**9.1: Theories of Legal Ethics**

*I catch him when he’s straying, like any brother would. Man turns his back on his family, he just ain’t no good.*[[1]](#footnote-0)

In one form or another, lawyers have existed since time immemorial. The very formation of a system for dispensing justice seems to summon forth the need for advocates to represent those requesting it. And as long as lawyers have existed, we have debated the ethics of lawyering. On the one hand, we believe that people are entitled to zealous representation by counsel, in order to ensure that their rights and interests are respected. But on the other, we question the ethics of a profession that exists in order to set aside the morals of society in favor of a client.

While philosophers have long struggled with legal ethics, the jurisprudential study of legal ethics is still in its infancy. The following excepts provide an eclectic selection of perspectives on modern philosophical legal ethics, beginning with a historical survey, and continuing with representative examples from canonical works.

[**David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 Georgetown Journal of Legal Ethics 337 (2017)**](https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2686&context=facpub)

We identify two “waves” of theoretical legal ethics scholarship, one that views the profession through the lens of moral philosophy, and a later wave that criticizes the moral philosophy orientation and approaches the profession through political philosophy. Roughly (but only roughly), the first wave focuses on the individual lawyer as a moral agent, and addresses the moral tension between ethical life and the lawyer’s role morality. The second wave focuses instead on legal representation as a political institution within a pluralist democracy, and links legal ethics to the requirements necessary for the profession to help sustain pluralist institutions. Chronologically, the first wave began in the 1970s and the second wave in the 2000s-but this too is very rough: the two schools of thought overlap in time more than the “two waves” metaphor suggests.

*The First Wave: Legal Ethics as a Problem of Moral Philosophy*

The first wave of scholarship and reflection grew out of the larger social and political ferment in the 1960s and 1970s. This was the time of the civil rights movement, the time of Martin Luther King Jr. and Malcolm X and the struggle for racial equality. It was also the beginning of the modern feminist movement. Importantly, it was also the time of the Vietnam War and the anti-war movement. To a great many people, young and old but mostly young, the Vietnam War proved, once and for all, the moral bankruptcy of American Cold War liberalism, with its slow progress on equality at home and its aggressive interventions abroad. That led to powerful political mistrust of the Establishment. This was also the era of the counter-culture. Notably, the counter-culture rebelled against conformism and careerism, which they thought were soul-deadening. Institutions became suspect, and that included legal institutions. Individual conscience, according to this world-view, must always trump institutional demands.

The widespread attitude of all these movements, both the political and the cultural, was therefore anti-authoritarian and intensely moralistic. Looking back, we can say that perhaps the movements lacked a political vision-like many social movements, they knew what they were against without knowing exactly what they were for. No doubt the movements were also too moralistic and too self-righteous. The fact remains that in this time of turmoil, an anti-authority stance seemed to many people like the bare minimum that human decency required.

The law schools were hardly immune to these larger currents in U.S. society. The New Left in the legal academy was active by the mid-1970s, and in 1977 the Conference on Critical Legal Studies held its first organizational meetings. Critical Legal Studies aimed at a radical critique of legal institutions based on the fundamentally moral ground that the law had become an enemy of an authentic and empathetic community.

*The Critique of the “Standard” Neutral Partisanship Conception*

Notably, two of the founding scholars of theoretical legal ethics identified with the left social movements of the time. In 1975, Richard Wasserstrom published a paper, titled “Lawyers as

Professionals: Some Moral Issues,” that launched philosophical legal ethics. Wasserstrom worried that the lawyer’s role “renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind,” and he questioned whether one-sided loyalty to clients can be reconciled with the universalism inherent in the moral point of view. Remember that Kant claimed that every human being, indeed every rational being, must be treated as an end in him- or herself, not merely a means to your own end. By contrast, the lawyer’s job is to treat the client as an end in himself, but nobody else.

Three years later, William Simon, a young law professor associated with Critical Legal Studies, published a brilliant 100-page article, titled "The Ideology of Advocacy." It was a fierce critique of traditional advocacy ethics. He began by providing the first precise definition of what has been called the “neutral partisanship” model or the “standard conception” of legal ethics. The standard conception, which was the target of much of the critical attention by philosophers in the emerging legal ethics scholarship, generally lists three principles: (1) partisanship (zealously pursuing the client’s lawful interests); (2) neutrality (not taking sides regarding the moral merits of the client’s ends); and (3) nonaccountability (being exempt from moral criticism for having helped another act immorally). Simon reviewed the main positions in U.S. legal thought that tried to justify the standard conception - legal realism, legal process theory, and the defense of client autonomy - and argued that none of them succeeds. Furthermore, he warned that by surrounding the law with a fog of technicality and mystique that only legal experts can understand, lawyers alienate their clients from the law. They substitute their own definitions of client problems for the subjective experiences of the client. In place of professionalized advocacy, Simon proposed a kind of deprofessionalization, where the lawyer’s personal

moral convictions would play a central role in determining how far to go on the client’s behalf.

There followed a veritable flood of writing on the themes that Wasserstrom, Simon, and a handful of others introduced. This was what we call the “First Wave” of legal ethics scholarship. It felt like a time of discovery - a time in which real intellectual progress was being made on some of the deepest questions in moral and legal philosophy. Instead of asking abstract conceptual questions, scholars were looking at the working lives of lawyers, and that seemed

like exactly the right direction to go. It still seems that way. Stanford law professor Deborah L. Rhode, another influential First Wave scholar, combined theory and sophisticated multidisciplinary analysis of regulatory issues such as the bar’s moral character requirement and its prohibition on unauthorized practice. Moreover, she gave attention to the necessary institutional aspects of the emerging field, such as casebooks, professional centers, and mentoring junior scholars. Rhode and Carrie Menkel-Meadow were also among the first theorists to bring an explicitly feminist perspective to legal ethics. Harvard law professor

David Wilkins situated legal ethics within American legal thought more generally, including the law and economics, legal process, and, importantly, legal realist traditions. Wilkins also raised crucial questions about the connections between race and role - asking, for example, whether a black lawyer could, as a moral matter, represent the Ku Klux Klan.

Also during the First Wave of scholarship, religiously affiliated scholars, most prominently Thomas Shaffer, asked about how specifically Christian lawyers should act within their role. (Scholars writing from the Jewish tradition have posed similar questions.) A Christian lawyer may wonder, for example, whether it is possible to be a lawyer without being involved in the fallenness of all human institutions, including the law.

*Defenders of a (More or Less) Standard Conception*

Not everyone in the First Wave of philosophical legal ethics was a critic of the standard conception. Traditional advocacy also had its defenders. A first, and deeply original, defense was offered by Charles Fried, who coined the striking metaphor of the “Lawyer as Friend.” Fried argued that a lawyer is like a special-purpose friend of the client. Morality allows us to favor our friends over other people, as long as we don’t violate the rights of third parties. Relationships with certain individuals - paradigmatically, family and friends - become important, constitutive aspects of a person's life. It follows that morality permits us to favor the interests of those with whom we are in particularly close, personal relationships over the more abstract commitment to the well-being of humanity as a whole. As the client’s friend, the lawyer adopts the client’s interests as his own, for adopting your friend’s interests as your own is part of the classical

definition of friendship. Furthermore, because the lawyer works within a legal system, she is not directly responsible for damaging outcomes the system produces - “the wrong is wholly institutional,” in Fried’s words. It is not a personal wrongdoing by the lawyer. As the saying goes, “don’t hate the player - hate the game.”

In response, Fried’s critics argued that he drew the wrong conclusion from his “lawyer as friend” analogy. One pointed out that if you adopt your friend’s interests as your own, that makes you morally responsible for them. Simon went even further in criticizing Fried. Emphasizing that normally the lawyer takes money for becoming the client’s friend, Simon complained that Fried had given the classical definition not of friendship, but of prostitution. Dauer and Leff believe that Fried’s conception of friendship - adopting the friend’s interests as your own - captures only a thin slice of what friendship is about, and the result is that “a lawyer is like a friend because, for Professor Fried, a friend is like a lawyer.” Despite these critiques, many lawyers today continue to see the attraction of Fried's vision, because it corresponds with an authentic experience

of representing clients.

A second powerful defense of the standard conception emphasizes that lawyers enhance their clients’ autonomy before the law. An autonomous person chooses her own ends. The lawyer’s role is to assist clients in doing what they have every right to do: pursue their ends to the limit set by the law, even if the lawyer thinks the client's ends are reprehensible. Assisting clients this way is an essential job in a rule of law regime, because the law is opaque and hard for laypeople to understand. All the lawyer is doing is helping clients do what they have autonomously chosen to do, and which the law permits them to do. That is clearly a good thing and a noble calling.

The late Monroe Freedman gave the autonomy argument a distinctive grounding in the American Constitution, which may have limited the influence of his work internationally, but which resonates powerfully with lawyers, particularly the criminal defense bar. For Freedman, the criminal defender’s all-in ethic of adversarial zeal on behalf of the client is grounded in the Fifth Amendment right to due process and the Sixth Amendment right to counsel - and, ultimately, the individual’s autonomy rights against state force that these doctrines embody. In his famous paper on the “three hardest questions” for criminal defense lawyers, Freedman argued that the duties owed to clients - confidentiality and competent representation - should have priority over the duty of candor to the tribunal. Lawyers, therefore, should permit clients to testify perjuriously. This position was so scandalous that then D.C. Circuit Court of Appeals Chief Judge Warren Burger, along with two other federal judges, actually filed disciplinary grievances against him. But Freedman never wavered from the view that, if a lawyer’s obligations are in conflict, then the duty to protect her clients should take precedence.

The First Wave highlighted a third defense of the standard conception, which has its origins in the adversarial structure of adjudication. Adversary argument seems like the best way to find the truth, and partisan advocacy seems like the best way to defend the individual’s rights - or so the argument goes. The search for truth and the defense of rights are social goods of enormous importance. If partisan advocates are essential instruments for finding truth and defending

rights, shouldn’t that be enough to justify the lawyer’s role?

The problem with the adversary system excuse is that it is only as good as the adversary system, which is an imperfect truth-seeker and rights-defender. Adversarial argument works best when lawyers are arguing issues of law, not issues of fact. When judges decide questions of law, hearing both sides of the questions argued in their most forceful form will almost certainly help the judges decide more intelligently. In purely legal arguments there are no confidences or secrets to conceal and no witnesses to impeach - there is a relatively pure dialectic of arguments carried on in the open.

It is different when lawyers argue about factual matters. There, the advocate’s job is to protect the client's secrets and cast doubt on the other side’s evidence - even if the advocate knows that the truth lies with the other side. Does a system with that design feature do a good job of finding truth? There are reasons to doubt that it does.

To summarize the First Wave of theoretical scholarship in four sentences, it holds:

1. Legal ethics is not only a matter of legal doctrine; at its most basic level, it is a subject in moral philosophy.
2. The principal question it must answer is how to reconcile the lawyer’s professional role morality with “ordinary” or “common” morality, when they seemingly conflict.
3. The role morality centrally involves a “standard” conception, according to which lawyers must zealously advance the client’s lawful ends, while maintaining moral neutrality toward those ends and the lawful means used to pursue them - and, furthermore, that lawyers are morally unaccountable for any “collateral damage” they inflict in their representation.
4. The arguments about role morality circle around the moral importance of the client-lawyer relationship, the value of client autonomy, and the moral significance of the adversary system.

*The Second Wave: From Moral to Political Philosophy*

Second Wave accounts begin with the political purpose of the legal system in a pluralist society. By a pluralist society, we mean a society of people with many different, sometimes competing, moral and religious beliefs. Concrete decisions must be made about a wide range of matters of importance to the community, yet citizens of that community disagree about what constitutes a good life, what ends are worth pursuing, and what facts bear on the resolution of these controversies. Such a society faces what Rawls calls the burdens of judgment. If pluralism

means anything, it is that rational people’s judgments, even about very basic matters, cannot be expected to agree - hence the “burden” that judgment carries, namely that reason and rationality do not yield unique right answers on contested moral and political questions.

Of course, a lawyer has a right to refuse a client on moral grounds. But refusal should be an exceptional event. Otherwise, lawyers are imposing their own moral views on their clients, and when they do that they are dishonoring the pluralism of society - the very same pluralism that democratic legal systems exist to preserve. Preserving pluralism provides a powerful reason for a lawyer not to engage in moral deliberation about the client’s ends or the lawful means used to pursue it. In the language of legal theory, it is an “exclusionary reason” - a second-order reason not to engage in first-order moral deliberation.

Less theoretically, respecting the institutional settlement is what practicing lawyers believe they are doing. Lawyers and practically-minded legal scholars have sometimes expressed annoyance at what they take to be philosophers’ broad-brush condemnation of advocacy as morally unjustified. One of the motivations behind Second Wave legal ethics scholarship was to take seriously the possibility that lawyers may be fully justified in doing what they do, even when it “looks nasty,” and then try to work out a philosophical explanation of how that could be the case.

These are the fundamental arguments of the Second Wave of philosophical legal ethics, in three sentences:

1. Legal ethics is a subject in political philosophy, not moral philosophy.
2. The political function of legal institutions is to resolve disputes in a pluralist society.
3. And that requires lawyers to abstain from moral judgment about their clients, understand their role of serving as agents of their clients, and follow the positive legal obligations in the code of ethics.

These thinkers are very different from each other. And they do not all defend traditional advocacy. Wendel, in particular, argues that the fundamental value lawyers must serve is fidelity to law, not fidelity to clients’ goals. This is particularly important when we turn from the lawyer’s role as courtroom advocate to the role of confidential advisor. As an advisor, the lawyer’s duty is to give the client a candid, objective opinion about the law, even if it is not what the client wants to hear. Of course we know that business clients often want opinion letters from their lawyers telling them they can do whatever it is they want to do; but the lawyer must be faithful to the law even if it means the client cannot do the deal.

Markovits shares the political premises of Wendel’s argument, including the view that law has “a distinctively political kind of authority” over citizens, which derives from the capacity of the law to sustain a stable framework for collective government, notwithstanding the incompatible interests, and plurality of reasonable moral commitments, of individuals. But Markovits places considerable additional emphasis on participation by citizens in the processes of democratic

self-government, an affective sense of solidarity with other members of the political community, shared ownership of political outcomes, and the transformative potential of political engagement.

Markovits argues that the primary lawyerly virtue is what he calls “negative capability.” This concept, which he borrows from the poet John Keats, suggests openness to others and the setting aside of one’s preconceptions. One might object that the world needs “negatively capable” lawyers like a hole in the head, if negative capability means pushing their own judgment out of the way.

*Second Wave Responses to the Moralist Challenge*

One area of concern with Second Wave arguments is the extent to which they seem to require lawyers to abstain from moral deliberation, for the sake of preserving the institutional settlement of our pluralist society. This is an issue about which the two co-authors disagree, and we think our disagreement is symptomatic of the difference between First Wave and Second Wave theoretical legal ethics - the difference, as we have explained, between treating legal ethics as a subject within moral philosophy rather than political philosophy. The former approach, recall, asks whether, as a moral matter, a good lawyer can be a good person even when representing morally disagreeable ends in morally disagreeable ways. Luban is skeptical that the answer is yes, and proposes an alternative - “moral activism” - in which the lawyer leaves her moral judgment switch in the “on” position and engages actively with the client on issues of ends and means. The latter points to the importance of lawyers to a legal system that knits together a pluralist society, and argues that lawyers must suspend moral judgment of their clients' ends and the lawful means needed to pursue them.

The argument for the moralist position is straightforward: fundamentally, our moral agency is always with us; it is inescapable. It is part of the human condition. Therefore an advocate can never ignore the damage her representation inflicts on innocent others. Human solidarity demands no less. Can any reason for side-stepping moral deliberation be truly exclusionary?

One response is that, no, there is no reason that would be truly exclusionary, but the bar for opting out of the requirements of a role can be set at a high level. On one influential conception of role morality, the occupants of a social role may opt out if the best way to serve the ends of the role is to do something that is not permitted by the constitutive rules of the role.

A second possible Second Wave response to the moralistic challenge is that First Wave moralists simply have no plausible moral psychology to back up the exacting demands they place on lawyers. You cannot lead a professional life in a constant state of moral arousal, any more than a physician can practice emergency room medicine in a constant state of sympathetic anguish for the patients. The traits of character the moralists call for are not functional, realistic, or desirable. They would make a lawyer a misfit in the teamwork-based setting of a law firm, and constant moral evaluation of client ends and means assumes cognitive capacities and moral virtue at an unrealistic level.

Another possibility for dealing with the alarms and torments brought upon others by the law, with which both of us have some sympathy, is to emphasize that public ethics deals with a world characterized by the necessity of compromise. Dilemmas in political life, of which the practice of law is a part, are sometimes incapable of resolution without a sense that there is something disagreeable, even wrongful, about the resolution, even though the conclusion may be justified.

**Questions:**

1. Luban and Wendel describe different theories of legal ethics that arose at different points in time. Which of those theories do you find most convincing and why?
2. Did the theories advanced in this article affect the practice of law and the application of the rules of professional responsibility? Can you identify any ways in which theories of legal ethics may have affected how lawyers argued cases, judges decided cases, or organizations regulated lawyers?

**Further Listening:**

* [*W. Bradley Wendel on the History of Philosophical Legal Ethics*, Ipse Dixit, January 23, 2019](https://shows.pippa.io/ipse-dixit/episodes/w-bradley-wendel-on-the-history-of-philosophical-legal-ethic)

**Legal Ethics According to the Legal Profession**

*Boswell: “But what do you think of supporting a cause which you know to be bad?”*

*Johnson: “Sir, you do not know it to be good or bad till the Judge determines it.”*[[2]](#footnote-1)

[**Louis D. Brandeis, *The Opportunity in the Law* (1905)**](https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-20)

The ethical question which laymen most frequently ask about the legal profession is this: How can a lawyer take a case which he does not believe in? The profession is regarded as necessarily somewhat immoral, because its members are supposed to be habitually taking cases of that character. As a practical matter, the lawyer is not often harassed by this problem; partly because he is apt to believe, at the time, in most of the cases that he actually tries; and partly because he either abandons or settles a large number of those he does not believe in. But the lawyer recognizes that in trying a case his prime duty is to present his side to the tribunal fairly and as well as he can, relying upon his adversary to present the other side fairly and as well as he can. Since the lawyers on the two sides are usually reasonably well matched, the judge or jury may ordinarily be trusted to make such a decision as justice demands.

But when lawyers act upon the same principle in supporting the attempts of their private clients to secure or to oppose legislation, a very different condition is presented. In the first place, the counsel selected to represent important private interests possesses usually ability of a high order, while the public is often inadequately represented or wholly unrepresented. Great unfairness to the public is apt to result from this fact. Many bills pass in our legislatures which would not have become law, if the public interest had been fairly represented; and many good bills are defeated which if supported by able lawyers would have been enacted. Lawyers have, as a rule, failed to consider this distinction between practice in courts involving only private interests, and practice before the legislature or city council involving public interests. Some men of high professional standing have even endeavored to justify their course in advocating professionally legislation which in their character as citizens they would have voted against.

Furthermore, lawyers of high standing have often failed to apply in connection with professional work before the legislature or city council a rule of ethics which they would deem imperative in practice before the court. Lawyers who would indignantly retire from a court case in the justice of which they believed, if they had reason to think that a juror had been bribed or a witness had been suborned by their client, are content to serve their client by honest arguments before a legislative committee, although they have as great reason to believe that their client has bribed members of the legislature or corrupted public opinion. This confusion of ethical ideas is an important reason why the Bar does not now hold the position which it formerly did as a brake upon democracy, and which I believe it must take again if the serious questions now before us are to be properly solved.

Here, consequently, is the great opportunity in the law. The next generation must witness a continuing and ever-increasing contest between those who have and those who have not. The people’s thought will take shape in action; and it lies with us, with you to whom in part the future belongs, to say on what lines the action is to be expressed; whether it is to be expressed wisely and temperately, or wildly and intemperately; whether it is to be expressed on lines of evolution or on lines of revolution. Nothing can better fit you for taking part in the solution of these problems, than the study and preeminently the practice of law. Those of you who feel drawn to that profession may rest assured that you will find in it an opportunity for usefulness which is probably unequalled. There is a call upon the legal profession to do a great work for this country.

[**Woodrow Wilson, *The Lawyer and the Community*, 192 N. Am. Rev. 604 (1910)**](https://www.jstor.org/stable/25106795?seq=1#metadata_info_tab_contents)

Lawyers are not a mere body of expert business advisers in the field of civil law or a mere body of expert advocates for those who get entangled in the meshes of the criminal law. They are servants of the public, of the State itself. They are under bonds to serve the general interest, the integrity and enlightenment of law itself, in the advice they give individuals. It is their duty also to advise those who make the laws?to advise them in the general interest, with a view to the amelioration of every undesirable condition that the law can reach, the removal of every obstacle to progress and fair dealing that the law can remove, the lightening of every burden the law can lift and the righting of every wrong the law can rectify. The services of the lawyer are indispensable not only in the application of the accepted processes of the law, the interpretation of existing rules in the daily operations of life and business. His services are indispensable also in keeping and in making the law clear with regard to responsibility, to organization, to liability and, above all, to the relation of private rights to the public interest.

Whatever may be the cause, it is evident that he now regards himself as the counsel of individuals exclusively and not of communities. He may plead the new organization of politics, which seems to exclude all counsel except that of party success and personal control; he may argue that public questions have changed, have drifted away from his field, and that his advice is no longer asked; but, whatever his explanation or excuse, the fact is the same. He does not play the part he used to play. He does not show the spirit in affairs he used to show. He does not do what he ought to do.

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

Traditionally, the organized bar has prided itself upon being a profession, based upon the well-accepted view that the primacy of service over profit is the criterion which distinguishes a profession from a business. Now, though, strong voices have begun to challenge the bar’s complacent view of itself. For example, in a recent speech to a joint luncheon of the American Judicature Society and the National Conference of Bar Presidents, Senator John V. Tunney of California criticized what he perceived as the bar’s over-emphasis on pecuniary return and declared that “the profession is kidding itself if it views Watergate as the flaw in an otherwise heroic tapestry of public service.”

In scholarly articles as well as in the popular press, lawyers are being condemned as valueless technicians who are more concerned with the tactical than with the ethical, and the blame for this general erosion in integrity is being attributed to the failure of the profession to discipline itself. Most of that criticism centers around enforcement of our canons of ethics-the tools by which the bar polices itself and the goals by which we judge ourselves. It is charged that our Code of Professional Responsibility does not in fact protect either the public or the recipients of professional services, but rather safeguards only the interests of an entrenched segment of the profession. Many would agree with Professor Waltz’s comment that: “By regulating ourselves and brooking no lay interference in the process, we too often avoid disciplining even the most

venal and inept among us.”

There is no doubt in my mind that the present state of our disciplinary machinery is deplorable and that we must perfect the professional system of disciplining and weeding out judges and lawyers who are inept, lazy, corrupt or dishonest. Happily, the organized bar has finally begun to move in this direction, but this is an effort which has a crucial prerequisite, the same prerequisite that Senator Ervin alluded to in his Honolulu speech: integrity. 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.

[**Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 Clev. St. L. Rev. 377 (1980)**](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2157&context=clevstlrev)

To become a lawyer is to be more than being available as a “hired gun” or a “legal mechanic.” To be sure, one of our great tasks is to be effective advocates. The history of our profession is rich with accounts of lawyers who risked careers by asserting their independence in opposition to the government or to popular attitudes. Andrew Hamilton did that in defending John Peter Zenger; John Adams did that when he defended the soldiers accused of what history calls the “Boston Massacre;” that is what Luther Martin and others did when they defended Aaron Burr in his trial for treason. Defending their clients, these men advanced the liberties of all. An independent judiciary alone is not enough; it must be supported by a strong, independent, courageous and competent bar. This is an imperative for a free people.

But lawyers are not “licensed” to promote conflict; they must be more than skilled legal technicians. We should be that, but in a larger sense, we must be legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role, as problem-solvers, harmonizers, and peacemakers, the healers - not the promoters - of conflict. Lawyers must reconcile and stabilize, for a democracy often functions best by compromise. For hundreds of years England and the United States have been able largely to avoid internecine conflict, vigilantism, and collective violence because lawyers have served as the indispensable “brokers” of social progress, providing the lubricant for acceptable resolution of controversies and for gradual change and evolution of the law. It bears repeating that we must see ourselves more clearly in the function of healers rather than as promoters of litigation.

Our profession carries public and ethical burdens with its privileges. Daniel Webster spoke of justice as “the greatest interest of man on earth.” As a profession with a monopoly over the performance of certain services, we have special obligations to the consumers of justice to be energetic and imaginative in producing the best quality of justice at the lowest possible costs for those who use it, and with a minimum of delay. It was in these respects that my late colleague, Charles Fahy, hoped that we would think of a lawyer and the law as forces for moral good, “as a civilization of its own, enhancing the whole of our civilization.”

**Questions:**

1. How do Brandeis, Wilson, Clark, and Burger define legal ethics? Do they provide a basis for determining whether an action is ethical?
2. How would you describe the ethical theories advanced by Brandeis, Wilson, Clark, and Burger in relation to the categories advanced by Luban and Wendel?

**The First Wave of Legal Ethics: Moral Theories**

[**Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rts. 1 (1975)**](https://heinonline.org/HOL/P?h=hein.journals/huri5&i=8)

Conventional wisdom has it that where the attorney-client relationship exists, the point of view of the attorney is properly different - and appreciably so - from that which would be appropriate in the absence of the attorney-client relationship. For where the attorney-client relationship exists, it is often appropriate and many times even obligatory for the attorney to do things that, all other things being equal, an ordinary person need not, and should not do. What is characteristic of this role of a lawyer is the lawyer’s required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance. Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established. The question, as I have indicated, is whether this particular and pervasive feature of professionalism is itself justifiable. At a minimum, I do not think any of the typical, simple answers will suffice.

One such answer focuses upon and generalizes from the criminal defense lawyer. For what is probably the most familiar aspect of this role-differentiated character of the lawyer's activity is that of the defense of a client charged with a crime. The received view within the profession (and to a lesser degree within the society at large) is that having once agreed to represent the client, the lawyer is under an obligation to do his or her best to defend that person at trial, irrespective, for instance, even of the lawyer's belief in the client’s innocence. There are limits, of course, to what constitutes a defense: a lawyer cannot bribe or intimidate witnesses to increase the likelihood of securing an acquittal. And there are legitimate questions, in close cases, about how those limits are to be delineated. But, however these matters get resolved, it is at least clear that it is thought both appropriate and obligatory for the attorney to put on as vigorous and persuasive a defense of a client believed to be guilty as would have been mounted by the lawyer thoroughly convinced of the client’s innocence. I suspect that many persons find this an attractive and admirable feature of the life of a legal professional. I know that often I do. The justifications are varied and, as I shall argue below, probably convincing.

But part of the difficulty is that the irrelevance of the guilt or innocence of an accused client by no means exhausts the altered perspective of the lawyer's conscience, even in criminal cases. For in the course of defending an accused, an attorney may have, as a part of his or her duty of representation, the obligation to invoke procedures and practices which are themselves morally objectionable and of which the lawyer in other contexts might thoroughly disapprove. And these situations, I think, are somewhat less comfortable to confront.

Nor, it is important to point out, is this peculiar, strikingly amoral behavior limited to the lawyer involved with the workings of the criminal law. Most clients come to lawyers to get the lawyers

to help them do things that they could not easily do without the assistance provided by the lawyer's special competence. And in each case, the role-differentiated character of the lawyer's

way of being tends to render irrelevant what would otherwise be morally relevant considerations.

The lawyer need not of course agree to represent the client (and that is equally true for the unpopular client accused of a heinous crime), but there is nothing wrong with representing a client whose aims and purposes are quite immoral. And having agreed to do so, the lawyer is required to provide the best possible assistance, without regard to his or her disapproval of the objective that is sought. The lesson, on this view, is clear. The job of the lawyer, so the argument typically concludes, 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. And the difficulty I have with all of this is that the arguments for such a way of life seem to be not quite so convincing to me as they do to many lawyers. I am, that is, at best uncertain that it is a good thing for lawyers to be so professional-for them to embrace so completely this role-differentiated way of approaching matters.

More specifically, if it is correct that this is the perspective of lawyers in particular and professionals in general, is it right that this should be their perspective? Is it right that the lawyer should be able so easily to put to one side otherwise difficult problems with the answer: but these are not and cannot be my concern as a lawyer? What do we gain and what do we lose from having a social universe in which there are professionals such as lawyers, who, as such, inhabit a universe of the sort I have been trying to describe?

[**William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29 (1978)**](https://scholarship.law.columbia.edu/faculty_scholarship/730/)

Conventional morality frowns at the ethics of advocacy. Public opinion disapproves of what it considers the lawyer’s most characteristic activities. Popular culture can reconcile itself to him only by pretending that all his clients are virtuous. The lawyer’s response takes the form of a dialectic of cynicism and naivete. On one hand, he sees his more degrading activities as licensed by a fundamental amorality lying beneath conventional morality. On the other hand, he sees his more heartening ones as serving an institutional justice higher than conventional morality. The two moods divide the profession as a whole, and the division can sometimes be seen in the professional lives of individual lawyers, as, for instance, when they turn from their paid efforts on behalf of what they admit to be private interests to their donated services on behalf of what they claim to be the public good.

The formal, articulate expression of the lawyer’s response is the “Ideology of Advocacy.” The purpose of the Ideology of Advocacy is to rationalize the most salient aspect of the lawyer’s peculiar ethical orientation: his explicit refusal to be bound by personal and social norms which he considers binding on others. The most elaborate expressions of the Ideology of Advocacy occur in officially promulgated rules of ethics, in doctrinal writings on legal ethics, the attorney-client evidentiary privilege, and the constitutional right to counsel, and in writings on the

legal profession.

Although this literature is voluminous, it is barren of any fundamental questioning of the ethical premises of legal professionalism. The profession has never been inclined to join issue on any but the most superficial level with the lay critique of these premises, and it presently seems less disposed toward reexamination of them than ever.

Of course, there is a growing body of writing addressed to the profession which is critical of the conduct of lawyers and professional organizations. Yet, most of these discussions take place within the framework of the Ideology of Advocacy and do not involve criticism of its premises. The more prominent of these discussions have been of two types. First, doctrinal writings on legal ethics and judicial procedure often take the form of a debate between the partisans of a “battle” model and the partisans of a “truth” model of adjudication. These writings criticize certain kinds of conduct by lawyers as inconsistent with one or the other of these models. Yet, almost all of the distinctive ethical views of lawyers can be rationalized in terms of one or the other of the models, and the differences between them are greatly exaggerated in the debate. Both models accept the basic principles of the Ideology of Advocacy and are primarily concerned with defending those principles.

Second, there is a substantial body of sociology and social criticism which focuses on the legal profession. Some of this literature argues that lawyers compromise their clients’ interests in order to advance their own interests. Other studies focus on an elite within the profession and argue that the elite has used professional ethics and organization to achieve prestige and economic privilege at the expense of the less powerful members of the profession and of the lower classes generally. Studies which emphasize the exploitation of clients explicitly accept the Ideology of Advocacy and criticize lawyers for failing to live up to it. Although studies which emphasize elite domination purport to criticize legal ethics and professionalism, they do not deal with the basic principles expressed by the Ideology of Advocacy. Instead, they focus on principles such as restrictions on membership in the profession and prohibitions on advertising and solicitation. Such studies are concerned less with the nature of legal services than with their distribution. In suggesting that the increased availability of legal services allegedly inhibited by professional ethics and organization would be desirable, these writings often rely on the Ideology of Advocacy. It is notable that writing from both perspectives often calls for reforms which would enlarge the size and power of the profession.

Although the three versions of the Ideology of Advocacy all defend the same core of basic principles, each is based on different attitudes and commitments, and each describes and recommends a somewhat different style of law practice. Although all three versions exert influence today, each originated in a distinct historical situation and attained its greatest influence at a different time. The influence of the three versions has also varied significantly among different strata of the profession and in different areas of law practice.

At the base of each version of the Ideology of Advocacy is an appeal to an aspect of the fundamental value of individuality: autonomy, responsibility, dignity. Yet, in each instance, the practices and attitudes of professional advocacy subvert the norms of individuality in the interest of a repressive conception of social stability. The essay will argue that to take the value of individuality seriously would require the abandonment of the Ideology of Advocacy and of legal professionalism. Indeed, it will also suggest that respect for the value of law itself may require the repudiation of legal professionalism.

[**Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589 (1985)**](https://heinonline.org/HOL/P?h=hein.journals/stflr37&i=605)

A more ethically reflective form of legal practice will require different ideological foundations. Lawyers must assume personal moral responsibility for the consequences of their professional actions. At its most fundamental level, such a redefinition abandons Durkheim’s faith in the ability of insular occupational communities to generate adequate normative visions. Given the tendency of parochial interests to skew ethical judgment, the justification for conduct must be tested by conventional techniques of moral reasoning. The rationale for professional action cannot depend on a reflexive retreat to role, which denies the need for reflection at the very point when reflection becomes most essential. To be convincing, professional judgments must withstand scrutiny by individuals seeking consistent, disinterested, and generalizable foundations for conduct. Counsel should no longer categorically deflect responsibility to some governmental or private agent acting in a presumptively ideal regulatory system. Rather, attorneys must confront the consequences of their decisions against a realistic social backdrop, in which wealth, power, and information are unevenly distributed, and democratic, adversarial, and market processes function imperfectly.

This reformulation of role in no sense contemplates that lawyers will become personally accountable for every adverse consequence that flows from client representation or collegial relationships. Under conventional ethical theories, moral responsibility depends on a variety of factors, including the significance of harm and the agent’s degree of involvement, knowledge, and capacity to .affect action. Nor does it follow that counsel must endorse a client’s every objective or course of conduct before providing representation. Whether particular forms of assistance are defensible depends not only on the specific acts involved but also on their social and economic contexts, and on the principles at issue.

What distinguishes this framework is the insistence on an ethical predicate - on an attempt to justify systematically the consequences of professional action. That clients may have a “legal

right” to engage in certain conduct or to invoke a particular procedure is conclusive neither of their moral right, nor of the appropriateness of counsel’s aid. Lawyers cannot simply retreat to role in the face of larger normative questions. To cite only the most obvious example, attorneys who delay safety standards they would privately endorse, or who knowingly assist the distribution of products with significant undisclosed risks, are implicated in the human suffering that may result. So too, in more common circumstances, counsel cannot continually resolve doubts in favor of those with a history of revising reality, misplacing discoverable documents, or operating on the fringes of fraud. In effect, the attorney can no longer avoid responsibility for allowing client interests to trump all competing concerns.

Nor is the maxim “judge not” an adequate response to collegial misconduct. Participation in a common enterprise entails some accountability for the practices it tolerates and the values it engenders. Attorneys who blink at over-billing, misrepresentation, or procedural belligerence thereby legitimate forms of professional acculturation that are debilitating for practitioners as well as litigants. To argue for individual assumption of responsibility, however, only begins analysis. The more difficult issue, which remains a highly contextual determination, is what that responsibility entails. Relevant factors include not only the magnitude and likelihood of potential harm and the attorney’s capacity to affect it, but also the personal and social costs that corrective action would impose. Among those costs, the possible loss of client or collegial trust is entitled to weight. In some instances, an individual's dependency, or a lawyer’s limited leverage and access to information, may make suspension of judgment the only practicable course.

So too, some limits to self-sacrifice demand recognition. To suggest that individuals are morally obligated to respond to every harmful consequence that they could potentially influence would impose paralyzing burdens. Conventional ethical theories do not posit that all humanity should live as Trappist monks, devote every discretionary dollar to famine relief, or pontificate

at every possible opportunity. Without some concept of supererogation, some “cut off for heroism,” no significant realm of individual autonomy would survive. If it is to provide useful

normative guidance, a reformulation of professional role must remain sensitive to normal human capacities for altruism, as well as the psychological and economic pressures of legal practice.

Yet while professional ideology need not mandate canonization, neither should it legitimate abdication. For lawyers to do for profit what they would deplore as decisionmakers cannot be justified simply by recourse to role. Under some circumstances, an attorney may be more able or inclined to make principled judgments than other individuals involved in the process. Depending on the context, the only acceptable course may be a refusal to aid, or an affirmative attempt to prevent asocial conduct.

Such contexts cannot, of course, be identified in the abstract. Yet to concede that decisionmaking will necessarily prove situational is not to embrace a totally relativist perspective. Given the heterogeneity of the American legal profession, collective adherence to some codified standards remains essential. Deference to established precepts such as honesty, fair dealing, or procedural civility is a necessary means of minimizing temptation and keeping normative ambiguity within reasonable bounds. Exhaustive evaluation of every act would yield a numbing moral perplexity. Given the inevitable human tendency to skew ethical assessments in expedient directions, an *a priori* commitment to certain principles remains appropriate. What is critical, however, is that those precepts be themselves morally defensible in a world of regulatory imperfections and gross socioeconomic disparities. By that standard, as earlier discussion suggests, one cannot convincingly generate a principle that all clients are entitled to either unqualified confidentiality or the maximum neutral partisanship they can afford.

That is by no means to imply that systematic reflection will yield determinate resolutions, or to overlook the limitations of moral methodology noted earlier. But this concession need not

invite paralysis. There may be no uncontrovertible answers, but there are better and worse ways of thinking about the questions. Thus, the attempt must be to create more channels within which serious normative dialogue can occur. Individuals must have ongoing occasions to confront ethical issues, to test their perceptions openly, and to raise concerns about client or collegial practices without professional risk. For that purpose, far more is needed than bar association advisory opinions or law firm conflict-of-interest committees. Rather, the profession must fashion structures within and across employing institutions that can encourage collective support and a sense of responsibility for normative concerns.

[**Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963 (1987)**](https://scholarship.law.nd.edu/law_faculty_scholarship/533/)

Paternalism, in most writing on the professions, is a bad word. But *pater* (father) is not a bad word. The Hebraic religious tradition chose and retains the word, if only as metaphor, to describe God, despite the difficulty of a theology of patriarchy. The description approximates with a family metaphor the understanding of the Hebrew prophets that the God of Israel is a God with feelings - the “divine pathos,” as Abraham Joshua Heschel called it. God’s pathos means that He feels as a father feels; the prophetic response to God is thus sympathy. Father,

consequently, is not a bad word; it cannot be. Writers on professionalism erred in thinking otherwise.

It is not a moral condemnation of standards of professional conduct, then, to call them “fatherly” (paternalistic); nor would it be a moral condemnation to call them “motherly” (maternalistic) or even parent-like (parentalistic). If we take our theological metaphors seriously, to analogize behavior to the parental is to fit it to our traditions. The retreat from parental metaphors in modern writing on professionalism is subject to two criticisms. First, the analysis has not proceeded deeply enough; writing on professionalism has been duped into announcing a moral principle when it should have been concerned with description - truthfulness - in the comparison of a professional person and a parent, and of the virtues of good parents and the failures of bad parents. Writing on professionalism should describe the moral reasons that we use family metaphors, in theology and in professional life and it then should turn those reasons into doctrine. Second, the condemnation of paternalism (parentalism) in modern writing on ethics in the professions is the product of the lonely-individual doctrine in philosophical ethics, and of the philosophical distinction between fact and value, particularly in its disposition to turn the parental metaphor into a moral principle.

Radical individualism is the philosophy of an adolescent who wishes he had no parents. The school of moral philosophy that posits a parentless moral agent duped us into accepting an untruthful description of the world. I notice that untruthful description in *The Case of the Unwanted Will*, when legal-ethics commentators describe the woman making the will as a radical individual rather than as a wife, a mother, and a member of a family. The alternative is to understand enough about oneself and one’s client to know that family words describe more than a set of social roles that a woman puts on as she might put on a hat.

The argument I make here is an argument from the Hebraic religious tradition. In Judaism, the family is not merely fundamental; it is ordained. God dealt with the family; He made a covenant with it. Israel is a family of families. This “master story” has innumerable implications, some obvious and some subtle, for Hebraic norms on sex, raising children, business and property, and inheritance. These implications turn on the moral teaching that a person alone is not complete; as the Midrash says, “He who lives without a wife lives without blessing, without life, without joy, without help, without good, and without peace.”

In Christianity, marriage is, in the Hebraic ethics of Jesus, so fundamental that it is sinful to dissolve it. St. Paul’s metaphors equate family and church, and speak of the church as the body of Christ. The early Christian church was a patriarchy that tried to be open to notions of equality and partnership within the metaphor of family. That aspiration was fundamentally Judaic: “Unity is a task, to endure means to be one.”

There are two ways to take account of the religious tradition in American legal ethics. One way is to note that the cultural deposits of most American lawyers include the religious tradition. Failing to take account of the tradition therefore is failing to be truthful. As Peter Berger put it, “The very least that a knowledge of religious traditions has to offer is a catalogue of heresies for possible home use.” That is, the religious tradition, when we are conscious of it, helps to keep us from repeating obvious moral mistakes and, more profoundly, it influences our behavior when we are not conscious of it. Berger thought that these influences were appropriate: “In everyday life it is just as important that some things can silently be taken for granted as that some things are reaffirmed in so many words.” In that sense, law-office behavior probably rests on religious tradition in an ordinary and everyday way. The risk in Berger’s reassurance, as Robert Bellah and his colleagues recently demonstrated, is that we will lose or distort influences that we do not bring into the light and make sense of. The work of bringing moral influences into the light and making sense of them is the purpose of the discipline of ethics.

[**Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. (1976)**](https://digitalcommons.law.yale.edu/ylj/vol85/iss8/3/)

In this essay I will consider the moral status of the traditional conception of the professional. The two criticisms of this traditional conception, if left unanswered, will not put the lawyer in jail, but they will leave him without a moral basis for his acts. The real question is whether, in the face of these two criticisms, a decent and morally sensitive person can conduct himself according to the traditional conception of professional loyalty and still believe that what he is doing is morally worthwhile.

It might be said that anyone whose conscience is so tender that he cannot fulfill the prescribed obligations of a professional should not undertake those obligations. He should not allow his moral scruples to operate as a trap for those who are told by the law that they may expect something more. But of course this suggestion merely pushes the inquiry back a step. We must ask then not how a decent lawyer may behave, but whether a decent, ethical person can ever be a lawyer. Are the assurances implicit in assuming the role of lawyer such that an honorable person would not give them and thus would not enter the profession? And, indeed, this is a general point about an argument from obligation: It may be that the internal logic of a particular

obligation demands certain forms of conduct (*e.g.,* honor among thieves), but the question remains whether it is just and moral to contract such obligations.

I will argue in this essay that it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's interests-that it is right that a professional put the interests of his client above some idea, however valid, of the collective interest. I maintain that the traditional conception of the professional role expresses a morally valid conception of human conduct and human relationships, that one who acts according to that conception is to that extent a good person. Indeed, it is my view that, far from being a mere creature of positive law, the traditional conception is so far mandated by moral right that any advanced legal system which did not sanction this conception would be unjust.

The general problem raised by the two criticisms is this: How can it be that it is not only permissible, but indeed morally right, to favor the interests of a particular person in a way which we can be fairly sure is either harmful to another particular individual or not maximally conducive to the welfare of society as a whole?

The resolution of this problem is aided, I think, if set in a larger perspective. Charles Curtis made the perspicacious remark that a lawyer may be privileged to lie for his client in a way that one might lie to save one's friends or close relatives. I do not want to underwrite the notion that it is justifiable to lie even in those situations, but there is a great deal to the point that in those relations - friendship, kinship - we recognize an authorization to take the interests of particular concrete persons more seriously and to give them priority over the interests of the wider collectivity. One who provides an expensive education for his own children surely cannot be blamed because he does not use these resources to alleviate famine or to save lives in some distant land. Nor does he blame himself. Indeed, our intuition that an individual is authorized to prefer identified persons standing close to him over the abstract interests of humanity finds its sharpest expression in our sense that an individual is entitled to act with something less than impartiality to that person who stands closest to him - the person that he is. There is such a thing as selfishness to be sure, yet no reasonable morality asks us to look upon ourselves as merely plausible candidates for the distribution of the attention and resources which we command, plausible candidates whose entitlement to our own concern is no greater in principle than that of any other human being. Such a doctrine may seem edifying, but on reflection it strikes us as merely fanatical.

This suggests an interesting way to look at the situation of the lawyer. As a professional person one has a special care for the interests of those accepted as clients, just as his friends, his family, and he himself have a very general claim to his special concern. But I concede this does no more than widen the problem. It merely shows that in claiming this authorization to have a special care for my clients I am doing something which I do in other contexts as well.

**The Second Wave of Legal Ethics: Political Theories**

[**Monroe H. Freedman, *A Critique of Philosophizing About Lawyers’ Ethics*, 25 Geo. J. Legal Ethics 91 (2012)**](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/302/)

In the world of real lawyers and real clients, “role differentiation” refers to a fiduciary relationship in which the lawyer promises to take all reasonable and lawful means to attain the objectives of the client. This promise is an inescapable part of any meaningful moral analysis. Also, lawyers function under ethical rules, many of which reflect ordinary morality, and violation of those rules can result in serious professional sanctions and malpractice liability. Those rules and that potential responsibility should not be ignored in proposals for radical changes in how lawyers serve their clients. In addition, lawyers in the United States are subject to a constitutionalized adversary system, which defines and limits their professional responsibilities in fundamental respects. When moral philosophers ignore these practical concerns, they produce articles and books that have no significance in the world of real lawyers and real clients. As Chief Justice Roberts recently observed: “What the academy is doing is largely of no use or interest

to people who actually practice law.”

Structural engineers do not debate whether using skyhook cables that drop magically from the sky would be a better way of building bridges than the present suspension method. Nor do they publish reply articles about how air traffic would have to be rerouted to avoid the non-existent sky hook cables. In a similar sense, philosophical theorizing about lawyers’ ethics, based upon unrealistic facts and the omission of critical authorities, is irrelevant to the real-life concerns of

lawyers and is a waste of scholarly effort.

My point is not that the rules of lawyers’ ethics do not demand serious reform from a moral perspective. On the contrary, more practical moral criticism is badly needed. One of the reasons for my impatience with the work of the philosophical ethicists is that their moral sensitivity and keen intellects could be used to bring about much needed improvement in the ethics and practice of lawyers and judges.

Finally, despite the ongoing need for reform of ethical rules and practices, I resent the irresponsible charge that the practice of law is inherently immoral or amoral. For more than half a century I have served as an associate, partner, supervisor, co-counsel, consultant, and mentor alongside countless lawyers who, like me, have found the practice of law to be an exhilarating, gratifying, and essentially moral profession of serving the dignity and autonomy of our fellow citizens and of maintaining the ideals of our constitutional democracy. This moral role of service to others, and to our society, would not be possible if lawyers were to view their relationship with their clients with a patronizing attitude of moral arrogance.

[**Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 Geo. J. Legal Ethics 1 (1995)**](https://heinonline.org/HOL/P?h=hein.journals/geojlege9&i=11)

When we try to control the definition of rights by relying on our laws of obligation, we seem ridiculous, as if we were advocating that the tail wag the dog. The ethical obligations of lawyers, whether they be those articulated by the courts in ethics rules or enforced by the courts in tort actions, are simply too weak to drive the definition of right. The idea that a constitutional right should be contoured to reinforce the obligations set forth in secondary (obligation) law, like the rules of legal ethics, seems absurd and is rejected easily both by the Supreme Court in *Strickland* and by the federal courts deciding whether due process has been satisfied in a class action proceeding through the provision of adequate representation.

Rights law is not only strong enough to overshadow obligation law, it is strong enough to stop obligation law altogether. The right having been satisfied, making state action appropriate, it seems at once unseemly and unnecessary to question whether obligations have been met. This attitude accounts for the legal obstacles that prevent tort actions and the absence of disciplinary proceedings in both the class action and the criminal defense context.

Unlike tax law, tort law or other sources of legal obligation in our normative world, ethics is not merely a source of obligation but the place where obligation is understood as dignifying and ennobling. Our normative structure thus allows for the possibility that obligation can be understood as something more akin to a blessing than a burden. But the fact that this idea is so central to ethics may account for the secondary status that ethics occupies in our world, culturally and legally. The idea basic to ethics - dignifying and ennobling obligation - is an idea adrift in an alien universe. It does not resonate with our basic normative structures and, thus, we cannot quite take the enterprise seriously. Our thought tends to get stuck in this circle: if the obligation were meant to be mandatory or binding in some strong sense, it would be legal; on the other hand, if the obligation were designed to be ennobling, it would not be a legal obligation, which we understand to be a burden visited on us by the state, not a gift.

[**Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 Clinical L. Rev. 501 (2006)**](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=886730)

Legal obligations in our world are not worthy of the name of ethics. By making that move we make ethics not just something more than law, more ennobling, but something also much less, less compelling. Ultimately, we conceive of ethics in terms of rights. We have the right to be ethical or not, which in terms of an ethic makes no sense at all. The inconsistency in our world between law and ennobling obligation is apparent when we start speaking of legal ethics, which claims to be both law and ethics, both mandatory and dignifying. It claims to occupy a place in our normative world that seems like it cannot exist, a place where rain falls up instead of down.

Despite these problems, courts sometimes, however reluctantly, take the responsibilities of lawyers seriously, although not often and never with the passion that courts speak of rights. Blinded by rights rhetoric in the case of vulnerable clients, courts are easily persuaded that their job is done, that obligation will somehow take care of itself, that the petty matter of lawyer obligation cannot dictate the outcome of the struggle between individual and state or even be allowed to speak after the outcome of that struggle has been determined. That is how we get looking glass ethics.

The solution is not to get rid of the rights the law provides these vulnerable clients. In our world, with its understanding of rights, such a move would signal precisely the wrong thing. The answer is to understand that rights are not a substitute for obligations, to reinstate the tort remedies, to enliven the disciplinary process, and to express commitment to obligations by using them to contour rights. For any of this to happen, we first need to realize how nonsensical a law our rights jurisprudence has created. It is a law that imposes fewer obligations where the need is greatest, that guarantees the least protection for the most vulnerable of clients. That end is inconsistent with what we set out to do when we confer a right and, thus, the result may be critiqued from within the rights framework itself.

An internal critique is, however, not enough. The inherent weakness of rights theory is an important and pervasive problem, not only in the little corner of concern that has served as the vehicle for this discussion, but also everywhere where basic needs remain unmet. For all those who believe that a just society provides more than freedom, the inherent weakness of rights theory presents a formidable obstacle to achieving justice. To address this weakness, we need more than an internal critique. We need a serious jurisprudence of obligation.

Ethics, legal ethics and judicial ethics in particular, is the natural starting point for such an effort. In legal and judicial ethics we find the possibility of dignifying obligations that are enforceable as law. Adrift in a legal world obsessed with rights, these areas of study have long been and remain the step-children of American legal thought. They are considered soft, secondary subjects not worthy of the attention of our most serious scholars. They are law that is not quite law because how could dignifying obligation be mandatory like law? And ethics that is not quite ethics because how could mandatory obligation like law be worthy of the name of ethics? These subjects posit a possibility not found elsewhere in law, a possible normative understanding we need to nurture and explore, not ignore or mock. By treating legal obligations that dignify as important features in our jurisprudential vision, we may not only be able to walk back through the looking glass. We may be able to bring with us new possibilities of achieving a more

just world.

[**Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 Geo. J.L. Ethics**](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622266.)

[**1065 (2010)**](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622266.)

The most familiar debate in legal ethics involves a critique of theories, such as those of Fried, Simon, and Luban, in terms of their attractiveness as maxims of action. Simon’s act prescriptions, for example, can be critiqued on the basis that they require a reasoning style that is at odds with the expectations of clients, and may result in the disregarding of client interests if they happen not to coincide with the discretionary judgment of the lawyer in question. Moreover, the act prescriptions of Simon’s theory give insufficient weight to the procedural norms and ideals which justice arguably constitutes. His theory is relentlessly focused on substantive justice. This position leaves little room to recognize the possibility that what we call justice, and what we as lawyers should aim for, is what results from the procedures of the legal system and is not a concept that identifiably exists outside of those procedures and constraints. On the other hand, Fried’s act prescriptions can be critiqued on the basis that they result in the perpetuation of distributive injustices, simply cementing existing social disparities. The critiques offered from a dispositional or psychological perspective are, however, of a different nature. The point here is not to ask whether the acts prescribed, if accomplished, would be desirable. But is to ask whether the type of lawyer who would be able to accomplish those acts in a given case is the type of lawyer we would want to have across every case, across the totality of the legal system as a whole. Further, it is to ask whether, even if desirable, the type of lawyer posited is realistic. Simon and Luban, for example, rely on lawyers to be relentlessly focused on justice or morality. This may be how we think lawyers should be, but is it the equivalent of wanting basketball players who are 12 feet tall?

Each theory faces some uncomfortable questions when analyzed in this way. For Simon, the major challenge for his theory is that the maverick nature of Simon’s lawyer has an obvious maladaptive version. In its (perhaps) best conception, it may simply make the lawyer more like a critic or academic and less like an advocate. In its worst conception it turns the lawyer into the equivalent of a whistleblower. As sociological studies of whistleblowers show, the maladaptive version of Simon’s lawyer is not the “hysterical malcontent” of stereotypes, but someone

for whom individuality is a defining fact of life. The “unassimilated individual” is not necessarily the best building block for a stable and functional organizational culture. Research by business ethicists and social psychologists shows that organizational cultures may be much more important, as a determinant of behavior, than the personal characteristics of individuals within the organization. Individuals are susceptible to biases and other cognitive failings, which predictably cause certain kinds of dysfunctions within organizations. Organizational cultures can be designed to blunt the impact of some of these psychological processes. Assuming that it is possible to reform the cultures of law firms, government offices, and in-house legal departments, the last thing one would want in a lawyer is a disposition to regard established rules and procedures as optional guidelines, to be disregarded whenever the lawyer believed justice or morality would be better served. The whole point of rules and procedures is to supplant individual decision-making, presumably because we have reason to believe that following the procedures will do better in the long run, as compared with relying on the judgment of individuals.

In addition, it is not obvious that adopting the personality of the whistleblower or outlier is something that people can do as an act of choice or will. Being willing to question and stand outside the institutional, cultural, and personal structures within which you work may require exceptional fearlessness as to the consequences of your actions, a willingness to fight instead of conciliate those with whom one spends a great deal of time, and a preference for autonomy in judgment over relationships with others. Particularly given the social stigmatization suffered by many whistleblowers, it is unlikely that most individuals within an organization would want to be mavericks. It seems odd to ground a general theory of ethical lawyering, intended to be applicable to all lawyers, on a complex of personal characteristics that occurs only infrequently in the form of exceptionally courageous and individualistic people.

This critique is similarly applicable to Luban’s lawyer. As noted, discourses of morality are highly disfavored in legal practice. The ability to swim upstream against those norms either requires an agility in negotiating human relations, which may not be realistic to expect across the population as a whole, or an unwillingness to “go along and get along” which may be undesirable and dysfunctional in institutions which are generally good rather than generally corrupt. Luban worries a great deal about the possibility of organizations socializing individuals into acquiescing in great evils – what may be called the Eichmann problem. In response, he emphasizes relying on personal moral tripwires. Lawyers should establish in advance lines they will not cross, and be willing to walk away from a situation that seems to be pushing them to cross these lines. The experimental evidence showing how easily individuals may be socialized into corruption is both what pushes Luban to recommend this all-or-nothing solution and the grounds for criticizing his reliance on integrity as a way of ensuring ethical conduct by lawyers. If organizations are indeed such a powerful socializing force, then it would appear futile to regulate organizational wrongdoing by insisting on right conduct by individuals. Instead, it would be more effective to regulate organizations directly to ensure that they maintain healthy ethical cultures.

Yet another issue for Luban is his reliance on possession of moral character. This is where the critique of social psychology and the observation of the relationship between conduct and circumstances has the most bite. While psychological personality has, as noted, some ability to withstand the situationality critique, moral character has relatively little. Moral character seems neither identifiable nor predictive of conduct. That is to say, managers of an organization might do well to try to select employees on the basis of “Big Five” personality characteristics such as agreeableness, stability, or conscientiousness. It would be less helpful, and possibly even counterproductive, to choose on the basis of perceptions that a candidate is honest or loyal. One must consider the possibility of committing the fundamental attribution error, and confusing responses to situational pressures with cross-situationally stable moral dispositions.

For Fried the issues are different, and relate to the problem of the maladaptive version of the morally skeptical lawyer, who loses her moral compass altogether, pursuing victory for her client at any cost. Fried’s ideal of being a special purpose friend is attractive on its face, but does not carry over completely to the lawyering context. As many of Fried’s critics have pointed out, friends are not privileged to do nasty things for each other merely because they are friends. Moreover, lawyers sometimes treat their clients in ways they would never treat their friends – for example, refusing to help a client once he runs out of money. Indeed, some lawyers learn to be hired guns rather than friends. An obviously extreme version of this is the New Jersey lawyer who (allegedly) arranged for the murder of witnesses to secure acquittal for his clients on the basis of “no witnesses, no case.” This is not to suggest that every lawyer who embraces zealous advocacy so loses his moral bearings as to view murder as an acceptable litigation strategy, but is to suggest the fine line that exists between reserving moral judgment and losing the capacity for it. Critics of Fried’s metaphor complain that he drained the morally attractive features out of friendship in order to make it work as an analogy for representing clients. By doing that, he made it difficult to find anything of real moral value in the lawyer-client relationship. Thus, as Postema suggests, a lawyer feels torn between her personal moral commitments and the requirements of role, and thus begins to identify with a stance of detachment from all normatively significant commitments.

**Questions:**

1. How do these different theories of legal ethics conceptualize the attorney “role morality” differently?
2. Reflecting on the different subjects discussed in this casebook, do you think any of these concepts of legal ethics influenced the way lawyers and judges acted?
3. How might adopting one of these theories of legal ethics affect legal decisionmaking?

*When peace, like a river, attendeth my way, when sorrows like sea billows roll; whatever my lot, thou hast taught me to say, it is well, it is well with my soul.*[[3]](#footnote-2)

1. Bruce Springsteen, *Highway Patrolman*, Nebraska (1982). [↑](#footnote-ref-0)
2. James Boswell, *Life of Johnson* (1791). [↑](#footnote-ref-1)
3. Horatio G. Spafford, *It Is Well with My Soul* (1873). [↑](#footnote-ref-2)