it will help a person living the life that they describe.

All of these ideas might naturally be applied specifically to legal ethics. On this approach, the basic question for philosophical legal ethics is not, How should lawyers regulate their professional practices? Rather the basic question asks, What kind of a practice is lawyering? What are lawyering's immanent norms and how are these related to other moral ideals? How does lawyering fit into modern ethical life more generally? None of these questions calls for philosophical derivations of regulative ideals. All are morally deep and important, and all are amenable to philosophical analysis. Virtually no philosophical legal ethics takes up these questions, however. And the core methods and concerns of the field should therefore change.

This methodological reorientation will naturally produce a substantive reorientation for legal ethics also. The reason is that even the briefest engagement with the immanent structure of the law governing lawyers reveals that this body of law is not so much a moral as a *political* construction. (This should not be surprising, as a positive moral law is virtually impossible, whereas positive law is the first and central achievement of politics.) That is, the law governing lawyers is not so much concerned with the nature or content of an individual life well-lived as with how to sustain solidarity in the face of entrenched and intractable disagreement about the good life.

The positive law reflects an integrative achievement. When various factions (interested and moral) come together to adopt a particular piece of positive law, and to affirm its authority, they fix which resolution of their disagreements they will obey, even in the face of ongoing disagreement about which resolution it would have been best for them to adopt. (This achievement, incidentally, is qualitatively the same wherever the authority of positive law is jointly acknowledged by competing factions. It does not depend nearly so much on the democratic character of positive law as most contemporary commentators presume.)

It is less often noticed that the resolution of individual disputes, at ‘retail’, has a similar structure to the resolution of broader disputes through general law adopted at the ‘wholesale’ level. When individual disputants accept the authority of a particular adjudication, they similarly fix which resolution to their dispute they will obey in the face of their ongoing disagreement about which to adopt. The legal order that establishes processes of individual dispute resolution concerning the application of substantive law thus displays an immanent authority that runs in parallel to the authority of the mechanisms of wholesale dispute resolution that govern the enactment of substantive law. The law governing lawyers belongs centrally to the practices of retail dispute resolution. A legal ethics that seeks to discern the immanent norms of the practice of law will therefore ask, insistently, what lawyering contributes to the authority of retail dispute resolution and how the law governing lawyers supports this contribution.

This should be the central question for philosophical legal ethics. It has, however, been virtually totally ignored. Talcott Parsons took up the question sociologically a half-century or so ago,¹⁰³ and the law and society movement has looked in on Parsons’ insights every now and then.¹⁰⁴ Lon Fuller’s work on adjudication has mined a similar vein but has also been largely ignored.¹⁰⁵ More recently, I have tried to organise and provide a philosophical foundation for their insights for the special case of the adversary trial. None of these efforts (and especially not mine) has had much to say about how lawyers contribute to retail dispute resolution outside of trials, including in particular through contract negotiations (including, but not limited to, in connection with settlement contracts).

Almost 40 years after Fried asked the question from which our discussion takes its theme,¹⁰⁶ therefore, the most important features of legal ethics remain almost totally mysterious.

¹⁰³ See eg Talcott Parsons, ‘The Law and Social Control’ in William M Evan (ed), *Law and Sociology: Exploratory Essays* 56 (Free Press of Glencoe, 1962).

¹⁰⁴ See eg David M Trubek, ‘The Handmaiden’s Revenge: On Reading and Using the Newer Sociology of Civil Procedure’ [1989] (Autumn) *Law & Contemporary Problems* 111; William LF Felstiner, Richard L Abel and Austin Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...’ (1980–1) 15 *Law & Society Review* 631, 642; Lynn Mather and Barbara Yngvesson, ‘Language, Audience, and the Transformation of Disputes’ (1980–1) 15 *Law & Society Review* 775, 791.

¹⁰⁵ See eg Lon L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353, 368; Lon L Fuller, ‘Mediation—Its Forms and Functions’ (1970–1) 44 *Southern California Law Review* 305, 325.

¹⁰⁶ Fried (n 2).