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The Lawyer's Dirty Hands

LESLIE GRIFFIN*

I. INTRODUCTION

In his recent book, *The Lost Lawyer: Failing Ideals of the Legal Profession*,¹ Anthony Kronman discusses the moral conflicts faced by lawyers. Lawyers must protect the interests of their clients, but also must uphold the law's integrity because they are officers of the court. When these two interests conflict, the lawyer faces dilemmas that "no simple jurisdictional rule can solve."² Kronman concludes: "Everyone who enters the practice of law must grapple with this dilemma, just as every politician must confront the problem of dirty hands."³ Kronman's conclusion echoes Michael Walzer's depiction of the politician: "Here is the moral politician: it is by his dirty hands that we know him. If he were a moral man and nothing else, his hands would not be dirty; if he were a politician and nothing else, he would pretend that they were clean."⁴

Dirty hands is an inadequate metaphor for professional ethics, for law as well as politics. A review of dirty hands rhetoric reveals, not only the failures of the metaphor, but also the fault lines in the content and structure of legal ethics. In this Article, I explore the problem of dirty hands in the legal setting. In Walzer's language, I ask if we identify the moral lawyer by her dirty hands. While dirty hands are indeed pervasive in legal ethics, I conclude that this is cause, not for celebration, but for cleansing.

Dirty hands has not been a clear metaphor in the literature of legal and political ethics. There are two leading interpretations of the problem of dirty hands. In Parts II and III of this Article, I review these two accounts and identify their limitations. In both interpretations, "[t]he problem of dirty hands concerns the political leader who for the sake of public purposes violates moral principles."⁵

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1. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

2. *Id.* at 145.

3. *Id.*

4. Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *PRIVATE AND PUBLIC ETHICS* 96, 105 (Donald G. Jones ed., 1978) [hereinafter Walzer, *Dirty Hands*].

5. DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 11 (1987).

In the first account of dirty hands, when the agent violates moral principles she acts *immorally* (although, paradoxically, it is a justifiable immorality). In Part II, I examine the pervasiveness of this view of dirty hands in the field of legal ethics, arguing that much of legal ethics presupposes this “immoral” view of the lawyer’s role.

Another approach to dirty hands holds that the agent violates moral principles because she obeys another, more compelling morality, the morality of role. Complexity, therefore, dirties the agent’s hands, not immorality. The second view offers one way to “solve” the problem of dirty hands: it allows the agent to act *morally*, not *immorally*. In Part III, I ask if legal ethics is a dirty hands field in the second sense — if it is a separate morality.

Although much of legal ethics presupposes a separate view of professional morality, I argue that appealing to a separate morality does not resolve the problem of dirty hands. The separate ethic is too flawed to justify overriding common moral principles. I identify three central problems with the separate ethic. First, the norms of the profession are based in significant part upon self-interest. Second, the profession fails to enforce its norms of conduct. Third, the ethical guidelines are too confused to offer adequate guidance. In legal ethics, separate morality functions as a closed system that strangles rather than nurtures moral insight.

The analysis of the dirty hands literature, therefore, reveals fundamental flaws in the structure of legal ethics. Part IV addresses these flaws by identifying alternative approaches to the problem of dirty hands — ways to rid the profession of dirty hands. Philosophers and political scientists have criticized Walzer’s account of political dirty hands, and have offered numerous corrections to his description of the politician. In Part IV, I examine these criticisms and discuss their implications for legal ethics. From philosophy comes the insight that legal ethics should be rooted in principles. From political science comes the insight that the procedures of legal ethics — the procedures by which lawyers write as well as enforce the rules of the profession — must be changed. From both fields comes the conclusion that legal ethics must be enriched by the participation of outsiders as well as the addition of external perspectives.

In Part V, I offer one such perspective by examining some traditional religious accounts of law and ethics. Although philosophy has functioned as the preferred outside perspective for legal ethics, religion adds its own perspective. From Jewish and Christian authors emerge strong warnings against the separate role morality espoused by the legal profession. Moreover, these traditions of moral wisdom provide a content different from the content of contemporary legal ethics. Religious writers have for centuries confronted the moral problems that remain central to current legal ethics, and their moral reasoning deserves the attention of serious students of legal

ethics, with or without religious predilections. Finally, the reflections of religious traditions are rooted in the experience of institutions, which remind us of the dangers of the closed ethic.

I argue that both Jewish and Christian writers support Alan Donagan's philosophical conclusion that common morality should not be abandoned when one steps into a professional role.⁶ The religious traditions remind us that separate justifications for role moralities may justify too much. Instead, the examination of the norms of "common morality" is a more fruitful enterprise for legal ethics than the continued preoccupation with a separate role morality.

II. THE PROBLEM OF DIRTY HANDS: CAN LAWYERS BE MORAL?

The contemporary discussion of dirty hands commenced with an essay by Michael Walzer on political ethics.⁷ Walzer concluded that politicians must dirty their hands, i.e., violate the moral rules of common humanity, if they are to govern effectively.⁸ Walzer based this conclusion on the belief that political action differs from private sector behavior for the following three reasons. First, the politician acts not only in the name of others (the citizens she governs) but also on her own behalf. The tension between these responsibilities makes political decision-making difficult and complex. Second, politicians are subject to the "pleasures of ruling."⁹ Third, politicians have the potential to enforce their decisions, and the enforcement often takes the form of physical force.¹⁰

The paradox of Walzer's theory is his conclusion that politicians must be prepared to undergo punishment for their moral violations.¹¹ Such punishment guards politicians from breaking moral rules too easily. In addition, some reluctance, some recognition of involvement in an amoral or immoral enterprise acts as a psychological or moral barrier to the politician's conduct. Walzer places this paradox at the heart of the politician's identity: "Here is the moral politician: it is by his dirty hands that we know him. If he

6. Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 123 (David Luban Ed., 1983) [hereinafter Donagan, *Justifying Legal Practice*].

7. Walzer, *Dirty Hands*, *supra* note 4, at 96.

8. *Id.* at 101.

9. *Id.* at 99.

10. *Id.* at 100 (stating that: "[T]he victorious politician uses violence and the threat of violence — not only against foreign nations in our defense but also against us, and again ostensibly for our greater good.").

11. *Id.* at 117. Walzer contends, "[i]t is not the case that when [a politician] does bad in order to do good he surrenders himself forever to the demon of politics. He commits a determinate crime, and he must pay a determinate penalty. When he has done so, his hands will be clean again, or as clean as human hands can ever be." *Id.*

were a moral man and nothing else, his hands would not be dirty; if he were a politician and noting else, he would pretend that they were clean."¹²

Thus in politics, "[t]he problem of dirty hands concerns the political leader who for the sake of public purposes violates moral principles."¹³ In legal ethics, the problem of dirty hands involves the lawyer who violates moral principles, although, as we will see, there is some question whether the violation occurs for public purposes. Much of the relevant literature suggests that legal ethics is indeed a dirty hands field, involving its practitioners in the violation of moral principles.

A. THE STANDARD VIEW OF LEGAL ETHICS: DIRTY HANDS

In order to illustrate the claim that legal ethics involves the lawyer in morally questionable acts, I begin with an example that has by now become a standard case in legal ethics. The conflicts posed by this problem, and the law's resolution of them, illuminate the problem of dirty hands for lawyers. Indeed, the standard case illustrates the so-called standard conception of the lawyer's role.¹⁴

The facts of *New York v. Belge*,¹⁵ the Lake Pleasant bodies case, are by now well known. Robert F. Garrow, Sr. was arrested for murder. He told his attorneys, Frank Belge and Frank Armani, that he had killed two other girls, and then described the location of their bodies.¹⁶ The attorneys were not sure if Garrow was telling the truth. They therefore visited the site, found the bodies, and photographed the scene.¹⁷ One report suggests that they rearranged the body parts, moving the head of one of the victims closer to her body, before they took the picture.¹⁸

12. *Id.* at 105. Walzer identifies Albert Camus' *Just Assassins* as representative of his analysis. The assassins commit their crime, but they are prepared to accept punishment for their actions. An appropriate punishment thus fits the crime that has taken place. *Id.* at 117.

Another exemplar of dirty hands is Arthur Harris, a leader of the Bomber Command in England in the Second World War, who was not honored by his country after the war. Even though Harris' bombing was essential to the war effort, Walzer thinks Harris should not receive public praise or recognition: "[a] nation fighting a just war, when it is desperate and survival itself is at risk, must use unscrupulous or morally ignorant soldiers; and as soon as their usefulness is past, it must disown them." MICHAEL WALZER, *JUST AND UNJUST WARS* 325 (1977).

13. THOMPSON, *supra* note 5, at 11.

14. For a discussion of the standard conception, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY*, app. 1 (1988) [hereinafter LUBAN, *LAWYERS & JUSTICE*] and Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529 (1984) [hereinafter Schneyer, *Moral Philosophy's Standard Misconception*] (examining empirical assumptions made by moral philosophers who have critiqued lawyers' ethics).

15. 372 N.Y.S.2d 798 (Onondaga Cty. Ct. 1975).

16. *Id.* at 799.

17. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 53.

18. Bill Jerome, *Garrow Case to be Probed by Grand Jury*, SYRACUSE HERALD J., July 3, 1974, reprinted in *TEACHING PROFESSIONAL RESPONSIBILITY: MATERIALS & PROC. FROM THE NAT'L CONF.* 237, 240 (Patrick A. Keenan ed., 1979).

At no point did the lawyers divulge the location of the bodies.¹⁹ Belge and Armani found the bodies in August; the police did not discover the bodies until months later.²⁰ There were some circumstances that caused the lawyers to consider revealing the bodies' whereabouts. For example, they offered to disclose the location in return for a favorable plea bargain,²¹ and contemplated disclosure at trial as part of an insanity plea.

Outside of limited legal contexts, however, they would not disclose any information. When the father of one of the girls directly asked one attorney if he knew anything about the missing daughter, the lawyer did not answer.²² The attorney then avoided a meeting with the father of the second girl because he could not face the father's grief and anguish.²³

I resurrect the Lake Pleasant bodies case in a year of missing girls. The state of California has been transfixed by the murder of Polly Klaas, who was kidnapped from her home during a slumber party.²⁴ In Litchfield, New York, volunteers have spent many months searching for the missing twelve-year old Sara Anne Wood, the daughter of a local minister.²⁵ The public reaction to these stories conveys some sense of our reaction that few griefs can rival the taking of a child from her parent. The reaction also conveys some sense of our common moral wisdom, that there is an obligation to tell parents of their missing children's whereabouts.

The grief of the parents has always been an aspect of the Lake Pleasant bodies case, yet in legal ethics it is rarely identified as the central feature of the story. Instead, the events are usually viewed from the perspective of the lawyer: the focus is on the professional responsibilities of her role. Belge and Armani employed such a perspective. The lawyer has a duty to protect client confidences.²⁶ If a client has a right not to incriminate himself, he should not be incriminated by his statements to his lawyers. The bodies might have contained information that could implicate Garrow in two more murders, so their location could not be revealed.

The New York state prosecutor brought an indictment against Belge, alleging that he had violated Public Health Law by failing to report the

19. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 53.

20. Jerome, *supra* note 18, at 237. The police discovered one body in September and the other in December. *Id.*

21. *Id.* at 241.

22. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 53.

23. David J. Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 425 (1990) [hereinafter Luban, *Some Mid-Course Corrections*].

24. Laura Sessions Steg, *Missing Children: The Ultimate Nightmare*, PARENTS' MAG., Apr. 1994, at 47.

25. Michael Ingrassia, *The Trail of a Serial Killer?*, NEWSWEEK, Jan. 24, 1994, at 60.

26. See, e.g. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1969) (A Lawyer Should Preserve the Confidences and Secrets of a Client) [hereinafter MODEL CODE].

location of the bodies and by denying them burial.²⁷ An attorney is not allowed to break the law while keeping client confidences, and here a law had been broken. One could construe the unburied bodies as a continuing crime that is addressed under the rules of legal ethics.²⁸

The Onondaga County Court ruled that the public health statute did not outweigh the privilege against self-incrimination and dismissed the indictment.²⁹ In dicta, the court stated a recurring argument in the ethics literature: "The effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship."³⁰ On appeal, the Appellate Division ruled only on the question of the sufficiency of the indictment, and upheld the lower court.³¹ Without reaching the question of the attorney-client privilege, it stated in dicta that it did not view that privilege as absolute.³²

The courts dismissed the indictment against the attorneys without ever reaching the question of the lawyers' responsibility to the parents of the missing girls. The case's central moral question, then, fell outside the bounds of the court's technical legal analysis. Armani captured the conflicts of this situation in an interview given years after the events.

[Armani]: This was something that was really momentous for us because of the conflict within us. Your mind screaming one way "Relieve these parents!" You know — what is your responsibility? Should you report this? Shouldn't you report it? One sense of morality wants you to relieve the grief.

[Interviewer]: And the other?

[Armani]: The other is your sworn duty.

[Interviewer]: Didn't you think that there was a factor of just common decency here?

[Armani]: I can't explain it — but to me it was a question of which was the higher moral good.

[Interviewer]: Between what?

[Armani]: The question of the Constitution, the question of even a bastard like him having a proper defense, having adequate representation, being able to trust his lawyer as to what he says.

[Interviewer]: Against what?

[Armani]: As against the fact that I have a dead girl, the fact that her

27. *New York v. Belge*, 372 N.Y.S.2d 798, 803 (Onondaga Cty. Ct. 1975).

28. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 7 (noting that an attorney confronting his client's continuing wrongdoing may reveal the wrongdoing to the extent the wrongdoing is covered by Rule 1.6 — otherwise, withdrawal from representation may be required) [hereinafter MODEL RULES].

29. *Belge*, 372 N.Y.S.2d at 803.

30. *Id.* at 801.

31. *People v. Belge*, 359 N.E.2d 377 (N.Y. 1976).

32. *Id.* at 377-78.

body's there. As against the breaking hearts of her parents. But they are —. It's a terrible thing to play God at that moment, but in my judgment — and I still feel that way — that their suffering is not worth jeopardizing my sworn duty or my oath of office or the Constitution.³³

Here lurks the image of the lawyer with dirty hands, the lawyer who overcomes his moral scruples to do what the job requires. Armani's words capture the conflict at the heart of the problem of dirty hands, the conflict between common morality and the morality required by a profession. David Luban, for example, has identified this "fundamental problem of legal ethics" as whether "the professional role of lawyers impose[s] duties that are different from, or even in conflict with, common morality."³⁴ Charles Fried raises the dirty hands question when he asks if the lawyer can be a good person, "whether a decent, ethical person can ever be a lawyer."³⁵

Dirty hands pervade the literature of legal ethics. They are present, for example, in Monroe Freedman's provocative ethical analysis of the lawyer's obligations to the client.³⁶ According to Freedman, the American adversary system of justice entitles — indeed obligates — lawyers to use all available means to promote the well-being of their clients.³⁷ Freedman originally raised the subject of role morality through an exploration of three issues:

1. Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?
2. Is it proper to put a witness on the stand when you know he will commit perjury?
3. Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?³⁸

33. *Ethics on Trial* (WETA-TV, video 1987), reprinted in Luban, *Some Mid-Course Corrections*, *supra* note 23, at 425-26.

34. David Luban, *Introduction*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 1 (David Luban ed., 1983) [hereinafter *THE GOOD LAWYER*].

35. Charles Fried, *The Lawyer as Friend*, in *ETHICS AND THE LEGAL PROFESSION*, *supra* note 34, at 132, 135.

36. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, in *ETHICS AND THE LEGAL PROFESSION* 328 (Michael Davis & Frederick A. Elliston eds., 1986) [hereinafter *Freedman, Criminal Defense Lawyer*] (discussing the criminal defense lawyer's ethical obligations to employ morally suspect tactics on behalf of clients). For a broad discussion of lawyers' professional duties to preserve the adversary system, see MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) [hereinafter *FREEDMAN, LAWYERS' ETHICS*].

37. See generally *id.*

38. Freedman, *Criminal Defense Lawyer*, in *ETHICS THE LEGAL PROFESSION*, *supra* note 36, at 328.

Freedman's response to all three questions was yes. The system thus allows the lawyer to cross-examine the truthful witness harshly, or to place a witness on the stand with advance knowledge that she will commit perjury.

In reaching these conclusions, Freedman relied in part upon the legal profession's original *Canons of Professional Ethics*, which were adopted by the American Bar Association in 1908.³⁹ The 1908 *Canons* obligated the lawyer to keep a client's confidences and to devote himself to zealous representation of the client.⁴⁰ There were limits on such representation: "the office of attorney does not permit, much less does it demand of him for any client, violations of law or any manner of fraud or chicanery."⁴¹ Freedman conceded that the 1908 *Canons* were "ambiguous," and turned to his central argument, that the adversary system of justice requires such conduct of attorneys.⁴²

Throughout his article, Freedman argues that the needs of the adversary system regulate the attorney's conduct. The lawyer's role in this system requires zealous defense of one's clients. The attorney acts in ways that may appear questionable from outside the system, but which are appropriate within the adversary system. In the realm of confidentiality, Freedman argues that the adversary system depends on the client's absolute confidence that her communications will not be betrayed. Otherwise, attorneys would be prevented from acquiring full knowledge of their clients' cases.⁴³ Incomplete knowledge, in turn, impairs the attorney's ability to defend her clients.⁴⁴

The requirements of the adversary system, therefore, allow the lawyer to undertake the actions described in Freedman's three questions. Freedman has also justified the attorney's attack on the credibility of a rape victim by making her look promiscuous, despite his knowledge that the accused is guilty.⁴⁵ Moreover, Freedman endorsed the conduct of the lawyers in the Lake Pleasant bodies case in the name of confidentiality.⁴⁶

Freedman does not believe lawyers behave unethically in the performance of these actions, but merely as their role requires. Such tactics are as justified as pleading the statute of limitations even when the client has actually wronged the plaintiff. Public policy permits the separate ethic.

39. CANONS OF PROFESSIONAL ETHICS (1908) [hereinafter 1908 CANONS].

40. 1908 CANONS Canon 15 (How Far a Lawyer May Go in Supporting a Client's Cause).

41. *Id.*

42. Freedman, *Criminal Defense Lawyer*, *supra* note 36, at 328.

43. *Id.*

44. *Id.* at 329 (citing 1908 CANONS Canon 15).

45. FREEDMAN, *LAWYERS' ETHICS*, *supra* note 36, at 43-49.

46. *Id.* at 1-8 (1975). *But see* John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1489 (1966) (asserting "a standard by which to measure the lawyer's conduct in all situations, absolute confidentiality is inimical to a system which has as its end rational decision-making.").

Freedman states: "These policies include the maintenance of an adversary system, the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt, the right to counsel, and the obligation of confidentiality between lawyer and client."⁴⁷

Freedman raises a point that is central to the dirty hands discussion: he identifies a separate morality for lawyers, but not an immoral or amoral choice. Nonetheless, in Freedman's strong conclusion — that the lawyer is obligated by the adversarial system to undertake conduct that is otherwise morally questionable — lurks the image of a lawyer with dirty hands.

B. THE NEW STANDARD VIEW: MORE DIRTY HANDS

Critics of Freedman have rejected his interpretation of the adversary system. Nonetheless, even these critics finally retain a dirty hands approach to legal ethics. An important challenge to Freedman's defense of the adversary system is presented in David Luban's *Lawyers and Justice*.⁴⁸ Luban's book is a magisterial treatment of the field of legal ethics, attentive both to philosophical argument and to the demands of legal practice. Much of his work challenges the separate role morality proposed by Freedman. Yet, even though Luban questions the lawyer's ethic of dirty hands, he ultimately accepts them: he explicitly identifies public interest law as a dirty hands field.⁴⁹ Indeed, Luban's general theory of legal ethics, even though distinct from Freedman's, is ultimately a theory of dirty hands. Thus, even this perspicacious critic of Freedman and the adversary system leaves lawyers with their hands dirty.

In *Lawyers and Justice*, Luban examines the general subject of role morality by asking whether a so-called institutional excuse exists: "can a person appeal to her role in a social institution to excuse herself from conduct that would be morally culpable were anyone else to do it?"⁵⁰ Luban focuses on the adversary system excuse, already illustrated by Freedman's claim that the adversary system justifies otherwise immoral conduct, in order to ask whether the system justifies a separate role morality for lawyers.

In order to employ the institutional excuse, Luban states that "the institution itself must be justified."⁵¹ Luban argues that if a role morality is to be permitted, the institution that demands the role must provide sufficient justification for the practice. In less than felicitous language (as he

47. Freedman, *Criminal Defense Lawyer*, *supra* note 36, at 337.

48. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14.

49. *Id.* at 317-40.

50. *Id.* at 56.

51. *Id.*

himself admits) Luban refers to this argument as the Fourfold Root of Sufficient Reasoning.⁵²

In the fourfold process, the agent does the following:

- (1) justifies the institution by demonstrating its moral goodness;
- (2) justifies the role by appealing to the structure of the institution;
- (3) justifies the role obligations by showing that they are essential to the role; and
- (4) justifies the role act by showing that the obligations require it.⁵³

From the conviction that the strength of the institution provides the root of the moral argument arises Luban's lengthy examination of the American adversarial system. Luban concludes that the adversary system does not warrant a separate role morality for lawyers. The adversary system receives only weak support from pragmatic justifications because "it is no worse than the plausible alternatives,"⁵⁴ and therefore "is not capable of providing institutional excuses for acts that would be immoral if they were performed by someone who was not an incumbent of the institution."⁵⁵

Thus, the adversary system excuse does not end the moral discussion. When a conflict arises between role morality and common morality, Luban's solution is to "balance the demand of a role against the demand of common morality, giving each some weight."⁵⁶ Such an approach cannot give automatic answers to every hard case, but for Luban it avoids the dangers of the adversary system excuse.

Luban allows a role for "common morality" in the moral calculus of the lawyer because he recognizes the importance of a "morality of acknowledgment."⁵⁷ This "morality of acknowledgment" explains Luban's insistence that professionals must be attentive to common morality as well as to role morality. Professionals often have to deal with "persons *qua* persons," and at these times their roles cannot supply sufficient moral insight. Luban states:

Our independence from roles derives from the claim of the moral *patient*, the person affected by our actions, and not the agent . . . At bottom, the conflict between role morality and the morality of persons *qua* persons stems from the fact that acknowledging the other's predicament requires

52. *Id.* at 129.

53. *Id.* at 131.

54. *Id.* at 68.

55. *Id.* at 104.

56. *Id.* at 125.

57. *Id.* at 127.

me to divide my perspective — it requires, that is, thinking from the other's point of view.⁵⁸

If professionals are too entrenched in role moralities, then they will not respond to the needs of persons.

Despite these cautions against the adversary system excuse and the limitations of role moralities, Luban does not reject all role moralities. The reader anticipates a clean hands lawyer, ready to act upon the morality of acknowledgment. Yet, at that point, Luban reasserts the institutional excuse, and it becomes clear that the institution determines the moral conduct of the professional. Luban concludes that criminal law provides a strong institutional excuse, while civil law does not.⁵⁹ The criminal system, which protects the individual against the state, can support broad institutional excuses.⁶⁰ Yet "[i]n the civil suit paradigm, there is no adversary system excuse to speak of."⁶¹ This conclusion illustrates the primacy of the institutional context in Luban's vision of morality.

This distinction is obvious in Luban's resolution of the Lake Pleasant bodies case: the critic of the adversary system agrees with Freedman that the lawyers should not disclose. Armani and Belge were criminal lawyers. For Luban, the Lake Pleasant bodies case demonstrates that "lawyers may be required by the duty of confidentiality silently to permit the ruination of innocent third parties."⁶² So much for clean hands.

The uncertainty of Luban's institutional argument appears in his disagreement with Freedman's acceptance of the lawyer's portrayal of a victim in a rape case as promiscuous, even though he knows the client raped her.⁶³ This is a criminal trial, but Luban argues that in rape cases, it is usually the victim who is on trial.⁶⁴ In order to promote continued prosecution of rape cases, and because of the sexism of the system, Luban opposes cross-examination that makes the victim look promiscuous. But his grounds for doing so are unclear.

Luban has offered "mid-course corrections" to his book in response to a review by David Wasserman.⁶⁵ These corrections confirm, that, for Luban, the quality of the institution determines the moral analysis. These correc-

58. *Id.*

59. *Id.* 149-53.

60. *Id.* at 148.

61. *Id.* at 149.

62. *Id.* at 179.

63. *Id.* at 150-53.

64. *Id.* at 150-51 (stating that "It graphically illustrates the literal truth of the cliché that in rape cases, it is always the victim who is on trial.").

65. Luban, *Some Mid-Course Corrections*, *supra* note 23, at 424 (responding to David Wasserman, *Should A Good Lawyer Do the Right Thing?: David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392 (1990)).

tions confirm that despite Luban's objections to Freedman, he embraces a dirty hands ethic for lawyers.

In the opening pages of the corrective article, Luban replays the Lake Pleasant bodies case. Here he expresses more ambivalence about the case than he does in *Lawyers and Justice*. He notes "the parents' breaking hearts"⁶⁶ and admits that he is "not without qualms"⁶⁷ about his conclusion not to disclose.⁶⁸ Luban then reviews the book's philosophical argument. He admits, under challenge from Wasserman, that *Lawyers and Justice* offers a presumption in favor of the role duty, and not a simple balancing test between common and role morality. That presumption can be defeated in extreme circumstances. Luban notes that "[t]he deontological reading grants a presumption in behalf of doing one's duty — the strength of the presumption to be determined by the fourfold root inquiry — which nonetheless may be defeated in exceptional cases."⁶⁹ Luban concedes that one could accept his theory and still argue that the circumstances of the Lake Pleasant bodies case constitute an overriding exception. He remarks that "any moral theory that allows you to answer hard questions confidently is simple-minded."⁷⁰

Luban admits that he equivocates between consequentialist and deontological readings of institutional duty in the book, but opts for a deontological reading in the correction.⁷¹ He rejects, then, the balancing language of the book. No longer is there a balance between common morality and role morality. Rather, "role obligations should be regarded as defeasible presumptions. Treating role obligations as defeasible presumptions implies an important asymmetry between role morality and common morality, since role morality becomes in effect the 'default' position, and thus takes precedence over common morality."⁷²

Luban acknowledges that this argument signifies a change from the

66. Luban, *Some Mid-Course Corrections*, *supra* note 23, at 426.

67. *Id.* at 428.

68. Luban is certainly correct that there is no evidence that one overriding of confidentiality will destroy the adversary system. *See id.* at 430.

69. *Id.* at 433.

70. *Id.* at 433.

71. *Id.* at 431-35.

72. *Id.* at 435. *But see* Richard Wasserstrom, *Roles and Morality*, in *THE GOOD LAWYER*, *supra* note 34, at 25. Wasserstrom discusses the conflicts that arise when one distinguishes between personal morality and the role morality of the lawyer in this way. Wasserstrom sketches the "tensions" inherent in a morality that allows lawyers to perform actions not permitted to those outside the legal profession, a morality that excuses behavior which would in other situations be immoral. *Id.* at 25. Specific problems noted by Wasserstrom are that the lawyer appears to act independently of the client's moral ends, and that the means the lawyer employs (including cross-examination of a truthful witness) may be morally suspect. *Id.* at 27. A universal morality is suspicious of special circumstances. Wasserstrom also sympathizes with the arguments for role morality: that morality — justice — is better served by the role of an attorney in the adversarial system; that all of morality is

Lawyers and Justice view, in which common morality and role morality were "equally fundamental."⁷³ Luban now argues that the balancing test in *Lawyers and Justice* undermines the integrity of the role, and now accepts role morality as a defeasible presumption if "justified by the fourfold root inquiry."⁷⁴ Once again, the institution drives the moral analysis. And a parallel to Walzer's argument emerges: the law is a difficult sphere that often obligates lawyers to act in violation of common moral principles.

While dirty hands are thus implicit throughout Luban's legal ethics, Luban himself adopts Walzer's view of dirty hands in his analysis of public interest law. The public interest lawyer is "practicing politics, not law."⁷⁵ Once Luban asserts this definition, he invokes Walzer's dirty hands metaphor for the political arena, and applies it to public interest law. Dirty hands arise in public interest law because of the conflicts the lawyer faces between her commitment to reform the legal system and her commitment to the individual client. Public interest law is morally troubling because legal reform may require manipulation of clients.

The tension is especially evident in class action suits, in which individual clients' needs may have to be sacrificed to the needs of the group. Luban admits that the lawyer is a double agent in these cases: "[T]he lawyer is an agent for both the client and the cause"⁷⁶ and faces "the kind of dirty hands dilemma that arises when fidelity to our cause requires cheating against 'our own people.'"⁷⁷

The traditional lawyer's ethic of zealous devotion to the client, with its opposition to client manipulation, may be inconsistent with the public interest goal of legal reform. Luban refers to those who criticize public interest law from the perspective of traditional legal ethics as proponents of the "client control objection."⁷⁸ Luban challenges their ethic, suggesting that the objection is put forward by those resistant to social change.⁷⁹ Once

role-bound; and that peoples' agreements and expectations are fostered and protected within roles. *Id.* at 30.

Wasserstrom's primary concern is to identify the appeal of each side of the argument. Nonetheless, he concludes that role-differentiated moralities bear the burden of proof, but are not prohibited. *Id.* at 36-37. He states, "[t]he stronger the character of the role differentiation, the stronger the argument in its favor must be if the presumption is to be overcome." *Id.* at 37. Wasserstrom thus demands more justification for the separate role morality than Luban.

For a different criticism of Luban's role morality, which emphasizes an individual, "fideist" account of morality, see Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 883 (1992).

73. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 443.

74. *Id.* at 451.

75. *Id.* at 293.

76. *Id.* at 319.

77. *Id.* at 322.

78. *Id.* at 355.

79. *Id.* at 356.

again, for Luban the resolution of the ethical problem lies in the fourfold root with its focus on the institution. A sufficiently weighty cause may give the public interest lawyer reason to manipulate her individual client's well-being. The more just the cause, the better the excuse to manipulate the client.

The political nature of the institution of public interest law allows such conduct. In Luban's vision of political action, the reformers share a primary commitment to the cause, and a derivative mutual commitment to one another. In such circumstances, the individual in the public interest case may be subject to the needs, or even the vote, of the group.

Luban tries to limit this manipulation. For example, he asserts that "manipulation of a client on behalf of the cause is tolerable when and only when the conditions of mutual political commitment (freedom, reciprocity, and equality) are met."⁸⁰ Because one is manipulating the individual in the name of the group, the agent must be clear about the general will of the group. Luban contends that "the existence of a dirty-hands dilemma suggests that the lawyer should put the matter to the group as a whole (or to representative members of the group): a political decision should be made by political processes."⁸¹

Luban summarizes these limitations on dirty hands conduct by concluding

such action is excusable, "forgivable" states the matter more carefully, if

- (1) the clients are also committed to the cause;
- (2) the outcome of the manipulation represents the will of the political group;
- (3) the manipulative behavior is not itself abhorrent to the political group.⁸²

Nonetheless, these limitations cannot convincingly overcome the inherent tension public interest lawyers face when individual client interests conflict with broader goals of legal reform.⁸³ In this sphere, agents face an "intractable moral problem."⁸⁴ Thus, public interest law is a sphere of dirty hands.

Despite his disagreements with Freedman over the range of the adversary system excuse, therefore, Luban ultimately accepts the possibility of role-based moralities when an institution is sufficiently strong to support them. Dirtier tactics are allowed in criminal and in public interest law, given the needs of these institutions. Thus, in Luban, as in Freedman, as in the Lake

80. *Id.* at 337.

81. *Id.* at 339.

82. *Id.* at 340.

83. *Id.* at 336.

84. *Id.*

Pleasant bodies case, the profession obligates its members to questionable moral conduct, which violates common moral principles. While he does so reluctantly, Luban gives the professional role the automatic preference over common moral principles.

Charles Fried raises the dirty hands question when he asks if the lawyer can be a good person, "whether a decent, morally sensitive person" can ever be a lawyer.⁸⁵ He has drawn an analogy between the lawyer and the friend. In my opinion, Fried's analogy has become the Rorschach test for contemporary legal ethics. This analogy suggests a common morality approach, because both lawyers and friends should act under common moral principles. Moreover, Fried's essay implicitly criticizes Luban's account of public interest dirty hands. Although Fried's article antedates Luban's book, his argument counters Luban's resistance to the client control objection. Fried argues that: "[T]he concept of legal friendship was introduced to answer the argument that the lawyer is morally reprehensible to the extent that he lavishes undue concern on some particular person."⁸⁶

Fried, however, does not completely escape the problem of dirty hands. For Fried, the hardest question occurs when the lawyer is asked to do something personally dishonorable but not outlawed by the law or the ethical rules. This borderline area includes conduct that the lawyer finds morally repugnant. Moreover, such conduct may bring harm to a specific person. According to Fried, it is not enough to say that one may decline such a morally repugnant case; the important question is "whether one is morally *bound* to refuse — bound to refuse even if he is the last lawyer in town and no one else will bail him out of his moral conundrum."⁸⁷

In order to solve this problem, Fried's solution is for lawyers to distinguish "between wrongs that a reasonably just legal system permits to be worked by its rules and wrongs which the lawyer personally commits."⁸⁸ For example, asserting the statute of limitations or lack of a written memorandum is not a personal action; "it is a formal, legally-defined act."⁸⁹ But humiliating a witness or lying to a judge is a personal act. Thus the legal system insulates the lawyer's moral responsibility in the former cases, but not in the latter. Fried maintains there is a difference "between the lawyer's own wrong and the wrong of the system used to advantage by the client."⁹⁰

While Fried's solution is intriguing, its underlying principles are unclear. Fried does not expect this solution to resolve every borderline case. But it looks again as if the institution will justify questionable conduct. Thus Fried

85. Fried, *supra* note 35, at 135.

86. *Id.* at 141.

87. *Id.* at 148.

88. *Id.* at 149.

89. *Id.*

90. *Id.*

and Luban hint of approaches to legal ethics that circumvent the violation of moral principles. In the end, however, they succumb to dirty hands.

III. LEGAL ETHICS: A CLOSED SYSTEM

Dirty hands has not been a clear metaphor in the literature of political ethics. My discussion of Freedman's and Luban's analyses of legal ethics suggests the difficulty of the metaphor. One vision of dirty hands is that, in violating common morality, the agent acts immorally, although, paradoxically, the immorality is justifiable. This is Walzer's view. Luban suggests such an approach in public interest law.

Another vision holds that the agent violates moral principles because she obeys another, more compelling, morality—the morality of role. Thus complexity, not immorality, makes the agent's hands dirty. Freedman's adversary ethic supports this reading, as does Luban's institutional excuse. Hence, actions endorsed by Freedman and Luban, including the failure to disclose the location of the Lake Pleasant bodies, are not immoral, but moral in a different sense.

Walzer's description of political ethics supports the former view: the politician acts immorally. Much of the literature of legal ethics presupposes the second view of dirty hands: lawyers act according to a separate morality. Such a view is accepted by, for example, Anthony Kronman, when he employs the language of dirty hands.⁹¹ Luban and Freedman at times defend the latter view. The second view is attractive because it offers one way to "solve" the problem of dirty hands: it allows the agent to act morally, not immorally.

In this section I ask if legal ethics is a dirty hands field in the second sense, that is, if it is a separate morality. Although many proponents of legal ethics suggest that it is, I argue that appeals to a separate morality cannot eliminate the problem of dirty hands. The legal ethic is too flawed to provide sufficient justification for a separate morality. The most serious flaw is that the norms of legal ethics arise in significant part from self-interest. In addition, even if the separate morality were adequate, it is subject to serious deficiencies in enforcement. These failures of enforcement undermine the justification for a separate ethic.

A. AN ETHIC OF SELF-INTEREST

Legal ethics is a closed system, circumscribed in its sources, application and enforcement. Wherever one roams in the field, one encounters lawyers.

91. KRONMAN, *supra* note 1, at 101-06 (observing that the ideal statesman is peculiarly well equipped to confront unavoidable political ruthlessness).

Lawyers write the rules; lawyers interpret the rules; lawyers enforce the rules. In this country, it is difficult to identify a more closed professional ethic. Although much has been written about a medical fraternity unwilling to challenge its own members, doctors must face lawyers and judges when they make mistakes. Christian clergy, who also live within closed professional systems, are held accountable to members of a different profession in courts of law when they overstep certain boundaries.

The fundamental sources of legal ethics are profession-specific documents. The profession obligates its members to obey standard codes, canons or rules. Lawyers take multiple-choice tests on these rules when they enter the profession. The rules are written by lawyers under the assumption that lawyers best understand the moral requirements of the practice of law. The original American legal ethical standards were canons, written by lawyers to guide the conduct of their group. The American Bar Association's *1908 Canons* governed the profession for many years, from 1908 to 1969. Then the profession replaced the *Canons* with the *Model Code of Professional Responsibility (Model Code)*.⁹² The *Model Code* lasted a much shorter time, and was eventually replaced, or at least supplemented, by the *Model Rules of Professional Responsibility (Model Rules)*.⁹³

The changes in codes and rules reflect changes in the perspective of lawyers.⁹⁴ The *Canons* were drafted by the bar.⁹⁵ The *Model Code* was also drafted by lawyers only: "No outsiders were invited to participate or review drafts; no interim drafts were published or circulated; no hearings were held."⁹⁶ In contrast, Geoffrey Hazard reports that the Kutak Commission, which prepared the *Model Rules*, was very different and resembled "public lawmaking."⁹⁷ This commission held public hearings and distributed drafts of proposed rules. Yet, even this controversial commission, whose proposed reforms prompted great opposition from the American Bar Association, was composed primarily of lawyers.⁹⁸ After some discussion, two non-lawyers, Lois Harrison, of the League of Women Voters, and *Washington Post* editor Alan Barth, were added to the group.⁹⁹ Barth was not replaced

92. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

93. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]. States vary in their adoption of the MODEL RULES or the MODEL CODE.

94. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L. J. 1239 (1991) [hereinafter Hazard, *The Future of Legal Ethics*] (remarking that the change from the original *Canons* to the *Model Code* was a bigger shift than the move from the *Model Code* to the *Model Rules*, although the latter inspired comparatively greater uproar).

95. *Id.* at 1250-51.

96. *Id.* at 1253.

97. *Id.*

98. *Id.*

99. Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in LAWYERS' IDEALS/LAWYERS' PRACTICES 95, 108 (Robert Nelson et al. eds., 1992) [hereinafter Schneyer, *Professionalism as Politics*].

when he died in 1979.¹⁰⁰ Theodore Schneyer identifies Harrison's contribution as the requirement that lawyers put their fee agreements into writing.¹⁰¹ Reaction from non-lawyers was sought in public hearings on the drafts of the Rules, but the meetings were sparsely attended.¹⁰² Schneyer observes: "Not only did the public members of the commission prove inconsequential, but lay groups completely ignored the series of public hearings the commission held in 1980."¹⁰³ Public opinion was important in one sense, but one that had nothing to do with the merits of the ethical content of the *Model Rules*. Public opinion really meant good public relations, which became important to the legal profession in the wake of the Watergate scandal.¹⁰⁴

Thus lawyers' ethics are promulgated by lawyers. Then the rules are enforced against lawyers by other lawyers, by bar associations, or by judges in a court of law. Even attempts at outside regulation do not always escape the perspective of lawyers. In securities and banking law, for example, legislation may implicate the lawyer's ethics, but the interpretation of the lawyer's duty often reverts to the courts. Thus lawyers' ethical duties continue to be defined by lawyers.

For example, in *Schatz v. Rosenberg*,¹⁰⁵ Ivan and Joanne Schatz sued the law firm of Weinberg & Green (Weinberg) for violations of securities law, as well as common law misrepresentation.¹⁰⁶ Weinberg represented Mark Rosenberg and his MER Enterprises in dealings with the Schatzes. Rosenberg purchased an 80% interest in two companies owned by the Schatzes.¹⁰⁷ Rosenberg gave them promissory notes for \$1.4 million and the Schatzes provided a bridge loan of \$150,000 to Rosenberg.¹⁰⁸ The notes were worthless.¹⁰⁹ The Schatzes relied on a financial statement and an update letter, prepared by Weinberg, which overvalued Rosenberg's assets and contained other misrepresentations.¹¹⁰

The ethical question focuses on Weinberg's responsibility to the Schatzes.¹¹¹ As with the Lake Pleasant bodies case, responsibility is linked to the issue of disclosure. The Fourth Circuit ruled that Weinberg had no

100. *Id.*

101. *Id.*

102. *Id.* at 109.

103. *Id.* See also Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 667 (1981) (noting that "the principal symbolic function of rules of professional conduct, clearly, is legitimation.").

104. Schneyer, *Professionalism as Politics*, *supra* note 99, at 109.

105. 943 F.2d 485 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

106. *Id.* at 487.

107. *Id.*

108. *Id.* at 488.

109. *Id.*

110. *Id.*

111. See Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the*

duty to disclose Rosenberg's misrepresentation to the Schatzes.¹¹² The sources cited in the ruling illustrate the range of the court's approach to legal ethics. The court searched in vain for a duty to disclose in Maryland's legal ethics rules, Maryland common law, federal securities law, and public policy. The Maryland Rules of Professional Responsibility — and in particular, an ethics ruling from the State Bar Ethics Committee — were rejected as sources of a duty to disclose because the court reasoned that ethical codes for lawyers regulate the profession, but do not serve as legal standards of liability, and cannot provide a legal duty to disclose.¹¹³

Maryland common law also failed to impose a duty on Weinberg, for in Maryland a lawyer owes a duty only to clients or to third party beneficiaries of the lawyer's legal opinion.¹¹⁴ Weinberg had not issued any legal opinions, only an update letter.¹¹⁵

A duty to disclose was not found in federal securities law.¹¹⁶ The Schatzes alleged violations of section 10(b) of the Securities Exchange Act of 1934¹¹⁷ and aiding and abetting under the securities laws.¹¹⁸ They charged that Weinberg committed fraud by: (1) failing to disclose (silence) Rosenberg's misrepresentations as well as (2) making "affirmative misstatements" about Rosenberg's assets.¹¹⁹ Weinberg prepared the financial update letter for MER, as well as the closing documents which contained the misrepresentations. Weinberg argued, however, that he merely forwarded Rosenberg's own statements to the Schatzes.¹²⁰

The court agreed with Weinberg and ruled that non-disclosure of Rosenberg's troubles did not violate section 10(b) because there is no liability for silence, absent a duty to disclose.¹²¹ Under federal securities law, a duty of disclosure arises from a fiduciary — or similar — relationship between the

Kaye Scholer Case, 26 AKRON L. REV. 395 (1993) [hereinafter Hazard, *Lawyer Liability in Third Party Situations*] (discussing attorneys' liability to third parties with respect to the savings and loan crisis).

112. *Schatz*, 943 F.2d at 498.

113. *Id.* at 492. The court held: "The rationale for these rulings is clear. The ethical rules were intended by their drafters to regulate the conduct of the profession, not to create actionable duties in favor of third parties." *Id.*

114. *Id.*

115. *Id.* at 488. See also *Fortson v. Winstead*, 961 F.2d 469, 472 (4th Cir. 1992) (holding that "a failure to disclose material information constitutes securities fraud only upon proof of a duty to disclose"). Citing *Schatz*, the court held that federal securities laws cannot be the source of that duty. *Id.*

116. *Schatz*, 943 F.2d at 492.

117. 15 U.S.C. § 78(b) (1988).

118. *Schatz*, 943 F.2d at 489.

119. *Id.*

120. Note that the plaintiffs alleged that Weinberg & Green "knew that its client, Rosenberg, was financially insolvent." *Id.* The court's conclusion as to whether Weinberg possessed this knowledge is unclear.

121. In *Schatz*, the court identified the following elements of a section 10(b) and Rule 10b-5 violation: "[T]he defendant (1) made an untrue statement of material fact or omitted a material fact

parties, a relationship not present between lawyers and non-clients. A confidential or fiduciary relationship would have to be present between lawyer and non-client for a duty to disclose to arise.¹²² This standard would have required a signed opinion, such as a tax opinion, written for a third party.¹²³

The court also rejected a public policy argument favoring lawyer disclosure of such information, because it feared that recognition of a general duty to disclose would undermine the attorney-client relationship.¹²⁴ Clients might restrict their communications with their attorneys and thus hamper attorneys' search for knowledge about their clients' undertakings. The presence of this argument in the opinion is unsurprising. Whenever there is a discussion of a duty to disclose, lawyers — and judges — retreat to the argument that disclosure will ruin the attorney-client relationship.

None of the legal or ethical sources, even statutes whose original purpose was to protect investors, included any obligation to third parties. Moreover, interpretation of statutes that identify a duty to disclose is left to lawyers. Canons, codes or rules of ethics, statutes, and statutory interpretations: the court confronts an array of ethical sources, but not a very broad array. Even when it reaches beyond the ethical rules, the ethical range is narrow.

A closed ethical system is not per se unethical, nor does it automatically lead to dirty hands. But it is fraught with dangers. Reinhold Niebuhr warned that individuals working within groups are confronted by collective egoism and so pursue their own interests at the expense of others.¹²⁵ Legal ethics is subject to this temptation of self-interest, and so provides an illustration of an "immoral society."

Many commentators have identified the predominance of self-interest in

that rendered the statements misleading, (2) in connection with the purchase or sale of a security, (3) with scienter, and (4) which caused plaintiff's losses." *Id.*

122. The court cited the test employed in *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 914 (1989), that lawyers can be liable to third parties "only if the non-client plaintiff can prove that the attorney prepared specific legal documents that represent explicitly the legal opinion of the attorney preparing them, for the benefit of the plaintiff." *Id.* at 491.

123. *But see* *Ackerman v. Schwartz*, 947 F.2d 841, 848 (7th Cir. 1991) (distinguishing between silence and a material lie, arguing that even without a duty to disclose, a material lie is prohibited under section 10(b) and explaining that "[u]nder Rule 10b-5, moreover, the lack of an independent duty does not excuse a material lie.").

124. *Schatz*, 943 F.2d at 493.

125. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* (1932). Niebuhr appears to be the favorite theologian of those who accuse the profession of self-interest. *See, e.g.*, Timothy W. Floyd, *Realism, Responsibility and the Good Lawyer: Niebuhrian Perspectives on Legal Ethics*, 67 NOTRE DAME L. REV. 587 (1992) (applying Niebuhr's ethic of responsibility to issues raised by client loyalty); Amy R. Mashburn, *Pragmatism and Paradox: Reinhold Niebuhr's Critical Social Ethic and the Regulation of Lawyers*, 6 GEO. J. LEGAL ETHICS 737 (1993) (analyzing the *Model Code* based on Niebuhrian theory and methodology).

legal ethics.¹²⁶ The most striking example involves confidentiality. Confidentiality is a central tenet of the legal profession, present in its ethical codes, as well as its ideology and ethos.¹²⁷ Lawyers justify their commitment to confidentiality based on their fidelity to clients.¹²⁸ Keeping confidences both protects the client's interests, and upholds the adversary system. If clients think their confidences will be betrayed, they will not fully communicate with their lawyers. As a result, their cases will not be represented most effectively. It was this ethos that Frank Armani imbibed in law school, and for which Monroe Freedman provides intellectual underpinning.¹²⁹

The ideology of confidentiality explains why the legal profession has found it difficult to identify any exceptions to an absolute norm of confidentiality.¹³⁰ It also explains lawyers' fervent conviction that any exception, no matter how limited, will lead to the demise of the adversarial system.¹³¹

126. See Stephen Gillers, *What We Talked About When We Talked About Ethics*, 46 OHIO ST. L.J. 243, 256 [hereinafter Gillers, *What We Talked About*] (observing that the lawyer's duty of confidentiality yield when the lawyer's interests are in peril). See also Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981) (noting that the bar's commitment to advancing public ends is superficial).

127. See Hazard, *The Future of Legal Ethics*, *supra* note 94, at 1242 (identifying the ethos of the profession as the fearless lawyer championing the oppressed, bound by loyalty, confidentiality and candor to the court); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C.L. REV. 1389, 1427 (1992) [hereinafter Koniak, *Bar and State*] (noting that although codes of ethics mask the centrality of confidentiality to the bar, ethics opinions indicate that commitment to confidentiality unifies the bar in its war against the state).

128. Koniak, *Bar and State*, *supra* note 127, at 1456 ("For the bar, the moral of its narratives is duty to client first.").

129. See *supra* part II.A-B (describing the standard and contemporary view of dirty hands).

130. The *Model Code* permits, but does not require, disclosure of "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." MODEL CODE DR 4-101 (1980). It also allows disclosure of "[c]onfidences or secrets necessary to establish or collect [the lawyer's] fee or to defend himself or his employees or associates against an accusation of wrongful conduct." *Id.*

The *Model Rules* allow, but do not require, disclosure "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES Rule 1.6(b)(1). Disclosure is allowed "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." MODEL RULES Rule 1.6(b)(2). The Commentary to the *Model Rules* states that "[a] lawyer's decision not to take preventive action" on the criminal act does not violate the Rule. MODEL RULES Rule 1.6 cmt. The Kutak Commission proposed, but did not pass, a provision that allowed disclosure "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another" as well as "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used." COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, AM. BAR ASS'N, REVISED FINAL DRAFT OF MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6 (June 1982). See Deborah H. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985) [hereinafter Rhode, *Ethical Perspectives*] (summarizing the debate on confidentiality at the Kutak Commission as an illustration of the legal ethics system).

131. This belief that the legal system will disintegrate with any violation of confidentiality

Commitment to client protection may explain why lawyers needed to debate the most obvious exception to confidentiality, which permits disclosure of client confidences to prevent future bodily harm to a third party. It may also explain lawyers' reluctance to admit an exception to confidentiality for disclosure of fraud in financial transactions.¹³² It may even explain the Lake Pleasant bodies case.

However, it cannot explain the exceptions to client confidentiality that appear unexceptionable to lawyers. Lawyers quickly abandon absolute confidentiality when their fees are at stake or when the quality of their representation is challenged.¹³³ As Stephen Gillers has stated: "Though the confidentiality duty does not yield in the face of injustice to others, it dissolves if there is peril to the professional or financial interests of the lawyer."¹³⁴ Gillers captures the flavor of a professional ethic based on self-interest:

The lawyers who approved the Rules [of Professional Conduct] looked after their own. They have given us an astonishingly parochial, self-aggrandizing document, which favors lawyers over clients, other persons, and the administration of justice in almost every line, paragraph, and provision that permits significant choice. It is internally inconsistent to the bar's benefit.¹³⁵

If self-interest is the guiding force behind professional canons, then lawyers' hands will be dirty when they follow their separate ethic.

B. AN ETHIC WITHOUT ENFORCEMENT

Inadequacy of enforcement exacerbates problems of self-interest in the

pervades the literature. *But see* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1142 (1988) [hereinafter Simon, *Ethical Discretion*] ("[t]he argument's empirical premises are unverifiable and not powerful intuitively"); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (noting that lawyers often ignore empirical studies of confidentiality, but that such studies confirm the problems with absolute confidentiality).

132. See Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, The Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 999 n.57 (1993) for a summary of this discussion. The original rule required attorneys to reveal client fraud, but in 1974 it was qualified by the addition of "except when the information is protected as a privileged communication." *Id.* Model Rule 1.6 allowed revelation of fraud against a third party, but now the rule forbids disclosure. Instead, the lawyer may withdraw from the case. *Id.* See also Koniak, *Bar & State*, *supra* note 127, at 1431-47 (discussing the importance of confidentiality to the bar). For an overview of problems in the legal profession with confidentiality, see Rhode, *Ethical Perspectives*, *supra* note 130.

133. See MODEL RULES Rule 1.6(b)(2) (providing exceptions to the confidentiality rule when the lawyer's conduct is in dispute).

134. Gillers, *What We Talked About*, *supra* note 126, at 256. See also Rhode, *Ethical Perspectives*, *supra* note 130, at 590 (noting "insular" quality of the bar's interest in legal ethics).

135. Gillers, *What We Talked About*, *supra* note 126, at 245. See also Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 711 (1981) (stating that "[t]his self-protective attitude of the profession . . . is in reality the central, and so far, intractable puzzle of professional discipline.").

content of legal ethics. Even if one concedes, *arguendo*, that lawyers can devise for themselves appropriate rules of conduct, failures of enforcement call the ethic into question. Lawyers share with other professionals an unwillingness to discipline members of their own group. The problem is compounded by the fact that courts of law are the last resort for enforcement.¹³⁶

The dangers of enforcement in a closed ethical system are evident in the history of Rule 11 sanctions.¹³⁷ Rule 11 was passed as an attempt to guide the conduct of lawyers. Under Rule 11, sanctions can be sought against a lawyer who files frivolous lawsuits, or who uses frivolous arguments in a lawsuit.¹³⁸ The rule states:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.¹³⁹

What appears as an unobjectionable ethical rule has not worked so well in practice. Rule 11 has been used by lawyers as a weapon against other lawyers, especially against civil rights plaintiffs or lawyers for the poor.¹⁴⁰ The rule against frivolity can become a tool of harassment.

Moreover, the courts have failed to enforce Rule 11 in a meaningful manner. In *Cooter & Gell v. Hartmarx Corp.*,¹⁴¹ the Supreme Court established an abuse of discretion standard for review of Rule 11 sanctions.¹⁴² That standard is virtually meaningless; it provides little guidance to lower courts as to what circumstances really warrant sanctions.¹⁴³ Thus, little consistency has emerged in the circuit courts over the appropriate use of Rule 11 sanctions. Given the uncertainty in interpretation and enforcement

136. Martyn, *supra* note 135, at 707 (stating that "[u]nlike other professionals, who are supervised by state regulatory agencies, lawyers remain a virtually self-regulated profession.").

137. FED. R. CIV. P. 11.

138. *Id.*

139. *Id.*

140. See, e.g., David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 838-40 (1992) [hereinafter Wilkins, *Who Should Regulate Lawyers?*] (noting that certain kinds of plaintiffs are particularly likely to be sanctioned under Rule 11).

141. 496 U.S. 384 (1990).

142. *Id.* at 405.

143. For a critique of the standard developed in *Cooter & Gell*, see Marjorie Carol Turk, *Cooter & Gell v. Hartmarx Corp.: Federal Rule 11 Sanctions and the Inequitable Application of the Abuse of Discretion Standard of Review*, 25 LOY. L. REV. 555 (1992).

of this Rule, it is difficult to see how it functions as a meaningful, practical standard for lawyers.

Susan Koniak has described the numerous enforcement problems of legal ethics.¹⁴⁴ The standard view of legal ethics, asserts Koniak, is that attorneys should do everything possible for their clients without violating the law.¹⁴⁵ From the perspective of the problem of dirty hands, this restriction—that attorneys not violate the law in service of their clients — appears to provide an important restraint on the conduct of attorneys.

One could argue that this limitation justifies the separate ethic for lawyers; under this standard, lawyers are as accountable as any other parties for their violations of the law. Koniak, however, has demonstrated that this standard does not work in practice.¹⁴⁶ What counts as a violation of the law is often unclear, and the standard is uncertain in content.¹⁴⁷

Instead, lawyers engage in a constant battle to define the content of the law. Two visions of legal ethics are thus at war. The bar seeks to impose one view, while the state seeks to impose another. The state and the bar thus contest one another for control of the profession. Koniak claims that “[t]he state acts weak and speaks weak.”¹⁴⁸ But the bar is a strong actor, constantly asserting its own interests. When the state acts against the bar’s self-interest, the bar fights back.¹⁴⁹ For example, the bar tries to overcome state rulings on ethics when it disagrees with them.¹⁵⁰ The problem does not end with division between the state and the bar. Instead, the courts — whose task is to resolve disputes — do not mediate the conflict. The next layer of lawyers does not enforce legal ethics. Judges have been reluctant to enter the fray, and courts have “refuse[d] to frame the law.”¹⁵¹ Koniak asserts that: “[J]udges are particularly unlikely to assert their interpretive power or back their interpretations with violence in cases in which their understanding of law diverges from the bar’s.”¹⁵²

Koniak’s writings demonstrate how an ethic of self-interest, combined

144. Koniak, *Bar and State*, *supra* note 127.

145. *Id.* at 1395-96.

146. *Id.* at 1398.

147. See generally Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075, 1101 (1993) [hereinafter Koniak, *When Courts Refuse*]. Koniak contends that: “When confronted with court law contrary to bar law, the bar often takes the position that a lawyer may ethically comply with the court but is not required to do so.” *Id.*

148. Koniak, *Bar and State*, *supra* note 127, at 1391.

149. Koniak, *When Courts Refuse*, *supra* note 147, at 1101.

150. Koniak, *Bar and State*, *supra* note 127, at 1411. (noting that the bar presumes ethics rules control when they conflict with other law, whereas the state presumes that its laws control when they conflict with ethics rules).

151. *Id.*

152. Koniak, *When Courts Refuse*, *supra* note 147, at 1079. See also Hazard, *The Future of Legal Ethics*, *supra* note 94, at 1260 (asserting that the distance between the courts and the legal profession continues to grow).

with poor enforcement, provides a questionable morality for practicing lawyers. Her examination of securities law illustrates the problem. In the 1970's, the SEC sought a disclosure of fraud standard for lawyers in practice before the Commission. The bar vigorously opposed the standard, "[t]he courts ducked,"¹⁵³ and the issue was left unresolved.

The issue reappears in recent discussions of securities and banking law, and in the savings and loan scandal. Defenders of lawyers' conduct in the savings and loan crisis support the separate ethic of the lawyer, who protects client interests, without disclosing confidences. Under this view, disclosure of fraud violates ethics. Koniak is more critical of the bar; she argues that the legal profession invited the wrath of enforcers by refusing to provide and enforce meaningful ethical standards within the profession. She states that:

One must judge a private group's legal vision based on the acts it justifies. In the case of the bar, we must consider the acts of lawyers that the bar's law justifies. By this standard, I believe the state's vision is better than the bar's. Too many lawyers seem to live a law that functions as a justification for aiding clients' fraudulent schemes. A law that suggests that O.P.M.'s lawyers [who did not disclose financial fraud] did the right thing demands reform.¹⁵⁴

Koniak's criticisms of legal ethics can be read to offer another criticism of the separate ethic for the lawyer. Such a reading sympathizes with the profession's claims that legal practice confronts lawyers with difficult challenges, which they alone can understand. On this reading of legal ethics, the professional ethic ultimately fails because it does not provide lawyers with any clear code of behavior. The ethic is so muddled that it lacks sufficient status to justify a separate morality.¹⁵⁵

153. Koniak, *When Courts Refuse*, *supra* note 147, at 1079. Koniak suggests the court ducked in *SEC v. Nat'l Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978), when it held that an attorney who knew of inaccurate financial statements was liable for failing to disclose them before merger. *Id.* See also Koniak, *Bar and State*, *supra* note 127, at 1465 (arguing that the court in *SEC v. Nat'l Student Marketing Corp.* conceded "its role as authoritative interpreter simultaneously to the bar and the SEC.").

154. Koniak, *When Courts Refuse*, *supra* note 147, at 1109-10. In the O.P.M. case, the attorneys found out from the clients that financial statements were misleading. The client kept assuring the lawyers that no fraud was being committed. The law firm, Singer Hutner, eventually withdrew from the case, knowing that \$80-90 million worth of fraudulent loans were outstanding. The new law firm continued to close fraudulent deals. *Id.* at 1096-97 (citing *In re O.P.M. Leasing Servs.*, 28 B.R. 740 (Bankr. S.D.N.Y. 1983)).

155. See Abel, *supra* note 103, at 642. Abel contends that:

In order for rules to mold behavior they must set forth the boundaries of that behavior with clarity; the vaguer they are, the less effect they can have (or at least the less predictable that effect will be). Yet the Model Rules are drafted with an amorphousness and ambiguity that render them virtually meaningless.

Id.

The Kaye Scholer case, in which lawyers debated what standard applies to them as they practice law in a regulated industry, illustrates this difficulty. The Office of Thrift Supervision (OTS) filed a \$275 million action against the law firm Kaye Scholer, alleging violations of thrift regulations in Kaye Scholer's representation of Lincoln Savings and Loan (Lincoln).¹⁵⁶ Kaye Scholer had represented Lincoln before the Federal Home Loan Bank Board. The FDIC eventually took over Lincoln, and declared its insolvency.¹⁵⁷ The OTS accused Kay Scholer of hiding Lincoln's insolvency from federal regulators. Kaye Scholer eventually settled the suit for \$41 million.¹⁵⁸

Disclosure was the central issue in the case. The OTS charged that Kaye Scholer "knowingly misrepresented" Lincoln's status, and also "failed to disclose" the resignation of the accountants, the improper inflation of assets, and numerous adverse documents that were relevant to Lincoln's solvency.¹⁵⁹ Kaye Scholer's immediate defense was that the charges were an "attempt by the OTS to create and apply new standards for attorney conduct that are different from, and inconsistent with, generally accepted professional standards and ethical obligations for lawyers representing a client."¹⁶⁰

The discussion of the ethical issues surrounding Kaye Scholer illustrates the conflict and confusion within the profession over the meaning of lawyers' ethical standards. Harris Weinstein, the former Chief Counsel of the OTS, has examined the Kaye Scholer case in light of professional ethical standards and statutory authority.¹⁶¹ Weinstein argues that the charges against Kaye Scholer should be read in connection with the requirements of banking practice.¹⁶² He posits that the law firm's duty arose from an OTS regulation¹⁶³ which prohibits false statements and material omissions. If the law prohibits the client from such deception, then the attorney is also so prohibited, argues Weinstein.¹⁶⁴ On the issue of confidentiality, Weinstein concludes that "the best way to maximize the degree of client compliance with the law is to preserve confidences but also to make clear, both within

156. The chronology of these events is spelled out in Forum, *Introduction: Kaye, Scholer and the OTS — Did Anyone Go Too Far?*, 66 S. CAL. L. REV. 977 (1993).

157. *Id.*

158. *Id.*

159. *Id.* at 981-82.

160. *Id.* at 982-83 (quoting Memorandum from Kaye, Scholer Executive Committee to All Kaye, Scholer Personnel 1 (Mar. 2, 1992)).

161. Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53 (1993).

162. *Id.* at 62.

163. 12 C.F.R. § 563.180(b) (1992). Weinstein notes the parallels between these regulations and Rule 10-b(5) of securities law. Weinstein, *supra* note 161, at 56.

164. Weinstein, *supra* note 161, at 56.

the profession and to clients and the society at large, that a lawyer may have no role in assisting unlawful conduct.”¹⁶⁵ Furthermore, “[t]he [attorney-client] privilege protects silence, not deceit.”¹⁶⁶ Thus legal as well as ethical obligations would obligate disclosure by attorneys who knew of Lincoln’s condition.

Yet there is great fear within the profession that the regulators have gone too far, and that their actions threaten the profession (and finally the client). In these discussions, the relationship between the law and ethics is disputed. Some fear that “regulators have begun to take over from the bar enforcement of ethical rules governing legal practice.”¹⁶⁷ Moreover, this enforcement is not consistent with the traditional view of the lawyer’s role. As one commentator noted, “OTS’ approach was an attempt to use these ethical directives to impose arguably new fiduciary obligations and liabilities on lawyers.”¹⁶⁸ Lawyers who criticize the OTS argue that the bar should be able to police itself through disbarment and other regulations, not by external fines or penalties.¹⁶⁹ “[S]tatutes are the easiest enforcement tools.”¹⁷⁰

The discussion does not end with a conclusion that regulators should use statutes rather than ethical standards for enforcement. The statutes themselves are challenged.¹⁷¹ One commentator has argued that both the Financial Institutions Reform and Recovery Act (FIRREA) and the Securities Enforcement Remedies Act revolutionize lawyers’ ethics by turning lawyers into “watchdogs” or “gatekeepers.”¹⁷² Such a role undermines client confidentiality, and so limits the lawyer’s role.¹⁷³ Under this statutory

165. *Id.* at 64.

166. *Id.* at 61.

167. *See* Curtis, *supra* note 132, at 986 (observing that some commentators argue that OTS alleged ethics violations because insurance covered these malpractice violations, providing a deep pocket).

168. *Id.* at 996.

169. *Id.* at 1002 (citing Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 312 (1992)).

170. Curtis, *supra* note 132, at 1010. *See also* Jonathan R. Macey & Geoffrey P. Miller, *Kaye Scholer, FIRREA, and the Desirability of Early Closure: A View of the Kaye, Scholer Case From the Perspective of Bank Regulatory Policy*, 66 S. CAL. L. REV. 1115 (recommending enforcement, not of ethics rules, but of federal law). The authors argue that sanctions against Kaye Scholer are not an efficient enforcement mechanism because the real problem in the savings and loan crisis was with regulators who failed to move quickly enough against institutions. *Id.* at 1130.

171. The statutes are challenged on economic and policy grounds, as well as on ethical grounds. *See, e.g.*, Macey & Miller, *supra* note 170, at 1131 (questioning whether the prosecution of Kaye Scholer will result in an improved banking system).

172. Robert G. Day, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 STAN. L. REV. 645 (1993).

173. *Id.* at 667. Day argues that:

Heightened attorney liability generated through liberal enforcement of the Remedies Act

framework, "confidentiality, the heretofore presumed cornerstone of legal ethics, would be effectively eviscerated."¹⁷⁴

Then Luban-style questions arise: is practice before a government agency similar to criminal practice, or civil practice? Is it litigation, or regulatory practice, or counseling? For some, any practice before a government agency is equivalent to criminal practice, because the client faces the full enforcement powers of the government. So the strict criminal rule against any disclosure in any circumstances reappears in the regulatory context.

According to Curtis, "[w]hatever the causes, it is clear that regulation of lawyers' practice and enforcement of lawyers' ethical rules is slipping away from the bar and into the hands of agencies and courts. This trend appears to be irreversible."¹⁷⁵ The battle is joined among lawyers, who dispute which lawyers will be the final regulators, and responsibility is uncertain as the norms for practice remain unclear.¹⁷⁶ It remains to be seen whether the courts will also regulate their fellow professionals or whether society must turn to non-lawyers.

The confusion over ethical norms is also present in discussions of the lawyer's obligation to report child abuse to state authorities. The diversity of state reporting statutes shows that lawmakers disagree over whether lawyers should be treated as other professionals, or as other citizens, in the requirement to report child abuse.¹⁷⁷ The child abuse cases demonstrate that the lines between past crimes, future crimes, and continuous crimes, are tenuous.¹⁷⁸ The state statutes also illustrate the difficulty of identifying

could significantly affect the professional behavior of securities lawyers. . . . We cannot allow the SEC to view its new powers as the basis for imposing a regulatory model of legal ethics. The analysis of FIRREA shows that the heavy costs imposed by such a regime, especially in terms of the effects on the attorney-client relationship, outweigh any potential benefits in enforcement efficiency. This conclusion applies with even greater force to the securities markets.

Id. at 683. *But see* Hazard, *Lawyer Liability in Third Party Situations*, *supra* note 111 (arguing that the Kaye Scholer case does not extend third party liability for lawyers).

174. Day, *supra* note 172, at 685.

175. Curtis, *supra* note 132, at 1017. And it appears to be happening in securities law as well, with passage of the Securities Law Enforcement Remedies Act of 1990, which "like FIRREA, attempts to provide regulators with more powerful and more flexible enforcement alternatives." *See* Day, *supra* note 172, at 676.

176. Curtis, *supra* note 132, at 1012 ("There is simply too much shared history and experience among the regulators, the judiciary, and the lawyers in the regulated community for regulators to contemplate a slash-and-burn campaign to put law firms out of business, or for such a campaign to succeed."). This comment cuts both ways; it may save the profession, but it may also mean more failures of enforcement.

177. *See* Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 216-24 (1992) (discussing how some states, such as Florida, Kentucky, New Hampshire, and Rhode Island, retain the attorney-client privilege in their child-abuse reporting statutes).

178. *Id.* at 238-57 (noting that the lawyer who hears of past child abuse may have reason to think it

what the law demands of the lawyer who must not violate existing law. It is striking that in the midst of this confusion about the law of reporting child abuse, one commentator has noted that the only option left to the lawyer is to pursue "self-protection," or "self-preservation."¹⁷⁹

Thus in addition to concerns about self-interest, or failures of enforcement, current legal ethical standards offer moral confusion rather than moral clarity. Such confusion may explain why Geoffrey Hazard has stated that "neither the public at large nor lawyers themselves have a clear sense of what the legal profession is,"¹⁸⁰ or why Kronman entitled his book on the legal profession "The Lost Lawyer."¹⁸¹ A self-interested, unenforced, and confused professional ethic hardly justifies a separate morality removed from common moral standards.

The bar vigorously supports its separate ethic, content to claim that it knows best what the standards for lawyers should be. Indeed the bar does know best what is in the best interests of lawyers. Judge Sporkin's famous question — "Where were the lawyers?"¹⁸² — cuts to the heart, not only of the savings and loan crisis, but of legal ethics. They thought they were in a separate moral sphere, but to outsiders they appeared to be caught in public with dirty hands.¹⁸³

is on-going or subject to repetition). See also Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243 (1987) (observing that because child abuse is both a continuing and a future crime, it is unclear whether the attorney may reveal a client's future misconduct as a continuing crime).

179. Mosteller, *supra* note 177, at 243. He explains:

The lawyer is thus placed in an extremely vulnerable position where both professional and personal self-preservation require disclosure. In recent years, courts and ethics panels have increasingly recognized the right of an attorney who is, or may become, the target of criminal or civil action to make disclosures of confidential information for self-protection.

Id. Mosteller further notes that "[a]lthough courts and, to a lesser degree, ethics panels can provide some assistance, legislative action is probably required to avoid disclosure by lawyers, who understandably will act out of a need for personal and professional self-protection." *Id.* at 274.

180. Hazard, *The Future of Legal Ethics*, *supra* note 94, at 1242.

181. KRONMAN, *supra* note 1.

182. *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (Sporkin, J.). Sporkin asks:

Where were these professionals . . . when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions? Where also were the outside accountants and attorneys when these transactions were effectuated? What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.

Id.

183. See Nancy Rutter, *Dirty Hands*, 12 CAL. LAW. 30 (Jan. 1992) (reviewing the role of the law firm Jones, Day in Keating's representation by tracing disputes over lawyers' responsibility in representation).

IV. THE PROBLEM WITH DIRTY HANDS: A FLAWED ETHIC

With the failure of the separate morality argument, Walzer's account of dirty hands — that the politician acts immorally — reasserts itself as a plausible interpretation of legal ethics. Thus, lawyers at times act immorally in their profession, and then need to ask forgiveness for their offenses. Recall Luban's public interest lawyer.¹⁸⁴ Walzer's interpretation of dirty hands, however, is deeply flawed.¹⁸⁵ A parallel vision of legal ethics confronts the same weaknesses as Walzer's account of the politician. Indeed, this vision faces additional difficulties, because practicing lawyers are not in fact politicians.

Many commentators have criticized Walzer's acceptance of the dirty hands of the politician.¹⁸⁶ The primary criticisms have been enunciated by philosophers who disagree with Walzer's analysis of moral reasoning and political scientists who dispute his interpretation of politics.¹⁸⁷ From these criticisms emerge important guidelines for the avoidance of dirty hands in legal ethics.

Philosophical criticisms of dirty hands suggest that legal ethics should be grounded in clear principles. Moreover, these principles are general moral principles that are not unique to the profession. Political scientists recommend mechanisms of accountability for politicians that would restrict dirty hands behavior.¹⁸⁸ Such mechanisms, including retrospection, generalization, and mediation, should be imported into legal ethics.¹⁸⁹ Finally, some philosophers have suggested that Walzer ignores the importance of character for political ethics.¹⁹⁰ So too has character been ignored in current approaches to legal ethics.

A. AN ETHIC OF PRINCIPLE

Some philosophers have claimed that Walzer's theory suffers from "confused philosophy and bad psychology"¹⁹¹ because "[a]nalytically it is non-

184. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 293. *See also* discussion *supra* Part II.B (discussing the contemporary view of dirty hands).

185. For a discussion of this interpretation, see Walzer, *Dirty Hands*, *supra* note 4.

186. *See* H. Oberdiek, *Clean and Dirty Hands in Politics*, 1 INT'L J. MORAL & SOC. STUD. 41, 53 (arguing that Walzer's account is confused in that "no one can act rightly by acting wrongly."). *See also* W. Kenneth Howard, *Must Public Hands Be Dirty?*, 11 J. OF VALUE INQUIRY, 29, 34 (1977) (proposing that Walzer's depiction of the dilemma of dirty hands provides a starting point for analysis of political conduct, not an ending point).

187. *See infra* Part IV.A-C (analyzing dirty hands as a flawed ethic).

188. *See, e.g.*, THOMPSON, *supra* note 5, at 22.

189. These restrictions are especially important for Luban's public interest lawyer.

190. *See, e.g.*, Bernard Williams, *Professional Morality and its Dispositions*, in *THE GOOD LAWYER*, *supra* note 34, at 259.

191. Oberdiek, *supra* note 186, at 53.

sense to claim [Walzer's politician] was right in acting wrongly."¹⁹² Kantian theorists, as well as utilitarian philosophers, have rejected Walzer's ethical analysis of the politician.¹⁹³ In his essay, Walzer rejected rule-utilitarianism as well as the argument that there are no moral rules.¹⁹⁴ Instead, Walzer argues that when humans violate rules, they know they have done something wrong, even if their action was the best thing to do under the circumstances.¹⁹⁵

In other words, humans experience guilt. Rules, then, serve an important purpose, and guilt helps restrain persons from breaking the rules too easily. Guilt, with its suggestion of regret and reluctance, also shows that persons are "good." This vision of rules and guilt undergirds the concept of dirty hands: the politician cannot remain innocent and cannot act with clean hands.

Disagreement with Walzer's concept of moral rules spans philosophical schools. Alan Donagan, for example, has argued that "common morality," based on the "Hebrew-Christian" tradition and Kantianism, is sophisticated enough to provide moral principles that allow politicians to act with clean hands.¹⁹⁶ With such an approach to morality the problem of dirty hands "dissolves".¹⁹⁷ Other philosophers have argued that consequentialism dissolves the problem, but in a different way: the politician acts morally when she maximizes good consequences.¹⁹⁸ If the action was the best thing to do in the circumstances, then guilt is an inappropriate reaction.

Donagan's treatment of lawyers' ethics is consistent with his criticisms of Walzer in *The Theory of Morality*, and is persuasive as an alternative account of legal ethics.¹⁹⁹ In *The Theory of Morality*, Donagan disputed Walzer's account of the problem of dirty hands, and argued that common morality provides principles that can guide political as well as personal decision-making.²⁰⁰ Donagan's common morality is "the part of common morality according to the Hebrew-Christian tradition which does not depend on any theistic belief."²⁰¹ In addition to Jewish and Christian traditions, Donagan relies on the writings of Immanuel Kant. For Donagan, the image of

192. Howard, *supra* note 186, at 33.

193. See generally WAR AND MORAL RESPONSIBILITY (Marshall Cohen et al., eds., 1974).

194. Walzer, *Dirty Hands*, *supra* note 4, at 108.

195. *Id.* at 109.

196. ALAN DONAGAN, *THE THEORY OF MORALITY*, 180-89 (1977) [hereinafter DONAGAN, *THE THEORY OF MORALITY*].

197. *Id.* at 189.

198. See *id.* at 172-199 (discussing consequentialist interpretations of dirty hands).

199. Donagan, *Justifying Legal Practice*, note 34, at 123.

200. DONAGAN, *THE THEORY OF MORALITY*, *supra* note 196, at 180-89.

201. *Id.* at 29.

politicians with dirty hands is an unnecessary "sentimentalization" of politics and of morality.²⁰²

Donagan applies his common morality position to the analysis of lawyers' ethics.²⁰³ He compares the lawyer in the adversary system of justice to the professional soldier.²⁰⁴ Both professionals are subject to the general moral standards governing all human persons, standards which cannot be overridden by claims of professional responsibility. Hence, for the soldier, just war theory provides the norms for conduct.²⁰⁵ Thus, for Donagan, even one who occupies a morally justified role as soldier, lawyer, or politician is not allowed to do all things.²⁰⁶ The role is never a moral trump.

In contrast to the primacy of the institution in Luban's analysis, Donagan focuses on moral principles that cross personal and institutional boundaries. Donagan's treatment of the Fugitive Slave Act illustrates the interaction of principles and institutions:

[A] lawyer cannot rationally justify practice in the adversary system on the ground that only in that system is the dignity of human beings as autonomous rational agents respected, and then proceed to invoke the adversary system as justifying nineteenth-century lawyers in taking part in prosecutions under the Fugitive Slave Act — an act that flagrantly denied respect to the dignity of slaves. According to its standard justification, the adversary system rests on a moral principle that imposes conditions not only on the scope of that justification but also on morally permissible practice within the system itself. If those conditions are not observed, the justification is invalidated.²⁰⁷

In contrast to Luban, Donagan rejects roles as defeasible presumptions. Role morality does not justify the violation of general moral principles. He explains that "[w]hen the established constraints of their profession fall short of those of morality, lawyers cannot morally justify their actions by pleading conformity with them any more than professional soldiers can with those of theirs."²⁰⁸ In the same way that just war criteria must guide the

202. *Id.* at 189.

203. Donagan, *Justifying Legal Practice*, *supra* note 6, at 123. See also SISSELA BOK, *LYING* 166-73 (1983) (analyzing the pervasiveness of deception in our personal and professional lives).

204. Donagan, *Justifying Legal Practice*, *supra* note 6, at 123.

205. *Id.*

206. *Id.* Charles Fried also draws the analogy between the lawyer and a soldier who fights in a war decreed by others to be just, but does not use "dum-dum bullets." Fried, *supra* note 35, at 149.

207. Donagan, *Justifying Legal Practice*, *supra* note 6, at 133.

208. *Id.* at 135. Note Donagan's concern that lawyers have been especially lax in policing their own profession for misconduct, an added reason to oppose a role morality. *Id.* at 134. For another argument that suggests that lawyers should conform to general moral principles, see Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for A Golden Rule of Candor*, 138 U. PA. L. REV. 761, 764 (1990) (arguing that "lawyers should in all

soldier's choices throughout his professional life, so too must moral principles always regulate the life of the professional attorney.

This insistence on moral principles is evident in Donagan's treatment of confidentiality. The adversary system cannot justify maintaining confidentiality without moral limits, because "it is wrong to promise to keep secret what you have no right to keep secret" and "promises to do wrong are invalid."²⁰⁹ The attorney's professional duty of confidentiality does not override other moral obligations.²¹⁰ If an attorney has a moral duty to disclose information, then she must do so.

Donagan argues that lawyers already accept an exception to confidentiality, for continuing crimes.²¹¹ In moral analysis, to accept only the continuing crimes exception is not persuasive. "More harm is sometimes caused by withholding information about past crimes than about continuing ones."²¹² Donagan rejects Freedman's and Luban's conclusion that Frank Armani should not disclose.²¹³ He repudiates the actions of the lawyers in the Lake Pleasant bodies case, and describes moral justifications of such conduct as moving "from tragedy to farce."²¹⁴

In Donagan's assessment, not even the client's right against self-incrimination in the criminal context is sufficient to overcome the attorney's moral obligation.²¹⁵ In contrast to Luban, Donagan does not focus on the nature of criminal law. Instead, his analysis concentrates on rights and principles.

A murderer has no moral right whatever to escape incrimination by concealing the victim's body, although it would be wrong to compel him or her to reveal where it is. To the extreme wickedness of the original crime there has been added the wickedness of obstructing justice, of calculated cruelty to the victim's family and friends, and of desecrating a human body. That the legal right against self-incrimination should entitle the murderer to enlist professional associates in that obstruction, cruelty, and desecration is monstrous as moral theory.²¹⁶

Hence, in both political and legal ethics, rights and principles, not institutions, drive the analysis. Donagan's approach to legal ethics avoids the pitfalls of the current system. By invoking principles that apply in all

respects deal with their clients in the way they themselves would want to be treated if they were in the client's position.").

209. Donagan, *Justifying Legal Practice*, *supra* note 6, at 142.

210. *Id.* at 142-43.

211. *Id.* at 142.

212. *Id.* at 144.

213. *Id.* at 141.

214. *Id.* at 140.

215. *Id.* at 143.

216. *Id.*

realms of the moral life, he avoids the problem of the closed moral system. In particular, his refusal to restrict legal ethics to lawyers' principles avoids the problem of self-interest.²¹⁷

Donagan's reliance on principles that apply across moral realms is reminiscent of contemporary medical ethics.²¹⁸ In medical ethics, the principles of autonomy, non-maleficence, beneficence, and justice have been widely accepted as important guidelines for interpreting the conduct of health care professionals.²¹⁹ Principles, however, cannot do all the work of medical ethics, and their use has faced some criticism.²²⁰ Nonetheless, they have offered a helpful framework for reflection on medical ethics. In contrast, it is difficult to identify, much less to apply, the ruling principles of legal ethics.

In medical ethics, the principle of autonomy has focused on the right of the patient to determine her own treatment; much analysis has focused on the meaning of informed consent.²²¹ In theory, the principle mandates patient control over her own treatment. In practice, commitment to that principle has led to procedural safeguards, including the use of informed consent forms.²²² The principle of non-maleficence instructs the doctor to do no harm.²²³ The principle is often identified as the central mandate of the Hippocratic oath. The physician who must touch the body of the patient has an easy opportunity to do physical harm, and thus non-maleficence has clear significance in the medical context. Linked to the principle of non-maleficence is the professional's obligation to act for the well-being of the patient, under the principle of beneficence.²²⁴ Under this principle, the analysis examines when beneficence oversteps its boundaries and becomes paternalism.²²⁵ Finally, the principle of justice requires that persons be

217. *But see* MILNER S. BALL, *THE WORD AND THE LAW* 97-99 (1993) (identifying the importance of stories for legal ethics). Ball emphasizes the importance of narrative for Christian ethics; I prefer an approach of principle within Christian legal ethics as well. *See infra* Part V (discussing the perspective of religious ethics). *But see* Floyd, *supra* note 125, at 605 (supporting H. Richard Niebuhr's ethic of responsibility because it "assumes that relationships between persons are more important than purposes or principles."). Moreover, "the ethic of responsibility suggests that the debate should focus less on relative abstractions, such as purposes and principles, and more on the context of relationships in which lawyers and clients make ethical decisions." *Id.* at 590.

218. *See generally* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (3d ed. 1989) (offering an interdisciplinary and theoretical account of biomedical ethics).

219. *See generally* JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 107-10 (1984).

220. *See generally id.* at 220; Karen Lebacqz, *Bio-ethics: Some Challenges from a Liberation Perspective*, in *ON MORAL MEDICINE: THEOLOGICAL PERSPECTIVES IN MEDICAL ETHICS* (Stephen E. Lammers & Allen Verleg, eds., 1987).

221. BEAUCHAMP & CHILDRESS, *supra* note 218, at 67-74.

222. *Id.* at 74.

223. *Id.* at 120.

224. *Id.* at 194.

225. *Id.* at 209.

given their due.²²⁶ This principle also raises important distributive questions about access to health care.²²⁷

Principles exist in legal ethics. The Preamble to the *Model Code* states that "fundamental ethical principles are always present to guide" the lawyer.²²⁸ Within the *Model Code*, the "Ethical Considerations" provide a body of principles to guide the lawyer in a variety of situations. Those principles, however, are not immediately apparent, at least by name.

Standards of minimum competence and admission to the profession, however, could be read as specifications of the principle of non-maleficence.²²⁹ The concern that legal representation be available to those who need it evokes the principle of justice.²³⁰ The *Model Code* recommends an "informed" choice by the client in the selection of the lawyer and so suggests respect for a principle of autonomy.²³¹

The format of the *Model Rules* makes them more difficult to read within a framework of principle. The *Model Rules* are similar to statutes. This presentation may explain why several commentators describe them as more legalistic than earlier codes.²³² Geoffrey Hazard, for example, has identified a growing legalization of ethical standards. He reports that over the last twenty-five years, legal ethics has been legalized, displacing internal standards for the bar.²³³ Hazard posits that "[w]hat were fraternal norms issuing from an autonomous professional society have now been transformed into a body of judicially enforced regulations."²³⁴ His conclusion is striking: "As a result, neither the public at large nor lawyers themselves have a clear sense of what the legal profession is."²³⁵

Fraternal norms, however, are troubling as an ethical standard, because they pose the dangers of the closed ethical system. An ethic that is strictly a legal standard is also restrictive; "[i]t is this extralegal realm that defines ethics."²³⁶ An approach of principle may give a fuller context to legal ethics. Investigation of the principles underlying legal ethics could provide a more suitable framework for the profession. Such principles would at least

226. *Id.* at 256.

227. *Id.* at 283.

228. MODEL CODE pmbi.

229. MODEL CODE Canon 1 (A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession).

230. MODEL CODE Canon 2 (A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available).

231. MODEL CODE EC 2-6, 2-8.

232. See Gillers, *What We Talked About*, *supra* note 126, at 248 (warning of the dangers of an ethic that merely codifies legal duties, instead of appealing to a broader framework of ethical reasoning).

233. Hazard, *The Future of Legal Ethics*, *supra* note 94, at 1240.

234. *Id.* at 1249.

235. *Id.* at 1242.

236. Gillers, *What We Talked About*, *supra* note 126, at 248.

provide some framework for intensive discussion of the kinds of cases lawyers face.²³⁷

One way to avoid the problem of dirty hands, then, is to root legal ethics in principles. Beyond the adversary system excuse may stand the principle of justice. Beyond an ideology of confidentiality loom questions of promise-keeping.²³⁸ Representation in public interest law involves the principle of autonomy as well as norms of justice. One philosophical corrective to the problem of dirty hands, therefore, is reassessment and reidentification of the principles that regulate lawyers' ethics.

B. PROCEDURAL ACCOUNTABILITY

Criticism of Walzer's politician has not stopped with philosophical accounts of moral reasoning. Political scientists have criticized his approach to dirty hands as inaccurate in its representation of the political context. Central to this critique is the assertion that democratic governments are not ruled by solitary individuals who make choices that dirty their hands. Thus, Walzer is accused of envisioning the romantic figure of the prince instead of focusing on the moral demands upon the democratic leader.

Dennis Thompson argues that democracy changes the classical interpretation of the morality of the individual politician, and vitiates a dirty hands approach to political ethics.²³⁹ No longer can we think of rulers as princes and kings who perform immoral actions in secrecy. "Because democratic officials are supposed to act with the consent of citizens . . . they are not uniquely guilty in the way that the problem in its traditional form presumes."²⁴⁰

As a result, the politician cannot be judged by a separate standard: "[as]

237. But see William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 222-26 (1991) (pointing out difficulties in interpreting autonomy and paternalism in individual cases).

238. Issues of promise-keeping may obligate lawyers to explain confidentiality to clients. See generally Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703 (1988) (arguing that initial disclosure allows a potential client to make informed choices about the breadth of her disclosure, choosing a lawyer, or even deciding to forgo representation).

239. THOMPSON, *supra* note 5, at 11.

240. *Id.* See also JUDITH N. SHKLAR, ORDINARY VICES 243 (1984). Shklar argues that Walzer's theory of dirty hands, as well as the theories of Machiavelli and Weber in which it is rooted, presuppose an earlier stage of history, when individual statesmen were heroic, individual and "highly personal" figures, on the model of Corneille. *Id.* She states:

[The] simple choice that Weber inherited from Machiavelli between a mere two roles, immoral politics and moral privacy, does not make much sense in a liberal democratic state. . . . His [Weber's] were the politics of the great gesture, and they still appeal to those engaged intellectuals who like to think of 'dirty hands' as a peculiarly shaking, personal, and spectacular crisis. This is a fantasy quite appropriate to the imaginary world, in which

long as officials are assumed to act with the democratic approval of citizens, officials cannot be burdened with any greater responsibility than citizens."²⁴¹ The major ethical questions then become questions of accountability in a democratic setting.

Thompson thus changes the focus from the dirty hands of one politician to the many hands responsible in a democracy.²⁴² The politician must maintain accountability to the general public, but citizens must share responsibility. Thompson's shift from a traditional theory of dirty hands to democratic dirty hands is accompanied by a recognition that public officials are frequently involved in "making marginal choices" with "mixed moral results" leading to "only incremental change."²⁴³ He concludes: "Officials compromise more than they agonize."²⁴⁴

With this perspective, Thompson challenges Walzer's view of the politician's guilt, and wonders why politicians are guilty if they act for us, with our (presumed) consent.²⁴⁵ Instead of punishing politicians, citizens and politicians should ponder how to compensate others for the wrongs politicians commit.²⁴⁶

Thompson recognizes that politicians continue to face the problem of dirty hands in a democracy.²⁴⁷ This temptation necessitates mechanisms of accountability. The most obvious restraint is the democratic politician's electoral accountability. Citizens in a democracy, however, cannot vote on every decision made by politicians. Politicians at times must decide in secret, for publicity would defeat the purpose of the act. Secrecy threatens the democratic checks on the politician's conduct and so invites dirty hands, indeed "doubly dirty hands."²⁴⁸

Thompson offers three methods of protecting democratic accountability in conditions of secrecy: retrospection, generalization, and mediation.²⁴⁹ "Retrospective accountability" involves reviewing the decision after it has

these people see themselves in full technicolor. Stark choices and great decisions are actually very rare in politics.

Id.

241. THOMPSON, *supra* note 5, at 22.

242. *Id.*

243. *Id.* at 7.

244. *Id.*

245. *Id.* at 19. Thompson posits that: "Even on the assumption that . . . deception is a wrong that calls for social recognition, the problem remains that citizens themselves — the only judges who have the final authority to condemn the deceiver — must be presumed to endorse the deception."
Id.

246. *Id.* at 22.

247. *Id.*

248. *Id.* at 23. "Doubly dirty" hands occur because the vices of concealment are added to the vices of the original deed.

249. *Id.* at 22-32.

been made.²⁵⁰ The problem with such review is that the damage has already occurred. Moreover, the secret may be kept for so long that reforms of future practice cannot be made. For example, by the time the Cuban Missile Crisis decisions were made public, it was far too late for any of the actors to be held accountable. Thompson insists on early post-decision revelation of political actions, with a recognition that "[t]he license to deceive expires."²⁵¹

The inadequacies of retrospection make prior judgment a preferable option. Such prior judgment can occur through generalized public discussion of the types of decisions that a politician should make.²⁵² For example, general policies on the use of patrol cars can be delineated, without the disclosure of particulars that would jeopardize good police work.

Generalization cannot deal with all possible particulars. Therefore, mediation provides a third form of accountability.²⁵³ The model mediation draws from is the oversight of congressional committees. The advantage of mediation is that it brings a broader perspective into the decision-making. According to Thompson, congressional oversight reminds us that if the perspective of overseer and overseen is too similar, then real accountability does not occur.²⁵⁴ Yet if the range of publicity is too broad, then the necessary secrecy is endangered.

Thompson acknowledges that all three methods have weaknesses and that they cannot eliminate dirty hands.²⁵⁵ But, he argues, the methods can be made more effective. Thompson argues that: "Retrospection can be strengthened by limiting the duration of secrecy. Generalization can be enhanced through prohibitions on certain kinds of activities. Mediation can work better if in major disagreements of principle, legislators expand the public that deliberates on the decisions."²⁵⁶

If, as Luban asserts, law is politics, and lawyers act with the dirty hands of politicians, then legal ethics should be held to similar standards of accountability. If democracy limits dirty hands in the American political context, then legal dirty hands also demand some democratic accountability. Some lawyers, such as state judges and district attorneys who gain office through election, face such accountability. But most lawyers are not so accountable.

For lawyers, the obvious parallel to defeat at the polls is dismissal by the client. When lawyers lose a client, however, they usually continue to practice law, and they usually are paid. Furthermore, lawyers tend to escape

250. *Id.* at 24.

251. *Id.* at 26.

252. *Id.*

253. *Id.* at 29.

254. *Id.* at 30.

255. *Id.* at 32.

256. *Id.*

accountability in the press because the media do not apply the same scrutiny to lawyers and their reputations that they apply to political representatives. Thus, mere dismissal of lawyers by clients does not provide a sufficient democratic check upon dirty hands. In legal ethics, dirty hands romanticizes the role of the politician and thus of the lawyer.

Luban attempts to democratize his political account of public interest law, but he fails to demand accountability from lawyers. We have already seen that he offers certain limits to client manipulation by lawyers in the public interest setting.²⁵⁷ He suggests that the decision of the lawyer should usually, although not always, be put to the vote of the group; "a political decision should be made by political processes."²⁵⁸

Moreover, Luban excuses dirty hands conduct if "(1) the clients are also committed to the cause; (2) the outcome of the manipulation represents the will of the political group; (3) the manipulative behavior is not itself abhorrent to the political group."²⁵⁹

Luban addresses these political questions at length in his examination of class action lawsuits.²⁶⁰ Here the lawyer's dilemma, between representation of the individual and representation of the group, or the cause, becomes acute. Luban offers a solution based in political theory. He bases this theory on the "'own-mistakes principle,' which we may formulate as follows: Provided that the group's actions do not trench on the rights of outsiders or otherwise violate sound morals, it must be permitted to make its own mistakes. The general will trumps prudence."²⁶¹ Luban acknowledges that democracy, with the "own-mistakes principle," relies on an informed public, or else the principle is a "recipe for disaster."²⁶²

Luban focuses on what the lawyer must do in order to represent the class. Such representation encounters serious difficulties. The lawyer may not have access to the will of all members of the group. Some members of the group may be ill-informed about the class' well-being. Moreover, the interests of future generations may be at stake, and the attorney may wish to include these interests in her analysis.

Luban identifies four types of representation that may be involved in the class-action suit. The first is direct delegation by clients, which occurs "when the class is small enough and compact enough to be canvassed regularly."²⁶³ Indirect delegation, the second type of class action representation, occurs when the class members select representatives of their views, usually

257. See *supra* Part II.B (discussing the new standard view of dirty hands).

258. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 339.

259. *Id.* at 340.

260. *Id.* at 341-58.

261. *Id.* at 344.

262. *Id.*

263. *Id.* at 351.

because the class is large as well as politically mobilized.²⁶⁴ The third type of representation, interest representation, occurs when representatives of the class are chosen, not by class members, but by the lawyer.²⁶⁵ This variety of representation occurs when the class is “unmobilized.”²⁶⁶ Finally, best-world representation occurs when the lawyer takes into account future members of the class; “it involves lawyers making unilateral decisions and value choices.”²⁶⁷

Luban lists these types of class action representation in descending order of preference; direct representation is preferred but not mandated. The ethical conflicts for the lawyer are especially difficult when the interests of future generations are at stake. When the issues are most complex in class action suits, therefore, the decision will fall to the ethical discretion of the lawyer.²⁶⁸

Then, Luban links the double agent and the class action problems. “My approach to the problem of class conflicts is to require the lawyer to be as representative as it is possible to be — responsibly representative of the client class as a whole; and my approach to the double agent problem is based on the fact that mutual political commitments are consensual.”²⁶⁹

Luban proposes the political model of public interest law because of a laudable commitment to social reform, out of a desire to encourage “morally activist” lawyers. He thinks the client control objection, as well as limits on class action suits, restrict the efforts of the poor to seek justice.²⁷⁰ He fears that traditional legal ethics favor wealthy clients at the expense of poor clients.²⁷¹

Although these commitments are all commendable, they leave the lawyer — and thus her clients — without protection against the dirty hands dilemma. Even in public interest law, some commentators have noted the indicia of lawyers’ self-interest.²⁷² For example, the class of plaintiffs in a class action suit may be expanded, with little benefit to the actual parties. Meanwhile, lawyers profit from the additional fees awarded to them.²⁷³

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 352.

268. *Id.*

269. *Id.* at 356.

270. *Id.* at 391. See also William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, in *ETHICS AND THE LEGAL PROFESSION*, *supra* note 36, at 216-72 (criticizing jurisprudential justifications of legal professionalism and arguing that non-professional advocacy would lead to a more equitable distribution of legal services).

271. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 370.

272. See Menkel-Meadow, *supra* note 208, at 776 (noting that public interest lawyers may be self-interested and concerned about promoting their reputations).

273. There are proposals to limit abuses in contingency fees, and some recognition that the abuses are serious. See, e.g., Peter Passell, *Contingency Fee Windfalls Are Under Attack*, N.Y. TIMES,

Moreover, in such lawsuits, the lawyer may desire to reform the law in order to enhance her reputation. Luban's treatment of public interest law reminds us that the *Model Rules* and *Model Code* serve an important purpose in guiding the ethical conduct of lawyers, and that the absence of such general norms can at times harm clients.²⁷⁴

Luban's political model of the public interest lawyer lacks the basic representative check of voting. Moreover, given the problems associated with lawyers' underenforcement of ethical standards, retrospective review is a weak candidate for protection. Disclosure may not occur until long after damage to the client can be rectified, if ever. The *Model Rules* and the *Model Code* may be the generalizations available to the profession, but Luban challenges their use in public interest law. Thus general norms of client loyalty do not apply.

Luban's theory may provide some generalization, but it is not binding on the profession. Indeed, Luban suggests that even lawyers are divided on his approach to public interest law,²⁷⁵ so it is difficult to find the generalization that would protect clients or society. Although "[g]eneralization can be enhanced through prohibitions on certain kinds of activities,"²⁷⁶ it is not clear what prohibitions Luban's lawyer faces.

Thus mediation exists as the third check, but Luban has not written an oversight committee into his ethic. The judge who hears the case is the overseer, but by then the enforcement problems associated with a closed ethic reappear. Thompson warned against too close an identification between overseer and overseen in mediation.²⁷⁷ But precisely such an identification can occur within the realm of public interest law.

Luban approvingly cites Deborah Rhode's conclusion that class action suits pose "intractable" moral problems.²⁷⁸ He understates, however, the conflicts that Rhode chronicles in telling detail, such as the difficulties of

Feb. 11, 1994, at A1, B18 (reporting on the Manhattan Institutes proposal to place more precise limits on contingency fees).

274. One way to interpret Charles Fried's analogy of the lawyer as friend is as a critique of Luban's account of public interest law from the perspective of principle. Fried's comments implicitly address Luban's account of public interest law. Although Fried's article is prior to Luban's book, his argument is a counter to Luban's argument about the client control objection. "[T]he concept of legal friendship was introduced to answer the argument that the lawyer is morally reprehensible to the extent that he lavishes undue concern on some particular person." Fried, *supra* note 35, at 141. See also Schneyer, *Professionalism as Politics*, *supra* note 99 (identifying advantages of rules to legal profession and the function they serve in protecting clients).

275. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 293-316 (refuting arguments offered by critics of public interest law).

276. THOMPSON, *supra* note 5, at 32.

277. *Id.* at 30.

278. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 341 (citing with approval Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) [hereinafter Rhode, *Class Conflicts*]).

representing group members, uncertain enforcement by the courts, and self-interest of the lawyers.

Rhode's solution also proves more subtle than Luban's. She too introduces politics to the discussion. Politics, however, does not provide a dirty hands excuse. Instead, Rhode notes that political discourse has been more sophisticated than law in its analysis of representation.²⁷⁹ Rhode proposes procedural solutions to the problems of class action conflicts, emphasizing the need for stronger enforcement by the courts.²⁸⁰ For example, she recommends that courts maintain better factual records on notice-giving and on adequacy of client representation.²⁸¹ She also proposes adjustments to attorney's fees, and limits on lawyers' abilities to negotiate their fees.²⁸² Finally, she suggests the presence of court-appointed advisors.²⁸³ Luban may agree with these restrictions, but he does not require them.

Furthermore, Rhode does not discard traditional legal rules in this context. Although Luban moves too quickly to accept dirty hands, Rhode holds out more possibility for legal ethics when she states that "to acknowledge the limits of our technical expertise and ethical certitude is not, of course, to abandon all hope of improvement,"²⁸⁴ and then proposes reforms for the class action lawsuit.

Thus Luban translates law into politics and examines class action suits through the prism of democracy. But the lawyer is not a politician. Public interest law as understood by Luban does not possess the safeguards to protect against the problem of dirty hands. In the definitional move from law to politics, Luban releases the lawyer from responsibility. Giving a lawyer a license to practice politics with dirty hands licenses too much.²⁸⁵

Although Thompson's democratic accountability pertains to the lawyer-redefined-as-politician, it is also useful for all of legal ethics. While philosophical accounts of dirty hands suggest changes in the content of legal ethics, procedural restrictions are also valuable.

Retrospective accountability is difficult in the context of the lawyer-client

279. Rhode, *Class Conflicts*, *supra* note 278, at 1193.

280. *Id.* at 1247.

281. *Id.* at 1248-49.

282. *Id.* at 1251.

283. *Id.* at 1256.

284. *Id.* at 1243.

285. See Menkel-Meadow, *supra* note 208, at 776-77 (recognizing that public interest lawyers may be selfishly motivated to promote reputation). Menkel-Meadow argues for a "Golden Rule of Candor [which] would require such lawyers to fully disclose their motivations to clients who may be acting in [a] named representative capacity. . . . This forces the lawyer to be candid about his own 'vicarious altruism' and to see if the client shares similar altruistic values." *Id.* See also William H. Simon, *Class Actions — Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 391 (1972) (stating that "Rule 23 results in unjust enrichment to some members of the legal profession with little corresponding benefit to the public.").

relationship, because it depends upon disclosure, the bane of the profession. Generalization already exists in the profession through the *Model Rules* and the *Model Code*. However, as I suggested above, such generalization would be more effective if it included some discussion of general principles. Finally, mediation profits from an expansion of the public that regulates the profession. So too, legal ethics would be well-served by the presence of non-lawyers in regulatory bodies and disciplinary committees.²⁸⁶

David Wilkin's proposals for lawyer regulation address these procedural concerns.²⁸⁷ Although Wilkins describes the ABA as supporting "disciplinary agencies operating under the supervision of state supreme courts,"²⁸⁸ he prefers a contextual model of enforcement. In addition to disciplinary controls, Wilkins identifies liability controls such as third party suits; institutional controls such as Rule 11 sanctions; controls from agencies like the SEC, IRS, and OTS; and legislative controls.²⁸⁹

All four types of regulation are necessary for efficient enforcement of legal ethics, with "optimal compliance."²⁹⁰ Wilkins argues that "no single enforcement system is likely to address all categories of lawyer misconduct efficiently."²⁹¹ While he "does not provide definitive answers,"²⁹² Wilkins proposes a context-dependent approach to regulation:

Implicit in the many claims about how lawyers should be regulated is the assumption that a single enforcement structure will be appropriate for all

286. Kronman's analysis of the problem of dirty hands suggests the need for a variety of perspectives. He identifies the moral question for politicians as whether they can keep their ruthlessness within bounds. Some politicians are more at risk of succumbing to ruthlessness than others. KRONMAN, *supra* note 1, at 102-03. Kronman claims that politicians most at risk are those who view their opponents as false or evil. *Id.* at 103. He contends that: "The dangers of ruthlessness will be lower, by contrast, if one starts by acknowledging the incommensurable diversity of human goods." *Id.* at 104. One barrier against ruthlessness is to be open to the convictions of others. Kronman claims, "some political ideals offer more protection than others and that the ideal of political fraternity offers most of all." *Id.* at 105. Political fraternity is an ideal of "empathic pluralism." *Id.*

287. Wilkins, *Who Should Regulate Lawyers?*, *supra* note 139. See also Martyn, *supra* note 134 (recommending a variety of procedures in order to improve lawyer competence). Martyn's recommendations include revised standards for bar entry, peer review, continuing education, performance measures, and legislation. *Id.* Her essay recommends a solution also backed by Thompson: publicity. She identifies "[t]he lack of publicity and consequent secrecy that shroud the grievance process" as "critical problems that hinder the ability of many jurisdictions to respond adequately through their disciplinary process." *Id.* at 737. Martyn argues that publicity is essential for deterrence of bad lawyering, "[i]ncreased lay representation at the screening and investigative stages should also be sought." *Id.* at 739.

288. Wilkins, *Who Should Regulate Lawyers?*, *supra* note 140, at 802.

289. *Id.* at 873-86.

290. *Id.* at 847-48.

291. *Id.* at 804.

292. *Id.* at 886.

lawyers in all contexts. This unitary vision, however, fails to account for the diversity in both the structure of the legal marketplace and society's expectations of the profession.²⁹³

In the essay on regulation of lawyers, Wilkins prescind from examination the content of the rules. In doing so, he presupposes a single content of rules.²⁹⁴ The dirty hands literature reminds us that content is crucial as well as enforcement, and that both content and enforcement require participation of those outside the profession. Wilkins cannot adequately address the problem of dirty hands without reflection on content.

The context-dependent solution is evident in Wilkins' analysis of the Kaye Scholer case, and is enriched by reflection on the content of the ethic.²⁹⁵ He notes that both sides in the Kaye Scholer controversy cited the *Model Rules* in their defense.²⁹⁶ Thus, lawyers still search for the "unitary" guideline that rules the profession, but such an approach is outdated.²⁹⁷ Wilkins opines that "there are good reasons for believing that, despite all of the rhetoric to the contrary, the Kaye Scholer case has sounded the final death knell for the traditional model of legal ethics in the context of regulatory practice."²⁹⁸ A regulatory law practice requires a context-dependent set of guidelines that take account of the specifics of the regulatory setting. Wilkins suggests that the attorney be guided by the "middle-level principles" of "independent counseling, cooperation and disclosure."²⁹⁹

First, thrift lawyers should be under a special duty to give their clients "independent" and "candid" advice concerning regulatory compliance, where independence means that the advice is disinterested and objectively reasonable and candor requires a thorough review of any contrary position taken by the regulators as well as an unbiased assessment of how relevant legal decision makers would rule on the matter *if they knew all of*

293. *Id.* at 887.

294. Wilkins acknowledges that enforcement gives a "substantive tilt" to the interpretation of the rules. *Id.* at 811. He identifies three types of arguments that occur within discussion of these four regulatory controls. They are content, compliance, and independence arguments "according to whether they focus on the substantive content of the rules to be enforced, the ability of an enforcement system to produce substantial compliance at acceptable costs, or the relationship between a particular sanctioning system and the status of lawyers as independent professionals." *Id.* at 809. The independence arguments are the type we have seen earlier in this Article, where the bar claims that the lawyer needs independence in order to protect clients. Independence arguments are also a manner of arguing about content. *Id.* at 853.

295. David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1147 (1993) [hereinafter Wilkins, *Making Context Count*].

296. *Id.* at 1148.

297. *Id.* at 1148-49.

298. *Id.* at 1216.

299. *Id.*

the pertinent facts. Second, thrift lawyers should be under an affirmative duty to cooperate with the regulators' efforts to collect information and should be prohibited from taking any action or otherwise assisting their clients in impeding the regulators' ability to reach informed judgments. Third, in the event of a material dispute over the meaning or scope of an applicable regulation, thrift lawyers should be required to disclose the existence of the dispute and the grounds for their position. This disclosure should be made both internally, to the most disinterested thrift decision maker available (generally the board of directors), and externally, to the regulators.³⁰⁰

Wilkins adds that thrift officials should be able to enforce these standards unless "private enforcement efforts are adequately vindicating the government's regulatory interests."³⁰¹

Wilkins' resolution of the Kaye Scholer case addresses the content of the ethic, and it is an ethic of principle. Wilkins would enable regulators to enforce these principles against lawyers. With disclosure requirements, general principles, and outside regulators, he meets many of Thompson's concerns for accountability and Donagan's concern for moral reasoning. Perhaps he has sounded the "death knell"³⁰² for dirty hands, but not, as some fear, for the legal profession.

C. CHARACTER: THE MISSING PIECE?

Philosophical changes in the content of legal ethics, as well as procedural reforms in enforcement, may help to limit dirty hands conduct. However, the last bulwark against dirty hands is character. Walzer placed character at the heart of his portrayal of the politician when he insisted that the politician's reluctance or guilt provided important limitations on the politician's conduct.³⁰³ So too may character serve as the last resort for legal ethics.

Bernard Williams addresses the importance of character when he argues that "professional morality" is a better label than "role morality."³⁰⁴ Williams asserts that divergences in role morality are not the important issue in legal ethics, because fulfilling different expectations for different roles may not raise conflicts in professionals who anticipate these differences and accept them as part of the normal demands of professional life.³⁰⁵ Williams argues that it is not the divergence between acts undertaken in the

300. *Id.* at 1181-82.

301. *Id.*

302. *Id.* at 1216.

303. Walzer, *Dirty Hands*, *supra* note 4, at 111-12.

304. Williams, *supra* note 190, at 259.

305. *Id.* at 260.

professional context and in the non-professional context that is morally significant, because many professional acts, including cross-examination of witnesses, simply cannot be performed in an unprofessional setting.³⁰⁶

Instead, Williams suggests that the dispositions acquired in the professional setting are telling; these attitudes may be consistent with the dispositions of general morality, but at times they may not be. He states, "[t]his will have the result that the professionals get used to doing, from time to time, as an expression of their professional dispositions, acts that they find distasteful in virtue of their general dispositions."³⁰⁷

Another possibility is that professionals may eventually discard their general dispositions in favor of their professional dispositions.³⁰⁸ The risk is that as lawyers act professionally, they may develop dispositions that lead them to become the kind of person others do not want them to be.³⁰⁹ These dispositions may be troubling precisely because they blind professionals to moral considerations. Gerald Postema opposes just such "detachment" in the professional life, and argues for integration strategies which will encourage professional responsibility.³¹⁰

Williams concludes that lawyers must retain some qualms about their professional morality. The argument parallels one he makes about the need for reluctance in politicians:

[T]here are actions which remain morally disagreeable even when politically justified. The point of this is not at all that it is edifying to have politicians who, while as ruthless in action as others, are unhappy about it. Sackcloth is not suitable dress for politicians, least of all successful ones. The point . . . is that only those who are reluctant or disinclined to do the morally disagreeable when it is really necessary have much chance of not doing it when it is not necessary.³¹¹

For legal ethics, Williams concludes that a casuistry or a code is not sufficient; the focus must be on the sort of person one is.

One approach in contemporary legal ethics has been to emphasize the

306. *Id.*

307. *Id.* at 263-64.

308. *Id.* at 264. Richard Wasserstrom makes a related point. He mentions that one of the attractions of a separate role morality may be psychological. A role morality renders the moral life less complex and challenging, and therefore more comfortable psychologically. Wasserstrom, *supra* note 72, at 25-37.

309. Williams, *supra* note 190, at 268.

310. Gerald J. Postema, *Self-Image, Integrity, and Professional Responsibility*, in *THE GOOD LAWYER*, *supra* note 35, at 286-314.

311. Bernard Williams, *Politics and Moral Character*, in *PUBLIC AND PRIVATE MORALITY* 64 (Stuart Hampshire ed., 1978). See also KRONMAN, *supra* note 1, at 105 (remarking that politicians are always tempted to ruthlessness, and so tactics, especially recognition of the plurality of goods, must be established to limit ruthlessness).

judgment of the individual lawyer. For example, William Simon has proposed an ethic of discretion for lawyers.³¹² This ethic rejects "categorical" approaches to legal ethics, especially the so-called libertarian and regulatory models.³¹³ "Libertarian" names the traditional model of attorney loyalty to client, while "regulatory" captures the ethic of loyalty to the public arising from the lawyer's duties as an officer of the court.³¹⁴ Weinstein's vision of the thrift lawyer exemplifies Simon's regulatory category.³¹⁵

In the ethic of discretion, the judgment of the individual lawyer is central and "the basic consideration should be whether assisting the client would further justice."³¹⁶ Discretion is a complicated undertaking, but Simon argues that lawyers already accept it for the judge and prosecutor and therefore, he proposes the discretionary approach for all of legal ethics.³¹⁷

Simon rejects the developments in legal ethics that pit law against morality, holding that: "The discretionary approach . . . rejects the common tendency to attribute the tensions of legal ethics to a conflict between the demands of legality on the one hand and those of nonlegal, personal or ordinary morality on the other."³¹⁸ Instead of contrasting legal and moral choices, "both alternatives could readily be portrayed as competing legal values."³¹⁹

While this move to identify conflicting legal, rather than moral claims, may capture the moral aspect of law, one wonders what kind of judgment this lawyer will develop as she translates all moral issues into legal ones. Simon does not link discretion to the character of the lawyer. Instead, individual judgment and individual decision-making are key, but one looks in vain for the habit of reluctance favored by Williams and Walzer.³²⁰

In contrast, Kronman emphasizes character in his picture of the lawyer-statesman. "The ideal of the lawyer statesman was an ideal of character."³²¹ Kronman resists portrayals of the lawyer that emphasize his technical

312. Simon, *Ethical Discretion in Lawyering*, *supra* note 131.

313. *Id.* at 1083-84.

314. *Id.* at 1085-87.

315. See Weinstein, *supra* note 161, at 62 (stating that thrift lawyers must not aid clients in implementing illegal schemes).

316. Simon, *Ethical Discretion in Lawyering*, *supra* note 131, at 1090-91.

317. *Id.* at 1083.

318. *Id.* at 1113-14.

319. *Id.* at 1114.

320. Simon rejects the argument that the ethic of discretion is unconstrained, but the checks are not identified. *Id.* at 1126-29. See Schneyer, *Moral Philosophy's Standard Misconception*, *supra* note 14, at 1557 (faulting Simon's earlier work for inconsistency). Schneyer criticized the *Model Code* for too much latitude while calling for an ethic of individual discretion, stating "In my book, giving the individual lawyer more discretion means turning what would otherwise be professional obligations into personal privileges." *Id.*

321. KRONMAN, *supra* note 1, at 16 (holding that: "For this ideal affirmed that a lawyer can achieve a level of real excellence in his work only by acquiring certain valued traits of character.").

competence at the expense of good judgment. Instead, the lawyer-statesman relies upon practical wisdom in his practice.

Kronman insists that “the relationship between deliberation and character” is “at the heart of the classical ideal of the lawyer-statesman.”³²² Kronman’s book traces how this ideal of the character has been lost. Trends in the legal academy, legal education, and law practice have weakened the statesman’s appeal, and the “profession now stands in danger of losing its soul.”³²³

If character is the last protection against dirty hands, then non-lawyers may also be in some danger from a profession without character. That is why philosophical and procedural reforms are necessary. Legal ethics thus should be reformed to incorporate an ethic of principle. Furthermore, the procedures of legal ethics — the writing and enforcement of the rules — should be changed.

V. RELIGIOUS ETHICS: ANOTHER PERSPECTIVE

What is the metaphor of dirty hands? For some authors, it is the obligation to act immorally. For others, it is the obligation to act under a different morality. At times it is moral guilt. Elsewhere it is moral complexity. My impression is that the dirty hands metaphor is rooted in another concept, not always explicitly named, the concept of sin.

Theological — not religious — references pop up frequently in the literature. Walzer labelled his solution to the problem of dirty hands the Catholic position, even though it is not representative of that tradition.³²⁴ Luban, after his lengthy exposition of public interest dirty hands, concludes that our response to dirty hands behavior must be to forgive — as Jesus did.³²⁵

A. “COMMON MORALITY”

This appeal to religion is an interesting move in ethical analysis, especially when it appears in literature that does not purport to be about religion. In many cases, such as the works of Luban and Walzer, it plays a rhetorical or heuristic role. For other writers, such as Alan Donagan, religion plays a more substantive role. Donagan argues that his theory of

322. *Id.* at 27.

323. *Id.* at 1.

324. I have argued this point in a previous article. Leslie Griffin, *The Problem of Dirty Hands*, 17 J. REL. ETHICS 31 (1989).

325. LUBAN, *LAWYERS & JUSTICE*, *supra* note 14, at 336 (citing HANNAH ARENDT, *THE HUMAN CONDITION* 239 (1958)). Luban relies on Arendt’s reading of Jesus’s political and religious identification of forgiveness as “the necessary corrective for the inevitable damages resulting from action.” *Id.*

morality is rooted in the "Hebrew-Christian tradition."³²⁶ Donagan's analysis — with its emphasis on common morality and its suspicion of separate role moralities — more accurately captures the central insights of Jewish and Christian responses to the problem of the lawyer's dirty hands.³²⁷ While Christian writers have long acknowledged the moral complexities, difficulties, and limitations of professional roles, their message is ultimately one that limits the conduct that the lawyer can undertake in the name of the role. In contrast to the assumptions of Luban and Walzer, their central message is not that the lawyer resign herself to sin and ask for forgiveness or punishment.

For example, Thomistic natural law theory has provided the underpinning for much of Roman Catholic ethics. In Thomistic thought, the natural law provides a standard by which human politics as well as human law are judged. The ruler and the laws are not automatically obeyed because given by God, but are assessed according to their consistency with the natural law.³²⁸

For Thomas, an unjust law is not a law and is therefore not binding on the individual's conscience.³²⁹ Thomas provides criteria by which to judge human laws, the thirteenth-century equivalent, perhaps, of a contemporary court's four-part test. The law must be "ordained to the common good," while "not exceed[ing] the power of the lawgiver."³³⁰ Moreover, "burdens are [to be] laid on the subjects, according to an equality of proportion and with a view to the common good."³³¹ Finally, human law must not be "opposed to the Divine good — idolatry."³³² Thomas notes that if a law in most cases promotes the common good, but is in some instances harmful, one should not follow it in the harmful instance.³³³

In both politics and the law, therefore, moral standards must guide the conduct of the individual. Justice requires that individuals not violate the natural law in either their personal or professional lives. Although specific statements about the morality of lawyers do not emerge from Thomas' writings, Thomistic theory clearly applies a consistent standard to common morality and the professional morality of the lawyer.

In later centuries, Catholic moralists address more specific examples of

326. See *supra* Part IV.A (analyzing dirty hands as an ethic of principle).

327. But see Floyd, *supra* note 125, at 607 (rejecting "ordinary morality" in favor of an (H. Richard) Niebuhrian ethic of responsibility because "'ordinary morality' is a concept with questionable meaning.").

328. SUMMA THEOLOGIAE, I-II, 92, 1 (Fathers of the English Dominican Province trans. Christian Classics 1911).

329. I-II, 95, 2; I-II, 96, 4.

330. I-II, 96, 4.

331. I-II, 96, 4.

332. I-II, 96, 4.

333. I-II, 96, 6.

lawyers' ethics. For example, the Koch-Preuss twentieth century manual of moral theology refers to lawyers under the title "Duties of Restitution," a section that considers when a person is required to repair the damage done to others.³³⁴ A popular moral principle from the manualist tradition, the principle of cooperation, assists the calculus. The principle of cooperation is a tool of casuistry, by which the individual can determine what is right and what is wrong in both professional and personal spheres. Cooperation means "concurrence with another person in an act that is morally wrong."³³⁵ Catholic moralists then distinguish between formal and material cooperation with evil; the former is always prohibited, but the latter is permitted for a proportionate reason.³³⁶

Lawyers can be guilty of cooperation, and they must be careful in their work to avoid formal cooperation with evil. "A person co-operates with another in injustice by counsel if he gives him advice or urges motives or shows him how to proceed, in doing evil."³³⁷ Because the advisor is the "secondary author" of the injustice, she is required to restore whatever the principal in wrongdoing fails to restore. If a lawyer gives such advice, she is the "moral cause of the damage, and, as such, bound to make restitution."³³⁸

Koch and Preuss pursue further technicalities in their analysis. If the lawyer's advice is revoked and the reason for its revocation is given, the lawyer frees herself of liability.³³⁹ But if a reason is not given, the lawyer is responsible pro rata. The lawyer is not culpable if the client was already committed to the evil act, because there is no causation on the attorney's part. Nor is she responsible for restitution if she counsels a lesser evil, because the moral interpretation of her action is that she is doing good in her attempt to minimize the damage.³⁴⁰ Finally, a lawyer who undertakes unjust lawsuits is guilty of sinful cooperation, but a lawyer who defends a thief or criminal (even a guilty one) is not at fault.

Another example of the interpretation of a religious tradition in light of contemporary legal ethics is provided by Basil F. Herring's review of halakhic sources.³⁴¹ Herring distinguishes the halakhic interpretation of the lawyer in the judicial system from the American legal system. Jewish law is similar to an inquisitorial system, in which the judge plays an active role in

334. 5 ANTONY KOCH & ARTHUR PREUSS, *HANDBOOK OF MORAL THEOLOGY: MAN'S DUTIES TO HIS FELLOWMEN* 394 (1933).

335. EDWIN F. HEALY, S.J., *MEDICAL ETHICS* 101 (1956).

336. *Id.* at 102.

337. KOCH & PREUSS, *supra* note 334, at 394.

338. *Id.*

339. *Id.*

340. *Id.* at 395.

341. BASIL F. HERRING, *JEWISH ETHICS AND HALAKHA FOR OUR TIME* (1984).

searching for the truth. Halakhic interpretation of legal ethics is complicated, because there was no class of professional lawyers in ancient Israel.³⁴²

But Jewish law is clearly regulated by moral principles. For example, judges use instruments of coercion, including the death penalty, but these procedures are clearly moral, because they are biblically prescribed.³⁴³ In Jewish law, the two purposes of the judicial process are to attain the truth and to help the disadvantaged.³⁴⁴ Herring evaluates three areas of the law — the provision of legal advice, representation in court, and the presumption of innocence — in light of these two goals.

First, Herring notes the halakhic presumption against giving legal advice to a litigant.³⁴⁵ The danger is that if the lawyer explains the law to a litigant, she may tailor her account of the facts to the requirements of the law.³⁴⁶ The first purpose of the law, to attain the truth, is therefore better served by the client's ignorance of the law.

Herring recounts some dispute among the sources as to whether or not the prohibition against the provision of legal advice to the litigants is absolute, because the second goal of the legal system, helping the disadvantaged, may be relevant.³⁴⁷ The lawyer clearly must not give advice which will skirt the law's moral requirements. Nor can he advocate improper but effective arguments, even in support of a just cause. Some rabbis, however, allow the lawyer to give advice if the claim is just, and if the lawyer knows that the litigant is honest and will not abuse the law.³⁴⁸ Then both goals of the legal system are served.

Jewish law is also hesitant to name a proxy to represent litigants in court.³⁴⁹ The fear is that the participation of third parties will block the truth and prevent responsibility, because face-to-face confrontation is the chosen means of arriving at the truth. This practice, however, has changed over the centuries. Herring concludes that "halakhists have come to accept the practice of legal counsel before the court, in spite of earliest [sic] opposition to such practices."³⁵⁰ Yet this suspicion of lawyers permeates the tradition, such that another author refers to the lawyer as a "concession," a

342. *Id.* at 99.

343. *See id.* at 157-59 (discussing textual arguments supporting the death penalty under Jewish law).

344. *Id.* at 99.

345. *Id.* at 100.

346. *Id.*

347. *Id.* at 103.

348. *Id.* at 102-03.

349. *Id.* at 106.

350. *Id.* at 113. The date of this change is uncertain; Herring cites reports of the sixteenth, seventeenth and eighteenth centuries. *Id.*

“hindrance” and “an obstacle to ascertaining truth,” who is “superfluous.”³⁵¹

The purpose of discernment of the truth influences the third topic, the presumption of innocence. Jewish law recognizes a presumption of innocence for the accused party, so the lawyer can assume that her client is innocent and therefore worthy of defense.³⁵² An admission of guilt, however, destroys the presumption of innocence and excludes the possibility of legal representation for one who confesses to a crime.³⁵³ When a litigant admits guilt, the counselor’s role is to urge the client to present the truth before the court.³⁵⁴

Note in all three instances the sharp differences between Herring’s analysis and that of Monroe Freedman.³⁵⁵

Herring’s halakhic response and the Koch-Preuss calculus of cooperation and restitution are mere examples of ethical analysis, neither of which represent full traditions. Nor could they do so, because both traditions insist that particular circumstances are pertinent to the analysis of moral acts.

Yet in both traditions, law is forever permeated with a moral dimension. The existence of professional roles does not rid individuals of their moral concerns, of their sense of the moral purposes of the law, and of their responsibilities within their roles to the broader society, to “third parties” who may be affected by “professional” conduct.

Martin Luther and his Reformation followers provided an alternative to the Thomistic analysis of law and of the moral life to Christian believers. If adherence to a role morality is to be found in Christian ethics, one can expect it to arise in the writings of the German Reformer. Many elements of his theology support such a conclusion. Luther bases his theology in a belief that *sola scriptura* — scripture alone — is the source of Christian faith,³⁵⁶ and so rejects the Greek philosophical foundations of Thomistic ethics, including significant (but not all) aspects of natural law theory.

In political thought, Luther is famous, even controversial, for his two kingdoms theory, which divides the world into two kingdoms, the secular and the spiritual, both created by God and both good.³⁵⁷ The spiritual world is ruled by the Gospel, the secular world by the law. Luther also distinguishes between private and public men, and allows public officials acts

351. Dov I. Frimer, *The Role of the Lawyer in Jewish Law*, 1 J. L. & RELIGION 297, 298, 301 (1983).

352. HERRING, *supra* note 341, at 113.

353. *Id.* at 114.

354. The counselor’s role is different in capital cases, where all defenses are offered. *Id.* at 114.

355. See *supra* Part II.A (analyzing the standard view of legal ethics with regard to dirty hands).

356. See GERHARD EBELING, LUTHER: AN INTRODUCTION TO HIS THOUGHT (R.A. Wilson trans., 1970) (explaining that *sola scriptura* was the fundamental scriptural principle of the Reformation).

357. Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy*, 62 S. CAL. L. REV. 1573, 1585 (1989).

forbidden to private individuals.³⁵⁸ Indeed, Luther's Christian prince appears to have a vocation to a specific role morality.

In all spheres, Luther opposes works righteousness (the belief that humans earn salvation through their actions) de-emphasizes ethics, and places faith at the heart of the Christian life.³⁵⁹ He thus opposes ethical casuistry, which encourages works righteousness, and prefers that Christians "sin boldly" rather than vacillate in self-serving moral reckoning.³⁶⁰ Surely echoes of Luther reverberate in Luban's injunction to act in public interest law and ask forgiveness. However, Luban neglects the checks and balances that Luther provided.

On the subject of the law, Luther includes judges and lawyers in the group that is subject to an ethic different from that of personal morality. Judges must enforce the law, including the death penalty; such enforcement gives them a role similar to that of politicians. Harold Berman encapsulates the ethic: "As a public person, serving in such offices as the military, the judiciary, or the legal profession, however, a Christian may be required to resist his neighbor and to avenge injustice and abuse, even to the point of violence and bloodshed."³⁶¹ Luther reserves some of his usual witty commentary for the morality of lawyers:

A jurist can be a scoundrel but a theologian ought to be a godly man.
 Godliness befits theologians, not lawyers. . . . lawyers don't give anything to God but only to themselves.
 Every lawyer is either a good-for-nothing or a know-nothing.
 There's an old proverb: 'A lawyer's a bad Christian.' And it's true.³⁶²

In addition, Luther criticizes those who sue and are sued as weak and immature Christians.³⁶³ He urged his son not to be a lawyer, but to be a minister instead.³⁶⁴

Luther's theoretical treatment of the law differs from Thomistic natural law theory. Luther identifies two purposes in the law. Law *coerces* persons into actions they would otherwise not choose, thus bringing order to society.³⁶⁵ Law also *convicts* persons of their personal sinfulness, making

358. See *id.* at 1592 (noting that Lutheran public officials were thought to have a special calling to serve the community that might require adoption of a Christian social ethic distinct from a Christian personal ethic).

359. *Id.* at 1581.

360. See, e.g., PAUL ALTHAUS, *THE ETHICS OF MARTIN LUTHER* (Robert C. Schultz trans., 1972); PAUL ALTHAUS, *THE THEOLOGY OF MARTIN LUTHER* (Robert C. Schultz trans., 1966); MARTIN LUTHER: *SELECTIONS FROM HIS WRITINGS* (John Dillenberger ed., 1961); EBELING, *supra* note 356.

361. Berman & Witte, *supra* note 357, at 1592-93.

362. 54 LUTHER'S WORKS 22, 150, 473-74 (Theodore G. Tappert et al. eds. & trans., 1967).

363. *Id.* at 150.

364. *Id.* at 150-51.

365. Berman & Witte, *supra* note 357, at 1609.

them aware of their guilt, in its reminder that Christians never fully meet the requirements of the law.³⁶⁶ This less optimistic than the Thomistic account of the law leaves one with a firm impression that Luther recognizes and accepts the harsh realities of role morality in legal life.

However, the story does not end there. For there are nuances to Luther's double ethic that have not yet emerged. For example, even Luther's dual political ethic is not an account of completely separate realms; Luther is Lutheran, but never Machiavellian. Luther's prince is never merely expedient, for his public ethic is profoundly influenced by his personal morality. The personal life of the politician is supposed to influence and limit those actions he would undertake in the political sphere.

A similar dual morality in the law would leave the lawyer strongly influenced in the legal sphere by the demands of Christian love.³⁶⁷ Indeed, the case against dual morality is even stronger in the area of law than in the area of politics. Unlike politics, the law serves an additional theological purpose; it convicts of sinfulness as well as coercing obedience. That dual purpose places the law in a different category: the theological purpose of the law may give the lawyer additional reason to be guided by personal morality.³⁶⁸

Harold Berman notes that while Luther rejected many aspects of the Thomistic tradition, "Lutheranism also taught that the Christian lawmaker can and should do his utmost to use his reason and his will to serve God. . . . Politics and law were not paths to grace and faith, but grace and faith remained paths to right politics and right law."³⁶⁹ Luther is not Luban.

The Reformation provides a lawyer who builds upon Luther's jurisprudence in his *Institutes of the Christian Religion*, and who provides an additional reason to oppose a separate ethic for lawyers.³⁷⁰ John Calvin accepts the two Lutheran purposes of the law, but this theologian also trained as a lawyer, adds a third, more positive interpretation.

The third use of the law is pedagogical; it teaches and encourages

366. *Id.* at 1610.

367. Harold J. Berman, *The Influence of Christianity Upon the Development of Law*, 12 OKLA. L. REV. 86 (1959). Berman states: "[L]aw should be an instrument of justice, and a desire to convert law and justice into instruments of Christian love." *Id.*

368. *See id.* at 98 (arguing that without the motivating power of Christianity "secular morality becomes lukewarm, ineffectual, and hypocritical.").

369. HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 89-90 (1993).

370. III INSTITUTES OF THE CHRISTIAN RELIGION 18, 19 (John T. McNeill, ed. 1960). *See also* DAVID LITTLE, RELIGION, ORDER, AND LAW: A STUDY IN PRE-REVOLUTIONARY ENGLAND (1969), and David Little, *Duties of Station vs. Duties of Conscience: Are There Two Moralities?*, in PRIVATE AND PUBLIC ETHICS (D.G. Jones ed., 1978); Potter, *The Whole Office of the Law in the Theology of John Calvin*, 3 J.L. & Rel. 117 (1985).

Christians in the moral life.³⁷¹ Calvin offers some middle ground between Thomas Aquinas and Martin Luther; he restores a greater role than the one Luther gives to the natural law, although he remains more pessimistic than Thomas about the overall possibilities of human reason and moral conduct.

Calvin sees the courts as good, for scriptural reasons: Saint Paul employed the courts of law. Calvin argues that the courts perform the work of God, and that those who oppose the authority of the courts oppose God's hand.³⁷² He advocates that the courts must be used properly; there must be no hatred in litigation, no harm done to others, and no "relentless hounding."³⁷³ Lawsuits are permitted if they are used to promote justice and to protect a fair claim. Calvin condemns the abuse of the courts, the "mad lust to go to law,"³⁷⁴ but not the courts themselves. The intention of the parties is crucial; there must be no revenge or enmity, and even a just cause cannot be conducted with the wrong spirit. One must treat one's opponents with "love and good will," for "love will give every man the best counsel."³⁷⁵ Thus, as with Luther, Calvin never abandons the law to a separate morality.

There are additional aspects of Luther's thought that oppose a dual ethic. In their perceptive analysis of Lutheran jurisprudence, Harold Berman and John Witte argue that the importance and originality of Lutheran jurisprudence have been long neglected.³⁷⁶ The genius of this jurisprudence, they state, is its combination of rules and equity, and of natural law and positivism, in a creative way.³⁷⁷ Their point is that Lutheranism is positivist in its approach to legal rules, but natural law-like or equitable in the application of the rules.³⁷⁸ The emphasis within such a system is on the conscience of the individual.³⁷⁹

Berman and Witte contrast the Lutheran two kingdoms theory with the earlier papal two swords analysis, and argue that Luther "left law and politics solely to political authorities."³⁸⁰ However, within the secular realm, conscience guides the individual, and so morality does not dissociate from law or politics. Luther's recognition of the law's purpose of coercion, and his suspicion about human reason's capacity for moral judgment, are evident in his acceptance of strict legal rules as a tool for social order. Berman and

371. *Id.*

372. *Id.* at IV, 20, 17.

373. *Id.*

374. *Id.*

375. *Id.*

376. Berman & Witte, Jr., *supra* note 357, at 1576.

377. *Id.* at 1578.

378. *Id.*

379. *Id.* (explaining that "Lutheran legal philosophy postulates the existence within every person of a conscience, or sense of justice, which enables him or her to apply to concrete circumstances general rules that, precisely because of their generality, are necessarily unjust.").

380. *Id.* at 1590.

Witte state that Luther “emphasized that to maintain order it is important that there be precise legal rules, not only to deter lawbreakers but also to restrain officials, including judges, from their natural inclination to wield their powers arbitrarily.”³⁸¹ So for Luther the rules remain central to an ethical system as they do not, for example, in either Luban’s account of public interest law, or in Simon’s ethic of discretion. In a role-specific action, according to Luther, it is important to have more, not fewer, safeguards.

Yet the rules do not stand alone. The rules require application, and Luther urges judges to be equitable, to apply the rules in a manner helpful to those they serve. It is here that Berman and Witte view Luther’s theory of individual conscience as central: the “answer” the judge needs is not provided by the scholastic tradition of right reason, but by the conscience of the individual believer, a conscience nurtured in biblical faith.³⁸² Conscience and equity appear to operate even more forcefully for the judge than for the politician, and so too, one might suspect, for the lawyer.

Luther’s theological ethic gives further content to this idea of the individual conscience. First, Luther’s ethic has often been described as an “ethic of disposition.”³⁸³ The Christian is not preoccupied with the choice of right actions — for here she shall surely fail — but with undertaking her actions from a disposition of faith. Such faith gives rise to the works of love, but the Lutheran knows these works are never perfect. Nor, above all, are they salvific. Yet the disposition of faith must permeate the life of the individual. In an earlier essay, Berman encapsulates how twentieth century Protestant ethics has interpreted this idea in its ethic for the Christian —

Implicit in this image is a gospel of Christian legal ethics, but no full-blown Christian philosophy of law. This gospel says to the Christian individual: pray for God’s guidance in making and keeping your contracts, in avoiding the commission of torts, and in managing your legal affairs generally, that in all these matters you may behave in an upright and loving manner. This Gospel says to the Christian lawyer, judge or legislator: pray for God’s guidance in performing your official duties, so that you may act courageously in the interests of justice. But this gospel has very little to say concretely as to what is justice, what is prohibited and what is permitted, or what are the specific Christian aims of a system of law.³⁸⁴

Second, Luther rejects the Catholic narrowing of the notion of vocation

381. *Id.* at 1609.

382. *Id.* at 1578 (stating that Lutheran legal philosophy requires reliance on conscience for resolution of difficult moral dilemmas).

383. See generally GEORGE WOLFGANG FORELL, FAITH ACTIVE IN LOVE 79 (1959) (“For Luther only faith could guarantee ethical action.”).

384. Berman, *supra* note 367, at 95.

to the monastic or religious life and instead emphasizes the secular vocation of Christians.³⁸⁵ God calls persons to their secular duties, in law and in politics. Their conduct there ought always to be in response to God's call, and so is always subject to the requirements of Christian love.³⁸⁶

We have seen that Luban's concern about role morality is with whether or not certain roles or institutions can justify conduct that violates the requirements of common morality. Luther's ethic views the question from a different angle. His concern is less with institutional excuses than with the personal dispositions of those who serve God within institutions. As such, his writings resonate with those philosophers whose "solution" to the problem of dirty hands is to examine the implications of role morality for character.

There are traces of Luther in Bernard Williams' insistence that our professional dispositions not mar our personal dispositions.³⁸⁷ Walzer's "reluctance," however, does not capture the complexity of the Lutheran character.³⁸⁸ Simon's "ethic of discretion" has overtones of Luther's ethic of disposition, yet Simon leaves the lawyer circumscribed within the legal sphere, with no perspective provided from the outside and with no requirement that personal character precede the exercise of discretion.³⁸⁹ Luther surely would acknowledge that our hands are always dirty with sin. But his ethic is never as comfortable with sin as those writers who accept professional dirty hands.

B. A DIFFERENT CONTENT

Many Jewish and Christian writers, therefore, question the idea of a

385. See, e.g., James Luther Adams, *The Vocation of the Lawyer*, 31 MERCER L. REV. 531 (1979) (stating that: "[T]he vital interaction between law and religion (and between law and humanism) requires of all professions an active concern beyond the call of workaday duties and also beyond the call of career interests."); Charles L. Kammer, *Vocation and the Professions*, in ANN. SOC'Y OF CHRISTIAN ETHICS 153 (Thomas W. Ogletree ed., 1981); Christopher F. Mooney, S.J., *Law as Vocation*, in PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION 70 (1986) (discussing law as vocation). The sheer burden of the lawyer's job (e.g., the firm's expectation of unending billable hours or that lawyers will be constantly available for more work) makes it increasingly difficult for lawyers to develop a transcendent perspective which gives meaning to their successes and failures. Here religions, with their insistence that human work cannot provide all meaning to human life, may encourage a concept of vocation — tailored to the needs of the profession and the century — which will enable lawyers to step back from their work to see and respond to the world around them.

386. Berman & Witte, *supra* note 357, at 1592 (noting that although no occupation could provide a path to salvation, Lutherans considered every occupation held by a Christian a virtuous calling of God).

387. See *supra* Part IV.C (discussing the issue of character with regard to dirty hands).

388. See Walzer, *Dirty Hands*, *supra* note 4, at 100 (arguing that because politicians must be prepared to undergo punishment for their moral violations they will not break moral rules too easily).

389. See *supra* Part IV.C (discussing the issue of character with regard to dirty hands).

separate role morality for lawyers. They insist that law remain a moral sphere. They insist that personal character is relevant to one's conduct in a professional role, and that it must not be abandoned when one assumes that role. In addition, they provide a further challenge: in many areas the tenets of religious ethics challenge the content of professional, including legal, ethics. It is no surprise that it is Alan Donagan who questions most forcefully the content of the lawyer's ethic in the areas of confidentiality and self-incrimination.

Sanford Levinson has addressed this question of the content of religious and professional ethics in his analysis of the Jewish lawyer.³⁹⁰ Levinson raises, but does not resolve, the question of the appropriate connection between Jewish identity and the practice of law. He identifies five models of interaction between Jewish identity and law.³⁹¹ The fifth category raises the question of the content of the ethic. In category five Jewish commitment is a "constitutive aspect of the practice of law." The tension within this category is between one's religious or ethnic commitments and legal education, which offers the "systematic denigration of whatever one had done prior to entering law school."³⁹²

Levinson poses a number of difficult questions in this category. In the military, what would happen if Jewish generals were stricter than the Geneva conventions? Or if Jewish law suggested that one violate the Geneva conventions? How does one interpret the halakhic exhortation not to sue Jews in secular courts? Should the Jewish lawyer identify the

390. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993). See generally JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION (1990) (exploring the relationship between Jewish identity and American law).

391. Levinson, *supra* note 390, at 1583-84. The first is the "intersection of sets" approach. This category includes persons who are both Jewish and lawyers. By raising questions about Jewish identity, this category raises difficult questions about who is Jewish. While this category may tell us something about the progress of demographic groups, or about the nature of the legal profession, Levinson states that it has limited implications for legal practice.

The second category is the expression of social and political solidarity. Some lawyers may express loyalty to a specifically Jewish community, whether or not there is a religious element to the identification. In this model, being Jewish is an ethnic experience, as in Justice Frankfurter's commitment to Zionism. For example, a Jewish lawyer may refuse to work on Saturday out of ethnic solidarity, not because of religious obligation.

In the third model, the Jewish lawyer enters the workplace, but leaves the internal norms of legal practice untouched. Thus the lawyer may refuse to work on certain days to meet religious obligations, but his actual practice would not be affected. This category raises the question of whether one's legal practices themselves would be affected in any way by one's Jewish identity.

Fourth is the practitioner in Jewish courts, where the role of the lawyer is not interpreted as in the American system. The classic picture of the American lawyer is criticized in Jewish thought; the advocate is criticized as less interested in justice. In this tradition, there is great suspicion about the lawyer. Since the Middle Ages, this view has been rejected, and Jews can represent clients. *Id.* at 1584.

392. *Id.* at 1601.

religious identity of his client, and then explain religious duty to her? Should the Jewish lawyer promote adherence to halakhah?³⁹³

Within Levinson's analysis, the Lake Pleasant bodies case reappears. Levinson argues that there is a division between Jewish law and American legal ethics on questions of confidentiality.³⁹⁴ While there is no clear halakhic rule to regulate disclosure, the community interest takes precedence in Jewish law. What is clear in Jewish law is "its clear rejection of the authority of the secular state to make the final decision about the values involved in a given conflict between preserving the client's secrets and disclosing them in order to protect the community."³⁹⁵ The community interest would favor disclosure in the Lake Pleasant bodies case. As in Donagan's analysis, the moral weight favors disclosure.

Levinson does not conclude that the Jewish lawyer must disclose. Nor does he conclude that the religious commitments of the lawyer must override her professional obligations. Finally, he does not claim to resolve the difficult question of the appropriate interaction between religious faith and professional conduct.³⁹⁶

Even without reaching that hardest of questions, Levinson's analysis is important for contemporary legal ethics. Given the *status questionae*, it is sufficient for him to point out the existence of different moral traditions on questions of confidentiality, responsibility to clients, and obligations to third parties. Levinson notes that in most law schools, students with moral questions are directed to moral philosophy, not religion. "Rarely, if ever, does one hear suggestions that privileged guidance might be found in religious traditions and their notions of ethical duties."³⁹⁷ At a minimum, such traditions provide the outside perspective necessary to break the monopoly of lawyers on legal ethics.

393. One critic of Levinson's paper suggested that he include a sixth model. See Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613 (1993) (explaining that the sixth model would involve the lawyer in commitment to Jewish values in the practice of law, including special attention to the practice of civil rights law). Levinson is uncomfortable with such a model because it involves one in "a delineation of what count as specifically Jewish values." Levinson, *supra* note 390, at 1584.

394. Levinson, *supra* note 390, at 1609.

395. *Id.* at 1610 (explaining that "should this situation ever arise, it might well be analyzed as a true conflict of legal obligations, rather than as a more conventional conflict between law and morals."). On Jewish law and confidentiality, see generally Gordon Tucker, *The Confidentiality Rule: A Philosophical Perspective With Reference to Jewish Law and Ethics*, 13 FORDHAM URB. L.J. 99 (1985); Alfred S. Cohen, *On Maintaining A Professional Confidence*, 7 J. HALACHA & CONTEMP. SOC'Y 73, 76 (1984) (Bar amendment requiring lawyers to keep client secrets about financial fraud "is going to pose a great dilemma for an observant Jewish attorney who, for example, would be legally precluded from warning a friend not to buy a share in his client's business . . . [because] one must try to prevent harm from coming upon another Jew.").

396. Levinson, *supra* note 390, at 1610-11.

397. *Id.* at 1604.

C. A DIFFERENT PERSPECTIVE

Philosophical ethics has played an important role in piercing legal ethics. Yet religious ethics adds its own perspective.³⁹⁸ For example, in twentieth century medical ethics, a religious concept with limited acceptance in the secular world — the idea of the afterlife — had profound implications for the human moral questions of death and dying. Because of their conviction that physical life was not the ultimate value, religious ethicists were in the forefront of those committed to the right of patients to refuse certain forms of medical treatment.³⁹⁹ Religious ethicists have refused to identify the medical profession as a separate moral sphere, and so have brought their moral insights to bear on contemporary medical ethical questions in a productive manner.

Certain religious ethicists who address professional ethics argue that a perspective of “ultimacy” is gained from the dialogue between religion and law.⁴⁰⁰ Such a perspective is not superior to the vision of the lawyer, but it is different, and may lead lawyers to new interpretations of their conduct.

For example, Christopher Mooney observes that “lawyers precisely as lawyers are severely limited when it comes to dealing with moral questions. For the professionalizing of any area of knowledge tends to produce ‘minds in a groove,’ to use Alfred North Whitehead’s phrase, grooves that result in a ‘restraint of serious thought.’”⁴⁰¹ Dialogue with persons of different training — provided the dialogue respects the lawyer’s description of her own experience — may enable the lawyer to judge her professional experience in new ways.

If in law, as in other professions, specialized training circumscribes the agent’s moral vision, then religion’s task is to broaden the individual’s awareness of choices and of responsibilities. If, as Ronald Green argues, the “deep structure” of all religions includes “first, a method of moral reasoning involving ‘the moral point of view’; second, a set of beliefs affirming the reality of moral retribution; and third, a series of ‘transmoral’ beliefs that suspend moral judgment and retribution when this is needed to overcome

398. Religious perspectives may be of help to secular legal ethics, but not because they are really secular. See Mashburn, *supra* note 125 (arguing Reinhold Niebuhr is relevant for legal ethics because he is really not a theologian).

399. See, e.g., RICHARD A. MCCORMICK, *HEALTH AND MEDICINE IN THE CATHOLIC TRADITION* 50–55 (1984).

400. For a full discussion of the perspective of the religious ethicist, see James F. Bresnahan, S.J., ‘Ethics’ and the Study and Practice of Law: *The Problem of Being Professional in a Fuller Sense*, 28 J. LEG. EDUC. 189 (1976); James F. Bresnahan, S.J., *Ethical Theory and Professional Responsibility: Possible Contributions of Religious Ethics to Dialog About Professional Ethics of Attorneys*, 37 JURIST 56 (1977); James F. Bresnahan, S.J., *A Note on Recent Literature: Religion and Law in a New Perspective*, in 11 ANN. SOC’Y OF CHRISTIAN ETHICS 243–58 (Thomas W. Ogletree ed., 1981).

401. Mooney, *supra* note 385, at 67. See BALL, *supra* note 217, at 96 (arguing that: “[w]hat is taught under the rubric of ethics seems to me a gross distortion.”).

paralysis and despair,"⁴⁰² then the perspective of ultimacy may illuminate difficult moral choices as well as motivate persons to choose what is moral. Religions must be very complex systems if they are to meet such complicated and even contradictory human needs, Green concludes, and the way in which they do so captures much of the paradox of the human moral life.⁴⁰³

The perspective of religion may not really be "ultimate." But at a minimum it is different from the mindset of legal ethics, and so offers some new perspective on an ethic that is too closed. From both Jewish and Christian authors, I have argued, emerge convictions about the law which question the concept of a separate role morality for lawyers. Moreover, the content of these ethical traditions challenges the conclusions of legal ethics.

For example, in my opinion, the bar's self-interested conception of confidentiality fails to meet the challenge of Jewish and Christian accounts of confidentiality. These religious traditions do not end the moral discussion within the attorney-client nexus, but instead include broader social interests, especially the interests of the harmed "third party," in their ethical analysis. That perspective should be represented in the committees that draft and enforce bar regulations.

Many lawyers and philosophers greet the conclusions of religious traditions with indifference. The insights of one religious tradition are often insignificant to persons raised in another religious tradition, or to persons indifferent or hostile to all religious traditions. To lawyers in particular, linkages between legal ethics and religion may appear tenuous. Religion plays a small role in law school curricula, and when it appears on stage, it is usually in the guise of the Establishment Clause. The constitutional fear of entanglement overhangs the discussion, and prevents any critical analysis of religion itself as a field of study.

The burden of proof is at present on those who argue that figures like Maimonides and Martin Luther are relevant to contemporary discussions of legal ethics. One argument on their behalf is that in religion — unlike, for example, the history of philosophy — the traditions offer insight precisely because they arise from the historical experience of actual communities and individuals.

The history of Protestant and Roman Catholic ethics, for example, has

402. RONALD M. GREEN, *RELIGION AND MORAL REASON* 3 (1988). "They point their adherents to the method of moral reasoning. They try to assure them that governing one's life by this method is not ultimately self-destructive, that the righteous are rewarded. And, in response to the kind of self-condemnation that inevitably accompanies sensitive moral striving, they are prepared to ease their insistence on judgment and retribution by holding out the promise of a redemption not based entirely on one's deeds." *Id.*

403. *Id.* at 3-4. Green states: "[A]nyone unwilling to tolerate complexity should not undertake the study of religious belief."

provided a valuable resource for contemporary ethical theory. James Gustafson has demonstrated that, at its best, Roman Catholic thought offered a supple casuistry, which was able to confront complicated moral questions with intellectual rigor and with concrete suggestions for conduct.⁴⁰⁴ Yet in practice it often ossified, becoming a rigid system which excluded individual circumstances and subjective judgment. On the other hand, Protestant ethics exalted the conscience of the individual believer and gave voice to the moral freedom of the individual, in her ability to transcend her works. Yet it was often formless, failing to provide any clear guidance to those in moral perplexity.⁴⁰⁵

In the twentieth century, ecumenism led members of both groups to recognize the strengths of the other's perspective. Many religious ethicists turned to explore the middle ground between traditions: they learned to incorporate both rules and disposition, both moral norms and individual freedom, into their work. Lawyers who take sides in the ongoing model codes versus personal character debates in legal ethics might begin to recognize that they are reinventing the wheel.⁴⁰⁶

Moreover, the history of religions is a history of social institutions as well as doctrines. The history of religions is full of examples of the abuse of moral authority by those in power. Religions have been oppressors as well as defenders of the oppressed, and have always needed prophetic voices to recall the community to its basic moral purpose. Religions have sinned by fostering closed moral systems which shut out moral insight. In the profession of the ministry, for example, confidentiality has at times protected the priest at the expense of others in the community. Religion has yielded pride of place in our society to law, but there is still good reason for law to learn the lessons of its history.

Theodore Schneyer has dismissed some philosophical critiques of legal ethics with the following words: "In other words, only when the legal profession abandons its ethical canon or orthodoxy in favor of a priesthood

404. JAMES M. GUSTAFSON, *PROTESTANT AND ROMAN CATHOLIC ETHICS: PROSPECTS FOR RAPPROCHEMENT* 46-59 (1978).

405. *See id.* at 33-46.

406. *Id.* at 144-46. Gustafson concludes that despite twentieth century moves toward rapprochement between the Protestant and Roman Catholic traditions, persons of different religious backgrounds may still find that they agree about specific conclusions for ethical questions, but not about the theoretical foundations upon which those conclusions are based. *Id.* at 157-58.

Many participants in the development of American medical ethics discovered such a process at work. Something similar occurs in this analysis of religious arguments about the morality of the lawyer. Jewish and Roman Catholic approaches come to similar common morality conclusions, without sharing fundamental presuppositions about the nature of God's creation or of God's providence or revelation. Some Protestant authors are similarly suspicious about a separate morality for lawyers, but their theological presuppositions about the law, morality, and human capacities for reasoning and for righteousness, vary enormously from other Christian and Jewish authors.

of all believers can lawyers be restored to a state of grace.”⁴⁰⁷ With Walzer, Freedman, Luban, and many others, Schneyer may prefer that lawyers remain in their own state with dirty hands. But in the history of theology, the state of grace is better than the state of sin. The individual's job is to resist the temptation to sin and not grant it the status of a defeasible presumption. A priesthood of all believers which holds everyone to fundamental moral principles would be an improvement over the current legal magisterium.

VI. CONCLUSION

We began with dirty hands. They are indeed pervasive in legal and political ethics. Their meaning is ambiguous. In one sense, they are inevitable in a profession that struggles with complex moral dilemmas. In such a sense the presence of dirty hands is incontrovertible. The metaphor reminds us of human weakness, of imperfection, of finitude. Dirty hands express our sense that the moral life is complicated. Some Christian writers might call that sin. The dirty hands metaphor is valuable insofar as it reminds us of moral complexity and insofar as it helps to analyze difficult choices.

Other interpretations of dirty hands, however, should be rejected. In legal ethics, dirty hands seeks to justify conduct that should not be justified. In the name of dirty hands, outside perspectives — perspectives that might in fact illuminate moral decision-making — are excluded from discussion. In this Article, I have opposed two alternative accounts of dirty hands. In the first, professional conduct may obligate one to the violation of common morality. In the second, the separate morality of the profession justifies departures from common morality.

I have argued that these dirty hands should be combatted, not accepted. The activities of the legal profession should be assessed by common moral principles. Non-lawyers should be involved in the construction of the profession's moral codes, as well as in their enforcement. The ethical analysis of the profession should not stop with the attorney-client relationship, but should consider the broader moral and social dimensions of the attorney's conduct.

I have also argued that the Jewish and Christian traditions contribute a deep distrust of separate conduct for lawyers to the discussion. In addition, they urge that moral rules and personal character are not exclusive categories, but must be integrated in each moral agent. Their history as well as their doctrine remind us of the ease with which power is abused. They remind us to strive for clean hands.

407. Schneyer, *Moral Philosophy's Standard Misconception*, *supra* note 14, at 1538.

