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ARTICLES

PUBLIC VALUES AND PROFESSIONAL RESPONSIBILITY

W. Bradley Wendel*

I. INTRODUCTION

Hanging on my office door is a *Dilbert* cartoon which perfectly captures the condition of a great deal of contemporary discourse about applied ethics:

![Dilbert cartoon](image)

The humor in the cartoon\(^1\) resides in-part in the conflation of "ethics" in the business world with the prohibition of petty corruption, and the inattention to moral issues of greater import. It simply never occurred to Dogbert's client—or to Dogbert, in his exalted role as "ethics advisor"—to question the moral blameworthiness of the company's behavior.

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1 Reprinted with permission from United Feature Syndicate, Inc.
A similar confusion reigns in the study of the professional morality of lawyers. Anyone who has spent much time around practicing lawyers knows that many of them regard legal ethics as little more than the study of a lawyer-promulgated disciplinary code, which may or may not be enforced against them by overworked bar association officials. The dominant view in the organized bar has long been that ethical self-regulation should aim to do no more than produce lawyers who are "professionally . . . no rottener than the generality of people acting, so to speak, as amateurs." Proponents of this view argue that the misconduct of lawyers is no different in principle from a company's unfair trade practices, a manufacturer's sales of a product without adequate warnings, or the use of commodity forward straddles to shelter income from taxation. In all of these situations, legislatures, agencies, and courts apply legal rules to punish improper conduct or channel the activities of the marketplace into socially beneficial practices. The legal profession is a highly regulated industry, controlled by state bar associations, courts, and legislatures. It therefore seems to make perfect sense to theorize about regulation of the legal industry in the same way we think of applying legal rules to telecommunications companies or real estate brokers. Indeed, the activity of regulating lawyers' behavior has spawned a complex "law of lawyering," which comprises the bulk of what is taught in law school professional responsibility courses.

Opposing this view of professional responsibility as legal regulation is the call for "returning values to legal ethics." Readers of the

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5 A note on terminology: Some commentators draw a distinction between "professional responsibility," which they understand to refer to the formal rules regulating the practice of law, and "legal ethics," which consists of reflection on the moral dimension of lawyering. See, e.g., Richard A. Zitrin & Carol M. Langford, Legal Ethics in the Practice of Law I–2 (1995); Charles W. Wolfram, Legal Ethics and the Restatement Process—The Sometimes-Uncomfortable Fit, 46 Okla. L. Rev. 13, 13 (1993) ("Considerations of 'legal ethics,' for example, are concerned with personal ethics . . . ."). I do not make this distinction because I believe it obscures important questions concerning the status of non-legal considerations, such as moral principles, in
academic literature are familiar with a burgeoning genre—the "profession in crisis" jeremiad. Members of every segment of the legal profession—practicing lawyers, judges, and law professors—excoriate the failing ideals of their fellows. Countless bar leaders and judges have donned the mantle of preachers, ascending to their pulpits to proclaim boldly that lawyers should become better human beings:

Unless the bar is uniformly imbued with that spirit of honesty and decency and unless it is inspired to insist upon the exercise of the highest ideals in the day-to-day practice of law, then no disciplinary system can be effective and no code of professional conduct will be anything more than a hypocritical farce.9

Former United States Supreme Court Justice Tom Clark—while reluctantly acknowledging that honesty and integrity are values that develop through a long process of socialization, responding to influences by family, church, schools, and others—insisted that law schools should “shoulder alone and shoulder well”10 the burden of teaching virtue in the face of failure by other institutions.11 He recommended, among other measures, more speeches: “[W]e must also provide exhortation and instruction by the leaders of the bar to inspire acceptance of high ethical standards.”12 A modern preacher, D.C. Circuit

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9 Tom C. Clark, Teaching Professional Ethics, 12 San Diego L. Rev. 249, 252 (1975).

10 Id. at 253.

11 See id.

12 Id. at 259; cf. Paul T. Hayden, Sinners in the Hands of an Angry Professor: Cautionary Thoughts on Teaching Moral Lessons in the Professional Responsibility Course, 21 Legal Stud. F. 257, 260 (1997) (stating that when encountering this sort of rhetoric, one “cannot help but think of the classroom as a kind of sanctuary, with the professor at the pulpit and the students in the pews”).
Judge Harry Edwards, has made proposals only slightly less homiletic: lawyers in private practice should be more public-spirited and should "abandon their indifference to the ends being pursued by their clients." It is interesting to contrast these proposals with the response to dysfunctional behavior in other industries: no one talks about "exhorting" Microsoft not to include web browsers with its operating system—if the marketing arrangement violates antitrust laws, legal sanctions may be appropriate, but no observer suggests that giving Bill Gates a stern talking to is a potential solution to anticompetitive behavior.

All this sermonizing is premised on the existence and teachability of norms of legal ethics that transcend positive law and upon which there is agreement. Religious preachers can appeal to a sacred text or revealed truth to ground their claims that their parishioners ought or ought not to do something. But preaching to lawyers in a pluralistic society is a different matter altogether, and the success of secular preaching by bar association leaders and judges depends on locating the authority for moral propositions. When careful attention is not given to this foundational task, the resulting arguments have a marked tendency to sound moralistic and ripe for debunking. Critics are fond of pointing out that professionals' actions are never as public-spirited as their rhetoric; that the rules of self-regulation they impose on themselves are either self-serving or, if they have any teeth, inevitably under-enforced; and that the independence of professionals is often compromised by their cozy alliances with powerful clients.

Furthermore, appeals to shared values inevitably provoke the question of whether these values are really shared across class, racial, ethnic, and gender boundaries, or whether they are merely the values of the dominant class, dressed in spuriously universal garb. (Of course, even

15 See, e.g., Amy R. Mashburn, Professionalism as Class Ideology: Civility Codes and Bar Hierarchy, 28 Val. U. L. Rev. 657, 693–703 (1994); Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491 (1985). These critiques in legal ethics are a special case of broader arguments made in political theory. Critics claim that purportedly universally applicable moral values may in some cases actually be the particular norms of a distinct religious, gender, national, or ethnic group, or at least that opportunity for cultural identification is necessary for the individual’s development of a robust system of beliefs and moral norms. See, e.g., Martha Minow, Making All
within these subcommunities there may be substantial disagreement on moral questions.) Thus, a certain amount of analytical groundwork must be laid before lawyers may be criticized for their lack of professionalism. This foundation need not be a fully-realized system of moral philosophy or jurisprudence, but some care should be taken to specify exactly what it means to act according to the highest dictates of the profession. It is one thing to speak out in favor of ethics for lawyers—like apple pie and motherhood, who can be against it?—but another matter entirely to defend a substantive conception of professional morality that provides specific guidance for practicing lawyers making decisions with ramifications in the moral realm. Lawyers and academics who call for returning values to legal ethics ought to be expected to specify whose values they seek to infuse into the practice of lawyering, how those values are to be ascertained and applied, and what to do in cases in which these values conflict. Without a commonly known and readily accessible foundation for propositions of legal ethics, the enterprise becomes little more than intraprofessional mudslinging or, worse, the exercise of arbitrary power by courts and disciplinary agencies.

I certainly do not intend to demean the study of moral values as part of professional responsibility education. As the quotations above illustrate, however, a certain amount of rigor has been lacking in some of the literature on professional responsibility. The task of this Article, therefore, is to outline an approach to the study of professional values that provides an adequate theoretical grounding for further inquiry into the morality of lawyers’ conduct. The argument proceeds in four parts. Section II reviews and criticizes the assumptions about professional responsibility that prevail among most practicing lawyers. The principal contention in this Section is that lawyers’

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The Difference: Inclusion, Exclusion, and American Law 49-78 (1990); Anne Phillips, Democracy and Difference: Some Problems for Feminist Theory, in The Rights of Minority Cultures (Will Kymlicka ed., 1995). One must not automatically assume that proponents of multiculturalism are necessarily asserting moral claims that hold only for a particular cultural group, however. As Jeremy Waldron has emphasized, many of these moral arguments may actually be universal claims, maintaining that all societies should be organized along similar lines. See Jeremy Waldron, Particular Values and Critical Morality, in Liberal Rights 168-202 (1993).

16 Others have had a similar reaction to this debate. See, e.g., Eliot Friedson, Professionalism as Model and Ideology, in Ideals/Practices, supra note 14, at 215; Rob Atkinson, A Dissenter’s Commentary on the Professionalism Crusade, 74 Tex. L. Rev. 259 (1995); Timothy P. Terrell & James H. Wildman, Rethinking “Professionalism,” 41 Emory L.J. 403, 419 (1992) (arguing that “professionalism” is reduced either to etiquette—returning telephone calls and being pleasant—without any moral content, or else defined as providing pro bono services).
understanding of legal ethics is, jurisprudentially speaking, decades behind their conception of the law as it applies to everyone else. Lawyers are accustomed to thinking of judicial decisions as the product of a complex interaction between legal rules and the underlying principles of political morality that justify the system of law. At the same time, however, they conceptualize the application of the law to themselves as something devoid of creative normative judgment and interpretive flexibility. But as Karl Llewellyn recognized decades ago, the same rhetorical weapons that lawyers apply to cases and statutes on their clients’ behalf may also be trained on the sources of their own ethical obligations:

Within the law, I say, therefore, rules guide, but they do not control decision. There is no precedent the judge may not at his need either file down to razor thinness or expand into a bludgeon. Why should you expect the ethics of the game to be different from the game itself?\(^\text{17}\)

Professional self-regulation is inevitably an exercise in jurisprudence or applied moral philosophy. Thus, the next step in the argument is to uncover the moral principles that are implicated by the practice of lawyering.

Many legal ethicists have sought to understand these moral principles as essentially \textit{personal} values—that is, norms that do not depend upon a theory of legal or political institutions for their intelligibility. For example, a noteworthy recent trend in academic writing has been to consider the role of religious beliefs or other personal ethical commitments in the professional life of lawyers.\(^\text{18}\) Although much of this work is insightful, personal moral beliefs have limited application to the professional setting in a world of marked religious and moral diversity and disagreement. In a morally pluralistic society, it is highly likely that lawyers and clients will disagree on the morality of either the client’s goals or the tactics to be used to achieve those ends. This is not to suggest that moral values are nothing more than subjective tastes, whims, or preferences of individuals; I am not assuming the subjectivity of morality here. However, whether or not moral values are objective, the fact remains that we disagree about them incessantly, at both the theoretical and the practical levels. One response to disagreement in society has been to set up political and legal insti-
tutions—legislatures, administrative agencies, courts, mediators, lawyers, and so on—which are empowered to resolve contested moral issues. The existence of this political apparatus itself generates moral pressures on agents, by subjecting them to demands that would not exist in the absence of the institutional framework, and these conflicts create much of what forms the subject matter of academic legal ethics scholarship. Thus, as I argue in Section III, a potentially productive approach to handling ethical dilemmas in lawyering is to turn to the values of the legal profession that derive from the social function of lawyers and from the traditions and practices of the legal profession.19

Section IV is devoted to establishing a critical taxonomy of the foundational moral principles of the legal profession: loyalty, justice, and care. A theme running through this section is that professional values are inescapably plural. Many defenders of a specific conception of ethics start with one value—loyalty to one’s client, promotion of social justice, fidelity to a set of legal norms, or most recently, interpersonal considerations such as care, mercy, and connectedness—and seek to establish the primacy of that value in a lawyer’s moral analysis. Arguments of this sort can be quite sophisticated. For example, a frequently encountered contention is that social justice and partiality to one’s client are not incompatible, because justice, in the long run, requires lawyers who will represent their clients’ interests zealously. Of course, opposing arguments can be constructed: maintaining, for example, that a client is entitled only to a measure of loyalty that is compatible with social justice, and no more. What many of these arguments have in common is evaluative monism: the belief that a single value may be specified which can serve as a polestar for any lawyer’s deliberation about her ethical responsibilities. On a monistic account, what appear to be competing values must be understood as instantiations of the single relevant value—as in the argument that loyalty to one’s client is required by considerations of justice. I contend, contrary to monism, that professional values cannot always be

19 Other authors have defined “public values” in a similar manner. See, e.g., Kent Greenawalt, Private Consciences and Public Reasons (1995) (distinguishing grounds for political decisions which are accessible to other citizens, regardless of their religious or other comprehensive views, from those grounds which are not accessible to all); Kent Greenawalt, Religious Convictions and Political Choice 49–76, 144–62 (1988); Amy Gutmann & Dennis Thompson, Democracy and Disagreement 68 (1996) (stating that public values are those which are “essential to democratic citizenship”); William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1008 (1989) (defining “public values” as “legal norms and principles that form fundamental underlying precepts for our polity—background norms that contribute to and result from the moral development of our political community”).
reduced to a single foundational norm. Instead, legal ethics must be understood as a discipline which accepts the existence of plural, sometimes conflicting values in reasoning. Section V, accordingly, evaluates some of the traditions of practical reasoning which have been developed to accommodate plural values. The aim of this discussion is to suggest a more satisfying account of how ethically conscientious lawyers can work within a domain of plural values, by understanding traditions of practical reasoning that emphasize the interrelated values of sound judgment, character, and virtue over calculation.

II. The Regulatory Model

The job of the lawyer . . . is not to approve or disapprove of the character of his or her client, the cause for which the client seeks the lawyer's assistance, or the avenues provided by the law to achieve that which the client wants to accomplish. The lawyer's task is, instead, to provide that competence which the client lacks and the lawyer, as professional, possesses. In this way, the lawyer as professional comes to inhabit a simplified universe which is strikingly amoral—which regards as morally irrelevant any number of factors which nonprofessional citizens might take to be important, if not decisive, in their everyday lives.²⁰

Professional responsibility, on this account, is a technocratic value. It emphasizes skill and competence, but also stresses moral distance between lawyer and client. The two primary components of this conception are neutrality and partisanship: the lawyer should advocate her client's interests up to the limits of the law, regardless of her own moral judgments about her client's ends.²¹ This conception of professional responsibility operates to excuse lawyers from some of the demands of ordinary morality that would require a nonprofessional to behave differently. With this excuse, however, comes an obligation of fidelity to one's client: "[P]rofessionalism means that a lawyer should . . . zealously and competently use all lawful means to


protect and advance the client's lawful interests."\(^{22}\) (We can already see how much pressure this conception puts on the specification of the limits of the law, and the demand that legal reasoning be in some sense objective.)

We can refer to this minimalistic conception of legal ethics as the regulatory model. The regulatory model does not claim that there is no such thing as legal ethics, but that the set of moral obligations of lawyers \textit{qua} lawyers is exhausted by the law of lawyering.\(^{23}\) It bears emphasizing that this thin conception of normativity is a moral and jurisprudential position; it is not the absence of values, but the assertion of a cluster of normative propositions about the role and duties of lawyers.\(^{24}\) The foundational moral principle of the regulatory model is that the lawyer should defer to her client's instructions and seek to carry them out through any lawful means. Legal ethics on the regulatory model, therefore, places a great deal of weight on the justification of the system of legal rules that constrain the behavior of lawyers. Once this foundational criterion has been satisfied, however, legal ethics becomes simply the exposition and interpretation of an elaborate body of disciplinary codes and other positive legal rules governing the practice of law. As long as the legal system is itself morally


\(^{23}\) The law of lawyering encompasses much more than the disciplinary rules that are promulgated by state courts and administered through state bar associations. It includes agency law, criminal law (particularly regarding liability for complicity), tort law (especially pertaining to fraud and malpractice), and procedural law (such as the rules governing litigation conduct, discovery sanctions, frivolous motions, and the like). See Cramton & Koniak, supra note 2, at 170. For thoughtful analysis of the interaction between bar-promulgated disciplinary rules and law developed by courts and legislatures, see Geoffrey C. Hazard, Jr., \textit{Lawyers and Client Fraud: They Still Don't Get It}, 6 \textit{Geo. J. Legal Ethics} 701 (1993), Susan P. Koniak, \textit{The Law Between the Bar and the State}, 70 N.C. L. Rev. 1389 (1992), and David B. Wilkins, \textit{Who Should Regulate Lawyers?}, 105 \textit{Harv. L. Rev.} 799 (1992). The law of lawyering is in the process of being restated by the American Law Institute, which is nearing completion of the Restatement of the Law Governing Lawyers.


A lawyer in practice might persist and assert that, whatever has been happening on university campuses, he or she does not feel the need to think of ethics in law practice. That kind of lawyer may assert, for example, \ldots that 'my only job is to do whatever is legal and in the best interests of protecting my client's legal rights \ldots .'. But, of course, such assertions state profoundly ethical norms. They may not be defensible norms, but they clearly are morally prescriptive because the lawyer making the assertion means to tell us that any other position would be wrongful in some strong sense.

\textit{Id.}
justified, a lawyer is justified in taking any necessary actions in pursuit of her client’s objectives, provided her actions do not violate a legal rule.

By and large, law school professional responsibility courses have perpetuated the regulatory model. The law of lawyering has mostly swallowed up what could potentially be a more explicitly values-centered professional responsibility education, so that students’ exposure to legal ethics consists primarily of exegesis of the disciplinary codes and other legal texts. Thomas Shaffer, a leading legal ethicist of a theological bent, explains this orientation as resulting from the inability of American academics to talk about morality, for fear of implicating religious beliefs. Thus, talk about moral questions is immediately translated into the language of legal rights and duties, with which legal academics and law students do not experience discomfort. One might also blame the Multistate Professional Responsibility Exam, which emphasizes rote application of generic rules. Whatever its genesis, this approach has influenced many professional responsibility courses in law schools, which concentrate heavily on cases, statutes, and disciplinary rules. For example, one casebook takes a very strong stand in this direction: “We treat the rules of ethics as merely a subset of legal rules . . . . Although most of our law is morally based, the term ethics implies the antithesis of law. Ethical rules focus on individual and voluntary moral responses, not legally mandated duties.”

25 See, e.g., Michael J. Kelly, Legal Ethics and Legal Education 23 (1980) (“To an important extent the term ‘ethics’ is a misnomer, for the subject . . . . is much different in scope from ethics in any traditional sense of the term.”); Thomas L. Shaffer, The Legal Ethics of Radical Individualism, 65 Tex. L. Rev. 963, 963 (1987) (“Most of what American lawyers and law teachers call legal ethics is not ethics. Most of what is called legal ethics is similar to rules made by administrative agencies.”).

26 See Thomas L. Shaffer, On Teaching Legal Ethics in the Law Office, 71 Notre Dame L. Rev. 605, 606–07 (1996); see also Cramton & Koniak, supra note 2, at 190–91 (stating that law faculties might be unwilling to discuss virtue with candidates who wish to teach legal ethics because “the line across the personal [would be] crossed in a way that makes many of us feel especially vulnerable”).


28 L. Ray Patterson & Thomas B. Metzloff, Legal Ethics: The Law of Professional Responsibility 3 (1989). I do not mean to suggest that a rigorous exposure to disciplinary rules, cases, and statutes is a bad thing for students in a professional responsibility course. Keeping out of trouble is a legitimate end for lawyers, and there is no reason why the law of professional self-regulation should not get as much attention in law school as the regulation of other industries. My concern here is with the attitude that complying with disciplinary rules is a sufficient condition of ethical conduct.
Of course, the regulatory model has been subjected to sustained criticism. These critiques question the scope, utility, and jurisprudential status of authoritative rules of professional conduct. Ultimately, they show that the regulatory model is an incorrect description of the practice of legal ethics.

(1) The rules do not cover the waterfront. One frequently-noted objection to the regulatory model is that there are numerous moral principles governing professional conduct that are not expressed as a legal rule. The disciplinary codes do not claim to regulate lawyers' morality in a comprehensive manner. The older Model Code of Professional Responsibility states that "[e]ach lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards." 29 Given the structure of the Model Code, this proviso is hardly surprising, since the Model Code established a two-tiered structure of legally enforceable Disciplinary Rules, drafted to resemble a penal code, and aspirational Ethical Considerations to guide lawyers in achieving moral excellence in their profession. 30 But even the legalistic Model Rules do not claim to occupy the whole field of ethical deliberation. Some rules expressly build in an element of discretion, such as the provision which empowers a lawyer to withdraw from representation if "a client insists upon pursuing an objective that the lawyer considers repugnant," 31 or the rule which permits lawyers to charge only reasonable fees. 32 In addition to the rules which by their terms leave room for moral deliberation, the drafters of the disciplinary rules correctly note that in addition to substantive and procedural law, "a lawyer is also guided by personal conscience and the approbation of professional peers." 33 The appeal to conscience and other sources of moral duties is occasionally reflected in the structure of a lawyer's legal obligations. The forthcoming Restatement vests the lawyer with discretion either to disclose or to

32 Id. Rule 1.5.
33 Id. Preamble ¶ 6. Abel argues that the legitimation function of disciplinary rules depends on their claim to resolve all the ethical dilemmas of lawyers. See Abel, supra note 2, at 686. However, he wavers on whether the rules actually claim to occupy the field of ethical deliberation. See id. at 644 ("The Model Rules, however, ignore large and significant areas of professional conduct."); id. at 670 ("[T]he rules [implicitly] offer an exhaustive statement of the ethical dilemmas of lawyers, or at least address the most important ones . . . .").
choose not to disclose confidential information learned from a client, publication of which would prevent death or serious bodily harm to a person.\textsuperscript{34} The commentary to this section states that the decision whether to disclose is entirely discretionary with the lawyer, and the lawyer cannot be disciplined or found civilly liable for disclosing or refusing to disclose the confidential information.

Some critics of the regulatory model have pointed out that it ignores the aspirational dimension of professional ethics.\textsuperscript{35} They contend that disciplinary sanctions should be established to enforce minimal duties, and exhortation and inspiration should be employed to encourage lawyers to live up to the supererogatory ideals of the profession:

As we consider the whole range of moral issues, we may conveniently imagine a kind of scale or yardstick which begins at the bottom with the most obvious demands of social living and extends upward to the highest reaches of human aspiration. Somewhere along this scale there is an invisible pointer that marks the dividing line where the pressure of duty leaves off and the challenge of excellence begins. The whole field of moral argument is dominated by a great undeclared war over the location of this pointer.\textsuperscript{36}

In legal ethics, Lon Fuller's "great undeclared war"\textsuperscript{37} can be understood in terms of a debate over the location of a boundary line, so that duties and aspirations can be identified correctly and assigned to their respective domains.

Even if the role of extralegal considerations is not confined to aspirational or supererogatory norms, there is no doubt that significant moral questions are left unresolved by the law of lawyering. If a particular stratagem is legally permissible, it nevertheless may be morally problematic. For example, in the Dalkon Shield product liability litigation, lawyers were defending a manufacturer of medical devices

\textsuperscript{34} See Restatement (Third) of the Law Governing Lawyers § 117A & cmt. g (Proposed Final Draft No. 2, 1998).


\textsuperscript{36} Lon L. Fuller, The Morality of Law 9–10 (1964).

\textsuperscript{37} Id.
which had developed an intrauterine contraceptive. The device was poorly designed and caused thousands of injuries to users, including stillbirths, hysterectomies, sterility, and even death. The manufacturer was besieged by both groundless and meritorious claims. In general, its practice was to settle the valid claims for a fair amount, but to contest vigorously the doubtful cases. Additionally, the manufacturer reasoned that aggressive questioning of women about their sexual practices would naturally motivate many of the claimants to settle early, for comparatively small sums. Thus, in cases it judged to be without merit, the manufacturer directed the defense lawyers to probe the sexual histories of the women maintaining the claims in the claimants’ depositions.

In this case, the law of lawyering does not answer the moral question faced by the company’s lawyers: Should they probe the women’s sexual practices in order to intimidate the plaintiffs and coerce a favorable settlement? The judge supervising pretrial litigation in the consolidated action had allowed inquiry into claimants’ sexual history, as long as the questions were “reasonably [likely] to lead to the discovery of admissible evidence.” (Another procedural rule generally prohibits lawyers from asking questions in depositions “in such manner as unreasonably to annoy, embarrass, or oppress the deponent,” but the judge reasoned that in a case such as this one, some embarrassment and annoyance was inevitable and perhaps even justified, because the deponent’s sexual behavior may be relevant to the amount of damages the defendant must pay.) There is at least a colorable


39 A similar example has been debated exhaustively in the legal ethics literature: May a criminal defense lawyer vigorously, even brutally, cross-examine a rape victim to make her appear less credible and to support the defendant’s claim that the sexual encounter was consensual, even when the lawyer believes the client to be guilty? See John B. Mitchell, Reasonable Doubts Are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyer’s “Different Mission,” 1 Geo. J. Legal Ethics 339 (1987); Harry I. Subin, The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case, 1 Geo. J. Legal Ethics 125 (1987); see also Robert P. Lawry, Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering, 100 Dick. L. Rev. 563 (1996); Murray L. Schwartz, On Making the True Look False and the False Look True, 41 Sw. L.J. 1135 (1988); Harry I. Subin, Is This Lie Necessary? Further Reflections on the Right to Present a False Defense, 1 Geo. J. Legal Ethics 689 (1988).


argument that embarrassing questioning of the claimants in the case is legally permitted, but it is fatuous to assert that a moral analysis of the lawyers' behavior must stop with the conclusion that no legal rule was violated. An inquiry into the ethical status of lawyers' behavior must take into account more than simply whether or not rules are followed.

One might cynically respond that this criticism of the regulatory model is primarily a public-relations ploy, and indeed a great deal of the call for "returning values to legal ethics" seems driven by the need to convince the public that lawyers do not deserve ridicule and scorn. Some academic critics have noted that ethical self-regulation performs the function of bolstering the public image of the profession, which in turn permits the profession to continue to enjoy relative freedom from intrusive oversight by legislatures and administrative agencies. Nonprofessionals are less likely to demand stringent regulation of an occupation if they feel that the members of that occupational group are doing a satisfactory job policing themselves. To some extent, the project has been successful. The relative

42 See, e.g., Model Code of Professional Responsibility Preamble (1997) ("[I]t is the desire for the respect and confidence . . . of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct."); Diana Huffman, Ethics Review Needed to Polish Public Image of Bar, Legal Times, Jan. 31, 1983, at 9. Many reforms, such as the prohibition on direct-mail solicitation of accident victims, have been motivated by the bar's anxiety about the public's perception of lawyers. See Florida Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (upholding such a regulation). The American Inns of Court movement has similarly been inspired by the need to "promot[e] a national commitment to civility, ethics, advocacy skills, and professionalism in the practice of law, [and] communicat[e] these ideals to the nation and the world." American Inns of Court, Mission Statement, (visited Aug. 14, 1998) <http://www.innsofcourt.org/about/mission.htm> (copy on file with author). According to Robert Post, however, such reform proposals miss the point. See Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass, 75 Cal. L. Rev. 379 (1987). People hate lawyers because they expose the inherent tension between autonomy and common community and the urge toward individual independence and self-assertion . . . ." Id. at 389. No amount of image-polishing will change the underlying reality that liberty and order, equality, and partiality, must always stand in opposition, and that the uncomfortable accommodations we reach between the opposing values are mediated by lawyers in a liberal individualist society committed to the rule of law.


44 The disciplinary rules frankly acknowledge their function of warding off external regulation: "To the extent that lawyers meet the obligations of their professional
paucity of statutes and regulations applicable to the legal profession is striking in comparison with the comprehensive regulatory regimes under which other industries, like pharmaceutical manufacturers and airlines, must operate.\textsuperscript{45}

Rather than attribute cynicism to professional regulators, it is enough to note that the regulatory model tends to perpetuate the view of ethics typified by the \textit{Dilbert} cartoon reprinted in the introduction. An undue identification of legal ethics with the law of lawyering tends to concentrate the attention of law students and lawyers on the technical compliance with rules, instead of on deeper moral questions, or perhaps fosters a Holmesian bad man interpretive attitude in lawyers.\textsuperscript{46} The Robins lawyers in the Dalkon Shield case, for instance, may have been so caught up in exhaustively researching their legal obligations and determining the most aggressive trial strategy they could get away with that they left no time to ask the question, "Is this something we \textit{ought} to do?"

Similarly, by disabling moral criticism of lawyers' behavior, the regulatory model impedes development of a normative standpoint from which the existing framework of positive legal rules can be criticized, reformed, strengthened, or abandoned. In other legal sub-disciplines, outside the domain of self-regulation, considerable energy is calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination."

\textsc{Model Rules of Professional Conduct} Preamble \S 10 (1998).

\textsuperscript{45} An intriguing manifestation of this phenomenon is provided by the settlement of a discovery dispute by DuPont and its law firm, Alston & Bird. Accused of concealing documents suggesting that a DuPont fungicide had been contaminated, DuPont and the firm settled a criminal investigation by agreeing to pay $2.5 million each to four Georgia law schools to endow a chair in professional ethics, $1 million to endow an annual symposium on legal ethics, and $250,000 to the state bar's professionalism commission. See Milo Geyelin, \textit{DuPont, Atlanta Law Firm Agree to Pay Nearly $11.3 Million in Benlate Matter}, \textit{Wall St. J.}, Jan. 4, 1999, at A18; Jonathan Ringel & Ann Woolner, \textit{$11.25M Ends Charges Against DuPont, Atlanta Firm}, \textit{FULTON COUNTY (GA.) DAILY REPORT}, Jan. 4, 1999 (visited Jan. 22, 1998) <http://www.lawnewsnetwork.com/stories/jan/e010499f.html> (copy on file with author).

expended to construct a theoretical justification for legal rules, and critics defend or challenge existing doctrine on that basis. Consider, as an illustration, the intellectual ferment in torts, antitrust, and administrative law that has been created by the academic ascendency of law and economics. This movement seeks to provide a justificatory account of legal rules in terms of economic concepts like wealth maximization and reduction of transaction costs. It therefore arms critics with a robust conceptual apparatus for evaluating extant legal doctrine. The strongest version of the regulatory model, however, would block the legitimacy of any similar approach in legal ethics.

(2) Lawyers do not rely on rules when making decisions. A second critique of the regulatory model is empirical. It is worth asking whether the law of lawyering has much of an impact on most of the ethical decisions made by lawyers in the ordinary course of their practice. Explaining lawyers' behavior with reference to disciplinary rules, which by definition focus on pathological cases, may slant the analysis of moral decision making toward situations which do not represent the mainstream of the practice, "much like the description of human nature that we might get from a homicide detective, or a description of the game of bridge that thought it was centrally important to explain what happens when someone is dealt the wrong number of cards." Some anecdotal evidence suggests that lawyers do not consider the disciplinary rules when making many difficult ethical choices:

I had cause to refer to the Model Rules of Professional Conduct exactly twice in eight years; I almost never heard any other lawyer refer to them. Lawyers make decisions every day about what conduct is ethical and about whether they will behave ethically, but often the formal rules have little to do with those decisions.

Surely competing anecdotes could be offered to show that lawyers frequently do consult the law of lawyering. In my own practice experience, at every juncture where an ethical question arose, the first thing any lawyer in the firm did was turn to the relevant section of the Model Rules. In fact, I often found myself wondering whether the decisions of lawyers on ethical matters was too tightly bound up with the disci-

48 Schiltz, supra note 8, at 713; see also Abel, supra note 2, at 668 ("[T]here is little evidence that anyone pays attention to ethical rules beyond the small proportion of lawyers who draft, discuss, and enact them."); Edmund B. Spaeth, Jr. et al., Teaching Legal Ethics: Exploring the Continuum, 58 Law & Contemp. Prosbs. 153, 154 (1995) (stating that students in legal ethics courses tend to tune out discussions of disciplinary cases because they consider the possibility of discipline remote).
plinary rules, so that if a lawyer concluded that an action would not violate the letter of the rules, she would automatically conclude that it was ethically proper.

Very little empirical work has been done on the moral decision making of lawyers, but the extant evidence does not offer unqualified support either to the claim that lawyers hardly ever make reference to disciplinary rules or to the claim that they tend to over-rely on rules and cases in making moral judgments. One recent study found that lawyers' ethical decision making practices varied on a case-by-case basis; in some instances, rules were central to the deliberation, while in others the rules were not a factor.\(^4\) In another study reported by Ted Schneyer, a sociologist concluded that small-town lawyers sometimes reject cases that would harm the reputation of the lawyer, despite the absence of any provision in the *Model Code* or *Model Rules* that allows lawyers to turn down cases on this basis.\(^5\) However, this study does not purport to explain how lawyers decide other types of dilemmas—conflict of interest questions, for example—in which the law of lawyering may be more central. Thus, one cannot say based on the available evidence that the regulatory model describes the actual deliberation practice of lawyers.

(3) The regulatory model is a jurisprudential dinosaur. Finally, and most significantly for the purposes of my analysis, the argument for the regulatory model is misguided at a theoretical level. Even where the law of lawyering is applicable, the regulatory model assumes that the legal rules may be applied mechanically, without resort to creative normative judgment.\(^5\) In this way, it resembles a jurisprudential position that has almost no adherents outside the realm of legal ethics—the position that Ronald Dworkin calls conventionalism.\(^5\) According to the conventionalist thesis, a legal judgment is justified where it is expressly determined by past political decisions, such as legislation or


\(^5\) See Ronald Dworkin, *LAW'S EMPIRE* 114-50 (1986). The canonical conventionalist theory of law is positivism, in its various forms. See Ronald Dworkin, *A Reply by Ronald Dworkin*, in *RONALD DWORdKIN AND CONTEMPORARY JURISPRUDENCE* 247 (Marshall Cohen ed., 1983) (arguing that positivism or conventionalism holds that "it is characteristic of a legal system that some more-or-less mechanical test provides necessary and sufficient conditions for the truth of propositions about what the law is").
precedential cases. Conventions specify which political acts, such as utterances by judges and collective decisions by duly appointed legislators, count as "law" in a given society. Where no past political acts determine the judgment, there is no law on that point and the judge is free to make new law, with reference to "abstract justice," the public interest, or some other forward-looking justification. In future cases, that judge's decision, although not grounded in law, will become new law according to the conventions of the legal system.

A conventionalist theory of law fails for several reasons. First, the theory's plausibility may be undermined from within, by controversy in the very specification of the convention. Supreme Court Justices disagree vehemently over whether legislative history should play any role in statutory interpretation, for instance. Even if conventions successfully pick out which texts a judge ought to consider in elucidating the law, they cannot specify a single method of interpretation.

Supposing hypothetically that the conventions of American legal practice ruled out resort to legislative history in statutory interpretation, some judges may nevertheless read a provision of the statute broadly, others narrowly. There is no interpretive convention that tells judges how to interpret conventionally specified materials. Conventionalism also fails to account for some features of the practice of judging. As Dworkin points out, judges and lawyers do not behave as though conventionalism were true. In hard cases, judges do not give up on interpretation and make new law based on forward-looking, pragmatic concerns. Instead, they work themselves up into knots trying to figure out the "correct" reading of whatever past decisions can be found that bear on the issue. In light of our understanding of the practice of judging, we should expect judges to have this attitude. As a matter of our political morality, we believe judges ought to experience past political decisions as a constraint on their interpretive creativity. Conventionalism, if true, would undermine this attitude by encouraging

53 See Dworkin, supra note 52, at 118 ("If convention is silent there is no law... ").
55 See Dworkin, supra note 52, at 122.
57 See Dworkin, supra note 52, at 130-31.
58 See id. at 87. The arguments made by judges in actual cases "make sense only on the assumption that the law judges have an obligation to enforce depends on the 'correct' reading [of legal texts] even when it is controversial what that is." Id. at 131.
judges to see their role more as lawmakers than law-interpreters; however, the behavior of judges shows that conventionalism does not fit well with observed facts about our legal system.

Conventionalism also fails to account for the occurrence of cases in which a judge disregards the seemingly clear meaning of a legal text and reaches the contrary result, even though the case, before the decision, seemed like a paradigmatically "easy" one. Dworkin's favorite example, *Riggs v. Palmer*, should have been a straightforward case under the New York statute of wills, but the court nevertheless decided not to let the murdering heir inherit under the will. In *Riggs*, the judges in the majority did not claim to disregard the law, engaging in some kind of judicial civil disobedience in the name of a higher moral principle. Instead, they referred to the purpose animating the drafters of the statute: "[I]t never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it." The judges also cited the venerable legal principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong." Thus, the court construed the New York statute against a rich body of background legal norms, which in this case varied the meaning from the literal words of the statute. A decision for the murdering heir would have conflicted with other aims of the legal system, thus the majority judges were justified in interpreting the statute to deny inheritance to the heir in order to preserve the integrity of the scheme of laws and the community's moral principles. Dworkin stresses that this decision was not a lawless act, but an interpretation of law, as a larger intellectual system.


60 22 N.E. 188 (N.Y. 1889). *Riggs* was referred to as "Elmer's Case" in *Law's Empire*. *See* Dworkin, *supra* note 52.

61 *Riggs*, 22 N.E. at 189.

62 *Id.* at 190.

63 *See* Dworkin, *supra* note 52, at 19-20. For a couple of more contemporary examples, consider *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), and *Bob Jones University v. United States*, 461 U.S. 574 (1983). In *Bob Jones University*, the Court held that a university that practiced racial discrimination was not eligible for a tax exemption for educational institutions, despite there being no limitation of that exception in the Internal Revenue Code to institutions which followed a non-discrimination policy. *See id.* Was this a lawless decision? The answer is no if we accept a Dworkinian view of law, in which the meaning of statutes must be harmonized with background public values. The Court's analysis was decisively influenced by the "gravitational pull" of the principle that segregation and discrimination in education is wrong and must not be encouraged by government policies. *See* Eskridge, *supra* note 19, at 1035-36. Interestingly, the Reagan administration resisted the ultimately suc-
Dworkin’s theory of law as integrity imagines judges as interpreters of the overall legal order, whose task it is to discover “the scheme of principles” that prior judicial decisions presupposed and stated.\textsuperscript{64} This interpretive task demands fidelity to the past, but not only to past judicial decisions and other conventionally specified political acts. Because an interpretation of law must be normative—that is, it must justify the authority of law—the judge must inquire into the principles that undergird the statutes and cases and justify them in the political order.\textsuperscript{65} These principles may be discovered by analyzing those values presumed by, or reflected in, the institutions of the legal system.\textsuperscript{66}

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\textsuperscript{64} Dworkin, \textit{supra} note 52, at 211.

\textsuperscript{65} See Dworkin, \textit{supra} note 59, at 67.

Judging aims not only at discovering underlying moral values, but also at elaborating a coherent system of political principles: "[P]ropositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." The principles of justice, fairness, and due process are contained and reflected within legal texts, but the texts do not exhaust them. Instead, the community's principles of political morality are part of the raw material that the judge must work with in fashioning a decision on a legal question. The judge "must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality." There is no strict separation between politics, morality, and law for Dworkin. For example, the U.S. Constitution should be understood as containing a general principle that "political decisions and arrangements must display equal concern for the fate of all," even though that precise statement may not appear in the constitutional text or in any Supreme Court decision. According to Dworkin, a decision based on this principle is not judicial legislation, or imposition of the judge's subjective policy preferences; rather, it is interpretation of the law, as the term "law" is properly understood.

Dworkin's position has profound implications for legal ethics. His arguments challenge the regulatory model because they attack the regulatory model's insistence that the client's values and legal rules are all that a lawyer must grapple with to understand her professional

67 Dworkin, supra note 52, at 225.
68 Id. at 256.
69 Id. at 381.
70 See id.
71 Rather than argue for his definition of law, Dworkin merely stipulates that law is whatever we use to decide when application of collective force is justified. See Philip Soper, Dworkin's Domain, 100 Harv. L. Rev. 1166, 1170 (1987) (reviewing Dworkin, supra note 52). Some of his critics accordingly have faulted him for blurring the line between law and politics, so that a politically favored result has the status of a legally warranted judicial decision. See, e.g., George C. Christie, Dworkin's "Empire," 1987 Duke L.J. 157, 183–85 (reviewing Dworkin, supra note 52); Kent Greenawalt, Book Review, 84 J. Phil. 284, 286 (1987) (reviewing Dworkin, supra note 52, and arguing that the distinction between principles and policies is not as clear as Dworkin claims).
72 The legal ethicist to recognize this most clearly has been William Simon. The outlines of my argument here owe a great deal to his recent work. The arguments in this Article are also indebted substantially to a similar line of inquiry in clinical bioethics, best exemplified by Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics (4th ed. 1994).
obligations. The regulatory model of legal ethics assumes that the behavior of lawyers is constrained by texts—rules of professional conduct, cases, and the like—whose meanings are readily determined and fixed, and that lawyers are capable of a kind of morally neutral self-regulation.\footnote{73 See David B. Wilkins, Legal Realism for Lawyers, 104 Harv. L. Rev. 468 (1990).} Lawyers, on this account, may take any action on behalf of their clients that does not violate the law, including the law governing professional responsibility. If, however, the law is a system not only of legal conventions but also of public moral values, then a lawyer cannot evaluate her duties under the law without an excursus into the domain of values. Just as broader societal norms influenced the judges’ decisions in \textit{Riggs, Bob Jones University,} and \textit{Green}, an individual lawyer seeking to understand the law governing her activities as a professional must inquire into a similar set of public norms. Without this grounding in political morality, the practice of lawyering will not be normatively justified, and will therefore lack political legitimacy.\footnote{74 Cf. Dworkin, supra note 59, at 205 (“The Government will not re-establish respect for law without giving the law some claim to respect.”).} A casebook classic will serve to illustrate this point.

In \textit{Spaulding v. Zimmerman},\footnote{75 116 N.W.2d 704 (Minn. 1962).} the defense lawyer in a personal injury lawsuit learned that the plaintiff suffered from a potentially life-threatening aorta aneurysm, but did not reveal this information to the plaintiff or his lawyer in settlement negotiations. The case settled for an amount far below what the case would have been worth if the plaintiff’s lawyer had been informed of the plaintiff’s true condition. Both the trial court and the Minnesota Supreme Court agreed that the lawyer had no obligation under the then-existing disciplinary rules to inform the plaintiff that he had an aneurysm and might die without immediate surgery.\footnote{76 See id. at 709–10.} Nevertheless, the trial court vacated the settlement on the ground that the defendant’s lawyer had a duty to the court to disclose the plaintiff’s condition when presenting the settlement to the court for approval. In one prominent legal ethicist’s words, the court’s decision required “remarkable argumentative acrobatics”\footnote{77 Luban, supra note 21, at 150.} in its attempt to “smuggle common morality in through the back door.”\footnote{78 Id.} But the court’s arguments are no more remarkable in \textit{Spaulding} than in \textit{Riggs, Bob Jones University,} or \textit{Green}: a decision blindly respecting the literal language of legal texts—in \textit{Riggs} to allow the murdering heir to take under the will, and in \textit{Spaulding} to allow the defendant’s lawyer to engineer a settlement without the plaintiff’s
full awareness of the extent of his damages—would violate principles found elsewhere in the complicated system called law. The defendant’s lawyer in Spaulding relied on the principle that a lawyer should not provide helpful information to the opposing party, in the absence of a clearly defined duty to disclose set forth in positive law. The court, however, decided the case based on the principle that a lawyer should not participate in a fraud on the court by preventing relevant information from coming to the attention of the trier of fact. Implicit in the court’s reasoning is the argument that allowing lawyers to elevate confidentiality over the protection of human life would render the practice of lawyering so morally unappealing as to be normatively illegitimate.79

In legal ethics, lawyers play the role of judges in Dworkin’s theory, because they interpret and apply the law to themselves. Since judging is inevitably bound up with principles of political morality, it is impossible to understand the law governing lawyers without reference to the moral principles that undergird the practice of lawyering. Thus, if Dworkin is right, it will not do for lawyers to proclaim that they have fulfilled their ethical obligation by complying with the disciplinary rules because understanding what it means to comply with the rules inevitably requires interpretation of the rules, and interpretation depends on understanding the scheme of moral principles that undergird the rules and the practice. Interpretation, on Dworkin’s account, requires the interpreter to have in mind a conception of what makes a practice good, whether the activity is creating a work of literature, interpreting the law, or serving as a lawyer: the dastardly Elmer lost in Riggs because the majority of judges could not square recovery for Elmer with their view of what constitutes a good regime of laws; similarly, the trial judge in Spaulding vacated the settlement because, in his view, a good lawyer would not have withheld the information from the plaintiff.

79 Evidence of this principle’s existence may be observed not only in judicial opinions, but also in interpretation of disciplinary rules by state bar committees. See Strassberg, supra note 46, at 941–43 (stating that informal ethics opinions of several state bar associations reveal a principle valuing human life over nondisclosure); see also State v. Macumber, 544 P.2d 1084 (Ariz. 1976) (Holohon, J., concurring) (holding that a lawyer would not be disciplined for revealing a confidential communication from his client that suggested that the client had committed a murder for which a different person had been convicted and sentenced to imprisonment). In Macumber, the Arizona State Bar Committee did not identify the basis for this exception to the applicable disciplinary code, but it is probably fair to characterize their decision as animated by the moral principle that a lawyer ought not to participate knowingly in the conviction of an innocent person. See id.
Simon, in his recent book, contends that contested questions of legal ethics do not involve a neat dichotomy between legal rules and moral norms. Instead, the principles that some legal ethicists have relegated to the sphere of private morality should properly be understood as relevant to the resolution of the public ethical issues presented.  

In one of his hypotheticals, a welfare recipient who is living rent-free in a relative’s apartment comes to a lawyer for advice. The lawyer knows that applicable regulations require her client to include as income the receipt of lodging at no cost. The additional income will reduce the client’s eligibility for benefits. The lawyer wonders whether she should advise her client to make a nominal payment to the relative, so that her lodging will no longer be “at no cost.” Her personal moral belief is that it would be unjust for the state to cut her client’s benefits since they are barely adequate as it is.

For Simon, this situation does not present a choice for the lawyer between her personal view of justice and the requirement of her role as a lawyer. Rather, the question is whether her interpretation of the law governing her own conduct, as the concept of “law” is properly understood, allows her to effectively nullify the income reporting requirement in the regulations. In a Dworkinian understanding of law, that concept contains broad principles necessary for the justification of the legal system—here, the scheme of regulation of lawyering. In this case, the lawyer reasons that any legal norm, to be entitled to respect, must not deny a person’s basic material needs. The regulation, if applied literally, would violate a moral principle “so fundamental that it amounts to a precondition of legal legitimacy.” Since

80 See Simon, supra note 21, at 17-18.
82 See id. at 1116.
83 Id. In a review of Simon’s book (which also employs this argument), David Luban argues that the lawyer’s argument would be pretty weak at best, and borders on frivolous: American law is not especially hospitable to welfare rights and “cheerfully tolerates the greatest income inequalities of any modern industrial society.” David Luban, Reason and Passion in Legal Ethics, 51 Stan. L. Rev. 873, 890 (1999) (book review). Perhaps Simon is making a more Dworkinian argument, that the correct interpretation of the law in this case is one that makes the law the best it can be, and “the best it can be” here would require the law to recognize a right to receive a minimally adequate income. (It is hard to tell from his reply to Luban, where he accuses Luban of committing precisely the positivist/formalist error Simon has been arguing against. See 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, 998-99 (1999).) Without an argument of this sort, the lawyer in his example would indeed be appealing to extralegal values and contemplating justified disobedience of the legal rules to avoid an unjust outcome.
treating the regulation as binding would lead to an interpretation of law that would not be entitled to respect, the lawyer is justified in giving the regulation no weight. (Note that the question is not whether the lawyer's personal moral decision would be entitled to respect by others, even though the political judgment about the law's legitimacy happens to coincide with the lawyer's own moral beliefs.) Most contemporary lawyers would accept as legitimate a judge's decision which refused to enforce the regulation on the ground that it undermined the goals of the welfare system. According to Simon, his hypothetical lawyer is entitled to use the same reasoning process when thinking about her own obligations. Thus, the lawyer is acting within her role, not superseding the demands of her role, by appealing to purely private moral principles and by considering the extralegal moral principle that the law must not deprive a person of minimally adequate resources.

I think Luban is right to argue that not all attractive moral principles actually appear, in one form or another, in our legal system. The law is not that good, and we certainly do not live in Utopia. Nevertheless, Simon and Dworkin's insight is an important one, and forms much of the foundation of my argument. Questions about what lawyers ought to do are ultimately political ones. This does not mean that morality has nothing to do with legal ethics, but it does mean that moral principles must be fitted carefully into a particular political system. It is not enough to argue that a good person should do such-and-such, based on moral arguments that would apply to non-lawyer agents. Instead, one must take an additional step and show how those moral arguments are compatible with the legal institutions of which the lawyer is a part. As we will see, personal or private ethical reasons (in the sense of "moral principles that apply to all of us in virtue of our shared personhood") do play a role in my account of legal ethics. This role is limited, however, to the relatively small subset of cases

84 This argument of Simon's, which I largely accept, is the reason for my resistance to the terminological distinction between "legal ethics," understood as disciplinary rules and other binding legal norms, and "professional responsibility" or "professionalism" meaning aspirational, but unenforceable, principles. Cf. CHIEF JUSTICES' REPORT, supra note 35, at 25 ("It is important for the public to understand the disciplinary aspect of lawyer ethics and what encompasses 'ethics' and 'professionalism.'"). This Manichean distinction between legal ethics and professionalism implies that principles of public morality are not relevant to interpreting the scope of one's legal obligations, as defined by the disciplinary rules. Simon is absolutely warranted in his insistence that the insights of recent work in general jurisprudence, particularly on the nature of legal interpretation, should be applied to legal ethics.

85 Luban, supra note 83, at 887.

86 Id. at 882.
in which public values conflict and the conflict is not resolved by the moral traditions of the relevant community or, in cases of extreme injustice, where conscientious objection or civil disobedience would be justified. These personal moral values also warn when a system of laws or political institutions is fundamentally and pervasively unjust, so that an agent’s role, understood functionally, would not guide the agent’s decisions in morally acceptable ways. (This latter case obtained in the legal system of Nazi Germany.\(^\text{87}\)) But aside from those exceptional cases, in the ordinary run of legal practice within a basically just society, the lawyer’s personal values play a smaller role than the principles of political morality upon which the legal order is founded.

III. PERSONAL VALUES AS A WELLSPRING OF PROFESSIONAL ETHICS

Many theorists have sought to locate the source of the values at play in legal ethics in the personal, moral, or religious beliefs of the lawyer. To emphasize, “personal” does not mean that the values are subjective or idiosyncratic, only that they do not derive from the institutions and practices of lawyering. As the discussion of conventionalism above suggests, this strategy is a departure from at least some jurisprudential theories in which the justification for decisions made by judges is said to rest on political morality. Perhaps the situation is different for an account of lawyers’ ethics, however, since lawyers are individual moral agents not explicitly charged with making decisions for the good of the polity as a whole, as are judges. One might argue that the primary concern for legal ethics ought to be with the fit between the lawyer’s system of moral values and her professional obligations. Or, to restate the question that continues to crop up in the literature: Can a good lawyer be a good person?\(^\text{88}\) This Section will argue that personal values cannot serve as the foundational normative principles in legal ethics, because the legitimacy of the lawyer’s role in

\(^{87}\) See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618 (1958) (stating that because German lawyers under the Nazi regime attached too much importance to a rule being a valid principle of law, they too easily answered the question, “Ought this rule to be obeyed?” in the affirmative); see also DAVID LYONS, *ETHICS AND THE RULE OF LAW* 68–74 (1984).

a constitutional democracy requires that the lawyer make moral decisions with reference to public moral values.\textsuperscript{89}

Admittedly, the drafters of the disciplinary rules seem to contemplate a role for personal moral values and give short shrift to any conception of uncodified public values as a constraint on lawyers' behavior.\textsuperscript{90} There has also been a long tradition in legal ethics scholarship of focusing on the place of personal values in professional decision making. One form of this inquiry seeks to locate the feature of the lawyer's role that justifies her in acting in a professional capacity in a manner that would violate her personal moral beliefs.\textsuperscript{91} The way this question is sometimes posed implies that the lawyer's role operates as an \textit{excuse} from private or "common" moral duties,\textsuperscript{92} but I believe that it is more accurate to understand it as a question of political morality, pertaining to the justification of the institutions and social practices of lawyering.\textsuperscript{93} When we ask whether a moral agent does something good or bad by fulfilling the obligations of a professional role, what we are really asking is whether the social role itself is justified, and whether the specific action taken by the agent is a necessary and appropriate action given the requirements of the role. Luban actually appears to concede as much, for he stipulates that his consideration of the morality of lawyering will be focused on "the duties de-

\textsuperscript{89} I am grateful to Bill Sage and Michael Dorf for pointing out to me the intriguing analogy with the countermajoritarian difficulty in constitutional interpretation. \textit{See}, e.g., \textsc{Alexander M. Bickel}, \textsc{The Least Dangerous Branch} (1962); \textsc{John Hart Ely}, \textsc{Democracy and Distrust} (1980). The central challenge for liberal constitutionalism is locating a principled justification for judicial review of political acts by electoral majorities. Legal ethics faces a similar legitimacy problem, when it attempts to justify the priority of any actor's judgment about justice over the client's.

\textsuperscript{90} \textit{See} Model Code of Professional Responsibility Preamble (1997) ("Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards."); Model Rules of Professional Conduct Preamble ¶ 6 (1998) ("[A] lawyer is also guided by personal conscience and the approbation of professional peers."). Codified statements of the role of personal conscience arguably date back at least to the 1908 Canons: "[The lawyer] must obey his own conscience and not that of his client." \textsc{Canons of Professional Ethics} Canon 15, \textit{reprinted in} \textsc{Selected Standards on Professional Responsibility} 616, 620 (Thomas D. Morgan & Ronald D. Rotunda eds., 1998). However, this statement from Canon 15, read in context, is concerned more with the lawyer's duty to obey the law than with the lawyer's conscientious objection to the client's lawful wishes.

\textsuperscript{91} \textit{See generally} \textsc{Alan H. Goldman}, \textsc{The Moral Foundations of Professional Ethics} 20–33 (1980); Luban, \textit{supra} note 21, at 104–47; Wasserstrom, \textit{supra} note 20.

\textsuperscript{92} The analysis of institutional excuses and the term "common" morality are Luban's. \textit{See} Luban, \textit{supra} note 21, at 116–27.

\textsuperscript{93} For a similar suggestion by a noted moral philosopher, see \textsc{Susan Wolf}, \textit{Ethics, Legal Ethics, and the Ethics of Law}, in \textsc{The Good Lawyer} 38 (David Luban ed., 1983).
rived from a functional analysis of the means necessary to a role’s ultimate ends"—equivalent, it seems, to moral principles derived from the traditions and practices of the legal profession and from the profession’s assigned social role. Luban’s analysis of how a conscientious lawyer ought to reason through her ethical obligations reveals the orientation toward principles of political morality, not personal values that apply to moral agents generally: first, a lawyer ought to justify the institution, defined at the appropriate level of specificity; second, a lawyer should justify her role within that institution by appealing to its structure; third, the lawyer should justify the obligations of the role by “showing that they are essential to the role;” and finally, the lawyer should justify the act by showing it is required by the obligations. Note that none of the steps of this “fourfold root of sufficient reasoning” make any reference to the lawyer’s personal values, unconnected to a system of political institutions. Personal values may play a limited role in professional ethics, insofar as a person may choose not to become a lawyer, regarding even the morally justified institution of lawyering as repugnant. Or a lawyer may choose not to undertake a specific kind of practice because that particular role may impose obligations that the lawyer finds distasteful. (Not everyone is cut out to be a public defender.) But the fundamental questions of what one ought to do as a lawyer are resolved with reference to moral principles that derive from the social function of the lawyer, not from the lawyer’s personal values.

Of course, my claim that the values in legal ethics ought to be public, not private, cannot rest on the happenstance that a prominent legal ethicist’s model of justification makes reference to the social role of lawyers. However, there are two general objections: First, the moral

94 Luban, supra note 21, at 128–29. One of Luban’s critics has also understood him as being primarily concerned with the morality of the practice of lawyering, rather than with individual lawyers’ responses to the demands of their role. See David Wasserman, Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation, 49 Md. L. Rev. 392 (1990).

95 The definition of the institution can decisively, and sometimes subtly, affect the obligations that are subsequently derived. It is easy to define the institution too broadly—for example, by considering “the adversary system of resolving disputes”—and then to derive norms from one practice within that institution that would be inappropriate in another context. In legal ethics, this blurring of contextual lines often occurs when lawyers attempt to justify actions in civil litigation with reference to norms that are justified only in the criminal defense context. But see William H. Simon, The Ethics of Criminal Defense, 91 Mich. L. Rev. 1703 (1993) (arguing that the standard arguments for a highly adversarial ethic in the criminal defense arena are fallacious).

96 See Luban, supra note 21, at 131–32.
values that make claims on lawyers are not exactly the same values that are encountered in everyday moral life. To put it another way, the contours of the values differ in important ways. Undoubtedly, there exist analogies to the public values of lawyering in personal moral life—for example, one ought to be loyal to one’s family, friends, and country, just as a lawyer ought to be loyal to her client. But while the abstract value of loyalty may be stated at a high level of generality, so that it seems that the same moral considerations apply in the attorney-client relationship as in personal friendships, the contexts are actually so different that there is very little in common between them. (As we shall see, Charles Fried’s well-known paper, *The Lawyer as Friend*, made this analytical mistake by assuming that the duties and responsibilities owed by friends to each other could be transposed, *mutatis mutandis*, into the lawyer-client context.)

Ordinary moral life does not provide the resources for dealing with conflicts in values that are generated by complex political institutions that bear little resemblance to the environment in which non-lawyers make moral decisions. To return to the Dalkon Shield example, it is almost impossible to think of a relevantly similar case that would arise in everyday moral life, where an agent was duty-bound to ask embarrassing questions of complete strangers, while the strangers were absolutely required to answer them, provided that the answers to the questions would help an acquaintance of the agent in a dispute over allegedly having caused serious injuries to thousands of people. To emphasize, I acknowledge that there are *roughly* instructive cases that arise in family and friendship relationships, but they differ so extensively from the actual Dalkon Shield litigation that they cannot provide the kind of moral guidance that the personal-values ethicists require. What action does the attorney’s duty of loyalty to the company entail? To answer that question, it is more instructive to examine the institution of lawyering, and the morally significant details of the attorney-client relationship, than to inquire into what one friend owes to another in some social setting. To foreshadow an argument that will be developed at greater length throughout the pages that follow, practices generate moral values, and one must be sensitive to the diverse ends which give these practices their purpose and justifi-
Relying on ordinary moral values, therefore, detaches legal ethics from the situational sensitivity needed to adequately guide decisions in the practical dilemmas facing lawyers.

The second objection is that in a morally diverse society, where the lawyer and client can be expected to disagree about questions of right and wrong, lawyers should not be permitted to override their clients' own value commitments for reasons not shared by the clients. Calling upon the lawyer to assume personal moral responsibility for the representation potentially privileges the lawyer's moral beliefs over the client's. Unless the morality of the representation were judged on terms that depended on the lawyer's personal view of the goodness or evil of the client's ends, the ascription of agency to the lawyer would be nonsensical. But the insistence upon the lawyer's moral agency raises the possibility that the lawyer, taking seriously her personal responsibility, might insist on pursuing objectives different from her client's because she regarded the client's wishes as unjust. The legitimacy of the lawyer's role in a democratic society is therefore threatened by the lawyer's reference to personal moral commitments in the process of representation. In other words, a social institution in which the personal moral agency of the actors is central to the justification of the institution seems incompatible with the role of lawyers to represent and speak on behalf of another person with whom that lawyer might disagree about fundamental moral questions.

Let us consider an illustration. A client wants to draft a will disinheriting his child because of the child's persistent opposition to American military action against Iraq. The client may have an unqualified legal right to draft his will this way, but has no way of knowing this information and implementing his design without legal advice. If the lawyer in this case does not forthrightly acknowledge the client's right to disinherit his child, then the lawyer, by engaging in manipulative behavior based on her own beliefs about social justice, is preventing the client from exercising a right that he otherwise would possess. If the lawyer decides not to inform her client that he has the legal right to disinherit his children, then she effectively assumes an arrogant posture of moral superiority, since treating this information about the legal system as "dangerous knowledge," akin to a doctor refusing to tell a patient the lethal dose of a medication, as-

99 See infra notes 130–44 and accompanying text.
100 Cf. Bruce Ackerman, Social Justice in the Liberal State 10 (1980) ("Nobody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied to the rest of us.").
101 See Wasserstrom, supra note 20, at 7–8.
sumes that the lawyer has superior expertise in evaluating the morality of the child’s pacifism and the client’s disposition of his assets.102

The lawyer’s decision to respect her own conception of justice may be motivated by the belief that the client’s stated intention is not, in fact, in the client’s best interest. This is the related problem of paternalism. A lawyer acts paternalistically when she acts for what she takes to be the client’s own good, even though the client does not see matters the same way.103 In the will example, the lawyer may sincerely believe that refusing to inform the client about the full extent of his testamentary rights is in her client’s best interest because it will promote harmony in the family and thus better serve the long-term interests of the client, which the client is temporarily unable to perceive because of his pique over his son’s politics. The lawyer’s refusal to provide this information is unjustifiably paternalistic, however, unless the lawyer’s role justifies her overriding the client’s stated intention in order to accommodate the client’s long-term best interests.

In our liberal political tradition, which prizes individual autonomy very highly, paternalism is a grave violation of individual rights. Persons must be free to govern themselves through their own exercise of understanding, deliberation, and rational choice.104 From this freedom flows the privilege of the individual to be the sole judge of the moral legitimacy of her actions. These evaluative judgments may, of course, be influenced by one’s upbringing, religious training, community mores, and so on, but ultimately it is the autonomous individual who must exercise choice and accept responsibility for those choices. “The responsible man is not capricious or anarchic, for he does acknowledge himself bound by moral constraints. But he insists that he alone is the judge of those constraints.”105 While in a liberal society some additional constraints may be placed on the exercise of individual autonomy in the name of collective good, these political decisions about social welfare must be justified without reference to

102 Cf. Robert C. Post, On Professional Prerogatives, 37 STAN. L. REV. 459 (1985) (noting that the role of a professional invariably creates tension between autonomy and influence, which is the power a professional has over the client by virtue of expertise).

103 See generally David Luban, Paternalism and the Legal Profession, 1981 Wis. L. REV. 454; Wasserstrom, supra note 20. For a useful overview of the problem of paternalism in bioethics, see Beauchamp & Childress, supra note 72, at 120–81.

104 Indeed, in political philosophy, anarchy is sometimes presented not as a nightmarish conclusion to a slippery slope argument, but as a challenge to any political order to justify its claim to authority over autonomous individuals. See, e.g., R.P. Wolff, The Conflict Between Authority and Autonomy, in AUTHORITY 20 (Joseph Raz ed., 1990).

105 Id. at 26.
any particular vision of the good life.106 In other words, political actors must leave room for individuals to act in accordance with their own view of the good. If the father in the will example has a conception of family life that involves strict control over his children, then political institutions ought not to interfere with his ability to live according to those principles.

Lawyers in a liberal system must take care not to frustrate their clients' pursuit of their own conception of the good life by appealing to a moral principle that is unique to the lawyer's conception of the good. Many defenders of the regulatory model rest their objection to considering moral values in professional responsibility on this ground.107 Teachers of legal ethics, it is claimed, ought not to presuppose the validity of any substantive ethical outlook or conception of the good. "[I]nstruction in professional responsibility should not be premised on the correctness of any particular theory."108

Some judges and academics believe that the conduct of legal professionals ought to be governed by an ethical code, but this is not the general understanding of the profession or teachers of professional responsibility. Many if not most teachers of professional responsibility recognize that they are teaching the future lawyers of America a code of positive law rules enacted by their state legislatures, rather than the Bible, the Koran, or one of the many ethical systems that have existed from the pre-Socratic through twentieth-century revival of natural law theory.109

On the surface this argument is self-refuting, since the regulatory model is itself a moral position. It builds in several contestable normative assumptions, including the critical condition that following the rules laid down by bar associations and courts is a sufficient condition for moral rectitude. On a different reading, however, this argument does suggest that certain kinds of moral arguments by lawyers may

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106 See LIBERAL NEUTRALITY (Robert E. Goodin & Andrew Reeve eds., 1989) (collecting essays on this topic); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33 (1974); JOHN RAWLS, POLITICAL LIBERALISM 190 (1993) (explaining that the common theme of liberal thought has been that the state should not favor any comprehensive doctrine and any associated conception of the good); Ronald Dworkin, Liberalism, in PUBLIC AND PRIVATE MORALITY 113, 127 (Stuart Hampshire ed., 1978).


108 Johnstone & Treuthart, supra note 107, at 83.

potentially be inappropriate, given the demands of the lawyer's role. The lawyer's job is to acquaint her client with the demands of the law, counsel her client on conforming to the law, and advocate for her client's interests within the framework of the law. The emphasis in this statement on the law reflects the contention that only specifically legal constraints on the client's activities are legitimate in a liberal democracy.

It is not clear, however, that a lawyer may counsel the client about the law without referring to principles of public morality. Consider an extended example. Lois is a lawyer with a general practice in a town located in the state of Tradition, near the line with the state of Progress. Clint comes to her for advice. He recently quit his job in the big city and bought a small department store in town. He observes that stores in Tradition remain closed on Sundays, while those in Progress stay open; thus, he infers that Tradition still enforces "blue laws," prohibiting stores from opening on Sundays. Clint is losing money to the discount store across the state line because citizens of Tradition habitually cross the state line to shop on Sundays in Progress. Clint asks Lois whether he can open his store on Sundays. Lois, being a good conventionalist, sets out to discover the utterances by political officials that would constrain the advice she gives to Clint. The blue law is clear enough: it provides for a twenty-five dollar fine for the proprietor of any public marketplace who keeps his store open on Sunday. A case decided by the Supreme Court of Tradition held that the twenty-five dollar fine was applicable to each violation, and "violation" was interpreted as each day the store was open for

110 See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 144–46 (1990); see also ZETRIN & LANGFORD, supra note 5, at 441–42. An excellent discussion of the ethics of client counseling can be found in Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. REV. 1, 26–30 (1988). The form in which I present the counseling options below is drawn heavily from Gordon's presentation.

111 The relevant portion of the Civil Code of Tradition reads as follows:

Any person . . . who, being a merchant or shopkeeper, druggist excepted, keeps open store on Sunday, shall be fined $25.00. Any person who opens, or causes to be opened, for the purpose of selling or trading, any public market or place on Sunday, or opens, or causes to be opened, any stall or shop therein, or connected therewith, or brings anything for sale or barter to such market or place, or offers the same for sale therein on that day, or buys or sells therein on that day, including livestock or cattle, shall, on conviction, be fined $25.00. Any place where people assemble for the purchase and sale of goods, wares and merchandise, provisions, cattle or other articles is a market house or place within the meaning of this section.

Tradition modeled its statute on ALA. CODE § 13A-12-1 to -2 (1975).
business. Lois then reads the Tradition Rules of Professional Conduct to discover the legal texts that constrain her own actions:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.\textsuperscript{112}

In addition, Lois reviews the Tradition criminal code, and discovers a provision which makes liable as a principal anyone who "aids, abets, counsels, commands, induces, or procures" the commission of a crime.\textsuperscript{113} The statute does not contain an exemption for lawyers acting as counselors.

Lois considers a range of options for the advice she should give Clint, taking into account her obligation under the rule and the criminal statute. She could tell her client, (1) it is illegal to open his store on Sunday; (2) it is "technically" illegal, but the local D.A. is unlikely to prosecute him;\textsuperscript{114} (3) it is illegal and the D.A. actively enforces the law, but the fine is insignificant—thus, it would be cost-effective for him to open on Sundays in light of the revenues he is losing to the stores in Progress; (4) the blue laws are "on the books," but the Supreme Court of Tradition may be inclined to strike down the blue law as a violation of religious liberty;\textsuperscript{115} (5) the blue laws are an accepted part of life in Tradition, and although it is cost-effective to open on Sundays, the local townspeople might perceive Clint as being hostile to their religious convictions if he opens the store on Sundays;\textsuperscript{116} (6) concerns about the blue laws are moot because Clint could increase his revenue by the same amount if he kept the store

\textsuperscript{112}\textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 1.2(d) (1998).
\textsuperscript{113} This statute was based on 18 U.S.C. § 2 (1994).
\textsuperscript{115} Lois imagines the professional recognition she would receive by arguing the case in the Supreme Court and wonders whether Clint could be persuaded to subject himself to prosecution as a test case. In law school Lois wanted to be a constitutional lawyer, but circumstances intervened and she returned to her hometown and became a general practitioner.
\textsuperscript{116} Lois could mention to Clint that many people in town have been grumbling about "judicial activism" on the Supreme Court, and would likely resent a decision they would perceive as "against family values." She considers whether her practice would suffer if she were perceived as being against the blue laws. She does not think her neighbors are aware of Tradition Rule of Professional Conduct 1.2(b), which says, "A lawyer's representation of a client . . . does not constitute an endorsement of the
open for longer hours during the week; or (7) she will offer to lobby the legislature to change the law on Clint’s behalf, at her customary hourly rate, of course.

The relevant conventions of the law of professional responsibility—the disciplinary rule and the criminal statute set forth above—do not answer Lois’s question about what form of advice she should give to Clint without violating her ethical obligations. The rules themselves are too indeterminate to guide Lois’s behavior. (Where is the line between prohibited “assistance” of client crimes and permitted “discussion” of the legal consequences of actions? Must, or should, the lawyer assume her client is a Holmesian bad man, who regards criminal penalties as merely the cost of doing business?) Moreover, the boundaries of the rules are not stable over time. By her own lawyering efforts, Lois can influence the interpretation or implementation of legal norms. “[L]awyers, rather than taking the output of legislatures and courts as given, sometimes influence it.” Thus, in order to understand what she ought to do in this case, Lois cannot simply rely on legal texts, but must develop a moral theory, however crude, of what it means to be a good lawyer. Notice that in this example, Lois does not refer to her personal beliefs about what Clint ought to do; instead, she is concerned with the political morality of the state of Tradition and how those principles affect Clint’s business proposal.

IV. THREE FUNDAMENTAL PROFESSIONAL VALUES.

Dworkin’s account of general jurisprudence, which emphasizes the role of principles of political morality in legal judgments, represents an alternative approach to the study of moral values in profes-

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117 Does it matter whether Lois can foresee that Clint will use her advice to open on Sunday in defiance of the law, even though she does not expressly advise him to do so? Consider the case of a criminal defense lawyer whose client shows up at the lawyer’s office carrying the murder weapon. May she tell the client, “I won’t reveal to the prosecutor that you brought the gun to my office, but if you give it to me, I’m obligated to turn it over to the police”? Cf. In re Ryder, 263 F. Supp. 360 (E.D. Va. 1967). The lawyer, of course, knows (or certainly has reason to foresee) that the client will leave her office and throw the gun in the river after hearing that advice. See ABA Standards Relating to the Administration of Criminal Justice Standard 4–4.6(b), reprinted in Selected Standards on Professional Responsibility (Thomas D. Morgan & Ronald D. Rotunda eds., 1998) (“[D]efense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item.”).

118 Simon, supra note 21, at 46.

119 See Wolf, supra note 93, at 41–43.
sional responsibility. This Dworkinian conception maintains that there is something about the lawyer's role which generates moral duties that would not apply to a similarly situated nonprofessional. "[W]e make a particular, non-generalizable moral appeal when we remind someone that he or she is an attorney."120 These duties are grounded not in the personal moral or religious beliefs of professionals, but in the function performed by the profession in society. The legal profession mediates between citizens, the state, and other organizations in society by reposing complex knowledge with specially trained and public-spirited individuals, who then enable citizens to conform their actions to social norms.121 The duties of a lawyer on this account are shaped by public needs, so professional institutions, such as schools and self-regulatory mechanisms like disciplinary codes, should channel professional behavior in socially desirable ways.122 The goal of a theory of professional responsibility should be to provide a normatively satisfying story of why the legal profession deserves

120 Jack L. Sammons, The Professionalism Movement: The Problems Defined, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 269, 272 (1993) (emphasis added). Thus, I disagree with Patrick Schiltz, who claims that "[b]eing an ethical lawyer is not much different from being an ethical doctor or mail carrier or gas station attendant." Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 Vand. L. Rev. 871, 909 (1999). Of course doctors and mail carriers face similar ethical concerns in their non-work-related lives, which Schiltz sums up: "You should treat others as you want them to treat you. Be honest and fair. Show respect and compassion. Keep your promises." Id. at 910. And so on. These maxims for private moral life, however, do not provide sufficient guidance in professional ethical dilemmas that involve values not precisely analogous to those encountered in ordinary life. Consider again the Dalkon Shield case, but suppose this time that the lawyers did not cross the line into abusive and humiliating questioning. The lawyers would be morally justified in asking some questions about the plaintiffs' sexual practices, even though these questions would violate the maxim "treat other as you want them to treat you." I certainly do not want some stranger asking me embarrassing questions, and I would not tolerate it in daily life, but it is an acceptable feature of the morality of lawyering because of the countervailing consideration of fairness to the defendant.

121 See Abel, supra note 14, at 34–35; Jack L. Sammons, Jr., LAWYER PROFESSIONALISM (1988); Robert L. Nelson & David M. Trubek, Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in IDEALS/PRACTICES, supra note 14, at 180–81. The roots of the functional concept of professionalism can be found in Durkheim's hypothesis that occupational groups filled the normative void left by the breakdown of religious authority. See Emile Durkheim, Professional Ethics and Civil Morals (Cornelia Brookfield trans., 1957).

our respect. The public morality conception of legal ethics is, therefore, "a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future." For the public morality conception of legal ethics to function effectively as an alternative to incorporating personal ethical beliefs into professional decision making, the moral values that bear on professional decisions must derive from the social function of lawyers. If these public normative principles do indeed arise from the role of lawyers, then they function as a constraint on the personal morality of individuals acting as professionals, rather than the other way around. In this Section, therefore, I will consider three principles that have been defended as the source of norms of professional responsibility: the principle of undivided loyalty to one's client, the duty to seek justice, and the ethic of care or mercy which asks lawyers to consider the effect of their actions on human relationships. These values, alone or in combination, represent the background social norms that might be brought to bear on a problem in which legal conventions alone do not provide an answer, just as justice, fairness, and procedural due process are the constituents of Dworkin's theory of law as integrity. In each Subsection, I will review the work of legal ethicists who have urged each value to be paramount in the normative domain of lawyering and will also consider why a conception of legal ethics that emphasizes only that favored value must inevitably be incomplete. The goal of the discussion is to establish that a satisfying account of professional responsibility must allow for plural values and cannot proceed on the assumption that only one value may be identified which may serve as the polestar for lawyers in ethical deliberation.

Before proceeding with the discussion of the constituent values of lawyering, it is necessary to pause momentarily to introduce a proposition that I take to be fundamental for professional ethics: practical moral norms take their meaning from the context in which they are developed. Values do not mean much in the abstract; at least, they do not provide much guidance for decision makers in real cases.

123 "Law, as something deserving loyalty, must represent a human achievement . . . . If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe . . . ." Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 680, 682 (1958).

124 Dworkin, supra note 52, at 227–28.

is not to deny the role of theory, or of abstracting general concepts of value from our experience with particular cases. A system of morality depends on accepting some degree of generality in norms; otherwise agents would fall into relativism or solipsism. But a norm stated at a high level of abstraction, such as "lying is wrong," is not self-applying. For one thing, it does not address the question of exceptions or qualifications, such as "lying is wrong, unless the lie is trivial and is told to spare the feelings of another." We all learned as children to express excitement and gratitude at receiving socks and underwear from Grandma for Christmas, even though we would have preferred toys, and were privately mortified at Grandma's taste in clothes. In that case, the benefit of the deception—easing the interaction between generations, preventing the inference of undue hostility, providing cheer at holiday time, and so on—may be thought to outweigh the moral stricture against lying. To take a more serious example of a benevolent lie, some physicians in the past would have approved of deliberately misleading a patient about his chances for survival after an operation to remove a malignant tumor. Similarly, it has been reported that physicians in developing countries do not tell their HIV-positive patients about the existence in developed nations of costly experimental drugs which could extend the patient's life, but which cost more for a month's supply than the patient's annual salary. Telling the patient the truth, these physicians argue, would unnecessarily cause stress and anxiety, diminishing the quality of his last few months of life with little corresponding benefit. In these cases, the general norm is qualified by an implied exception for certain categories of

P. Fletcher, The Meaning of Morality, 64 Notre Dame L. Rev. 805, 809 (1989) ("[A]bstract propositions do not decide concrete cases in the common law tradition . . . ."). Compare what I take to be the misguided preoccupation in moral philosophy with stating ethical principles that are exceptionless, substantial, and context-free. See, e.g., J.B. Schneewind, Moral Knowledge and Moral Principles, in REVISIONS 113 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983).

126 See, e.g., Anderson, supra note 97, at 62; Sissela Bok, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 57-61 (1978).

127 See Beauchamp & Childress, supra note 72, at 398-401 (reporting that the attitude of physicians toward nondisclosure of the diagnosis of cancer has shifted in recent years, in response to changing societal attitudes toward cancer, increasing respect by physicians for patients' autonomy, and the fear of malpractice liability); see also Bok, supra note 126, at 226-38 (explaining that the increasing importance of informed consent requires physicians to proceed with caution when withholding information from patients). The fact that the application of an ethical norm has depended on such contingent facts tends to support the claim that an effective system of practical morality cannot proceed at too high a level of abstraction.
lies, which must be learned through experience with a variety of situations in which the lies are judged acceptable or unacceptable.

Exceptions are not the only reason why general norms cannot guide conduct. The concepts used in abstract moral norms are themselves defined with reference to concrete practical situations, and quite a bit of controversy can arise in the specification of these abstract values. For example, consider the debate surrounding the impeachment of President Clinton. Does the norm "lying is wrong" also encompass evasiveness, hair-splitting, and providing misleading answers to straightforward questions? Putting aside the legal definition of perjury, the interesting ethical question is whether the President lied, for the purposes of the general moral strictures against lying, if he accurately denied having "sex" under the stipulated definition used in his civil deposition, even though he clearly had sex as that term is commonly understood by non-lawyers. Other prominent moral debates, such as whether affirmative action is "discrimination," or whether assisted suicide is "murder," also reveal the difficulty inherent in specifying highly abstract norms so that they may be applied in borderline cases.

The specification of moral norms occurs within social practices. A practice is a form of social activity which is carried out for some purpose, which in turn generates evaluative standards. The practice of carefully crafting one's answers to remain technically correct but substantially misleading is not limited to lawyers. Bok discusses the much-maligned "mental reservation" doctrine once accepted by some Roman Catholic theologians, in which a witness would not technically be "lying" if he appended a mental qualification to the untrue statement which made the statement true. Thus, a defendant accused of adultery might say he had not had illicit sex, mentally adding, "at least not this week." Bok, supra note 126, at 35-37.

Consider some of the interpretive difficulties canvassed in Kent Greenawalt, Law and Objectivity 121-36 (1992). In moral philosophy, this critique is associated with Hegel and his arguments against the Kantian categorical imperative. See G.W.F. Hegel, Phenomenology of Spirit ¶¶ 424-26, at 254-56 (A.V. Miller trans., 1977). Hegel shows how two contradictory maxims can be derived from the same universal principle; thus, the principle is too vague to provide guidance in actual cases. The classic example of the indeterminacy of legal rules is the "no vehicles in the park" ordinance cited by Hart: Does "vehicle" include bicycles? What about an ambulance rushing to save a heart attack victim? See H.L.A. Hart, The Concept of Law 126-30 (2d ed. 1994). For a classic caricature of the view that jurisprudential concepts have a "pure" form, "freed from all entangling alliances with human life," see Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 809 (1935).

of defending a litigant in a civil lawsuit exists for particular reasons: ensuring an accurate presentation of truthful statements to a tribunal is undoubtedly important, but so is protecting one’s client from harassment, unfair invasion of privacy, onerous expenses, and pointless legal proceedings. The purpose of this practice differs from the practice of, say, living together with others as a member of a family, in which truthfulness is of paramount importance. The difference in the ends accommodated by these social practices partially explains why many observers of the Clinton scandal would not regard his “legally accurate but substantially misleading” deposition responses as lies, although they would roundly condemn the deception he practiced on his wife. (I am assuming here for the sake of discussion that Clinton did not tell an out-and-out lie about whether he had “sex” under the stipulated definition in the Paula Jones litigation, although he did lie if Monica Lewinsky told the truth about who touched whom and where.) Truthfulness for a lawyer in a civil deposition, where the adversary is expected to probe answers given by the witness until the responses are on the record in an artificially precise form, may be judged by a different set of criteria than truthfulness for a husband, where an answer that is “legally accurate but substantially misleading” would be considered an egregious breach of marital trust.

Some readers may be outraged by the claim that a lawyer’s truth is different from a husband’s truth, but any attack on this claim must be made at the level of the definition of the practice. One might contend that the truth-finding function of the civil deposition in the Clinton case was subverted by Clinton’s evasiveness, and that a higher standard of candor should be imposed on witnesses and their counsel. I have made this argument elsewhere, and indeed the public furor over Clinton’s parsing of the word “sex” has provided considerable support for my claim that this kind of gamesmanship in discovery is unethical behavior for lawyers. The point is that this argument directly engages with the nature of the practice at issue, whether maintaining a civil lawsuit, remaining faithful to one’s spouse, or serving as an elected political leader. It is entirely possible, though not neces-

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131 In politics this idea was nicely captured by Weber: “But is it true that any ethic of the world could establish commandments of identical content for erotic, business, familial, and official relations; for the relations to one’s wife, to the greengrocer, the son, the competitor, the friend, the defendant?” Max Weber, Politics as a Vocation, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 118–19 (H.H. Gerth & C. Wright Mills trans. & eds., 1946). For an extended, contemporary version of this argument, see MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

sary, that each of these practices has generated a different set of criteria for what constitutes a "lie." (In Section IV.B., I have much more to say about how a social practice generates and applies these criteria through a process of reasoning by analogy from prior cases in which a moral norm was specified and elaborated in concrete factual settings.)

In the ethical analysis of lawyers' behavior, too, one must pay careful attention to the nature and purpose of the practices under consideration. Criminal defense work, for example, has as one of its objects the protection of individual rights against government abuse. These "intrinsic procedural rights" include the right not to be required to testify against oneself, the right not to have one's person, home, and belongings searched without a warrant, and the protection against cruel and unusual punishment. The justification of a great deal of criminal defense lawyers' behavior is therefore grounded in the purpose of safeguarding individual liberty. As David Luban puts it, we want to "handicap" the state, even in its ability to secure convictions of the guilty, to ensure that it does not trample upon the rights of the innocent. For this reason, criminal defense attorneys are justified in asserting the illegality of a search and seizure of evidence as a ground for acquittal, even though the client may be guilty as sin. They may also be justified (although these cases are much more controversial) in brutally cross-examining a truthful witness for the prosecution or presenting perjured testimony. It would be a serious mistake, however, to generalize norms for the behavior of civil defense lawyers, transactional lawyers, or prosecutors from the standards appropriate to criminal defense attorneys, because the practices in question are directed at different ends. Despite suggestions to the contrary in some professional rhetoric, the practicing bar is not a monolith, and the context of legal practice plays an important role in the moral evaluation of practitioners.

Of course, there may be considerable controversy over the end of a practice. For example, the literature on the ethics of negotiation reveals a sharp conflict over whether the participants in the practice understand that the purpose of the activity is to bluff, exaggerate, and

133 Simon, supra note 21, at 170.
134 David Luban, The Adversary System Excuse, in THE GOOD LAWYER, supra note 93, at 83, 92. Simon responds that this argument proves too much: We do not want to handicap the state in all cases. Instead, we want the state to be effective in convicting the guilty and ineffective in convicting the innocent. See Simon, supra note 21, at 175.
conceal one’s true intentions, or whether negotiation is a practice demanding high standards of candor and fairness, like a judicial proceeding.  

Pious and generalized assertions that the negotiator must be “honest” or that the lawyer must use “candor” are not helpful. They are at too high a level of generality, and they fail to appreciate the fact that truth and truthful behavior at one time in one set of circumstances with one set of negotiators may be untruthful in another circumstance with other negotiators.  

This position goes too far. It is possible to generalize about honest and dishonest behavior in negotiation, although not at the level of merely stating that lawyers ought to be “candid.” If the end of the practice of negotiation could be fixed by some degree of professional consensus, then evaluative standards could be located that are not particular to each negotiation. Perhaps there is no stable consensus on the purpose of negotiation; in that case, we would expect considerable divergence in the moral evaluation of negotiators. This disagreement does not show that the morality of negotiation is completely situation-relative. It merely highlights the importance of seeking a clear understanding of the end of the practice.  

Interestingly, courts have frequently asserted that lawyering is a social practice which generates specific moral duties. For example, the Supreme Court has said that the phrase “conduct unbecoming a member of the bar” must be read in the context of the “lore of the profession.” Although at one point in the opinion the Court seemed to equate professional lore with the positive disciplinary codes promulgated by state bar associations, the Court also appears to concede that the competing demands of zealously advocating one’s

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139 For a useful example of how the thorough exploration of a particular area of legal practice may shed some light on appropriate professional behavior in that context, see William J. Stuntz, Lawyers, Deception, and Evidence Gathering, 79 VA. L. REV. 1903 (1993). For a more general argument, that norms are expressed and understood intersubjectively by members of a community, see Robert M. Cover, Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 HARV. L. REV. 4 (1983).

140 In re Snyder, 472 U.S. 634, 644-45 (1985).

141 Id. at 645 (“[G]uidance is provided by . . . ‘the lore of the profession’ as embodied in codes of professional conduct.”) (emphasis added).
client's cause and advancing the cause of justice must be resolved "in light of the traditional duties imposed on an attorney," which are not neatly captured in the disciplinary codes. In other cases, the Court has not attempted to anchor a narrowing construction of regulatory standards to the state bar codes and rules.

Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for conduct which all responsible attorneys would recognize as improper for a member of the profession.

In other words, by belonging to a community and sharing in the practices of similarly situated professionals, lawyers become acquainted with professional norms that are not reducible to neat disciplinary codes.

Thomas Shaffer raises an important issue at this juncture. Values, he argues, arise from communities such as families, churches, neighborhoods, and perhaps even regions and distinctive cultures, but not from national jurisprudence or the norms and practices of the legal profession. These "mediating institutions" are far richer and more

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142 Id. at 645.
144 For courts that have accepted the argument that professional norms are sufficiently clear to provide guidance for lawyers, see, for example, Howell v. State Bar of Texas, 843 F.2d 205, 208 (5th Cir. 1988), In re Disciplinary Proceedings of Phelps, 637 F.2d 171, 175 (10th Cir. 1981), In re Bithoney, 486 F.2d 319, 324–25 (1st Cir. 1973), In re Citation of Attorney Frerichs, 238 N.W.2d 764, 768 (Iowa 1976), Attorney Grievance Comm'n v. Alison, 565 A.2d 660, 667 (Md. 1989), and In re Hinds, 449 A.2d 483, 497–98 (N.J. 1982). The Eleventh Circuit appears to take the position that the "lore of the profession" must be set forth in disciplinary codes governing attorney practices to serve as grounds for sanctions. In re Finkelstein, 901 F.2d 1560, 1565 (11th Cir. 1990) (citing In re Snyder, 472 U.S. at 645). The Eleventh Circuit faulted the district judge for suspending a lawyer from practice based on violations of a "transcendental code of conduct... [that] existed only in the subjective opinion of the court." Id. The court focused on whether the lawyer had notice of the code of conduct which he allegedly violated and left open the possibility that an uncodified, but suitably clear, professional norm could form the basis for discipline, even in the Eleventh Circuit, if the lawyer knew or should have known of its existence. See also United States v. Wunsch, 54 F.3d 579 (9th Cir. 1995), rev'd granted, 84 F.3d 358 (9th Cir.), withdrawn, 84 F.3d 1110 (9th Cir. 1996). In Wunsch, the court held that a statute which stated, "It is the duty of an attorney... [to] abstain from all offensive personality... unless required by the justice of the cause with which he or she is charged," was void for vagueness. Id.
145 See Letter from Thomas L. Shaffer to W. Bradley Wendel (Feb. 26, 1999) (on file with author); see also Thomas L. Shaffer, Towering Figures, Enigmas, and Responsive
reliable sources of moral guidance than the legal system. Mediating institutions are exemplifications of what Aristotle calls a *polis*:

[A]ny polis which is truly so called, and is not merely one in name, must devote itself to the end of encouraging goodness. Otherwise, a political association sinks into a mere alliance, which only differs in space . . . from other forms of alliance where the members live at a distance from one another. . . . [A] polis is not an association for residence on a common site, or for the sake of preventing mutual injustice and easing exchange.\(^{146}\)

A *polis* is the opposite of what Dworkin would call a “rulebook community”—an association in which members agree to a *modus vivendi*, including procedures for resolving disputes among themselves, but do not share deep value commitments.\(^{147}\) Shaffer’s objection is that the legal system is a mere rulebook community and not an institution which is dedicated to defining and encouraging goodness. Thus, it is misguided to turn to legal practices in hopes that they may illuminate and inspire us morally.

Even if Shaffer is correct in his claim that legal practice does not tell us much about being a good human being (and he is probably right on that score), a further premise remains necessary for his argument to establish that lawyers ought to look to non-legal practices as a source of moral guidance. The missing premise is an account of the political legitimacy of legal ethics, conceived on a foundation of private moral norms, elucidated through mediating institutions. The reason Dworkin tries so hard to show that American jurisprudence arises from a “community of principle,” not a rulebook community, is bound up with his theory of legitimacy. For Dworkin, the integrity of a community’s moral principles provides the best account of why citizens have a general moral obligation to obey the law.\(^{148}\) Dworkin actually seems partially to concede Shaffer’s point when he observes that “responsibilities to family and lovers and friends and union or office colleagues are the most important, the most consequential obligations


\(^{147}\) *See Dworkin*, *supra* note 52, at 209–10; *cf.* *Gutmann & Thompson*, *supra* note 19, at 57–58 (providing a similar account of a “prudential” political community).

\(^{148}\) *See Dworkin*, *supra* note 52, at 191–92, 216.
of all." These special obligations arise from a sense of the community members' special reciprocal rights and responsibilities in regard to one another, which are not generalizable to obligations and privileges running between members and nonmembers of the community. But Dworkin seeks to go beyond Shaffer's reliance on mediating institutions by arguing that the political community composed of American citizens is a "community of principle," an Aristotelian polis, which is governed by commonly shared principles of justice, not merely compromises hammered out between warring factions. This is a daring and ambitious claim given Dworkin's admission that this community is morally pluralistic, but he defends it in part with a subtle burden-shifting argument: what other model of political legitimacy would work as well? Moral diversity should be accommodated not by leaving moral questions to a multiplicity of nonpolitical associations but by charging political institutions with the responsibility of fashioning principles of justice that speak directly to the normative concerns of these subcommunities and which seek to discover the deeper moral commitments that diverse constituencies share. Judging ought to proceed as if the American polity were a community of principle, and ought to aim to construct an interpretation of legality which best harmonizes competing moral perspectives.

Although Shaffer is surely right that nonprofessional activities are a rich source of moral understanding, lawyers who seek to apply norms developed in those activities to their professional lives must find a way to connect those norms with their clients' own moral com-

149 Id. at 196.
150 See id. at 198–99.
151 See id. at 211; cf. Jeremy Waldron, Kant's Legal Positivism, 109 HARV. L. REV. 1535, 1538–40 (1996) (asserting that disagreement about rights and justice requires a community to construct a univocal conception of justice which is the basis for the use of force).
152 See DWORKIN, supra note 52, at 213–14. Shifting the burden of proof is an effective, but underappreciated, tactic in non-legal rhetoric. See Richard H. Gaskins, Burdens of Proof in Modern Discourse (1992). This work casts the status quo as merely one of many positions competing for the title of "truth." By combining burden-shifting arguments with antifoundationalist claims or a general attitude of skepticism toward assertions of truth, critics of existing institutions can make these arrangements seem radically unstable. See id. at 42–43, 104–06. Dworkin is neither an antifoundationalist nor a skeptic, but his argument effectively shifts the burden onto someone like Shaffer to make his own argument for the legitimacy of a model of jurisprudence which emphasizes the moral authority of private associations.
153 See DWORKIN, supra note 52, at 225 ("[I]ntegrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.").
mitments. As I will discuss in more detail in subsequent sections, Shaffer and others have sought to accommodate the problem of moral diversity by urging lawyers to view representation as an opportunity for moral dialogue with clients. Conversation is one solution to the problem of constructing a model of legal ethics for a pluralistic society; the Dworkinian strategy of shifting the locus of justification and legitimacy onto public values is another and, as I hope to show, a more broadly applicable response.  

With that background in mind, we may proceed to the analysis of the foundational values of lawyering. 

A. Loyalty

Authoritative statements of professional norms have long emphasized paradigmatic loyalty to one's client as a fundamental principle of legal ethics:

"A lawyer shall abide by a client's decisions concerning the objectives of representation. . . ."  

"A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means. . . ."  

The regulatory model discussed above, with its strong attachment to the virtue of loyalty, is almost certainly the dominant conception

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154 To be fair to Shaffer, it is not clear that he is looking for a generally applicable theory of the political legitimacy of the practice of lawyering. His writing has a pronounced radical quality, and he repeatedly emphasizes that the rule of law may be intrinsically corrupt when viewed from the standpoint of religious truth. See, e.g., Thomas L. Shaffer, Faith Tends to Subvert Legal Order, 66 FORDHAM L. REV. 1089 (1998); Thomas L. Shaffer, Should a Christian Lawyer Sign Up For Simon's Practice of Justice?, 51 STAN. L. REV. 903 (1999). Perhaps a lawyer evaluating competing theories like Shaffer's and mine is required first to decide whether to approach questions of professional responsibility from within the legal order or from without. This is a profound question of personal faith and morality that is well beyond the scope of the questions addressed here.

155 These may be thought of as prima facie duties, following Ross's terminology. See W.D. Ross, THE RIGHT AND THE GOOD (1930); see also Robert Audi, Intuitionism, Pluralism, and the Foundations of Ethics, in MORAL KNOWLEDGE AND ETHICAL CHARACTER 32 (1997). The three public values I describe are a possible taxonomy of professional values but are by no means the only ones. Simon, for example, identifies neutrality, partisanship (both of which I analyze under the category of "loyalty"), procedural justice, and professionalism as foundational ethical norms for lawyers. See William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. REV. 29.

156 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1998).

among practicing lawyers.\textsuperscript{158} To a considerable extent, the judiciary has supported the organized bar’s position that loyalty to one’s client is the polestar value for lawyers. Justice Stevens, for example, has espoused consistently the view that independent lawyers and an adversary system of justice are essential to safeguard individual liberties.\textsuperscript{159} Justice Powell has taken a similar tack, arguing that the public interest in justice is best served not by requiring lawyers to serve social justice directly, but by holding them to the highest standards of loyalty to their clients’ causes.\textsuperscript{160}

\textsuperscript{158} See Luban, supra note 21, at 293–403 (labeling the regulatory model the “standard conception”); Simon, supra note 21, at 7 (calling the regulatory model the “dominant view” in legal ethics); Donald C. Langevoort, Where Were the Lawyers? A Behavioral Inquiry Into Lawyers’ Responsibility for Clients’ Fraud, 46 Vand. L. Rev. 75, 78 (1993) (arguing that ethical norms contrary to loyalty have been so subverted that loyalty has emerged as the dominant justification for lawyer behavior); Harry I. Subin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, 70 Iowa L. Rev. 1091, 1150 (1985) (“With the adoption of the Model Rules the ABA has come perilously close to asserting that confidentiality [entailed by the principle of loyalty] is not just an important interest of the justice system, but the only one.”). Although professional rhetoric surely emphasizes loyalty, one fascinating empirical study shows that in practice, lawyers’ conduct is frequently modulated by what appears to be self-interest. See James S. Eisenstein & Herbert Jacob, Felony Justice: An Organizational Analysis of Criminal Courts (1977). This report shows that criminal defense lawyers are often less concerned with their clients’ welfare than with the interests of other courthouse “regulars” such as court clerks, judges, and prosecutors. Lawyers report that they will sometimes agree to a plea bargain that is harsher than they could have obtained to preserve a good working relationship with a particular state’s attorney. Ironically, such short-run disloyalty may be necessary for defense lawyers to remain effective as advocates in the long run: the business of dispute resolution may be conducted by “work groups” consisting of judges, lawyers, and court personnel, and outsiders—nonmembers of these work groups—are at a tremendous disadvantage. See id. at 19–39. Thus, it is difficult to label short-term disloyalty as self-interested behavior by the lawyer since the lawyer’s motivation may be to become as effective as possible on behalf of her clients within the criminal justice system.

\textsuperscript{159} See Wheat v. United States, 486 U.S. 153, 172 (1988) (Stevens, J., dissenting) (“This is not the first case in which the Court has demonstrated its apparent unawareness of the function of the independent lawyer as a guardian of our freedom.”) (quoting Walters v. National Ass’n of Radiation Survivors, 473 U.S. 305, 371 (1985) (Stevens, J., dissenting)); Moran v. Burbine, 475 U.S. 412, 468 (1986) (Stevens, J., dissenting) (stating that lawyers are to be regarded as protectors of rights in an accusatorial system).

\textsuperscript{160} See Polk County v. Dodson, 454 U.S. 312, 318–19 (1981) (“[A] defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing the undivided interests of his client.”) (internal quotation marks omitted).
1. Justifying the Primacy of Loyalty in Legal Ethics.

When asked to explain why loyalty ought to be the paramount value for legal ethics, many lawyers tell a story about a powerless individual and the heroic lawyer who stands up for him. The image of the lone lawyer resolutely defending an oppressed client is one of the most compelling ones in the lore of the profession in the United States. Geoffrey Hazard recounts noteworthy cases such as John Peter Zenger’s trial, the McCarthy hearings, and the trial of the wrongly accused defendants in Scottsboro, and identifies the self-congratulatory story the profession tells about itself:

In the basic narrative the private party is an individual, the proceeding is criminal or quasi-criminal, and the defendant’s life or liberty is at stake. The defending attorney’s cause is always just, for the narrative holds that government is inevitably heavy-handed and misguided. The lawyer is thus an instrument of both liberty and political justice.  

This narrative certainly sounds compelling, but it must be evaluated critically and must be limited carefully to its facts. For one thing, the legal profession has employed rhetoric of loyalty and client service to justify results that are anything but inspirational. The Scottsboro case, for example, is the story of several brave lawyers who fought for a fair trial in a corrupt system. It is also the story, however, of the prosecutors who pressed for repeated retrials even after it became clear that the defendants were innocent of the crimes charged, the judge who permitted the state to inflame the racial prejudices of the jury, and the numerous local lawyers who wanted no part of the defense of the boys.  

If anything, the legal profession distinguished itself in the South during the period between Reconstruction and the civil rights movement for its unflinching support of the repressive regime of white domination.  

Arguments for a strong adversarial ethic of loyalty in cases where an isolated individual is overwhelmed by the power of the state become distorted when they are applied in other contexts. Consider a

161 Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 Yale L.J. 1239, 1244 (1991); see also Koniak, supra note 23, at 1447–60.

162 For a carefully documented and highly readable account of the legal proceedings as seen through the eyes of the various participants, see James Goodman, Stories of Scottsboro (1994). Even if the prosecutors did not recognize the defendants’ actual innocence, it should have been clear to the prosecutors that the boys were innocent given the unreliability of the state’s witnesses and the compelling exculpatory evidence available.

talk that attorney Simon Rifkind gave to the New York City bar.\footnote{See Simon H. Rifkind, The Lawyer's Role and Responsibility in Modern Society, 30 Record 534 (1975), reprinted in Geoffrey C. Hazard, Jr. et al., The Law and Ethics of Lawyering 456 (2d ed. 1994), and in Zitrin & Langford, supra note 5, at 239.} He praised lawyers for representing "the outcasts, the rejected ones, the deviationists," and other unpopular members of society. He then went on to criticize law students led by Ralph Nader for picketing the law firm that represented General Motors ("GM"), calling their conduct "subversive" of professional norms. The irony of comparing GM with "a sharecropper in Mississippi" seems entirely to have escaped Rifkind, but his speech skillfully exploits the rhetorical advantage of identifying GM's law firm with a lawyer for the downtrodden. These images of heroic lawyers representing oppressed clients influence the argument about ethics at an affective level, rather than a cognitive one. It is easy to imagine Atticus Finch bravely defending an innocent black man in a racist town as one's archetypical lawyer and to ignore the host of real-world cases that do not measure up to this ideal.\footnote{See Abel, supra note 2, at 669 (summarizing studies which report that most lawyers spend virtually no time challenging abuses of legal authority); cf. Mullenix, supra note 109, at 581 (criticizing Judge Weinstein for equating "torture-chamber county jails in some 1950's backwater" with corporate defendants in mass tort cases and for generalizing ethics rules from one case to the other).} Rifkind's analogy fails because it is GM, not the state or the plaintiffs suing GM, that holds power. In other words, the practices of sticking up for a sharecropper in Mississippi and of working on behalf of a gigantic, multinational corporation are fundamentally different in their purpose. This is not an argument that large corporations are inherently evil; it does show, however, that it is important not to mix metaphors when applying moral lessons from one context to another.

This problem can be stated as a challenge to those who exalt loyalty as the central normative value for legal ethics. Accepting that loyalty is a praiseworthy value through which lawyers secure justice for the victims of oppression, why are lawyers justified in representing and being loyal toward clients who may be the oppressors? One way to defend the central position of loyalty is to maintain that it is an \textit{intrinsic} good, valuable regardless of any social disutilities it may produce incidentally. Several prominent versions of this answer have been given.

a. Friendship

Charles Fried memorably defended the centrality of loyalty by analogizing the lawyer-client relationship to one of personal friend-
ship. Friendship is a good in and of itself, so, by analogy, the lawyer-client relationship is valuable regardless of the justice of the outcome sought by the client. The limitations of Fried's analogy are well known, and I will not rehearse them in detail here. Briefly, outsiders cannot claim a right to be treated equally alongside friends and family members because they have not shared the experiences that bind people into close relationships. Duties of friendship, but not all duties that derive from the value of loyalty, must be grounded in an actual history that has transpired between two persons. Interaction between a lawyer and her client is likely to be fleeting and is likely to be focused on the legal problem at hand, not on getting to know one another as persons. Some clients may not even be humans, but may be institutions, personified by numerous in-house lawyers or bureaucrats. At the moment the lawyer and client enter into a relationship, their status is that of contracting parties, not friends. A professional relationship is different in kind from a close, personal relationship, precisely because of the missing element of a shared history which justifies the feelings of loyalty between friends. (Naturally, some lawyers and clients may be friends independent of the representation or may become friends over the course of a protracted professional relationship. At that stage, however, they are literal, not metaphorical, friends and thus have no need to justify their behavior in Fried's terms.)

The further problem with Fried's model of lawyering-as-friendship is that it fails to explain why the good of the lawyer-client relationship should automatically trump other public values. Relationships of loyalty may be created and preserved for immoral ends, as in the Sicilian Mafia, where the value of fidelity to one's "family" is exalted


167 See generally Luban, supra note 21, at 83-85; Simon, supra note 21, at 19-21; Wolfram, supra note 24, at 76-77; Simon, supra note 155.


169 Hence Simon's famous quip that another term for "friend-for-hire" is "prostitute." Simon, supra note 155, at 108.

170 See Simon, supra note 21, at 19.
over all others, and appeals to societal values are seen as betrayal. A horrifying example of the abuse of the principle of loyalty was provided by the friend of a young man who raped and murdered a little girl in a casino restroom in Nevada. The friend watched for a few minutes and left the scene, without trying to stop the crime or summon help. When asked why he acted in this way, the friend responded that he did not recognize any moral obligation to the girl. "I'm not going to get upset over somebody else's life. I just worry about myself first. I'm not going to lose sleep over somebody else's problems." Another friend explained that the most important ethical principle in this case was loyalty to one's buddies. "It's a man thing. If your friend does something really bad or really wrong, you're not going to go out and narc on them real quick." This is an extreme case, but it does show that in personal matters, one's moral evaluation of an actor's conduct cannot be limited to whether or not that person displayed the value of loyalty.

As I have emphasized, however, legal ethics is not simply a matter of importing principles of personal ethics into the professional realm. The friendship metaphor does not translate neatly between the private and public contexts. Other arguments might be defended, however, which would establish loyalty as the polestar value for lawyers, even though such a strong priority for loyalty may not be justified in nonprofessional settings. The most prominent such argument emphasizes the intrinsic value of the client's autonomy.

b. Autonomy

Lawyers are the only practical means for individuals to gain access to the social goods secured by a system of law in a complex regulatory state, because the laws governing all aspects of human affairs are too numerous and detailed to be known to nonprofessionals. We do not want to constrain individual choices by channeling legal advice through lawyers who are free to substitute their own value judgments

171 Cf. Beauchamp & Childress, supra note 72, at 24–28 (describing the seventeenth-century Pirates' Creed of Ethics, a coherent body of rules and principles constituted for a morally repugnant end).
173 Id.
for their clients. "[W]e worry about anyone, lawyer or not, interposing her scruples to filter the legally permissible projects of autonomous agents."\textsuperscript{175} Private lawyers are not supposed to narrow the range of permissible interpretations of the law against the interests of their clients; instead, they are supposed to facilitate planning and compliance with the law. In this context, the law is understood as primarily coercive; it sets limits on the exercise of one's personal freedom. However, the law is the \textit{only} justifiable limit on liberty. Lawyers' personal moral beliefs, for example, should not be interposed between the client and the client's otherwise lawful objectives. Thus, under the autonomy model, lawyers should present to their clients the full range of options that are compatible within the framework of the law, without otherwise limiting their clients' choices. Indeed, the client might assert as a moral right her interest in doing anything not prohibited by law, regardless of whether the act is unjust.\textsuperscript{176} That right of the client includes the power to compel the lawyer to accept the client's resolution of a contested moral issue, and the duty on the part of the lawyer to put aside her own moral commitments and adopt the client's as her own.\textsuperscript{177}

The argument that lawyers ought to defer to their clients' direction on contestable moral matters is the public-values version of the argument, considered above, that permitting a lawyer to make ethical decisions based on her personal moral values invites unjustified paternalism, or even statism. According to the defenders of the value of loyalty, the lawyer should remain agnostic about questions of morality and social justice and should defer to her client's resolution of the moral issues in the representation. This agnosticism is based on political liberalism: in a democracy, people have a right to order their affairs as they see fit, provided they do not transgress any legal prohibitions. Significantly—and this is where the autonomy model diverges from Fried's—the agreement in this instance does not arise from a sentiment of friendship or from the lawyer's personal history;

\textsuperscript{175} Luban, \textit{supra} note 21, at 167. Luban is untroubled by lawyers filtering their clients' preferences; instead, he sees this function as essential to the moral and political justification of the lawyer's role. \textit{See id.} at 168. This "filtering" function is represented in my model by the values of justice and care, discussed in subsequent sections.

\textsuperscript{176} See Jeremy Waldron, \textit{A Right to Do Wrong}, 92 ETHICS 21 (1981).

\textsuperscript{177} See Thomas D. Morgan & Robert W. Tuttle, \textit{Legal Representation in a Pluralist Society}, 63 GEO. WASH. L. REV. 984, 988 (1995). It is not an overstatement to observe that the client has the right, entailed by the autonomy justification for the principle of loyalty, to demand that the lawyer help her achieve her objective, even if it is immoral, provided that it is not unlawful. \textit{See} Andrew L. Kaufman, \textit{A Commentary on Pepper's "The Lawyer's Amoral Ethical Role,"} 1986 AM. B. FOUND. RES. J. 651, 652.
instead, it is a rational recognition of the rule of law in a democratic society. The lawyer's role, on this account, is instrumental—to provide expertise that clients lack and in assisting clients in pursuing their interests.\textsuperscript{178} It also functions as a check on government power, by diffusing power away from the state in favor of individuals.\textsuperscript{179} Thus, unlike the justification provided by the lawyer-as-friend conception, under the autonomy model the commitment to one's client follows not from a personal, affective sense of attachment, but from rational assent to institutional norms.

It is worth asking, however, whether the pure agency model is either descriptively accurate\textsuperscript{180} or normatively attractive when applied to the lawyer-client relationship. Just as one is not justified, solely on the basis of the value of friendship, in protecting one's friend who has committed a terrible wrong, a lawyer is not justified, merely by appealing to her client's autonomy, in facilitating any nefarious objective the client may intend to accomplish.\textsuperscript{181} The Mafia consigliere enhances the family's autonomy, but no one would grant the moral worth of the consigliere's role solely for that reason. The defense of the value of loyalty on autonomy or rule-of-law grounds must acknowledge that if the client seeks by her actions to subvert the rule of law, the lawyer cannot then appeal to the protection of the client's legal rights as a


\textsuperscript{179} See Albert W. Alschuler, \textit{The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?}, 52 \textit{U. COLO. L. REV.} 349, 355 (1981) (stating that, for a lawyer, loyalty is "the obligation to serve his clients rather than to become part of the official machinery that judges them"); Stephen L. Pepper, \textit{Autonomy, Community, and Lawyers' Ethics}, 19 \textit{CAP. U. L. REV.} 939, 958 (1990). Pepper overstates his case in this article by claiming that "[t]his is the currently accepted understanding of the lawyer's role . . . ." \textit{Id.} (emphasis added). For Pepper, the lawyer's obligation to respect the community's norms entails only a duty to provide access to the law for the client. But, as the jurisprudential argument above shows, the "law" cannot be made accessible to clients without an understanding of non-textual, or non-conventional political principles.

\textsuperscript{180} See generally Deborah DeMott, \textit{The Lawyer as Agent}, 67 \textit{FORDHAM L. REV.} 301 (1998).

\textsuperscript{181} Joseph Raz makes a similar point about the value of autonomy in political theory. "Autonomy is valuable only if exercised in pursuit of the good. The ideal of autonomy requires only the availability of morally acceptable options." \textit{JOSEPH RAZ, THE MORALITY OF FREEDOM} 381 (1986). Raz's argument has deep implications, for it calls into question the common assumption of liberal political theory that autonomy is intrinsically valuable; Raz and others claim that autonomy should be valued only insofar as it permits people to realize other, more basic, human goods. \textit{See id.; see also ROBERT P. GEORGE, MAKING MEN MORAL} (1993).
justification for facilitating the client's conduct.\footnote{See Gordon, \textit{supra} note 110; Subin, \textit{supra} note 158, at 1162.} This is why other mechanisms for protecting clients' rights, like the attorney-client privilege, are qualified by exceptions for cases where the client seeks to perpetrate a crime or fraud. Even in the absence of specific articulated legal rules, however, other forms of conduct, such as the abusive questioning of plaintiffs in the Dalkon Shield litigation, can be said to interfere with the orderly process for adjudicating legal claims on their merit, and therefore to undermine the functioning of the legal system of which the lawyer is a part. Thus, some restrictions on lawyers' activities may be justified, even though they reduce client autonomy, on the ground that the restrictions enhance the ability of the legal system to channel societal disputes into an orderly process of resolution.

Furthermore, the autonomy justification for the principle of loyalty, taken too far, reduces lawyers merely to amoral technicians, who bring to the lawyer-client relationship nothing more than expertise in the complex apparatus of the legal system. This conception of the lawyer's role eliminates valued traits such as prudence and professional judgment, which are important goods the lawyer brings to a representation. The moral tradition of the practice of lawyering, as elaborated through official statements of the organized bar, judicial decisions, legislation, and academic and public commentary, reveals a much more nuanced role for lawyers. In particular, lawyers owe duties to nonclients—affected third parties, courts and other tribunals, and the judicial system or the rule of law—that are not imposed on nonlawyer agents. These duties, which will be discussed below under the rubrics of justice and care, require lawyers to contend with conflicting obligations that would not be imposed on ordinary agents. Like the friendship model, the autonomy model fails to explain why the good of increasing one's client's autonomy should override the public's interest in preventing unjustified harm to others.\footnote{See Kaufman, \textit{supra} note 177, at 653.} In short, respecting and enhancing one's client's autonomy is certainly a distinct feature of the morality of the practice of lawyering, but it is far from the only one. To put the point another way, the autonomy of clients is not intrinsically valuable. "[P]ursuit of the morally repugnant cannot be defended from coercive interference [for example, by lawyers preventing their clients from making immoral choices] on the ground that being an autonomous choice endows it with any value."\footnote{Raz, \textit{supra} note 181, at 418.}
2. Loyalty and Client Selection.

A frequently encountered problem in legal ethics literature is justifying the representation of clients with whom the lawyer disagrees. This dilemma is often posed in stark form by lawyers who represent utterly reprehensible clients, such as the Ku Klux Klan, "Ivan the Terrible," or Larry Flynt. The representation of abhorrent clients directly implicates the nature of the lawyer's moral agency. Is the lawyer an amoral hired gun, in no way morally implicated in her client's evil? Or, must the lawyer make the moral decision that representing a particular client is justified?

One strategy for avoiding this debate is to imagine the client not as a person, but as an abstract principle or right. In this argument, what matters is not that the particular client be able to assert her rights, but that the rights themselves be established or defended. The lawyer thus considers herself the loyal friend or defender of a good constitutional principle, not an evil client. This argument is often advanced by civil libertarian lawyers who work for unpopular clients. The Jewish lawyer who argued in favor of the Nazis' right to march in Skokie, Illinois was not motivated to increase the Nazis' freedom to terrorize his people; instead, he located the value of his efforts in the goal of vindicating important First Amendment values. A decision prohibiting the Nazis from marching might be used as precedent to keep a civil rights group from demonstrating in the future. Similarly, Anthony Griffin, a black lawyer who represented the Ku Klux Klan,

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185 See the debate between Michael Tigar and Monroe Freedman over Tigar's representation of John Demjanjuk in Monroe H. Freedman, The Lawyer's Moral Obligation of Justification, 74 Tex. L. Rev. 111 (1995) [hereinafter Freedman, Moral Obligation], Michael E. Tigar, Defending, 74 Tex. L. Rev. 101 (1995) [hereinafter Tigar, Defending], Monroe H. Freedman, Must You Be the Devil’s Advocate?, Legal Times, Aug. 23, 1994, at 19 [hereinafter Freedman, Devil’s Advocate], and Michael E. Tigar, Setting the Record Straight on the Defense of John Demjanjuk, Legal Times, Sept. 6, 1993, at 22 [hereinafter Tigar, Record]. This exchange is particularly noteworthy because the disputants have both reversed their positions over the years. In 1970, Tigar argued that the law firm mentioned by Simon Rifkind did have an obligation to ask whether it should allow its services to be used by General Motors (GM). "I am not criticizing Wilmer, Cutler & Pickering for going all out on behalf of their clients. I am criticizing them for the choice of their clients that they choose to go all out on behalf of." Freedman, Moral Obligation, supra, at 112 (quoting Michael E. Tigar, Debate at George Washington University Law School 7 (1990) (transcript on file with the Texas Law Review)). Freedman took Rifkind's point of view, arguing that law students should not criticize lawyers for zealously advocating GM's cause. The precise words exchanged at the 1970 debate are hotly disputed; I am relying on Freedman's account, which he asserts is supported by a videotape of the exchange. See id. at 112 n.9.

186 See Aryeh Neier, Defending My Enemy (1979).
defended his actions in terms of the constitutional principle the Klan sought to uphold.  

A state agency had sought to compel the Klan to disclose its membership list and Griffin, on behalf of the ACLU, resisted this effort. Opponents of civil rights had previously sought disclosure of the NAACP’s membership lists, a ploy that was rejected by the Supreme Court. For Griffin, representing the Klan was a means to ensure that the right of free association, which had protected the NAACP in the past, would remain inviolate. These lawyers were not the full-time advocates and counselors for the Nazis and the Klan—they stepped in only when an important constitutional principle was threatened; thus, they were able to claim plausibly that their clients were not the hateful organizations, but abstract political rights such as free speech and freedom of association.

The conception of rights-as-clients is, however, too readily generalized into a reason for undertaking any representation at all. Substantive rights, like freedom of speech and association, are not the only rights a lawyer may claim to represent. A lawyer may also conceive of herself as representing the procedural right of every citizen to have her day in court. This conceptual move collapses the civil libertarian argument into the justification of advocacy as a means of increasing the client’s autonomy. However, the putative procedural right is absolutely insensitive to the substantive claims made upon the judicial system by the client, and is therefore unable to discriminate between clients who have varying entitlements to occupy judicial attention with their claims. A client who wishes judicial approval to do X, which is permitted in our society, has an entitlement to court resources, while a client who seeks to do Y, which is not allowed, is not entitled to waste the court’s time on a frivolous claim.

The conception of loyalty just described requires a safety valve for conscientious objectors. David Wilkins argues powerfully that a black lawyer must consider his loyalty to the black community when deciding whether to represent the Klan. If Anthony Griffin had made the

189 See Luban, supra note 21, at 161–62.
191 See SIMON, supra note 21, at 26–52; see also Nathan M. Crystal, Limitations on Zealous Representation in an Adversarial System, 32 WAKE FOREST L. REV. 671 (1997) (arguing that frivolous claims are disallowed in light of the purpose of the adversarial system of resolving disputes).
opposite choice, we should respect him for having the integrity to stand with his community against the Klan. The right to counsel is not absolute—the client is not entitled to demand that the lawyer do something beyond the bounds of permissible advocacy. There are numerous individuals who act without counsel in legal proceedings, even in cases where the government seeks to deprive them of some important benefit. Moreover, no lawyer is compelled to represent a particular client in a case where the client would be able to secure alternate representation. These considerations show that the lawyer has discretion to choose not to serve a particular cause. As we

193 See id. at 1034.
194 The qualification in this sentence is necessary to avoid the “last lawyer in town” problem, in which the lawyer’s decision whether to represent a potential client is made with knowledge that there are no other lawyers available to provide the desired legal services. Wilkins concedes that lawyers face different moral questions when deciding whether to represent a client with no other alternative. See id. at 1058, 1040. For a general description of this problem, see Model Code of Professional Responsibility EC 2–29 (1997) (“When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel . . . he should not seek to be excused from undertaking the representation except for compelling reasons.”), and Murray L. Schwartz, The Zeal of the Civil Advocate, in The Good Lawyer, supra note 93, at 150, 168–69.
195 This discretion may be limited by antidiscrimination laws, as shown by a recent decision of a Massachusetts civil rights agency, disciplining a lawyer for limiting her divorce practice only to women. See Steve Berenson, Politics and Plurality in a Lawyer’s Choice of Clients: The Case of Stropnickey v. Nathanson, 35 San Diego L. Rev. 1 (1998); Martha Minow, Foreword: Of Legal Ethics, Taxis, and Doing the Right Thing, 20 W. New Eng. L. Rev. 5 (1998). The lawyer testified that she sought to “devote her expertise to eliminating gender bias in the court system.” Bruce K. Miller, Lawyers’ Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctimining of Judith Nathanson, 20 W. New Eng. L. Rev. 93, 94–95 (1998) (quoting Stropnickey v. Nathanson, No. 91-BPA-0061 (Mass. Comm’n Against Discrimination Feb. 25, 1997)). She also claimed that she was able to function effectively as an advocate only on behalf of those clients to whose cause she felt a personal commitment. See id. at 95. Ironically, the Massachusetts agency’s decision is ultimately an impediment to the goal of eliminating discrimination, because it prevents clients from seeking ideologically compatible lawyers if the clients identify those lawyers by racial or sexual characteristics. However, the agency’s statutory interpretation is reasonable: there is no exemption for lawyers from the public accommodation statute, and lawyers are generally free to discriminate on other grounds, such as against representing defendants in personal injury cases or working for management in labor disputes, as long as the discrimination does not impinge upon a statutorily protected class. See id. at 96. For another analysis of these issues, see Robert T. Begg, Revoking the Lawyers’ License to Discriminate in New York: The Demise of a Traditional Professional Prerogative, 7 Geo. J. Legal Ethics 275 (1993).
have seen, Simon, Freedman, and Wilkins urge lawyers to exercise that discretion in a particular way, in favor of clients whose projects will promote substantive justice. These critics, I think, are correct to maintain that lawyers are not required to represent causes they find repugnant. They may decline the representation because of loyalty to one's community or for impartial considerations of justice.

3. Loyalty in the Lawyer-Client Relationship

Many of the thorniest problems in professional ethics involve lawyers who have already entered into a representation relationship with a client. For these lawyers, the ethical issue does not center on whether to accept the representation, but how one should act on behalf of one's client. In these cases, loyalty means championing the client's interest, as the client sees it, in opposition to the interests of third parties, social justice, and the lawyer's self-interest. The principle of loyalty in the lawyer-client relationship derives from the law of agency, although it differs from agency precepts in significant respects. Generally, courts have held lawyers to the highest standards of fair dealing in their relationships with clients. Judicial state-

196 A separate cite here to Monroe Freedman's work is useful, since he is often made into a punching bag by critics who insist on a wider role for personal values in lawyering and claim that Freedman's conception of lawyering is systematically amoral. See, e.g., Leslie H. Griffin, The Lawyer's Dirty Hands, 8 Geo. J. Legal Ethics 219 (1995). In fact, Freedman has consistently maintained that a lawyer has discretion to make a moral decision whether or not to represent a particular client. See Freedman, supra note 110, at 49 ("[A] lawyer should indeed have the freedom to choose clients on any standard he or she deems appropriate."); Monroe H. Freedman, Ethical Ends and Ethical Means, 41 J. Legal Educ. 55 (1991); Monroe H. Freedman, Personal Responsibility in a Professional System, 27 Cath. U. L. Rev. 191 (1978); see also supra note 185.

197 See Model Rules of Professional Conduct Rule 1.2(a) (1998) (stating that subject to limited exceptions, "[a] lawyer should abide by a client's decisions concerning the objectives of representation"); Restatement (Third) of the Law Governing Lawyers § 28 cmt. c (Proposed Final Draft No. 1, 1996) ("The client, not the lawyer, determines the goals to be pursued, subject to the lawyer's duty not to do or assist an unlawful act.").


199 Bernard Williams suggests that the domain of professional ethics generally is the protection of clients in sensitive areas of their interests against the self-interest of the fiduciary. See Bernard Williams, Politics and Moral Character, in Public and Private Morality 55 (Stuart Hampshire ed., 1978). These statements by state courts are typical of the descriptions offered of the lawyer's duty toward her client:

[T]he relationship between attorney and client is highly fiduciary in nature, and their dealings with each other are subject to the same scrutiny as a transaction between trustee and beneficiary. . . . Specifically, the relationship
ments of the lawyer's duty of loyalty owe a great deal to Judge Car-
dozo, who stated the nature of a fiduciary duty in lapidary prose:

Many forms of conduct[,] permissible in a workaday world for those
acting at arm's length, are forbidden to those bound by fiduciary
ties. A trustee is held to something stricter than the morals of the
market place. Not honesty alone, but the punctilio of an honor the
most sensitive, is then the standard of behavior.\textsuperscript{200}

From the standpoint of the law of lawyering, the principle of loy-
alty is the foundation of many of the strictest imperatives governing
the behavior of lawyers, including the obligation not to reveal confi-
dential information,\textsuperscript{201} the prohibition on representing conflicting in-
terests,\textsuperscript{202} the obligation not to engage in self-dealing in relationships
with one's client,\textsuperscript{203} and even the basic duty of providing competent
services.\textsuperscript{204}

between attorney and client has been described as one of \textit{uberima fides},
which means, "most abundant good faith," requiring absolute and perfect
candor, openness and honesty, and the absence of any concealment or
deception.

An attorney owes to his client the high duty to diligently, faithfully and legiti-
mately perform every act necessary to protect, conserve and advance the in-
terests of his client. No deviation from that duty can be permitted. That
principle of conduct is a stern and inflexible rule controlling the relation-
ship of attorney and client so long as the relation exists.


200 Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Cardozo goes on to say
that a trusteeship is a relationship "through which preference of self is made
subordinate to loyalty to others." \textit{Id.} at 548. The influence of Cardozo's language is
noted in H. Jefferson Powell, "Cardozo's Foot": The Chancellor's Conscience and Construc-
tive Trusts, 56 Law & Contemp. Probs. 7, 16-20 (1999). As Powell observed, judges
hardly ever discuss the facts or holding of this case, leaving Cardozo's words to stand
for a judicial attitude, rather than a principle of law. For a useful discussion of fiduci-
ary norms within law partnerships, see Allan W. Vestal, \textit{Law Partner Expulsions}, 55

201 \textit{See} Model Code of Professional Responsibility Canon 4 (1997); Model

202 \textit{See} Model Code of Professional Responsibility EC 5-14, DR 5-105 (1997);

203 \textit{See} 2 Ronald E. Mallen & Jeffrey M. Smith, \textit{Legal Malpractice} §§ 14.22-.25

204 \textit{See} Model Code of Professional Responsibility Canon 6 (1997); Model
Rules of Professional Conduct Rule 1.1 (1998). The need for new lawyers to be
prepared to provide competent services is a major theme of the ABA's MacCrate Re-
port on legal education. \textit{See} Section on Legal Educ. and Admission to the Bar, Am.
Bar Ass'n, Legal Education and Professional Development—An Educational
Continuum (1992) [hereinafter MacCrate Report].
The imperative of loyalty arises in any lawyer-client relationship, regardless of whether the lawyer is motivated by community loyalty, a sense of friendship, or some other preexisting common interest with her client. Once he has agreed to the representation, Anthony Griffin is under no less obligation to represent the Klan assiduously than he is to apply the same industry to his work on behalf of the NAACP. He owes that organization "the punctilio of an honor the most sensitive," even though it is dedicated to abhorrent purposes. Furthermore, loyalty requires that he submerge his own interests to the Klan's, albeit only in the context of the litigation. On a mundane level, loyalty may mean staying late at work to respond to a discovery motion, rather than attending his child's ballet recital or soccer game. On an affective level, loyalty requires that he "get fired up" for his client, and throw himself into the case as though the client's interest were his own. Where the client is the KKK, these demands naturally will be excruciating. Nevertheless, the duty to represent one's client zealously is a recognition that the lawyer's interest and the client's may diverge significantly, and that the client's interest must prevail, at least between the lawyer and client.

Unfortunately, the value of loyalty to one's client has been conflated by practicing lawyers into a principle of unyielding zeal that has been used to justify the worst kind of abusive practices. Witness the words of the lawyer defending Queen Caroline in a prosecution for adultery, which have become a staple of professional responsibility texts and commentary:

\[A\]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.205

205 2 Trial of Queen Caroline 8 (1821), quoted in Freedman, supra note 110, at 65–66, in David Mellinkoff, The Conscience of a Lawyer 189 (1973), and in Wolfram, supra note 24, at 580; see also Robert L. Haig & Robert S. Getman, Does "Hardball" Litigation Produce the Best Result for Your Client?, 65 N.Y. St. B.J., Jan. 1993, at 24, 26 (quoting Lord Brougham's speech to justify—incorrectly, in my view—the assertion that "hardball litigation . . . goes hand in hand with our system"). The Restatement recognizes that the word "zealous," which is used to refer to the lawyer's obligation of loyalty, has been misused to justify unwarranted combativeness in representing clients. "The term [zeal] sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain
Here we have moved beyond "the punctilio of honor" into the realm of scorched-earth litigation tactics. The difficult question for legal ethics is how to recognize the principle of loyalty without permitting lawyers to degenerate into "Rambo" advocates. The answer to this question depends on the justification for the lawyer's role which, I contend, should be sketched out along rhetorical lines.

Arguments or other speech acts which have the effect of subverting the system of discourse in which they are offered are not allowed under a rhetorical justification of the lawyer's role. In order to talk about justice in the first place, we need words to describe the parties and the facts of the case, but more importantly, a language of right and wrong, responsibilities and duties, and a rich trove of moral narratives to illustrate the application of these concepts. Some of these rules and principles may stand in opposition to each other, but the language of the law and the stories told in that language must have a sufficient degree of overall coherence in order to function as a background against which debates about the right and the good may be conducted. "[W]hat we lawyers do is to maintain that language in a condition in which it can be used for those purposes by ourselves and others." The corollary to this maxim is that lawyers may justifiably be criticized in ethical terms for abusive practices, whereby "abusive" one means practices which tend to undermine the ability of legal language, stories, and rules to facilitate government under the rule of law. So pandering to the racial prejudices of a jury in a closing argument must be condemned, because the race of the parties is presumed irrelevant to the resolution of questions of guilt, liability, and rights. The language of law is not spoken where the speakers appeal to bigotry. Similarly, abusive discovery practices, like producing millions of pages of irrelevant documents or making speaking objections emotion or style of litigating, negotiating, or counseling." Restatement (Third) of the Law Governing Lawyers § 28 cmt. d (Proposed Final Draft 1996). The Restatement view is in line with a more nuanced understanding of the Lord Brougham defense, which was never intended as a maxim of legal ethics. Brougham made his statement in the context of a parliamentary debate, not a judicial proceeding, and the speech was intended as a veiled political threat to King George IV. In any event, given the extraordinary circumstances of the case, it can hardly be argued that the Brougham speech has any general applicability; it certainly does not describe the prevailing norms of the English Bar in 1820. I am grateful to Tom Shaffer for pointing out to me the rich history of this speech, which he sets out in his legal ethics coursebook. See Thomas L. Shaffer, American Legal Ethics: Text, Readings, and Discussion Topics 204-06 (1985).

207 Id. at 888.
in depositions, cannot be permitted because they interfere with the parties’ representation in legal language of the factual predicates of their claims to legal entitlements.

James Boyd White and his literary protagonist, Euphemes, make an important point here, with which I will conclude the discussion of loyalty and anticipate some of the arguments in the following section on justice: legal language cannot contain only impersonal justice-talk. It also requires terms which reflect the selfish, prudential needs of the parties, for it is only this part of legal discourse which connects the law to the real world of human motivations. What makes lawyers lawyers, and not philosopher-kings, is that they speak on behalf of real people who want something concrete from the state, whether or not their desires are necessarily congruent with what is best for the public good. Monroe Freedman is fond of quoting Communist-bloc lawyers to show the dangers of prioritizing collective justice over individual autonomy. “In a Socialist state there is no division of duty between the judge, prosecutor, and defense counsel,” a Bulgarian lawyer says. “The defense must assist the prosecution to find the objective truth in a case.” The fault of this lawyer is not expressing a concern for social justice. Instead the Bulgarian lawyer errs by collapsing the role of lawyer and judge so completely that the lawyer neglects to conceive of the claims of individuals to justice. Justice is not some freely floating, Platonic concept. It is a relationship among individuals, and between individuals and the state, that must be assessed in terms of particular disputes in which the parties assert divergent claims to legal entitlements. The strength of the rhetorical model of advocacy is that it does not give undue weight to either social justice or the client’s desires, but recognizes that the role of the lawyer is to mediate between both, in a linguistic process of disputation between actual persons.

208 See id. at 888–89.
209 MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 2 (1975) (quoting Communist-bloc lawyers).
210 Id. (quoting Communist-bloc lawyers).
211 This example is somewhat misleading, since the Bulgarian lawyer is working within a civil-law system in which lawyers do have a duty to assist government bureaucrats in the search for truth; it is not necessarily the socialist political order, but the civil law tradition that determines the Bulgarian lawyer’s duties. See generally John Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823 (1985) (discussing the differences between a common-law (United States) and civil-law (West Germany) lawyering paradigm). (I am indebted to Mark Drumbl for pointing out the limitation of Freedman’s analogy here.) Nevertheless, Freedman’s basic argument is unaffected—lawyers in a common-law system primarily speak on behalf of a party’s claim vis-a-vis the state or private actors, not in terms of the good for society at large.
B. Justice

1. The Obligation to Seek Justice

One conception of legal ethics holds that a lawyer ought to be dedicated, above all, to achieving social justice or improving the public welfare.\(^{212}\) Naturally, the first task for proponents of this view is to explain what they mean by securing justice. A thorough-going version of the justice conception—"social engineering"—would have the lawyer striving to implement the political values on which there is general society-wide agreement.\(^{213}\) A less ambitious version would teach lawyers not to work exclusively for the public good, but simply to ensure that legal services are available to those who cannot afford them. Historically this latter version has been the way of justice-oriented conceptions of legal ethics. The Ford Foundation jump-started professional responsibility teaching in the 1960s by awarding grants for clinical legal education, the purpose of which was to ensure "the distribution of . . . legal services to all segments of the public including the poor."\(^{214}\) Interestingly, Ford chose not to emphasize instruction in professional ethics, which it defined as "the moral norms that regulate the personal relationships of law practice."\(^{215}\) More recently, the ABA Professionalism Committee has also chosen to emphasize distributional concerns, by including a commitment by law firms to pro bono

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\(^{212}\) See, e.g., Henry Rose, Law Schools Should Be About Justice Too, 40 CLEV. ST. L. REV. 443, 449 (1992) ("Being a lawyer . . . should include a commitment to use one's skills to improve the social order and to remedy injustice."); Thomas L. Shaffer, The Unique, Novel, and Unsound Adversary Ethic, 41 VAND. L. REV. 697 (1988). Some critical legal scholars have called for an overtly political method of judging, which would entail a social-engineering conception of lawyering. "Asked how he would decide a case, for example, Mark Tushnet said, 'My answer, in brief, is to make an explicitly political judgment: which result, is in the circumstances now existing, likely to advance the cause of socialism.'" Laura Kalman, The Strange Career of Legal Liberalism 83 (1996). Presumably a lawyer with similar political commitments would evaluate her ethical obligations in terms of which actions are likely to advance the cause of socialism.


\(^{215}\) Condlin, supra note 214, at 333.
services among its recommendations for increasing the level of professionalism among practicing lawyers.\textsuperscript{216}

A weaker, but more generally applicable version of the principle that a lawyer must seek justice may be located in any one of the well-known cases in which lawyers placed unwarranted emphasis on their duty of loyalty, to the detriment of some third party. For example, in the O.P.M. Leasing scandal, lawyers representing a company that obtained fraudulent loans maintained an attitude of wilful blindness toward their client's activities.\textsuperscript{217} When an officer of the company eventually disclosed the fraud to the law firm, the lawyers promptly sought out an ethics expert to validate their continuing representation of O.P.M. Essentially, the expert told the lawyers that they were not required by the state disciplinary rules to notify third parties that loan documents prepared by the lawyers may have been fraudulent.\textsuperscript{218} This advice was based on the primacy of the lawyers' duty of confidentiality, which is of course a corollary to the principle of loyalty. The law firm eventually resigned, but not until closing more loans with fraudulent documents, again without notifying any of the affected parties that it had reason to doubt the veracity of the documents. When the house of cards finally collapsed and O.P.M. entered bankruptcy, the lawyers' role was revealed, and the bankruptcy trustee was outraged. "No rule of professional ethics can or should exempt lawyers from the general legal proscription against willful blindness to their clients' crimes."\textsuperscript{219} Or as a federal judge wrote decades before the O.P.M. case:

In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar. . . . Congress . . . could not have intended that men holding themselves out as members of these an-

\textsuperscript{216} See Section on Legal Educ. and Admission to the Bar, American Bar Ass'n, Teaching and Learning Professionalism app. D (1996) [hereinafter Professionalism].


\textsuperscript{219} In re O.P.M. Leasing Serv., 28 B.R. 740 (Bankr. S.D.N.Y. 1983). In a similar vein are the often-reported words of Judge Stanley Sporkin, commenting on the failure of Lincoln Savings and other savings and loan institutions: "Where were these professionals . . . ? Why didn't any of them speak up or disassociate themselves from the transactions?" Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990).
cient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen. . . . 220

We may represent the "general legal proscription" referred to by the trustee and Judge Friendly as the value of justice. Justice, in legal ethics, does not require that lawyers seek the greatest good for society; rather, it serves as a check on the partisan zeal that would otherwise license the lawyers' conduct in O.P.M. It essentially builds a component of public-mindedness into the professional obligations of a lawyer, so that the lawyer is charged not only with her client's good, but with the duty to acknowledge and take seriously the good of society as a whole. 221 As stated by Court of Appeals Judge Harry Edwards: "The ethical lawyer should only advance reasonable interpretations of the authoritative texts—interpretations that are plausible from a public-regarding point of view." 222

220 United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964).
221 The American Bar Association's Professionalism Committee defines a "professional" lawyer as follows: "[A]n expert in law pursuing a learned art in service to clients and in the spirit of public service, and engaging those pursuits as part of a common calling to promote justice and the public good." Professionalism, supra note 216, at 6 (emphasis added). This definition is borrowed from Roscoe Pound. See Roscoe Pound, The Lawyer from Antiquity to Modern Times 5 (1953) (characterizing a profession as "pursuing a learned art as a common calling in the spirit of public service"). Unfortunately, the ABA's analysis is hopelessly circular, because the key phrase "in the spirit of public service" is defined by the committee as follows: "A lawyer representing individual clients and zealously advocating their interests in a professional manner is engaged in public service." Professionalism, supra note 216, at 6 n.22 (emphasis added). Since "professional" or "in a professional manner" was the term for which we were seeking a definition in the first place, the ABA's report simply begs the question.
222 Edwards, supra note 7, at 59. Compare this "proposed professional resolution":

In civil matters it shall be unprofessional conduct for a lawyer to assert any legal doctrine or rule on behalf of a client unless the lawyer has a good faith belief that the assertion of the doctrine or rule in the particular case will further a policy behind the doctrine or rule.

Kenney Hegland, Quibbles, 67 Tex. L. Rev. 1491, 1494 (1989). The policy behind a rule is a principle of political morality that justifies the doctrine as a matter of social justice. Hegland acknowledges that his colleagues have called his proposal "lunacy," but insists that in the long run, judges will adapt legal rules to fit social justice, so quibbling in the short run is ultimately corrosive of the rule of law. The manifold judicial exceptions created to restrain unjust procedural gambits by lawyers will ultimately hasten the trend in the legal system away from deciding cases according to legal rules to making judgments according to factual gestalt. See id. at 1495, 1510–12. Of course, Hegland's proposal merely shifts the decision-according-to-gestalt process from judges to lawyers. Why should lawyers, not judges, be trusted with this decision
Note that the principle relied upon by the bankruptcy trustee and elaborated by Judge Edwards is not a rule of professional discipline promulgated by the organized bar. Indeed, the ABA has taken precisely the opposite position in Model Rule 1.6, which was drafted after the O.P.M. scam was revealed. In the wake of the Lincoln Savings collapse, many representatives of the organized bar argued that the conduct of Kaye, Scholer in its representation of Lincoln Savings was appropriate under the bar’s conception of professional norms, despite the contrary conclusion of the Office of Thrift Supervision. These conflicts show that although the traditions and self-understanding of the legal profession may illustrate the public values of lawyering, other sources of normative input remain. Courts and legislatures are the most obvious institutions whose vision of ethical legal practice may be at odds with lawyers’ conceptions, but other institutions, such as the press and the public, at large also play a role. Thus, lawyers are not free simply to define for themselves their own moral obligations in a vacuum, without taking into account the divergent views of other actors.

William Simon has proposed a similar resolution of the conflict between a lawyer’s duty of loyalty and the obligation to take into account the interests of third parties or society as a whole: “Lawyers should take actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.” “Justice” in this formulation is emphatically not equivalent to the personal moral beliefs about social justice that the lawyer may happen to hold. Instead,

making authority? Hegland is aware of the paradox, but offers no way out of it, except to claim the virtue for his proposal that it enhances justice in the short run. (Simon makes a similar argument in The Practice of Justice. See Simon, supra note 21, at 53-76.)


224 See Wilkins, supra note 136, at 1148-49, 1167-68. This tension is reminiscent of the classic torts case, The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932), in which Judge Learned Hand held that the general custom among tugboat owners not to equip their vessels with radios was not conclusive of the question of whether they had breached their duty of care. Hand wrote, “[T]here are precautions so imperative that even their universal disregard will not excuse their omission.” Id. at 740.

225 See, e.g., Nix v. Whiteside, 475 U.S. 157 (1986) (stating that “prevailing professional norms” warranted a lawyer’s threat to withdraw if his client committed perjury, even though there was no specific disciplinary rule requiring withdrawal in that case); United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993) (“[A] general duty of candor to the court exists in connection with an attorney’s role as an officer of the court.”).

226 Simon, supra note 21, at 138.
for Simon justice is equivalent to "legal merit." Simon takes a Dworkinian view of the concept of legal merit: to determine legal merit one must look at not only the conventionally-specified legal texts such as statutes and court decisions, but also to more general norms of political morality which undergird and lend legitimacy to the legal system. The paradigm for Simon’s model of ethical decision making is the judge, or perhaps a public prosecutor, who makes enforcement decisions based on considerations of legal merit and scarce resources. Although the lawyer need not reach the same conclusions as she would as a judge or prosecutor, the point is that she should use the same reasoning process, paying attention to context, substance, and the broader societal interests affected by the representation.

An objection immediately suggests itself: lawyers are not judges; they have a fiduciary obligation to their clients, and in an adversarial, common-law adjudicatory system are not permitted to adopt the viewpoint of judges, who do not speak on behalf of a party to a dispute. In many cases, responds Simon, this argument is simply spurious. In some circumstances, the lawyers are in a better position than a judge to make determinations about justice—perhaps they have access to a document or another piece of information their adversary lacks, or perhaps the lawyer knows that a judge is likely to rule incorrectly on a motion. Familiar cases like Spaulding v. Zimmerman trade on just such institutional imbalances in information to create ethical dilemmas. In Spaulding, because of the plaintiff’s doctor’s oversight, the defendant’s lawyer and the physician retained by the defense were the only potential source of information regarding the true severity of the plaintiff’s injury. On the modest assumption that the settlement negotiated by the parties would be substantively just only if it reflected the true nature of the harm suffered by the plaintiff, the defendant’s lawyer’s behavior must be called subversive of a substantively just outcome in that case. Of course, the lawyer would claim that he was acting in furtherance of procedural justice; that is, he was justified in withholding the information because doing substantive justice is someone else’s job. If the plaintiff’s doctor missed his patient’s aortic aneurysm, and the plaintiff’s lawyer was thereby unaware of how badly

227 See id.
228 See Simon, supra note 81, at 1093; cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7–13 (1997) (stating that the responsibility of public prosecutor is to seek justice, not merely to convict).
229 116 N.W.2d 704 (Minn. 1962); see also supra note 75 and accompanying text.
his client had been injured, so be it, but the defense lawyer's job is not to correct other people's mistakes.

The linchpin of Simon's response to this argument is his claim that the appeal to role is differentially justified, depending on the context of the lawyer's work: "[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she needs to assume for substantive justice." The critical move here is to focus tightly on the circumstances of particular cases, rather than to evaluate lawyers' conduct based on hypothetical situations. In Spaulding, the correct phrasing of the ethical question should be, "given that the plaintiff's doctor blew the diagnosis, what should the defense lawyer do?" This contextual framing of the issue stands in contrast to the usual perspective on litigation ethics, which is to pose the question in much more general terms, such as "do lawyers have a duty to disclose information that their adversary could have obtained through the exercise of reasonable diligence?" Simon correctly observes that a certain slipperiness with framing pervades legal ethics discourse. As an example he cites Monroe Freedman, who has prominently argued that a criminal defense lawyer is entitled to cross-examine a truthful witness aggressively in order to make that witness's testimony seem inaccurate and secure an acquittal for the defendant. The plausibility of Freedman's conclusion depends on the fact that the client is, in fact, innocent but lacks a convincing alibi witness. From this argument, Freedman seeks to draw a general conclusion that a criminal defense lawyer is entitled to seek to impeach all witnesses, whether or not the client is innocent of the crime charged. But the rightness of one's moral conviction in the case described may depend on the innocence of the client, and may not extend to a case in which the client is guilty. Additional steps are required in this argument to establish that the same considerations that justify the lawyer's vigorous cross-examination in the case imagined by Freedman, where the client is innocent but lacks a solid alibi, are present in the case where the client is guilty. A substantial portion of Simon's book, The Practice of Justice, is devoted to resisting this kind of argumentative slippage, employed in the attempt to establish categorical ethical norms for lawyers.

Simon succeeds in demonstrating that lawyers cannot use arguments from just outcomes to excuse conduct which has the effect of interfering with the apparatus that is in place to bring about the out-

230 Simon, supra note 21, at 140.
231 See id. at 149–50.
come. (He also gives a guarded endorsement to certain kinds of forensic trickery if the lawyer knows that the tactics are likely to contribute to a fair decision on the merits of the case.232) A different kind of case is more troublesome for a lawyer who seeks to promote social justice—the familiar situation of a lawyer and client who disagree about the very nature of a just society. Here is where the argument, "a lawyer is not a judge," has some bite. For while we can easily see how a lawyer is just as capable as a judge of reaching an objective judgment about the seriousness of the plaintiff's injury in Spaulding, a very different problem is presented by a case in which the relevant facts are known to the tribunal, but the decision turns on the resolution of contested legal, political, or moral issues. The next Section considers this situation in greater depth.

2. Disagreement with Clients and Deliberation About Justice

In a Panglossian world, a lawyer working for justice would simultaneously advance her client's interests, and the demands of justice and the duty of loyalty would never conflict. In a classic example of this kind of convergence, then-attorney Louis Brandeis was representing the owner of a shoe factory in a labor dispute.233 In front of the union's lawyer, Brandeis told his client that the union was "absolutely right" in the dispute and explained how the problem could be resolved to everyone's mutual satisfaction. As a result, the factory owner changed his employment practices, the workers were happy, and the company prospered. (One expects the story to end with the workers and managers holding hands in a circle, singing "Kumbaya.")

From this story, Gutmann draws the lesson that a lawyer should be prepared to deliberate with her client about doing what is right, rather than refusing to do what is wrong, or to manipulating the client into doing the right thing: "Had Brandeis deceived McElwain or simply quit as his legal counsel because he deemed McElwain's cause unjust, the story would illustrate a weakness of the justice conception as commonly articulated, rather than its potential strength."234

Instead, says Gutmann, social justice is something that lawyers can talk about with their clients.235 The lawyer and client should be prepared to work together to ascertain what justice demands. If the opponent's position is genuinely just, a rational, morally conscientious

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232 See id. at 143.
234 Id. at 1764.
235 See Rubin, supra note 137, at 591-92.
client presumably should be persuaded to adopt it. Gutmann cau-
tions lawyers not to assume that the first words out of a client’s mouth
represent the client’s informed preference. For example, a divorcing
spouse may say that he doesn’t want to pay his soon-to-be ex-spouse a
single dime; the lawyer, acting on this statement may proceed with
scorched earth litigation to ruin the opposing party financially.\footnote{See Gutmann, supra note 233, at 1761–62. This example is reminiscent of
Monroe Freedman’s “bomber,” who seeks only to “strip[] the husband of every
penny and piece of property he has, at whatever cost to the personal relations and
children, and anything else.” Monroe Freedman, A Gathering of Legal Scholars to Dis-
cuss “Professional Responsibility and the Model Rules of Professional Conduct,” 35 U. MIAMI
L. Rev. 639, 652–53 (1981).} If
the lawyer had stopped to educate the client about the wrongfulness
or the adverse consequences of a hard-line litigation strategy, the cli-
ent might have changed his mind.\footnote{Note that in cases where a lawyer elects to disclose confidential information in
order to prevent death, serious bodily injury, or substantial financial loss to a third
party, the Restatement requires the lawyer first to attempt to persuade the client to
rectify the situation. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 117A(2), 117B(3) (Proposed Final Draft 1998).} Of course, the lawyer should
also be open to possible persuasion that the client’s position is just,
even if she is initially inclined to disagree with it. The lawyer’s open-
ness to persuasion distinguishes Gutmann’s proposal from mere
preaching.

Gutmann is careful to insist that lawyers who work for justice
must never treat their clients merely as means to the end of a just
social order. Lawyers are not social engineers. The imperative to do
justice, for Gutmann, means that the lawyer and client should deliber-
ate conscientiously about the demands of morality. This is a more
attractive option than the suggestion, sometimes encountered in the
literature, that lawyers should either agree with their clients, refuse to
represent them, or swallow hard and admit that they are prostituting
themselves to make a living. However, Gutmann does not have much
to say about the case in which the client is not persuaded by the law-
ner’s account of what justice requires. Brandeis in this story is fortu-
nate that his client listened to his moral counseling. If McElwain had
told Brandeis to play hardball, the story would have lacked its utopian
ending, but may have been more typical of lawyers’ experiences. So,
too, if Gutmann’s hypothetical divorce client sticks to his guns and
says that he really, really means it when he says he wants to ruin his
wife. I have represented clients who have said, in effect, “sure I see
the other side's point, but I disagree with it, and I want you to fight this claim with whatever legal means we have available.\textsuperscript{238}

The "legal means available" will frequently be a procedural gambit, ambiguously worded statute, or a creative, but nonfrivolous legal argument, that would permit the client to achieve its objectives. Simon offers several examples of these devices: structuring a taxicab company as numerous, nominally independent corporations to minimize exposure of assets to tort liability;\textsuperscript{239} an agribusiness company obtaining subsidized water intended for family farmers by holding land through individual trustees, all under the company’s control, of course;\textsuperscript{240} and the familiar case in which a debtor is pleading the statute of limitations to avoid paying a legitimate debt.\textsuperscript{241} In these cases the disagreement between lawyer and client will be focused on whether to employ these strategies even though they seem to be at odds with the purposes for which the legal doctrines were created. Simon argues that the disagreement between lawyer and client may be resolved uncontroversially if one of the options is only formally permitted by law while the other option better accords with the background political principles that undergird the legal system. Most legal ethicists would insist that unless she is prepared to withdraw, the lawyer must follow her client’s wishes and incorporate the individual taxicabs, acquire land through shadow trustees, or plead the statute of limitations. Simon’s critique asks why the lawyer should have no ethical obligation to ensure that the law is implemented according to its purposes.\textsuperscript{242} He proposes that where the purposes of the law are clear, the lawyer is required to respect the principle by refusing to

\textsuperscript{238} Cf. Lee Modjeska, \textit{On Teaching Morality to Law Students}, 41 J. \textit{LEGAL EDUC.} 71 (1991). This brief article reports on the author’s moral advice to a client who had planned to shut down an office on Christmas Eve, throwing his employees out of work. According to Modjeska, the client’s “stony disapproval, then disregard” of his attempt at ethical deliberation was entirely proper, given his transgression of the role of lawyer. \textit{Id.} at 73. Modjeska even goes so far as to say that his professional ability could reasonably be questioned because he dared to suggest that the client’s reorganization plan was morally problematic. If the client had questioned Modjeska’s attempt at deliberation, the fault lies with the client’s inability to recognize that legal advice is inevitably suffused with moral reasoning, not with Modjeska’s actions. \textit{See id.} For a suggestion that lawyers be \textit{required} to consider moral issues and third-party interests, see Peter Margulies, “\textit{Who Are You to Tell Me That?}: Attorney-Client Deliberation Regarding NonLegal Issues and the Interests of Nonclients, \textit{68 N.C. L. REV.} 213 (1990).\textsuperscript{239} \textit{See Walkovszky v. Carlton, 223 N.E.2d 6 (N.Y. 1966); Simon, supra note 21, at 145.}\textsuperscript{240} \textit{See Simon, supra note 21, at 4–5.}\textsuperscript{241} \textit{See id.} at 29.\textsuperscript{242} \textit{See id.} at 145. The purpose of a legal rule should be understood as one which does not conflict with fundamental principles of political morality, \textit{a la} Dworkin. \textit{See}
manipulate the form of legal rules to defeat the purpose.\textsuperscript{243} Where ambiguity exists in the background principles, however, the lawyer may accede to her client's desires that the rules be interpreted formally.

On this account, disagreement between a lawyer and client is, in many cases, only \textit{apparent} disagreement. Suppose the agribusiness company's lawyer uses the trusteeship arrangement on behalf of her client in order to obtain inexpensive government-subsidized water. Her moral justification is that although she and her client disagree about justice, she should err on the side of her client's resolution of a disputed moral question, because to do otherwise would violate democratic process values. As Simon shows, there is an implicit premise concerning the subjectivity and arbitrariness of legal judgments lurking in this argument.\textsuperscript{244} This argument may then be undermined by showing that lawyers believe in the legitimacy of legal judgments when uttered by judges. Even in hard cases (to use Dworkin's term), where no settled rule determines the outcome, judges make legitimate decisions based on principle.\textsuperscript{245} Lawyers may regard a judge's decision as mistaken, but the very argument that it is \textit{mistaken} betrays their conviction that there are right and wrong answers to legal questions. No one would argue that a preference for rum raisin over vanilla ice cream is a mistake—a quirk, an oddity perhaps, but the language of error seems inappropriate in connection with genuinely subjective judgments of taste or preference. Simon then asks why, if lawyers ascribe the possibility of correctness and error to the reasoning of judges, they cannot accept the same model of reasoning for themselves in the context of legal ethics. If lawyers believe that judges can discover objectively legitimate legal principles, it follows that they should have faith in their own capacity to elucidate objectively valid legal judgments regarding their clients' ends, or when considering the application of legal norms to themselves. Then, they are in a position to assert these judgments against their clients without the charge of violating their clients' autonomy. Lawyer and client may disagree, but one of them must be wrong. If it is the client who is mistaken, there is no reason why an ethically conscientious lawyer must lend her support to a legally unjustified cause, merely because the client wishes the law

\textsuperscript{243} See \textit{id.} at 146. Thus, I refer interchangeably to "purposes" and "background principles" when relating Simon's argument here.

\textsuperscript{244} See \textit{id.} at 164–65.

\textsuperscript{245} See \textit{Dworkin, supra} note 81, at 1120–25.
were favorable to her interests; no client has a legal or moral right to injustice.\textsuperscript{246}

One might ask whether Simon places more weight on the objectivity of legal judgments than is warranted. Indeed, he sounds in places like Dworkin, who has sometimes argued that all legal questions have a single right answer.\textsuperscript{247} The rhetoric of objectivity and subjectivity may be somewhat misleading when applied to legal judgments. The legitimacy of legal decisions issued by a judge or lawyer does not depend on any higher-order meta-ethical thesis about the objectivity of values.\textsuperscript{248} Even if values have some objective basis, we still disagree about these values, and this disagreement can be traced to divergent beliefs about values. Two judges who asserted the objectivity of moral values might still disagree about the right result in a particular case—their moral realism would not change their disagreement over what they believe the moral facts of the matter to be. Similarly, the putatively objective basis for legal judgments would not resolve a dispute between a lawyer and client about the right thing to do in a particular case, where they hold different beliefs about the relevant moral facts.

Whatever one thinks about objectivity and moral realism, the fact remains that conscientious judges, deliberating in good faith, may disagree about justice in particular cases. Simon offers the taxicab hypothetical as a straightforward example of a legal strategem that is inconsistent with more broadly conceived principles of the legal system. But a reasonable argument can be made that allowing the taxicab companies to set up dozens of small, independent corporations is at least as efficient, economically speaking, compared with permitting tort plaintiffs to hold corporate shareholders personally liable for damages. That was precisely the argument made by the majority of the court in \textit{Walkovsky v. Carlton}, the case upon which Simon based his example.\textsuperscript{249} Limited liability is necessary to encourage investment in

\textsuperscript{246} See Simon, \textit{supra} note 21, at 26-52.
\textsuperscript{248} See generally Jeremy Waldron, \textit{Law and Disagreement} ch. 8 (1998); Michael C. Dorf, \textit{Truth, Justice, and the American Constitution}, 97 Colum. L. Rev. 133, 146-52 (1997) (asserting that Dworkin's right-answers thesis is irrelevant in judicial reasoning since there is no method for judges to know whether they have correctly discerned objective truth).
\textsuperscript{249} 223 N.E.2d 6 (N.Y. 1966); see also Richard A. Posner, \textit{Economic Analysis of Law} 447-48 (5th ed. 1998); Simon, \textit{supra} note 231; David W. Leebron, \textit{Limited Liabil-
risky enterprises, and as long as the corporate entity is not being used as an alter ego of the individual shareholders, it should not be disregarded in favor of an injured plaintiff. Maybe the law and economics arguments for limited liability for shareholders in these taxicab companies is incorrect, maybe not. The point is, the argument from justice, and the appeal to fundamental principles of the legal system, cuts both ways. The legal system undoubtedly contains a principle that injured persons should recover the full measure of their damages, but it also contains a principle that private economic actors should be permitted to structure their affairs in any way they see fit, with relatively few restrictions, and perhaps the legal system even contains a principle that legal rules should exist to channel actors' behavior in economically efficient ways. This general form of argument should be familiar from the critiques of Dworkin originated by members of the Critical Legal Studies movement. While Dworkin claims that it is possible to offer one interpretation of the legal system that makes it the best it can be, his critics assert that this task is impossible, since the legal system tries to be many things at once. For example, principles of individualism and altruism exist side by side in the law, and courts oscillate back and forth between these principles when they try to justify decisions in particular cases. While I think this argument can be carried too far, and it is implausible to assert that the coherence of many well-settled legal doctrines is undermined by the existence of multiple justificatory principles, it is nevertheless true in a non-trivial subset of disputed cases that a judicial decision either way could be justified on principle.

One need not endorse a radical critique of the rule of law to express doubts about whether Dworkin's model of judging (and by analogy Simon's model of legal ethics) adequately handles the case in which two legal actors disagree in good faith about the interpretation of the scheme of justificatory principles underlying the practice of judging or lawyering. This point was developed forcefully by Gerald Postema, in a review of *Law's Empire*.

Different interpreters can vary in how they rank the background normative principles that inform a practice. Consider as an example the controversy over California's

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252 See id. at 294-95.
Proposition 209, a ballot initiative that ended affirmative action by state institutions.253 The constitutional litigation that arose in the wake of the initiative posed a question about how to balance two political rights which had both been recognized by the Supreme Court: (1) The right of "discrete and insular minorities" not to have decisions affecting them removed from their control by restructuring the political process;254 and (2) the right of members of the majority not to be disadvantaged on the grounds of race in government decision making, absent specific evidence of past discrimination by the government body that now seeks to use affirmative action.255 Naturally, people disagreed about how those two political rights should be weighed. But what is more, the procedural principles that might help a judge reconcile the competing political rights were themselves inconsistent. Civil rights advocates believed that the correct interpretation of the Fourteenth Amendment Equal Protection Clause was as follows: the right of people of color to lobby local governments for beneficial legislation outweighs the right of members of the majority to legislatively repeal, at the state level, existing and future local affirmative action programs. The proponents of Proposition 209, on the other hand, argued that the Fourteenth Amendment establishes a constitutional presumption against affirmative action programs, and this presumption should be read in conjunction with a political principle that favors majoritarian political decision making. Of course, both sides of the case suggest principles of political morality—the necessity for race-conscious remedial action to ameliorate deeply entrenched racism and the ideal of color-blindness, respectively—to supply the principled foundation for the outcome they desire.256 In this example, the parties not only disa-

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253 See Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).
254 See Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Hunter v. Erickson, 393 U.S. 385 (1969). These cases are arguably supported by Romer v. Evans, 517 U.S. 620 (1996), although Romer is an extremely difficult case to get a handle upon.
agree about what social justice requires, and can both cite fundamental normative principles of the legal system which support their argument, but they can also appeal to procedural due process values which lend support to their substantive arguments. How is Dworkin’s Judge Hercules to elucidate a coherent account of the deep moral principles of the community that justify the community’s legal practice when not only those moral principles, but also procedural principles of priority or ranking, stand in irreconcilable conflict?257

Simon grants that legal actors disagree about what justice requires in particular cases, but argues that the bare fact of disagreement should not preclude the use of “promoting justice” as a standard of evaluation. He draws an analogy with the law of negligence, in which the standard of reasonable care is elaborated with reference to specific disputes by courts, who consider the broad array of circumstances applicable in that case.258 Lawyers may disagree about whether liability is warranted in a particular case, but they do not conclude on that basis that “reasonable care” is an inappropriate evaluative norm. Consensus is not necessary in order for a judgment of reasonableness to be legitimate.

When someone says [Simon’s model of legal ethics] is unworkable because the judgments it encourages are controversial, . . . the objection [sometimes] refers to controversy about which of competing reasonable judgments is best in terms of the relevant values of the legal system. This would be preclusive for [the model] only if it were exclusively preoccupied with liability, but it should not be.259

Simon explains that the maxim, “promote justice,” should not form the basis for judgments of criminal liability or professional discipline where there is intraprofessional disagreement on whether a lawyer’s actions fell below a certain threshold, but the maxim may nevertheless function as the grounding for ethical criticism of lawyers, akin to censure or reprimand. But I think this elaboration of the maxim confuses two distinct issues: first, whether a lawyer ought to be sanctioned by some tribunal for failing to respect justice, and second, whether a lawyer ought to seek to advance her client’s goals if the lawyer believes that the client is not advancing justice. In the Proposition 209 example above, no one would claim that a lawyer should be

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257 See Dworkin, supra note 52, at 122–23.
258 See Simon, supra note 21, at 197–203.
259 Id. at 201.
subject to disciplinary sanctions for working on behalf of the conservative advocacy groups who supported the ballot initiative. But the main thrust of the argument in his book suggests that the conservative lawyers could be criticized in moral terms for attempting to abolish race-conscious remedial legislation that promotes social justice for minority groups. In the example of the agribusiness companies, as a matter of legal ethics, a lawyer ought to conclude that “the transactions should not proceed because they are inconsistent with the statutory purpose,” even though they are formally permitted under the statute. Should, therefore, a lawyer refuse to argue that Proposition 209 does not violate the U.S. Constitution? More to the point, is a lawyer for one of the conservative organizations acting unethically?

To me, the answer seems clearly to be “no,” for reasons I have alluded to in the previous Section. In cases in which the lawyer and client disagree about what justice requires, the balance between loyalty to one’s client and the imperative to seek justice should be understood rhetorically, as a contribution to a social conversation of sorts about justice.

It is the function of the lawyer, like the rhetorician, to persuade about the just and the unjust, about the expedient and the in expedient, and to do so not among people generally (or in the university), but among those who have power — in the courts, legislatures, and assemblies. Moreover, the lawyer always speaks in the service of someone else whose interests he [or she] represents and he accordingly says not what he believes to be true or right about an issue he addresses, but whatever will persuade his audience to act in furtherance of those interests.

On this account, the lawyer representing a client, even a client with whom she disagrees, is affirming that she will seek to advance the client’s moral principles, even though they are not her own, because

260 Id. at 165.
261 See GUTMANN & THOMPSON, supra note 19; see also Tanina Rostain, The Company We Keep: Kromman’s The Lost Lawyer and the Development of Moral Imagination in the Practice of Law, 21 LAW & SOC. INQUIRY 1017, 1033 (1996) (stating that legal practice is “a form of collaborative storytelling in which the lawyer’s role is ‘that of a translator who serves to shape her client’s experiences into claims, arguments, and remedies that both the client and the judge can understand!’”) (quoting Lucie E. White, Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 REV. L. & SOC. CHANGE 535, 544 (1987–88)); Jack L. Sammons, A Sixth Semester Conversation, 100 DICK. L. REV. 625 (1996) (claiming that since the essence of law is rhetoric, the role of lawyers is to speak persuasively for others); Jack L. Sammons, The Radical Ethics of Legal Rhetoricians, 92 VAL. U. L. REV. 93, 99 (1997) (“The game of lawyering is a particular conversation about certain social disputes.”).
262 White, supra note 206, at 872.
conducting public discussions about justice is the only way for citizens with widely divergent conceptions of the good to live together in peace.

Moral issues in the United States are frequently cashed out in the form of legal disputes, and with the growing complexity of the regulatory state, it has become inevitable that lawyers are practically necessary to facilitate deliberation about justice. Without lawyers, our society would lack a "culture of argument"—the "language of description, value, and reason" necessary to represent claims about justice and social goods. The lawyer's role is not solely to represent an abstract principle, like the First Amendment, but to represent the client, as a participant in a democratic conversation about justice, and to maintain the rules of the conversation so that it can continue to flourish in our pluralistic culture. The goal of this conversation is not to establish the client's rights, or to vindicate the client's autonomy, but to create an environment in which it is possible to move closer toward social agreement on contested issues. The ethical question, then, is not about justice per se, but about the moral status of talk about justice, which is more closely bound up with the lawyer's role of speaking on behalf of her client.

Deliberation about justice, through the medium of the legal system, is premised on the principle of reciprocity, according to which citizens "offer reasons that can be accepted by others who are similarly motivated to find reasons that can be accepted by others." Thus, the lawyer's role is justified to the extent that the lawyer's participation in the conversation enables the principal conversants to offer public reasons—that is, reasons that are general enough to make moral claims on other similarly situated citizens. Here, the lawyer acts as a mediator between public and private values, or between impersonal and personal perspectives. The principle of loyalty requires the lawyer to speak on behalf of some particular person, not merely to deliberate about justice generally. At the same time, however, the lawyer's mandate to serve as an officer of the court, to respect the pull of public norms, requires the lawyer to offer only arguments which are

263 Id. at 880.
265 GUTMANN & THOMPSON, supra note 19, at 53; see also JÜRGEN HABERMAS, LEGITIMATION CRISIS 108 (Thomas McCarthy trans., 1975) ("Argumentation is expected to test the generalizability of interests, instead of being resigned to an impenetrable pluralism of apparently ultimate value orientations."); Eskridge, supra note 19, at 1008 ("Public values appeal to conceptions of justice and the common good, not to the desires of just one person or group.").
impartial enough to apply to persons other than the client. The fundamental ethical justification of the practice of lawyering is the maintenance of a form of community which sustains the social conversation about justice in a pluralistic society. A community of this nature requires not blind loyalty to clients, but a carefully modulated form of partisanship, in which the lawyer speaks on behalf of another, but does so with a view toward maintaining processes of dialogue and conversation.

The rhetorical conception does not assume the truth of the lawyer's beliefs about justice—in fact, it takes moral pluralism and disagreement as givens. It therefore differs from Simon's account, which places too much weight on the truth of the lawyer's moral beliefs. The rhetorical model of justice does, however, share with Simon's the insistence that lawyers be motivated by reaching the resolution of disputes on the merits—that is, on grounds of principles of political morality that can be generalized. This means that the only type of lawyering activity that is allowable is that which could, in principle, be justified on grounds shared by other lawyers who are similarly motivated to act justly, and by the opposing clients with the similar motivation.

Thus, a lawyer may justifiably argue in good faith the merits of a case with which she disagrees, or which she believes is incompatible with social justice, provided that the argument on the merits is justified by some plausible moral view. By "plausible" I mean, following Gutmann and Thompson, a view that is compatible with life in a pluralist democratic society committed to protecting the basic liberties and opportunities of all citizens through a constitutional regime of laws. For example, in the Dalkon Shield case mentioned earlier, a defense lawyer would be justified in questioning plaintiffs about conduct that may have contributed to their injuries, since a plausible view of corrective justice and the tort system is that a defendant should be responsible only for the portions of a claimant's injuries that were caused by the defendant's wrongful conduct. The lawyer would not be justified in questioning the women about their sexual histories in that case, however, since there was no evidence linking their injuries to any of the activities that the lawyers sought to explore in depositions. No plausible moral ground for a law-governed dispute resolu-

267 Cf MacIntyre, supra note 130, at 244.
268 See Gutmann & Thompson, supra note 19, at 55–57.
269 See id. at 65–68.
tion procedure would permit questioning into medically irrelevant, but highly embarrassing private activities, for this questioning would tend to interfere with the plaintiffs' basic liberty interests, without any possible warrant in considerations of corrective justice between the parties. No plausible moral justification of the tort system would vary the amount a plaintiff is entitled to recover according to whether the plaintiff participated in sexual activities unrelated to the cause of her injury. On the other hand, many of the practices for which lawyers are criticized in the mass media are eminently justifiable under the rhetorical-justice conception. Arguing to suppress inculpatory evidence that was seized in violation of the Fourth Amendment, while popularly decried as "getting a bad guy off on a technicality," is justified by the constitutional values of privacy and liberty protected by the Fourth Amendment. (But the same argument does not justify brutally cross-examining a truthful witness, and certainly does not warrant presenting perjured testimony.)

Naturally, there are closer cases. In the client-counseling hypothetical that closed Section III,270 the advice the lawyer would be permitted to give her client would depend on which of the client's options would be justifiable to other citizens of Tradition who seek to achieve a principled basis for living together harmoniously in society. One way to approach this question is to see which of the client's options manifest respect for other citizens—"a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees."271 The client's option of disobeying the Sunday closing regulations and either hoping he won't get caught by an overburdened local prosecutor or paying the fines out of the proceeds of his increased sales shows disrespect for other citizens' moral views, by treating a statute that embodies those views as a mere inconvenience or impediment to the making of more money.272 Better to openly challenge the prohibition on constitutional grounds, invoking a countervailing moral principle of religious liberty and government neutrality,

270 See supra notes 103-12 and accompanying text.
271 Gutmann & Thompson, supra note 19, at 79.
272 The fact that other citizens do not seem to place much value on refraining from shopping on Sundays may or may not be relevant. The citizens who cross state lines to shop may be a minority of the local population, in which case many other residents still take the ordinance quite seriously. Alternatively, the law may have fallen into a condition of general desuetude, in which case the moral arguments for obeying it do not have the same force. See generally Linda Rodgers & William Rodgers, Desuetude as a Defense, 52 Iowa L. Rev. 1 (1966), reprinted in 2 Norman J. Singer, Statutes and Statutory Construction 624 (5th ed. 1993), and in Pepper, Counseling, supra note 174, at 1554-58.
lobby for a change in the law, or seek to accommodate the client’s interest with the interests of his fellow citizens by staying open longer during the week. These actions by the lawyer communicate understanding, the recognition that the opposing views are based on moral grounds about which reasonable disagreement exists,\textsuperscript{273} while covert disobedience implicitly slights the moral basis of the majority’s laws.

\section{C. Care: Avoiding Harm to Third Parties}

1. Relational Norms

Feminist critics, inspired by the work of psychologist Carol Gilligan, have argued that the domain of ethics must be understood to include not only individualist, impersonal concepts like rules, obligations, and principles, but must also encompass norms in which interpersonal relationships are central. Some of these critics have applied this argument directly to legal ethics, arguing that traditional accounts of professional responsibility are impoverished by exclusion of relational norms.\textsuperscript{274} From the point of view of relational ethicists, keeping human connections open and flourishing is a moral imperative, just as is the principle that one must not interfere with the rights of others. Thus, actors must recognize norms such as avoidance of harm, the maintenance of relationships, and responsibility to others.\textsuperscript{275} The proper resolution of disputes, in a care-based system, does not depend on the assignment of rights and the interpretation of rules against non-interference. Rather, disputes should be resolved with an eye toward keeping relationships healthy over the life of the

\begin{footnotes}
\item[273] See Gutmann & Thompson, supra note 19, at 82–85.
\item[275] See Jack & Jack, supra note 274, at 9.
\end{footnotes}
community. In a legal system, the ideal of care is not retribution or restitution; instead, care requires legal actors to work toward a mutually advantageous solution to a dispute, in which the harmony of the community is the desideratum. Correspondingly, in legal ethics, a lawyer should work toward resolutions of problems by "strategies that maintain connection and relationship." 

A now famous story which illustrates the differential application of the ethics of care and rights is told by Gilligan. She was studying the moral development of girls, using hypotheticals devised by the psychologist Lawrence Kohlberg. In one problem, a man named Heinz wonders whether or not to steal a drug to save his wife's life. The pharmacist had refused to discount the drug, and Heinz could not afford the charged price. The boy in Gilligan's study, Jake, analyzes the question in terms of casuistical categories—life is worth more than the drug, therefore it's right to steal the drug. Jake sees the problem as analogous to a mathematical calculation, what students at my undergraduate university used to call a "plug 'n' chug" problem—just plug in the values, chug through the calculation, and the right answer pops out at the end. Amy, who is the same age as Jake, sees the problem very differently. For Amy, the hypothetical does not present conceptual categories, but a web of human relationships that must be maintained over time. It would be a bad thing if Heinz's wife dies, not just for her, but for the people who love her. For Amy, the fault for the breakdowns in the relationships lies with the pharmacist, who does not see how he is damaging these ongoing connections. The pharmacist's judgment is deficient because he cannot imagine a solution that would be beneficial to everyone, such as giving Heinz the drug and allowing him to pay it back over time. Amy's solution, like Brandeis's solution to the labor dispute at his client's shoe factory, is deliberation. "[I]f Heinz and the druggist had talked it out long enough, they could reach something besides stealing." This deliberation would enable the pharmacist to acknowledge his responsibility

276 See id. at 17-19.
277 Naomi R. Cahn, *Styles of Lawyering*, 43 Hastings L.J. 1039, 1047 (1992). Using principles of care, legal practice would involve, for example, increased use of mediation and negotiation, rather than litigation, for dispute resolution; greater appreciation for the opposing party's point of view; and less confrontational trial tactics. See id. at 1048-49; see also Robert J. Levine, *Medical Ethics and Personal Doctors: Conflicts Between What We Teach and What We Want*, 13 Am. J.L. & Med. 351 (1987) (explaining that qualities like caring, relationship-building, and mutual trust tend to be discouraged by rule-based ethics).
278 See CAROL GILLIGAN, IN A DIFFERENT VOICE 25-32 (1982).
279 Id. at 29.
to Heinz's wife. Notice that Amy's reasoning cannot be reduced to plug 'n' chug. It is inherently contextual, sensitive to the character of the individuals, their history, and the history of the community. Amy seems to be saying that there is no mathematical algorithm which adequately captures all the variables presented by a real human dispute.

The work of relational ethicists has shown that moral reasoning is richer than previously believed. Kohlberg thought that arguments about relationships and feelings represented a lower rung on the ladder of moral development. In his theory, the aim of a mature moral agent was to use impartial, universalized principles that made no reference to the context of the relationship. Feminist critics have argued persuasively that women's ethical decision making is not the result of stunted psychological growth, but a different way of reasoning through dilemmas.

A strong version of the ethic of care, which holds that care-based reasoning is exclusively or primarily the province of women, has been criticized as essentialist or for perpetuating gender stereotypes.\(^2\) One study of lawyers and law students, which included an evaluation of moral decision making styles, did find a slightly greater orientation toward relational norms in women respondents.\(^2\) All the statistically significant differences between men and women were in the direction of women's preference for contextual reasoning, but the study's authors concluded that their data provide only limited support for Gilligan's hypothesis. This study certainly does not suggest that men do not, or cannot resolve ethical problems by using considerations of caring or connectedness. However, it does not matter for the purpose of this argument whether the observed tendencies of some women to orient ethical decision making toward human relationships is socially conditioned or innate, as long as it is possible for men also to use concepts of interconnectedness in moral reasoning.\(^2\)

Although feminist scholars have been at the vanguard of reviving the idea of care as a moral consideration, the ethic of care is also

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282 See Cahn, supra note 277, at 1040 ("Ultimately, however, the question whether gender-based styles of lawyering exist is not as important as examining the different methods by which we practice law and the implications of seemingly different ethics of lawyering for ourselves as lawyers, for our clients, and for transforming legal practice.").
expressed in other intellectual traditions, for example as the value of mercy in tempering the imperatives of justice. One of the most striking examples in literature of the opposition between justice and mercy is Shakespeare's *The Merchant of Venice*. Although Portia, the character who argued for mercy, was a woman, she was disguised as a man while making this argument. None of the audience in the courtroom found it odd that a masculine voice was pleading for mercy. George Fletcher's account of loyalty, with its emphasis on personal history and human relationships, is also based on religious and moral principles not uniquely identified with feminism. Some psychoanalytic accounts of legal reasoning suggest that the reported malaise of contemporary legal culture results from an inattention to interpersonal relationships. Martin Buber's religious thought breaks down the difference between subject and object, so that the relationship between two beings is prior to either one of them as an individual. Finally, Christian theology requires believers to give support and comfort to their enemies as well as to their friends. Indeed, the religious obligation to treat strangers as brothers and sisters is an exquisitely demanding moral duty: "When I deal with the lawyer for the other side . . . I deal . . . with the noblest work of God, as much as when I deal with my own client. . . . I also deal with the noblest work of God when I deal with my client's enemy."

Significantly, some prominent normative work on the *legal* ethics of care has explicitly been addressed to men as well as women lawyers. Thomas Shaffer writes powerfully about the cramped reasoning of traditional legal ethics when confronted not with individuals, but with existing relationships of care, loyalty, and affection. In one

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287 Thomas L. Shaffer, *On Lying for Clients*, 71 Notre Dame L. Rev. 195, 208 (1996). For a secular variation on this argument, see Luban, *supra* note 21, at 157. Luban argues that the Kantian injunction to treat persons as ends in themselves, which is universally applicable regardless of an agent's status as a lawyer, requires lawyers to avoid inflicting morally unjustifiable harm on others.
288 See Ellmann, *supra* note 274; Luban, *supra* note 21, at 452 ("I join with many contemporary feminist writers in insisting that the primary moral experience is that of responding to, or sympathizing with, the situation of particular other people."); Menkel-Meadow, *supra* note 274.
experiment, Shaffer presented practitioners with a hypothetical case in which a lawyer drafts parallel wills for a husband and wife, only to learn in a subsequent conversation with the wife that she wants to change her bequest without consulting her husband. The response of most lawyers to the problem was some variation of, “Oops!”—the conversation with the wife alone had placed the lawyer in a conflict between the wife’s interest and the husband’s, so that the lawyer was now the keeper of the wife’s confidence, forbidden to use this information to the husband’s advantage but required to zealously represent both husband and wife. Shaffer argues that the traditional way of answering the question is erroneous because it misdescribes the problem. The lawyer’s client was the family, not the wife or the husband individually. The lawyer’s role is not to gain the maximum advantage for an individual client. Rather, it is to uncover the complex relationships that constitute the family. “The lawyer’s skill includes the moral art of seeing,” and seeing properly requires that the lawyer be attuned to human connectedness. The problem is misdescribed because concepts of care have been shorn from the moral vocabulary of lawyers, who have become habituated to talking exclusively in terms of legalistic and impersonal rights, entitlements, and duties. (As Carrie Menkel-Meadow argues, this deficiency begins with legal education, which neglects relational ethics: “The values that we attend to in the classroom are apt to be individualism and autonomy, which we present as the basis for the adversary system, the Bill of Rights, and the standard of proof in criminal cases. We fail to teach our students that lawyering involves responsibility to and for others.”)

It is not a large step to generalize from Shaffer’s family example to disputes involving ongoing relationships which may be destroyed by litigation. Commercial litigation may involve, for example, a business relationship between a manufacturer and a supplier of raw materials who will probably have occasion to deal with one another in the future. The participants in a criminal case may live in close proximity and the subsequent course of their lives may be shaped by what occurs

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290 See id. at 969-70; see also Thomas L. Shaffer & Mary M. Shaffer, American Lawyers and Their Communities: Ethics in the Legal Profession 15 (1991) (arguing that most legal ethicists use the language of rights and are focused on individual autonomy, not communities); Eric J. Cassell, Do Justice, Love Mercy: The Inappropriateness of the Concept of Justice Applied to Bedside Decisions, in Justice and Health Care 75 (Earl E. Shelp ed., 1981).

291 Shaffer, supra note 25, at 978.

during the trial of the case.\textsuperscript{293} Many lawyers, even if they do not understand themselves as employing a distinctive set of care-concepts, recognize the potential harm to relationships that may result from overzealous litigation, and accordingly serve as a restraint on their clients' shortsighted desire to ruin the opposing parties. The lawyer, who has almost certainly seen more legal disputes than the client, is probably in a better position to appreciate the destructiveness of untempered aggression in litigation, and the value in a more conciliatory approach.

For these reasons, I will assume that lawyers of either sex can use the insights of care theorists in ethical decision making. Lawyers should be attentive to the varieties of moral reasoning, and should be willing to employ considerations of care in evaluating ethical choice situations. To a very great extent, this suggestion may sound like preaching to the choir, since many lawyering theorists have already adopted many of the suggestions put forward by proponents of care and relational ethics. For example, Naomi Cahn suggests that lawyers cultivate "more appreciation of the other party's perspective—more understanding and recognition of that party's interests."\textsuperscript{294} But of course that is precisely what good trial lawyers have always learned to do. Only by anticipating her opponent's strategy and theory of the case can a lawyer understand the strengths and weaknesses of her own case well enough to shore it up against attacks and persuade a judge or jury.\textsuperscript{295} New lawyers quickly learn the danger of overestimating the strength of their case because of a failure to imagine sympathetically the other side's point of view. Another of Cahn's suggestions—increasing emphasis on alternative dispute resolution\textsuperscript{296}—has been embraced wholeheartedly by the profession. Judges, either individually or through local court rules, now routinely require the parties to submit to mediation before trial,\textsuperscript{297} and courts generally uphold contrac-

\textsuperscript{293} See, e.g., SEYMOUR WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER 3-18 (1981) (relating defense lawyer's realization of the harm he had inflicted on a witness in a rape case).

\textsuperscript{294} Cahn, supra note 277, at 1049.

\textsuperscript{295} See, e.g., THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 369-414 (3d ed. 1992); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 387 (3d ed. 1998) (advising advocates to "[m]ake a ruthless list of every weakness in your case and every question that you would be tempted to ask if you were a judge"); SIMON, supra note 21, at 69 (quoting John W. Davis, The Argument of an Appeal, 26 A.B.A. J. 895, 896 (1940)) (arguing that the cardinal rule of advocacy is, "Change places (in your imagination of course) with the Court").

\textsuperscript{296} See Cahn, supra note 277, at 1048.

\textsuperscript{297} See, e.g., W.D. Wash. C.R. 39.1(c)(1) ("The court may designate any civil case for mediation under this rule."). For one judge's enthusiastic endorsement of ADR,
tual provisions mandating binding arbitration of claims, even where those agreements are arguably adhesion contracts. 298 Finally, Cahn and others may be correct to suggest that care theorists would recommend altruistic measures like pro bono work, but there has been an active movement for decades in the profession to increase lawyers' commitment to pro bono. 299

2. Some Reservations

Despite the prevalence of care concepts in some recent writings, there remain a couple of problems in applying relational norms in legal ethics. First, proponents of care are not always clear on whether they understand caring to be a distinctive kind of reasoning, incompatible with traditional moral deliberation. Some principles that are urged as relational may only be restatements of moral reasons that already have a secure home in ethical deliberation. Put another way, urging someone to care about someone else may be understood as nothing more than persuading that person that the Categorical Imperative, rights, utility, God's will, or some other moral principle requires the "caring" action. It may be the case, on the other hand, that the "caring" action requires partiality to a particular person, rather than concern for humanity as a whole. (A common critique of utilitarianism is that it leaves no room for personal attachments and thereby denigrates the value of particular relationships.) If care is taken to demand that the interests of a concrete person be given priority over the claims of society as a whole, then the proponent of care must just-

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298 See, e.g., First Liberty Inv. Group v. Nicholsberg, 145 F.3d 647 (3d Cir. 1998); McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998); Miller v. Public Storage Mgt., Inc., 121 F.3d 215 (5th Cir. 1997). But see Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054 (11th Cir. 1998) (refusing, correctly, to compel arbitration where language of agreement did not adequately inform employee that statutory discrimination claims were subject to arbitration); Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 762 (9th Cir. 1997) ("Any bargain to waive the right to a judicial forum for civil rights claims... must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question."). See generally Stephen J. Ware, Employment Arbitration and Voluntary Consent, 25 Hofstra L. Rev. 83, 146 (1996).

299 For contributions to the debate over mandatory pro bono work by lawyers, see Esther F. Lardent, Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question, 49 Md. L. Rev. 78 (1990), Michael Millemann, Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question, 49 Md. L. Rev. 18 (1990), and Suzanne Bretz, Note, Why Mandatory Pro Bono Is a Bad Idea, 3 Geo. J. Legal Ethics 623 (1990).
tify the priority of care over impersonal considerations like justice or utility.

My second concern is potentially more troubling for legal practice: caring is inherently based on interpersonal relationships that the agent has reason to value. For this reason, it seems inapplicable to many cases in legal ethics, where many strangers make moral claims on the lawyer. The rule of law is premised, to a large extent, on the eradication of certain differences among people. If it is wrong for a person to lie under oath in a civil proceeding, then it is wrong for Bill Clinton to lie under oath, notwithstanding that he occupies an important office, and presumably has better things to do than justify his private life to the electorate. If this rule-of-law reasoning is applied to legal ethics, then a caring lawyer must explain why she is entitled to prefer one similarly situated party over another. This objection to relational ethics may be separated into two related problems: whether norms of caring should apply where the parties are strangers to one another, and whether lawyers should necessarily experience a relationship of care toward their clients.

a. Should the Parties Care About Each Other?

The ethic of care is best suited, if not limited, to situations in which there is some ongoing personal relationship between the parties whose preservation would be valuable. It isn’t clear from Gilligan’s description of the problem, but it appears that Heinz and the pharmacist live in a relatively small community, or perhaps a neighborhood within a larger city, where the pharmacist could be expected to feel some sense of personal obligation toward Heinz and his wife. This feeling of obligation on the part of the pharmacist must be personal for it to count as a duty of care, and not another kind of moral obligation. A utilitarian calculation—taking into account the pharmacist’s need to make a living, the drug company’s justifiable expectation of being paid for its product, the precedential effect of handing out free drugs in cases like this one, and the harm that would result from not providing the drug to Heinz—might reveal that the pharmacist has an obligation to give the drug to Heinz’s wife. In that case, though, the obligation would not arise out of a sense of personal connectedness between Heinz, his wife, and the pharmacist. A brand-new pharmacist, just transferred from another city, could go through the same consequentialist reasoning, but could not be expected to feel the pull of human relationships in the same way as the old pharmacist who has passed Heinz and his wife in the street for years. The whole point of the ethic of care, as it is imagined by relational ethicists, is
that it is not a universal obligation. It is a reaction to Kant, Mill, and other philosophers who see moral problems in terms of categories that are binding on all similarly-situated rational agents. By demanding that legalistic reasoning yield to personal, contextualized analysis, proponents of care usefully open up the range of moral considerations to the interpersonal dimensions of action. At the same time, however, they sacrifice some of the pull that morality exerts on strangers. 300

If the duty of care is limited to interpersonal relationships which the client has some reason to value, it cannot be universally binding. Here the diversity of practice settings makes it impossible to generalize about care as an ethic for lawyers. 301 A small-town dispute may disturb a complex web of relationships, to which the lawyer should be sensitive. Even in larger communities, certain types of practices, such as domestic relations, inevitably implicate an ethic of care. The divorcing parents of minor children will have contact with each other, and the children, for years after the lawyer’s work is done. In a large city corporate practice, however, the number of ongoing personal connections that the lawyer must take into account in any given transaction may be much diminished. 302 There may be some circumstances, like a company’s decision to downsize hundreds or thousands of loyal employees out of the jobs, in which more compassion and attention to the human dimension of the legal question is critical. The company may have the right to throw people out of work, but it

300 A much stronger version of the ethic of care is represented by the parable of the Good Samaritan, in which the political enemy of an injured man, not the victim’s co-religionists, proved to be the man’s neighbor for the purposes of the commandment to love one’s neighbor as oneself. See Luke 10:29–37. This story has consistently been interpreted as a universal injunction to show mercy, even to those for whom one would ordinarily not feel an affective sense of compassion or love. “[O]ne can define only the subject of love, not the object.” Raymond E. Brown, An Introduction to the New Testament 245 (1997). Although the target of my critique in this section is the secular ethic of care, particularly as developed by feminist theorists, it is worth bearing in mind the more demanding Christian obligation to care for everyone, not merely for those close to us. Thanks to Kent Greenawalt for emphasizing the need for qualification on this point.


302 Compare Weber’s account of the conflict between the religiously grounded obligation of caring and the rationalizing force of the market. “Money is the most abstract and ‘impersonal’ element that exists in human life. The more the world of the modern capitalist economy follows its own immanent laws, the less accessible it is to any imaginable relationship with a religious ethic of brotherliness.” Max Weber, Religious Rejections of the World and Their Directions, in From Max Weber 323, 331 (H.H. Gerth & C. Wright Mills trans. & eds., 1946).
might benefit from an analysis offered by a lawyer reasoning like Amy in Gilligan’s study. Isn’t there some way to cut costs or improve productivity without eliminating jobs? But even here the duty of care is founded on the long-standing relationship between the company and its employees. Would the same duty apply to strangers? What if the downsizing resulted from a hostile takeover of a company, with whose employees the acquiring corporation had no preexisting relationship? Any duty on the part of the acquiring company must be founded in universal moral obligations, because it had no preexisting relationship with the target company’s employees. Universal obligations are characteristic of Jake-style reasoning, not relational considerations. To use another example, a large chain store can’t have a duty of care toward the small merchants it displaces when it enters a new market. The large stores obviously have legal duties, for example not to set prices artificially low, but these duties apply whether or not it is good for the relationships between the mom and pop stores and their customers. Again, it seems that Jake has the more compelling argument in that case.

The hypothetical heartless corporation also illustrates a point about the response of caring to power. It is easy to criticize the adversary system for fostering Rambo litigation tactics, driving up the costs of dispute resolution, and exacerbating, rather than healing, divisions between the parties. It is tempting further to proclaim the unsuitability of adversarial litigation to a postmodern, pluralistic society. In some cases, however, the only way to budge a powerful adversary would be to put relational ethics aside in favor of the traditional discourse of liberal rights. Grant Gilmore neatly captures this insight in a famous aphorism: “The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. . . . In Hell there will be nothing but law, and due process will be meticulously observed.”

We would naturally prefer to live in heaven, but until we encounter more reports of lions and lambs lying down together, it would be wise not to abandon the observation of due process. Defenders of the adversary system remind us that many minority groups, political dissidents, and other unpopular clients are not exactly in a position of strength in the legal system, and may have their rights vindicated only

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by a lawyer who can push the recalcitrant party against the wall.305

Caring is a conservative virtue—it tends to maintain existing relationships, including those marked by dominance and oppression. If the extant pattern of relationships is not one which tends to respect one of the parties’ claims to be treated with care, then reciprocal care is probably the wrong moral emotion for the marginalized party to adopt. In that case, the depersonalized rhetoric of individual rights may be the only way to place the out-of-power party in a position where she can compel the other person to take her interests seriously. Furthermore, relationships of care may be stable only in case there is a framework of legal rights and obligations that enable the parties to handle breakdowns in affectionate relationships in a peaceable manner.306 As Waldron recognizes, rights give people power to change existing relationships, form new affective bonds, and enter into transactions with strangers.307 These formal legal guarantees do not enter into the daily structure of a healthy affectionate relationship, but are nevertheless available to give the parties confidence that their expectations will be honored in the event of the relationship’s deterioration.

To put the point another way, caring requires the parties to treat one another as persons, but lawyers are often brought into relationships only when the parties are no longer able to conceive of one another in that way. “The client comes to a lawyer to be aided when he feels he is being treated, or wishes to treat someone else, not as a whole other person, but (at least in part) as a threat or hindrance to the client’s satisfaction in life.”308 This acerbic quip is meant to illustrate the difference between lawyers on the one hand, and members of the clergy, counselors, and therapists on the other; lawyers are trained to deal with the impersonal side of human relationships, not the personal aspect. Few students arrive at law school with extensive training in clinical psychology, social work, or any other body of healing knowledge, and law professors are, for the most part, ill-equipped

307 See id. at 631, 641–42; see also Judith Leonie Miller, Making Change: Women and Ethics in the Practice of Law, 2 YALE J.L. & FEMINISM 453, 464 (1990) (book review) (“[I]t is possible to think of law, and perhaps even of rights, as a way of caring for, and among, larger groups of people.”).
308 Dauer & Leff, supra note 3, at 581; cf. Morgan & Tuttle, supra note 177, at 997 (“Most acts for which people hire lawyers are inconsistent with the interests of some other people.”).
to enrich their students' capacity for empathy. This objection is sometimes greatly overstated. No one expects lawyers to become therapists, but it is surely not too much to ask lawyers to exercise the same degree of solicitude in human relationships that we would expect from any other person.

The relational ethicists' proposals seem almost revolutionary where they touch on the value of loyalty to one's client. Much of the practicing bar would balk at any suggestion that lawyers ought to decline to seek a benefit for their clients whenever the clients' interests can be promoted only at the expense of some relationship among third parties, or between the client and someone else. Think of the terms of approbation that are often used to describe litigators: "street fighters," "tenacious," "junkyard dogs," and other epithets describe the kind of guy you'd like to have in your corner when the chips are down (to mix some metaphors). The reason we praise these lawyers is that they are dedicated to their clients' welfare, no matter what the effect on other relationships. And, how many of us would look for such a lawyer if someone like Kenneth Starr subpoenaed us to testify before a grand jury? Although it is clear that extolling junkyard dogs has the harmful consequence of obscuring other essential qualities of lawyering, such as compassion and empathy, it also apparent that care and mercy cannot be taught as the hallmarks of lawyering, either. A fully realized theory of professional responsibility will need to explain when empathy is appropriate and when a lawyer should fight for her client without concern for the collateral damage caused.

b. Must Lawyers Care About Their Clients?

The previous objection was concerned with the nature of the relationships among the parties to a transaction or dispute. It is also possible to ask about the objects of the lawyer's concern, the client. In general, the problem with applying relational reasoning to lawyer-client relationships is that it is psychologically impossible for ordinary humans, as opposed to saints, to care for all people equally. We tend to care more about our family members and friends than we do about strangers. There is nothing wrong with this priority—there would be no recognizable institution of the family if we did not reserve a special area of concern for those close to us. But the psychological priority of concern does make it difficult to expect lawyers to treat all of those who may come to them for legal services with the same degree of care.

Stephen Ellmann, an advocate of a strong legal ethic of care, would generally approve only of a representation which somehow furthers a cause that promoted connectedness, community, and responsi-
bility. A caring lawyer, according to Ellmann, should respond to three factors: (1) the extent of the client’s need; (2) the lawyer’s subjective feeling of empathy for the potential client; and (3) the caring or uncaring quality of the client. The difficulty with Ellmann’s criteria is that they would disqualify a tremendous number of lawyer-client relationships that we as a society wish to encourage. It seems impossible to care about truly reprehensible clients, although some lawyers seem to manage by imagining that the individual client is a family member who has gotten into trouble. A black civil rights lawyer would be unable to justify his representation of the Ku Klux Klan to Ellmann, since he plainly feels nothing but revulsion for the organization, which itself is notably lacking in qualities of caring and empathy. Of course, that is precisely the point of Ellmann’s argument—organizations like the Klan aren’t worthy of a lawyer’s time and attention—but the danger remains that the impersonal value of freedom of speech may be sacrificed in favor of personal values if a lawyer refuses to represent abhorrent clients. There is a danger in emphasizing care to the exclusion of other public values. Care is not necessarily correlated with social justice. A proponent of the ethic of care must justify the priority of personal over impersonal values in a case like the Klan’s First Amendment litigation.

To take a less dramatic example, entity clients, even those that aren’t engaged in anything particularly untoward, do not fit neatly within Ellmann’s criteria for deserving a caring lawyer. Any large institutional client probably does not need the services of any individual lawyer. The “last lawyer in town” problem hardly ever arises for a wealthy client that can offer repeat business to a law firm. Some institutional clients do not tend to engender feelings of empathy, although this problem could potentially be alleviated by allowing the lawyer to consider her feelings of empathy toward individuals who work for the corporate client, instead of for the client itself. Finally, the caring nature of many institutional clients may in some cases be limited by their social role. Corporations, for example, must be responsive to shareholders, or their officers and directors risk being sued for breaching their fiduciary duties. Some corporations never-

309 See Ellmann, supra note 274, at 2685. This principle of client selection is reminiscent of Simon’s analogy between a private lawyer and a public prosecutor, except that Ellmann advises choosing clients on the basis of care, and Simon’s criterion of selection is social justice. See Simon, supra note 81, at 1093.

310 See, e.g., JACK & JACK, supra note 274, at 138 (relating how a defense lawyer imagined her client, a man accused of raping and murdering an elderly woman, as her brother).
theless do attempt to act in a caring manner.\textsuperscript{311} Other kinds of enti-
ties, such as labor unions and advocacy groups, tend to take the same
position repeatedly on contested social issues, so that a lawyer of the
same ideological bent can develop something like a feeling of care
toward that kind of institutional client.\textsuperscript{312} Entity clients also raise the
suspicion that, as a general matter, allowing caring lawyers to work
only for caring clients seems like medicine that is too strong.

Furthermore, in many cases caring too much for one's client may
be an impediment to providing effective legal services. In Confe-
sions of a Criminal Lawyer, a former defense attorney relates a story of repre-
senting a Puerto Rican man who had been stopped by police officers
and severely beaten; predictably, he was charged with assaulting the
cops.\textsuperscript{313} While waiting for his client's case to be called, the narrator
watches a young defense attorney cross-examining a police officer.
Losing his temper, the junior lawyer begins shouting at the witness:
"And isn't it a fact that you lied in your direct testimony?"\textsuperscript{314}
Wishman, the narrator, thinks to himself what a disservice this lawyer
is doing his client: "I had little patience with people who lost control
and became incompetent. One thing was clear: cops rarely lost con-
trol and they rarely admitted they were lying, even when young law-
yers were yelling at them."\textsuperscript{315} But when Wishman's turn comes for the
preliminary hearing in his client's case, he finds himself thinking
about the cruelty of the officer, who beat this innocent man so se-
verely that his eye was swollen shut and he could no longer move his
fingers. He, too, loses his cool and screams at the witness. At the end
of the hearing, the judge calls him aside for some friendly advice:

\begin{quote}
Seymour, you need a vacation. You're overwrought. You've lost all
sense of proportion. I know what went on here and I'm going to
throw this case out. . . . But what I'm more concerned about is you,
Seymour. You looked like you wanted to kill that cop. . . . [D]on't
you see that your lack of restraint made it harder for you to get
control over him?\textsuperscript{316}
\end{quote}

\textsuperscript{311} A few courts and legislatures have attempted to alleviate this problem by per-
mitting corporate directors to take account of the interests of employees, creditors,
Ann. § 1715(a)(1) (West 1995); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955
(Del. 1985).

\textsuperscript{312} \textit{See} Ted Schneyer, \textit{Some Sympathy for the Hired Gun}, 41 J. Legal Educ. 11, 14–15

\textsuperscript{313} \textit{Wishman}, supra note 293, at 126–46.

\textsuperscript{314} \textit{Id.} at 135.

\textsuperscript{315} \textit{Id.} at 136.

\textsuperscript{316} \textit{Id.} at 142.
Thus, "getting personal," the natural result of caring too much for one's client, can paradoxically be worse for the client than a greater sense of neutrality and detachment.\textsuperscript{317}

Finally, Ellmann's argument is addressed only to those lawyers who wish to be guided by the ethic of care—for the rest of you, the ordinary morality of the marketplace will have to do, he seems to say. "[T]he caring lawyer should choose in light of the considerations of care," he says.\textsuperscript{318} The syntax of that sentence suggests that the uncaring lawyer is not bound to choose in light of the considerations of care. The uncaring lawyer is thrown back into the interminable debate in legal ethics over the extent to which considerations of social justice should play a role in professional representation. This objection is certainly not fatal; ethical arguments must be sensitive to the character of the person to whom they are addressed.\textsuperscript{319} I do fear, however, that urging only a subset of the profession to use relational reasoning would lead to a Gresham's law effect, where the worst clients would be paired with the worst lawyers, and the caring lawyers would be driven out of business. There may be more worth than Ellmann acknowledges in caring lawyers trying their best to represent uncaring clients.

\textbf{IV. Plural Values and Ethical Reasoning}

The arguments of the preceding section show that each of the constituent professional values cannot function by itself as a foundation for a theory of professional responsibility. Thus, lawyers must consider the possibility that their professional obligations are guided by a multiplicity of values, and that these values may from time to time conflict. The possibility of conflict among professional values may be alarming to lawyers who had hoped for neat solutions to ethical dilemmas. These lawyers are in good company—many philosophers have

\textsuperscript{317} Wishman seemed to learn his lesson, as he subsequently advised a young lawyer, "Bad practice for a lawyer to get too involved. That's why it's supposed to be easier to represent someone you hate. . . . [Y]ou and your client are both better off if you don't like him too much." \textit{Id.} at 162. Weber provided similar advice for aspiring politicians—passionate devotion to a cause must be tempered by a "cool sense of proportion" or distance. \textit{See Max Weber, Politics as a Vocation, in From Max Weber, supra note 302, at 77, 115.}

\textsuperscript{318} Ellmann, \textit{supra} note 274, at 2689 (emphasis added).

\textsuperscript{319} Cf. Alasdair MacIntyre, \textit{Egoism and Altruism, in 2 The Encyclopedia of Philosophy} 462, 466 (Paul Edwards ed., 1967) (arguing that people who want a life with relationships of trust, friendship, and cooperation need not be concerned about questions of altruism or benevolence as such, since other-regarding reasons and self-serving reasons will coincide).
thought that practical reasoning should strive to eliminate insoluble conflicts between values, so that only one of the choices presented would represent the correct resolution of an ethical problem. Indeed, some have gone so far as to describe as "the central tradition of western political thought" the claim that there is, in principle, only one correct answer to any question of ethics, which can be discovered by the correct procedure and acted upon without violating any other demands that reason makes simultaneously on the agent. This view dates at least from the time of Socrates: "From the time of the Euthyphro onwards, a dominant tradition in moral philosophy has agreed on one central point: these cases of conflict display an inconsistency which is an offense to practical logic and ought to be eliminated." One strand of ancient thought equated practical deliberation with a kind of measurement or algorithm: in any serious ethical conflict, the agent merely had to calculate how much of The Good was presented by each option, and choose the path which resulted in a greater quantity. In the Protagoras, for example, Socrates argued for an ethical science of measurement, in which The Good was hedonic pleasure.

Official statements on the professional responsibilities of lawyers, promulgated by the organized bar, follow the traditional Platonic approach, resisting the notion that the duties incumbent upon lawyers can conflict. For example, the Model Rules suggest that conflicts between values should be quite rare:

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.

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322 See id. at 108–09.
324 See Jean-François Lyotard, The Postmodern Condition 8 (Geoff Bennington & Brian Massumi trans., 1984) ("[T]here is a strict interlinkage between the kind of language called science and the kind called ethics and politics.").
Courts also hesitate to admit that the conflicting duties they impose on advocates could possibly be irreconcilable. Consider this quote from a case allowing a lawyer to sue for being wrongfully discharged after blowing the whistle on client misconduct:

In contrast, plaintiff's performance of professional services for the firm's clients as a duly admitted member of the Bar was at the very core and, indeed, the only purpose of his association with defendants. Associates are, to be sure, employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations.326

The court correctly recognized that the lawyer had a duty to the public as well as to his client, but then left the matter at that, without attempting to give other lawyers any guidance as to how they should resolve similar dilemmas that may arise in the future.

Other discussions of legal ethics do admit that basic professional values can and do conflict, but argue that one value must always trump the others. One writer extracts this "central" principle from reported cases, disciplinary rules, and stories of the legal profession: "[T]he lawyer's obligation to the client is subordinate to the lawyer's primary obligation to the law."327 This principle can be traced back in legal ethics at least as far as the lectures of Sharswood, who advocated a measure of priority for social justice that is practically unthinkable in today's legal system:

It is to be observed, then, that such a contract changes entirely the relation of counsel, to the cause. It reduces him from his high position of an officer of the court and a minister of justice, to that of a party litigating his own claim. Having now, a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct. He is tempted to make success, at all hazards and by all means, the sole end of his exertions. He becomes blind to the merits of the case, and would find it difficult to persuade himself, no matter what state of facts might be developed in the progress of the proceedings, as to the true character of the transaction, that it was his duty to retire from it.328

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328 George Sharswood, Professional Ethics 89–90 (1854). Stephen Kalish cautions that Sharswood is often misinterpreted as being a strong proponent of the value of progressive social justice in legal ethics, when in fact he was quite a conservative jurist, emphasizing the protection of private property and the maintenance of the status quo.
Here Sharswood is inveighing specifically against contingency fee contracts, but the evil he identifies in these arrangements is that they create an undue identification of the lawyer with the client's cause, preventing the lawyer from cultivating a spirit of detachment from the client, and sympathy with the cause of social justice. Sharswood's diatribe leaves no room for the sentiment of loyalty felt by a lawyer toward her client. (His suspicion, presumably, is that this loyalty is merely bought, like the affections of a prostitute.)

Contemporary lawyers have a more nuanced view of contingency fee contracts. They admit that these arrangements may produce conflicting loyalties—for example, the lawyer may wish her client to proceed to trial in hopes of obtaining a larger verdict, rather than accepting an early settlement. Consider a situation in which the defendant, knowing that the plaintiff is in dire financial straits, has offered a modest amount in settlement, say $25,000, for a tort case that will probably be worth ten times that amount at trial. The plaintiff's lawyer sincerely believes that the defendant's conduct was reprehensible, and that a substantial verdict at trial would deter future misconduct by the defendant. However, the plaintiff insists that she needs the money immediately, and refuses to consent to the lawyer taking the case to trial. Even in a simple example like this one, lawyers recognize numerous competing considerations: respect for the client's decision making autonomy; the desire to see justice done at trial; care-based considerations such as ending the client's ordeal of litigation; and finally the lawyer's own needs to make a living. No one today would accept Sharswood's contention that it is a simple matter of identifying the lawyer's sole duty as that of an officer of the court, and invalidate a contingency fee arrangement on that basis.

Although we accept the plurality of professional values, this condition is troublesome because it undermines the attempt to justify ethical decisions from the top down—that is, by a process of deductive reasoning from a set of general principles of universal applicability, which are accepted as given for the purposes of the practical in-


330 Recent efforts to codify lawyers' professional obligations exhibit increasing sophistication regarding value conflicts. For example, the American Law Institute's position on the lawyer's duty to prevent client frauds recognizes the opposition between the lawyer's duty of loyalty to the client and the duty to protect the interest of society and third persons. See Restatement (Third) of the Law Governing Lawyers § 117B cmt. b (Proposed Final Draft 1998).
If our moral reasoning is not deductive, a skeptical critic might claim that ethics must be without foundation. We are so conditioned to regard scientific reasoning as the paradigm of objective truth that any rational process that does not resemble science is automatically suspect. Alternatively, we may acknowledge plural values and ethical dilemmas, but despair of being able to resolve them.

This section’s task is to rescue professional ethics from the skepticism, relativism, or even nihilism that might be thought to attend to the problem of value pluralism. My ambition is not to tear down legal ethics, but to point the way to a more satisfying account of how ethically conscientious lawyers can work within a domain of plural values, by understanding traditions of practical reasoning that emphasize the interrelated values of sound judgment, character, and virtue over calculation. Aristotle criticized Plato for seeking scientific certainty in ethical inquiry, instead of recognizing the domain of practical reasoning for what it is—the messy, imprecise field of human affairs. It is illogical, argued Aristotle, to expect the same degree of exactitude in all disciplines:

Our discussion will be adequate if it has as much clearness as the subject matter admits of; for precision is not to be sought for alike

331 See ALBERT R. JONSEN & STEPHEN ToulMin, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 28–36, 293–94 (1988); Richardson, supra note 125, at 276–77. Richardson in particular emphasizes that this insistence on a quasi-scientific method of practical reasoning has caused many philosophers, such as Kuhn and Feyerabend, to believe that disagreement is intractable.

332 The MacCrate Report stresses the role of legal education in training future lawyers to recognize ethical dilemmas, but it has little to say about how a lawyer should proceed to resolve the dilemma, except that the lawyer should be aware of any positive legal rules that may be applicable. See MACCRATE REPORT, supra note 204, Skill § 10, at 203–07. The only suggestion given in the report for teaching decision principles for ethical deliberation is that law students should learn how to “[i]dentify a solution that satisfies the applicable ethical rules and principles while at the same time accommodating any competing interests of a client.” See id. Skill § 10.3(c)(iii), at 206. This paragraph merely restates the problem, and so tells legal educators nothing at all about how they should instruct lawyers-to-be in resolving these conflicts.

in all discussions, any more than in all the products of the crafts. . . .

It is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits: it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician demonstrative proofs. 334

In practical disciplines like ethics, we cannot expect to construct a system of principles deductively related to a limited set of universally applicable axioms. Instead, we are looking for a kind of non-scientific deliberation, to use Martha Nussbaum’s phrase, 335 that is suited to the complexity of human goods and the potential for conflict presented by plural values. A number of suitable modes of ethical reasoning have been defended by philosophers working in practical disciplines, such as medical, political, and legal ethics. It is these proposals to which I will turn now.

A. Professional Judgment

It has been suggested that the plurality of professional values may be accommodated by constructing an account of judgment, or practical wisdom, as an alternative process of making ethical decisions. Professional judgment is sometimes invoked in the legal ethics literature where a factual situation presents a seemingly insoluble dilemma. “Here is a place for practical reason and nuanced judgment,” wrote one commentator in his discussion of the problem of cross-examining the truthful witness. 336 The Model Rules reluctantly recognize rare cases of conflicts between plural values, and in those rare cases, the drafters believe that such conflicts may be resolved “through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.” 337


335 See Nussbaum, supra note 321, at 290–317; see also Richard J. Bernstein, Beyond Objectivism and Relativism 41 (1983) (“[D]eliberation and choosing are rational activities, but not the sort of rational activity that has been characterized as deductive proof or empirical verification or falsification.”).


Anthony Kronman’s book, *The Lost Lawyer*, is an elegant, philosophically sophisticated defense of the virtue of practical wisdom.\(^{338}\) Where political questions pertain merely to the means for reaching some preestablished goal, resolution of the issue is nothing more than a matter of calculation.\(^{339}\) When the dispute pertains to the goals that should be chosen by the polity, however, rational deliberation is hampered by “the participants’ own belief that the alternatives involved appeal to incommensurable values.”\(^{340}\) Kronman offers examples like the snail darter case (beloved of Ronald Dworkin as well), in which one of two irreconcilable alternatives like environmental preservation and the provision of cheap electricity must be chosen. In such a case, where policy decisions are made against a background of plural values, the decision may appear groundless and arbitrary, since it cannot be justified deductively from generally accepted moral and political principles.\(^{341}\) Thus, Kronman argues that decisions about which ends to pursue must be justified by some other reasoning process—in his view, that justification is that the alternative was chosen by a person of practical wisdom.

Practical wisdom is, of course, an Aristotelian concept, and Kronman’s “lawyer-statesman ideal” is considerably indebted to Aristotle’s account of *phronesis* in the *Nicomachean Ethics*. For Kronman and Aristotle, practical wisdom is a matter of the moral agent’s character. A prudent person (Kronman uses the terms “prudence” and “practical wisdom” interchangeably) is set apart by a cluster of dispositions which mark him or her as a person of sound practical judgment.\(^{342}\) Good judgment is not simply an intellectual discipline that can be represented as an algorithm or formula; rather, it is a complex set of interacting character traits, including sobriety, fair-mindedness, honesty, and the paired capacities for sympathy and detachment.\(^{343}\) Kronman follows Aristotle in maintaining that some people are better than others at discerning the common good, and that this excellence is due to the agent’s superior character that has been cultivated carefully over time.\(^{344}\) He also endorses the Aristotelian epistemological


\(^{339}\) See id. at 54–55.

\(^{340}\) Id. at 56.

\(^{341}\) See id. at 59.

\(^{342}\) See id. at 24.

\(^{343}\) See id. at 43.

\(^{344}\) See id. at 35, 41.
assumption that learning practical wisdom is a matter of *doing* something, not merely reading about it in books.\footnote{Id.; cf. Robert Condlin, *The Moral Failure of Clinical Legal Education,* in *The Good Lawyer,* supra note 93, at 317, 323 (noting that the foundation for the claimed superiority of clinical instruction in professional responsibility is that “only someone who has had the experience of acting in a certain way is capable of knowing the principle embodied in that way of acting”).}

Kronman also makes a startling and original claim. He argues that lawyers, at least historically, have been uniquely well suited to exercising the virtue of practical wisdom. Because lawyers must make decisions among alternatives that conflict and cannot be reduced to some common unit of value, they must learn to see disputes through the eyes of all the participants, viewing the conflict imaginatively from the internal perspective of each person; at the same time, they must remain detached from the particularity of the individuals’ perspectives and keep in mind the needs of the community as a whole. Kronman refers to these paired standpoints as sympathy and detachment.\footnote{Kronman argues that the case method of instruction helps develop students’ capacity of sympathetic detachment by requiring them to imagine themselves with the particular interests of a wide range of participants in a social controversy—the plaintiff, a third party, and so on—and advocating on that person’s behalf, while simultaneously retaining the ability to see things from the judge’s point of view. *See id.* at 113–16. One of his critics points out, however, that the case method tends to suppress some of the participants’ characteristics, particularly those which have been deemed “irrelevant” by dominant groups. *See* David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics,* 108 Harv. L. Rev. 458, 466 (1994).}

It is difficult to remain both sympathetic and detached, and not everyone is as good at maintaining this unstable neutral standpoint between competing perspectives. But lawyers, says Kronman, develop the capacity for this “bifocal” deliberative attitude through their training—first in law school.\footnote{See Kronman, supra note 8, at 128–34. It is perhaps difficult to see how law practice could develop one’s practical wisdom; many would cynically say that contemporary law practice develops, at best, one’s stamina, tolerance for stultifying work, and waistline. But Kronman insists that large-firm practice in the 1980s and 1990s bears little resemblance to the heyday of corporate practice in which firms represented clients on a long-term basis, rather than piecemeal on individual cases and “deals,” and had an opportunity to help their clients think about strategic decisions, instead of serving as technicians who merely implement the clients’ wishes. *See id.* at 283–300.} and later in practice.\footnote{Kronman, supra note 8, at 66–74.} Thus, they are professionally disposed toward being prudent, or practically wise. The ideal lawyer of superior practical wisdom is given the sobriquet “lawyer-statesman” by Kronman, and exemplified by historical figures like Robert Jackson, Alexander Hamilton, and Abraham Lin-
coin. To the question, “what ought a lawyer to do in this situation?” Kronman offers a series of moral exemplars, who present ideals for emulation by aspiring wise lawyers. While Kronman’s lawyer-statesman ideal has an uncomfortable air of WASP-ish male elitism, his claim that lawyers are superior practical reasoners is empirically questionable, his basic insight is sound. Choosing the good in a case where ethical values conflict is a matter of character and virtue, which develops through experience and the guidance of exemplary practitioners of the tradition. It is not necessary to accept Kronman’s story about the rise and fall of the legal profession in order to make use of his insights into practical reasoning.

It is tempting to derive anti-theoretical, anti-rational, or even mystical conclusions from Kronman’s call for a renewed appreciation of practical wisdom. To put the question simply: What does practical wisdom consist of, if not theoretical reasoning? And is there any non-circular way to tell good judgment from bad? Kronman’s appeal to the tradition of legal practice appears to beg important questions—the good lawyer is the one who does what good lawyers do, his claim seems to be. Skeptics claim that the theory of some social practice,

349 See Cramton & Koniak, supra note 2, at 184. Practical wisdom need not necessarily be elitist. As Bernstein shows, discussing Gadamer’s hermeneutics, an authentic conception of practical wisdom requires the agent as interpreter to approach another (whether a text, a work of art, or a participant in conversation) with respect, openness to risk, and willingness to be changed by the encounter. See Bernstein, supra note 335, at 162–65. Kronman’s application of practical wisdom to lawyers builds in the requirement that the lawyer maintain an attitude of sympathy and detachment; here, sympathy requires the lawyer to be aware of her own historical situation of privilege and power, with respect to (at least some) clients. It seems that Kronman does not take this requirement seriously, however, given that he identifies as moral exemplars powerful lawyers working on behalf of commercial interests, who occasionally assume high government positions. One may surely ask of Kronman why skillful and courageous lawyers for outsiders, like Clarence Darrow, Thurgood Marshall, or Michael Tigar, do not count as virtuous. See Simon, supra note 21, at 23–24. Or, as another reviewer puts it, Kronman seems not to appreciate the irony that any tradition, including that of the lawyer-statesman, suppresses other traditions which could serve as vantage points from which to question the status quo. See Peter Margulies, Progressive Lawyering and Lost Traditions, 73 Tex. L. Rev. 1139 (1995).

350 For a critique of Kronman’s assertion that the legal profession has fallen from a previous state of grace, see Marc Galanter, Lawyers in the Mist: The Golden Age of Legal Nostalgia, 100 Dick. L. Rev. 549 (1996). According to Thomas and Mary Shaffer, moral exemplars exist even in the degenerate modern legal profession, at least if popular culture portrayals are to be believed. On television shows like L.A. Law, ethical dilemmas are resolved by “the wise elder who is skilled in professional craftsmanship”—someone like Kronman’s lawyer-statesman. See Shaffer & Shaffer, supra note 290, at 31.

like lawyering or baseball pitching, can do nothing other than tell someone to do whatever it is that participants in that practice do. It is a small matter to take the next inferential step and argue that reasoning about a practice is pointless, since all that can be done is to proceed without worrying about constructing some theoretical account to explain the actions of participants in the practice.

While it is true that ethical judgments do not proceed on the basis of an explicit rule that the agent has internalized and consults when making the judgment, it is an overstatement to say that theories have no place in explaining ethical decision making. As Rawls recognizes, people tend to oscillate between pre-theoretical judgments or hunches and fully theorized ethical principles that explain their intuitions in particular cases. People may revise their considered judgments if these intuitions do not accord with acceptable theories, but they also test their ethical theories for “fit” with their considered judgments about what is right in particular cases and may revise theories to accord more closely with particular judgments. This method of reach-

352 See Stanley Fish, Dennis Martinez and the Uses of Theory, 96 Yale L.J. 1773 (1987). Fish’s anti-theory has intellectual roots in some interpretations of Wittgenstein’s rule-following argument:

This was our paradox: no course of action would be determined by a rule, because every course of action can be made out to accord with the rule. . . . What this shows is that there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call “obeying the rule” and “going against it” in actual cases. . . . And hence also “obeying a rule” is a practice. And to think one is obeying a rule is not to obey a rule.

Wittgenstein, supra note 130, § 201. This is certainly not the place to attempt a critical analysis of this argument, but it is important to note that the interpretation of these passages of the Investigations is highly controversial, and the extent to which they undermine theoretical reasoning is not settled. See, e.g., Saul A. Kripke, Wittgenstein on Rules and Private Language (1982); Warren Goldfarb, Kripke on Wittgenstein on Rules, 82 J. Phil. 471 (1985); Scott Landers, Wittgenstein, Realism, and CLS: Undermining Rule Scepticism, 9 Law & Phil. 177 (1990); Thomas Morawetz, The Epistemology of Judging, Wittgenstein and Deliberative Practices, 3 Can. J.L. & Juris. 35 (1990); Christian Zapf & Eben Moglen, Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein, 84 Geo. L.J. 485 (1996).

353 See Williams, Ethics and the Limits of Philosophy 98 (1985).

354 See John Rawls, A Theory of Justice 48–50 (1971); Rawls, supra note 106, at 28, 45; cf. Bernstein, supra note 335, at 146 ("Phronesis is a form of reasoning and knowledge that involves a distinctive mediation between the universal and the particular."); Ross, supra note 155, at 40 ("[W]hat we are apt to describe as ‘what we think’ about moral questions contains a considerable amount that we do not think but know, and that this forms the standard by reference to which the truth of any moral theory has to be tested, instead of having itself to be tested by reference to any theory."); Norman Daniels, Wide Reflective Equilibrium and Theory Acceptance in Ethics, 76 J. Phil. 256 (1979).
ing "reflective equilibrium" shows that theories do constrain practical judgments, but not in the way that a priori axioms constrain proofs in geometry. Rather, theories may show when practical judgments may have unacceptable consequences if applied more generally. Or, they may point out additional considerations that actors should take into account in practical reasoning. Even though theories do not replace practical judgment, they nevertheless retain a significant role in ethical deliberation.

Reflective equilibrium between intuition and theory is not the only source of constraint for prudential decision makers, however. In law, the tradition of legal practice channels the discretion of judges in deciding cases, as well as the latitude of lawyers in choosing one option among many as an ethically permissible course of action. Not every interpretation of precedent passes the "straight-face test" for judges. So, too, with the range of plausible options in the realm of professional conduct—an experienced lawyer will recognize an action as ethically troublesome, in light of the traditions of legal practice, even though the action may not run afoul of any prohibition in the disciplinary rules or other applicable law. Essential to the constraint of tradition is the experience of the decision maker, for it is not by abstract reasoning alone that one can appreciate the force of customary norms. Instead, one who fully appreciates tradition possesses what Llewellyn termed "horse-sense," which is the proper balance of theoretical abstraction and attention to the particulars of a case under consideration. This faculty is something which cannot be captured by theory and which accordingly has no place in a Platonic moral system.

Because "horse-sense" is some kind of intuitive balance between theory and practice (or between universals and particulars), it is itself an exceedingly difficult term to get a handle on. Llewellyn himself was fond of disclaiming any pretense of professional philosophy, calling his theories "pre-scientific" or nothing more than "fighting faiths" or "readily workable" generalizations. For a reader acquainted with

analytic jurisprudence, Llewellyn's definition of the term is striking for both its imprecision and its tone: "Horse-sense is the kind of highly informed, distinctly uncommon, better-than-common, expert but not scientifically demonstrable know-what and know-how which a David Harum had about horses and other horse-traders."359 A judge with horse-sense is recognizable by other experienced judges, even though the judge's craft cannot be reduced to an algorithm that even a rookie judge could follow. Rookies lack the discernment that permits their experienced colleagues to judge the excellence of practitioners of the craft.360 Even though this sense of discernment is impossible to pin down theoretically, it is recognizable to others "skilled in the art," in the language of patent lawyers. For Llewellyn, excellence in judging may be recognized by members of the relevant community; similarly, experienced lawyers may recognize their colleagues who are best able to decide ethical questions that touch on incomparable values.361

Tradition, horse-sense, and the Wittgensteinian notion of a social practice point to the *intersubjective* nature of ethical reasoning. All plausible responses to the plurality and conflict of values in professional ethics must take account of the dialectic nature of the inquiry. One's ethical decisions are not constrained *a priori* by logical relationships, but *a posteriori* by the acceptability of the decision by the relevant community. The next section discusses an ancient tradition, casuistry, which is being revived in some practical disciplines as a potential means of making ethical judgments in settings in which competing values cannot be compared quasi-scientifically. Casuistry can be seen as a living example of horse-sense, for it emphasizes to a greater degree than the tradition of prudential reasoning the role of the community in validating evaluative judgments.

1567, 1570, 1588 (1985) (citing ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 64 (1962)) (stating that practical reasoning in politics involves "muddling through," not theory or ideology).


361 For this reason, some legal educators have praised mentoring systems, such as the one used to train British lawyers, as more effective means to inculcate professional norms. See, e.g., Robert F. Cochran, Jr., Lawyers and Virtues, 71 NOTRE DAME L. REV. 707, 726-27 (1996) (book review). But see Atkinson, *supra* note 16, at 341-42 (agreeing that an ideal mentoring program would be an excellent way to teach professional values but arguing that most efforts at mentoring probably "begin and end in awkward lunches with courteous strangers").
B. Case Ethics

1. The Method of Casuistry

The tradition of case-by-case reasoning—casuistry—embraces pluralism and situational complexity as the essence of ethical deliberation. The method of casuistical moral deliberation can be defined as follows:

[It is] the analysis of moral issues, using procedures of reasoning based on paradigms and analogies, leading to the formulation of expert opinions about the existence and stringency of particular moral obligations, framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with certainty only in the typical conditions of the agent and circumstances of action.

This procedure of reasoning proceeds “from the bottom up,” starting with a substantial number of analyzed precedent cases, which serve as analogies for decisions in new cases. Analysis of the precedent cases shows the connection between the factual circumstances of the case and a general moral principle, and reveals how the combination of the general principle and the particular facts of the situation mandates the practical judgment in that case. But the resolution of practical problems is not accomplished geometrically, by deductive proof from general principles. Instead, the resolution of concrete cases, on the one hand, and general ethical rules or maxims, on the other, play off against each other and produce the judgment about right and wrong in a particular instance. The reasoning process is dialectical, reminiscent of the Rawlsian process of reflective equilibrium or the hermeneutic circle of Gadamer.

Just as the holding of common-law cases cannot reliably be predicted without knowing something about the policies that inform the


363 JONSEN & TOULMIN, supra note 331, at 257.

364 Id. at 252.

365 See HANS-GEORG GADAMER, TRUTH AND METHOD 261 (2d rev. ed. 1989); LARMORE, supra note 351, at 4–8; RAWLS, supra note 354.
Casuistic reasoning makes reference to highly abstract ethical principles like consequences, duties, justice, care, and so on. Classically, casuists explicated their decisions with reference to moral first principles as found in the Bible or in the work of speculative theologians. But policies or ethical first principles alone do not justify judgments in particular cases. Rather, the decision maker accepts the authority of precedential cases, which embody and instantiate general principles, but only insofar as the principles and the facts considered together produce the judgment. In the common law, the authority of precedent is needed to protect settled expectations and to ensure the stability of private ordering. Respect for precedent also ensures that unelected judges stay within their institutional boundaries, leaving many contested issues of policy to legislatures, administrative agencies, or other appropriate public bodies. In casuistical moral reasoning, due attention to past decisions gives the decision maker access to the accumulated wisdom of previous thinkers who have confronted similar issues. Since precedent is essential to the reasoning process, ethical judgments can never be abstracted completely from their factual settings.

Casuistry was traditionally explained and taught in a manner that would be familiar to any first-year law student in a common-law jurisdiction. Treatises on casuistry featured “type cases,” or paradigms, in which the application of a moral principle to a set of facts was unproblematic. The commentary to the case then varied the facts of the type case, moving away from the clear resolution of the type case, and showing how additional facts or different motives of the agent made the resolution of the problem less certain. For example, a type case might present an agent who willfully killed an innocent person with no excuse. Those facts, in conjunction with the scriptural commandment, “thou shalt not kill,” produced the judgment that the killing was wrongful. But then the casuists introduced complications: the agent was enraged or in the heat of passion; the killer was a revolutionist; or the situation was highly unusual.

See, e.g., Llewellyn, supra note 357, at 75 (“Nor, until you see this double aspect of the doctrine-in-action, do you appreciate how little, in detail, you can predict out of the rules alone; how much you must turn, for purposes of prediction, to the reactions of the judges to the facts and to the life around them.”). See Bok, supra note 126, at 55 (“[C]ases of conscience cannot be examined in a vacuum. Traditionally, they have been discussed in a specific religious, moral, or legal framework.”); Arras, supra note 362, at 1002. See Dworkin, supra note 52, at 117–20; Sunstein, supra note 362, at 76. See Sunstein, supra note 362, at 195. See id. at 76–77. See generally Jonsen & Toulmin, supra note 331, at 149–51, 251–57.
tionary and the victim was a tyrannical ruler; the killer was an executioner and the victim had been duly convicted of a crime and sentenced to death; the agent was defending his family against assault; and so on. This movement from clear type cases to contested penumbral cases was typical of casuistical pedagogy, and developed in students of casuistry an extraordinary sensitivity to factual nuance and the morally relevant differences between cases. Indeed, the Roman rhetoricians whose work forms part of the intellectual history of casuistry stressed to their students that persuasion about the right and the good depends on the orator's grasp of the attributes of the persons and things involved: "for persons, their names, natures, manners of life, fortunes, characters, feelings, interests, purposes, achievements, accidents, speeches; and for an action, its nature and purpose, place, time, occasion, manner, and consequences."\(^{372}\)

Fully specified factual descriptions are essential to the method of casuistry, because only relevant precedents constrain future decisions. Casuistical reasoning is not irrational or anti-theoretical, since not every analogy with a precedent case is a legitimate ground for bringing a new case under the decision principle of the case. The application of precedent cases to new cases, "though it is a contentious and ethically fraught matter, is constrained by rational criteria of what is and what is not an adequate similarity to the core cases."\(^{373}\) Casuistry is certainly not equivalent to existentialism, where the existence of opposing ethical principles is said to leave the agent radically free to create her own system of morality.\(^{374}\) Past decisions, along with the general principles that underpin those decisions, are always the starting point for the exercise of practical reason. The justification of present decisions depends on their analogical relationship with past decisions. If the present case and a past case are relevantly similar, then a decision maker is justified in treating the present case in the same manner as a prior decision maker treated the precedent case.\(^{375}\) The theoretical problem, of course, is working out the logic of analogies, so that not every case can be subsumed under the same precedent.

\(^{372}\) Id. at 85.
\(^{373}\) Williams, supra note 353, at 96; see also Sunstein, supra note 362, at 71 ("[O]ne cannot characterize any holding absolutely any way at all, and the constraints on characterization are enough to undergird the enterprise of analogy.").
\(^{374}\) See Jonsen & Toulmin, supra note 331, at 272 (contrasting casuistry with "situation ethics").
"A claim of relevant similarity requires a judgment of principle." Type cases are not self-applying. They do not contain within themselves specifications of all the future cases in which they will control the outcome. In bioethics, for example, it is not immediately clear whether the relevant type case for physician-assisted suicide is one of murder (and the Hypocratic injunction to "do no harm") or a case in which patient autonomy is paramount. It is only by studying a body of past cases, considered as a coherent system and taking into account the higher-order principles that undergird the decided cases, that a decision maker can ascertain whether a new case is relevantly similar to a past case. Casuistical reasoning depends on "principled" distinctions and analogies between cases. What makes a distinction principled or not depends on the practices of the relevant community. In the practice of professional self-regulation, the community is composed of lawyers, judges, legislators, legal academics, journalists, interested members of the public, and all others who make normative claims about what lawyers ought to do in the course of representing clients. It is, in Dworkin's term, a "community of principle," in that it is committed to a coherent scheme of principles of professional morality.

The community I propose as the source of interpretive discipline is broader than "the organized bar," "all lawyers," or other communities that might be proposed. In a democratic society, however, lawyers cannot be sole arbiters of the legitimacy of their conduct. We speak of professional self-regulation, but in practice, the self-imposed norms of the profession are constantly being checked from without,

376 Sunstein, supra note 362, at 91; see also LaFollette, supra note 125 ("[S]ituation sensitive rules will be effective only if we know in advance which features are morally relevant."); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 597 (1987).

377 See Beauchamp & Childress, supra note 72, at 28–32.

378 See Bernstein, supra note 335, at 219 ("Judgment is communal and intersubjective; it always implicitly appeals to and requires testing against the opinions of other judging persons."); Sunstein, supra note 362, at 69–74; see also Dennis Patterson, Law and Truth 169–79 (1996).

379 See Dworkin, supra note 52, at 211–15.

380 Cf. David Cole, Against Literalism, 40 Stan. L. Rev. 545, 548 (1988) (book review) (criticizing James Boyd White's rhetorical/poetical theory of legal analysis for limiting the participants in legal argument to lawyers, judges, and legal scholars). This delimitation of community is also not identical with "the state," as Stephen Pepper has suggested. See Pepper, supra note 179, at 958. Instead, the interested community must consist of all persons who are potentially affected by the activity of lawyers. See Wolf, supra note 93, at 43.
by judicial decisions, journalistic criticism (as in Watergate, the O.J. Simpson criminal trial, and the savings and loan collapse), the publication of longer narratives which highlight unethical behavior for the public (as in *A Civil Action*), the portrayal of fictional lawyers in popular culture, legislation (as in recent attempts to limit contingency-fee agreements and class action litigation), debate in the public arena, and even a mechanism as prosaic as lawyer jokes. Although it may seem counterintuitive to link the normative structure of a profession to extra-professional sources of criticism, this idea is not at all radical in the realm of judging. Courts have long recognized that the source of their legitimacy lies partly in the acquiescence of the public in their judgments. For example, the Supreme Court has acknowledged that it is influenced by the perceived legitimacy of its decisions:

The Court's power lies ... in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

... .

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle . . . .

This passage from the Court's unusual joint opinion in *Planned Parenthood v. Casey* illustrates the extent to which extra-judicial criticism and attacks on its legitimacy operate as one part of a feedback

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381 See, e.g., Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054 (Wash. 1993). In this case, a law firm claimed that its conduct of discovery in a civil case was consistent with prevailing professional norms, and obtained numerous affidavits of local lawyers and ethics experts to support its claim. The Washington Supreme Court, however, essentially responded, "If those are your norms, they're the wrong ones—*this* is how you should conduct discovery," and imposed heavy sanctions on the firm. The court in this case asserted its control over the *nomos* of lawyering, refusing to allow the practicing bar to maintain its normative hegemony. *Cf.* Koniak, *supra* note 23.

382 See Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. Cal. L. Rev. 1267, 1270 (1996) ("We believe the public's response is the most important legacy of the O.J. Simpson trial.").


loop, bringing the values of the American public within the purview of the Court’s deliberation, even though the justices are otherwise not subject to democratic process controls.\textsuperscript{386} Similarly, I have been concerned throughout this analysis with establishing the legitimacy of lawyers’ ethical decisions, particularly in cases where these judgments would have the effect of limiting the exercise of clients’ power. Lawyers, like judges, interpret legal texts against a background of principles of public morality that justify the applicable legal rules. Since lawyers are even more isolated than judges from control through ordinary political processes, they must be at least as concerned as the Court about respecting normative judgments made by the public. Moreover, as members of a closed profession, lawyers have powerful economic and social incentives not to report wrongdoing by one another,\textsuperscript{387} leading to an impoverishment of intra-professional critical precedent. In short, lawyers are not free to constitute themselves as a sovereign nomic community entirely isolated from social control.\textsuperscript{388} By broadening the relevant interpretive community to include informed members of the citizenry, lawyers can ensure that their interpretive decisions are informed by the appropriate background moral principles.

2. The Appeal of Casuistry

Several features of casuistry make it particularly apt as a model of ethical decision making by an agent confronted with multiple, con-

\textsuperscript{386} For a related point, see Robert M. Cover, \textit{Foreword: Nomos and Narrative}, 97 Harv. L. Rev. 4 (1983). After observing that many citizens interpret \textit{Roe v. Wade} and the Supreme Court’s death penalty jurisprudence as officially sanctioning murder, Cover argues that the public criticism of these decisions becomes part of the interpretive narrative that is constituent of the political community:

\begin{quote}
Even if the horror and resentment felt by such persons fails to manifest itself in the pattern of court decisions and their enforcement, the meaning of the normative world changes with these events. Both for opponents of abortion and for opponents of capital punishment the principle that ‘no person shall be deprived of life without due process of law’ has assumed an ironic cast.
\end{quote}

\textit{Id.} at 7.


\textsuperscript{388} Cf Michael C. Dorf, \textit{God and Man in the Yale Dormitories}, 84 Va. L. Rev. 843, 867 (1998). I am not endorsing the position, associated with Lord Devlin, that a community is entitled to enforce its moral standards regardless of whether those morals are true or false. \textit{See Patrick Devlin, The Enforcement of Morals} (1965). The dialectic interplay of public criticism and the bar’s efforts to define its own moral code is essential to assure that the community’s norms do, in fact, represent true moral beliefs.
flicting obligations. First, casuistical moral judgments are more or less tentative, and even the most certain conclusion is open to revision in light of later-discovered circumstances. The principal benefit of casuistry for our purposes, however, is its suitability for grounding ethical decisions against a background of plural, sometimes conflicting values. Some of the early founders of the tradition realized that there may be a genuine conflict of principles of moral obligation, so that there is no "faultless" way to resolve a practical dilemma. By abandoning the false hope of moral innocence, casuists created a decision procedure that was well suited to value pluralism.

Casuistry has deep roots in antiquity, but it achieved dominance as a method of reasoning during times of great religious strife, when previously certain bases for morality were called into question. For example, Christian casuists were called upon to resolve conflicts of duty between secular institutions and the Church. After the Reformation, Catholic casuists had to resolve questions of conflicting obligations brought about by the schism between faiths: May a Catholic serve as a judge in a Protestant kingdom? Can Catholics and Protestants enter into commercial contracts with each other? Do Catholics owe an obligation of obedience to Protestant rulers? Rather than regarding conflicting obligations as pathological cases to be explained away, casuistry took them as typical and evolved a decision procedure tailored to these conflicts.

Casuistry is useful for making ethical choices among plural values because it regards conflicting values not as rivals, but as complementary theories for resolving practical problems. Just as a lawyer might decide to build a case on a tort or contract theory, depending on which would be the most persuasive to its audience, an ethical decision maker might choose to emphasize consequences, duties, or bonds of loyalty, depending on the circumstances of the case. Lawyers do not pick theories of cases at random, of course. They can assess the likely persuasive value of a contract or tort theory only in light of their knowledge of how particular contract and tort cases have been resolved in the past, by adjudicators working within the same system of precedent. But no lawyer would seriously argue that it is theoretically impossible for a lawsuit to be brought under tort and

390 See Jonsen & Toulmin, supra note 331, at 78, 96.
391 See id. at 114–16.
392 See id. at 144.
393 See id. at 299–303; see also Sunstein, supra note 362, at 98–99.
394 See Jonsen & Toulmin, supra note 331, at 297–98.
contract theories simultaneously. Moreover, no lawyer would spend much time trying to construct a meta-theory to determine a hierarchical ranking of contract and tort principles in individual cases. Similarly, a problem in legal ethics might raise issues of loyalty, justice, and care, but it seems odd to seek a theoretical foundation that would enthrone only one of these ethical considerations as the master principle for resolving practical dilemmas.

In Sunstein's words, casuistical judgments are "incompletely theorized"—the resolution of a particular case is judged to be correct in light of past decisions, but there may nevertheless be deep disagreement about the higher-order theoretical justification for the decision.\textsuperscript{395} For example, if a previous case held that the Ku Klux Klan can meet and burn crosses, as long as there is no "clear and present danger" of imminent violence, then a judge considering an application for an injunction by the American Nazi Party, which wants to conduct a march in Skokie, Illinois, can conclude that the Nazis must be allowed to march, without working out a fully theorized account of the role of speech in a democratic society.\textsuperscript{396}

Casuistical judgments make use of the Rawlsian concept of an overlapping consensus.\textsuperscript{397} An overlapping consensus exists if two parties agree on normative principles to resolve a dispute, and these principles are justified in terms of more deeply held or fundamental principles. Significantly, these more fundamental principles may diverge, permitting agreement between parties who would otherwise be at odds. The locus of certainty is the particular case, not the moral first principles. In the free speech cases, it is not necessary to resolve the deep disagreement between Nazis and their liberal neighbors on most political issues; all that is required is that the disputing parties agree on the moral principles that should govern disputes over speech activities. For Sunstein, this is a great virtue of casuistry, since he takes as a given that there will be profound disagreement in a pluralistic society over foundational questions of justice.

Finally, some have claimed that this reasoning process, in which type cases are described and used as points of departure for the analysis of new cases, exemplifies the way in which practitioners actually make ethical choices. Doctors, for example, might report: "This is a Cruzan-type case, except here, instead of a feeding tube, the issue is

\textsuperscript{395} Sunstein, supra note 362, at 37; see also Williams, supra note 353, at 117; Larmore, supra note 351, at 29.

\textsuperscript{396} See Richardson, supra note 125, at 277; Sunstein, supra note 362, at 66–69.

\textsuperscript{397} See Rawls, supra note 106, at 144–50.
antibiotics.” It is certainly conceivable that practicing lawyers might wrestle with a disclosure case by reasoning, “This case resembles Spaulding, only the injury isn’t life-threatening and the plaintiff is scheduled to see his own specialist, who might discover the injury.” The source of moral certainty in this type of reasoning is the resemblance or distance between the present case and type cases, where the goodness or evil of the conduct in the type case is not subject to dispute. In bioethics, for example, doctors can regard the Nazi medical experiments as clear examples of how not to treat human research subjects, find another example in which the morality of the human research is more doubtful, although closer to the Nazi cases, and continue, via a process of “moral triangulation,” until sufficient light has been shed on the present case. The complexity of judgments of this nature may explain why anti-theories such as Llewellyn’s horse-sense are difficult to describe. If literally dozens of type cases and their outcomes are germane to ethical reasoning, only very experienced practitioners might be expected to grasp the range of relevant precedent and understand the application of these past cases to the present situation. Furthermore, if the precedent cases exemplify conflicting values, then they can do no more than suggest considerations to factor into practical deliberation—they cannot determine the case in advance of an experienced practitioner.

3. Some Objections and Responses

The very term “casuistry” comes laden with considerable baggage—it is generally used pejoratively by contemporary writers as a synonym for “sophistry” or “a quibbling, evasive way of dealing with difficult cases of duty.” Casuistry, it is charged, creates moral skepti-
cism, relativism, and laxity; it is a "mere farrago of excuses, loopholes, and evasions." 402 Certainly bad casuistry can degenerate into nothing more than an enterprise of offering excuses for self-serving behavior, as occurred with religious casuistry in the sixteenth century. But there is no more reason to tar the practice of casuistry with the corrupt practices of the sixteenth-century church than there is to use the Dred Scott decision as a model of constitutional interpretation. Most systems of practical reasoning of any complexity can be manipulated by a person acting in bad faith: "Uncertainty and imprecision beset hard moral choices. The more the intervening steps are multiplied and the more we are told that one thing can be explained in terms of another or derived from another, the more room is left for bias, self-deception, even sleight of hand." 403

Casuistry is nothing more than a rhetorical process of resolving moral dilemmas with reference to previously decided cases, paying due attention to analogies, distinctions, family resemblances, and other features of the factual settings of the cases, while remaining attentive to the more abstract theoretical principles that justify the proffered analogies and distinctions. Casuistry must be criticized in the same way one would criticize the common law: to show the process to be inherently susceptible to moral laxity, an opponent must do more than point to institutional malfunctions in which casuistry or common-law reasoning was used to legitimate abhorrent results. The common law justified appalling incidents, like the internment of Japanese-Americans during World War II, but it also enabled the Supreme Court to decide Brown v. Board of Education.

Bernard Williams criticizes casuistry for being too closely tied to local circumstances and, thus, encouraging ethical relativism. 404 This objection echoes the legitimacy problem we have encountered throughout this article—if case-by-case ethics proceeds in a kind of oscillation between particular judgments based on individual cases and higher-order principles, one is entitled to ask whose higher-order

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403 BOYK, supra note 126, at 57.

404 See WILLIAMS, supra note 353, at 96–97.
principles serve as the arbiter of the correctness of particularized judgments. Certainly the organized bar, if left to its own devices, might promulgate a set of "ethical" norms which does no more than pander to lawyers' self-interest. (Richard Abel and others have developed this criticism forcefully.) The definition of community proposed above, however, makes clear that it is not merely the lawyer's subjective judgment that constrains the practice of casuistry. A lawyer deliberating about the application a prior case should take into account not only what she and her fellow lawyers believe about that case, but also (wherever possible) what informed citizens have said about the praiseworthiness or blameworthiness of the conduct of the lawyers in the prior case.

Some high-profile cases are practically meaningless without understanding the public reaction to them. The O.J. Simpson criminal and civil defense cases, the Lincoln Savings debacle, the toxic-tort litigation described in A Civil Action, and the defense of President Clinton in the impeachment proceedings are important for what they show us about the public response to actions taken by lawyers, particularly where the public reaction differs from that of the organized Bar. Those cases have generated substantial discussion by nonlawyers, both on the level of higher-order ethical principles and particularized practical judgments. Thus, lawyers seeking to determine whether their ethical judgments are legitimate in similar cases should pay close attention to arguments made in newspaper op-ed pieces, on television and radio talk shows, and in stump speeches and other public statements by politicians.

Williams and others argue further that, by failing to provide for a method of challenging current cultural traditions, casuistry tends to be a conservative method of reasoning. James Boyd White has his...
imaginary Socrates argue against the proponent of an antifoundationalist, rhetorical ethics of lawyering:

Where the conventions of the art are not beautiful but ugly, will the work of the artist not be ugly too? And where do the standards by which he establishes his ideal come from? Are they not also formed by the musical or legal culture itself, with all of its defects? Either as a lawyer or musician, then, how can you have any confidence that the changes you make are true improvements, that the ideal to which you assimilate yourself is a proper one? The questions of beauty and justice are in the end the most important ones, and for them rhetoric is plainly useless: only dialectic will suffice.

These arguments ignore the internal constraints built into the process of reasoning from past cases. The method of casuistry contains within itself mechanisms for criticizing tradition. This kind of reasoning does not focus myopically on cases, but it constantly checks the outcomes of particular factual disputes against higher-order principles or maxims. If the rule derived from a previous case seems to mandate a result contrary to a higher-order theory, the previous rule can be rejected or modified. It should be emphasized that casuistical reasoning—like the common law tradition, Rawls’s reflective equilibrium, or Dworkin’s theory of adjudication—is dialectical. The appropriateness of an analogy in a normative argument depends not only on the fit between the facts of present and past cases, but it also depends on the consonance of the outcome of the present case with more general principles of morality. To avoid falling into the trap of monism, however, casuistical theories must remain anchored firmly to tradition at the same time. The point is that there is nothing inherently conservative about tradition—it provides the intellectual and

of legal reasoning fail to allow for radical critique or change). Similar criticisms can, and have been, leveled at virtue or tradition-centered theories of ethics. See, e.g., Elizabeth Frazer & Nicola Lacey, MacIntyre, Feminism and the Concept of Practice, in AFTER MACINTYRE: CRITICAL PERSPECTIVES ON THE WORK OF ALASDAIR MACINTYRE 265 (John Horton & Susan Mendus eds., 1994).

409 White, supra note 206, at 885.

410 SUNSTEIN, supra note 362, at 94–96; cf. GADAMER, supra note 365, at 250–51 (stating that just as reason must be located within tradition, and can never transcend tradition, tradition cannot place itself outside reason); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 29–30 (1995) (explaining that it may be possible to show that shared social understandings have been produced by structural injustice, but this argument need not assume an Archimedian point outside the social tradition; instead, a critic may appeal to deeper values of the culture that have gone unexpressed in majority understandings).

411 See DWORKIN, supra note 52, at 243–49; DWORKIN, supra note 59, at 67–68.
V. CONCLUSION

My ambition is not to crown one tradition of practical reasoning as the canonical method for lawyers to use in ethical deliberation. Each of the traditions has something to offer, and a fully worked-out theory of professional responsibility may draw from both strands at once. The revival of practical wisdom championed by Kronman usefully reminds us that the character of individual practitioners is as important as the rules, principles, consequences, rights, and duties ordinarily emphasized in philosophical inquiry. It also encourages fledgling lawyers to seek out the guidance of more experienced practitioners, whose character and judgment have developed over a long course of dealing with the realities of practical decision making.

Casuistry recalls the role of particular judgments, upon which there may be considerable agreement, and demands attention to the full factual setting of ethical dilemmas. In legal ethics education, the lessons of casuistry have already been learned through the numerous teachers who use role-playing scenarios, videotapes, and possibly live-client clinics to expose students to a richness of detail that could never be conveyed by appellate cases and hypothetical questions. The students can test their intuitive responses to these realistic scenarios against higher-order theoretical considerations, rather than trying to apply highly abstract principles from the top down. Casuistry also highlights the importance of the community in practical reasoning. It is the integrity of the community's normative understanding that serves as an important criterion for the validity of ethical judgments.

Both casuistry and Kronman's prudentialism require the lawyer as a moral agent to deliberate about public values, that is, the normative principles that justify the practice of lawyering in a democratic society. Focusing on public values in this way offers an alternative to the endless debate over the extent to which a lawyer's personal value commitments ought to influence her actions in the professional arena. As should be clear from this discussion, I do not mean to foreclose all reliance on personal values in legal ethics. Just as civil disobe-

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412 See Anderson, supra note 97, at 101–12; James Boyd White, Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 241 (1985) (stating that the language of law "in principle is open to challenge at every point . . . . [I]t is made by those who represent the interests of others; and [it] . . . has elements that enact a politics that can be seen as radically individualistic and indeed subversive of the claims of ideology and power").
dience may be justified in the face of a law that a person perceives as unjust, lawyers may also engage in civilly disobedient behavior in cases of stark conflict between public and personal values. For most lawyers, civil disobedience does not confront them on a daily basis. Thus, a potentially more robust role for personal values in professional ethics is suggested by the persistence of conflict among plural values. In many cases of value conflict, the methods of practical wisdom and casuistry will produce a result that is mandatory, given the norms of the professional community. The lawyer who failed to disclose the aneurysm in *Spaulding* and the defense lawyers who badgered women about their sexual practices in the Dalkon Shield litigation did something indefensible in light of the proper balance of the public values at issue. There are other cases, however, in which two or more choices may be equally defensible, given the professional norms of loyalty, justice, and care. In those situations, the lawyer will have some leeway to define her own professional self, based in part on the lawyer's personal value commitments. For now, this case is beyond the scope of the argument in this article. I hope to have more to say on the subject soon.

It is worth reiterating that this analysis is not intended to supplant entirely the law of lawyering. The public-values framework I have defended here is, rather, a basis for the moral assessment of lawyers and of lawyering activities. Its relevance to legal practice can be summarized as follows:

(1) The scheme of principles underlying the positive law of lawyering is necessary for interpreting given legal texts. Thus, if a rule or statute does not facially determine a lawyer's obligation, then a court, disciplinary body, or other authoritative tribunal may, tacitly or expressly, refer to the normative foundations of the practice of lawyering in order to elucidate the lawyer's ethical duty. The Minnesota Supreme Court's decision in *Spaulding* implicitly relies on public values in this way.

(2) If there is no legal text which speaks to the problem at hand, then the public values of lawyering provide some basis for a lawyer to reason through her ethical obligations. If the defense lawyers in the Dalkon Shield litigation had referred to these values, they would have observed a conflict between their duty to seek a favorable result for

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their client and their duty not to inflict undue emotional harm on third party witnesses. When outside observers criticized the Robins lawyers in that case, they were tacitly relying on these public values, arguing that the lawyers should have given more weight to the value of care and the avoidance of harm.

(3) The public values of lawyering may serve as a basis for criticizing existing legal rules and advocating reform. The debate surrounding a lawyer's disclosure obligations, which occurred during the drafting of the Model Rules, illustrates how the moral values of lawyering may serve as standpoints for criticism of existing legal rules. The older Model Code permitted the lawyer to disclose any future crime, no matter how minor. The Model Rules version is significantly more protective of client confidences, not permitting disclosure unless the crime is one that may result in serious personal injury. Critics argue back and forth, in moral terms, about whether this rule change was desirable. Simon claims that the almost complete prohibition on whistleblowing in the Model Rules "cements the lawyer's subordination to wealthy clients by depriving her of the only effective leverage she has to curb unjust conduct by the client...." On the other hand, the American Trial Lawyers Association, which is composed primarily of plaintiffs' personal-injury lawyers, sought a rule with limited provisions for mandatory disclosure because of its vehement opposition to a scheme of rules that would make "lawyers servants of the system, rather than the bulwark between organized power and the individual." Whether the Model Code or Model Rules correctly struck the balance between protecting third parties and serving one's client, this dialogue shows that the constituent public values of lawyering play a central role in law reform.

414 Model Code of Professional Responsibility DR 4-101(C) (1997) ("A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime.") (footnotes omitted). 415 Model Rules of Professional Conduct Rule 1.6(b) (1997).
416 Simon, supra note 2, at 68.
418 Some cases that look like ethical dilemmas may be institutional malfunctions that can be ameliorated by substantive or procedural reforms. See Weinstein, supra note 2, at 453; see also Jerome Frank, Courts on Trial: Myth and Reality in American Justice 85 (1949) ("[D]o not blame trial lawyers for using the techniques I have described. If there is to be criticism, it should be directed at the system that virtually compels their use . . . ."). Lawyers, like any other rational actors, respond to incentives, and if it is easy to cheat and get away with it, some percentage of lawyers can be predicted to try. United States District Judge Jack B. Weinstein, who has written extensively about ethical problems in mass tort litigation, has suggested a menu of ethi-
(4) Finally, and somewhat paradoxically, the public values of lawyering may serve as a basis for criticizing a lawyer's conduct, even though that conduct is permissible under law and there are good reasons not to change the applicable law. Consider the Abner Louima case in New York City, in which a police officer dragged an arrestee, Louima, down to the basement of a Brooklyn precinct house and violently sodomized him with a broken plunger handle. During the trial of the officer, the officer's lawyer suggested in his opening argument that the severe injuries to Louima's rectum and bladder were caused not by the officer's attack, but by consensual sexual activity earlier that evening. Most observers were outraged at the lawyer's argument, but some criminal defense lawyers insisted that he was not only permitted to make the argument, but would be constitutionally required to do so if it were a promising avenue of attacking the prosecution's case.\(^4\)

(The claim that the lawyer's consensual-sex theory was constitutionally required assumes something that should not be taken for granted—namely, the efficacy of that theory of defense. In this case, the argument probably inflamed the jury and made the officer's case look even weaker. For prudential reasons alone, the lawyer should not have used this line of defense.) I think it is possible to criticize the lawyer's arguments in the strongest possible terms, without thereby implying that he should be subject to any kind of disciplinary sanctions. The lawyer took a high-stakes gamble that one of the jurors might be sufficiently homophobic that he or she would vote to acquit, if the lawyer could plant the suggestion that Louima's injuries were the result of homosexual sex. That makes the lawyer a real jerk, but here it must be sufficient to call the lawyer a jerk, without seeking legal sanctions against him. The constitutional principles that a defendant is presumed innocent, that an accused is entitled to the assistance of counsel, and that the state must prove its case beyond a reasonable doubt are of such overriding importance that criminal defense lawyers enjoy a great deal of latitude to misbehave. Sometimes,
unethical behavior ought to go unpunished in deference to other institutional values.

It should be clear that "returning values to legal ethics" is not a simple matter, but there are reasons to expect that lawyers and law teachers will prove well suited to the task. For the public values of lawyering are kindred to the policies underlying other legal rules, which we are accustomed to discovering, criticizing, deploying in arguments, and conveying to our students. A values-centered approach to professional responsibility does not require lawyers to become theologians or moral philosophers; instead, it asks merely that they be lawyers. The public values that underlie the practice of law are plural, and often conflicting, but this situation is no different from any other area of human activity that is regulated by the law. We expect courts to resolve disputes in a "just, speedy, and inexpensive" manner. We seek a tort system that is efficient but also fair, and a constitutional order that appropriately balances democratic self-government and the rule of law. Notwithstanding Dworkin's occasional optimism on this front, there are seldom unambiguously right answers to vexing questions of political morality in any area of law, so we should not be conditioned to expect perfect clarity in legal ethics. But Dworkin has shown the way to a satisfying process for deliberating about right answers, a process that seeks a basis for resolving legal disputes according to the community's moral principles. What is the best light in which this community may be seen, given its multifarious moral commitments? By keeping this question in mind, we may better understand the ethical basis for the practice of lawyering.