

# COMMEMORATIVE CONTRIBUTIONS

## Philosophical Legal Ethics: An Affectionate History

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### ABSTRACT

*The modern subject of theoretical legal ethics began in the 1970s. This brief history distinguishes two waves of theoretical writing on legal ethics. The “First Wave” connects the subject to moral philosophy and focuses on conflicts between ordinary morality and lawyers’ role morality, while the “Second Wave” focuses instead on the role legal representation plays in maintaining and fostering a pluralist democracy. We trace the emergence of the First Wave to the larger social movements of the 1960s and 1970s; in the Conclusion, we speculate about possible directions for a Third Wave of theoretical legal ethics, based in behavioral ethics, virtue ethics, or fiduciary theory.*

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INTRODUCTION

The English Whig historian Thomas Babington Macaulay, who trained as a lawyer, archly questioned the willingness of a lawyer, “with a wig on his head, and a band around his neck [to] do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire.”<sup>1</sup> Never mind the guinea. What kind of person, merely upon occupying a social role, feels free to set aside universal human duties and virtues? In one way, this problem about the lawyer’s role morality is among the oldest of all philosophical questions, going back to Plato’s critique of the Sophists.<sup>2</sup> Remarkably, though, very few modern jurists—and, for that matter, very few moral philosophers—wrote about the professional ethics of lawyers in the century before the 1970s. There were platitudes aplenty,<sup>3</sup> but little sustained theoretical analysis.<sup>4</sup> In the 1970s, though, something unexpected happened. There was a sudden outpouring of articles and books on theoretical legal ethics, which gave birth to the modern subject. Its origin and rapid development is a fascinating piece of intellectual history, which

1. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xxi (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*] (quoting THOMAS BABINGTON MACAULAY, *Francis Bacon*, in 2 *CRITICAL AND HISTORICAL ESSAYS* 290, 317 (1926)).

2. See, e.g., PLATO, *Gorgias* (W.D. Woodhead trans.), in *THE COLLECTED DIALOGUES OF PLATO* 229 (Edith Hamilton & Huntington Cairns eds., 1961). By “role morality” we mean the moral obligations and permissions associated with social roles—for example, the lawyer’s moral duties of confidentiality and zeal, as well as the lawyer’s moral permission to promote client interests even at the expense of worthier ones.

3. Former Supreme Court Justice Tom C. Clark chaired a special committee for the American Bar Association (ABA), subsequently known as the Clark Commission, to study lawyer discipline. It has been called the starting point for the revolution in the field of legal ethics. See Vincent R. Johnson, *Justice Tom C. Clark’s Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 35 (2005). However, Justice Clark’s best-known contribution to the field as a sole author is notable mostly for its pious generalities, such as asserting that the most important lesson of Watergate is that intellectual and moral integrity are important, and that the bar has devolved from a noble profession to a profit-seeking business. See Hon. Tom C. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 250–52 (1975). Unfortunately, much of the commentary on legal ethics, even (or particularly) by distinguished bar leaders and judges, had this homiletic quality.

4. The sole exception was Lon Fuller, a great legal philosopher at Harvard University; but his writings on legal ethics in the 1950s and 1960s were largely ignored in the scholarly world. Mostly, they still are. See generally David Luban, *Rediscovering Fuller’s Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801 (1998), reprinted in REDISCOVERING FULLER: *ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN* (Willem J. Witteveen & Wibren van der Burg eds., 1999).

also tells us a great deal about the profession as it has evolved since then. This commemoration of the *Georgetown Journal of Legal Ethics* is an apt occasion to examine this history. Father Robert Drinan, founder of the Journal, welcomed the theorists. (One of us, Luban, recalls getting a phone call from Father Drinan, who with his usual infectious enthusiasm began “Hi, this is Bob Drinan. What do you think of my journal?” At that time, we had met only once.) Father Drinan’s vision was a journal that would address practical problems, not only theoretical ones, but he fully understood how deeply entwined practical legal ethics is with theory. Father Drinan understood as well that the revived interest in fundamental moral problems connected with the lawyer’s role put wind in the sails of legal ethics scholarship and made the *Georgetown Journal of Legal Ethics* not only necessary but possible.

The short history that follows is selective, and—we wish to emphasize—very personal to the two authors. Other participants in the evolving discourse of theoretical legal ethics would no doubt tell the story in a very different way. We don’t apologize for offering a personally inflected history; we do apologize to scholars whose work we have overlooked. Given space constraints and the desire not to get too deep into the weeds of these debates, we make no claim to being comprehensive in this survey. In particular, there are many important scholars whose work has been left out of our history. Furthermore, the story we tell is mostly a U.S. story. For reasons that we don’t entirely understand, philosophical legal ethics flourished in the United States more than a decade before it attracted interest internationally.

In what follows, 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 that Macaulay’s quote highlights. 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.

In our Conclusion, we speculate briefly on current themes in scholarship that may represent a third wave of theorizing about legal ethics.

## I. THE FIRST WAVE: LEGAL ETHICS AS A PROBLEM OF MORAL PHILOSOPHY

### A. THE SOCIAL AND POLITICAL BACKGROUND

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.<sup>5</sup>

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. As Robert Gordon put it in a well-known paper about Critical Legal Studies published the same year the *Georgetown Journal of Legal Ethics* was founded,

CLS is a movement mostly of law teachers, but also including some practitioners, which started for most of us in the late 1960s or early 1970s out of a sense of dissatisfaction with our own legal education. We hoped to produce some work about law that would try to make clear and convincing our felt uneasiness, and to work those inchoate feelings of dissatisfaction into a critique

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5. On the political side, perhaps the best exemplar is the Port Huron Statement, the founding manifesto of Students for a Democratic Society—for example:

The goal of man and society should be . . . finding a meaning in life that is personally authentic; a quality of mind not compulsively driven by a sense of powerlessness, nor one which unthinkingly adopts status values . . . Personal links between man and man are needed, especially to go beyond the partial and fragmentary bonds of function that bind men only as worker to worker, employer to employee, teacher to student, American to Russian.

Students for a Democratic Soc’y, *The Port Huron Statement* (1962), <http://coursesa.matrix.msu.edu/hst306/documents/huron.html> [<https://perma.cc/YU9E-4VR3>]. On the counter-cultural yearning for something outside of institutions, there is no better exemplar than Timothy Leary’s 1967 mantra “turn on, tune in, drop out.” A useful history is TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (rev. ed. 1993).

with some cogency and content . . . . But at the same time it is a movement in pursuit of some shared political and social objectives . . . . [W]e are united in that we would like our work, in so far as it is possible, to help in modest ways to realize the potential we believe exists to transform the practices of the legal system to help make this a more decent, equal, solidary society—less intensively ordered by hierarchies of class, status, “merit,” race, and gender—more decentralized, democratic, and participatory both in its own forms of social life and in the forms it promotes in other countries.<sup>6</sup>

Not coincidentally, Gordon is among the most distinguished legal ethicists, and his paper *The Independence of Lawyers* counts among the classics of the theoretical literature.<sup>7</sup> Even though relatively few legal academics and lawyers joined Critical Legal Studies, a great many sympathized with CLS, and even more sympathized with the vision of the larger social movements.<sup>8</sup>

It is worth mentioning that the clinical education movement arose during the same period of social ferment and calls for reform—and some of the most distinguished theoreticians of legal ethics are, or began their careers as, clinical scholars.<sup>9</sup> The close connection between clinical education and the development of theoretical legal ethics is fascinating, but it would take another article to explore the many complications in this chapter of the history.

## B. 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. Richard Wasserstrom, who is now eighty

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6. Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 196–97 (1987).

7. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) [hereinafter Gordon, *The Independence of Lawyers*].

8. For example, in the early 1980s, the Conference on Critical Legal Studies claimed 350 members, while its 1982 annual conference drew 1,000 participants. Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 201 (1984). Similarly, our impression is that a large number of the scholars whose work appears in Kennedy and Klare’s 1984 bibliography of Critical Legal Studies (CLS) scholarship would identify themselves as crit sympathizers but not necessarily as crits. Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). This includes several prominent legal ethicists: Howard Lesnick, Carrie Menkel-Meadow, and Deborah L. Rhode; others, Richard Abel, Robert S. Gordon, and William H. Simon, are more closely and directly identified with CLS. One of us (Luban) would place himself in the ranks of the sympathizers. See the title essay in DAVID LUBAN, *LEGAL MODERNISM* (1993). Another (Wendel) self-consciously identifies with pre-CLS movements such as the legal process school. See, e.g., W. Bradley Wendel, *The Craft of Legal Interpretation*, in *INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT: FROM THE RULE OF THE KING TO THE RULE OF LAW* 153 (Yasutomo Morigiwa ed., 2011).

9. There are, indeed, too many to name, and we won’t try. We will merely mention several of the prominent theorists who began or continue in the clinical world: Anthony Alfieri, Gary Bellow, Clark Cunningham, Kate Kruse, Peter Margulies, Carrie Menkel-Meadow, Abbe Smith, and Paul Tremblay. A classic account of the origins of clinical education is Michael Meltzer & Philip G. Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976).

years old, is a philosopher, law professor, and civil rights lawyer of great eminence (now retired). In 1975 he published a paper, titled *Lawyers as Professionals: Some Moral Issues*,<sup>10</sup> 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.<sup>11</sup> By contrast, the lawyer's job is to treat the *client* as an end in himself, but nobody else. As two other scholars put it rather savagely, "When one desires help in those processes whereby and wherein people are treated as means and not as ends, then one comes to lawyers, to us."<sup>12</sup> They added: "Thus, if you feel the need for a trope to express what a lawyer largely is, perhaps this will do: A lawyer is a person who on behalf of some people treats other people the way bureaucracies treat all people—as nonpeople."<sup>13</sup> Even Macaulay was barely this nasty.

Wasserstrom wrote in a calmer and more dispassionate spirit. He raised hard and fundamental questions about the lawyer's role morality, but he did not claim to answer them. He saw the other side as well. He was fully aware that social roles and one-sided loyalties are deeply woven into the fabric of human morality, and always have been. Consider the social role of a parent. Parents favor their own children over other people's children, and it would be very strange if universal morality condemned parental favoritism, which is basic human nature. Universal morality has its claim on our moral imagination, but so do social roles. The problem is figuring out how to reconcile these claims.<sup>14</sup> Even though Wasserstrom did not solve the problem, the very fact that he raised it resonated with the social movements of the time: he questioned established roles on basically moral grounds. Notably, *Lawyers as Professionals: Some Moral Issues* also raised the question of whether lawyers are overly paternalistic to their

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10. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975) [hereinafter Wasserstrom, *Lawyers as Professionals*].

11. Most famously in IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, in PRACTICAL PHILOSOPHY (THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT) 79 (Mary J. Gregor ed. & trans., 1996), AK. 4:428.

12. Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977).

13. *Id.*

14. Richard Wasserstrom, *Roles and Morality*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 24, 26–27 (David Luban ed., 1983); see also LUBAN, LAWYERS AND JUSTICE, *supra* note 1, at 105–16 (exploring the tension between a morality of roles and a morality that rejects the claims of roles). Another pioneering work on professional ethics (including legal ethics) that focuses on the problem of role morality is ALAN GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980) [hereinafter GOLDMAN, MORAL FOUNDATIONS]. See also MICHAEL J. KELLY, LEGAL ETHICS AND LEGAL EDUCATION (1980).

clients, another question about lawyers' roles that has become a staple of theoretical legal ethics.<sup>15</sup>

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."<sup>16</sup> 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.<sup>17</sup> 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) non-accountability (being exempt from moral criticism for having helped another act immorally).<sup>18</sup> 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.<sup>19</sup> Years later, Simon abandoned deprofessionalization, but at the time it seemed like a promising idea.<sup>20</sup> Wasserstrom, too, had flirted with a

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15. See, e.g., David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454; Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010) [hereinafter Kruse, *Beyond Cardboard Clients*].

16. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 [hereinafter Simon, *Ideology*].

17. *Id.* at 36–37. Murray Schwartz provided a similar definition concurrently with Simon. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673 (1978). The main difference is that where Simon emphasized the Principle of Neutrality, Schwartz emphasized the Principle of Moral Nonaccountability. To the best of our knowledge, the label "standard conception" of legal ethics originated in Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980), another of the pioneering essays in First Wave theoretical legal ethics. But see Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529 [hereinafter Schneyer, *Standard Misconception*] (arguing that there is nothing standard in the so-called "standard conception" as moral philosophers understand it).

18. See, e.g., TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* 5–12 (2009) [hereinafter DARE, *COUNSEL OF ROGUES*]; see *supra* text accompanying note 17 (addressing that different scholars produced somewhat different formulations of the neutral partisanship model, with Simon emphasizing neutrality rather than moral nonaccountability).

19. Simon, *Ideology*, *supra* note 16, at 130–42.

20. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998) [hereinafter SIMON, *PRACTICE OF JUSTICE*]; Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 230 (Robert L. Nelson et al. eds., 1992). For an early critique of deprofessionalization, see Postema, *supra* note 17, at 71–73.

deprofessionalized model of the lawyer's role.<sup>21</sup> Both of them, in this respect, were attracted by the counter-culture's critique of conformism.

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. One of us (Luban), is a proud member of the First Wave and reports that it was very exciting. 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> (The connections between race and the lawyer's role have been pursued by Anthony Alfieri in a great many publications.<sup>27</sup>)

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21. Wasserstrom, *Lawyers as Professionals*, *supra* note 10, at 22–24.

22. Luban's major First Wave statement is LUBAN, *LAWYERS AND JUSTICE*, *supra* note 1.

23. See, e.g., Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981). For more theoretical work, see, for example, Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); DEBORAH L. RHODE, IN *THE INTERESTS OF JUSTICE* (2000).

24. See Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985). See generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

25. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

26. See David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995); see also David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993). Not incidentally, in the status-conscious world of the legal academy, the fact that junior scholars at Harvard and Stanford would at the start of their careers self-identify as legal ethicists was important to the legitimacy of the field.

27. Here, as befits the occasion, we cite two that appeared in the pages of this Journal: Anthony V. Alfieri, *Objecting to Race*, 27 GEO. J. LEGAL ETHICS 1129 (2014); Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991).



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.<sup>28</sup> (Scholars writing from the Jewish tradition have posed similar questions.<sup>29</sup>) 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.<sup>30</sup> Because the answers to questions formulated in these terms would themselves be dependent upon theological commitments, the influence of the religious-lawyering literature was somewhat limited. Its wider impact depended upon its translation into what Rawls would call public reasons, in which case it risked losing its distinctive prophetic voice.<sup>31</sup>

Shaffer, we might add, does not come from the progressive and counter-cultural milieu we have previously identified as an inspiration for some of the First Wave. He is a former dean of Notre Dame Law School, and those who read his 1971 article defending property rights against “liberal bias,” or his blistering critique of liberal democracy, might mistake him for the conservative gentleman-lawyer he often writes about.<sup>32</sup> Yet Shaffer (who describes himself as “left of center” and criticizes the gentleman-lawyer’s penchant for patriarchy<sup>33</sup>) has come to explicitly identify with some of the most radical strains in Christianity, a kind of Book of Acts Christianity that Shaffer himself describes as “countercultural”: economic egalitarianism, opposition to coercive power, suspicion of patriotism as a kind of idolatry.<sup>34</sup> His vision of legal ethics is equally radical: it involves lawyers taking on a relationship of ministry to their clients, which he

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28. See, e.g., THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981) [hereinafter SHAFFER, ON BEING A CHRISTIAN]; Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 FORDHAM L. REV. 1089 (1998); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); see also Howard Lesnick, *No Other Gods: Answering the Call of Faith in the Practice of Law*, 18 J.L. & RELIGION 459 (2002). For a noteworthy recent contribution to the religious lawyering literature, see ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE (2013).

29. See, e.g., Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOYOLA L.A. L. REV. 1771 (1996); Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993); David Luban, *A Midrash on Rabbi Shaffer and Rabbi Trollope*, 77 NOTRE DAME L. REV. 889 (2002), reprinted in DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 301 (2007); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999).

30. See, e.g., Milner S. Ball, *A Meditation on Vocation*, in RADICAL CHRISTIAN AND EXEMPLARY LAWYER: HONORING WILLIAM STRINGFELLOW 129 (Andrew W. McThenia, Jr. ed., 2006); see also STANLEY HAUEWAS, AFTER CHRISTENDOM?: HOW THE CHURCH IS TO BEHAVE IF FREEDOM, JUSTICE, AND A CHRISTIAN NATION ARE BAD IDEAS (1st ed. 1991).

31. Shaffer, who was deeply influenced by the Mennonite theologian John Howard Yoder, warns religious lawyers that acting as a prophet might lead the world to view you as a kook. Thomas L. Shaffer, *On Being a Professional Elder*, 62 NOTRE DAME L. REV. 624, 640 (1987).

32. Thomas L. Shaffer, *Men and Things: The Liberal Bias Against Property*, 57 A.B.A. J. 123 (1971); see THOMAS L. SHAFFER & MARY SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 13, 24 (1991).

33. SHAFFER & SHAFFER, *supra* note 32, at 36 n.1, 51–58.

34. Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon’s Practice of Justice?*, 51 STAN. L. REV. 903, 907–10 (1999).

describes in rather terrifying terms: “The scene to superimpose on the jail cells where we talk to the guilty is Jesus and the tax-gatherers. The scene to superimpose on the frightful image of my client receiving his punishment is Dismas on the cross, Dismas with an advocate and a companion hanging by his side.”<sup>35</sup> As for the neutral partisanship model, Shaffer calls it “the unique, novel, and unsound adversary ethic.”<sup>36</sup>

### C. 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.”<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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

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35. SHAFFER, ON BEING A CHRISTIAN, *supra* note 28, at 79.

36. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

37. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

38. *Id.* at 1071.

39. *Id.* at 1085.

40. Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, in *THE GOOD LAWYER*, *supra* note 14, at 59 n.4.

41. Simon, *Ideology*, *supra* note 16, at 108.

lawyer.”<sup>42</sup> 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. One of us (Luban), has witnessed this again and again among clinic students, for example those who represent poor people seeking political asylum and women who are victims of domestic violence. The students often become intensely wrapped up in their clients’ lives, so much so that their teachers warn them about the importance of maintaining boundaries. They truly are lawyers as friends, although perhaps not in the sense that Fried had in mind.

A second powerful defense of the standard conception emphasizes that lawyers enhance their clients’ autonomy before the law.<sup>43</sup> 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,<sup>44</sup> 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 perjurally.<sup>45</sup> 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.<sup>46</sup> But Freedman never wavered

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42. Dauer & Leff, *supra* note 12, at 578.

43. This argument is articulated forcefully in Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

44. See, e.g., MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975). Freedman, later with co-author Abbe Smith, prepared a student textbook that is actually a sustained argument for the view that the fundamental role of lawyers is to vindicate the Constitution’s protection of the rights of individuals against the state. See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* (5th ed. 2016).

45. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). The other two “hardest questions” concern the destructive cross-examination of an opposing witness who the lawyer knows is telling the truth, and explaining the law to the client, knowing that the client will tailor his story to the available defenses.

46. See Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008) (recounting this history).

from the view that, if a lawyer's obligations are in conflict, then the duty to protect her clients should take precedence.<sup>47</sup> Abbe Smith, who joined Freedman as co-author of *Understanding Lawyers' Ethics*, has offered equally powerful defenses of the criminal defender's role, although Smith bases them not only on autonomy rights but also on a critique of the criminal justice system.<sup>48</sup>

The autonomy argument is powerful, but in our view it is not decisive.<sup>49</sup> To see why (briefly departing from our historical narrative), consider a notorious case that has been discussed frequently in the legal ethics literature, the Dalkon Shield intrauterine device products liability litigation.<sup>50</sup> The Dalkon Shield caused infections that sterilized thousands of women. Although the litigation centered on whether the product was defective, defense counsel theorized that certain sexual and hygienic practices were an alternative causal explanation for the pelvic inflammatory disease suffered by the plaintiffs. To defend the cases, the company's lawyers devised a brutal but effective tactic, which became known as the "Dirty Questions List." During the pre-trial discovery, they asked the women graphic and even humiliating questions like: "How often did you have anal sex?" and "When you go to the toilet, do you wipe from back to front?" They also asked them for the names and addresses of all their sex partners "other than your husband," presumably so those partners could be questioned on the same intimate subjects. The lawyers argued that the "dirty questions" were relevant to the legal question of causation, because they might reveal alternative sources of pelvic infection. Unfortunately, the judge agreed and permitted the questions.

In reality, everyone understood that the real purpose was intimidation—to warn the women that if they went forward with their cases, they might be humiliated by having to answer the "dirty questions" in open court. One woman complained that the questions were "like an obscene telephone call."<sup>51</sup> She answered them anyway, but many other women abandoned their cases. That was exactly what the company wanted—so the lawyers' intimidation tactics succeeded. The defense lawyers made the conscious choice to assist the client using the "dirty questions" strategy. Why should they be excused from moral blame for their autonomous choice to harm and humiliate injured women? They will

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47. In one sense, however, Chief Justice Burger prevailed: he wrote the unanimous opinion in *Nix v. Whiteside*, 475 U.S. 157 (1986), which held that a lawyer who warned his client that the lawyer would inform the court if the client testified perjurally did not violate the client's Sixth Amendment rights.

48. See generally FREEDMAN & SMITH, *supra* note 44; Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFFSTRA L. REV. 925 (2000).

49. See David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637; David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1035–43 (1990).

50. See W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 24–26 (2010) [hereinafter WENDEL, *FIDELITY TO LAW*]; David Luban, *The Adversary System Excuse*, in *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 29, at 35–36; DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 669 (2d ed. 1998).

51. RONALD J. BACIGAL, *THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY* 19–20 (1990).

respond indignantly: “No no! All I was doing was defending my client’s autonomy.” But that is not *all* they were doing. The “dirty questions list” did two things: it defended the client’s autonomy *and* it harmed and humiliated the innocent. You cannot assert half the act description but reject the other half. In fact, the “dirty questions” intimidation tactic defended the client’s autonomy *by* harming and humiliating the innocent, so the two halves of the act description are bound together as closely as flesh and blood.

The question of whether act descriptions done within the lawyer’s role can be translated into act descriptions in ordinary moral terms is a fundamental one in professional ethics. After all, there is a big difference between wielding a knife in a street fight and an operating room; one is maiming, the other is surgery. The question is a major theme in a significant work on professional ethics—Arthur Applbaum’s *Ethics for Adversaries*.<sup>52</sup> There are numerous intelligible descriptions that can be offered of the questioning in the Dalkon Shield case, including: A man asking creepy, intrusive questions about a stranger’s sexual practices; a man trying to intimidate a victim from seeking redress; or, a lawyer obtaining evidence to support a defense in a civil lawsuit. Which of these is the appropriate description? We know, from John Searle among others, that the social practices in which acts are embedded can change the description of the acts.<sup>53</sup> Familiarly, certain acts such as “hitting a single” are possible only within the social practice of baseball. As Applbaum argued, however, the possibility of giving an institutional act description, such as “taking a deposition,” does not magically erase the description in ordinary moral terms, like “dirty questions” and “humiliating”—no more than the description “home run” would magically erase the description “breaking a nearby window” when a sandlot ballplayer hits a long ball that travels a tad too far.<sup>54</sup>

The Dalkon Shield case reveals another problem with the autonomy argument. Here, the defendant was not a natural person but a corporation. We may agree with Kant that autonomous choice is the highest human faculty, the source of human dignity. The same can hardly be said about a corporation, which is a juridical person but not a moral person, and which has no human dignity.<sup>55</sup> (As

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52. ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999) [hereinafter APPLBAUM, *ETHICS FOR ADVERSARIES*]. The relevant chapter was originally published as Arthur Isak Applbaum, *Are Lawyers Liars? The Argument of Redescription*, 4 *LEGAL THEORY* 63 (1998). For other notable contributions to the role morality literature by moral philosophers outside the legal academy, see GOLDMAN, *MORAL FOUNDATIONS*, *supra* note 14, at 1–33, 90–155; Alan Gewirth, *Professional Ethics: The Separatist Thesis*, 96 *ETHICS* 282 (1986); Michael O. Hardimon, *Role Obligations*, 91 *J. PHIL.* 333 (1994); Judith Andre, *Role Morality as a Complex Instance of Ordinary Morality*, 28 *AM. PHIL. Q.* 73 (1991); Mike W. Martin, *Rights and the Meta-Ethics of Professional Morality*, 91 *ETHICS* 619 (1981).

53. See, e.g., JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995).

54. APPLBAUM, *ETHICS FOR ADVERSARIES*, *supra* note 52, at 91–98.

55. A corporation can own an act, but not own moral responsibility for an act. See DAVID LUBAN, *TORTURE, POWER, AND LAW* 291 (2014) [hereinafter LUBAN, *TORTURE, POWER, AND LAW*] (acknowledging Amy Sepinwall’s use of this distinction). Luban observes that his argument has never attracted much support:

the saying goes, a corporation has no soul to damn, no body to kick.) Its officers and directors have autonomy in the moral sense, but they are not the lawyer's client.<sup>56</sup> It seems, then, that the autonomy argument is weak when the client is an organization.

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? Monroe Freedman championed this line of argument in his 1975 book *Lawyers' Ethics in an Adversary System*, but it appeared as early as 1958 in a quasi-official report co-authored by the great legal philosopher Lon Fuller—arguably the first-ever modern article on theoretical legal ethics.<sup>57</sup> One of us labeled this argument the “adversary system excuse,” and in an early paper found it at best only a weak pragmatic justification for what lawyers do.<sup>58</sup> 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

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In *Lawyers and Justice*, I argued that the organizational attorney-client privilege should be abolished, because organizational clients are not subjects with human dignity, and the privilege costs society too much by facilitating corporate cover-ups. The argument, which I naively regarded as among the strongest in my book, attracted no subsequent discussion, not even criticism. Apparently my recommendation was too fanciful to take seriously.

David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 29, at 87. The deafening silence may be due to the fact that lawyers don't think the attorney-client privilege has much to do with human dignity, least of all in the organizational setting. As the Supreme Court stated in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the purpose of the privilege is to allow a free flow of confidential communications between attorney and client so that the attorney can learn all the relevant facts and then provide advice to the client on how to comply with the law. Norman Spaulding has recently developed a historical and normative critique of *Upjohn*, contending that the function of the privilege is to reinforce a moral division of labor; the attorney and client can deliberate confidentially about the legality of a proposed course of conduct, but then it is the client's decision whether to comply with the law. See Norman W. Spaulding, *The Privilege of Probity: Forgotten Foundations of the Attorney-Client Privilege*, 26 GEO. J. LEGAL ETHICS 301 (2013); Norman W. Spaulding, *Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege*, 2013 J. PROF'L LAW. 135. This may be an interesting variation on the traditional dignitarian argument for an organizational attorney-client privilege, which serves to reinforce the moral and legal accountability of corporate managers.

56. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2016) [hereinafter MODEL RULES].

57. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958) [hereinafter *Report of the Joint Conference*].

58. David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER, *supra* note 14, at 83. Luban revised and corrected this essay, and would refer interested readers to the later version, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 29, at 19.

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. The best efforts by empiricists to answer that question are inconclusive, for an obvious reason: when the system fails to produce the truth, it remains hidden, like buried treasure or dark matter. Therefore we will never be in a position to say “the system fails five percent of the time (or ten percent, or twenty percent).” How could we know? But consider a common sense argument. Suppose you face a crucial life decision, for example a choice between two attractive but very different job possibilities. If the adversary system really is the best method of finding the truth, you would ask friends, or hire lawyers, to investigate the possibilities, and then use every trick in the litigator's bag to try to persuade you of one or the other—tricks that might include efforts to suppress important facts. The ironically named discovery process in civil litigation can be abused by lawyers who play games like asserting frivolous objections and assertions of privilege, artificially narrowing the scope of responsive information, and burying “hot documents” in thousands of pages of irrelevant dreck.<sup>59</sup> It is obvious that no sane person would make a life decision in such a perverse way. Thus, whatever permission lawyers have to take a highly partisan stance when arguing legal questions, it would seem that more of an attitude of neutrality is called for when dealing with facts.<sup>60</sup>

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

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59. See, e.g., Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *FORDHAM L. REV.* 773 (1998).

60. See, e.g., W. Bradley Wendel, *Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 *YALE J.L. & HUMAN.* 105 (2016).

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.

## II. THE SECOND WAVE: FROM MORAL TO POLITICAL PHILOSOPHY

### A. SECOND WAVE BASICS: THE LAWYER’S ROLE IN A PLURALIST DEMOCRACY

So the arguments went, back and forth, during the First Wave of philosophical reflection on legal ethics. These debates persist. But time moves on, and minds move on. In the last two decades, a fresh generation of scholars entered the arena and took the field in a new direction.<sup>61</sup> They argued that the question that preoccupied the First Wave—how can role morality be reconciled with universal morality?—or, as Charles Fried posed it, “Can a good lawyer be a good person?”<sup>62</sup>—is simply the wrong question. It treats legal ethics as a subject within moral philosophy. But the lawyer’s role is not really an aspect of ordinary moral life, like the role of parent or neighbor. It is fundamentally institutional—part of a scheme of political institutions and practices that has the governance of the community as its end. Generalizing from an ordinary moral relationship such as friendship, as Fried did, misses the point that the legal system is impersonal and bureaucratic in a way that friendships are not. Fried’s critics saw this as a fatal flaw in his analogy, and it very well may be, but it can also be seen as the starting point for a different normative perspective on the lawyer’s role. The difference between natural friendship and political “special-purpose” friendship is one of the insights that motivated what may be called the Second Wave of philosophical legal ethics.

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.<sup>63</sup> If pluralism means anything, it is that rational people’s judgments, even about very basic

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61. See Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer’s Point of View*, 16 YALE J.L. & HUMAN. 45 (2003) (recognizing this emerging theme in scholarship); Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493 (2011) (assessing second-wave legal ethics scholarship from an insider’s perspective).

62. Fried, *supra* note 37.

63. See JOHN RAWLS, *POLITICAL LIBERALISM* 54–58 (1993).



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.

In products liability and consumer protection, for example, one can imagine a range of reasonable but conflicting views about what should be a manufacturer’s responsibility for the well-being of consumers, given the benefit of the product to consumers and the background risks to which users of a product are exposed in any event. But there must be some basis for manufacturers and consumers to form long-term expectations about product safety and the liability of manufacturers—otherwise there will be fewer beneficial consumer products and medical devices available. The solution to this problem is the establishment of a political process that creates laws and legal institutions for the peaceful and orderly resolution of conflicts.<sup>64</sup> This apparatus is what is sometimes called an “institutional settlement”—and every society requires an institutional settlement to survive and prosper. Notably, our institutional settlement includes the law of lawyering, including rules of ethics and procedure, among its elements. Even if we don’t like the results the settlement produces in an individual case, the very existence of society requires us to abide by the settlement anyway.

If lawyers refuse to represent clients because they have moral objections to the clients’ ends, they are violating the terms of the institutional settlement. 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.<sup>65</sup>

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.<sup>66</sup> 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

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64. See, e.g., SCOTT J. SHAPIRO, *LEGALITY* 213 (2011) (focusing on the moral aim of law to address this type of problem within political communities).

65. JOSEPH RAZ, *THE AUTHORITY OF LAW* 22–23 (1979).

66. See, e.g., Monroe H. Freedman, *A Critique of Philosophizing About Lawyers’ Ethics*, 25 *GEO. J. LEGAL ETHICS* 91 (2012); M.B.E. Smith, *Should Lawyers Listen to Philosophers about Legal Ethics?*, 9 *LAW & PHIL.* 67 (1990); Schneyer, *Standard Misconception*, *supra* note 17; Geoffrey C. Hazard, Jr., *My Station as a Lawyer*, 6 *GA. ST. L. REV.* 1 (1989); Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 *U. PA. L. REV.* 751 (2011). An extended critique is Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 *HARV. L. REV.* 2009 (1990).

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.

You can find this argument set out in books by the New Zealand philosopher Tim Dare and by one of the co-authors of this Essay (Wendel).<sup>67</sup> But variations on the argument also mark the writing of other Second Wave theorists, among them Kate Kruse, Daniel Markovits, Alice Woolley, and Norman Spaulding.<sup>68</sup>

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.<sup>69</sup> 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

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67. WENDEL, FIDELITY TO LAW, *supra* note 50; DARE, COUNSEL OF ROGUES, *supra* note 18.

68. See DANIEL MARKOVITS, A MODERN LEGAL ETHICS (2008); Alice Woolley, *The Lawyer as Advisor and the Practice of the Rule of Law*, 47 U.B.C. L. REV. 743 (2014); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931 (2007); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2003); Kruse, *Beyond Cardboard Clients*, *supra* note 15.

69. See WENDEL, FIDELITY TO LAW, *supra* note 50, at 59 (distinguishing legal entitlements from client interests, and arguing that only the former are the lawyer's ethical concern). One complication arises when we recognize that the state's vision of the law, and more specifically the law of lawyering, may be different from the bar's own, client-centered vision of that same law. Exposing that difference, and warning of its dangers to public values, is one of the themes of Susan P. Koniak's writing. Koniak is one of the most original theoretical legal ethicists, and her work does not fall neatly into our First Wave/Second Wave typology. Koniak argues that the profession's vision of the law is all too often self-serving and obstructionist—for example, placing excessive weight on client confidentiality at the expense of mandatory disclosure obligations written into public law. Her fundamental moral critique of the legal profession is that the organized bar is far more interested in protecting the interests of the powerful than it is in enforcing law designed to protect the weak. See, e.g., Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrongs with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1 (1995); Susan P. Koniak, *When Courts Refuse to Frame the Law, and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075 (1993); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992).

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.<sup>70</sup> 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.<sup>71</sup>

Markovits argues that the primary lawyerly virtue is what he calls "negative capability."<sup>72</sup> This concept, which he borrows from the poet John Keats, suggests openness to others and the setting aside of one's preconceptions. Keats described it as "capable of being in uncertainties, [m]ysteries, doubts, without any irritable reaching after fact and reason."<sup>73</sup> Rather than exercising her own judgment, a lawyer must "efface herself, or at least her personal beliefs about the claims and causes that she argues."<sup>74</sup> For Keats, negative capability is the essential virtue of a poet, who in Keats's aesthetics must not let her own personality obscure the poem's subject: perhaps paradoxically, the poet's craft consists of making herself invisible to let the subject shine through. Many trial lawyers will nod their heads in agreement: it takes all their skill to make it seem that the client's case is so powerful that it speaks for itself with no need for a lawyer's skill.

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.<sup>75</sup> The root cause of many high-profile scandals in the American legal profession, including the participation of lawyers in the savings and loan crisis of the 1980s and the spectacular rise and fall of Enron in the early 2000s,<sup>76</sup> have been caused by lawyers who "remain content with half knowledge."<sup>77</sup> Whatever philosophers may say, law firm liability insurers do not advise lawyers to exercise negative capability.

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70. MARKOVITS, *supra* note 68, at 174–75.

71. *Id.* at 176–77, 180–82, 188–89.

72. *Id.* at 93–95.

73. *Id.* at 94.

74. *Id.* at 93.

75. So one of us has argued. See David Luban, Book Review, 120 ETHICS 864, 866 (2010) (reviewing MARKOVITS, *supra* note 68).

76. See, e.g., William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (criticizing lawyers for their role in the collapse of the savings and loan industry in the 1980s); *Accountability Issues: Lessons Learned From Enron's Fall: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 35–48 (Feb. 6, 2002) (statement of Susan P. Koniak, Professor of Law, Boston University School of Law) (pointing out role played by lawyers in the financial accounting scandals of 2002); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003) (criticizing the collusive role of lawyers in the Enron scandal).

77. See MARKOVITS, *supra* note 68, at 94 (quoting Keats's vision of negative capability).

## B. THE LAWYER AS ADVISOR

Perhaps the problem is that even if negative capability is a professional virtue in a trial lawyer grasping and presenting the client's case, it is a professional vice in the lawyer's role as advisor. The proper way to characterize the lawyer's role as advisor arose with terrible practicality in the aftermath of the 9/11 terror attacks. Lawyers within the U.S. government wrote more than half-a-dozen secret legal opinions approving CIA torture and other violations of international law. These written opinions were legally unsound, and some of them are absurd.<sup>78</sup> The lawyers made the fatal mistake of thinking that their duty was to give the president and the CIA what they wanted, not what the law actually required. And the result was an ethical catastrophe.

What exactly was wrong with what the lawyers did? One answer is obvious: Torture is a grave moral evil, and they took actions that made it more likely that detainees in American custody would be subjected to torture.<sup>79</sup> But that would be true for anyone; the question for legal ethics is whether there is a specifically *lawyerly* vice in the Justice Department memos authorizing torture.<sup>80</sup> To put it differently, is the role of the lawyer to push as hard as possible (whether in litigation, advising, or transactional-planning matters) to allow the client to do what it wants, or should the lawyer be a kind of public-spirited brake on the ambitions of clients?

Of course, the "torture lawyers" present a very atypical context of lawyer-advisors. But the scandal surrounding the torture memos prompted important reflection on the ethics of the advisor's role that pertains to private practice as well. Lawyers in private practice often feel the ethical strain in giving clients "candid and independent" advice that the clients don't wish to hear because it tells them they can't do what they want to do, even though that is the lawyer's job under positive law.<sup>81</sup> And lawyers may confuse their role as advisor with that of an advocate whose job is to put the most client-friendly spin on the law that the prohibition on frivolity permits. They may, for example, feel pressed to draft opinion letters blessing transactions their clients want to undertake even if the

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78. See, e.g., HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* (2009); Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193 (2010); David Cole, *The Torture Memos: The Case Against the Lawyers*, N.Y. REV. BOOKS (Oct. 8, 2009), <http://www.nybooks.com/articles/2009/10/08/the-torture-memos-the-case-against-the-lawyers/> [<http://perma.cc/7PTQ-UQM9>]; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); David Luban, *The Torture Lawyers of Washington*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 29, at 162–205, *expanded in* LUBAN, TORTURE, POWER, AND LAW *supra* note 55, at 197–253. The memos themselves are reprinted in DAVID COLE, *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (2009).

79. See, e.g., David Luban, *A Communicative Conception of Torture*, in LUBAN, TORTURE, POWER, AND LAW, *supra* note 55, at 111; David Sussman, *What's Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1 (2005); Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978).

80. For an affirmative answer, see W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickwire Memorial Lecture*, 31 DALHOUSIE L.J. 247 (2008).

81. MODEL RULES R. 2.1.

lawyer doesn't believe the law supports the position. One of Wendel's salient arguments is that the lawyer's duty of fidelity to law prohibits such shenanigans.<sup>82</sup> This duty of fidelity to the law flows directly from the importance the Second Wave places on law as a political institution essential to resolving disputes in a pluralist society. Without exhibiting fidelity to law, a lawyer will have a hard time justifying her role—she will be undermining the very institution to which she appeals to explain why she is setting her own moral beliefs to one side.<sup>83</sup>

### C. PROFESSIONALISM AND LEGAL ETHICS

Bar leaders are fond of calling for a “rekindling” of traditional conceptions of professionalism, which allegedly flourished in the late nineteenth and early twentieth centuries.<sup>84</sup> They sometimes quote Elihu Root, a lawyer who made a practice of representing robber barons like Jay Gould, as saying “[a]bout half the practice of a decent lawyer consists in telling would-be clients they are damned fools and should stop.”<sup>85</sup> There is at least some anecdotal evidence that large-firm lawyers once enjoyed sufficient independence to resist pressure from clients to

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82. See, e.g., WENDEL, FIDELITY TO LAW, *supra* note 50, at 186–87 (“Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and then you say to your accountants, ‘This is a duck! Don’t you agree that it’s a duck?’ And the accountants say, ‘Yes, according to the rules, this is a duck.’ Everybody knows that it’s a dog, not a duck, but that doesn’t matter, because you’ve met the rules for calling it a duck.”) (quoting BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* 142–43 (2003)).

83. We note, however, that the critique of importing adversary ethics into the non-adversarial context of legal advice is not unique to Second Wave theory. See, e.g., *Report of the Joint Conference*, *supra* note 57, at 1160–61 (distinguishing the advocate’s and advisor’s roles); LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 29, at chs. 4–5 (analyzing the ethics of the advisor’s role and criticizing the torture memos). Doctrinally, it is implicit in the *Model Rules*’ distinction between the duty of the advocate to press the client’s case limited only by the prohibition on frivolity (Rule 3.1) and the advisor’s duty of candid and independent advice (Rule 2.1); it was explicit in the *Model Code of Professional Responsibility*. See MODEL RULES R. 2.1, 3.1; MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3, 7-5 (1980). The pioneering article on the advisor’s role is Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

84. See, e.g., Am. Bar Ass’n Comm’n on Professionalism, ‘... In the Spirit of Public Service:’ A Blueprint for the Rekindling of Lawyer Professionalism, reprinted in 112 F.R.D. 243, 300 (1987).

85. GERALD W. GAWALT, *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 4 (1984); 1 PHILLIP C. JESSUP, ELIHU ROOT, 1845–1909, at 132–33 (1938). Root also quite famously stated: “The client never wants to be told he can’t do what he wants to do; he wants to be told how to do it, and it is the lawyer’s business to tell him how.” ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1947*, at 667 (1946). Given Root’s clientele, it is likely that the second maxim is more representative of his understanding of lawyer professionalism. Legal historian Lawrence Friedman contends that lawyers always served first themselves, then their clients, and last “their conception of that diffuse, nebulous thing, the public interest.” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 639 (2d ed. 1985).

assist with conduct that was contrary to the public interest.<sup>86</sup> William Simon has argued that Louis D. Brandeis, in his private practice career before his appointment to the U.S. Supreme Court, exemplified features of the ideal of professional practice in his day.<sup>87</sup> These include attempting to dissuade powerful institutional clients from “unjust or antisocial projects” and considering the interests of third parties with whom their clients were dealing. The specifically professional critique of the U.S. government lawyers involved in the torture of detainees would therefore be that they failed to ensure that their advice was consistent with the public interest. This would supplement, not conflict with, the criticism in ordinary moral terms of assisting another in committing a grave violation of human dignity.

For a number of political, social, and structural reasons, ably documented in a recent paper by Rebecca Roiphe,<sup>88</sup> the traditional conception of professionalism has collapsed entirely, and lawyers now believe themselves to be permitted, and even required, to seek any advantage for clients that can be obtained through means that do not clearly violate applicable law. Nevertheless, a much-discussed 1993 book—in many ways a hybrid of First and Second Wave approaches—argued for a revitalization of the classical virtue of practical wisdom. That book is former Yale Law School Dean Anthony Kronman’s *The Lost Lawyer*.<sup>89</sup> Practical wisdom for lawyers consists of the capacity to view the client’s position sympathetically but also with detachment. Detachment requires a significant degree of independence from the client.<sup>90</sup> The lawyer must appreciate the client’s point of view without necessarily endorsing it, while also seeing things from the standpoint of others and taking into account their own interests and commitments.<sup>91</sup> The lawyer is a loyal representative of clients, but she is also a public-spirited professional who acts to preserve the integrity of the framework of laws and legal institutions within which the interests of clients may be realized.<sup>92</sup>

Kronman’s book was criticized for its frank elitism. Not all lawyers are equally capable of exercising practical wisdom. To illustrate his professional ideal,

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86. See MARY ANN GLENDON, *A NATION UNDER LAWYERS* 32–38 (1994); SAMUEL HABER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750–1900*, at 224 (1991) (noting the Gilded Age anxiety about the “lawyer as hired man” who does his client’s bidding without regard to the demands of justice); *id.* at 238 (reporting ABA President Thomas Cooley’s opposition to “trusts” and concentration of business power and wealth).

87. See SIMON, *PRACTICE OF JUSTICE*, *supra* note 20, at 128–29.

88. See Rebecca Roiphe, *The Decline of Professionalism*, 29 *GEO. J. LEGAL ETHICS* 649 (2016).

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

90. Also a theme of the work of Robert Gordon who, despite being primarily a historian rather than a philosopher, has had considerable influence on philosophical legal ethics. See, e.g., Robert W. Gordon, *Why Lawyers Can’t Just Be Hired Guns*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION* 42 (Deborah L. Rhode ed., 2000); Gordon, *Independence of Lawyers*, *supra* note 7.

91. See KRONMAN, *supra* note 89, at 69–70.

92. See *id.* at 364.

Kronman chose a number of “lawyer-statesmen” who had alternated periods of government service with practice in top private law firms.<sup>93</sup> But obviously excellence in the exercise of judgment on behalf of clients is not limited to famous government officials who become name partners of law firms. Perfectly ordinary lawyers, in small towns and big cities everywhere, very well might be able to acquire the distinctive expertise of deliberating well about cases, seeing them as instantiations of conflicting values, approaching the client’s situation with sympathy and detachment, and ultimately making wise decisions for their clients. A conception of ethical lawyering that emphasizes the exercise of professional judgment and the balancing of private and public values may be attractive if it can be adapted to include lawyers less prominent and powerful than Robert Jackson, Dean Acheson, and Cyrus Vance.<sup>94</sup>

#### D. 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.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup>

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93. *Id.* at 11–12, 283.

94. Or at least as one of us has argued. See W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005); see also Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 FORDHAM L. REV. 1615 (2006) (offering a broadly similar argument).

95. We have explored our disagreements in a number of publications. See, e.g., W. Bradley Wendel, *Legal Ethics as “Political Moralism” or the Morality of Politics*, 93 CORNELL L. REV. 1413 (2008) (reviewing DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 29); David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437 (2008); David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673 (2012) (reviewing WENDEL, *FIDELITY TO LAW*, *supra* note 50); W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727 (2012).

96. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 1, at 148–74.

97. More precisely, the lawyer must abide by the positive law of lawyering, which requires a lawyer who cannot get past her moral distaste for the client’s cause to withdraw from representation because of a conflict of interest. *Cf.* MODEL RULES R. 1.7(a)(2), 1.16(a)(1), 1.16(b)(4); *cf. also* WENDEL, *FIDELITY TO LAW*, *supra* note 50.

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.<sup>98</sup> 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.<sup>99</sup> But that still does not address the argument that, while settlement of controversy in a pluralistic society may be a moral good, it is not of such importance that it should underwrite exclusionary reasons. For Joseph Raz, who brought the idea of exclusionary reasons to the forefront of jurisprudence, it is a conceptual truth about law that it purports to have authority, and for something to have authority means to create content-independent reasons.<sup>100</sup> This conceptual argument leaves an open *normative* question, however—namely, whether it be a good thing to organize a society around a type of reasoning that requires officials and citizens to “disentangle their judgments about what was required or permitted by the law of their society from their individual judgments about justice and morality.”<sup>101</sup> How one answers that question may determine one’s affinity for First and Second Wave positions.

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.<sup>102</sup>

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.

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98. This is Wendel’s approach. See WENDEL, *FIDELITY TO LAW*, *supra* note 50, at 107 (arguing that the law of lawyering “creates presumptive, not conclusive obligations”).

99. See MORTIMER H. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (1973).

100. Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 210 (1994).

101. Jeremy Waldron, *Normative (or Ethical) Positivism*, in *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 411, 413 (Jules Coleman ed., 2001).

102. Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 *GEO. J. LEGAL ETHICS* 1065 (2010); cf. David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 *GEO. J. LEGAL ETHICS* 1101 (2010).



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.<sup>103</sup> Max Weber instructed politicians that “in numerous instances the attainment of ‘good’ ends is bound to the fact that one must be willing to pay the price of using morally dubious means” and that “anyone who fails to see this is . . . a political infant.”<sup>104</sup> To borrow from the title of Stuart Hampshire’s powerful book, being a lawyer involves experience, not innocence:

[T]hose who incur the responsibility of political power . . . should at all times be prepared for the occurrence of an uncontrolled conflict of duties in situations which seem to exclude the possibility of a decent outcome, and in which all lines of action seem dishonourable or blameworthy. This is the point at which the contrast between innocence and experience becomes indispensable in ethics. The idea of experience is the idea of guilty knowledge, of the expectation of unavoidable squalor and imperfection, of necessary disappointments and mixed results, of half success and half failure.<sup>105</sup>

The ethics of dirty hands does not mean becoming inured to the use of morally dubious means, but to have qualms about the use of morally dubious means—and to be prepared to judge when dirty hands become too dirty. Only a lawyer who is hesitant to incur the personal moral costs of engaging in wrongdoing to further the client’s legitimate legal interests, when it is truly necessary to do so, will have any hope of avoiding wrongdoing when it is not necessary, and of not rationalizing self-interested conduct as the inevitable moral costs of exercising public power.<sup>106</sup>

### CONCLUSION: THIRD WAVE?

We begin this concluding section with an anecdote. In Wendel’s first year of law teaching, he met Luban, whose work he had admired for many years. He was shocked when Luban said ruefully, “I’m afraid the field of philosophical legal ethics has been entirely written out, and there’s nothing more to say.”<sup>107</sup> Wendel, being a contrarian by nature, became determined to prove him wrong, and ended up contributing, several years later, to the development of Second Wave scholarship. On a panel at a recent conference, Wendel told that story, and

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103. See, e.g., Bernard Williams, *Professional Morality and Its Dispositions*, in *THE GOOD LAWYER*, *supra* note 14, reprinted in BERNARD WILLIAMS, *MAKING SENSE OF HUMANITY* (1995); Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *PHIL. & PUB. AFF.* 160 (1973).

104. Max Weber, *Politics as Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 121, 123 (Hans H. Gerth & C. Wright Mills eds., 1948).

105. STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 170 (1989).

106. See Bernard Williams, *Politics and Moral Character*, in *MORAL LUCK* 62–63 (1980).

107. Luban now considers this one of the dumber things he recalls saying. At least, he hopes he hasn’t said too many dumber things than that.

concluded by admitting, “I’m not really sure what there is left to say about legal ethics . . . .” A fellow panelist responded, “Well, that’s just the thing you would say if you were so immersed in working on your own little paradigm that you’re missing all the new things happening around you.”<sup>108</sup> Fair enough. We write this little history as representatives of the First and Second Wave of theoretical ethics, and claim no special insight into what a Third Wave might look like. But we’re willing to speculate a bit. Here are some questions that we think may be fruitful areas for future legal ethics scholarship:

1. *Behavioral legal ethics.* One of the promising developments in moral philosophy is the cautious incorporation of the findings of the empirical psychology research on ethical decision-making, of which Jonathan Haidt’s work is probably the best-known example.<sup>109</sup> Of course one cannot straightforwardly derive an “ought” from an “is,” but ethicists have begun to reconsider traditional philosophical issues such as motivation, responsibility, character and virtue, guilt and shame, free will and determinism, and moral luck, with reference to psychological evidence.<sup>110</sup> Lawyers frequently practice in organizational settings, such as law firms or in-house counsel’s offices. There is a rich body of literature on the ways organizational systems, practices, and cultures can foster unethical behavior.<sup>111</sup> A few legal ethics scholars have begun to make use of these findings,<sup>112</sup> but the booming field of law and psychology suggests there is a great deal yet to be written about behavioral legal ethics.

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108. Thanks, Eli Wald!

109. Jonathan Haidt, *The Emotional Dog and the Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCH. REV. 814 (2001).

110. See, e.g., JOHN M. DORIS, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR (2002); OWEN FLANAGAN, VARIETIES OF MORAL PERSONALITY: ETHICS AND PSYCHOLOGICAL REALISM (1991); Gilbert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, 99 PROC. ARISTOTELIAN SOC’Y 315 (1999). An encyclopedic overview is the five-volume compendium edited by Walter Sinnott-Armstrong and Christian Miller: MORAL PSYCHOLOGY, THE EVOLUTION OF MORALITY: ADAPTATIONS AND INNATENESS (Walter Sinnott-Armstrong & Christian B. Miller eds., 2007); MORAL PSYCHOLOGY: THE COGNITIVE SCIENCE OF MORALITY: INTUITION AND DIVERSITY (Walter Sinnott-Armstrong ed., 2007); MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT (Walter Sinnott-Armstrong ed., 2008) [hereinafter MORAL PSYCHOLOGY: NEUROSCIENCE OF MORALITY]; MORAL PSYCHOLOGY: FREE WILL AND MORAL RESPONSIBILITY (Walter Sinnott-Armstrong ed., 2014); MORAL PSYCHOLOGY: VIRTUE AND CHARACTER (Walter Sinnott-Armstrong & Christian B. Miller eds., 2017).

111. See, e.g., John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13 (David M. Messick & Ann E. Tenbrunsel eds., 1996); ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988); IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES (2d ed. 1982).

112. See, e.g., MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER (2004); Milton Regan, *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (2007); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639 (2015); Jennifer K. Robbennolt & Jean Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013); Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper’s Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209 (2011).

We do have some hesitations about jumping on the behavioral bandwagon. No doubt realistic ethics must understand the cognitive and organizational structures that shape individual moral judgment. But psychologists sometimes lapse into something like determinism, the view that human moral choice is an illusion. They sometimes write as though a full understanding of the external situation we find ourselves in and the internal cognitive biases wired into us would reveal that what looks like choice is no such thing.<sup>113</sup> But determinism is only one possible approach to the problem of free will, which one distinguished philosopher has described as the hardest problem in philosophy.<sup>114</sup> We are inclined to think that determinism is singularly useless in practical reasoning: if you are agonizing about the right thing to do, the reflection “it’s not up to me” is an evasion, and it obviously won’t help you make up your mind. It will simply offer you false comfort as you follow the path of least resistance. Nevertheless, the behavioral turn in ethics raises important issues of how we might reorganize practical structures to minimize the cognitive and emotional strains situations place on our moral commitments and practical judgment.

The same goes for one of the currently fashionable areas of behavioral ethics: the application of neuroscience to ethical decision-making. Some have argued that deep knowledge of which brain structures are active in different modes of moral deliberation can help us decide which moral theories are true.<sup>115</sup> We are not convinced. If, for example, it turns out that different patterns of moral reasoning cause one rather than another part of the brain to “light up” an fMRI, that counts as an interesting scientific discovery, but it doesn’t tell us anything about the validity of moral judgments. So, while we are encouraged to think that behavioral ethics holds promise, we also think there are more and less promising avenues for pursuing behavioral ethics.

2. *Virtue ethics.* Every human deed involves an actor, an action, and consequences; and, over the millennia, philosophical ethics has tended to place primary emphasis on one or the other element in this triad. Consequentialism focuses on whether consequences are good or not; deontological theories focus on the intrinsic character of the act. The approach (dating back to Aristotle) that focuses on the character of the actor is called “virtue ethics.” In recent years Australasian legal ethicists have engaged in a vigorous debate over the place of character and virtue in the ethics of lawyers,<sup>116</sup> but with a few exceptions,<sup>117</sup>

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113. See, e.g., MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* 120 (1980) (declaring that “any reasonable psychologist” believes “all behavior is ‘caused’ by a combination of antecedent events and the genetic endowment of the individual”).

114. SUSAN WOLF, *FREEDOM WITHIN REASON*, at vii (1990).

115. See, e.g., Joshua D. Greene, *The Secret Joke of Kant’s Soul*, in 3 *MORAL PSYCHOLOGY: NEUROSCIENCE OF MORALITY*, *supra* note 110, at 35; Joshua D. Greene, *Beyond Point-and-Shoot Morality: Why Cognitive (Neuro) Science Matters for Ethics*, 124 *ETHICS* 695 (2014).

116. See JUSTIN OAKLEY & DEAN COCKING, *VIRTUE ETHICS AND PROFESSIONAL ROLES* (2001); Tim Dare, *Virtue Ethics and Legal Ethics*, 28 *VICTORIA U. WELLINGTON L. REV.* 141 (1998).

American scholars have not been particularly drawn to the subject. Perhaps that is because virtue ethics does not lend itself to the casuistry of cases, which is at the heart of ethical decision-making. Being told that the right thing to do in a moral dilemma is what the good person would do is less than illuminating, even if it is true. But we believe that any account of legal ethics that leaves out the actor and the judgments we pass on the actor misses something crucial, and we look forward to a virtue ethics that can provide guidance to practical deliberations.

3. *Fiduciary theory*. The client-lawyer relationship, it is often said, originates in agency law, because lawyers are agents of their clients. As agents, they are bound by fiduciary obligations to their clients. The fiduciary relationship is not only a legal relationship; it is a moral relationship as well—in Cardozo’s famous plummy words from *Meinhard v. Salmon*, “the punctilio of an honor the most sensitive.”<sup>118</sup> These obligations are the *fons et origo* of legal ethics. In recent years, scholars have come to recognize that fiduciary obligations—originating in contract but somehow transcending the arm’s-length individualism in classical contract law—are complicated.<sup>119</sup> Some parts of the law of lawyering, such as prohibitions on conflicts of interest, are obviously there to preserve the fiduciary relationship. Others, such as the prohibition on frivolous legal arguments, or for that matter the professional commitment to pro bono, seem to have a different source. We see the analysis of fiduciary obligation in the client-lawyer relationship as a task for moral and political philosophy.

All three of the topics we have just mentioned—behavioral legal ethics, virtue ethics, and fiduciary theory—seem to us to raise questions that legal ethicists have only begun to explore. Whether they will generate a Third Wave of philosophical legal ethics is not a question we can answer—our crystal ball is cloudy. For that matter, we don’t assert that the questions raised by the earlier waves of legal ethics have been definitively answered. We are tempted to conclude with a sign on the desk of a German philosopher: “I can’t solve your problems; my job is to help you enjoy them.”

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117. See, e.g., Heidi Li Feldman, *Codes and Virtues: Can Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996).

118. *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

119. See generally, e.g., PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., 2016); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016).