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LEGALLY TRUE BUT MISLEADING STATEMENTS: A MORAL DILEMMA

R. JOHN KUEHN III*

INTRODUCTION

Let justice be done—that is, for my client let justice be done—though the heavens fall.¹

Scholars of legal ethics are nearly unanimous in the belief that “lawyers lost the persuasion of their ancestors that the profession possesses other responsibilities than those owing to their clients.”² Many lawyers and courts no longer look to religious principles for guidance in their professional duties.³ “Instead, the bar now looks primarily to the adversary system, rather than broad moral principles, as the source of what is right.”⁴ The lawyer does have duties to the client, the court, and the common good, but the deification of these duties has led to “suspension of moral assessment of [the client’s] objectives, and perhaps also of the means chosen to secure them (at least if the client insists on those means).”⁵

¹. MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 9 (1975).
However, not all lawyers are willing to wash their hands of moral responsibility when making professional judgments. The lawyer who strives both to adhere to her religion's moral teaching and to have a successful legal practice will attempt to lead what Professor Deborah Rhode calls a "more ethically reflective form of legal practice"; such a practice will "require different ideological foundations. Lawyers must assume personal moral responsibility for the consequences of their professional actions." Those lawyers who strive to base their professional decisions on the moral principles of their faith are the intended audience of this note.

The "morality" which I will discuss is based both on analyses by legal scholars and on the teachings of the Roman Catholic Church. Although for Catholics moral authority derives from the Church's teaching of revealed truths rooted in the natural law, many Catholics find intellectual discourse about those teachings helpful in putting their faith into practice. Likewise, non-Catholic Christians, recognizing their belief in the moral imperatives of the natural law, may look to Catholic revelation of the natural law as it is intended to be—that is, "universal"—for guidance in moral matters.

I intend for this note to be instructive for all lawyers who either choose to follow Christian beliefs or find persuasive the views and arguments herein presented.

One situation in which both the lawyer's and client's moral responsibilities are implicated has been largely unexamined: "Professional Ethics" 90 (1980) (arguing that a lawyer should not impose own moral opinion of client's legal objectives).

Professor David Luban refers to the disregard of moral principles in professional decision-making as the "standard conception of the lawyer's role." David Luban, Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellman, 90 Colum. L. Rev. 1004, 1004 (1990). He offers the sentiments of Elihu Root on the attitude of "hardball" attorneys: "'The client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how.'” Id.


8. Professor Luban notes C.S. Lewis's collection of precepts from various sources—Jewish, Christian, Hindu, Babylonian, Old Norse, Egyptian, Chinese, Greek, and Roman—which illustrates the universality of the natural law. See Luban, supra note 5, at 1024 n.70. Luban recognizes that counterarguments abound, but he notes: "[I]t seems to me that Lewis has a point: does any culture deny that gratuitous cruelty is evil or that children deserve special care and indulgence?" Id.
whether it is immoral for a lawyer to advise a client to offer "legally true" but nonetheless intentionally misleading statements under oath. The infrequent discussion of this issue likely is due in part to the legality of the morally questionable conduct. In *Bronston v. United States*, the Supreme Court held that a witness does not commit perjury when he or she responds to an opponent's question with a legally true but misleading answer. The Court reversed Bronston's perjury conviction that was based on testimony he gave regarding Swiss bank accounts belonging to him and his company. Although the statement was misleading in the context of the prosecution's line of questioning, it was truthful when considered by itself. I write this article because I believe that more than legal precedent is necessary to justify a morally questionable course of conduct.

The reader will best understand the problem if she keeps a hypothetical situation in mind. In the hypothetical, a witness is in court answering under oath questions posed by the opponent's lawyer. A direct answer to one question which the lawyer poses would incriminate the witness. Instead of answering the question directly, the witness makes a statement which, if considered out of context, is true. When placed in the context of the questioning, however, the statement clearly is misleading. The witness's attorney is implicated because she anticipated the opponent's question, referred her client to it, and instructed the client how to provide the misleading answer.

Meaningful analysis of the attorney's moral dilemma requires that two questions be answered. First, is the lawyer morally responsible for choices a client makes based on her advice? If the attorney is not morally accountable, then she may disregard moral implications that her advice might have. Second, if one decides that the lawyer can be morally responsible, one must ask whether the client acts immorally when he chooses to give a

10. Bronston's testimony was as follows:
    Q: Do you have any bank accounts in Swiss banks, Mr. Bronston?
    A: No, sir.
    Q: Have you ever?
    A: The company had an account there for about six months in Zurich.

   *Id.* at 354 (emphasis added). It was proven that Bronston had his own Swiss bank account for a period of almost five years, and the prosecution argued that his response was intentionally misleading and therefore was perjurious. See *id.* at 345-55.
11. The hypothetical is based on the facts of *Bronston*. 
legally true but misleading statement.\textsuperscript{12} If the client does not act immorally, then the lawyer commits no moral wrong when she advises the client to make a misleading statement. If the lawyer is morally accountable for her client’s actions, and if the client’s action is immoral, then the attorney can be morally culpable for advising her client to make the misleading statement.

In this note, I argue that lawyers within the adversary litigation system can be morally accountable for advising a client to make legally true but misleading statements under oath.\textsuperscript{13} I analyze this in the context of the two aforementioned questions. First, I present three common views under which the lawyer is not responsible for the client’s actions. Next, I respond to those views with analyses of legal scholars and the teachings of the Catholic Church. Because I conclude that the lawyer is morally responsible for her professional actions, I proceed to discuss whether the client’s act is immoral. Finally, after concluding that the client’s act is immoral and therefore the lawyer’s advice can be immoral, I present possible courses of conduct for lawyers who are “influenced by their religious/moral commitments, not just the moral guidelines set out by their profession.”\textsuperscript{14}

I. OPPOSING VIEWPOINT: A LAWYER IS NOT RESPONSIBLE FOR A CLIENT’S ACTIONS

A commonly held view of contemporary attorneys is that a lawyer is not morally responsible for advice given to a client upon which the client acts. Support for this view can be derived from many different sources of which I will present three: legal positivism, skepticism, and the concept of role morality.

A. Legal Positivism

A positivist view of legal ethics supports the position that a lawyer is not morally accountable for her client’s actions. I use the term “positivism” in the same sense as Professor William H. Simon, namely “the kind of theory which emphasizes the separa-

\textsuperscript{12} I presume that the client makes his statement under oath in court, at a deposition, or in an interrogatory, that the client knows that his statement is misleading, and that the client exercises complete freedom in making the statement (that the client is not under social or psychological duress).

\textsuperscript{13} Professor Stephen Gillers poses the question, albeit in “ethical” rather than “moral” terms: “If [the] lawyer had coached [the client] to give literally truthful but evasive and misleading answers (but not untruthful ones), would the lawyer have acted unethically even if [the client] would not thereby have committed perjury?” STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 354 (3d ed. 1992).

\textsuperscript{14} Griffin, \textit{supra} note 6, at 1255.
tion of law from personal and social norms . . . ." A positivist society is comprised of individuals that are wholly concerned with themselves. Professor Harold J. Berman writes that positivism, "which in the twentieth century has come to dominate American and European legal thought, identifies law with the policies of the lawmaker . . . expressed in the form of a more or less self-contained body of rules laid down by the state and enforced by state sanctions." A lawyer serves to explain how the client will be affected by the government, that is, by the artificial system constructed to maintain order.

In this system, according to Simon, "the lawyer's neutrality is essential to the proper performance of [her] basic task" of predicting how the sovereign will affect the client. "Since the legal system is independent of personal ends and social norms, the lawyer's ends and his notions of social norms have no relevance to the prediction of the sovereign's actions." By taking her ends into account—and "personal" ends are understood to be "moral" ends in this context—the lawyer would become less effective in her predictions. If the lawyer is not permitted to consider her moral convictions in deciding how to advise clients, then the lawyer cannot be held accountable if adhering to legal standards causes her to violate those moral convictions.

B. Skepticism: The Epistemological Excuse

The skeptic, like the positivist, would not hold a lawyer morally accountable for a client's actions. Professor David Luban explicates the skeptic's view: "Because lawyers are forbidden from lying or knowingly putting on perjured testimony, knowing too much can tie a lawyer's hands." Luban offers the reflections of a white-collar defense lawyer to illustrate the importance to many attorneys of remaining ignorant of certain aspects of the client's case: "I can remember years ago when I represented a fellow in a
massive case of political corruption. I was very young, and I asked him, 'Would you please tell me everything that happened.' And he said, 'What, are you out of your mind?'"22 Were a lawyer to know "everything that happened," she would be unable to make those arguments which, though more persuasive and likely to prevail, would be untrue in light of the client's circumstances.

Luban offers another example of skepticism. During World War II, Albert Speer was Hitler's architect and minister of armaments. When advised by his friend, Karl Hanke, that he should never accept an invitation to inspect certain concentration camps, Speer reflected:

[Hanke] had seen something there which he was not permitted to describe and moreover could not describe. I did not query him, I did not query Himmler, I did not query Hitler, I did not speak with personal friends. I did not investigate—for I did not want to know what was happening there. Hanke must have been speaking of Auschwitz . . . . [F]rom fear of discovering something which might have made me turn from my course, I had closed my eyes.23

Speer was the only defendant at the Nuremberg Trials who took responsibility for his crimes.24 He claimed he had no knowledge of the Final Solution. However, he confessed that he could have known but instead chose to remain ignorant in order to keep a clear conscience.25

The skepticist view also is illustrated by Professor Monroe H. Freedman in the context of another moral dilemma, namely the problem of pleading a client "not guilty" whom the lawyer believes to be guilty. Freedman explains that there "is, of course, a simple way to evade the dilemma raised by the not guilty plea. Some attorneys rationalize the problem by insisting that a lawyer never knows for sure whether his client is guilty."26 Freedman notes several reasons why the client might indeed be innocent despite an admission of guilt: the client might be protecting a friend or family member, or the client might have thought he

22. Id. at 957-58 (citation omitted).
24. See Luban, supra note 21, at 965.
25. See id.
26. Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 MICH. L. REV. 1469, 1472 (1966); see also Rhode, supra note 7, at 617 ("Arguments from skepticism fall into a variety of camps but share a common premise and pedigree. In essence, the premise is that lawyers neither can nor ought to make the factual and normative judgments that more rigorous ethical obligations would entail.").
committed the crime, but circumstances unknown to him would prove he did not. Freedman suggests that skepticism as to facts "can also be taken as a response at a level of personal morality, specifically, as a rejection of personal moral responsibility."  

Professor Freedman discusses a "more honest and more useful" understanding of the skepticist view, that is, "by viewing the propositions in systemic rather than personal terms." According to this understanding, the attorney cannot "know" whether a client's assertions are true because of the nature of the adversary system. The procedures established in the system require that the judgment of truth be made after the facts and relevant law have been presented to a judge or jury. In personal terms, the lawyer may know the truth. Her personal knowledge, however, is irrelevant in systemic terms because she has no role in determining the only "truth" important to the system. The attorney cannot be accountable if she either does not know whether the client's response is truthful or if her knowledge is irrelevant to the determination. "Invoking [the incapacity to determine truthfulness], lawyers have resisted both legal and moral accountability for their participation in conduct later found to be fraudulent, misleading, hazardous, or unconscionable." For the skeptic, the lawyer is not morally accountable and the inquiry therefore need not continue.

C. Role (Separate) Morality

Whereas the skeptic claims not to know, either systemically or personally, the true facts of the client's case, an adherent of "role morality" is comfortable with knowing the facts of the case and assumes definite moral responsibility. However, the role moralist shifts the source of values from an objective moral order to the legal system. In her role as a lawyer in an adversarial system, the lawyer acts with a separate morality—one justified by the system itself. The system, in turn, requires the lawyer to "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer," that is, to do what the client requests if it is legal and ethical.

27. See Freedman, supra note 1, at 52-54; Freedman, supra note 26, at 1472.
28. Freedman, supra note 1, at 53 (emphasis added).
29. Id. at 53.
30. See id.
31. Rhode, supra note 7, at 618.
32. Model Rules of Professional Conduct Rule 1.3 cmt. 1 (1998). An "ethical" action, in this context, is one which is consistent with the applicable code of professional responsibility; see also Fred C. Zacharias, Structuring the Eth-
man's words, "once the lawyer has assumed responsibility to represent a client, the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause."^33

Professor Freedman staunchly advocates this view. He argues that if a client desires to pursue a legal right which the lawyer believes is immoral, the lawyer must defer to the client's desired course of action notwithstanding the lawyer's moral objection.\(^34\) Professor Freedman cites several policy concerns which support role morality: maintaining the adversary system; presumption of client innocence and the burden of reasonable doubt; the right to counsel; and the confidentiality that is an integral part of the lawyer-client relationship.\(^35\)

Professor Thomas L. Shaffer asserts that a separate professional morality has been prevalent in American legal ethics since the late nineteenth century. He discusses the doctrine in terms of "kingdoms." "Two Kingdom" reasoning emerges from the argument that "each office has a moral logic of its own, an inherent morality that is defined, not by the person's status or order, but by the nature of the work he is given to do."\(^36\) Shaffer cites Albert Speer as an example of the Two Kingdom approach. Speer "told himself he need not worry about Hitler's slave-labor camps because his job was to be an architect, and the logic of that job required single-minded devotion to the design of great buildings."\(^37\)

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^33. Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 199 (1978). Freedman takes a position diametrically opposed to that which I advocate in this paper: "In day to day law practice, the most common instances of amoral or immoral conduct by lawyers are those occasions in which we preempt our clients' moral judgments." *Id.* at 200.


^35. *See* Freedman, *supra* note 26, at 1482. Two additional policy reasons have been suggested by Alan H. Goldman. First, the client pays the lawyer to guide the client through legal matters. By placing equal importance on his own moral considerations and his client's interests, the lawyer ignores the fact that the client pays him to do otherwise. Second, by imposing her moral judgment on a client, the lawyer disadvantages the client (who holds different moral values) with respect to the dominant views of the legal profession. *See* Goldman, *supra* note 5, at 108.


^37. *Id.*
Professor Murray L. Schwartz advocates role morality in slightly different terms. In the lawyer's role as operator of the adversary system, "lawyers must meet certain expectations about their behavior." 38 His theory is based on two principles which he derives from codes of professional responsibility that govern lawyer conduct: the Principle of Professionalism, and its corollary, the Principle of Nonaccountability.

According to the Principle of Professionalism, "[w]hen acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail." 39 The lawyer is required to place unassailable importance on the client's interests. Accordingly, the lawyer is only constrained by the system's rules governing professional behavior. 40 By definition, this principle forbids the lawyer to rely on moral principles in making client-centered decisions.

From this follows an inescapable conclusion: because the lawyer is not permitted to follow moral guidelines, she cannot be held morally responsible for professional decisions. Schwartz embodies this conclusion in the Principle of Nonaccountability: "When acting as an advocate for a client according to the Principle of Professionalism, a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved." 41 Schwartz clarifies the reach of the principle by assuring that the lawyer is protected from more than civil and criminal liability or professional criticism and sanctions. "[T]he Principle of Nonaccountability for the Advocate proposed here goes further in asserting that the same demands of the system also justify the moral nonaccountability of the advocate." 42 The result of Schwartz's two principles is a complete disregard for moral responsibility, and an "adversarial lawyer is driven to select facts, present proofs and make arguments by the force of his client's interests, and in some quarters is viewed as morally bound to advance those interests under a 'means justifies the end' rationale." 43

The following two examples illustrate the manifestation of role morality in the legal profession. Professor (now Circuit

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39. Id. at 673.
40. See id.
41. Id.
42. Id.
Judge) John T. Noonan, Jr., offers one example of role morality in legal history. He cites the actions of Hoyt Moore, a New York lawyer who represented Bethlehem Steel in a foreclosure action on one of Bethlehem's small debtors, Williamsport Wire Rope. In order to facilitate a smooth foreclosure, Moore bribed the judge in the case by paying approximately $600,000 in fees to some of the judge's nominees. The state indicted Moore but could not convict him because the statute of limitations already had run. Noonan observes that Moore had no reason—financial or otherwise—to use such extreme measures except that he did what his client wanted. "In a sense, there was no division between Moore's morals and his client's morals—his client's morals had become his, and if they had to 'play ball' with a corrupt federal judge, Moore was willing to arrange it." That Moore "remained a pillar of his firm and of the New York bar" exemplifies the legal profession's ratification of a separate morality for the role of attorneys.

Professor Luban offers an illustration of role morality's effects on the legal practice. In order to fight a hostile takeover of Conoco by Seagram's, Conoco's chief legal advisor, Joseph Flom, suggested that Conoco inform its Arab suppliers that Seagram's was under Jewish ownership. Flom reasoned that, if the Arab suppliers were opposed to Jewish management, Conoco's board likely would not risk the change in ownership:

The plan was carried out successfully. Here . . . the lawyer has created a potential international incident, fomented and utilized antisemitism, and—perhaps—obstructed a legitimate and worthwhile market transaction. Yet here too the standard conception of the lawyer's role seems to preclude any moral criticism of the tactic.

D. Summary

Positivism, skepticism, and role morality each share a common outcome with regard to the current discussion: the lawyer is not responsible for advice given to a client upon which the client acts. If the lawyer is not accountable, any discussion of client morality would be superfluous.

45. Id. at 229.
46. Luban, supra note 5, at 1018.
II. SUPPORTING ARGUMENTS: A LAWYER IS RESPONSIBLE FOR A CLIENT’S ACTIONS

The lawyer who strives to incorporate her morality into her legal practice cannot be satisfied with the three approaches discussed above. Professor Leslie Griffin states the position well: "If the believer assesses her professional life in light of her religious commitments, then she will have a dual task. Not only will she have to master the profession’s ethical standards, but she will also have to weigh these norms against the second standard of the religious commitment."47 The lawyer would recognize that she cannot divide herself as a moral agent. "In morals . . . only a person acts, always a person, always and only a single and whole person."48 Professor Luban refers to lawyers who consider themselves morally responsible for their professional decisions as "morally activist" lawyers. He cites for the guiding principle of the morally activist lawyer a memorandum which Justice Brandeis wrote to himself while he still was a practicing attorney: "Advise client what he should have—not what he wants."49

For guidance, lawyers can look to legal and theological discourse as well as Christian teachings, especially those of the Catholic Church. As Pope John Paul II stated: "Only God can answer the question about the good, because he is the Good."50 Two indispensable underlying themes in Christian morality are love of God and love of neighbor. These are the basis of the Decalogue and are essential commandments for those who wish to attain eternal life.51 "Both the Old and the New Testaments explicitly affirm that without love of neighbor, made concrete in keeping the commandments, genuine love for God is not possible."52 Pope John Paul II cites St. John for this proposition: "If anyone says, 'I love God,'
and hates his brother, he is a liar; for he who does not love his brother whom he has seen, cannot love God whom he has not seen." The following responses to positivism, skepticism, and role morality are based both on discourse consistent with the Christian moral view and on the teachings of the Catholic Church.

A. Response to Positivism

A Christian lawyer cannot accept positivist legal ethics. He "rejects this position; he knows that law is not merely a means by which the powerful impose their wills upon the remainder of the community. He insists that criticism of rules of law is not merely expression of subjective preference." The lawyer's course of conduct is no longer dictated entirely by the client. "He denies that his professional work is only a means of earning a living by promoting the interests of the clients who pay his fees."

Positivist legal ethics results in morally unacceptable consequences. For example, because a positivist legal system operates independently of personal moral ends and social norms, some morally justified and desirable conduct might be considered impermissible. The system thereby punishes disobedience of positivist norms that, in moral terms, is necessary. The "legal and personal moral failure" of the system prevailed "among Northern anti-slavery judges prior to the Civil War when they consistently reached unnecessarily doctrinaire decisions supporting slavery despite their deep moral or political repugnance toward slavery." Such decisions were the result of a "stern judicial positivism which viewed law and morality as analytically distinct, and which required formalistic decision-making to preserve this distinction."

The Christian response to positivism is premised on the commandments to love God and one's neighbor. Whereas a positivist focuses solely on the individual, the command to love one's neighbor requires that human beings live in community and take others into account when making decisions. "The human person needs to live in society. Society is not for him an extraneous addition but a requirement of his nature. Through the

53. Id. (quoting 1 John 4:20).
54. Wilber G. Katz, Law, Christianity and the University, 10 Vand. L. Rev. 879, 880 (1957).
55. Id.
57. Id.
58. Id.
exchange with others, mutual service and dialogue with his brethren, man develops his potential; he thus responds to his vocation."\textsuperscript{59} Pope John XXIII taught that the benefits of a society concerned with the spiritual "give aim and scope to all that has bearing on... social institutions, political movements and form, laws, and all other structures by which society is outwardly established and constantly developed."\textsuperscript{60}

A fundamental Catholic teaching (also accepted in many other religions) is that the believer is required to follow an established objective morality. "Catholic morality presumes there are objective norms of conduct. Certain actions are good and others bad... always and everywhere and for everyone who knows what he is doing and does so with sufficient reflection and freedom of assent."\textsuperscript{61} John A. Hardon, S.J., accurately indicates that the "Church has had to defend this moral objectivity in modern times, whenever subjectivism threatened the foundations of Catholic morality."\textsuperscript{62} Professor Berman echoes this sentiment, stating that the natural-law theory which, before the sixteenth and seventeenth centuries, prevailed in the West, "has fought a rear-guard battle against positivism ever since..."\textsuperscript{63}

Objective morality is known by reason; it is the natural moral law that guides a person to choose to do good and avoid evil. "The natural law, present in the heart of each man and established by reason, is universal in its precepts and its authority extends to all men."\textsuperscript{64} Indeed, "[e]veryone is obliged to follow this law, which makes itself heard in conscience and is fulfilled in the love of God and neighbor."\textsuperscript{65} Pope John Paul II informs the faithful that God has determined what is good by inscribing in the hearts of human beings the natural law. He offers the image propounded by St. Thomas Aquinas and affirmed in the Catechism of the Catholic Church that the natural law is the "light of understand-

\begin{itemize}
\item[59.] \textit{Catechism, supra note 51, at para. 1879.}
\item[60.] \textit{Id. at 1886 (quoting John XXIII, Pacem in Terris para. 36 (1963)) (emphasis added); see also John Paul II, Fides et Ratio para. 32 (1998) ("[B]elief is often humanly richer than mere evidence, because it involves an interpersonal relationship and brings into play not only a person's capacity to know but also the deeper capacity to entrust oneself to others, to enter into a relationship with them which is intimate and enduring.").}
\item[61.] \textit{John A. Hardon, S.J., The Catholic Catechism 293 (1975).}
\item[62.] \textit{Id.}
\item[63.] Berman, \textit{supra note 16, at 151.}
\item[64.] \textit{Catechism, supra note 51, at para. 1956 (emphasis added).}
\item[65.] \textit{Id. at para. 1706 (emphasis added) (citation omitted); see also id. at para. 1713 ("Man is obliged to follow the moral law, which urges him 'to do what is good and avoid what is evil.'").}
\end{itemize}
ing infused in us by God, whereby we understand what must be done and what must be avoided."  

The obligations to live in community with others and to adhere to the natural moral law eliminate positivism as a feasible model of legal ethics. From these requirements it follows that a person cannot base decisions solely on individualistic motivations:

The right to religious liberty can of itself be neither unlimited nor limited only by a 'public order' conceived in a positivist or naturalist manner . . . . [The limits of religious liberty must be determined] in accordance with "legal principles which are in conformity with the objective moral order."  

Professor Simon is correct in his assertion that a natural law lawyer "believes that a legal system must meet certain normative preconditions to be entitled to respect and compliance, and perhaps even to be considered a system of law." If the laws of the system conflict with moral imperatives, then the lawyer must adhere to her moral norms in lieu of complying with the law.  

B. Response to Skepticism

Like the positivist, the skeptic cannot maintain his view in light of rational and religious criticism. An initial noteworthy consideration is that the legal system fosters pragmatism in most situations. Professor Luban recognizes that lawyers who normally are pragmatic in their decision-making processes "and who usually have no patience for philosophical abstractions and paradoxes, suddenly embrace a wildly implausible standard of knowledge as Cartesian certainty—roughly, equating knowledge with infallibility—whenever ‘knowing’ something would prove inconvenient." Within a coherent system of objective morality,

66. *Sp* lendor of *T*h*r*tu*h, *s*upra *note* 3, at para. 12; *s*ee also *C*atechism, *s*upra *note* 51, at para. 1951. Professor Berman clarifies:

Natural law theory does not deny the virtues of political order but it would subordinate them to standards of justice . . . . Its advocates put reason over will, and conscience over power; they would stress as the principal source of law not legislation but equity, the sense of fairness; they would subordinate rules to the purposes which they embody.

Berman, *s*upra *note* 16, at 151.


69. For an exposition of this idea, see *infra* Pt. IV.

however, convenience does not justify behavior that otherwise conflicts with an established moral precept.

Professor Deborah Rhode asserts that skepticism is inadequate on its own terms. In order to be plausible, skepticism would require an unattainable and inappropriate standard of certainty. "No system of governance could function if certitude became a requisite for liability. Since the law generally does not insist on omniscience, why should professional ideology require more?" Rhode concludes that, in many situations, lawyers should know the factual elements of a client's case. Even if they do not, Rhode believes that lawyers should not be relieved of all responsibility for the advice they give.

According to the Church’s epistemology, a person can "know" things and therefore need not dwell in a realm of uncertainty. With regard to following his conscience, a person "is obliged to follow faithfully what he knows to be just and right." The conscience is guided by the natural moral law. Through the conscience, "[t]he natural law expresses the original moral sense which enables man to discern by reason the good and the evil, the truth and the lie." Because the lawyer can know whether the client is being truthful, the lawyer cannot turn to skepticism as a convenient way to avoid responsibility for advising a client to make misleading statements.

C. Response to Role Morality

Separate role morality is rejected by those lawyers who want to practice according to a "one kingdom" approach. "These dissidents say they believe and try to live as if there is only one kingdom and as if there can only be one morality in our lives, a single morality to govern both personal life and professional life." Professor Leslie Griffin notes that "[f]rom Jewish and Christian authors emerge strong warnings against the separate role morality espoused by the legal profession." Such warnings, if expressed through reason founded properly in objective morality, undermine the basic tenets of role morality.

Catholic teaching precludes a lawyer's reliance on her role in the adversary system for moral justification in several ways.

71. Rhode, supra note 7, at 619.
72. See id.
73. CATECHISM, supra note 51, at para. 1778 (emphasis added).
74. Id. at para. 1954 (emphasis added).
75. See supra notes 33-38 and accompanying text.
76. SHAFFER, supra note 35, at 208.
First, Professor Schwartz himself suggests that his Principle of Nonaccountability, "which relieves the advocate of moral accountability[,] is open to objection."\(^\text{78}\) He admits that if one were to accept the argument that law cannot make an immoral act moral, "the justification for the application of the Principle of Non-accountability to moral accountability would disappear."\(^\text{79}\)

The Church teaches that decisions must be based on objective moral principles whose source is the natural law. Because the natural law flows from the divine and eternal laws, and because human law cannot be exalted over the law of God, human laws cannot trump the divine, eternal, or natural laws and make an immoral act a moral one.\(^\text{80}\)

Second, Chief Judge Clement F. Haynsworth of the Court of Appeals for the Fourth Circuit echoed Catholic doctrine when he stated that the lawyer "serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right . . . ."\(^\text{81}\) This idea is fundamental to Alan Goldman's belief that lawyers are not relieved of personal moral accountability for legal decisions. Goldman argues that the lawyer's own moral autonomy is at stake when she advises a client. "If [the lawyer] must do whatever the client demands or desires in continuing to represent him, then the lawyer is relinquishing all moral control over his own actions to the client."\(^\text{82}\) Goldman concludes that the value of client

78. Schwartz, supra note 38, at 674.
79. Id.
80. See Catechism, supra note 51, at para. 1952 (finding that eternal law, natural law, revealed law, and human laws are all interrelated expressions of the moral law); see also id. at para. 1958 (natural law is immutable; "Even when it is rejected in its very principles, it cannot be destroyed or removed from the heart of man."); id. at para. 1959 ("The natural law, the Creator's very good work, provides the solid foundation on which man can build the structure of moral rules to guide his choices.").

Legal ethics is thinking about the morals of someone else. It is concerned with the goodness of someone else . . . . Legal ethics is complicated by the fact that the discussion of this other person's morals is focused not in his conscience but in mine. Legal ethics is thinking about my client's morals, but I am the one who is thinking.
82. Goldman, supra note 5, at 129; see generally Luban, supra note 5, at 1012-14 (lawyer's reflections on the representation of a developer by another lawyer who, it seems, "forgot he was a lawyer . . . . Might just as well been [sic] the developer himself.").
autonomy is insufficient to relieve lawyers of their moral responsibility.

Haynsworth's and Goldman's views are supported by Catholic doctrine that the Church's Catechism iterates clearly:

Freedom is exercised in relationships between human beings. Every human person, created in the image of God, has the natural right to be recognized as a free and responsible being. All owe to each other this duty of respect. The right to the exercise of freedom, especially in moral and religious matters, is an inalienable requirement of the dignity of the human person.\(^8\)

The Church stands firmly in its conviction that "[n]obody may be forced to act against his convictions, nor is anyone to be restrained from acting in accordance with his conscience in religious matters . . . ."\(^8^4\) The Church stands on this conviction in accordance with the commandments to love God and one's neighbor.\(^8^5\)

Catholic teaching expressly holds that, in certain circumstances, one is responsible for others' sins when one cooperates in them.\(^8^6\) Those circumstances which are relevant to this analysis are: "by participating directly and voluntarily in them" and "by ordering, advising, praising, or approving them."\(^8^7\) By suggesting a client give legally true but misleading statements, the lawyer advises the client and thereby participates directly and voluntarily in the client's action.\(^8^8\) An essential and more complex issue, however, is exactly how the lawyer "cooperates" in the client's wrongdoing.

Referring to the current hypothetical, a lawyer can cooperate with his client in two ways. "It is of great importance to distinguish between formal cooperation in another's sin and material cooperation. The former is always sinful, the latter not always

\(^{83.}\) Catechism, supra note 51, at para. 1738.

\(^{84.}\) Id. at para. 2106.


Yes, every man is his "brother's keeper," because God entrusts us to one another. And it is also in view of this entrusting that God gives everyone freedom, a freedom which possesses an inherently relational dimension . . . . [W]hen freedom is made absolute in an individualistic way, it is emptied of its original content, and its very meaning and dignity are contradicted.

\(^{86.}\) See Catechism, supra note 51, at para. 1868.

\(^{87.}\) Id. at para. 1868 (emphasis added).

\(^{88.}\) Whether the client's action is immoral will be discussed in the next section. In order to determine whether the lawyer is responsible for a client's action, the client's moral culpability is assumed.
First, the lawyer can cooperate formally by intending the evil which she facilitates. She acts immorally anytime she cooperates formally. Pope John Paul II writes: “Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God’s law.”

By intending that the client’s legally true statement mislead the opposing party, the lawyer formally cooperates in the client’s deception and therefore is morally accountable.

A lawyer also can cooperate materially, that is, she helps the client mislead the other party “by an act that is not sinful, and without approving of what [the client] does.” Material cooperation can be either immediate or mediate. Immediate cooperation requires that the lawyer actually assist in the immoral act; in the current hypothetical, this is not possible because the client makes the misleading statement of his own volition. The lawyer cooperates mediate if her role is “secondary and subservient to the main act of another, as to supply a burglar with tools for his burglary.” This accurately describes the lawyer’s conduct; through her advice, the lawyer gives the client the “tools” he can use to mislead the opposing party.

Mediate material cooperation is described as proximate if the lawyer’s advice is intimately connected with the client’s statement. The person who assists the burglar in handling his tools during a burglary would cooperate proximately. Cooperation also can be remote, in which case the lawyer’s advice is not closely connected with the client’s misleading statement. The person who gives the burglar his tools prior to the burglary cooperates remotely. The lawyer would cooperate proximately if she extensively coached the client before questioning to ensure that his misleading response was given effectively. This assistance would help the client “handle the tools” given to him by the lawyer. The lawyer would cooperate remotely if she gave the client a general instruction to offer only that information which the opposing party specifically requested. Through this limited advice, the lawyer gives the client the tools he needs to make the

90. Gospel of Life, supra note 85, at para. 74 (emphasis added).
92. Davis, supra note 89, at 341.
93. See id.
94. See id. at 342.
misleading statement but does not help the client handle those tools.

In determining the extent of the lawyer's moral culpability, Henry Davis, S.J., instructs that material cooperation is generally sinful. However, the lawyer will not act immorally for cooperating materially if she meets two conditions. First, the act by which she cooperates itself cannot be sinful. The lawyer meets this condition because the act of cooperation, namely advising the client, is not an immoral act. Indeed, if it were, there would be a distinct shortage of morally-conscious lawyers, psychologists, psychiatrists, guidance counselors, and members of other professions to which providing advice is an inherent role.

Second, there must be a sufficient cause for permitting the client to act immorally. According to Davis, "a more serious excuse is required for immediate than for mediate cooperation, as also for proximate than for remote." Davis lists several factors to consider when judging the sufficiency of the lawyer's excuse: the spiritual character and needs of the client; the lawyer's relationship to the client; the gravity of the client's offense; the harm the client will perpetrate on the opposing party; the likely harm to the public; the proximity of the cooperation; and whether the cooperation is dispensable. Davis astutely asserts that "[g]reat varieties of opinion, therefore, on any given case except the most obvious, are inevitable, and there is no more difficult question than this in the whole range of Moral Theology."

D. Conclusion

The foregoing discussion demonstrates the inadequacies of positivism, skepticism, and role morality as those views apply to legal ethics. According to Catholic moral theology, a lawyer is responsible for advice upon which her client acts if the lawyer cooperates with the client in making immoral choices. If the lawyer cooperates either formally or materially and immediately, then the attorney is morally responsible for her client's immoral acts. If the lawyer's cooperation is material and mediate, however, then she may not be morally accountable. The lawyer must carefully determine the degree of proximity of her advice to the client's action, and she must apply carefully to her specific case the factors expounded above. By doing so, she will determine to

95. See id.
96. Id. at 341.
97. See id. at 342.
98. Id.
the best of her human ability whether any material cooperation she provides is morally justifiable.

III. THE CLIENT'S MORAL CULPABILITY

To decide whether she can be morally accountable, the lawyer must make one final determination: whether the client acted immorally on the lawyer's advice to make a legally true but misleading statement under oath. The fundamental difficulty with this determination is that the client's statement is not clearly untruthful and therefore immoral. According to the Church, "[t]he moral quality of our actions derives from three different sources, each so closely connected with the other that unless all three are simultaneously good, the action performed is morally bad."99 The Church declares that an act's "moral quality" depends on the object chosen, the intention of the actor, and the circumstances surrounding the action.100

Of primary concern is the client's intention in making a legally true but misleading statement. "The intention is a movement of the will toward the end: it is concerned with the goal of the activity."101 Although it seems that the client could justify a legally true but misleading statement if his intention were noble (for example, to stay out of prison so that he might support his family), intention alone cannot make an intrinsically wrong act morally right.102 If the object of the client's action is wrongful, the good intention cannot relieve him of moral culpability.

One also must consider the circumstances surrounding the client's misleading statement when determining his moral accountability. "The circumstances, including the consequences, are secondary elements of a moral act. They contribute to increasing or diminishing the moral goodness or evil of human acts . . . . They can also diminish or increase the agent's responsibility."103 The degree of the client's culpability is significant to the

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99. HARDON, supra note 61, at 283-84.
100. See CATECHISM, supra note 51, at para. 1750.
101. Id. at para. 1752; see also HARDON, supra note 61, at 284 (motive is of great importance in Catholic morality; some actions may be either good or bad, depending on the actor's motivation).
102. Indeed, the intention of the action most often functions to make an otherwise moral act immoral. See CATECHISM, supra note 51, at para. 1753 ("[A]n added bad intention (such as vainglory) makes an act evil that, in and of itself, can be good (such as almsgiving.").
103. Id. at para. 1754 (second emphasis added); see also id. at para. 1957 ("Application of the natural law varies greatly; it can demand reflection that takes account of various conditions of life according to places, times, and circumstances.").
lawyer's own moral accountability: the lawyer acts only as immorally as the client when cooperating in the client's action. However, if the object of the action is "always gravely illicit," then neither the attendant circumstances nor the client's intentions will diminish the act's moral gravity.\textsuperscript{104}

I discuss the object of the action last because it requires a more detailed analysis. The object chosen is the good toward which the actor directs the action. "We should note that the object is not only the physical makeup of an action, like taking what belongs to someone else, but taking it with (or without) his permission. Only in the second case is there any question of theft."\textsuperscript{105} In the problem of the legally true but misleading statement, the object is a proposition which the author knows to be misleading.

Not every misleading statement is immoral when uttered. However, if the statement is a "lie," and therefore perjurious when uttered under oath, then the statement is inherently immoral.\textsuperscript{106} "To lie," according to the Church, "is to speak or act against the truth in order to lead into error someone who has the right to know the truth."\textsuperscript{107} Misleading statements, including those that are legally-false, may be justifiable if they do not meet all elements of this definition.\textsuperscript{108} In the current hypothetical situation, however, the client's statement is a lie. He therefore acts immorally, and the lawyer can be held morally accountable.

\begin{itemize}
  \item \textsuperscript{104} See id. at para. 1756.
  \item \textsuperscript{105} HARDON, supra note 61, at 284.
  \item \textsuperscript{106} See infra p. 614 for a discussion of the meaning of "perjury" used here and in the discussion which follows.
  \item \textsuperscript{107} CATECHISM, supra note 51, at para. 2483. Evidence of Christianity's condemnation of lying is plentiful. See Prov. 6:16-19, 12:22, 19:5, 19:28 (St. Joseph); CATECHISM, supra note 51, at paras. 2464, 2468-69, 2476, 2482, 2484-86. Consider briefly the definition of "lie" offered in Black's Law Dictionary: "A falsehood uttered for the purpose of deception; an intentional statement of an untruth designed to mislead another; anything which misleads or deceives . . . ." BLACK'S LAW DICTIONARY 922 (6th ed. 1990) (emphasis added). If one were considering the legally true but misleading statement from a legal rather than a moral perspective, it would be noteworthy that this definition encompasses anything which is intentionally misleading.\textsuperscript{109} If one were considering the legally true but misleading statement from a legal rather than a moral perspective, it would be noteworthy that this definition encompasses anything which is intentionally misleading.
  \item \textsuperscript{108} For example, the definition requires that the person to whom the falsehood is spoken have a \textit{right to know} the truth. In the classic example of a Jewish family hiding from Nazi stormtroopers during World War II, the person hiding them is morally permitted to speak a falsehood in order to protect the family. The rationale is that the stormtroopers had \textit{no right} to know the truth because they were searching for the family for morally-unjustifiable reasons. The question of duty to tell the truth will be discussed below. See infra notes 113-21 and accompanying text.
\end{itemize}
In order for the legally true but misleading statement to be a lie, the client first must speak or act against the truth. According to the Supreme Court's opinion in *Bronston*, the client does not speak untruthfully when he makes the misleading statement. However, this opinion is inconsistent with legal principles in other areas of the law. The principles underlying the interpretation of both legislation and contracts are instructive as analogies when analyzing the truthfulness of the client's statement.

First, the client's misleading statement would be untrue if analyzed by principles of legislative interpretation. Like the legally-defined term in the hypothetical case, the law is a "legal definition" of a regulation and its enforcement mechanisms. Enacted legislation frequently does not, and often cannot, express the precise intention of the lawmakers who drafted it. When a court is charged with enforcing a statute which contains unclear or ambiguous language, the court looks to the "intent of the legislative body" that drafted the law that is embodied in the legislative intent.109 Likewise, the intention of the attorney who is questioning the client should be considered when determining the moral value of the client's response. If the client knew or clearly should have known what the opposing lawyer was asking, the morality of his action should be determined as if he responded to a question containing the lawyer's intended meaning.

In his argument against relying strictly on the plain meanings of words to determine legal truth and validity in a contract setting, Stanley Fish supports the idea that a misleading statement is untruthful. "A sentence is never *not* in a context. We are never *not* in a situation . . . . A sentence . . . is never in the abstract; it is always in a situation . . . it always has the meaning that has been conferred on it by the situation in which it is uttered."110 The client's legally true statement is only truthful when considered in isolation from the discussion in which it was made. If one accepts Fish's proposition, however, one must consider the context in which the statement fits. Assuming, as in the

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109. See *Pub. Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 185 (1989) ("Ordinarily, we ascertain the meaning of a statutory provision by looking to its text, and, if the statutory language is unclear, to its legislative history.") (emphasis added); see also *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (Court looked to legislative history in the face of an unclear pre-emption statute).

hypothesetical, that the client made the statement during questioning by his adversary's attorney, then the statement must be interpreted in the context of the entire line of questioning. In context, the client intends that the statement fail to communicate the truth that the attorney seeks. Understood in context, the statement is indeed untruthful.

From the standpoint of Catholic morality, the client does speak against the truth. St. Thomas Aquinas, a medieval philosopher highly regarded in the tradition of the Catholic Church's natural law teaching, wrote that it is immoral to "employ guile or fraud" when defending oneself, "because fraud and guile have the force of a lie . . . ." The Church condemns lying as a "profanation of speech whereas the purpose of speech is to communicate known truth to others." The same rationale applies to a misleading statement because it, too, is made contrary to the purpose of speech. The client is asked to "communicate a known truth" to the opponent's attorney, and the client fails to do so by providing a misleading answer. By making the false statement, the client employs "guile" in order to avoid communicating a known truth. The misleading statement therefore is untruthful.

In order to be a "lie," the statement also must be uttered in order to lead the questioner into error. "A lie consists in speaking a falsehood with the intention of deceiving." If the client did not intend to mislead, then his statement would not be a "lie" and his act would not be immoral. Intent to lead into error is an indispensable aspect of the client's statement in question. For the purposes of this analysis, that intent is assumed.

In addition to being untruthful and intending to mislead, the client must speak the statement to someone who has the right to know the truth; that is, the client must have a moral duty to tell the truth to the questioner. "The right to the communication of the truth is not unconditional . . . . This requires us in concrete situations to judge whether or not it is appropriate to reveal the truth to someone who asks for it." When the client who is under oath is asked a question by opposing counsel, the client has a duty to tell the truth precisely because he has sworn under oath to tell the whole truth. To lie under oath is to violate the Second Commandment which forbids taking the Lord's name in vain. "Taking an oath or swearing is to take God as a witness to

111. 2 Summa Theologica of St. Thomas Aquinas 1491 (Fathers of the English Dominican Province trans., 1947) [hereinafter Aquinas] (emphasis added).
112. Catechism, supra note 51, at para. 2485.
113. Id. at para. 2482.
114. Id. at para. 2488.
what one affirms. It is to invoke the divine truthfulness as a pledge of one’s own truthfulness.” To offer the misleading statement under oath is tantamount to committing perjury. “A person commits perjury when he makes a promise under oath with no intention of keeping it, or when after promising on oath he does not keep it.”

I must digress briefly to clarify my use of the word perjury in this discussion. Clearly, “perjury” is a word with legal significance. In Bronston, for example, the Court was concerned with client perjury in a legal context. However, as the Bronston Court held, a legally true but misleading statement is not legally perjurious. In this discussion, I do not refer to “perjury” in this legal sense. This note focuses on the morality of making misleading statements under oath, not the legality of that act (which the Bronston Court already has determined). The oath which binds the moral actor to tell the “whole truth” is, in this context, a moral obligation which produces moral consequences. In this discussion, I use “perjury” in a moral context consistent with the definition expounded in the previous paragraph.

The client might argue that he meets one of the conditions which may negate his duty: others’ good and safety, respect for his and his family’s privacy, or the common good. According to the Church’s teaching, those conditions are “sufficient reasons for being silent about what ought not be known or for making use of a discreet language.” On its face, this language would appear to justify the client’s misleading statement. This, however, is not the case.

The client must be free from his duty to tell the truth in order to remain silent or use “discreet language.” While the aforementioned conditions will suffice to relieve him of that duty in many situations, they do not relieve his duty when he has taken an oath to tell the truth. “[W]hen a man lies in court in order to exculpate himself, he does an injury to one whom he is bound to obey, since he refuses him his due, namely an avowal of the truth.” Thus, the same misleading statement made when the client is not under oath is morally unacceptable when made under oath in court, at a deposition, or in an interrogation. The

115. Id. at para. 2150.
116. Id. at para. 2152.
117. See id. at para. 2489.
118. Id. at para. 2489 (emphasis added).
119. AQUINAS, supra note 111, at 1490. For Aquinas, the witness is bound to tell the truth even if, by doing so, he risks capital punishment.
duty which the client assumes by taking an oath makes his misleading statement given under oath a lie.\textsuperscript{120}

Because the client utters an untruthful statement, leads his questioner into error, and has a duty to communicate the truth when he takes an oath, he lies and therefore commits perjury when he makes a legally true but misleading statement under oath. In order for an action to be morally acceptable, however, it "requires the goodness of the object, of the end, and of the circumstances together."\textsuperscript{121} In the client’s case, the object vitiates the act in its entirety because the object of his action—the lie—is evil.\textsuperscript{122} Because the client acts immorally in making a legally true but misleading statement under oath, the lawyer can be morally accountable for advising him to do so.

IV. The Lawyer’s Possible Solutions

The lawyer who accepts the conclusion that she can be accountable for cooperating in the client’s immoral conduct will find herself faced with the troublesome issue of a proper course of conduct. "\textquote{[T]}he attorney-client relationship metamorphoses into something very different from the hired gun model . . . . [T]he lawyer must reconcile conflicts between her own considered moral judgments and the client’s wishes."\textsuperscript{123} A lawyer undoubtedly will encounter clients who do not respond amiably when the lawyer offers moral objections to the client’s legal objectives. “The morally activist lawyer regrets this, but sees ‘advise client what he should have—not what he wants’ as the minimum that legal ethics requires of her.”\textsuperscript{124} The lawyer’s religious beliefs and moral standards likely are at the root of the controversy. Unfortunately, “[t]raditional legal ethics has not promulgated standards for religious dissent.”\textsuperscript{125}

I substantially affirm Professor Luban’s view that the approach to morally-activist client counseling should focus on the moral implications of the client’s objectives and should be discussed “in the same matter-of-fact and (one hopes) unmoralistic manner that one discusses the financial aspects of a repre-

\textsuperscript{120} The client is also barred from remaining silent under oath despite Aquinas’s distinction that “[i]t is one thing to withhold the truth, and another to utter a falsehood.” \textit{Id}. By taking the oath, the witness owes a duty to tell the truth; he would fail in his duty by both remaining silent and using discreet language.

\textsuperscript{121} \textit{Catechism}, supra note 51, at para. 1755.

\textsuperscript{122} \textit{See id}. at para. 1755.

\textsuperscript{123} Luban, supra note 5, at 1021-22.

\textsuperscript{124} \textit{Id}. at 1005.

\textsuperscript{125} Griffin, supra note 6, at 1259.
The lawyer must consider her audience in determining exactly how to present the moral implications of a particular client objective. Many clients likely would respond positively to Luban's "matter-of-fact" approach; such an approach should be used most frequently in order to avoid upsetting a client with uncomfortable religious discussions. However, the lawyer might determine that discussing the issues in expressly religious terms will be most effective with some clients. When the lawyer is comfortable doing so, she might choose to adapt a more "ministerial" approach which Luban seems to disdain.\footnote{Luban, supra note 5, at 1026 (citation omitted).}

I offer several methods by which the lawyer might handle a client who feels compelled to use "discreet language" when making statements under oath. First, I discuss some alternatives which are unacceptable based on a model of legal ethics founded in the lawyer's morality. I conclude with two methods that the Christian lawyer rightfully may choose in her attempt to act consistently with her religion's moral tradition.

First, the lawyer might consider sacrificing her morals to serve her client and instruct him to give the misleading statement. "One might... recognize that the profession requires one to be prepared to violate one's moral convictions and thereby jeopardize (or in a more heroic vein, sacrifice) one's moral integrity."\footnote{See id. Such an approach could include reading from pertinent scripture during client meetings or praying with the client for spiritual guidance. Let me be clear: this approach should only be used where the lawyer is comfortable and is certain that the approach will be most effective with the particular client. I envision that this approach rarely would be appropriate.} Professor Gerald J. Postema criticizes this approach, however, because "it is incoherent to suggest that one can ever be justified in sacrificing one's moral integrity."\footnote{Professor Gerald J. Postema criticizes this approach, however, because "it is incoherent to suggest that one can ever be justified in sacrificing one's moral integrity."} Postema argues that, in order for moral sacrifice to be justified, one of two conditions must exist. Either the moral principles which the lawyer violates are mistaken and should be abandoned, or the principles are valid but are outweighed by the value of the cause for which they were sacrificed.\footnote{Postema, supra note 5, at 289.}

"Sacrifice" is not justifiable because in neither case is a real sacrifice made. First, the moral principles discussed so far in this article, which determine the attorney's moral accountability, likely are not mistaken; they are established doctrines of the Catholic Church coupled with reasoned analysis of prominent legal and religious scholars. Second, there is no greater good

\footnote{See id.}
than the objective moral norms which support the determination of the lawyer's moral culpability. "The natural law is written and engraved in the soul of each and every man . . . . But this command of human reason would not have the force of law if it were not the voice and interpreter of a higher reason to which our spirit and our freedom must be submitted." The commands of the natural law cannot be overridden by concerns of public policy or individual interest.

Second, the lawyer might decide on a more extreme course of action (at least from a conventional legal ethics point of view) and withdraw from representation entirely. Withdrawal clearly would remove the lawyer from the moral dilemma she would encounter were the representation still in effect. This solution, however, still is not desirable because "[i]t tends to negate the importance of the lawyer's role as counselor and advisor." In that role, the Catholic lawyer is in the best possible position to ensure that the potential evil does not occur. By terminating representation, the lawyer forces the client to seek other representation, possibly from an attorney who might not care to prevent the client from making the misleading statement. In order to best serve the client as a counselor whose faith is rooted in objective morality, the lawyer should continue to represent the client and employ one of the following morally-justifiable options.

First, the lawyer could give advice that will ensure she cooperates with the client only materially if the client chooses to give misleading testimony. This option appeals for two reasons. First, it is in accord with—or at least represents an honest attempt to be in accord with—a reasonable understanding of Catholic doctrine. Second, this option minimizes the likelihood that the client will make the misleading statement by depriving the client of the lawyer's direct assistance ("coaching").

The problem with this position is that it is difficult to apply. The lawyer must carefully analyze each individual case and

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131. CATECHISM, supra note 51, at para. 1954.
132. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 115 n.21 (1990). Katz writes:

[The lawyer] should, perhaps, make an attempt to handle the client in terms of the whole man rather than in terms of his legal problems. In this way he would be coming closer to a religious ideal of putting his relationship with his fellow man on a basis of love and mercy rather than justice or, particularly, legality.

Katz, supra note 54, at 937.
133. See supra notes 83-96 and accompanying text for explanation of how the lawyer would cooperate materially.
ensure that she does not provide her client with tactical information that will aid the client in accomplishing an immoral objective. She must decide in each case whether she is excused from advising the client based on the extent of her material cooperation. If properly applied, this option enables a lawyer to effectively represent her clients, remain faithful to her moral beliefs, and prevent the client from acting immorally.

This first option is most in accord with characteristics of a model presented by Professors Thomas Shaffer and Robert Cochran which focuses on the goodness of the client as well as the lawyer. "Maybe a true advocate considers all of the aspects of the client's life, including the client's relationships with others, in determining how to approach the client, in determining, in fact, what the client's interests are." This is an expression of the Catholic commandment that one love one's neighbor. "[A]s Martin Buber taught, the moral life centers in relationships with other people." The morally-conscious lawyer believes that she best serves her client by concerning herself with the morality involved in the client's choices. She indeed loves her neighbor as she does herself by enlightening him to the same high moral standard that she has set for herself.

The second option for the Catholic lawyer is also the most radical: civil disobedience. The lawyer who chooses the previous option, but whose client insists that the lawyer assist him in presenting legally true but misleading testimony, might be forced to confront this option if she is sued for malpractice or disciplined for failing to provide the client with "zealous" representation. "In a civil disobedience model, the penalty is not suspended. The individual attorney [violates] rules of professional ethics] and can state publicly the reasons for her (mis)conduct or explain why the norms are wrong or inconsistent with her religious beliefs, then accepts whatever penalty the disciplinary committee assesses." This model is attractive because the lawyer nobly attempts to bring the human law into greater accord with the natural law. "If rulers were to enact unjust laws or take measures contrary to the moral order, such arrangements would not be binding in

134. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 42-43 (1994); see also Luban, supra note 5, at 1005 n.8 ("Moral activism is an unabashedly interventionist ideal that aims to make legal practice a positive moral force in society rather than—as in the standard conception of the lawyer's role—a mere conduit of the client's will.").
135. SHAFFER & COCHRAN, supra note 134, at 44.
136. Griffin, supra note 6, at 1259-60.
137. See CATECHISM, supra note 51, at para. 1959.
conscience. In such a case, 'authority breaks down completely and results in shameful abuse.'" By publicly adhering to a higher moral standard than that set by the profession, the lawyer attempts to remedy the "shameful abuse" which occurred when the profession adopted the unjust regulation.

However, the lawyer should, and undoubtedly will, view this option as a last resort. It should only be considered a possibility where the lawyer absolutely cannot adhere simultaneously to legal standards and moral imperatives. If the lawyer chooses civil disobedience too often, she risks losing her license if the bar refuses to tolerate her repeated dissention. If she works in a law firm, her choices might negatively affect the prosperity of the firm.

This outcome is not undesirable simply because the lawyer and her firm experience economic misfortune. Of equal or greater concern is that the legal profession sanctions a lawyer who practices in accord with her faith and who might be discouraged in the future from challenging the profession's standards with her beliefs. "It is preferable that each power be balanced by other powers and by other spheres of responsibility which keep it within proper bounds. This is the principle of the "rule of law," in which the law is sovereign and not the arbitrary will of men." If the lawyer chooses civil disobedience, she should do so only in extreme circumstances and should ensure that her dis-
obedience has a significant impact on the profession and its ethical standards.

CONCLUSION

Secular legal ethics often fails to proscribe conduct which would be immoral from a Christian perspective. Those lawyers who strive to make morally-sound choices in all facets of their lives require more guidance than the legal profession provides; they find this guidance in moral guidelines set by the Catholic Church and in reasoned scholarly analyses consistent with those guidelines. Whether a lawyer is morally accountable for advising a client to offer legally true but misleading statements under oath is one specific dilemma in which legal guidance is insufficient. Christian morality offers a complex but comprehensible solution to the dilemma.

In order to solve the problem, the lawyer must answer two questions. First, is the attorney morally accountable for the actions her client takes based on the attorney's advice? Second, does the client act immorally when he makes a misleading statement under oath? The morally-conscious lawyer answers both questions affirmatively. She rejects positivism, skepticism, and role morality as feasible approaches, and she recognizes that she is morally accountable for the client's actions if she cooperates in them. Whereas she always is accountable for cooperating either formally or materially and immediately, she may avoid responsibility if she cooperates only materially and mediately. The more remote her cooperation, the less compelling her excuse must be.

The lawyer understands that she will be accountable only if the client's actions are immoral. According to Church teaching, the goodness of an act depends on the object chosen, the client's intention, and the attending circumstances. Regardless of the client's intention and the surrounding circumstances, the client's act is entirely vitiated if the object is inherently immoral. Because the legally true but misleading statement is untruthful, is made with intent to lead the questioner into error, and is made by the client who is under a duty to communicate the truth, the statement is a lie. The object of the client's action and the entire act itself therefore are inherently immoral.

The lawyer must choose a course of action which enables her to act in accord with her moral standards. If, when representation begins, the lawyer determines that the client might have the opportunity to respond to an ambiguous question with a misleading answer, the lawyer should advise her client in a limited manner to ensure that the lawyer cooperates as materially,
mediately, and remotely as possible. By considering the factors explicated above, she might find that her otherwise immoral advice is excusable in her particular situation. By advising the client that he need not volunteer information which is not requested, but ensuring him that he must answer any question with the “whole truth,” the lawyer leads the client toward legally and morally correct behavior.

The lawyer should be able to provide sufficient advice to satisfy the client. If, however, the client does not accept the lawyer’s advice, the lawyer will be faced with a choice: assent to or refuse to assist in the client’s proposed course of conduct. The latter likely will have undesirable consequences. If the lawyer continues to represent the client throughout the case, and if the result is unfavorable to the client, then the lawyer might be sued for malpractice or sanctioned by the bar. If the lawyer chooses to assist the client in making the misleading statement, then the lawyer must accept the consequences of an immoral act. Although it is likely immoral, the lawyer still might find this option appealing if she determines that remaining free from malpractice suits and sanctions will enable her to have opportunities in the future to advise clients in accord with her values.

Clearly, no simple solution to the dilemma exists. However, the lawyer who makes informed decisions based on her Christian morality demonstrates her love for God and her neighbor. She should not view her conflicting obligations as a burden but rather as a sacrifice that will ultimately bring the human and divine laws in greater accord. The lawyer should strive to make decisions that may one day effect changes in the legal system and make its precepts coterminous with those of her morality.