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# THE JURISPRUDENTIAL TURN IN LEGAL ETHICS

Katherine R. Kruse \*

*When legal ethics developed as an academic discipline in the mid-1970s, its theoretical roots were in moral philosophy. The early theorists in legal ethics were moral philosophers by training, and they explored legal ethics as a branch of moral philosophy. From the vantage point of moral philosophy, lawyers' professional duties comprised a system of moral duties that governed lawyers in their professional lives, a "role-morality" for lawyers that competed with ordinary moral duties. In defining this "role-morality," the moral philosophers accepted the premise that "good lawyers" are professionally obligated to pursue the interests of their clients all the way to the arguable limits of the law, even when doing so would harm third persons or undermine the public good. More recent scholarship in legal ethics has rejected the moral philosophers' premise that lawyers' ethical duties demand instrumentalist partisan interpretation of the "bounds of the law." In what I call the "jurisprudential turn" in legal ethics, legal scholars are now increasingly looking to jurisprudential and political theory to explore the interpretive stance that it is appropriate for lawyers to take with respect to the "bounds of the law" that limit their partisan advocacy. Just as jurisprudential theories of adjudication ground judges' duties of legal interpretation in the role of judges in a democratic society, jurisprudential theories of lawyering ground lawyers' interpretive duties in analysis of the role lawyers play in a democratic system of government. This Article critically examines the emerging uses of jurisprudential theory in legal ethics. It argues that jurisprudential theory presents an attractive alternative to moral theory in legal ethics because it provides a rubric for limiting lawyers' no-holds-barred partisan manipulation of law that springs directly from the lawyer's professional duties rather than competing with them. It critiques the two major schools of thought in the "jurisprudence of lawyering," based on Dworkian and positivist jurisprudence. And it questions the common framework within each jurisprudential school, which assigns lawyers a*

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*role as case-by-case lawmakers, suggesting that this framework imposes an inappropriately lawyer-centered focus on assessments of the legitimacy of law that more properly belong to clients.*

### INTRODUCTION

Clients come to lawyers to find out what the law requires, prohibits, or allows them to do. However, the limits of the law are often unclear, and lawyers must exercise professional judgment in choosing how to explain the law to their clients. Legal ethicists have recently begun to debate the contours of lawyers' jurisprudential duties when counseling clients, grappling in the process with how to apply jurisprudential theory about the relationship between law and morality to the tasks of lawyering.<sup>1</sup> This "jurisprudential turn" in legal ethics is based on the premise that in counseling and advising their clients, lawyers are not merely transmitting information about law but are playing a quasi-official role in shaping the "bounds of the law" within which their clients operate.<sup>2</sup> Although each lawyer-client consultation affects the life and affairs of only one client, legal ethicists argue, the aggregate of these consultations determines the shape of law as it exists in society.<sup>3</sup> Lawyers thus play a lawmaking or law-interpreting role that is different from, but no less important than, the role that legislatures and judges play in creating and interpreting law.

Consider Stephen Pepper's example of a lawyer counseling a manufacturing plant about the effect of environmental regulations that prohibit discharge of ammonia into the ground water in amounts greater than 0.050 grams per liter.<sup>4</sup> Should the lawyer inform the client that violations of less than 0.075 per liter will be ignored by the EPA? Or that first-time violations of less than 1.5

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1. Recent exploration of the jurisprudence of lawyering can be found in WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998); TIM DARE, *THE COUNSEL OF ROGUES?: A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* (2009); and W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010). *See also* DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in *LEGAL ETHICS AND HUMAN DIGNITY* 99 (2007) [hereinafter *HUMAN DIGNITY*] (reading Lon Fuller's jurisprudence about lawmaking as inclusive of the work of legislators, judges, and lawyers).

2. *See generally* W. Bradley Wendel, *Professionalism as Interpretation*, 99 *Nw. U. L. REV.* 1167 (2005). *See also* DAVID LUBAN, *A Different Nightmare and a Different Dream*, in *HUMAN DIGNITY*, *supra* note 1, at 131, 131 (describing lawyer-client consultations as a "the primary point of intersection between 'The Law' and the people it governs, the point at which the law in books becomes the law in action").

3. LUBAN, *supra* note 2, at 145-52; Wendel, *supra* note 2, at 1172; David B. Wilkins, *Legal Realism for Lawyers*, 104 *HARV. L. REV.* 468, 476-78 (1990).

4. This example was presented by Pepper as a moral problem in his classic defense of traditional partisan legal ethics. Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613, 627-28 [hereinafter *Pepper, Lawyer's Amoral Role*]. It was discussed again in the context of a range of examples of counseling clients about enforcement or remedies in Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 *YALE L.J.* 1545, 1550-52 (1995) [hereinafter *Pepper, Counseling at the Limits*].

grams per liter will result in only a warning?<sup>5</sup> Whether the lawyer acknowledges it or not, in choosing to include or exclude enforcement information, the lawyer has taken a jurisprudential stand on whether such enforcement practices are written into the “bounds of the law” within which clients are entitled to operate. Lawyers’ jurisprudential stands on these issues also affect law’s reach in society. If lawyers in an industry regularly advise clients about the limits of administrative enforcement, the practical effect of the law in society will mirror the limits of its enforcement rather than its intended scope.

Jurisprudential issues are also implicated when lawyers decide whether to seek out or take advantage of “loopholes” in the law, interpretations that comply technically with the letter of the law but violate the law’s spirit or purpose. Enron’s “creative and aggressive” approach to interpreting permissible accounting practices under securities regulations contravened regulatory purposes and eventually led to the company’s financial collapse.<sup>6</sup> The Bush administration’s legal justifications for the use of interrogation tactics such as beatings, waterboarding, sexual humiliation, and sleep deprivation relied on interpretations of language prohibiting torture that ignored its history and context and stretched its conventional legal meaning.<sup>7</sup> The lawyers in these cases “made law” by providing legal opinions that guided their clients’ actions. Yet, unlike public and reviewable judicial opinions, the lawyers’ interpretations of law were communicated in the privacy of the lawyer–client relationship without the accountability of public oversight.

Legal ethicists have long recognized that the choices lawyers make in characterizing the law to their clients have jurisprudential implications,<sup>8</sup> but have only recently focused attention on theoretical analysis of lawyers’ duties to interpret the law correctly or appropriately. This Article maps the emerging “jurisprudence of lawyering” and raises questions about its current direction. Part I sets the stage for the jurisprudential turn in legal ethics by describing the implicit—though ethically problematic—jurisprudence of practicing lawyers, which legal ethicists recognize as being based on a legal realist conception of law as prediction of official behavior. When applied to legal ethics, the legal realist conception of law is problematic because it deprives law of the capacity to set normative limits on legal representation and encourages lawyers to view the “bounds of the law” that are supposed to constrain their partisan pursuit of their clients’ interests from the perspective of a Holmesian “bad man.”

Taking this implicit jurisprudence as a given, early legal ethicists argued that lawyers have a professional duty to limit the pursuit of their clients’ objectives on moral grounds, and legal ethics debates came to center around how robust a

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5. Pepper, *Counseling at the Limits*, *supra* note 4, at 1551.

6. Wendel, *supra* note 2, at 1170–71.

7. W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 81 (2005).

8. See generally Pepper, *Counseling at the Limits*, *supra* note 4; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

role lawyers' moral judgments ought to play in shaping legal representation.<sup>9</sup> Both critics and defenders of the legal realist jurisprudence agreed that lawyers have a professional duty to bring their moral influence to bear on clients, differing primarily on questions of how strongly and in what circumstances moral counseling is required. The professional duty of moral influence is problematic, however, because it threatens overreaching by lawyers beyond their legal expertise, beyond their role as client agents and fiduciaries, and in contravention of rule-of-law values that client objectives should be limited by law rather than by the moral judgment of their lawyers.

The new jurisprudential theories in legal ethics reject both a duty of moral counseling and the assumption that the bounds of the law must be understood according to the legal realist conception of law. Instead, they define lawyers' jurisprudential duties in interpreting the "bounds of the law" to place real and sometimes substantial limits on lawyers' partisan advocacy. Jurisprudential theories of lawyering are an attractive alternative to moral lawyering theories because they derive limits on partisan advocacy from the practice of legal interpretation, which falls squarely within the scope of lawyers' expertise and decisionmaking authority in the lawyer-client relationship. However, jurisprudential theories of lawyering are successful only to the extent that they can provide a plausible and legitimate account of legal interpretation that is appropriate to the lawyer-client relationship and fitted to the role that lawyers play in the legal system and in society.

Part II examines and evaluates two schools of thought within jurisprudential legal ethics: (1) William Simon's theory that lawyers should interpret the "bounds of the law" according to underlying principles of justice in the style of a Dworkian judge, which joins the practice of lawyers advising clients about the law with the larger project of making law coherent and substantively just; and (2) positivist theories advanced by Bradley Wendel and Tim Dare, who argue that in interpreting the "bounds of the law," lawyers should respect the authority of law as society's resolution of contested moral and political disagreement and not seek to unsettle that resolution by stretching legal interpretation to meet either their clients' interests or their own conceptions of morality or justice. Part II concludes that neither school of jurisprudential theory achieves complete success as a jurisprudence of lawyering because even the moderate indeterminacy that each theory leaves behind creates too much space for lawyers to exercise judgment that is both pre-emptive of client decisionmaking and unreviewable by the public.

Part III questions the common framing of the issues within the unfolding jurisprudence of lawyering as questions about how lawyers should interpret the "bounds of the law," suggesting that this framework imposes an inappropriately lawyer-centered focus on assessments of the legitimacy of law. It proposes instead that lawyers have a jurisprudential duty to situate their clients to make appropriately informed decisions about how strictly to comply with the law or how best to order their affairs within legal frameworks based on the clients' assessments of the law's legitimacy.

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9. See *infra* Part I.B.

The work of Ted Schneyer both inspires and guides this Article's analysis of lawyers' jurisprudential duties. The jurisprudential project is one that Schneyer has specifically advocated, calling on legal ethicists to "help lawyers internalize a jurisprudence" that takes a middle ground between moral activism and hired-gun instrumentalism.<sup>10</sup> For those embarking on the jurisprudential project, Schneyer's work exemplifies two principles for making legal ethics theory responsive to practice and useful to practitioners. First, he has insisted that in theorizing about the role of lawyers, legal ethicists take into account the actual work that lawyers do. His groundbreaking article, "Moral Philosophy's Standard Misconception of Legal Ethics," drew heavily on sociological studies of how lawyers actually behave to challenge the assumptions about lawyer behavior on which the new legal ethics models were based.<sup>11</sup> His studies and analysis of the creation of the ABA Model Rules of Professional Conduct,<sup>12</sup> of lawyer discipline,<sup>13</sup> the role of in-house counsel,<sup>14</sup> and the regulation of lawyers in law firms<sup>15</sup> and in dispute resolution processes<sup>16</sup> are characterized by the same balanced, complex, and empirically grounded perspective on the challenges and motivations of practicing lawyers.

Second, Schneyer's work reminds us that if theoretical legal ethics is to have meaning and value for lawyers, it must resonate with the basic values of the legal profession. He has repeatedly noted that a significant purpose of professional regulation is to protect clients and the public against lawyer self-interest, warning against the perils of using public values as a guidepost for legal ethics,<sup>17</sup> and applauding the emergence of theories that preserve and elaborate the basic client-

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10. Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 26 (1991). In this regard, Ted has noted that "[w]ith an appropriately purposive jurisprudence, full-bore partisanship—doing everything one can for clients up to the limits of the law—becomes less worrisome because the law as interpreted corresponds more closely with moral values or at least policy purposes." *Id.*

11. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529.

12. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

13. Ted Finman & Ted Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67 (1981).

14. Ted Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449 (1988).

15. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991) [hereinafter Schneyer, *Discipline for Firms*]; Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Regulates the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245 (1998) [hereinafter Schneyer, *Ethical Infrastructure*]; Geoffrey C. Hazard & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593 (2002).

16. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289 (2008).

17. Ted Schneyer, *Reforming Law Practice in the Pursuit of Justice: The Perils of Privileging "Public" over Professional Values*, 70 FORDHAM L. REV. 1831 (2002) [hereinafter Schneyer, *Perils of Public Values*]; see also Ted Schneyer, *Who Should Define Arizona's Corporate Attorney-Client Privilege?: Asserting Judicial Independence Through the Power to Regulate the Practice of Law*, 48 ARIZ. L. REV. 419 (2006).

centered values of the legal profession.<sup>18</sup> These aspects of Schneyer's work have influenced the development of my own work in legal ethics and infuse the analysis I provide in this Article, paying tribute in a small way to the much larger influence of Schneyer's grounded realism and critical eye in legal ethics.

### I. LAW AND MORALITY IN LEGAL ETHICS

The jurisprudential turn in legal ethics is a shift in theoretical focus from analyzing the moral dilemmas that lawyers face because of their professional role to questions of how lawyers should interpret the "bounds of the law" that constrain their partisan representation of clients. This Part maps the emergence of jurisprudential theory in legal ethics by examining how ethically problematic legal realist conceptions of law set the stage for the jurisprudential turn in legal ethics, how the early legal ethicists proposed that lawyers make up for the ethical deficiencies of this implicit jurisprudence of lawyering by incorporating personal moral judgment into legal representation, and how the "jurisprudential turn" avoids the problems with this moral alternative.

#### A. *Legal Realism as the Operating Jurisprudence of Practicing Lawyers*

Legal ethicists have identified legal realist conceptions of law as a core component of the implicit operating jurisprudence of everyday lawyers.<sup>19</sup> Legal Realism identified a gap between the "law in books" and the "law in action," which Roscoe Pound described as "a very real and a very deep" distinction between "the rules that purport to govern the relations of man and man and those that in fact govern them."<sup>20</sup> Legal Realists insisted that accurate description of the "real rules" that govern society cannot be captured by parsing the words of statutes or the written opinions of appellate judges, but must include study of the way that "paper rules" are interpreted, implemented, applied, or ignored as they are carried into practice.<sup>21</sup> As Karl Llewellyn ruminated, the business of law is dispute resolution and "whether they be judges or sheriffs or clerks or jailers or lawyers . . . . *What these officials do about disputes is, to my mind, the law itself.*"<sup>22</sup>

Although the legal realist "prediction theory" has well-demonstrated shortcomings as a definition of law, it is a functional point of view for lawyers to

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18. Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer's Point of View*, 16 YALE J.L. & HUMAN. 45, 70–78 (2004).

19. Pepper, *Lawyers' Amoral Role*, *supra* note 4, at 624–25; DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 18–20 (1988); *see also* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997) ("[T]he Core Claim of Realism is that judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law.").

20. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

21. Karl Llewellyn, *A Realistic Jurisprudence—The Next Steps*, 30 COLUM. L. REV. 431, 447–57 (1930).

22. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 5 (1930).

take in advising clients.<sup>23</sup> The law that matters most to clients is the law that will affect their lives directly; and lower-court judges and other legal officials often provide the final statement of the law in a client's case.<sup>24</sup> Indeed, lawyers who did not take account of gaps between what the "law in books" says and how the law is likely to be applied or implemented in a client's case might be criticized for providing legal advice that, while technically accurate, was nonetheless useless to their clients as a practical matter.

However, the legal realist conception of law is also ethically problematic. When translated from the predictions of lower-level officials in clients' cases to a more general conception of law, the radical indeterminacy inherent in the legal realist conception of law poses one set of problems.<sup>25</sup> If law is nothing other than what legal officials do in implementing the law, no official interpretation of law can be said to be better than any other.<sup>26</sup> To illustrate this point, Brad Wendel asks us to consider the interpretive challenge posed by a lawyer representing a mining company required by federal law to pay disability benefits to employees who are "totally disabled" due to Black Lung Disease.<sup>27</sup> Suppose a former employee has been receiving benefits from the company based on the presence of a lesion on his lung measuring 1.5 cm, a condition entitling him to a statutory presumption that he is "totally disabled."<sup>28</sup> After the benefits have paid for a lung transplant, a creative reading of the statute might arguably permit the company to terminate disability payments for the expensive medication and treatment necessary to keep his body from rejecting the new lung. Because the new lung no longer has a lesion, the argument might go, the employee is no longer presumptively "totally disabled," and must go through a time consuming administrative process to prove his disability.<sup>29</sup> Wendel argues that nothing in the implicit operating jurisprudence of traditional lawyering constrains this interpretation; as long as there is a nonfrivolous argument supporting the interpretation, the lawyer would be entitled (and maybe even required) to deploy it on behalf of the client.<sup>30</sup>

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23. The "prediction theory of law" has been reduced to absurdity when applied to appellate judges, who cannot coherently be said to be predicting their own behavior when they decide cases. H.L.A. HART, *THE CONCEPT OF LAW* 141–47 (2d ed. 1994); *see also* LUBAN, *supra* note 19, at 22–23. However, from the perspective of lawyers advising clients, prediction is coherent. *See* Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. REV.* 651, 656–60 (1995).

24. JEROME FRANK, *LAW AND THE MODERN MIND* 50–51 (1930); Llewellyn, *supra* note 21, at 455–56.

25. Wilkins, *supra* note 3, at 474–75.

26. *Id.* at 484. If the legal realist conception of law as prediction of official behavior is spun even more radically, no way of influencing legal officials can be said to be better than any other; the legitimacy of bribery and threats cannot be distinguished from the legitimacy of a persuasive legal argument. LUBAN, *supra* note 19, at 20–21.

27. W. Bradley Wendel, *Civil Obedience*, 104 *COLUM. L. REV.* 363, 389–93 (2004).

28. *Id.* at 389–91.

29. *Id.* at 391–92.

30. *Id.* at 391.

The legal realist conception of law is also ethically problematic because the “external point of view” it takes on law strips law of its normative content.<sup>31</sup> Holmes famously wrote that “[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”<sup>32</sup> The Holmesian “bad man” view of the law undermines respect for law as a source of normative guidance and replaces it with a view of law as “something like a force of nature, which can be studied and hopefully avoided, but which does not alter the citizen’s practical reasoning.”<sup>33</sup> Because the Holmesian “bad man” perspective encourages citizens to continually unsettle the boundaries set by law as they seek to avoid its enforcement, it also limits law’s effectiveness and increases its cost as a mechanism to coordinate and structure the common life of society.<sup>34</sup>

Of particular concern among legal ethicists is the prospect that by advising clients about the law from a legal realist perspective, lawyers encourage otherwise law-abiding or law-respecting citizens to view the law more instrumentally than they otherwise would.<sup>35</sup> A client might enter a lawyer’s office as a Holmesian good man who views the law as a source of normative guidance on a human problem (or, as Hart might say, as “the ‘puzzled man’ or ‘ignorant man’ who is willing to do what is required, if only he can be told what it is”).<sup>36</sup> In the lawyer’s translation of the client’s situation from a human problem into a legal problem, the lawyer will tend to define the client’s objectives as coextensive with the client’s legal interests, which most often revolve around maximizing the client’s wealth, freedom, or power over others.<sup>37</sup> In the process, the lawyer will “distill out, or disguise, the moral dimension and the more complex human elements from the situation.”<sup>38</sup> In advising clients that they “should do” what it is in their legal interests to do, lawyers may implicitly encourage clients to press their legal interests further than the clients might otherwise be inclined to go.<sup>39</sup> As Stephen Pepper has pointed out, the unfortunate result is that both the lawyer and the client can evade moral responsibility for decisions that harm others, with the lawyer perceiving moral decisions to be outside the realm of legal advice, and the

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31. See generally W. Bradley Wendel, *Lawyers, Citizens and the Internal Point of View*, 75 *FORDHAM L. REV.* 1473 (2006).

32. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 459 (1897).

33. Wendel, *supra* note 31, at 1473.

34. *Id.* at 1473–76; Pepper, *Counseling at the Limits*, *supra* note 4, at 1553.

35. Pepper, *Lawyers’ Amoral Role*, *supra* note 4, at 625–26; see also Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 *GEO. J. LEGAL ETHICS* 103, 133 (2010).

36. HART, *supra* note 23, at 40.

37. See generally Warren Lehman, *The Pursuit of a Client’s Interests*, 77 *MICH. L. REV.* 1078 (1979); Simon, *supra* note 8, at 52–59; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS. Q.* 1, 21 (1975).

38. Stephen L. Pepper, *Lawyers’ Ethics in the Gap Between Law and Justice*, 40 *S. TEX. L. REV.* 181, 188 (1999).

39. Kruse, *supra* note 35, at 133; Lehman, *supra* note 37, at 1088–90.

client perceiving the lawyer's advice as authority or permission to do only what the law requires and no more.<sup>40</sup>

Taking the ethically problematic legal realist jurisprudence of the "bounds of the law" as a set feature of legal representation, early legal ethicists turned to moral theory, arguing that lawyers have a duty to reign in their partisan zeal by supplementing the "bounds of the law" with additional constraints based on the personal moral judgments that lawyers would make outside their professional roles.<sup>41</sup> The next section demonstrates how both critics and defenders of legal realism as a jurisprudence of practicing lawyers turned to this moral solution, differing primarily on the question of how robust a role lawyers' moral judgments should play in legal representation.

### ***B. The Professional Duty to Exercise Moral Judgment***

When legal ethics developed as an academic discipline in the mid-1970s, its theoretical roots were in moral philosophy.<sup>42</sup> Many of the early theorists in legal ethics were moral philosophers by training, and they explored legal ethics as a branch of moral philosophy.<sup>43</sup> From the moral philosophical point of view, lawyers' professional duties were a "role morality" defining what it meant to be a "good lawyer," and the most interesting questions in legal ethics were not the nature of lawyers' ethical lapses, but whether "the professional ideal is itself morally worthy."<sup>44</sup> The central question that captured the attention of these moral philosophers was put succinctly by Charles Fried as the opening sentence of a seminal article in the field: "Can a good lawyer be a good person?"<sup>45</sup>

Moral philosophers understood lawyers' role morality by reference to principles of partisanship and neutrality in what they called the "standard conception" of the lawyer's role.<sup>46</sup> As the moral philosophers saw it, the standard

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40. Pepper, *supra* note 38, at 188–92.

41. Kruse, *supra* note 35, at 122–29.

42. Although theoretical legal ethics solidified as an academic field in legal scholarship in the 1970s, conceptions of the ethics and role of lawyers in society have long reflected and been grounded in jurisprudential theories and political philosophy. *See generally* Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence and Legal Ethics*, 75 *FORDHAM L. REV.* 1339 (2006). The earliest American legal ethicists grounded their conception of lawyers as a governing class in natural law jurisprudence and republican political theory. *Id.* at 1346–50.

43. *See* David Luban, *Reason and Passion in Legal Ethics*, 51 *STAN. L. REV.* 873, 878–81 (1999) [hereinafter Luban, *Reason and Passion*] (describing this history); David Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 *MD. L. REV.* 451, 452 (1981) (laying out a research agenda of legal ethics questions amenable to study and guidance by moral philosophy).

44. DAVID LUBAN, *THE GOOD LAWYER: LAWYER'S ROLES AND LAWYERS' ETHICS* 1 (David Luban ed., 1984).

45. *See, e.g.*, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer–Client Relation*, 85 *YALE L.J.* 1060, 1060 (1976) (asking whether it is possible for "a good lawyer [to] be a good person"). I have explored and critiqued this history in more depth in Kruse, *supra* note 35, at 107–22.

46. Authors have called the principles by various names and defined the principles differently. LUBAN, *supra* note 19, at 7. As defined in the early legal ethical

conception “committed [lawyers] to the aggressive and single-minded pursuit of the client’s objectives” not only *within* the law, but “all the way *up to* [the] limits of the law.”<sup>47</sup> They saw lawyers’ deployment of the legal realist conception of the “bounds of the law” as a thinly justified lack of respect for law in the name of partisan zeal, which impelled lawyers past the ordinary meaning and intended purpose of legal limits to embrace any colorable interpretation of law that suited their clients’ interests—a style of interpretation David Luban called “zeal at the margin.”<sup>48</sup> However, they did not develop any alternative jurisprudence of lawyering to replace legal realist conceptions of the “bounds of the law.”

To make up for the deficiencies created by the legal realist conception of the bounds of the law, moral theorists conceived a robust role for lawyers’ morality in legal representation. At its most extreme, “moral activist” lawyering tolerated only “the most minor deviations from common morality” by lawyers in most civil cases.<sup>49</sup> Moral theorists argued that lawyers should have the prerogative to withhold legal services to persons whose projects they found morally objectionable.<sup>50</sup> Additionally, they urged strategies of moral-activist client counseling, in which lawyers “take it upon themselves to judge and shape client projects”<sup>51</sup> and actively “steer [their] clients in the direction of the public good”<sup>52</sup> by employing strategies of persuasion, coercion, or even betrayal, to align the client’s decision with the lawyer’s moral judgment.<sup>53</sup>

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writings, the principle of partisanship required lawyers to maximize their clients’ objectives “within, but all the way up to [the] limits of the law.” Gerald J. Postema, *Moral Responsibility in Legal Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (emphasis omitted); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673 (1978). The principle of neutrality relieved lawyers of moral responsibility for the harmful effects on others of actions taken in pursuit of their clients’ objectives. See Postema, *supra*, at 73; Schwartz, *supra*, at 673.

47. Postema, *supra* note 46, at 73.

48. DAVID LUBAN, *The Adversary System Excuse*, in HUMAN DIGNITY, *supra* note 1, at 19, 26.

49. LUBAN, *supra* note 19, at 149. This conclusion is embedded within Luban’s larger argument that lawyers should take into account the moral justifications for their adversarial role and weigh the strength of those justifications against the moral harm that adhering to the role would cause. *Id.* at 128–47. According to Luban, where a lawyer represents an individual squaring off against the state or a powerful institution, the moral justifications for zealous partisan advocacy are strong. *Id.* at 148. It is in representing clients with power greater than, or roughly equal to, their opponents that the adversary system is only weakly justified. *Id.* at 92. In such cases, Luban argued, lawyers would be morally enjoined from pursuing legally permissible but “substantively unjust results.” *Id.* at 157.

50. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 642.

51. David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 738 (1988).

52. *Id.* at 721; LUBAN, *supra* note 19, at 171.

53. See Luban, *supra* note 51, at 721. It should be noted, however, that this is an extreme. David Luban, the original proponent of “moral activist” client counseling has described the heart of moral activist counseling as “discussing with the client the rightness and wrongness of her projects, and the possible impact of those projects [on ‘the people’] in the same matter-of-fact and (one hopes) unmoralistic manner that one discusses the

The legal realist conception of the “bounds of the law” was not without defenders, the most prominent of whom was Stephen Pepper. Pepper raised early objections to the moral theorists’ project and argued that the legal realist conception of law was a morally justified jurisprudence for lawyers.<sup>54</sup> Pepper’s defense was based on the premise that the core function of lawyers is to provide “access to the law” as a public good. The primary function of providing “access to law” creates, at the very least, a rebuttable presumption that clients are entitled to full information about the law, including information about available loopholes and the limits of law enforcement.<sup>55</sup> In cases where “the law is manipulable and without clear limits on client conduct,” Pepper argued, “that aspect of the law should be accessible to the client.”<sup>56</sup> To limit access to the law based on lawyers’ personal views of right and wrong would threaten the status of law as a public good and undermine the underlying values of autonomy, equality and diversity.<sup>57</sup>

Yet, as Pepper recognized, the indeterminacy and lack of normative content in the legal realist conception of law creates inevitable gaps between what the client has a legal right to do and what it is morally right for the client to do.<sup>58</sup> Pepper and other defenders of the legal realist conception of law sought to close the gap between law and morality by emphasizing that lawyers have secondary obligations to exercise moral judgment in selecting clients, to engage their clients in moral dialogue, or both.<sup>59</sup> However, Pepper delineated only limited circumstances in which it would be appropriate for lawyers to refuse representation or engage in moral dialogue with clients, noting the interference of such actions with the primary duty of providing access to the law.<sup>60</sup>

In the end, those who defended the legal realist conception of law as a legitimate operating jurisprudence for everyday lawyers and those who bemoaned it as an unfortunate reality of legal practice ended up debating the proper boundary between law and morality in legal representation within the same theoretical structure. Each camp understood the “bounds of the law” to incorporate the legal realists’ conception of law as open-textured, manipulable, and devoid of normative content. Because such limits are ultimately incapable of preventing moral harm, each camp agreed that lawyers have a professional duty to supplement legal advice with personal moral judgment in the form of moral dialogue with clients, a duty to refuse representation on moral grounds, or both. They differed primarily on

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financial aspects of a representation.” David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer–Client Relationship*, 90 COLUM. L. REV. 1004, 1026 (1990) (quoting LUBAN, *supra* note 19, at 173).

54. Pepper, *Lawyers’ Amoral Role*, *supra* note 4, at 624–28.

55. Pepper, *Counseling at the Limits*, *supra* note 4, at 1598–1600.

56. Pepper, *Lawyers’ Amoral Role*, *supra* note 4, at 626.

57. Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 662–67.

58. Pepper, *supra* note 38, at 186.

59. Pepper, *Lawyers’ Amoral Role*, *supra* note 4, at 630–35; *see also* Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 199–204 (1978).

60. Pepper, *supra* note 38, at 192–96; Pepper, *Lawyers’ Amoral Role*, *supra* note 4, at 632–33.

questions of how strongly and in what circumstances it was appropriate for lawyers to bridge the gaps between law and justice by bringing their moral influence to bear in legal representation of their clients.<sup>61</sup>

*C. The Problems with Deploying Personal Moral Judgment in the Line of Professional Duty*

The reliance on lawyers' moral judgments to supplement and limit the professional duty of partisan advocacy creates significant tensions with lawyers' role in the legal system. The permission given to lawyers to pursue client objectives all the way to the "bounds of the law" is grounded in rule-of-law values that individuals should be free to pursue their projects and objectives within limits set through open, public, and democratic processes.<sup>62</sup> When lawyers supplement these legal boundaries and curtail or withhold legal representation based on their private and personal judgments about whether clients' projects or objectives are morally worthy, society runs the risk of substituting the rule of law with the rule of an "oligarchy of lawyers."<sup>63</sup> The tension becomes especially acute in the context of a morally pluralistic society, where the promotion of a robust role for morality in the lawyer-client relationship can become a license for lawyers to impose their personal resolution of contested moral issues on their clients' life choices.<sup>64</sup>

Although lawyers are not ethically prevented from providing moral advice to their clients,<sup>65</sup> attempts to fashion a professional duty to incorporate moral judgment into legal representation strain against the nature and purpose of the lawyer-client relationship. The lawyer-client relationship is a fiduciary relationship, in which the lawyer acts for the benefit of the client, bringing legal knowledge and expertise to bear on matters of great importance to the client.<sup>66</sup> As Tim Dare has argued, because of the imbalance of legal knowledge and expertise, clients have only limited ability to assess their lawyers' competence and diligence and very little information from which to ascertain the lawyer's personal, moral, or political views.<sup>67</sup> Although some ethicists have argued that the ideal lawyer-client relationship should be like a friendship, in which lawyers and clients mutually strive for goodness as they collaborate in addressing the moral issues that inevitably arise in legal representation,<sup>68</sup> clients typically don't have the personal information about their lawyers that we rely on when we turn to friends for moral

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61. See, e.g., Luban, *supra* note 50, at 649 (characterizing his difference with Pepper as one of degree rather than kind). This observation is less accurate with respect to Freedman, who grounds the importance of moral dialogue in respect for the client's dignity. Freedman, *supra* note 59, at 203-04.

62. Wilkins, *supra* note 3, at 472-73.

63. Pepper, *Lawyers' Amoral Role*, *supra* note 4, at 617.

64. DARE, *supra* note 1, at 74-75; Wendel, *supra* note 27, at 376-83.

65. The Model Rules contemplate that moral considerations may be part of the lawyer's duty to "exercise independent professional judgment and render candid advice." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009).

66. DARE, *supra* note 1, at 89-94.

67. *Id.* at 89-93.

68. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS AND MORAL RESPONSIBILITY* 46-53 (2d ed. 2009).

guidance, such as whether they share our values or have the life experience to understand our dilemmas or empathize with our struggles.<sup>69</sup> When a lawyer takes on the goal of morally educating the client or making the client a better person through moral conversation, the problems of lack of moral expertise, risk of moral overreaching, and threat to rule-of-law values arise.

The moral theorists' premise that the public would benefit from the moral guidance that lawyers have to offer is also debatable. Moral judgment falls outside the scope of specifically legal expertise. Although some scholars have argued that lawyers' training and experience endows them with superior capacity to exercise sound moral judgment,<sup>70</sup> just as many have argued that lawyers' habitation of their professional role impairs their moral capacities.<sup>71</sup> Moreover, the incorporation of moral judgment into legal representation has the paradoxical quality of being least effective in shaping moral outcomes in the situations in which it is acknowledged to be most appropriate. Legal ethicists across the spectrum agree that the lawyer's moral management of legal representation is least appropriate for clients who are vulnerable to moral overreaching by their lawyers due to their relative lack of power, sophistication, and capacity to seek a second opinion from another lawyer.<sup>72</sup> Yet they acknowledge that more sophisticated and powerful clients are less likely to tolerate a lawyer's moral maneuvering, either by brushing off moral advice as irrelevant or by seeking legal representation from a lawyer who will provide representation free of moral challenge.<sup>73</sup>

The jurisprudential turn in legal ethics presents an attractive alternative to the moral theoretical solution to over-zealous partisanship because it provides limits on lawyers' no-holds-barred partisanship that spring directly from lawyers' professional duties rather than from appeals to personal morality that compete with professional duty. The turn to jurisprudential theory promises to remain consonant with rule-of-law values by limiting lawyers' partisan pursuit of client interests based on correct or legitimate interpretation of the law. Because the interpretation of law is a quintessential lawyering task, it falls squarely within the scope of lawyers' expertise and authority within the lawyer-client relationship. A lawyer who interprets the law to set limits on client objectives thus avoids the dangers of moral overreaching with vulnerable clients and gains traction with more powerful clients.

## II. THE JURISPRUDENTIAL TURN IN LEGAL ETHICS

In the recent jurisprudential turn in legal ethics, theorists draw on jurisprudential theories to ground lawyers' interpretations of the "bounds of the law" in the role that lawyers play in the legal system and the role that law plays in

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69. DARE, *supra* note 1, at 95.

70. See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 109–62 (1993).

71. Wasserstrom, *supra* note 37, at 15; Postema, *supra* note 46, at 75–80.

72. Pepper, *supra* note 38, at 194–95; SHAFFER & COCHRAN, *supra* note 68, at 54–57.

73. Pepper, *supra* note 38, at 193–94.

society.<sup>74</sup> This Part describes and evaluates the relative successes and shortcomings of two alternative jurisprudential theories of correct or appropriate interpretation that have been advanced within legal ethics: (1) William Simon's theory that lawyers should interpret the "bounds of the law" according to underlying principles of justice in the style of a Dworkian judge; and (2) positivist theories advanced by Bradley Wendel and Tim Dare, which argue that in interpreting the "bounds of the law" lawyers should respect the authority of law as society's resolution of contested moral and political disagreement and not seek to unsettle that resolution by stretching legal interpretation to meet either their clients' interests or their own conceptions of morality or justice.

Jurisprudential questions of what makes legal interpretation legitimate have more commonly been explored in the context of adjudication, and invoke separation-of-powers issues regarding the role of judges in a democratic system of law. The jurisprudence of lawyering re-frames the questions of correct or appropriate interpretation within the context of the lawyer-client relationship.<sup>75</sup> The stakes are arguably higher in the context of legal representation than they are in adjudication because lawyers' interpretations of the "bounds of the law" are carried out in the private and unreviewable context of the lawyer-client relationship.<sup>76</sup> To the extent that lawyers' interpretations of law deviate too radically from law's ordinary meaning and intended purpose, lawyers privately undermine publicly and democratically established frameworks for establishing societal norms through law. Moreover, the consequences of incorrect or illegitimate interpretation fall directly on clients, who often lack the necessary expertise to challenge their lawyers' legal interpretations. As David Luban has written (borrowing a metaphor from Hart), "the Nightmare vision of legal advice" consists in the twin dangers that lawyers will "dominate and manipulate clients, either to advance their own agenda or to line their own pockets," or lawyers will "treat the advisor's role like that of an advocate and spin the law to support whatever the client wishes to do."<sup>77</sup> The "Noble Dream in a jurisprudence centered on the lawyer-advisor" is based on a vision of lawyers acting as intermediaries between the law and those it governs.<sup>78</sup>

The jurisprudence of lawyering aspires to fill out the details of the Noble Dream of lawyers acting as intermediaries between the law and those it governs by describing and justifying the appropriate interpretive practices for lawyers in setting the "bounds of the law" within which their clients are entitled to operate. To succeed as a jurisprudence of lawyering, a theory must deliver on promises that

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74. Wendel, *supra* note 2, at 1176-77.

75. See, e.g., Ted Schneyer, *Who Should Define Arizona's Corporate Attorney-Client Privilege?: Asserting Judicial Independence Through the Power to Regulate the Practice of Law*, 48 ARIZ. L. REV. 419, 445 (2006).

76. The institutional constraints on common law judging, such as the requirements that judges reduce their opinions to writing, sit on panels, and hear the benefit of adversary argument have been acknowledged by even Legal Realist Karl Llewellyn to bring a sense of "reckonability" to the law. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 19-51 (1960).

77. LUBAN, *supra* note 2, at 158-59.

78. *Id.* at 159-60.

the “bounds of the law” makes to clients and to the public. As David Wilkins has written, legal ethics imposes complementary professional duties on lawyers to further the private interests of particular individuals on the one hand, and to respect and preserve “the fair and efficient administration of justice” on the other.<sup>79</sup> The directive to “represent a client zealously within the bounds of the law” strikes a balance between these private and public interests.<sup>80</sup> It promises clients that the pursuit of their ends will be limited only by objective and identifiable external constraints rather than by their lawyers’ personal or idiosyncratic moral or political views,<sup>81</sup> and it promises the public that “the pursuit of private ends will not unduly frustrate public purposes.”<sup>82</sup> Moreover, the “bounds of the law” are an ostensibly legitimate constraint on the pursuit of private ends because law’s authority derives from the will of the people, who control its boundary through democratic processes.<sup>83</sup>

To deliver on the promise to clients—that their projects will be limited by objectively identifiable boundaries set by legitimate democratic processes rather than by the personal or idiosyncratic views of their lawyers—a jurisprudence of lawyering must constrain lawyers from displacing the public resolution of policy issues with their personal views. To deliver on the promise to the public—that the partisan pursuit of private ends will not unduly frustrate the public interest—a jurisprudence of lawyering must constrain lawyers from manipulating the meaning of law in ways that skew the bounds of the law toward their clients’ private ends.

The legal realist implicit jurisprudence of everyday lawyering, which “stresses [law’s] open-textured, vague nature over its precision; its manipulability over its certainty; and its instrumental possibilities over its normative content,”<sup>84</sup> arguably fails to deliver on these promises to either clients or the public for two reasons.<sup>85</sup> First, the agnosticism about correct or legitimate interpretation in the legal realist conception of law conflicts with the rule-of-law notion that disputes among members of a society ought to be resolved by reference to impartially applied rules and principles, rather than lawyers’ idiosyncratic or personal beliefs.<sup>86</sup> It unravels the traditional legal ethical model’s promise to the public by opening the door for lawyers’ instrumentalist manipulation of the “bounds of the law” that are supposed to constrain their partisanship,<sup>87</sup> effectively collapsing lawyers’ public duties into the pursuit of their clients’ private interests.<sup>88</sup> Second, it

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79. Wilkins, *supra* note 3, at 470–71.

80. *Id.* at 473–74.

81. *Id.* at 472.

82. *Id.* at 471.

83. *Id.* at 473.

84. Pepper, *Lawyers’ Amoral Role*, *supra* note 4, at 624–26.

85. Wilkins, *supra* note 3, at 484.

86. Dorf, *supra* note 23, at 680–89. Some legal realists argued that judges decide cases primarily based on personal or idiosyncratic hunches and then search for legal justification in conceptual rules. See FRANK, *supra* note 24, at 111–12; Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L. REV. 274 (1928).

87. See Postema, *supra* note 46, at 73; see also LUBAN, *supra* note 19, at 18–19.

88. Wilkins, *supra* note 3, at 483–84.

threatens clients' interests by positioning lawyers to deploy interpretations of the law that secure their own financial or reputational interests at the expense of their clients.<sup>89</sup>

To the extent that proposed alternative jurisprudential theories deliver determinate answers to questions of legal interpretation, they can fulfill the promises of legal ethics to clients and to the public. The central question for a jurisprudence of lawyering is how well it guides lawyers faced with a range of plausible interpretations to resolve the open questions of interpretation that remain. As Brad Wendel has written, theories of legal ethics are “‘normative all the way down,’ with a theory of democracy justifying a theory of the function of law, which in turn justifies a conception of the lawyer’s role.”<sup>90</sup> It is by reference to this normative substructure that lawyers can escape the problems raised by the moral theories in legal ethics and make judgments grounded in professional values incident to their role in the legal system.<sup>91</sup> The success of a jurisprudence of lawyering rides on whether it provides criteria for choosing among plausible interpretations that appropriately balance the public and private interests at stake when lawyers advise clients about the law.

#### A. *Substantive Justice and Dworkian Interpretation*

William Simon was the first legal ethicist to break from the fold of moral theory and explicitly ground legal ethics in jurisprudential theory.<sup>92</sup> Simon proposed replacing the various categorical and client-centered norms in legal ethics—zeal, confidentiality, loyalty—with a single imperative that lawyers exercise discretionary and contextualized judgment to “take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice,” or as he synonymously called it, “legal merit.”<sup>93</sup> In deciding questions of justice, Simon proposed that lawyers invoke the same style of contextual reasoning that judges employ in deciding questions of law, taking into account the background values, principles and purposes that underlie the letter of

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89. Some analysts suggest that in advising clients, lawyers do just that. *See, e.g.*, AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 106–07 (1995) (documenting conversations between divorce lawyers and clients); Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 *L. & SOC’Y REV.* 15, 18–31 (1967) (analyzing the institutional factors that cause defense lawyers to manipulate their clients into accepting plea bargains); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 *S. CAL. INTERDISC. L.J.* 375, 423–26 (1997) (providing a model explaining why lawyers would overestimate legal risk to their clients).

90. Wendel, *supra* note 2, at 1176–77.

91. *See generally* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 *NOTRE DAME L. REV.* 1 (1999).

92. SIMON, *supra* note 1, at 13 (“An important premise of my argument is that the key issues of legal ethics are jurisprudential, that is, they implicate questions of the nature and purpose of law and the legal system.”); *see also* Luban, *Reason and Passion*, *supra* note 43, at 877–85.

93. SIMON, *supra* note 1, at 9, 138.

the law and provide it with legitimate authority.<sup>94</sup> In Simon's view, a lawyer's determinations of what actions seem likely to promote justice are not simply expressions of lawyers' personal or moral beliefs; rather, they are "legal judgments grounded in the methods and sources of authority of the professional culture."<sup>95</sup>

Simon's equation of "justice" and "legal merit" and the style of legal reasoning he prescribed for determining the "bounds of the law" borrow heavily from the jurisprudence of Ronald Dworkin.<sup>96</sup> Like Dworkin, Simon argued that background values, principles and purposes "are part of the law in the sense that they affect the decisions of cases."<sup>97</sup> More importantly, Simon argued, law's consistency with these background values provides the strongest reason to respect and obey the law.<sup>98</sup> Simon's jurisprudence of lawyering invites lawyers to join Dworkin's project of making law the best it can be by interpreting the "bounds of the law" according to principles of justice that both fit with past interpretations of law and justify its continued legitimacy.<sup>99</sup>

Simon argued that the "dominant view" of legal ethics defines law too narrowly in positivist terms that privilege its form over its substance.<sup>100</sup> Such a narrow interpretation is problematic in Simon's view because it mandates that lawyers adhere to technical legal limits even when the law is unfair or has become outmoded.<sup>101</sup> At the same time, it encourages lawyers to structure client affairs in ways that technically comply with the letter of the law even though they undermine law's purposes.<sup>102</sup> Simon argued that lawyers should resist these temptations of technical adherence to positive law and interpret the "bounds of the

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94. *Id.* at 139, 144–45.

95. *Id.* at 138.

96. Although Simon did not discuss Dworkin's jurisprudence in any depth, Simon acknowledged that his argument "has been inspired by . . . the legal liberalism of Ronald Dworkin" and "influenced by his phenomenological account of legal decisionmaking." *Id.* at 247. Commentators have read Simon's jurisprudence as borrowing heavily from Dworkin's arguments. See Robin West, *The Zealous Advocacy of Justice in a Less than Ideal Legal World*, 51 STAN. L. REV. 973, 977–78 (1999); Luban, *Reason and Passion*, *supra* note 43, at 886–87. It should be noted that Dworkin himself does not conflate law with justice. RONALD DWORGIN, *LAW'S EMPIRE* 97 (1986) ("Law is also different from justice. Justice is a matter of the correct or best theory of moral and political rights, and anyone's conception of justice is his theory, imposed by his own personal convictions, of what these rights actually are.").

97. SIMON, *supra* note 1, at 38.

98. *Id.* at 77; see also William H. Simon, *The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on The Practice of Justice*, 51 STAN. L. REV. 991, 996–97 (1999).

99. See generally DWORGIN, *supra* note 96.

100. Simon argued that the traditional partisan approach to lawyering—what he called the "dominant view" of legal ethics—defines the "bounds of the law" narrowly according to positivist criteria of whether law has been "enacted or adopted by recognized lawmaking institutions of the state" and whether it "take[s] the form of commands or prohibitions backed by penalties." SIMON, *supra* note 1, at 27.

101. See *id.* at 78.

102. *Id.* at 145.

law” that constrain their partisan advocacy more expansively.<sup>103</sup> Under Simon’s proposed jurisprudence, lawyers may be required to stop short of the arguable limits of the law by foregoing possible interpretations of law that are inconsistent with underlying principles of justice.<sup>104</sup> Conversely, and more controversially, lawyers may be required to nullify unjust laws by noncompliance with their formal terms.<sup>105</sup>

Although Simon’s jurisprudence borrows a style of legal interpretation associated with Dworkian adjudication, it is a jurisprudence designed for lawyers, not judges. Accordingly, Simon emphasized that in making judgments about the actions most likely to promote justice, lawyers must take into account a threshold question of institutional competence, comparing their own capacity to reach reliable determinations of justice with that of other legal officials.<sup>106</sup> The adversary system assigns to lawyers a role as client advocates, Simon posited, because judges and other legal officials are usually better positioned than lawyers to reach reliable determinations of justice.<sup>107</sup> In situations where the adversary system is functioning effectively, lawyers can comfortably inhabit their traditional role as client advocates, deferring to the judgment of other legal officials to declare and apply the law correctly.<sup>108</sup> However, where the institutional competence of existing procedures is in question—such as where a matter is unlikely to come before an official decisionmaker; where an adverse party or official decisionmaker “lacks information or resources needed to initiate, pursue or determine a claim”; or where officials are “corrupt, or politically intimidated, or incompetent”—lawyers must step into the breach and take direct responsibility for substantive justice.<sup>109</sup>

Simon’s jurisprudence represents an advance over both the ethically problematic legal realist jurisprudence of ordinary practice and the moral activist alternative. Unlike the radical indeterminacy suggested in the legal realist conception, Simon’s jurisprudence requires lawyers to justify deviations from

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103. *Id.* at 38–39.

104. *Id.* at 77.

105. *Id.* at 81–82. Simon contended that lawyers owe no particular duty of obedience to the letter of the law, *id.* at 103–04, pointing to a long history of explicit and implicit nullification of positive law in the public interest through judicial interpretation and regulatory under-enforcement, *id.* at 86–95. For a criticism of this view, see David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269 (1996).

106. SIMON, *supra* note 1, at 139–40; *see also* Simon, *supra* note 98, at 1004 (clarifying that the analysis of institutional competence is a threshold question).

107. SIMON, *supra* note 1, at 139–40. However, even when acting in an advocacy role, lawyers’ ultimate loyalty is to justice, not to the advancement of client interests. Lawyers thus retain a duty to calibrate their actions in ways that facilitate reliable and just results by refraining from actions like discovery abuse or over-zealous motion practice, which undermine the smooth operation of the system and diminish the likelihood of reliable and just results. *Id.* at 143.

108. *Id.* at 138. As Robert Gordon points out, however, most cases will not deliver this kind of comfort zone because even with the best-matched adversaries, the adversary system has the capacity to “horribly malfunction.” Robert W. Gordon, *The Radical Conservatism of The Practice of Justice*, 51 STAN. L. REV. 919, 926 (1999).

109. SIMON, *supra* note 1, at 140.

formal legal requirements with respect to public values that are arguably reflected in law. Unlike the moral activist alternative, the process Simon prescribes for searching out legal merit introduces genuinely legal considerations into lawyers' reasoning about what justice requires, disciplining lawyers to look beyond their own moral and political beliefs to ascertain justice in terms of legal norms and shared interpretive practices of the legal profession.<sup>110</sup>

Moreover, Simon's jurisprudence ostensibly fulfills the promises that legal ethics makes to both the public and to clients: that the "bounds of the law" will protect the public interest by limiting over-zealous partisanship, and that the limits on partisanship will reflect objective and legitimate criteria rather than the idiosyncratic personal or political views of lawyers. Under Simon's view, lawyers who refuse to advance unjust claims or refrain from over-zealous tactics do not impose their personal moral views on their clients; they simply judge such claims and tactics to be legally invalid.<sup>111</sup> Because clients are not entitled to pursue legally invalid claims, lawyers' judgments to forego claims or tactics based on determinations of legal merit remain consistent with rule-of-law values and do not risk moral overreaching with vulnerable clients. In interactions with more powerful clients, Simon's jurisprudence provides lawyers with the traction that moral counseling denies them, because lawyers can advise their clients that the law—interpreted according to its background values and underlying principles—simply does not permit the lawyers to pursue morally questionable claims or abusive hyper-zealous tactics.

However, the capacity of Simon's jurisprudence to deliver on these promises rides on the questionable ability of his Dworkian conception of law to determine true or correct answers to lawyers' contextual judgments of legal merit. As critics have pointed out, if lawyers' assessments of "legal merit" turn primarily on lawyers' subjective personal, moral or political beliefs, Simon's theory ends merely restating the moral theorists' solution to the problems of legal professionalism in legal terms.<sup>112</sup> In response, Simon appears to adopt a version of Dworkin's "right answer" thesis: that most cases will provide at least a "best interpretation" if not a "right answer" to the question of how the background principles and fundamental values in law cohere.<sup>113</sup> Simon concedes—as he must—that in applying his justice-based theory of legal ethics "not all lawyers [will] agree in any given situation on how the applicable principles apply."<sup>114</sup> But he attributes the variant results to the fact that "[i]ndividual lawyers will make mistakes,"<sup>115</sup> suggesting that correct interpretations of what justice requires in

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110. *Id.* at 102–03. Simon maintained that his theory of legal ethics asks only that "the lawyer make the best effort she reasonably can to vindicate the relevant legal merit." Simon, *supra* note 98, at 996.

111. West, *Zealous Advocacy for Justice*, *supra* note 96, at 979–80.

112. Both moral theorists and jurisprudential positivists in legal ethics have leveled this critique at Simon's theory of legal ethics. Luban, *Reason and Passion*, *supra* note 43, at 885–88; Wendel, *supra* note 27, at 373–75.

113. See, e.g., RONALD DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81, 123–30 (1977).

114. SIMON, *supra* note 1, at 51–52.

115. *Id.* at 52.

particular circumstances will emerge from a properly executed analysis of legal merit.

It has not escaped most observers that the examples Simon provides of contextual reasoning about legal merit seem heavily tilted toward vindicating a particular outcome with arguments that can be plausibly framed as legal, rather than as launching a searching inquiry into the “best interpretation” of the background values immanent in the law.<sup>116</sup> This point has been illustrated by the juxtaposition of two of Simon’s examples.<sup>117</sup> In one, a client on public assistance lives rent-free in a home owned by her cousin, which requires a reduction of the client’s monthly welfare benefits by \$150 because the free housing is considered “income in kind” under the applicable regulations.<sup>118</sup> Simon argues that a lawyer might justifiably recommend to the client that the client make a nominal rent payment of five dollars per month to her cousin to avoid the force of this regulation, arguing that it is permissible because “the claimant’s interest in a minimally adequate income is a value of exceptional legal importance” reflected in the law.<sup>119</sup> In the second example, a highly paid hotel manager lives on the hotel premises, and the in-kind benefit of the free housing is taxable as income.<sup>120</sup> Simon argues that a lawyer could not properly advise the manager to take advantage of a tax exemption by renegotiating his contract to make living on the hotel premises a condition of employment. The clear purpose of the exemption, Simon explains, is to compensate employees who are inconvenienced by the requirement to live onsite, and it “would not be consistent with this statutory purpose to apply the exemption to arrangements the taxpayer has initiated.”<sup>121</sup>

It is notable that under the dominant, or implicit operating jurisprudence of lawyering, either of these maneuvers would be justifiable. As long as the structuring maneuver is not explicitly prohibited by law, there is no basis in the operating jurisprudence of lawyers to criticize either as unethical. Ethical analysis that labels one maneuver ethical and the other unethical might be justified by moral or distributive justice arguments that view tax breaks for wealthy and powerful clients differently than legal aid to the poor. This approach is endorsed under moral theory by Deborah Rhode, who has argued that conventional norms of zealous advocacy and avoidance of regulation should continue to apply to poverty lawyers because “[a]n impoverished mother struggling to escape welfare stands on

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116. Luban, *Reason and Passion*, *supra* note 43, at 888–91 (discussing the tenuous legal authority for the lawyer’s resolution of legal merit in two of Simon’s examples). Somewhat surprisingly, Simon’s response to such criticism is that as long as a lawyer has produced an analysis that is “consistent with a minimally plausible interpretation of [relevant legal] authority,” it ought to be counted as a judgment of legal merit rather than a moral judgment in disguise. Simon, *supra* note 98, at 999.

117. See, e.g., William H. Simon et al., *William H. Simon: Thinking Like a Lawyer—About Ethics*, 38 DUQUESNE L. REV. 1015, 1035 (2000) (comments by Professor Bruce S. Ledewitz).

118. SIMON, *supra* note 1, at 148.

119. *Id.* at 148–49.

120. *Id.* at 146.

121. *Id.* at 147.

different ethical footing than a wealthy executive attempting to escape taxes.”<sup>122</sup> It is also endorsed by Susan Carle, who argues for the explicit recognition of the relative power of the clients in making ethical calls.<sup>123</sup> However, Simon does not argue in favor of such activist interpretations of law on moral or political grounds. In his view, the ethical difference in the leeway afforded the lawyers to structure the client’s affairs to avoid the regulatory effect of the law is driven by interpretation of the underlying values and principles within the law itself.<sup>124</sup>

Without the premise that Dworkian interpretation yields a “right answer” or “best interpretation” of law most of the time, the implications of Simon’s jurisprudence are troubling. In determining the “bounds of the law,” Simon’s jurisprudence eschews deference to both formal law and client interests in favor of lawyers’ assessments of substantive justice in the circumstances that each case presents. Given the complex, contestable, and multilayered analysis that Simon’s approach requires, we might expect that lawyers’ judgments will be heavily freighted with the lawyers’ personal and political beliefs about the moral worthiness of the client’s claim and moral justifications for the law.<sup>125</sup> If there really is a right or best interpretation of the “bounds of the law” at which lawyers are aiming in each case, these judgments may roughly converge.<sup>126</sup> However, if

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122. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 79 (2000).

123. See generally Susan D. Carle, *Power as a Factor in Lawyers’ Ethical Deliberation*, 35 *HOFSTRA L. REV.* 115 (2006).

124. See Simon, *supra* note 98, at 997–99 (defending the legality of the analysis in his controversial examples by arguing that a purely moral analysis would yield different results).

125. As Simon acknowledged, when the definition of law is expanded beyond positivist criteria to incorporate analysis of the relative weight of various background values and principles, the question of what law prescribes becomes difficult to answer. SIMON, *supra* note 1, at 99–100. And, determining what the law prescribes is only half the game: lawyers also need to assess the institutional competence of relevant processes and institutions to arrive at reliable determinations of justice and calibrate their direct responsibility for ensuring just results accordingly.

126. Even if the “right answer” thesis holds, Simon’s theory of legal ethics faces the critique that the complex contextual judgments it requires are too intellectually demanding to expect lawyers in ordinary practice to execute reliably. Luban criticized Simon on this point, arguing that Simon’s theory of legal ethics requires “excessive cognitive demands on lawyers” that are “too strenuous for ordinary decision-making by ordinary lawyers.” Luban, *Reason and Passion*, *supra* note 43, at 896. Simon—rightly, in my view—rejects the charge that his contextual style of reasoning requires an unrealistically Herculean effort, responding that experienced practitioners already engage in sophisticated and complex strategic analysis, and that experience renders such judgments less daunting than they appear when spelled out on paper. Simon, *supra* note 98, at 995. Interestingly, Luban raised the same defense to the charge that his own theory of legal ethics, which requires lawyers to balance the moral justifications for zealous advocacy against the moral harm caused by adhering to professional role in particular cases, was too complex. See LUBAN, *supra* note 19, at 140–41. In my view, Simon and Luban are each correct in noting that expert judgment looks more complicated when its various steps and multiple factors are spelled out in writing than it is in actual implementation, where the steps of reasoning and factors of analysis are incorporated into the schemas on which experts implicitly rely in processing information.

there is not, Simon's jurisprudence of lawyering provides substantial leeway for lawyers to exercise private and unreviewable judgment about the merits of substantive justice, and to do so under the imprimatur of legal expertise.

To the extent that the law leaves room for genuine disagreement about the merits of substantive justice—in what I have elsewhere called the “challenge of moral pluralism”<sup>127</sup>—Simon's approach is troubling from the perspective of both clients and the public. Consider an example I have posed elsewhere, of a lawyer advising a lesbian couple about how to structure their family affairs to raise a child together.<sup>128</sup> The legal landscape in which the lawyer operates in the “lesbian family planning” example might well include a narrowly worded statute that explicitly limits co-adoption to married couples in a state that prohibits same-sex marriage, making co-adoption technically impossible for same-sex couples.<sup>129</sup> However, a creative interpretation of the statute might permit same-sex adoption based on a broader provision in the family code stating that family law statutes ought generally to be construed to protect the “best interests” of children.<sup>130</sup> The problem with Simon's approach in such a legal landscape is that family law is not univocal: its strands of family privacy, individual autonomy, and *parens patriae* intervention on behalf of children are woven together by underlying principles that value both religious traditionalism and liberal individualism.<sup>131</sup> As a result, a lesbian-friendly lawyer would be inclined to view the statutory language explicitly confining co-adoption to married couples as inappropriately narrow and outmoded and to read the underlying principles and values in family law as supportive of the rights and liberties of same-sex couples to establish equal parentage of a child they intend to raise together.<sup>132</sup> A lawyer who believes that homosexuality is immoral and that raising children in same-sex relationships undermines the important social institution of the family would interpret the underlying principles and values inherent in family law differently. Such a lawyer would read the statutory provisions limiting co-adoption to married heterosexual couples as an expression of society's deeply held faith in the sanctity of marriage and would view attempts to use a “best interests of the child” provision to extend co-adoption to same-sex families as manipulative and corruptive of the law's underlying values and principles.<sup>133</sup>

Under Simon's jurisprudence of lawyering, the couple's luck would be in the draw. The lawyer's public responsibility would be to get the interpretation right, not according to their own conception of right and wrong, but according to a broadly defined conception of legal merit. Simon's jurisprudence would direct each lawyer to interpret the law in the way that seemed to best fit with law's underlying principles and values, without any particular deference to explicit

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127. See generally Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005).

128. *Id.* at 409–11.

129. *Id.* at 410–11.

130. *Id.* at 430–31.

131. For an interesting analysis of the underlying principles in family law, see Vivian E. Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31 (2006).

132. Kruse, *supra* note 127, at 431.

133. *Id.* at 431–32.

language in the statute that ran contrary to those purposes and without an anchor in the client's interests. Lawyers with different views of the priority of competing underlying values might well come to different conclusions about the right or best interpretation of governing law, and do so in good faith. But, unlike Dworkian judges, whose decisions about which interpretations best fit and justify the law are disciplined by exposure to adversary advocacy and public scrutiny, lawyers' judgments about the best interpretation of law would be shielded from public review and cloaked in a mantle of legal expertise that their clients might well lack the professional education and training to challenge or second-guess.<sup>134</sup>

The competing jurisprudential camp that has emerged within legal ethics explicitly takes moral pluralism into account, beginning with the premise that society is characterized by such a deep and irreconcilable moral pluralism that the Dworkian ideal of integrating the underlying principles of law into a coherent narrative is unattainable and Simon's jurisprudence of lawyering is unworkable.<sup>135</sup> The next section examines how that premise leads to the positivist school of thought within the emerging jurisprudence of lawyering.

### ***B. Moral Pluralism and Positivism for Lawyers***

Legal scholar Brad Wendel and philosopher Tim Dare have each advanced a positivist jurisprudence of lawyering derived from a professional duty to respect the authority of law as a framework for enabling coordinated social activity in the face of deep and persistent normative disagreement in a morally pluralistic society.<sup>136</sup> According to the premise of moral pluralism that forms the foundation for the positivist jurisprudence in legal ethics, people in society share an interest in creating a stable framework to enable cooperative activity despite their deep and persistent normative disagreement.<sup>137</sup> However, because society is characterized by a diversity of comprehensive moral viewpoints and empirical disagreement about how to implement even widely shared norms in concrete situations,<sup>138</sup> society is "unable to establish a stable basis for cooperative activity with reference to comprehensive doctrines of the good, or substantive theories of rights."<sup>139</sup> According to the positivist theorists in legal ethics, the primary function of law is to resolve and supersede this normative controversy.<sup>140</sup> Law achieves the goals of settlement, stability, and coordination by providing neutral lawmaking procedures that "transform brute demands into claims of [legal] entitlement."<sup>141</sup> By accepting the authority of neutral lawmaking procedures, persons who hold

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134. *Id.* at 426–33. Shaffer and Cochran raise a similar concern, criticizing Simon's theory for putting lawyers in the role of a "guru." SHAFFER & COCHRAN, *supra* note 68, at 40–41.

135. *See* WENDEL, *supra* note 1, at 46–48 (arguing that both Dworkin's jurisprudence and Simon's application of it to legal ethics ultimately rely on contested extra-legal normative criteria rather than interpretation of legal sources).

136. *See generally id.*; DARE, *supra* note 1.

137. WENDEL, *supra* note 1, at 94; DARE, *supra* note 1, at 61–63.

138. WENDEL, *supra* note 1, at 97.

139. *Id.* at 98.

140. *Id.* at 86–98; DARE, *supra* note 1, at 59–63.

141. WENDEL, *supra* note 1, at 114.

divergent views on justice and morality can coordinate their activities through mutual respect for law “without abandoning their own views or embracing the views of others.”<sup>142</sup>

The legal ethicists who accept the premises of moral pluralism argue that the conception of law that best serves the coordinating function demanded by moral pluralism is “broadly positivist” in insisting on the separability of legality from morality.<sup>143</sup> Under a moral pluralist view, citizens will never reach full—maybe not even approximate—agreement on substantive questions of justice.<sup>144</sup> Law’s authority can be established only if it can be derived in a way that retains its independence from the normative claims it is meant to settle.<sup>145</sup> Positivist conceptions of law make such settlement possible because they allow citizens to transcend underlying contests over notions of justice or morality by appealing to shared understandings of legality. As Tim Dare explains, the authority of law is analogous to the authority of a coin toss in providing “a way of going on, of deciding what to do, despite our disagreement as to what ought to be done.”<sup>146</sup> After the coin toss, the loser has an authoritative reason to set aside substantive disagreement with the result and accept it as the outcome of a decision procedure to which the parties agreed.<sup>147</sup> Analogously, the fact that something has been enacted as law is said to provide a sufficient and exclusionary reason for citizens to obey the authority of law, which supplants any reasoning about contested underlying policies that led up to the enactment of law.<sup>148</sup>

Wendel makes a different argument about the authority of law, contrasting the coin toss example with his own elaboration of Joseph Raz’s example of binding arbitration.<sup>149</sup> Wendel asks us to imagine a dispute between a manufacturer and distributor of machine parts: the manufacturer believes the distributor has misappropriated trade secrets and is using those secrets to sell its own line of products in violation of the parties’ distribution agreement; the distributor believes that the technology at issue is not a trade secret, that the side distribution is not in violation of the parties’ agreement, and that the manufacturer is tortiously interfering with his business dealings.<sup>150</sup> After disputing “the right way to interpret the contract and the applicable law,” the parties are at an impasse,

142. DARE, *supra* note 1, at 62.

143. *Id.* at 63; WENDEL, *supra* note 1, at 194–200.

144. WENDEL, *supra* note 1, at 88.

145. *Id.* at 115–16.

146. DARE, *supra* note 1, at 62.

147. *Id.* at 62–63.

148. Dare derives this account from Joseph Raz’s concept of authority, in which authority requires the provision of exclusionary reasons for action. *Id.* at 69–71. Dare is sympathetic as well to Raz’s derivation of exclusive positivism from this conception of authority. *Id.* at 71–73.

149. WENDEL, *supra* note 1, at 110. The binding arbitration example is offered by Raz as an example of an authoritative decision that is dependent on the underlying reasons offered by each party in support of their proposed resolution. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 41–42 (1986). The coin toss differs from binding arbitration by producing an authoritative reason for action that is independent of the underlying reasons.

150. WENDEL, *supra* note 1, at 110.

but want to preserve their mutually beneficial commercial relationship, so they agree to submit their dispute to binding arbitration and to abide by the result.<sup>151</sup> Like the coin toss, the arbitrator's decision provides an authoritative reason to set aside their underlying controversy and continue to do business, even for the losing party who disagrees with the result of the arbitration. Unlike the coin toss, which is independent of the underlying issues, the arbitrator's decision is based on a balancing and resolution of the competing reasons in favor of one or the other of the parties.<sup>152</sup>

Law, Wendel argues, is more like the decision of the arbitrator than the coin toss because its settlement is derived from a lawmaking process in which the parties' competing viewpoints have been heard and taken into account. Moreover, according to Wendel, the legitimacy of law does not rest solely on the fact that law has achieved an authoritative settlement of normative controversy in society; it also rests on the fairness of the procedures through which the settlement has been achieved.<sup>153</sup> Normative controversy in society can be settled by installing a dictator, he points out, but installing a dictator is a normatively unattractive way to reach a settlement because it does not respect the equality and political liberty of citizens.<sup>154</sup> The normative appeal of democracy is that its lawmaking processes provide a procedure for resolving normative controversy that "treat[s] citizens as equals, entitled to an equal measure of respect no matter what their substantive views about justice and morality."<sup>155</sup> Lawyers' duties of fidelity to law arise out of respect for the values of equality and dignity reflected in the settlement of controversy through a democratic lawmaking process that "give[s] an equal voice to participants in a political debate, so that the resulting legal settlement reflects the view[s] of everyone, as much as possible."<sup>156</sup>

When translated into a theory of legal ethics, the positivist jurisprudence of lawyering has two ramifications for legal advice and counseling. First, lawyers have a professional duty not to toy with society's settlement of normative controversy by playing interpretive games with the law. Fidelity to law demands that lawyers interpret the law "in good faith with due regard to its meaning" rather than "as an obstacle standing in the way of the client's goals."<sup>157</sup> "The law is purposive; it is *about* something," Wendel explains, and good faith interpretation from an internal point of view "is aimed at recovering that meaning."<sup>158</sup> Rather than zealously pursuing a client's *interests* within any arguable interpretation of law, Wendel argues that lawyers' partisanship should be limited to the pursuit of a client's *legal entitlements*,<sup>159</sup> defined as "what the law, properly interpreted, actually provides."<sup>160</sup> As Tim Dare similarly puts it, partisanship requires only

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151. *Id.* at 110.

152. *Id.* at 111.

153. *Id.* at 98.

154. *Id.*

155. *Id.* at 91.

156. *Id.* at 98.

157. Wendel, *supra* note 2, at 1169.

158. WENDEL, *supra* note 1, at 196.

159. *Id.* at 78–79; *see also* DARE, *supra* note 1, at 76.

160. WENDEL, *supra* note 1, at 59.

“merely-zealous” representation that pursues a client’s legal entitlements, rather “hyper-zealous” representation, in which lawyers “pursue any advantage attainable for their client[s] through the law.”<sup>161</sup>

Second, respect for the authority of law commits lawyers to pursuing their clients’ legal entitlements regardless of their own moral agreement or disagreement with their clients’ aims. For law to settle normative controversy, moral considerations must be separated from the determination of law and external to the professional role of lawyers.<sup>162</sup> Lawyers who re-introduce moral considerations into their interpretations of the “bounds of the law” actively “undercut the procedures which allow the advocates of a plurality of views to live together in communities.”<sup>163</sup> Moreover, to the extent that law incorporates moral standards, lawyers should look not to their own resolution of the incorporated moral standards, but to the beliefs of the legal officials who are likely to apply the law.<sup>164</sup>

As with Simon’s Dworkian jurisprudence of lawyering, the capacity of the positivist theories of lawyering to deliver on the promises legal ethics makes to clients and to the public rides in part on its capacity to deliver clear and determinative answers to interpretive questions. There are significant differences between the nature of a coin toss or binding arbitration in settling a private dispute and the nature of law in settling normative controversy in a morally pluralistic society. In the consensual coin toss and binding arbitration examples from which Wendel and Dare generalize respect for the authority of law, the parties have endorsed the decision procedure in advance and agreed to submit their dispute to that procedure for resolution. Moreover, these procedures produce a clear result—a coin toss comes up either heads or tails—without further dispute about what the result means. Law’s capacity to deliver such clear results is debatable. Even in Wendel’s binding arbitration example, which does not implicate a particularly deep normative controversy in society, the law is open to multiple interpretations, and it is the arbitrator who provides the authoritative interpretation that allows the parties to move forward.

Wendel recognizes that law’s indeterminacy poses a challenge to the premise that law can successfully settle normative controversy in a morally pluralistic society.<sup>165</sup> He concedes that it is most often not possible to “read the

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161. DARE, *supra* note 1, at 76.

162. The exclusion of ordinary moral reasoning from the performance of professional role is dictated in part by the argument that lawyers occupy a role, and that the occupant of any role is subject to the distinct obligations and permissions incident to the role, excluding recourse to considerations that might otherwise influence decisionmaking. *Id.* at 44–47. In the case of lawyers in a morally pluralistic society, the prohibition on the recourse to ordinary moral considerations is bolstered by the function of law as the settlement of normative controversy in society.

163. *Id.* at 77.

164. Wendel, *supra* note 7, at 108.

165. See, e.g., Wendel, *supra* note 27, at 395 (conceding that his conception of legal ethics “does real work in *ruling out* particular actions taken by lawyers, even if it underdetermines action in cases with multiple plausible interpretations of the governing legal norms”).

meaning of the law directly from legal texts” and that the client’s legal entitlements are therefore not always clear.<sup>166</sup> However, Wendel insists that interpreting the law respectfully with due regard for its intended meaning is not a wholly subjective enterprise; it is an exercise of professional judgment susceptible to criticism based on “intersubjective criteria” of validity.<sup>167</sup> These criteria are built on social practices that differentiate legal from non-legal reasons and plausible from implausible interpretations of law.<sup>168</sup> Interpretations of the “bounds of the law” that would not pass muster within interpretive communities “comprised of judges, lawyers, scholars, and interested citizens who have learned to differentiate between legal and non-legal reasons”<sup>169</sup> cannot be said to constitute “legal” advice because they violate the implicit “rules of recognition” that arise from the social practices of lawyers.<sup>170</sup>

According to Wendel, the positivist jurisprudence of lawyering rules out some of the most extreme interpretations of law deployed by Enron lawyers in structuring their client’s financial transactions and by Office of Legal Counsel lawyers advising the Bush administration on the laws prohibiting torture of enemy combatants in United States custody.<sup>171</sup> However, the moderate indeterminacy that fidelity to law leaves behind still allows lawyers to choose from the range of multiple plausible interpretations that remain.<sup>172</sup> Within this range of plausible interpretations, the positivist jurisprudential theories look to the underlying function of law in settling normative controversy in society to guide lawyers’ interpretive practices. Lawyers, Wendel argues, should “understand their role in the process of legal interpretation as coordination-enhancing.”<sup>173</sup>

While recognizing that fidelity to law is “a complex political value, including ideals of both stability and flexibility,”<sup>174</sup> Wendel consistently leans in the direction of upholding the stabilizing function of law. Wendel firmly insists that lawyers owe fidelity to laws despite lawmaking processes admittedly skewed by existing disparities in power, wealth, and social influence that fall far short of the ideal of equal participation.<sup>175</sup> He explicitly rules out lawyers’ covert

166. WENDEL, *supra* note 1, at 176–77.

167. *Id.* at 196.

168. *Id.* at 185.

169. *Id.* at 196, 207.

170. *Id.* at 196–97.

171. Wendel discusses these examples in Wendel, *supra* note 2, at 1218–32.

172. Even among interpretive communities, there is a continuum of assessments of relative plausibility ranging from solid to frivolous along which legal interpretations might fall. WENDEL, *supra* note 1, at 185. Wendel’s aim is merely to show that some interpretations are out of bounds: “that there is enough objectivity and determinacy in the law that the set of inadequately supported legal positions is not empty.” *Id.* at 176.

173. Wendel, *supra* note 27, at 393.

174. WENDEL, *supra* note 1, at 131.

175. Wendel describes the actual lawmaking process as follows, arguing that it is entitled to respect and fidelity despite its shortcomings:

[E]lectoral politics is skewed by the influence of wealthy donors, both corporate and individual, and policy-making is affected by interest-group lobbying; the ability of many citizens to participate in the political process is limited by disparities in wealth and the inability to organize

nullification or subversion of laws they deem unjust or outmoded through strategies like selective ignorance of damaging facts or the creative structuring of client affairs, reflected in the welfare avoidance examples endorsed (for different reasons) by Simon and Rhode.<sup>176</sup> Although there may be a theoretical basis for avoiding the effect of laws enacted by unfair processes, Wendel argues that it is necessary to “set the threshold very high for a finding of unfairness” because citizens in a morally pluralistic society are likely to have competing notions of fairness, and to base the professional duty of fidelity to law on a thick notion of procedural fairness in lawmaking would re-mire society in the very type of normative controversy from which law is supposed to extract it.<sup>177</sup> It was justifications of exactly this type, he cautions, that fueled the Enron lawyers, whose clients “believed, in sincere subjective good faith, that their company’s business model was so game-changing that it had simply outpaced legal regulation, and that fidelity to anachronistic laws would only hamper necessary innovation in dynamic markets.”<sup>178</sup>

The view of moral conflict in the positivist jurisprudential theories of lawyering—that moral conflict is a problem that law needs to overcome through settlement—may be criticized for undervaluing the need for flexibility and openness in a morally pluralistic society. Isaiah Berlin, one of the most prominent political philosophers to endorse a premise of moral pluralism, wrote quite differently about the ideal to which morally pluralistic societies should aspire: that it should be the aim of decent societies “to promot[e] and preserv[e] an uneasy equilibrium which is constantly threatened and in constant need of repair.”<sup>179</sup> In the face of moral pluralism, one might hope for a society that takes this vision more seriously by alternatively aiming to unsettle majoritarian control as well as to stabilize it. The emphasis that the positivist jurisprudence of lawyering places on stability and coordination leaves little space for clients to create Berlin’s “uneasy equilibrium” by structuring their private affairs in ways that resist or avoid unfair laws and by unsettling the authority of law by creating a web of social practices that are increasingly distant from formal legal requirements.

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into effective coalitions; differentials in wealth and power are reinforced by structural features such as inequality in primary and secondary education and the practical inaccessibility to middle-income families of elite higher-education institutions; women, people of color, sexual minorities, and people with disabilities face persistent discrimination, both explicit and tacit, which reinforces inequality in the political, economic, and social realms; and for the poorest and most disempowered citizens, the state is not perceived as a means of engagement at all, but as an alien force they experience, if at all, through intrusive policing and bureaucratic indifference.

*Id.* at 91.

176. *Id.* at 134. For discussion of the welfare avoidance examples, see *supra* notes 118–24 and accompanying text.

177. WENDEL, *supra* note 1, at 102.

178. *Id.* at 134–35.

179. ISAIAH BERLIN, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY* 1, 19 (1990).

The commitment to the overriding importance of law's stability and settlement function leads Wendel to the conclusion that "moderately fair" legal systems must in the end simply tolerate the "localized injustice" suffered by discrete groups, such as sexual minority groups who "believe that the political process has been captured by citizens whose irrational bigotry renders them unable to decide fairly on matters of concern to these groups, such as same-sex marriage and same-sex-partner adoption rights."<sup>180</sup> If a law is unjust, he argues, lawyers must either support it or seek to challenge it directly through public modes of law reform, lest they damage or undermine the very framework of law that makes legal strategies of reform possible through disrespectful non-compliance.<sup>181</sup> Wendel admits with an air of resignation that the low threshold he sets for fidelity to law enacted with "rough equality and tolerably fair procedures"<sup>182</sup> provides "a thin basis for solidarity, but it is likely the best we can do."<sup>183</sup> The need to settle controversy is pressing, the resources for reaching a settlement are limited, and "[a]t some point the majority is entitled to say, 'we have heard enough,' and move on."<sup>184</sup>

### III. SHIFTING THE PARADIGM: TOWARD A CLIENT-CENTERED JURISPRUDENCE OF LAWYERING

The emerging jurisprudence of lawyering proposes new and refreshing answers to the ethical problems created when lawyers pursue their clients' objectives within the bounds of the law, while at the same time interpreting the bounds of the law instrumentally as a cost or interference to be avoided or structured around. As Part I explained, the implicit operating jurisprudence criticized in legal ethics is based on legal realist conceptions of law, which ignore constraints that might arise from law's underlying purpose and strip law of its normative content. The moral theories in legal ethics took this instrumental interpretive stance as a set feature of legal representation and sought to mitigate its deleterious effects by incorporating ordinary moral responsibilities into lawyers' professional duties—responsibilities that encouraged lawyers to engage in instructional moral counseling designed to bring the pursuit of their clients' private goals into line with the public good. However, the moral theory approach threatens to undermine rule-of-law values, strains against the role that lawyers play as client agents and fiduciaries, and is questionable in terms of its public benefit, both because lawyers have no special expertise in moral reasoning vis-à-vis their clients and because the structural constraints of practice are likely to make such moral advice ineffectual in the situations where it is most needed.

As Part II demonstrated, the jurisprudential theories in legal ethics take an alternative route of defining the task of lawyers' interpretations of the "bounds of the law" to encompass public duties of correct or good faith interpretation of law.<sup>185</sup> As Part II argued, the conceptions of law that set the standard for correct or

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180. WENDEL, *supra* note 1, at 102–03.

181. *Id.* at 129–32.

182. *Id.* at 98.

183. *Id.* at 91.

184. *Id.* at 101.

185. As Ben Zipursky points out, counseling a client about what the law says has

good faith interpretation depend for their legitimacy on the fulfillment of certain conditions, and it is questionable whether law has the capacity to deliver what these jurisprudential theories demand. For example, the Dworkian model of adjudication built into Simon's contextual theory of legal ethics conceives of law according to its correspondence with principles of substantive justice that can be derived from the underlying values and principles in the law. Its success depends on the capacity of law to deliver right answers to these questions of fit and justification. The positivist jurisprudence on which Wendel and Dare stake their theories of legal ethics depend on the capacity of law to transcend normative controversy in society through shared understandings of legality.

In this Part, I question the underlying framework within which the emerging jurisprudential theories in legal ethics are based, using Ted Schneyer's work in legal ethics as a guide. I argue that, even if law has the capacities these jurisprudential theories claim—to correspond with substantive justice or to settle normative controversy in society—their jurisprudential successes cannot be achieved by delegating authoritative interpretation of law to lawyers. Yet, this is exactly what the emerging theories in the jurisprudence of lawyering do. Both Simon's Dworkian jurisprudence and the positivist jurisprudence define lawyers' primary duties in terms of public goods: substantive justice or legal entitlement. In the emerging theories, the lawyers owe primary fidelity to the law and only secondary duties to their clients. In the emerging jurisprudence of legal ethics, lawyers stand between the law and their clients and have direct responsibility for achieving law's aims through the interpretations of the "bounds of the law" that they provide to their clients, case-by-case and controversy-by-controversy.

Ted Schneyer has long noted the perils and problems of assigning primary responsibility to lawyers for carrying out public duties, and his work provides a template of considerations that those embarking on a jurisprudence of lawyering ought to take into account.<sup>186</sup> Schneyer's arguments in favor of the primacy of client-centered duties in legal ethics are based in important part on the capacity of client-centered legal ethics to hold lawyers accountable to something beyond their own interests.<sup>187</sup> One of Schneyer's early and groundbreaking critiques of theoretical legal ethics was that the solutions proposed by moral theorists were aimed at the wrong target: he argued that much of the apparently excessively client-regarding behavior at the center of concern about legal professionalism could be more easily explained in terms of the coincidence of zealous advocacy with lawyers' pursuit of their own financial, reputational, and professional interests.<sup>188</sup> The problem with holding lawyers primarily accountable to public values, Schneyer argues, is that the lack of widespread public consensus on what counts as morally right or substantively just makes adherence to those

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a normative component built into it through the concept of legal obligation that inheres in legal rules. Benjamin C. Zipursky, *Legal Obligation and the Internal Aspect of Rules*, 75 *FORDHAM L. REV.* 1229, 1249 (2006).

186. See generally Schneyer, *supra* note 10; Schneyer, *Perils of Public Values*, *supra* note 17.

187. Schneyer, *Perils of Public Values*, *supra* note 17, at 1841–42.

188. Schneyer, *supra* note 11, at 1544–50.

norms difficult to enforce.<sup>189</sup> A client-centered role morality protects clients against lawyer self-dealing and “guards against the risk that [lawyers], biased by strong financial pressures or personal bonds and unconstrained by role, would *misapply* their own conceptions of justice or all-things-considered morality.”<sup>190</sup>

To be fair, Schneyer directs his criticisms of professionalizing public duties against the moral theorists in legal ethics, noting that jurisprudential theory at least “tries to grapple with the complexities” of defining justice with reference to a jurisprudentially grounded conception of law.<sup>191</sup> However, Schneyer’s oft-repeated cautions about lawyer accountability and the risks of lawyer self-dealing ought to concern us in the emerging jurisprudence of lawyering as well. Because the interpretation of the “bounds of the law” is a task grounded in lawyers’ expertise rather than their personal moral judgments, it has the benefit of disciplining lawyers to look beyond their personal or political views in deciding the limits of their representation. Yet in carrying out the interpretive task, lawyers must exercise judgment about how to implement the public duties that the jurisprudence of lawyering assigns directly to them. To the extent that the law is indeterminate, lawyers’ judgments about its underlying purpose pose some of the same risks that the moral theories in legal ethics face: that lawyers will inappropriately impose their own views on their clients rather than acting as their clients’ agents; and that their private and unreviewable interpretations of the “bounds of the law” in their clients’ cases will undermine rule-of-law values. Additionally, the dangers of lawyer overreaching within the lawyer–client relationship are greater when the lawyer communicates a limitation on legal representation in terms of the “bounds of the law” than they are when the lawyer offers a moral opinion or advice that a client feels more free to accept or reject on the basis of the client’s own moral agreement or disagreement with the lawyer’s view.

Schneyer’s concern about the risks of lawyer overreaching and self-dealing has always been tempered by an optimistic realism about the potential for lawyers to engage in professional self-correction through appropriately structured self-regulation. In a field where cynicism about the decline of the legal profession is rife, Ted Schneyer has always had faith: in lawyers, in traditional client-centered lawyering, and in the legal profession. His archival study of the bar politics in the creation of the ABA Model Rules of Professional Conduct rejected simplistic accounts of lawyer self-regulation either as “a collective effort to aggrandize lawyers at their clients’ expense,”<sup>192</sup> or as “a public relations charade that would legitimate the bar’s tradition of self-regulation but have no regulatory bite.”<sup>193</sup> Rather, he revealed the interplay of complex and shifting alliances among different sectors of the bar and a sensitivity to both public and academic criticism of the legal profession. Schneyer’s groundbreaking work on law firm discipline similarly emphasizes both optimism about the potential for law firms to develop

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189. Schneyer, *supra* note 10, at 12–13.

190. Schneyer, *Perils of Public Values*, *supra* note 17, at 1842.

191. *Id.* at 1848.

192. Schneyer, *supra* note 12, at 736.

193. *Id.* at 737.

infrastructures to support and patrol the ethical quality of their legal representation, and the need for bar agencies to hold firms ethically accountable for doing so.<sup>194</sup>

My own work in legal ethics both mirrors and elaborates these themes in Schneyer's work. Like Schneyer, I am skeptical about the standard legal ethics diagnosis of the problem of professionalism as stemming from lawyers' strict adherence to partisan professional norms.<sup>195</sup> Although lawyers sometimes invoke zealous partisanship as an excuse to justify tactics that coincide with their own financial or reputational interests, I share Schneyer's faith that client-centered professional norms need not demand such tactics, and attempts to curb excessive zeal need not do away with the primary commitment of lawyers to their clients. As Schneyer has written, "Nothing about a properly reconstructed hired-gun ethic stands in the way of a lawyer's (1) considering solutions that can accommodate the interests of adversaries, (2) proposing such solutions to clients, and (3) helping clients see that those solutions are also in their own interests."<sup>196</sup> And, he argued, "[i]f lawyers can be trained to understand this, then how much about hired-gun ethics is there left to fear?"<sup>197</sup>

The engaged client-centered theory of the lawyer-client relationship that I am developing has focused so far on defining the duty of partisanship to include a responsibility to shape legal representation around a more robust understanding of client objectives grounded in the client's values as well as their legal interests.<sup>198</sup> It can be seen as an alternative response to one of the more troubling problems associated with the legal realist conception of law: the prospect that lawyers' preoccupation with their clients' legal rights and interests distorts their perspectives on their clients' objectives.<sup>199</sup> I have argued that when clients seek legal representation, their legal interests are most often entangled with other projects, commitments, and relationships with others, all of which are natural sources of normative constraint on a client's objectives.<sup>200</sup> Lawyers provide expert legal advice by sorting the facts of the client's situation into a series of legal categories: claims, defenses, procedures, evidence. As their clients' legal rights and interests come more sharply into focus, other non-legal concerns—clients' relationships with others, reputation and standing in the community, values and commitments that clients want to honor—can fade into the background. As a result, lawyers may come to over-value the client's legal rights and interests

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194. See generally Schneyer, *Discipline for Law Firms*, *supra* note 15; Schneyer, *Ethical Infrastructure*, *supra* note 15.

195. Kruse, *supra* note 35, at 124–26.

196. Schneyer, *supra* note 10, at 27.

197. *Id.* at 27.

198. See Kruse, *supra* note 35, at 127–38; Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 431–37 (2006) [hereinafter Kruse, *Fortress in the Sand*].

199. I have elsewhere called this the problem of "legal objectification." Kruse, *supra* note 35, at 104. The professional tendency of lawyers to reduce their clients to the sum of the clients' legal interests was identified and understood in early legal ethics as a moral problem. Wasserstrom, *supra* note 37, at 21; Simon, *supra* note 8, at 54. See also generally Lehman, *supra* note 37.

200. Kruse, *supra* note 35, at 132.

relative to the weight that the client might assign to the protection of those rights and interests when the client compares them to the other things that the client values. The solution to this problem is not to turn over moral control of the representation to the lawyer; it is to get lawyers to bring their clients' other interests and concerns back into the picture so that legal representation can be directed toward objectives that put the pursuit of legal interests into the context of the other values, relationships, and concerns that are important to clients.

This kind of solution was a central focus of client-centered theories of lawyering that grew out of clinical legal scholarship in the 1970s and 1980s.<sup>201</sup> Client-centered representation responded to the problem of legal objectification through a combination of strategies designed to increase lawyers' attention to the interrelationship between a client's legal and non-legal concerns and to re-configure authority and expertise in the lawyer-client relationship in ways that recognized a broader and more participatory role for clients in legal representation.<sup>202</sup> The foundation for client-centered representation is a conceptualization of legal representation as problem-solving that puts the client—rather than the client's legal issues—at the center of legal representation.<sup>203</sup> When legal representation is conceptualized as problem-solving, the non-legal aspects of a client's problem or situation—the economic, social, psychological, political, moral, and religious considerations—play a more prominent role. Because the client has better access to information about the relative weight and importance of these considerations, as well as a better sense of how choosing different legal alternatives will affect these non-legal values, the client is seen as better situated than the lawyer to make many of the decisions related to representation.<sup>204</sup>

Client-centered representation initially relied heavily on the idea that lawyers and clients occupy separate spheres of expertise and the client-centered approach articulated methods of interviewing and counseling based largely on lawyer neutrality and non-interference into client decisionmaking.<sup>205</sup> However, client-centered representation has matured well beyond that conception. Sophisticated conceptions of client-centered representation now include ideals of holistic representation, cross-cultural competence, problem-solving lawyering, lawyering as empowerment, and lawyering for social change, which blur the boundaries between lawyer and client expertise about law and legal strategies and promote more collaborative and interdisciplinary methods of lawyering.<sup>206</sup> In these

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201. For a comprehensive examination of the history and theoretical basis for this approach, see Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990). For a survey of the growth and development of the client-centered approach into a multiplicity of closely related lawyering theories, see generally Kruse, *Fortress in the Sand*, *supra* note 198.

202. Kruse, *Fortress in the Sand*, *supra* note 198, at 376–80.

203. *See id.* at 376–77.

204. *See id.* at 378.

205. *Id.* at 379–80.

206. *Id.* at 387–99. I have argued that these expansions of client-centered lawyering theory have created a plurality of client-centered values that may be in tension with one another: holistic representation, narrative integrity, client empowerment, partisan advocacy, and client-directed lawyering. *Id.* at 419–26.

“engaged client-centered” practices, lawyers become more actively involved in helping clients articulate their objectives, offer advice based on the lawyers’ best understanding of the clients’ values, and involve clients in decisions and strategies that might traditionally be thought to fall within lawyers’ expertise and decisionmaking authority with legal representation.<sup>207</sup>

Client-centered representation is theoretically grounded in respect for client autonomy.<sup>208</sup> Autonomy tends to get a bad name in legal ethics because it is equated with permitting clients to do whatever they want to do without either guidance or self-restraint.<sup>209</sup> Generally, the foundation offered for a client-autonomy-based theory of legal ethics is a libertarian argument that citizens are entitled to be free from state interference with minimal deference to society’s need to accomplish basic coordinating goals, sometimes supplemented with consequentialist arguments that providing individuals with maximum freedom achieves justice.<sup>210</sup> The repudiation of these arguments has been powerfully stated by the leading thinkers within legal ethics. David Luban has systematically critiqued arguments that the lawyers’ partisan role in an adversary system is the best way to determine truth, to protect legal rights, or to reflect society’s commitment to enhancing personal autonomy and protecting human dignity.<sup>211</sup> Lawyers, he asserted, invoke such arguments as an “adversary system excuse” to justify instrumental manipulation of the law and legal process to maximize their clients’ legal interests. William Simon similarly critiqued the “ideology of advocacy” as an incoherent and internally inconsistent theoretical basis for the neutral partisan advocacy deemed necessary to the functioning of the legal system.<sup>212</sup>

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207. I have recently explored the contours of an “engaged client-centered” approach to lawyering with co-authors Stephen Ellmann, Robert Dinerstein, Isabelle Gunning, and Ann Shalleck in a book of critical essays on interviewing and counseling. STEPHEN ELLMANN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 6–7 (2010).

208. Kruse, *Fortress in the Sand*, *supra* note 198, at 399–414. The issues of client autonomy and lawyer paternalism were discussed in a couple of legal ethics articles. David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454; William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213 (1991). Luban revisited his views on the subject of the justification and limits of lawyer paternalism more recently in an article on human dignity, arguing that human dignity provides a better conceptual framework for discussing the moral issues that arise in the division of decisionmaking authority between lawyers and clients. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 824–30 [hereinafter Luban, *Lawyers as Upholders of Human Dignity*].

209. Luban, *Lawyers as Upholders of Human Dignity*, *supra* note 208, at 826 (contrasting Kantian notions of self-rule with a more popular version based on freedom of choice); Simon, *supra* note 208, at 222–23 (describing what he calls a “crude version” of autonomy as lawyers providing information and clients acting on it without further guidance or direction from the lawyer).

210. See, e.g., LUBAN, *supra* note 48; SIMON, *supra* note 1, at 26–52, 53–76 (Chapter 2, “A Right to Injustice,” and Chapter 3, “Justice in the Long Run”).

211. LUBAN, *supra* note 48, at 32–55.

212. See generally Simon, *supra* note 8.

However, these critiques of client autonomy rely—either explicitly or implicitly—on the image of clients as Holmesian “bad men” bent on maximizing their freedom from state interference, and a view of autonomy that emphasizes the concept of “negative liberty,” or the freedom to be left alone.<sup>213</sup> They tend to overlook conceptions of autonomy grounded in the “positive liberty” to live one’s life according to values that one has chosen and affirmed over time.<sup>214</sup> When we shift our view of autonomy to encompass conceptions of “positive liberty,” a different picture of the connections between enhancing autonomy and achieving justice emerges. Positive liberty is based in notions of self-actualization, or as Joseph Raz has put it, the ability to be the author of one’s own life.<sup>215</sup> The conditions of an autonomous life under this view are not reducible to separation from others and independence from external constraint, but are based in creative and constructive engagement in projects, commitments, relationships, and endeavors.<sup>216</sup> The richer conception of positive freedom helps to justify and inform practices of engaged client-centered lawyering within the basic framework of enhancing and supporting client autonomy.<sup>217</sup>

However, appeals to client autonomy alone cannot support a full-blown theory of legal ethics, because theories of legal ethics require a balancing of duties that lawyers owe to clients and to the public. Theories of client autonomy can do much to elucidate client-centered theories of how engaged lawyers should be in helping clients clarify and define their objectives without making Holmesian “bad man” assumptions that clients are primarily self-interested. They can even encompass the notion that enhancing a client’s autonomy may include helping clients who value obedience to law to meet that objective. But a full-blown theory of lawyering would require more. It would require an account of the relationship between enhancing client autonomy and the function of law in society, and a jurisprudence of lawyering that explains how in enhancing their clients’ autonomy, lawyers contribute to the functioning of law.

It is possible to sketch out a different understanding of the traditional client-centered role of lawyers within the legal system based on this conception of autonomy as positive—or self-creative—liberty. In such a view, the function of law in promoting autonomy is not based merely on leaving citizens alone but on creating conditions in which they can actualize their values by supporting their creative endeavors and helping them structure their commitments within productive relationships and supportive communities. The qualities of law that

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213. This reliance is explicit Simon’s critique of what he calls “positivist advocacy.” *Id.* at 39–42. In Luban’s critique, it is less obvious but nonetheless present. For an analysis of how Luban’s critiques of adversary advocacy rely on an image of “cardboard clients,” see Kruse, *supra* note 35, at 113–14.

214. RAZ, *supra* note 149, at 370; *see also* ISIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 166 (Henry Hardy ed., 2002). David Luban has defended such a conception, relying on the concept of dignity rather than the concept of autonomy. *See* DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, in HUMAN DIGNITY, *supra* note 1, at 65, 70–72, 76.

215. RAZ, *supra* note 149, at 369–71.

216. *Id.* at 373–81.

217. Kruse, *Fortress in the Sand*, *supra* note 198, at 413–26.

create these conditions are not limited to maintaining social stability but include flexibility and responsiveness to the needs of citizens to access legal structures for a variety of diverse projects and in the context of multiple and shifting sub-communities and counter-cultures in which these diverse projects are rooted and sustained. Lawyers' partisan duties to clients and their duties to the legal system can be harmonized within this vision through the idea that lawyers' partisan representation of clients helps create space within and around the law for clients to experiment with and test the legitimacy of the norms enacted into law, so that individuals can both pursue the projects that will enable them to lead autonomous lives, and so that law can adjust itself to the needs of its citizenry. Rather than seeing partisan representation as the cynical manipulation of law to maximize clients' interests, it could be viewed as a creative attempt to legitimize the client's values by connecting them to values reflected in the law; or to challenge the law by surfacing divergence between the clients' values and values reflected in law.

Existing strands of thought within legal ethics, social science, and political theory support this vision of the lawyers' role. Within legal ethics, Daniel Markovits has argued that lawyers play "critical roles in sustaining the legitimacy" of legal frameworks in the litigation context by "bringing the law's doctrinal categories and the concerns of clients into equilibrium."<sup>218</sup> Markovits draws in part on a vast body of "law and society" literature to argue that when lawyers engage clients about how their projects, aims, and values fit within the law, it transforms the way clients view their demands by restating them as legal claims that stand in relationship to the claims and interests of others in society.<sup>219</sup> Such empirical analysis reveals the complex ways in which law both influences, and is influenced by, social norms.<sup>220</sup> These interactions can be seen as a sort of proving ground in which the legitimacy of law is tested through acts of compliance, resistance, and creative reinterpretation that extend well beyond the formal structures of adjudicative and administrative interpretation. Moreover, as noted above, there is support in political theory for the view that morally pluralistic democratic societies ought to allow citizens informal spaces within which to contest and unsettle the law, as well as to use law to coordinate social activity in the face of normative controversy.<sup>221</sup>

The jurisprudential role to which lawyers would be assigned in this vision is a familiar one: client-centered agents charged with using their legal expertise to help their clients make informed decisions about law compliance and law avoidance. Lawyers' judgments about how to characterize the law to their clients would be informed by their role in facilitating interaction between the norms

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218. DANIEL MARKOVITS, A MODERN LEGAL ETHICS 205 (2008).

219. *Id.* at 188–89.

220. *See generally, e.g.,* Herbert Jacob, *The Elusive Shadow of the Law*, 26 LAW & SOC'Y REV. 565 (1992) (describing the interplay between legal and social norms in divorce law); Eduardo Moises Penalver & Sonia Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007) (describing a range of law avoidant behavior that helps to shape property law); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107 (1995) (describing the domain of contract law defined by transactional lawyers and clients outside the context of formal litigation).

221. *See supra* note 179 and accompanying text.

inherent in the law and their clients' values, rather than providing bare legal conclusions that give clients a "bottom line" assessment of what the law permits or prohibits in the clients' circumstances. This facilitative role does not assume that enforcement is clients' only concern; it favors providing clients with information about law's purposes as a way to invite clients to accept (or reject) law as a normative guide to their behavior. Lawyers in a facilitative role would educate their clients by communicating the law in the context of a sympathetic version of the purposes that law is meant to fulfill. Such "full picture" counseling about the law positions clients to make informed decisions about compliance with—or avoidance of—law's dictates based on clients' assessments of whether the law, understood within the context of its regulatory purposes, is worthy of their respect.<sup>222</sup>

I have recently explored such an approach as a critical issue in legal interviewing and counseling by analyzing the ethical and jurisprudential issues that arise in lawyer–client dialogue between a prison inmate client with a child support debt and his legal services lawyer.<sup>223</sup> In this fictitious interview, the client begins by raising a concern about notices he is receiving in prison from the child support enforcement office, which show his child support debt continuing to rise despite his inability to earn money in prison.<sup>224</sup> The lawyer explains the basic doctrines of child support law to him, offering a "decidedly sympathetic" account of the purposes behind child support law, which help the client connect the purposes inherent in the law to his own values and desire to support his daughter.<sup>225</sup> The lawyer's explanation of the purposes behind the rule that imputes income to child support obligors based on their earning potential despite their actual earnings surfaces a divergence between the client's situation and the situation that the imputed income standard is meant to address.<sup>226</sup> The lawyer explores this gap by reference to a paradigmatic example of a hypothetical highly paid doctor who voluntarily foregoes his income to follow his dream of being a street artist, contrasting the hypothetical doctor with the client who lacks the ability to respond to the incentive created by the law by getting a job that would actualize his earning potential.<sup>227</sup> I used this example to illustrate that when lawyers explain the reasons "that *best justify* the law governing their clients' situations"—exemplified in this case by the reasons why the law would impute income to the hypothetical doctor—they "invite their clients to assess the validity of those reasons" and to either "see the law as a reasonable constraint on their behavior" or "decide that the law deserves little respect other than the fear of its enforcement."<sup>228</sup>

An anecdote from my own experience on the client side of the lawyer–client relationship also illustrates how such an approach might work in practice. In

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222. See generally, e.g., Jamie G. Heller, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503 (1994).

223. See ELLMANN ET AL., *supra* note 207, at 319–45 (Chapter 8, "Talking to Clients About the Law").

224. *Id.* at 320.

225. *Id.* at 341–42.

226. *Id.* at 342.

227. *Id.* at 342–43.

228. *Id.* at 341 (emphasis added).

1993, my sister Ann was hit by a car while crossing the street on an icy January night. The accident broke both of her legs below the knee, and while one leg sustained a clean break, the other required multiple surgeries and a lengthy stay in a nursing home. Ann is a developmentally disabled adult living independently and at the time of the accident was no longer covered by health insurance that had until recently been provided through a job. The driver of the car was an employee at a Perkins restaurant, who had been sent on an errand to the local supermarket when the restaurant's supply of pickles ran out. The lawyer who agreed to pursue a personal injury case on Ann's behalf was a small town Wisconsin lawyer in the very best sense you might imagine: smart, creative, caring, and holistic in his approach.

Because Ann's injuries rendered her incapable of heavy physical labor and her cognitive disability limited her ability to do clerical and other light work, her lawyer suggested that she apply for social security disability benefits that would cover her medical and rehabilitative expenses from the date of application forward. Ann had a modest but significant amount of money—about \$30,000—that she had inherited from our great-uncle several years ago. Her lawyer advised us about how we might protect those assets from being reached and spent down before the benefits began to cover her hospital and nursing home expenses. He informed us that a “loophole” in the law regarding transfers of assets would fail to re-capture funds that were deposited by Ann into a joint bank account and then withdrawn by a joint account holder. He told us that such transfers went against the spirit of the law, which was designed to prohibit divestment of assets prior to applying for government benefits, and that legislation had already been passed that would close the loophole. However, he told us that the legislation would not go into effect for several more months and that making the transfer now would not be technically illegal.

Of course, this is exactly the kind of information and advice about the law—that the law technically allows behavior that contravenes a clear regulatory purpose recently reaffirmed by legislation designed to close an existing loophole—that is at issue in the jurisprudential theories of lawyering. The result of analysis under the emerging jurisprudential theories has to be that Ann's lawyer had no business sharing information about how to take eleventh-hour advantage of a closing loophole with his clients. Personally, I am grateful that the lawyer was unaware of any such jurisprudential duties.

What is most striking to me about this example from my own experience, however, is not the fact that the lawyer felt free to give us the advice, but the way he delivered it and the effect that his delivery had on our family's decisionmaking. Unlike a lawyer operating under Holmesian bad man assumptions about our interests and his role, the lawyer's advice did not come across as a professional assessment that we needed to protect the money by setting up a joint account and making the transfer.<sup>229</sup> Nor did he engage in even mild forms of judgmental

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229. Although perhaps only subtly different, advice that begins and ends with the assumption that a client will want to take advantage of every loophole may be heard by the client to be the lawyer's professional assessment that the best course of action for the client to take is the one that maximizes the client's legal and financial interests. *See* Lehman,

moralizing suggested by some legal ethicists about whether taking advantage of the loophole would be the “right thing” or a “fair thing” to do.<sup>230</sup> Instead, he gave us the information that he as a legal expert possessed and that we as laypersons lacked: that the loophole existed, that it was technically legal to make a transfer, and that its availability ran counter to the intended purpose of the law. This information enabled us to make a decision that took into account our own values associated with law compliance and advantage-taking, that considered how seriously the specific transfer in this case contravened the purposes of the law, and that evaluated how strongly those considerations weighed against our desire to protect (albeit symbolically through protection of assets) our particularly vulnerable family member. Without specifically engaging us in a moral dialogue, the way the lawyer characterized the law sparked a decisionmaking process that took morality into account.

### CONCLUSION

Theorizing a workable jurisprudence of lawyering is a project that is just beginning to bloom in legal ethics. Springtime is a time of hope, expectation, and promise. This brief sketch of the contours of a client-centered jurisprudence of lawyering is still quite far from a fully developed theory of legal ethics. It remains to be seen whether a workable jurisprudence of lawyering can fulfill the Noble Dream of lawyers acting as intermediaries between clients and the law. Its further development will require careful attention to the considerations Ted Schneyer has provided over the years: theoretical models in legal ethics must fit plausibly within the profession’s self-understanding; they must be responsive to the concern for lawyer self-dealing without devolving into cynicism about the potential for lawyer self-regulation; and they must remain attentive to the need for workable structures of accountability and enforcement.

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*supra* note 37, at 188–91 (giving examples of the effect of such advice).

230. Cf. Thomas L. Shaffer & Robert F. Cochran, Jr., “*Technical*” *Defenses: Ethics, Morals and the Lawyer as Friend*, 14 CLIN. L. REV. 337 (2007) (arguing that even in lawyering for poor people, lawyers should raise issues of the “fairness” of taking advantage of loopholes or technical defenses in moral dialogue with clients); Pepper, *supra* note 38, at 204.