TAKING OWNERSHIP OF LEGAL OUTCOMES: AN ARGUMENT AGAINST DISSOCIATION PARADIGM AND ANALYTICAL GAMING

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INTRODUCTION

This Article explores the question of whether legal professionals take responsibility for legal outcomes.[1] The legal profession is a service industry that provides a wide range of knowledge-based services to individuals, businesses, governments, and numerous other entities, perpetuating the lore that lawyers "adhere to strict standards of professionalism rather than the morals of the marketplace."[2] Law, as an epistemic profession of persuasion, is inextricably tied to both legal reasoning and moral responsibility.[3] Lawyers use legal reasoning and analysis to counsel clients, structure transactions, draft contracts and wills, write briefs, make oral arguments to judges and juries, and provide other legal services. Judges are the dispensers of legal reasoning. Based on legal reasoning, judges issue orders, rule on motions, and write judicial opinions.[4] Law professors teach legal reasoning to prepare future lawyers and judges.[5] They write articles and books to influence legal outcomes, judicial opinions, and legislation.[6] Almost every form of legal services, whether oral or written, relies on legal reasoning and analysis. However, the relationship between reasoning and responsibility is far from clear. This study presses the legal community to both recognize and clarify the relationship.

The Model Rules of Professional Conduct specifically point out that codified ethics and laws do not exhaust the lawyer's professional responsibilities. "[A] lawyer is also guided by personal conscience and the

1. In understanding the argument of this study, a few basic terminological clarifications are called for. The phrases "legal professionals" and "legal analysts" include lawyers, judges, law professors, and lawmakers. The phrases "legal outcomes" and "legal services" include written and oral legal products of lawyers, opinions and decisions of judges, writings and presentations of law professors, constitutions, statutes, and regulations that lawmakers endorse, enact, or authorize. The phrases "legal reasoning" and "legal analysis" include substantive analyses, procedural tactics, and litigation and settlement strategies. The phrase "legal materials" includes constitutions, cases, statutes, regulations, treaties, and treatises.

2. *See* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1907 (2008).

3. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 4–5 (1953) (distinguishing profession from business, and arguing that profit is not the primary calling of a profession); Rakesh K. Anand, *Toward an Interpretive Theory of Legal Ethics*, 58 RUTGERS L. REV. 653, 659 (2006) (discussing law's epistemic integrity and its relationship with ethics).

4. *See generally* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (2d prtg. 1950).

5. At Washburn University School of Law, I introduced and taught for many years a first-year course called Legal Systems, in which I explored the various genres of legal reasoning and their impact on lawyering, legal theory, theories of adjudication, and dispute resolution. *See also* Ali Khan, *Learning Legal Reasoning by John Delaney*, 30 WASHBURN L.J. 265, 268 (1991) (book review).

6. Erwin Chemerinsky, Foreword, *Why Write?*, 107 MICH. L. REV. 881, 888, 890 (2009).

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approbation of professional peers."[7] Therefore, in exploring connections between reasoning and responsibility, the dictates of personal conscience and peers' approbation cannot be set aside. While the approbation of professional peers is not critically examined in this study, the lawyer's reputation in the legal community is the "most important professional asset[]" that no lawyer can afford to squander.[8] Enjoying a good reputation among professional peers and providing legal services consistent with laws and ethics, though commendable, do not automatically vouchsafe the lawyer's consciential responsibilities.

Questions arise whether personal conscience does and ought to influence the lawyer's legal reasoning, and whether the lawyer should ever engage in legal reasoning that alienates the lawyer from personal conscience. What is the lawyer's responsibility if legal reasoning found in cases and statutes cannot be reconciled with the dictates of personal conscience? Instead of furnishing clarity, as the discussion below demonstrates, ethical and legal conventions obfuscate and even prevent, legal professionals from taking consciential responsibility for legal reasoning.[9]

The confusion accumulates because ethical and legal conventions champion two conflicting prescriptions. The first prescription, here called the "dissociation paradigm," instructs legal professionals to separate personal predispositions from legal analysis and respect law as an objective aggregation of norms.[10] The second prescription, called the "ownership principle," instructs legal professionals not to set aside personal conscience in providing legal services.[11] The two prescriptions pull in opposite directions. The dissociation paradigm claims to preserve the objectivity of law by requiring legal professionals to separate personal self from legal reasoning.[12] The

7. MODEL RULES OF PROF'L CONDUCT, pmbl. ¶ 7 (2010). The 1908 American Bar Association Canons of Professional Ethics also emphasized that the lawyer, while pressing the client's case, "must obey his own conscience and not that of the client." ABA, CANONS OF PROF'L ETHICS Canon 15 (1908). For a discussion of ethics and conscience, see Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1959 (2006).

8. Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1353 (Fed. Cir. 2003).

9. *See* discussion *infra* Part IV.A.

10. The dissociation paradigm shares close ties with legal positivism under which law is separated from morality. The dominance of legal positivism, fueled by Jeremy Bentham, John Austin, H.L.A. Hart, and Hans Kelsen, has been influential in theories of adjudication, demanding that judges enforce the law and not morality. For a recent critique of legal positivism, see Richard Mullender, *Law, Morality and the Egalitarian Philosophy of Government*, 29 OXFORD J. LEGAL STUD. 389, 390 (2009). Ronald Dworkin, the chief critic of legal positivism, has been arguing for the fusion of law and morality. For recent commentary on Dworkin's law and moral fusion, see T.R.S. Allan, *Law, Justice and Integrity: The Paradox of Wicked Laws*, 29 OXFORD J. LEGAL STUD. 705 (2009).

11. *See* discussion *infra* Part V.

12. *See* discussion *infra* Part IV.

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ownership principle offers a more integrated domain of law, ethics, and personal conscience, and it requires legal professionals to engage in reasoning under their mutual constraints.[13] Consequently, law and ethics inform personal conscience, and personal conscience illuminates law and ethics. The ownership principle reformulates—but does not undermine—the notions of legal objectivity and rule of law.[14]

In considering the dynamics of consciential responsibility, the dissociation paradigm must not be confused with dissociative disorders. Whereas dissociation is a professional skill, dissociative disorders are mental pathologies.[15] The two are not the same. The most obvious difference between the two is the element of deliberation. Dissociation is a deliberative skill that legal professionals exercise to wear on professional personality and to separate legal reasoning from personal preferences.[16] Dissociative disorders are non-volitional disabilities and fantasies.[17] Frequently used as a defense in criminal cases, the defendant pleads a dissociative disorder to deny wrongfulness and the concomitant responsibility for crime.[18]

The conflicting prescriptions of dissociation and ownership may be superficially synthesized by arguing that while legal professionals must separate personal predispositions from legal analysis, they need not abdicate personal conscience.[19] This synthesis presumes that personal conscience is something inherently good that must be esteemed, whereas personal predispositions, such as ideological, political, social, and economic views, are biases that must be precluded. This synthesis also presumes that legal

13. *See* discussion *infra* Part V.B.

14. As will be discussed in Part V, however, the ownership principle explores more sophisticated connections between law, ethics, and personal conscience.

15. Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 837 n.563 (2009).

16. *See* discussion *infra* Part IV.

17. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 477, 484 (4th ed., 4th prtg. 1995) [hereinafter DSM-IV]

18. For example, dissociate identity disorder (multiple personality disorder) was described as "a condition where the physical body belonged to two or more distinct, well-integrated personalities, each with a separate set of memories that the other is completely unaware of." State v. Alley, 776 S.W.2d 506, 511 (Tenn. 1989) (citing testimony from a forensic psychologist). In murder cases, the defendant may rely on a dissociative disorder to claim that the person who killed the victim was not him, but someone else in his body or that someone else in his body forced the defendant to kill the victim. The defendant thus claims that more than one person, with diverse and even diametrically opposed views, resides in the same physical person. Courts and juries may or may not believe in the concept of multiple personalities, which becomes even trickier when defendants feign dissociative disorders after the commission of the crime. *See also* DSM-IV, *supra* note 17, at 487.

19. *See* Mullender, *supra* note 10, at 390 (citing John Gardner, *Nearly Natural Law*, 52 AM. J. JURIS. 1, 23 (2007)).

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professionals are psychologically equipped to separate personal conscience from personal dispositions. This Article does not embrace any such superficial synthesis.

To some extent, a person's critical self-awareness, anchored in knowledge and reflection, can reduce negative predispositions and promote good conscience.[20] For the most part, however, personal preferences emanate from a complex web of predispositions and personal conscience.[21] It is unrealistic to expect that legal professionals have no personal preferences (biases) about legal issues and that their minds ought to be ideological *tabula rasa* while engaging in legal reasoning. Any such expectation, noted Justice Rehnquist, endorses lawyers and judges with lack of competence and experience, "not lack of bias."[22] The ownership principle recognizes that the mind of the legal professional cannot be severed from one's biography and life experiences, though a critical self-awareness of life experiences generates a robust force that shapes the legal professional's personal idealism and "plan of action."[23]

Understanding the difficulty of separating predispositions from personal conscience, this Article explores the systemic effects of dissociation and ownership prescriptions on consciential responsibilities. Parts II and III examine ratio-moral tensions and the related dynamics of personal conscience. This discussion underscores the value of integrating the personal idealism of legal professionals with their professional work. Parts IV and V analyze dissociation and ownership prescriptions. This analysis demonstrates that each prescription carries significant normative weight but requires a sophisticated understanding for its application to legal reasoning. After explaining comparative merits and demerits of the two prescriptions, Part VI explores the art of gaming under which legal professionals implement personal preferences but fake subscription to the dissociation paradigm.

The Article has a prescriptive purpose. It recommends that legal professionals, though they must reject unnecessary excesses of each prescription, choose the ownership principle over the dissociation paradigm. The ownership principle sensitizes legal professionals to the morality and consequences of legal outcomes; it affirms personal conscience as a critical normative filter; and it promotes what Professor Trevor Farrow calls

20. *See* John E. Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 342–43 (2008) (explaining how self-awareness promotes emotional intelligence, fosters honesty and trustworthiness, and guides decisions).

21. *See infra* Part III.

22. Laird v. Tatum, 409 U.S. 824, 835 (1972).

23. Winfried Brugger, *Dignity, Rights, and Legal Philosophy Within the Anthropological Cross of Decision-Making*, 9 GERMAN L.J. 1243, 1245 (2008).

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"sustainable professionalism."[24] The study proposes that legal professionals recognize the value of an inter-connected normative domain of laws, ethics, and personal conscience, a domain in which all three normative systems are simultaneously present and connected with each other. This connectionist model, explained in this Article as it applies to legal reasoning, illuminates consciential responsibilities that legal professionals of all stripes must accept while providing professional services derived from laws and consistent with ethics.[25]

I. RATIO-MORAL TENSIONS

This part explains ratio-moral tensions that the legal system generates and that legal professionals may experience in providing legal services. Ratio-moral tensions refer to consciential moral dilemmas and anxieties in the realm of legal reasoning.[26] This part also introduces cognitive dissonance, a concept of psychology that explains why persons facing ratio-moral tensions experience discomfort and strive to minimize these tensions in order to feel good and satisfy the personal need for consistency.[27] An examination of cognitive dissonance and associated ratio-moral tensions furnish a context for understanding the dynamics and limitations of the dissociation paradigm.

A. Cognitive Dissonance

In his seminal work on cognitive dissonance, Leon Festinger argues that dissonance occurs when "persons sometimes find themselves doing things that do not fit with what they know, or having opinions that do not fit with other opinions they hold."[28] Festinger also argues that those who experience

24. Trevor C.W. Farrow, *Sustainable Professionalism*, 10 GERMAN L.J. (SPECIAL ISSUE) 1001, 1004–07 (2009).

25. For a background understanding of connectionist psychology, see CONNECTIONIST MODELS IN COGNITIVE PSYCHOLOGY (George Houghton ed., 2005). For an overview of connectionism, see James Garson, *Connectionism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 27, 2010), http://plato.stanford.edu/entries/connectionism.

26. I offer the term *ratio-moral* tensions to describe a combination of rational and moral concerns that legal professionals may have in arguing for certain legal outcomes. For example, a judge who personally opposes abortion is likely to experience ratio-moral anxiety while enforcing the state's permissive abortion laws. As compared to purely rational or moral tensions, the concept of ratio-moral tensions is presented to claim that a person's morality and rationality are often inextricably tied to each other and may not be severable. *See* DAVID MOSHMAN, ADOLESCENT PSYCHOLOGICAL DEVELOPMENT: RATIONALITY, MORALITY, AND IDENTITY 117 (2d ed. 2005).

27. *See infra* Part II.A.

28. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 4 (Stanford Univ. Press 1979) (1957). Numerous legal scholars refer to cognitive dissonance in analyzing legal issues. *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1258 (2002); Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad*

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cognitive dissonance suffer from "psychological discomfort,"[29] and persons suffering from cognitive dissonance undergo internal pressure to reduce dissonance.[30] Dissonance reduction is as critical for human beings, says Festinger, as is hunger reduction or frustration reduction, and persons strive to reduce dissonance in proportion to the magnitude of dissonance.[31]

Contrary to Festinger's observations, the dissociation paradigm demands cognitive dissonance; it requires legal professionals to set aside personal conscience and apply law, particularly if personal conscience is incompatible with legal reasoning. Furthermore, contrary to Festinger's thesis of natural behavior, the dissociation paradigm teaches suppression and not reduction of dissonance. The more the legal professional experiences dissonance in a particular case, the more the legal professional must suppress personal preferences in favor of legal reasoning that the law supposedly dictates.[32] This unnatural and possibly mentally unhealthy approach to legal reasoning is ignored in defending the dissociation paradigm.[33]

Cognitive dissonance may also arise in the realm of ethics. It occurs when a certain professional ethic is at odds with the personal conscience of the legal professional, that is, with his or her personal sense of justice, personal view of fairness, and personal code of right and wrong.[34] Cognitive dissonance may occur when the legal professional violates ethical rules of responsibility, but only if the legal professional has intrinsic respect for those rules.[35] The ultimate test of cognitive dissonance focuses on the violation of personal conscience rather than the violation of an externally imposed ethics code.[36]

Should legal professionals claim recusal for cognitive dissonance? Suppose a pro-life judge, who abhors all forms of abortion, is presiding over a civil case involving a physician whose license to practice medicine has been

Decisionmaking: Lessons from Psychology and from Lawyers in the Dock, 22 GEO. J. LEGAL ETHICS 1549, 1571 (2009) (book review); Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 428 (1999); Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 405 (2010).

29. FESTINGER, *supra* note 28, at 2.

30. *Id.* at 3.

31. *Id.* at 3–4.

32. *See* Ronald Turner, *On* Parents Involved *and the Problematic Praise of Justice Clarence Thomas*, 37 HASTINGS CONST. L.Q. 225, 238 (2010) (commenting upon the Justice's assertion that judges must decide cases on the basis of law and not personal preferences).

33. *See* FESTINGER, *supra* note 28, at 3.

34. For example, billable hours, even when ethically allocated to a client, may be excessive. Additionally, a lawyer may charge two clients for the same duration of time. For a discussion of such dilemmas, see Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 231 (2007).

35. *See* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178, 191 (Wendy Brown & Janet Halley eds., 2002).

36. *See* FESTINGER, *supra* note 28, at 1–2.

suspended for violating abortion procedures or a criminal case where such a physician has been killed. The judge holds a special grudge against physicians who assist in abortion procedures and holds a secret belief that such physicians engage in murder. With such strong sentiments against abortion, judges may recuse themselves from abortion cases to avoid cognitive dissonance.[37] Under the dissociation paradigm, the judge would be asked to set aside his personal views about abortion and rule on the case objectively and according to the rules.[38]

Dead conscience or cynicism unlikely to generate ratio-moral tensions is rarely the reigning presumption of any legal system. Cynical attitudes that subscribe to no notion of justice, fairness, or morality perhaps lend to no cognitive dissonance because cynicism discounts the role of personal conscience and denies responsibility.[39] In unjust legal systems, such as the apartheid system in South Africa, legal professionals may resist rather than support oppressive laws.[40] In such cases, legal professionals may honestly believe that the laws are unjust. Doubts about an unjust legal system are not cynical. What undermines cognitive dissonance and the concomitant notion of responsibility is the legal professional's rejection of personal notions of justice, fairness, and morality.[41] Legal professionals are unlikely to assume any personal responsibility if no notion of justice, fairness, or morality is part of their personal conscience. Conscience-free legal professionals are cynical operators who use legal reasoning without assuming any personal responsibility.[42]

B. Reasoning and Responsibility

In legal literature, legal reasoning and moral responsibility are rarely examined together, even though the pair is the primary source of ratio-moral tensions.[43] Legal reasoning is perhaps the most cherished concept in the legal profession as law students, lawyers, and judges master the art and science of

37. *See* Gregory A. Kalscheur, *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. CATH. LEGAL STUD. 211, 248 (2007).

38. *Id.* at 250 n.130 (noting legislative intent does not allow judges to opt out of abortion cases for moral reasons) (citing Ann Crawford McClure et al., *A Guide to Proceedings Under the Texas Parental Notification Statute and Rules*, 41 S. TEX. L. REV. 755, 801 (2000)).

39. Kennedy, *supra* note 35, at 190–91.

40. *See* KENNETH S. BROUN, BLACK LAWYERS, WHITE COURTS: THE SOUL OF SOUTH AFRICAN LAW 1–29 (2000) (recounting Godfrey Pitje, a prominent black lawyer who resisted apartheid laws).

41. *See* Liaquat Ali Khan, *Advocacy Under Islam and Common Law*, 45 SAN DIEGO L. REV. 547, 597–98 (2008).

42. *See id.* at 597–601 (analyzing cynical advocacy).

43. In law, these words rarely constitute a pair, as do, for example, tort and liability or crime and punishment.

legal argumentation. Legal reasoning embodied in professional products[44] supplies, legitimizes, and defends legal outcomes. Ratio-moral tensions are generated when legal reasoning points toward conflicting legal outcomes, forcing legal professionals to choose one over the other.[45]

In addition to legal reasoning, the concept of responsibility also generates ratio-moral tensions as legal professionals confront questions of responsibility in cases where law does not comport with their personal conscience.[46] Such tensions may appear in almost all areas of substantive and procedural law. Responsibility is an integral part of legal ethics.[47] Ordinarily, however, ethics relate responsibility to professional conduct and not to legal reasoning. In codes of ethics, nowhere is responsibility specifically tied to legal reasoning, except that the rules of professional conduct caution lawyers not to bring or defend frivolous cases.[48] Frivolous cases, at times indistinguishable from groundbreaking cases, are arguably associated with some sort of unacceptable legal reasoning.

Professor Bradley Wendel argues that law defines the interpretive parameters within which lawyers must engage in analysis.[49] "Lawyers cannot understand their role as merely executing their clients' preferences; the distinctive function of lawyers is that they act as agents of their clients, but only within the bounds of the law."[50] This statement, though a professional truism, sheds little informative light on ratio-moral tensions that legal professionals regularly face "within the bounds of law."

Ratio-moral tensions emanating from legal reasoning and personal conscience may affect legal professionals differently. Judges' ratio-moral tensions may or may not be the same as those of lawyers. Judges are duty-bound under judicial conventions to apply the law without contaminating legal reasoning with personal preferences.[51] They cannot pick and choose cases to

44. Reasoning is also the core constitutive element of legal services and attendant professional products. Professional products—cast in many forms, including memorandums, pleadings, motions, briefs, oral arguments, court orders, judgments, legal commentaries, law review articles, and treatises—are embodiments of legal reasoning.

45. Note, *The Rule of Law in the Marketplace of Ideas: Pledges or Promises by Candidates for Judicial Election*, 122 HARV. L. REV. 1511, 1528–29 (2009).

46. *See id.*

47. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 (2010) (responsibilities of a prosecutor); *id.* R. 5.1 (responsibilities of a supervisory lawyer).

48. *See id.* R. 3.1. *See also* Penny J. White, Commentary, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 133 (2009) (lawyers filing frivolous cases risk losing personal reputation).

49. W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1362 (2009).

50. *Id.*

51. Note, *supra* note 45, at 1525 (discussing how the search for determinate sources of law, rather than arbitrary will, continues to spawn theories such as legal science, textualism, and originalism).

avoid ratio-moral tensions. Nor can they openly disregard legal reasoning to enforce their contrary personal preferences. Under these conventions, therefore, judges can easily deny responsibility by simply asserting that they render judicial decisions that the legal reasoning dictates. Some judges may absorb ratio-moral tensions by confessing that a certain reasoning of law is contrary to their deeply held values, but they are bound to enforce the law. Some judges may resolve ratio-moral tensions by distorting the law to conform to their personal conscience.[52]

Unlike judges, lawyers may minimize ratio-moral tensions by selecting cases agreeable with their personal conscience. But for many lawyers, the freedom to pick and choose cases might indeed be illusory. Take the hypothetical case of a lawyer who agonizes over a murder case.[53] The economically struggling lawyer (who has set up solo practice in a small town) is appointed to defend an indigent person charged with murder. The defendant had signed a properly notarized confession of the crime. In the very first meeting, the defendant confesses to the appointed lawyer that the defendant has committed the crime. However, the defendant asks the lawyer to enter a not guilty plea.

The client regrets his confession to the authorities and at trial wants to take the stand in his own defense and offer perjured testimony. Using her independent judgment, the lawyer believes that the defendant has indeed committed the crime. The lawyer is morally and ethically opposed to entering a not guilty plea on the client's behalf. The attorney's opposition to entering a not guilty plea for a client she believes is guilty has been partly informed by her personal conscience and partly by codes of professional responsibility that prohibit lawyers from offering evidence that the lawyers know is false.[54]

52. *See id.* at 1528–29.

53. The facts of this hypothetical are adapted from a few cases: United States v. Baker, 65 M.J. 691 (A. Ct. Crim. App. 2007); Brown v. Commonwealth, 226 S.W.3d 74 (Ky. 2007); and Commonwealth v. Mitchell, 781 N.E.2d 1237 (Mass. 2003).

54. *See, e.g.*, MASS. BAR INST., RULES OF PROF'L CONDUCT R. 3.3 (1998). Paragraph (e) of Rule 3.3, entitled "Candor Toward the Tribunal," provides, in pertinent part:

> In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. . . . If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue

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Driven by the need to make a living to support her family, however, the lawyer makes an exception to her personal conscience and provides legal services in the case.

The lawyer tries to minimize her ratio-moral tensions by suppressing personal conscience, which directs the lawyer not to accept the case. She persuades herself that the rule of confidentiality forbids her from communicating the defendant's plan to offer perjured testimony to the court and petitioning the court for her withdrawal from the case.[55] The lawyer finds comfort in the rule that she has a duty to represent the client. She also entertains the possibility that the defendant might have falsely confessed to the crime, both to the police and to her. The lawyer considers the question of personal responsibility and concludes, though a bit uncomfortably, that she is not personally responsible if the defendant offers perjured testimony at trial to contest his notarized confession. While she is unsure about the conviction with which she would speak to the jury that her client's notarized confession was involuntarily given, she believes that it is the prosecutor's job, not hers, to prove each element of the defendant's crime beyond a reasonable doubt. The lawyer resolves ratio-moral tensions by persuading herself that it is the client's decision to lie on the stand and it is up to the jury whether they believe the defendant's story.[56]

The story of *Gorilla Law* provides useful insights into ratio-moral tensions of a different genre.[57] *Gorilla Law* is a modest booklet that lays out grievance procedures for prison inmates to assert their constitutional rights. The booklet portrays prison inmates as the victims of "lawyers who never provided any semblance of representation, the district attorneys who built their careers on [their] back[s], [and] the judges who expediently handed out justice for the sake of the noon recess."[58] Dave Davis, a California ex-convict, urges inmates to file multiple complaints about attorney misbehavior and judicial misconduct, turning "the powers of the state against itself."[59]

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the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

Id.

55. Several solutions have been explored to respond to client's perjury, including withdrawing from the case, allowing the client to make the statement but not commenting on it to the jury, telling the client at the outset that perjury is not within the client-attorney privilege, and reporting the perjured statement to the tribunal. For a discussion of these ideas, see VINCENT LUIZZI, A CASE FOR LEGAL ETHICS: LEGAL ETHICS AS A SOURCE FOR A UNIVERSAL ETHIC 13–14 (1993).

56. *See id.* at 13. Is the lawyer responsible if the defendant commits perjury, successfully lies to the jury, and is acquitted?

57. DAVE DAVIS, GORILLA LAW (1981).

58. *Id.* at Acknowledgements.

59. *Id.* at 7, 19–23. The cover of the booklet shows a frowning King Kong-size gorilla, stomping on the roof of the county jail with broken bars, and holding a captured aircraft labeled

Gorilla Law became an object of litigation when prison officials at an Arkansas maximum security unit denied inmates their claimed First Amendment right to receive the booklet.[60] The United States Court of Appeals for the Eighth Circuit opined that although the booklet "advocates the use of prisoner grievance procedures and urges inmates to exercise their rights, and in that sense is unobjectionable, the tone of the publication is relentlessly hostile to prison officials and to authority in general."[61] Vengeful attitudes that the booklet promotes, the court held, cannot be reconciled with the goal of prisoners' rehabilitation.[62] The dissenting judge declared *Gorilla Law* to be a "harmless document" and pointed out that the prison warden did not even read the booklet before he ordered it confiscated as contraband.[63]

Consider how the law itself generates ratio-moral tensions. The author of *Gorilla Law* has the First Amendment right to publish the booklet with a rational plan to influence the behavior of prison inmates. As an ex-convict who had faced difficulty in the prison, the author may have developed a genuine moral responsibility to help inmates. Arguably, the author could have plotted a mischievous agenda to mobilize the booklet to create disorder in prisons. Still the law, in permitting the publication of the booklet, protects the author's rational but morally dubious agenda. Regardless of the author's moral intentions, prison officials and judges have their own reasons to ban the booklet from reaching prison inmates. Consequently, a booklet publishable by the force of law (under the First Amendment) cannot by the force of law (prison rules) reach its intended audience.

In allowing ratio-moral tensions, the system aggregates the conflicting notions of responsibility. With respect to *Gorilla Law*, neither the author, nor prison officials, nor judges could be blamed for their divergent viewpoints and legal reasoning on the same issues. Even the dissenting judge, who supports the author and disagrees with prison officials and colleagues on the bench, is free of blame, since dissent is a cherished common law tradition of judicial decision-making. We do not know, perhaps cannot know, whether prison officials and judges were using legal reasoning in harmony with or dissociated from personal conscience.[64]

"sheriff" in one hand while three other aircraft frighteningly circle around the gorilla's imposing black and white torso. *See id.*

60. *See* Travis v. Norris, 805 F.2d 806, 807 (8th Cir. 1986).

61. *Id.* at 808.

62. *Id.* at 809.

63. *Id.* at 809, 811 (Heaney, J., dissenting). Litigation came to an end, however, when the court declined to rehear the case. *Id.* at 806, *reh'g denied*. The booklet was banned from the prison, thus denying the booklet access to its intended audience. *Id.* at 809.

64. *See infra* discussion of secrecy in Part VI.A.

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Routinely, the legal system generates and absorbs ratio-moral tensions. It permits the coexistence of incompatible modes and effects of law and legal reasoning. Legal reasoning rarely dictates one and only one legal consequence. Frequently, legal reasoning supplies multiple normative choices.[65] The generation of incompatible modes and effects of legal reasoning might be nourishing for an open, diverse, and vigorous legal discourse. In advocating and reaching legal outcomes, the legal system supplies plentiful normative space within which legal professionals may either dissociate legal reasoning from personal conscience or may summon personal conscience to inform legal reasoning and its consequences.[66] The connectionist model of legal reasoning does not propose to exclude laws, ethics, or personal conscience.[67] All these systems must be brought to bear in the construction of legal reasoning and the consequent minimization of ratio-moral tensions.

II. PERSONAL CONSCIENCE

This part argues that personal conscience is a critical normative filter that legal professionals must employ while providing legal services. It also discusses ratio-moral tensions that legal professionals experience when they act contrary to the moral gravity of personal conscience. This discussion clarifies that legal professionals must function within the inter-connected normative domain of laws, ethics, and personal conscience. Just as legal professionals cannot ignore laws or ethics in solving legal problems, they must not suppress the calls of personal conscience in serving clients, deciding cases, teaching law, or in any other matters related to law and legal reasoning. Law, ethics, and personal conscience must not be treated as separate conduits, for they constitute a fluid aggregation of inter-connected flows.[68]

In endorsing the connectionist web of responsibilities, the Model Rules of Professional Conduct use the phrase "personal conscience" and not

65. JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 56 (1964). "There are comparatively few cases . . . in which the relevant rules of law are uncertain. What is more often uncertain is, what is the right rule to apply." *Id.* (quoting LORD WRIGHT, LEGAL ESSAYS AND ADDRESSES 343 (1939)).

66. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 115 (13th prtg. 1921). Cardozo invokes the metaphor of "open spaces" within which the judge makes the law when there are no rules to be found. *Id.* Compare this with Lord Wright's view, which subscribes to many applicable rules and describes the challenge for the judge as picking the appropriate rule for the case. *See* STONE, *supra* note 65, at 56.

67. *See supra* text accompanying notes 1–27.

68. Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 53–54 (1998) (explaining that each cognitive element exerts influence on cognitive elements to which it is connected, thus creating a mutually constrained aggregate).

conscience,[69] implying that personal conscience is an individualized infrastructure of morality, ideology, perspectives, views, and other mental processes. For purposes of this discussion, personal conscience constitutes the internal ethics of a legal professional. Even though legal professionals draw internal ethics from family, school, society, culture, and other institutions in which they participate, personal conscience varies from person to person. Personal conscience is both subjective and inter-subjective.[70] It is both unique and participatory.[71] It is both personal and communitarian.[72] Personal conscience that shares nothing with community values is atypical, and possibly pathological. Personal conscience that absorbs community values without reflection or critical evaluation lacks personal identity and is susceptible to prejudice, bigotry, and other negative values of the community. Needless to say, personal conscience is rarely etched in stone; it progresses, regresses, and changes with knowledge and experience.[73]

Note further that the Model Rules instruct lawyers to be "also guided by personal conscience."[74] The "also" language clarifies that personal conscience cannot be the sole driver of the lawyer's professional responsibilities. The Model Rules, however, recognize the significance of personal conscience in the domain of professional responsibility. They do not dissociate personal ethics from professional ethics. Avoiding dissociation, lawyers are free to practice in areas of law compatible with their personal conscience.[75]

Unlike lawyers, other legal professionals, particularly judges, may not be explicitly permitted to import personal conscience into their decision-making. The professional ethics for judges provide no allowance for personal conscience.[76] Law professors are well situated to engage in teaching and scholarship most compatible with their personal values, ethical preferences, moral choices, and religious beliefs.[77] But even law professors may lose peer approbation and chances for professional advancement if their writings spill far

69. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 7 (2010).

70. PAUL HERNADI, CULTURAL TRANSACTIONS: NATURE, SELF, SOCIETY 2–3 (1995) (growing recognition of three-dimensionality of being human, subjective, objective, and intersubjective).

71. *See id.*

72. *See id.*

73. BARBARA M. STILWELL ET AL., RIGHT VERSUS WRONG—RAISING A CHILD WITH A CONSCIENCE, at ix (2000).

74. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 7 (2010).

75. Lance McMillian, *Tortured Souls: Unhappy Lawyers Viewed Through the Medium of Film*, 19 SETON HALL J. SPORTS & ENT. L. 31, 83 (2009).

76. *See* MODEL CODE OF JUDICIAL CONDUCT pmbl. (2007). "The United States legal system is based upon the principle that an independent, impartial, and competent judiciary . . . will interpret and apply the law that governs our society." *Id.* pmbl. ¶ 1.

77. Even lawmakers must selectively compose personal conscience into the legislative process, as they may not be reelected if they act contrary to the will of the people.

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out of the mainstream. This varying affordability of composing personal conscience into professional work raises a simple but fundamental question: What is personal conscience?

While the Model Rules recognize the importance of personal conscience, the definition of personal conscience is far from clear. There is an unspoken presumption that personal conscience embodies a sense of right and wrong and carries notions of justice, fairness, and morality.[78] Few would argue that personal inclinations for discrimination, prejudice, hostility, violence, injustice, and cruelty are parts of conscience, even though such inclinations cannot be completely expelled from the human mind.[79] In its ordinary meaning, personal conscience is rarely identified with prejudice or bigotry.[80] The development of personal conscience in religious cultures, for example, is likely to be different from the development of personal conscience in cultures that champion moral relativity or amoral professionalism. Believers of natural law might assert that human beings are born with innate and universal notions of morality and fairness.[81] Others might argue that personal conscience is a social and cultural construct.[82] While the precise formation of personal conscience is perhaps unknowable, most legal systems continue to rely on personal conscience regardless of its constitutive sources.

A. Calls of Personal Conscience

In common law, the notion of conscience entered early and forcefully into the judicial system.[83] In many cases, conscience was invoked to mitigate the harshness of laws.[84] The Court of Chancery was established as a court of

78. *See* Jon C. Dalton et al., *Maintaining and Modeling Everyday Ethics in Student Affairs*, *in* THE HANDBOOK OF STUDENT AFFAIRS ADMINISTRATION 166, 172–73 (George S. McClellan et al. eds., 3d ed. 2009).

79. *See* ROBERT W. CRAPPS, AN INTRODUCTION TO PSYCHOLOGY OF RELIGION 247–48 (1986).

80. In dictionaries, for example, conscience is defined in moral terms, excluding immoral elements such as bigotry or prejudice. *See, e.g.*, WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 387 (2d ed. 1983).

81. William E. May, *Conscience Formation and the Teaching of the Church*, 87 HOMILETIC & PASTORAL REV. 11, 11–20 (1986), *reprinted in* WHY HUMANAE VITAE WAS RIGHT 363, 369–70 (Janet E. Smith ed., 1993).

82. Bertrand Russell declares that conscience is territorial, not universal. BERTRAND RUSSELL, RELIGION AND SCIENCE (1935), *reprinted in* RUSSELL ON ETHICS: SELECTIONS FROM THE WRITINGS OF BERTRAND RUSSELL 131, 136–37 (Charles R. Pigden ed., 1999). Hence, personal conscience in Kansas is not the same as personal conscience in Japan, Jordan, or Mongolia. Yet not every Kansan shares the same personal conscience with fellow Kansans.

83. *See* DENNIS R. KLINCK, CONSCIENCE, EQUITY AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND 1 (2010).

84. *See, e.g.*, *infra* text accompanying notes 87–90 (illustrating classic example of how a court of law would force a debtor to repay the same loan twice).

conscience in which equity, rather than law, informed judicial decision-making.[85] The Court of Chancery was a court of empathy launched to protect the poor and public servants.[86] A classical case of debt illuminates the difference between the court of law and the court of conscience. A debtor paid his loan but neglected to retrieve the bond from the lender.[87] The common law judges refused relief on the ground that relief would support the debtor's "folly."[88] The chancellor asked the lender to bring the bond to the court. The chancellor cancelled the bond, remarking that "'God is the guardian of fools.'"[89] The chancellor, frequently a church official, was "the only dispenser of the king's conscience."[90]

Even though conscience is frequently associated with equity, common law itself recognizes honesty, fairness, good faith, and other elements that constitute the notion of conscience. In 1909, Professor George Trumbull Ladd challenged mechanical conceptions of law by arguing that judges of law are no less than duty-bound to guide themselves by "justice, equity, and good conscience."[91]

In historical phraseology of common law, a term like the King's conscience sounds high and mighty, signifying royal prerogative; however, the notion of conscience was by no means an elitist or ecclesiastic construction. Ordinary members of the community, such as jurors, are as entitled as judges or, for that matter, the King to rely on personal conscience in reaching verdicts. Each juror hears the evidence, weighs conflicting stories told in the courtroom, and discusses the case with fellow jurors. But, in the end, each juror must reach a verdict as an individual and not as a corporate member of the jury. In reaching the verdict, the juror may rely on personal conscience to determine the outcome. Whether a defendant is guilty beyond a reasonable doubt is not an automatic, law-prompted, analytical decision; it is a call of personal conscience. Courts recognize each juror's personal conscience as a factor in jury decisions and declare that "the law cannot and should not probe into matters of personal conscience."[92] Courts may encourage an indecisive jury to reach a verdict, but any such charge must also admonish the jury "that each

85. Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1038 (2009).

86. *See* 1 EDWARD P. CHEYNEY, A HISTORY OF ENGLAND 111 (reprt. 1926).

87. *Id.* at 128.

88. *Id.* (recalling an historic case). *See also* Kraus & Scott, *supra* note 85, at 1038 (citing Glaston v. Abbot of Crowland (1330), *reprinted in* SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 252 (J.H. Baker & S.F.C. Milsom eds., 1986)).

89. CHEYNEY, *supra* note 86, at 128.

90. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 42, at 47 (W.H. Lyon, Jr. ed., Little, Brown, & Co. 14th ed. 1918) (1886).

91. George Trumbull Ladd, *Ethics and the Law*, 18 YALE L.J. 613, 619 (1909).

92. *See, e.g.*, Robinson v. Polk, 444 F.3d 225, 226 (4th Cir. 2006).

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individual juror not surrender his or her honest convictions and not to return any verdict contrary to the dictates of personal conscience."[93] William Blackstone commended the practice of the juries to do the right thing.[94]

Some judges in the United States seem uncomfortable with the idea of summoning personal conscience as a judicial metric in deciding cases. In 1983, the Michigan Supreme Court adopted the "shock the conscience of appellate court" test for reviewing sentences given by trial courts.[95] However, the appellate judges expressed great discomfort with the personal conscience test and viewed it as subjective and without any guidelines.[96] Seven years later, the Michigan Supreme Court scrapped the "shock the conscience" test and instead adopted the proportionality standard, which reviews whether the sentence is proportionate to the circumstances surrounding the offense and the offender.[97]

Despite judicial reservations to its application in select cases,[98] personal conscience is a significant part of American judicial philosophy. Thousands of cases turn upon the "shock the conscience" test.[99] For example, in Connecticut, the courts could overturn a jury award for economic damages in negligence cases if the award is so low or so high that it shocks the conscience of the court.[100] New York courts refuse to enforce "unconscionable bargains" that shock the conscience of the court.[101] California courts consider a punishment cruel and unusual under the California Constitution if the punishment is so disproportionate to the crime that it shocks the conscience of the court.[102] Florida courts hold that fundamental rights granted under the

93. Brown v. State, 369 A.2d 682, 684 (Del. 1976). *Compare id.* (setting aside verdict where jurors not admonished to retain conscience), *with* Davis v. State, No. 119, 1998, 1999 WL 86055, at *3 (Del. Jan. 20, 1999) (holding that instruction to reach decision, when coupled with admonition to follow personal conscience, was not coercive).

94. Common law juries developed a practice of finding the value of stolen goods to be less than twelve pence to avoid the mandatory death penalty for theft of goods over twelve pence. Blackstone called such practice "pious perjury." 4 WILLIAM BLACKSTONE, COMMENTARIES *239.

95. People v. Coles, 339 N.W.2d 440, 453 (Mich. 1983).

96. People v. Rutherford, 364 N.W.2d 305, 308–10 (Mich. Ct. App. 1985) (Shepherd, J., concurring).

97. People v. Milbourn, 461 N.W.2d 1, 9 (Mich. 1990).

98. *See, e.g.*, *id.*; *Rutherford*, 364 N.W.2d at 308–10.

99. A Westlaw search shows that between January 1, 2009 and August 15, 2009, more than 700 cases contained the "shock the conscience" search term.

100. *See, e.g.*, Earlington v. Anastasi, 976 A.2d 689, 697 (Conn. 2009); Childs v. Bainer, 663 A.2d 398, 402 (Conn. 1995).

101. *See, e.g.*, Christian v. Christian, 365 N.E.2d 849, 854–55 (N.Y. 1977) (noting use of "shock the conscience" as component to unconscionability analysis); Morad v. Morad, 812 N.Y.S.2d 126, 127 (N.Y. App. Div. 2006).

102. *See, e.g.*, People v. Dillon, 668 P.2d 697, 719–20 (Cal. 1983) (en banc) (stating the courts should not interfere unless a punishment is so disproportionate that it shocks the

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substantive due process clause of the Florida Constitution may not be taken away by means of government conduct "so egregious that it shocks the conscience."[103] Kansas courts uphold contract provisions "unless the provision in question is, under the circumstances, so outrageous and unfair in its wording or its application that it shocks the conscience or offends the sensibilities of the court."[104] Note that Kansas courts rely not only on judicial conscience but also on "sensibilities of the court."

The conscience-shocking behavior test was articulated by the United States Supreme Court, in a seminal 1952 case, to safeguard against egregious governmental violations of Due Process protected by the Fourteenth Amendment.[105] In that case, the actions taken by government agents to procure incriminating evidence offended "even hardened sensibilities."[106] Three Los Angeles deputy sheriffs, upon receiving information that Rochin was selling narcotics, illegally broke into the defendant's home, invaded his bedroom privacy where they found a partly dressed Rochin sharing the bed with his wife.[107] The deputies noticed two capsules lying on a table next to the bed.[108] When questioned about the capsules, Rochin seized and swallowed them.[109] The deputies pounced upon Rochin and physically struggled to extract the capsules from his mouth but were unsuccessful.[110] They handcuffed Rochin and took him to the hospital.[111] There, upon a deputy's direction, a doctor forcibly administered an emetic solution into Rochin's body to cause stomach pumping.[112] Rochin vomited the capsules later found to contain morphine.[113]

"This is conduct that shocks the conscience," stated the *Rochin* Court, thus forging ties between Due Process and judicial conscience.[114] Consequently, governmental behavior that shocks judicial conscience is a violation of Due

conscience); *In re* Lynch, 503 P.2d 921, 930 (Cal. 1972) (stating the judiciary should not interfere unless a statutory penalty is so severe in relation to the crime that it is cruel and unusual).

103. City of Lauderhill v. Rhames, 864 So. 2d 432, 438 (Fla. Dist. Ct. App. 2003) (citation omitted) (quoting Boyanowski v. Capital Area Intermediate Unit 215 F.3d 396, 301 (3d Cir. 2000)). *See also* J.B. v. Fla. Dep't of Children & Family Servs., 768 So. 2d 1060, 1063 (Fla. 2000) (evaluating whether treatment of individual was "fundamentally unfair").

104. Adams v. John Deere Co., 774 P.2d 355, 357 (Kan. Ct. App. 1989).

105. Rochin v. California, 342 U.S. 165 (1952).

106. *Id.* at 172.

107. *Id.* at 166.

108. *Id.*

109. *Id.*

110. *Rochin*, 342 U.S. at 166.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 172.

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Process. The Court was careful to separate conscience from "fastidious squeamishness" and "private sentimentalism."[115] It also seemed to distinguish between judicial conscience and "our merely personal and private notions."[116] In order to objectify judicial conscience, the Court invoked reason, decencies of civilized conduct, a sense of justice, and the community's sense of fair play. Expressing discomfort with these nebulous distinctions, Justice Black saw no difference between objectified and subjective domains of personal conscience.[117] For Justice Black, conscience is just another name for personal ideology or what he called personal philosophy with "accordion-like qualities."[118]

B. Elements of Personal Conscience

Justice Black made a valid observation to the extent that personal conscience cannot be precisely defined. A lack of definition, however, is no basis to throw away the concept of personal conscience from the realm of legal reasoning. In a broad sense, personal conscience encompasses a legal professional's character, conscience, and intellectual, emotional, and moral assets. Good faith, a fundamental concept of law that runs through the entire legal system, is an integral part of personal conscience.[119]

I use the term personal conscience to specifically draw attention to three main elements: state of knowledge, self-concept, and self-criticism. These elements do not define personal conscience but provide valuable insights into how personal conscience is constructed and how it is mobilized in the process of legal reasoning.

State of Knowledge: The first element of personal conscience is the legal professional's state of knowledge.[120] Legal professionals are generally well-informed citizens of the community. In addition to the knowledge of law, analytical skills, legal theory, and jurisprudence, legal professionals understand

115. *Rochin*, 342 U.S. at 172.

116. *Id.* at 170.

117. *Id.* at 175–76 (Black, J., concurring).

118. *Id.* at 177. Personal conscience has been invoked even to criticize United States Supreme Court decisions. Two justices of the Montana Supreme Court refused to comply with a decision of the United States Supreme Court. "We cannot in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the United States Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." Casarotto v. Lombardi, No. 93-488, at *3 (Mont. July 16, 1996) (Trieweiler & Hunt, JJ., dissenting).

119. The classical definition of good faith means honesty in fact. BLACK'S LAW DICTIONARY 713 (8th ed. 2004).

120. Lawyers are distinguished from other professionals based on their qualifications and training in the legal field. Richard L. Abel & Philip S.C. Lewis, *Putting Law Back into the Sociology of Lawyers*, *in* 3 LAWYERS IN SOCIETY: COMPARATIVE THEORIES 478, 501 (Richard L. Abel & Philip S.C. Lewis eds., 1989).

how the legal system delivers justice and allocates social goods and resources to various constituents. Legal professionals also accumulate extensive knowledge about culture and social forces that influence the legal system. Of course, knowledge is limitless.[121] The state of knowledge is, therefore, a dynamic phenomenon; it develops and matures as the legal professional gains more knowledge, experience, and cognitive congruence. Personal conscience as an epistemic entity develops sophistication when firmly anchored in general and legal knowledge.[122]

Self-Concept: The second element of personal conscience is what Elliot Aronson calls self-concept.[123] Most people, including legal professionals, "strive to maintain a sense of self that is both consistent *and* positive."[124] Like most individuals, legal professionals have favorable views of themselves and want to see themselves as competent, ethical, and reliable. Positive self-concept in the case of legal professionals also includes feelings for fairness, sentiments for morality, and desires for economic and social justice, even though what constitutes fairness, morality, or justice may vary from person to person and might, in some cases, be controversial. Some legal professionals are self-righteous but rarely do they rejoice in being unfair, immoral, or unjust. For the maintenance of self-concept, legal professionals avoid cognitive dissonance, that is, blatant contradictions between what they say and what they do.[125] The maintenance of self-concept is both external and internal. Externally, legal professionals avoid and hide breaches of law, ethics, and personal conscience. External approbation of the community or professional peers reinforces positive self-concept. Internally, legal professionals must rationalize the breaches to themselves and find defenses and justifications for what they do.[126] Some sort of self-atonement is critical for the maintenance of self-concept.[127]

121. C.L. SHENG, A UTILITARIAN GENERAL THEORY OF VALUE 84 (1998).

122. *See* THOMAS SOWELL, KNOWLEDGE AND DECISIONS 11 (2d prtg. 1996).

123. Elliot Aronson, *Dissonance, Hypocrisy, and The Self-Concept*, *in* READINGS ABOUT THE SOCIAL ANIMAL 227, 233 (Elliot Aronson ed., 9th ed. 2004).

124. *Id.*

125. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 267–68 (reprt. 2008). *See also* Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651, 1696–97 (2009) (citing LUBAN, *supra*, at 267–68) (applying David Luban's views on dissonance to race-based professional norms of practice).

126. "[W]e are all highly resistant to the thought of our own wrongdoing, and the result is that we will bend our moral beliefs and even our perceptions to fight off the harsh judgment of our own behavior." LUBAN, *supra* note 125, at 269–70.

127. *Cf.* Gerald J. Postema, *Self-Image, Integrity, and Professional Responsibility*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 286, 297–99 (David Luban ed., 1984) (arguing that unreconciled internal conflicts impede the understanding of others' societal roles and interrelations).

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Self-Criticism: The third element of personal conscience is self-criticism, which is the ability for legal professionals to critically examine their personal (and professional) deficiencies.[128] While self-concept emphasizes personal strengths, self-criticism points out personal weaknesses. Both self-concept and self-criticism are parts of self-awareness. For example, a legal professional may recognize that her knowledge in a certain discipline is inadequate. This recognition can be an incentive for removing the deficiency. Another legal professional may catch himself engaging in racial stereotyping. This self-discovery might jolt the legal professional into changing his views on race. Self-criticism is an internal mechanism to correct personal flaws and improve personal strengths. Self-criticism is fruitless if it causes no personal improvement.[129] In some cases, self-criticism could be pathological, leading to stress, mental and physical harm.[130] A judge may drive himself crazy by comparing his writing abilities with those of Lord Denning, or a lawyer may declare himself to be a failure because his trial techniques are demonstrably inferior to those of Clarence Darrow.[131] Destructive self-criticism is as harmful to personal conscience as is the absence of self-criticism.

Even though most legal professionals have a positive self-concept, they may nonetheless review and even change their notions of morality, justice, and fairness. Self-criticism may also lead to the abandonment of idealism and naïve sentiments for fairness, morality, and justice. Realizing that the world around them cannot be neatly divided into any linear good and bad, legal professionals may tone down their sentiments for justice and fairness and adopt a more hard-nosed attitude toward personal, social, and economic problems.[132] Even when legal professionals adopt pragmatism or compromise some deeply held values to function in real world situations, few completely abandon the inner voices of fairness, justice, and morality.

Employing the dynamics of knowledge, self-concept, and self-criticism, personal conscience pursues cognitive congruence and avoids cognitive dissonance.[133] An active and engaged personal conscience assures that the legal professional is aware of his or her preferences, prejudices, and moral strengths and weaknesses. In light of self-awareness, most legal professionals

128. *See* Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1663–64 (2002).

129. RAYMOND M. BERGNER, PATHOLOGICAL SELF-CRITICISM: ASSESSMENT AND TREATMENT 1–2 (C.R. Snyder ed., Plenum Ser. in Soc./Clinical Psychology, 1995).

130. *Id.* at 4–6.

131. For examples of pathological self-criticism, see *id.* at 2–3.

132. In William Shakespeare's play *Hamlet*, the famous soliloquy "to be, or not to be" signifies the tension between self-concept and self-criticism that leads Hamlet away from a naïve and idealist view of the world to the stark reality of intrigue, incest, murder, and revenge. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.

133. *See supra* notes 124–36 and accompanying text.

strive to pursue consistency and clarity in what they believe and in what they say or do.[134] Accordingly, they avoid blatant contradictions in their speech and deeds. With varying degrees of commitment, legal professionals may wish to actively pursue what they believe is good, fair, and just. Self-awareness preserves personal conscience,[135] alerting legal professionals that their acts and deeds are inconsistent or morally indefensible. Personal conscience, however, is more than self-awareness. Personal conscience is action; it is a dynamic force, which provides an ethical view of the world directing legal professionals to do the right thing, causing cognitive dissonance when legal professionals say or act contrary to their internal ethics.[136]

Personal conscience, as an epistemic entity, could be highly enlightened and anchored in wisdom. In pre-legal communities, wise men and women, including tribal chiefs, were highly regarded for their mature personality and cognitive development.[137] Even in sophisticated legal communities, the mystique of the wise person lingers. The wise person develops personal conscience that the community trusts and is willing to follow. Wisdom or personal conscience is not tied to any innate or genetic sense of morality and justice. Personal conscience for the most part is an acquired personal asset that matures through learning, observation, reflection, and action.[138] Of course, personal conscience varies from person to person in both quality and consistency. In some cases, personal conscience is the light of the world, but in most cases personal conscience shares burdens and benefits of the culture in which the individual is raised and reared.[139] This study does not require legal professionals to be prophets or messiahs but, rather, upright persons with a developed sense of intellectual and moral integrity and, most important, the knowledge-based will "to do the right thing."[140]

134. Lawyers are driven to resolve dissonance by adjusting their principles and conduct so that they are in harmony with one another. *See* LUBAN, *supra* note 125, at 267.

135. *See* Lucinda Orwoll & Marion Perlmutter, *The Study of Wise Persons: Integrating a Personality Perspective*, *in* WISDOM: ITS NATURE, ORIGINS, AND DEVELOPMENT 160, 161 (Robert J. Sternberg ed., 1990).

136. *See* LUBAN, *supra* note 125, at 267–68.

137. *Cf.* EXPLORING ANCIENT CIVILIZATIONS 695 (Woolf et al. eds., 2004).

138. *See* DAVID BOHR, CATHOLIC MORAL TRADITION 171 (rev. ed. 1999) (comparing differing developmental conceptions of conscience).

139. Stephen Fields, *Mediating The Non-Christian Religions: Congar, Balthasar, Nature and Grace*, *in* YVES CONGAR: THEOLOGIAN OF THE CHURCH 401, 409 (Gabriel Flynn ed., Louvain Theological & Pastoral Monographs No. 32, 2005).

140. Herbert E. Phipps, *Lawyers—The Guardians of Truth and Justice*, 58 CASE W. RES. L. REV. 483, 488 (2008).

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III. DISSOCIATION PARADIGM

Legal conventions, professional ethics, and market pressures compel legal professionals to subscribe to the dissociation paradigm.[141] The dissociation paradigm mandates that legal professionals' personal preferences must not influence their legal reasoning or judgment.[142] A stronger version of the dissociation paradigm demands that legal professionals refrain from injecting personal views, values, and opinions into the application and interpretation of laws. They must apply the law wherever the law leads them, even if the law offends their personal conscience. This capacity or existential will to enforce the law contrary to personal conscience is considered the high achievement of legal professionalism. Professionalism is seriously undermined when lawyers and judges ignore laws and implement personal preferences. A strict separation between legal reasoning (objective and rational) and personal conscience (subjective and non-rational) constitutes the core of dissociation paradigm.[143]

Unfortunately, while upholding the supremacy of law over personal conscience, as discussed below, the dissociation paradigm clouds personal responsibility and intellectual integrity of legal professionals. If legal professionals must apply law and legal reasoning regardless of personal conscience, it would be unfair to hold legal professionals personally accountable for their professional services. Physicians and many other professionals integrate rather than separate professional and personal selves.

141. *See* Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 37, 39 (2001) (arguing that legal education continues to present law as an autonomous entity disengaged from moral considerations).

142. The dissociation paradigm is a psychophysics concept that involves the separation of conscious and subconscious perception. *See* Eyal M. Reingold, *Unconscious Perception and the Classic Dissociation Paradigm: A New Angle?*, 66 PERCEPTION & PSYCHOPHYSICS 882, 882 (2004).

143. Laura S. Underkuffler, *Agentic and Conscientic Decisions in Law: Death and Other Cases*, 74 NOTRE DAME L. REV. 1713, 1714 (1999). Professor Underkuffler draws a distinction between what she calls "agentic" and "conscientic" models of decision making and posits that under the agentic model, juries, judges, and executive officials decide cases according to law. *Id.* at 1714. Under the conscientic model, decision makers bring in nonrational factors derived from personal conscience. *Id.* The conscientic model may be used in death-penalty cases when the agentic model fails. *Id.* at 1715. Professor Underkuffler concludes her article with remarkable words:

> But rare as these cases are, they serve a vital function. They remind us that we are, in the end, *personal* actors in law, as in life . . . . They remind us that when we deny the humanity of others, we should feel the prick of doubt, the sickness of conscience. . . . They are the times when we cannot comfort ourselves with murmurs of agentic roles. They are the small spaces left, in law, for personal moral inquiry.

Id. at 1736.

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For example, medical doctors cannot relinquish personal judgment in treating patients, nor can they renounce personal conscience from professional work.[144] They must take personal responsibility for the work they do, and may, on the basis of ethics, refuse to enforce unjust laws.[145] By contrast, lawyers and judges, serving under the dissociation paradigm, owe no consciential responsibility for providing professional services.

As noted earlier, professional ethics do not encourage legal professionals to evade personal responsibility or suspend personal conscience in providing legal services. The notion of responsibility, however, is predominantly tied to legal knowledge, skills, and the craft of legal reasoning. Legal professionals are responsible for preparation, diligence, competence, and other work-related virtues.[146] In discharging professional responsibilities, however, legal professionals may consult personal conscience only if the conscience endorses what the law dictates. Judges must follow the law regardless of their assessment about the soundness of the law. Lawyers must defend the client's claims, interests, and rights regardless of personal reservations.[147] By relying on the dissociation paradigm, judges and lawyers can conclude that it is the law they are enforcing and they have no personal responsibility if the application of law leads to social harm.

A. Primary Justifications

The dissociation paradigm is defended at multiple levels. The rule of law and law-based justice are its primary justifications.[148] The dissociation paradigm safeguards the legal system against arbitrariness and distortions, furnishing comfort to people that trained legal professionals uphold the law even if they are personally opposed to it. Even though rarely examined, the dissociation paradigm can also serve as an instrument to defend and preserve

144. Unfortunately, even the medical profession faces conscientic dilemmas. Doctors experience market pressures to prescribe newer medicine and sometimes order marginal clinical tests to safeguard against possible lawsuits. *See* Tara F. Bishop et al., *Physicians' Views on Defensive Medicine: A National Survey*, 170 ARCHIVES INTERNAL MED. 1081, 1081 (2010).

145. "In general, when physicians believe a law is unjust, they should work to change the law. In exceptional circumstances of unjust laws, ethical responsibilities should supersede legal obligations." COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AMA, CODE OF MEDICAL ETHICS § 1.02 (2008).

146. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010).

147. *Cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1983) ("[T]he lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client.").

148. *Cf.* Neil S. Siegel, *Interring The Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 570 (2010) (commenting on testimony from senators regarding Supreme Court qualifications).

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the monopoly of Establishment.[149] Unjust systems under which laws are oppressive prescribe the dissociation paradigm as the practice guide for legal professionals.

1. Rule of Law

The rule of law argument is perhaps the chief defender of the dissociation paradigm.[150] The rule of law argument proceeds as follows: Lawyers and judges must resolve disputes according to the dictates of law, which means according to valid legal materials, such as statutes, regulations, and case precedents. When lawyers and judges ignore the application of laws, the rule of law is subverted. The rule of law is also undermined when lawyers and judges apply one set of laws to one case and another set of laws to another case, even though the two cases are similar and ought to be judged alike. Arbitrary or selective non-application of precedents undermines the rule of law.[151] Of course, favors, special rights, exemptions, exceptions, and numerous other devices may also be used to undermine the rule of law.

Furthermore, the rule of law demands that the morality embedded in laws ought to be upheld. The laws are rarely morally empty.[152] Most frequently, laws carry notions of morality, even though some lawyers and some judges may disagree with these notions. The dissociation paradigm prohibits the undermining of the morality of laws under some contrary notions of morality. Lawyers and judges may appeal to lawmakers to modify or repeal undesirable laws, but until lawmakers take action, lawyers and judges must apply the morality of laws as it is and not as it ought to be.[153]

149. *See* Lynn Berat, Essay, *Courting Justice: A Call for Judicial Activism in a Transformed South Africa*, 37 ST. LOUIS U. L.J. 849, 850–51 (1993) (describing judicial passivism during the South African apartheid).

150. *See* J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 783 (1987) ("[T]he Rule of Law *requires* that a legal text be separated from the purpose present in the mind of the creator of the text.").

151. *See* Commonwealth v. Poundstone, 188 A.2d 830, 832 (Pa. Super. Ct. 1963) ("If the courts are to wave like wheat in the wind, the whims of the particular judges of the moment and not rules of law will control the destinies, lives and fortunes of our people.").

152. Even unjust laws contain the morality of the lawmakers who make such laws. Slavery laws, for example, were not morally vacuous for slave owners, even though they were for the slaves. *See* Ali Khan, *The Dignity of Labor*, 32 COLUM. HUM. RTS. L. REV. 289, 326–28 (2001) (discussing varying theories as moral justifications for the preservation of slavery and the labor class).

153. *But see* RICHARD A. POSNER, HOW JUDGES THINK 9 (2008) ("[J]udges perforce have occasional—indeed rather frequent—recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies.").

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2. Law-Based Justice

Closely related to the rule of law is the argument for law-based justice. In pluralistic and diverse societies in which social groups adhere to different religions, political philosophies, and notions of fairness and justice, lawyers and judges should not be allowed to subvert the balance of competing values achieved through representative legislation. In a democratic society when a bill is proposed for adoption, groups with competing interests and values attempt to influence lawmakers and strive to obtain legislation most favorable to their respective goals and ideologies. Lawmakers, through a complex process of political deliberation, debate competing goals. The democratic process allows the majority of elected representatives to legislate policy preferences, though under constraints of the constitution. Once the legislature has opted for a law-based fairness or justice and translated its preference into a statute, all competing notions of fairness and justice stand excluded.[154] Legal professionals must respect the democratic process and refrain from undermining legislative preferences through lawyering or judicial process. The dissociation paradigm thus promises to preserve law-based justice.

3. Safeguarding Establishment

The dissociation paradigm furnishes a theoretical construct for safeguarding the power of the Establishment. The Establishment—be it oligarchy, clergy, military, influential families, powerbrokers, or pressure groups—does not wish to lose its control of the state machinery.[155] It employs the state machinery to preserve its dominion over the creation, application, and enforcement of laws.[156] The dissociation paradigm serves as a powerful instrument of exclusion as it forbids legal professionals from undermining the laws of the Establishment. Legal professionals are welcome to join and support the Establishment but not undermine it. Apartheid South Africa relied on the dissociation paradigm in obligating lawyers and judges to apply the apartheid laws regardless of their personal views of fairness and justice.[157] In *Dred Scott*, shortly before the eruption of the Civil War, Justice Taney affirmed the dissociation paradigm to argue that morality and justice have

154. J. Skelly Wright, *Law And The Logic of Experience: Reflections on Denning, Devlin, and Judicial Innovation in the British Context*, 33 STAN. L. REV. 179, 182 (1980) (book review).

155. *See* WEBSTER'S II: NEW COLLEGE DICTIONARY 384 (1995) (defining establishment). Even in democracies, plutocracies, rather than the people, control power. *See* Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1058 (2005).

156. *Cf.* Thompson, *supra* note 155, at 1036 (discussing the implications of campaign contributions).

157. Berat, *supra* note 149, at 850–51.

nothing to do with application of the U.S. Constitution—a judicial effort to preserve the race ideology of the Establishment.[158]

Even though judges and lawyers are frequently part of the Establishment, the dissociation paradigm is most needed when legal professionals lose respect for the system and when the Establishment no longer trusts legal professionals. In democratic societies, the institutional justification for promoting the dissociation paradigm is dressed up in philosophical theories such as the will of the people, constitutional supremacy, and representative democracy. In non-democratic societies, state ideology is enforced by invoking the welfare of the people or through blatant coercion. In any system, when the Establishment fears that legal professionals are likely to challenge laws and state ideology, the dissociation paradigm gathers mass. In mistrusting times, the personal conscience of legal professionals is excluded, even monitored, to preempt subversion.[159]

B. Judicial Nominees

It is customary for the Senate Judicial Committee members to give speeches to affirm the dissociation paradigm, preaching to judicial nominees that they must uphold the rule of law and not impose their personal social, political, and economic views.[160] Judicial nominees of all persuasions, "to one degree or another, tell the same sort of lies."[161] The nominees state they will respect the law, uttering some variation of the "magical words" that Robert Bork, an unsuccessful nominee for the Supreme Court, asked judges to believe: Judges should apply, not make, law.[162] These representations to the Committee are for the most part deceptive utterances calculated to lubricate the confirmation process.[163] These hearings perpetuate the fiction of the

158. *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 405 (1857), *superseded by* U.S. CONST. amend. XIV.

159. John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 993 (2009) (noting that as part of the war on terror, Attorney General Ashcroft authorized monitoring communications between lawyers and prisoners).

160. *See, e.g.*, *The Nomination of Elena Kagan to be an Associate Judge of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Sen. Patrick Leahy, Chairman, S. Judiciary Comm.), *available at* http://judiciary.senate.gov/hearings/index.cfm?t=month&d=06-2010&p=hearings.

161. Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 CONST. COMMENT. 169, 171 (2009) (reviewing PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008)) (questioning the scrutiny given to Justice Sotomayor's testimony before the Senate Judiciary Committee given the prevalence of similar statements in the justices' judicial opinions).

162. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 2 (1990) ("A judge who announces a decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result.").

163. *See* Lund, *supra* 161, at 170–71 (describing representations made by Sonia Sotomayor).

dissociation paradigm. Everyone in the audience and elsewhere knows that successful nominees, particularly for the Supreme Court, would likely ignore their statements to the Committee and decide cases as they see fit.[164] Regardless of what they say to politicians, judges do make law.[165]

The Senate Judiciary Committee hearings on Sonia Sotomayor's nomination to the United States Supreme Court brought forth a vivid defense of the dissociation paradigm. Some members of the Committee questioned whether Sotomayor would uphold the law regardless of her personal views. Senator Orin Hatch reminded the audience that President Barack Obama, while a member of the Committee, had opposed a Bush appointee to the federal appeals court arguing "that the test of a qualified judicial nominee is whether she can set aside her personal views."[166] Hatch added that in nominating Sotomayor, President Obama stated that "personal empathy is an essential ingredient in judicial decisions."[167] Hatch sought assurances that Sotomayor's rulings would be rooted in the law, not "personal feelings or politics."[168] Similarly, Senator Mitch McConnell demanded decisions free of "feelings or personal or political preferences."[169] Senator Charles Grassley said Sotomayor must "apply the law, not personal politics, feelings or preferences."[170]

These reactions indicate that for some lawmakers empathy is an affront to the dissociation paradigm. Empathy carries the discomforting idea that the judge would bend the law and show favor for the poor, the unprivileged, indeed for anyone that the judge sees as the underdog. The outrage against empathy does not necessarily connote cold-heartedness, but rather a fear that judges would begin to enforce self-righteousness, indeed their own biases, and ignore the law.[171] This fear, however, as discussed below, is contrary to the common law tradition of consciential juries and judges.

164. *See id.* at 171–72.

165. *See* Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. PITT. L. REV. 545, 547 (2004) (citing, *inter alia*, JOHN HART ELY, DEMOCRACY AND DISTRUST 1–9 (1980), Aharon Barak, *Foreward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 62 (2002)).

166. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 11 (2009) (statement of Sen. Orrin Hatch).

167. *Id.* at 12.

168. Sheryl Gay Stolberg, *Say it with Feeling? Not This Time Around*, N.Y. TIMES, May 29, 2009, at A15.

169. *Id.*

170. *Id.*

171. Even conservative nominees are grilled over the dissociation paradigm in the Committee hearings as some members of the Committee fear that conservative nominees might overrule cases such as *Roe v. Wade*. *See* Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 436–62 (2008) (describing the Roberts and Alito confirmation hearings).

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C. Juries and Judges

Historically, common law juries were rarely subjected to the dissociation paradigm, as they are now. Instead of controlling juries, common law empowered juries to decide cases of law, facts, and punishment. In the eighteenth century America, "lawyers argued fundamental law to juries, which rendered verdicts based on their own interpretation and understanding of the constitution."[172] Juries were not simply fact finders but decided every aspect of the case, including points of law.[173] Thus, law had a popular dimension, and juries were trusted to understand and apply the law as they saw fit. John Adams, an advocate of the popular power of juries, reaffirmed that it was "not only [every juror's] right but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho [sic] in Direct opposition to the Direction of the Court."[174] Juries were thus not bound to the instructions that judges would give to streamline the analytical process of jury decision making. However, as law turned to statutes and technical craftsmanship, juries lost their powers to interpret the laws.[175] Even facts presented to juries were controlled and filtered through rules of evidence.

The historical freedom of juries to render verdicts compatible with their personal conscience is under judicial assault.[176] For a variety of reasons, the legal system has begun to subject juries to the dissociation paradigm.[177] Trial judges do not inform juries that they have the power to nullify, a power under which the jury returns a verdict intentionally defying the law as instructed by the court.[178] "Nullification instructions, historically common, are no longer given. It is generally accepted that defendants have no right to such a charge."[179] Although juries are losing their traditional consciential prerogatives, "juror departures—when they seek to nullify the law in order to

172. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 28 (2004).

173. *Id.*

174. *Id.* (alteration in original) (quoting 1 LEGAL PAPERS OF JOHN ADAMS 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

175. *Id.* at 164.

176. *See generally* Andrew J. Parmenter, Note, *Nullifying the Jury, "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L.J. 379 (2007).

177. These reasons include the near extinction of traditional all-white juries, the influx of immigrants from non-common law cultures, and the doctrinal complexity of civil and criminal law. *Id.* at 387 (suggesting that "America's ruling, wealthy, white, elite" distrusted the "increasingly diverse jury pool").

178. Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 485–86 (2008) (noting that some courts dismiss jurors if the intent to nullify is discovered pre-verdict).

179. United States v. Polizzi, 549 F. Supp. 2d 308, 425 (E.D.N.Y. 2008). In his opinion, Judge Jack B. Weinstein furnishes an erudite and historically-informed commentary on the changing role of the juries in the United States.

humanize it—are far from universally frowned upon."[180] On their part, judges, empowered with the dissociation paradigm, but conscious of jury nullification, may give instructions asking juries to apply the law even if the law is incompatible with their personal conscience.[181]

In a 2008 jury trial, U.S. District Court Judge David Coar captured the dissociation rationale in a speech to the jury:

> Now, ladies and gentlemen, we all have the God given right in this country to believe whatever we like and to make decisions as we see fit. Outside of this courthouse and in our personal lives you can make decisions and judge people on any basis you choose. Opinions about wealth, occupation, political party, religious affiliation, color, race, size, sex, national origin, whatever you think is important. As a human being I have deeply held opinions and biases, and I suspect that you have some too. But I have taken an oath that says as a judge I will to the very best of my ability put my stereotypes and biases aside and decide cases on the merits, not based on my personal views.[182]

In instructing jurors to practice the dissociation paradigm and not let their personal conscience affect the jury verdict, Judge Coar made several observations. First, Judge Coar observed that personal views consisting of opinions and biases constitute a state of mind that is not unique to judges but is an essential part of human condition. Every human being has "deeply held opinions and biases," said the Judge.[183] Implied in this observation is the conclusion that a judge's or a juror's personal conscience can interfere with the application of laws. Second, Judge Coar stated that the oath of judicial office requires judges to put aside their personal views.[184] Implied in this observation is a belief that the oath mandates the dissociation paradigm. Under the influence of the oath, Judge Coar believes, it is indeed psychologically possible for judges to separate their professional self from personal conscience and put personal opinions and biases on hold while judges hear and decide cases.[185] It is unclear whether Judge Coar believes that the dissociation skill to turn on the professional self and turn off personal conscience can be developed through practice and experience. Judge Coar did not claim that deeply held opinions and biases can be (or should be) permanently disabled from judges' and juries' minds. The suspension of personal views is temporary and not permanent.

180. United States v. Khan, 325 F. Supp. 2d 218, 232 (E.D.N.Y. 2004) (citing Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WIS. L. REV. 1115 (2003)).

181. *See, e.g.*, United States v. Hill, 552 F.3d 541, 546 (7th Cir. 2008) (examining the actions of the district court).

182. *Id.* (quoting the trial court).

183. *Id.*

184. *Id.*

185. *Id.*

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After disposing of the case, judges will not breach the oath if they revert to their personal self again.

The dissociation paradigm is not confined to trial courts. Appellate judges are equally conscious of what they call "judicial activism," a phrase that dissenting judges use to criticize the majority holding of the court.[186] West Virginia Supreme Court of Appeals Justice Benjamin described judicial activism as a method of decision making "[w]hen judges advance their own notions of what they believe the law should be rather than what the law is . . . which is disrespectful to our constitutional system of governance and which is ultimately destructive to public confidence in the judiciary."[187] Judges who allege that other judges engage in judicial activism frequently cite their own example of upholding the law even when they personally disagree with the law's purpose or policy, thereby demonstrating that judicial restraint can indeed be practiced as a professional skill.[188]

Some judges, including Supreme Court Justices, openly endorse the dissociation paradigm in judicial opinions. Justice Holmes' legendary dissent in *Lochner* is as much about the dissociation paradigm as it is about the state regulation of working hours in New York bakeries.[189] Justice Holmes dissented in support of the New York legislature because, in his view, the majority had opted for free markets (*laissez faire* economics), even though "a constitution is not intended to embody a particular economic theory."[190] Justice Holmes raised a simple dissociation question: Should judges invalidate democratic choices, which a state legislature makes, by reading a contrary economic theory into the Constitution? Holmes pointed out that some judges may personally prefer one economic theory over the other.[191] Some might be highly learned in an economic theory while others might "desire to study it further."[192] But the knowledge or preference of judges for a certain economic theory does not empower judges to invalidate "the right of a majority to embody their opinions in law."[193] Thus, Justice Holmes endorsed the dissociation paradigm, at least in matters of economic ideology, arguing that

186. *See, e.g.*, Edwards v. Kia Motors of Am., Inc., 8 So. 3d 277, 283 (Ala. 2008) (Cobb, C.J., dissenting).

187. Eastham v. City of Huntington, 671 S.E.2d 666, 673 (W. Va. 2008) (Benjamin, J., concurring). For academic commentary, see for example, Hon. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401 (2002); Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441 (2004).

188. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 250 (1983) (Stevens, J., concurring).

189. Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

190. *Id.* at 75.

191. *Id.*

192. *Id.*

193. *Id.* at 75.

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judges cannot invalidate state statutes just because they personally disagree with the economic theory embedded in legislative policy choices.

The dissociation paradigm is by no means a liberal or conservative philosophy. Liberal judges invoke the principle when it suits their argumentation. Justice Stevens, a liberal judge, was willing to uphold federal statutes that prescribed minimum wages and non-discrimination on the basis of age, even though he believed that increasing "the minimum price of labor inevitably reduces the number of jobs" and that the burdens of prohibiting a mandatory retirement age outweigh its benefits.[194] In doing so, Justice Stevens boldly and unequivocally declared that "[m]y personal views on such matters are, however, totally irrelevant to the judicial task I am obligated to perform."[195] In a contested abortion case, the conservative Supreme Court Justices accused their liberal colleagues, including Justice Stevens, of minting "a brand new standard" to disallow the state regulation of abortion.[196] "[T]he standard will do nothing to prevent 'judges from roaming at large in the constitutional field' guided only by their personal views."[197]

The dissociation paradigm is not confined to readings of the Constitution. It has also been invoked in the interpretation of statutes. In 1944, Justice Black declared that "for judges to rest their interpretation of statutes on nothing but their own conceptions of 'morals' and 'ethics' is, to say the least, dangerous business."[198] Likewise, Justice Stewart upheld Texas's procedures to enforce a state recidivist statute, declaring that "the Constitution [has given] me [no] roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy."[199]

Personal conscience does not appear in the Model Code of Judicial Conduct.[200] Judges must be independent, but judicial independence has not been interpreted to mean that judges may subordinate laws to their personal conscience.[201] Compliance with the law, and not personal conscience, is considered indispensable for maintaining public confidence in impartiality of the judiciary.[202] Any concession that a judge may consider personal

194. EEOC v. Wyoming, 460 U.S. at 250 (Stevens, J., concurring).

195. *Id.* (Stevens, J., concurring).

196. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 964 (Rehnquist, C.J., concurring in part, dissenting in part). Chief Justice Rehnquist was joined by Justices White, Scalia, and Thomas. *Id.* at 944.

197. *Id.* at 965 (Rehnquist, C.J., concurring) (quoting Griswold v. Connecticut, 381 U.S. 479, 502 (Harlan, J., concurring).

198. Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 673 (1944) (Black, J., concurring).

199. Spencer v. Texas, 385 U.S. 554, 569 (1967) (Stewart, J., concurring).

200. *See* MODEL CODE OF JUDICIAL CONDUCT pmbl. (2007).

201. *Id.*

202. *Id.*

conscience in deciding cases is tantamount to discarding the dissociation paradigm, the primary purpose of which is to direct judges to apply the law even if the law conflicts with the judges' personal values. Personal conscience, however, has not been completely banished from judicial conduct or legal reasoning. Judicial recusal, for example, is closely tied to personal conscience.[203] Absent legal disqualification, recusal is a matter left to the judge's personal conscience.[204]

Judge Richard Posner of the Seventh Circuit stated that when writing opinions, judges suffer from a "terrible anxiety" that they would be accused of making decisions not on the basis of law but personal inclinations.[205] To allay this anxiety, judges anchor their reasoning in a highly complex analytical framework of precedents and legal history, "much of it extremely phony."[206] Posner stated that judges are not necessarily geniuses and scholars, but rather "just lawyers trying to give some reasonable grounds for their opinions."[207]

D. Government Lawyers

While judges do not have to align with the government, government lawyers defend government actions and policies. Government lawyers also represent the interests and values of the nation and not merely those of governments or state agencies to which they are assigned. When government lawyers serve primarily the persons in power and subordinate personal conscience to the interests of their political bosses, they may be called establishment lawyers. Establishment lawyers use legal knowledge and skills to enforce the policies of the persons in power.[208] Willing to serve, the establishment lawyers face situations where they might have to abandon personal conscience and situations where they might also have to discard the dissociation paradigm.[209]

203. 28 U.S.C. § 455(a) (2006) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

204. *See, e.g.*, People v. Moreno, 516 N.E.2d 200, 201–02 (N.Y. 1987); *In re* Zugibe v. Bartlett, 881 N.Y.S.2d 307, 307 (N.Y. App. Div. 2009). The United States Code provides for judicial disqualification in 28 U.S.C. § 455(b) (2006).

205. Linda Greenhouse, *In His Opinion*, N.Y. TIMES, Sept. 26, 1999, § 7 (Book Review), at 14 (quoting Judge Richard A. Posner).

206. *Id.*

207. *Id.*

208. The so-called "torture memos" attempted to legalize a policy of torture. *See, e.g.*, Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002) [hereinafter Bybee]. In these memos, the establishment lawyers were using legal skills and analysis to legally fortify a policy of torturing Muslims detained for seeking information. *See* Khan, *supra* note 41, at 599 & n.271.

209. *See id.* at 549.

The United States Constitution empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[210] This Clause appears to be stating the obvious.[211] Yet the Clause highlights two important points. First, each principal officer of the executive department is under a constitutional obligation to furnish an opinion if the President so requires. Second, the opinion must be in writing, although nothing prevents the President from soliciting oral opinions. Does the Opinion Clause protect the President from liability (including impeachment) if reliance on written opinions leads to an illegal or unconstitutional policy?[212] Are principal officers liable for political, social, and legal consequences if their written opinions lead to an illegal or unconstitutional policy? Is the purpose of the Opinion Clause to shift responsibility from the President to principal officers?[213]

The Opinion Clause assumes frightening meaning when we read the Torture Memos, which government lawyers drafted to defend certain extraordinary policies and practices in the aftermath of the September 11 attacks on the United States.[214] The Torture Memos were written to furnish legal opinions to the White House Counsel and, ultimately, to the President.[215] These Memos pose a set of difficult questions. Are government lawyers free to render legal opinions without fear of civil and criminal penalties? If government lawyers are protected for their legal opinions, are elected officials who act upon such opinions to make policies immune from civil and criminal penalties? If neither government lawyers nor elected officials are accountable, how do we prevent blatantly unlawful opinions from undermining the rule of law?

Consider the memo that Assistant Attorney General Jay S. Bybee, now a federal judge on the Ninth Circuit, wrote in August 2002 for Alberto R. Gonzales, Counsel to the President.[216] The memo described Presidential

210. U.S. CONST. art. II, § 2, cl. 2.

211. *See* THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (E.H. Scott ed., 1898).

212. Akhil Reed Amar, Essay, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 662 (1996) (arguing that the purpose was not to pass the buck from the President to principal officers).

213. The President is under a constitutional obligation to "take [c]are that the [l]aws be faithfully executed." U.S. CONST. art. II, § 3. The Opinion Clause cannot be interpreted to dilute the Take Care Clause. *See* Amar, *supra* note 212, at 659.

214. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., for the Files, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (Jan. 15, 2009), *available at* http://www.usdoj.gov/opa/documents/memo statusolcopinions01152009.pdf.

215. *See* Khan, *supra* note 41, at 599.

216. *See* Bybee, *supra* note 208.

powers to institute standards of conduct for interrogation of enemy combatants, arguing that Congress cannot restrict or regulate interrogation of battlefield combatants.[217] The power to set standards for interrogation is vested in the President as the sole custodian of the Commander-in-Chief authority.[218] The President may, the memo argued, lawfully disregard a federal criminal statute that interferes with his powers to detain and interrogate enemy combatants.[219] More specifically, the memo narrowed the definition of torture, asserting, for example, that torture does not mean any physical injury but only serious physical injury such as organ failure or a permanent loss of a significant body function.[220] This narrowed definition leaves out a range of acts that though they "may amount to cruel, inhuman, or degrading treatment, they do not produce pain or suffering of the necessary intensity to meet the definition of torture."[221]

In writing this memo, it is unknown whether Bybee was upholding the dissociation paradigm. It is possible that Bybee was writing a memo in accordance with the law as he saw it, without personally adopting any definition of torture or personally endorsing any aggressive interrogation techniques. Bybee might personally have been opposed to the findings of the memo. If so, Bybee was analyzing the law under the dissociation paradigm and, as such, carries no personal responsibility for facilitating the subsequent torturing of Muslim detainees. It is also possible that Bybee's personal approval of torture supported the findings of the memo. Any such personal concord with the memo might have been coincidental or manipulative. The concord was coincidental and protected under the dissociation paradigm if Bybee made no effort to distort the legal analysis in favor of torture. However, the concord was manipulative and not protected under the dissociation paradigm if Bybee was coloring the legal reasoning to sanction torture in line with his personal views. Nobody knows what Bybee was thinking when he wrote the memo. Unless Bybee speaks honestly, these and related questions will remain shrouded in mystery.

It is also unknown whether government lawyers, including Bybee, faced practical arguments in assessing the laws against torture. They knew that torture is unlawful.[222] The legal reasoning derived from statutes, cases, and treaties is overwhelming against commissioning torture.[223] The assertion that

217. *Id.* at 2, 34–35.

218. *Id.* at 36–38.

219. *Id.* at 34–35.

220. *Id.* at 6.

221. Bybee, *supra* note 208, at 2.

222. *Id*. at 7 (citing 18 U.S.C. §§ 2340–2340A (2006)).

223. *See* Jeannine Bell, Essay, *"Behind This Mortal Bone": The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 343 n.14, 344 n.15 (2008) (listing international and American statutory prohibitions on torture).

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torture does not work and produces bad information is a well-known practical argument against the use of torture.[224] This practical argument, however, lost traction in the aftermath of the 9/11 attacks.[225] The opposing practical argument that torture could produce reliable information was endorsed in the halls of power.[226] Government lawyers had a choice to make between legal reasoning embedded in normative sources of law and the practical argument.[227] They opted for the practical argument and scrapped the normative standard. They manufactured new phrases to conceal torture and twisted legal reasoning to allow what is manifestly prohibited under the law. Unfortunately, for most governments, the practical argument trumps the contrary normative standard. In such cases, government lawyers are under patriotic pressure to undermine prescriptive standards to serve the nation (facing security threats). In such cases, the dissociation paradigm is also discarded.

The Torture Memos demonstrate that the dissociation paradigm takes a naïve, mechanistic view of professional mind. The dissociation paradigm presupposes that legal professionals are psychologically capable of separating the legal-self from practical considerations and personal pressures. The dissociation paradigm also expects that legal professionals will indeed do so.[228] The paradigm views human personality as a concoction of numerous distinct and severable parts, which can be individually mobilized and demobilized at will. Legal professionals are asked to demobilize emotions, ideology, and pressures while performing legal services. They are asked to mobilize legal knowledge and analytical skills, adhering to what law is in statutes, cases, and regulations. The idea of selective mobilization of human intellect or what has been called "mechanical rationalism" happily presumes that knowledge and skills can be surgically severed from the web of the human personality and successfully employed to engage in purely knowledge-driven legal reasoning and decisionmaking.[229] The ownership principle, discussed below, accepts no such mechanical rationalism.

IV. OWNERSHIP PRINCIPLE

The ownership principle requires legal professionals, notably lawyers and judges, to accept connectionist responsibilities for legal services they render

224. *See id.* at 352–57.

225. The rejection of practical argument thus imposes informational cost on the community since the system cannot benefit from the information that could be obtained through torture.

226. Bell, *supra* note 223, at 349.

227. *Cf.* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 354 (1997) (distinguishing between theoretical and practical approaches to legal reasoning).

228. Maybe, some legal professionals cannot unlearn their formative consciousness and must inject personal views and values in to the reasoning process.

229. *See* WILLIAM JAMES, *What Psychical Research Has Accomplished*, *in* THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 299, 323–24 (2d reprt. 1897).

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and for legal reasoning they employ to influence legal outcomes. They must pursue in legal reasoning what Dan Simon calls "cognitive coherence."[230] The connectionist responsibilities emanate from the intertwined domains of laws, ethics, and personal conscience. By reasoning within the constraints of laws and ethics, legal professionals do not renounce personal conscience. The ownership principle holds legal professionals responsible for the reasoning they employ in their work products, such as briefs, memorandums, oral arguments, opinions, law review articles, and legislation. Accordingly, whenever legal professionals render legal services, produce, or strive to produce legal outcomes, they must own the services and the reasoning that support legal outcomes and accept the concomitant responsibilities.[231]

The ownership responsibility is specific and individual; it is tied to each legal outcome and to each legal professional. Lawyers coauthoring briefs, judges coauthoring opinions, and professors coauthoring law review articles are responsible individually and collectively. Sharing the production of a legal outcome does not distribute or dilute ownership responsibilities. In shared legal services, each participating professional is responsible as if he or she were the sole provider of services.

The ownership principle presumes that the legal professional is an integrated human being, pursuing cognitive coherence, not a mechanical assembly of distinct and severable parts of legal knowledge, ethics, and personal conscience pursuing cognitive dispersion. Mark Orkin captures it succinctly: "A lawyer cannot, more than any other man, keep his personal conscience and his professional conscience in separate pockets."[232] The ownership principle recognizes that legal professionals strive to minimize cognitive dissonance and remove ratio-moral tensions in their thoughts and deeds. They cannot lead successful personal and professional lives if they are internally conflicted and if they have to constantly switch on and off their professional personality when at odds with their deeply held beliefs. While a complete harmony with law is nearly impossible, and some intellectual and behavioral inconsistencies are a natural part of life and perhaps even necessary for personal development, a deliberate separation between professional and personal selves—a separation that the dissociation paradigm requires—is unsustainable. Ignoring the dissociation paradigm, most legal professionals minimize cognitive dissonance using a number of conventional methods,

230. *See* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513 (2004) (cognitive coherence merges the rational with the critical).

231. The ownership responsibility of lawyers, judges, and lawmakers is manifest. The ownership responsibility of law professors and law students is diffused, but no less important.

232. MARK M. ORKIN, LEGAL ETHICS: A STUDY OF PROFESSIONAL CONDUCT 264 (1957).

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including rationalization, gaming, and subversion.[233] Any such minimization of cognitive dissonance, however, does not automatically satisfy the ownership principle. Legal professionals who experience no ratio-moral tensions in providing legal services may still care for the approbation of peers, and act under constraints. Even in such cases, however, the critical question remains: Is personal conscience actively engaged with legal reasoning?

As members of an epistemic group, that provides knowledge-based legal services to numerous sections of the society, legal professionals serve as advocates, advisors, negotiators, evaluators, arbitrators, mediators, judges, and law professors. In providing professional services, the singular devotion to promoting any one set of interests is no longer the dominant professional ethic of law practice. For lawyers, serving clients is an undertaking situated in a complex web of responsibilities emanating from the core values of the legal system, legal profession, and personal conscience.

The Model Rules of Professional Conduct endorse a connectionist web of responsibilities.[234] In providing legal services, the lawyer is not only a representative of clients, but the same lawyer is also an officer of the legal system and a public citizen having special responsibility for the quality of justice.[235] The lawyer must also be guided by "personal conscience."[236] In representing clients, the lawyer is obligated to exercise independent professional judgment and render candid advice.[237] "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[238] The same is true for judges and law professors. Practically and normatively, legal professionals function in a complex and intertwined domain of prescriptive and permissive standards.

A. Distinguishing the Ownership Principle

Several points need clarification to remove confusion that might gather around the ownership principle. Aware of multiple responsibilities, the ownership principle recognizes responsibility for malpractice and professional incompetence in civil and criminal cases, but the ownership principle extends beyond these responsibilities. Similarly, the ownership principle is closely tied

233. *See* David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 280, 285 (2003).

234. MODEL RULES OF PROF'L CONDUCT pmbl. (2010). These rules were adopted by the ABA House of Delegates in 1983 and succeed the 1969 Model Code of Professional Responsibility. *Id.* at ix–x.

235. *See* GEOFFREY C. HAZARD JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 233 (2004).

236. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 7 (2010).

237. *Id*. R. 2.1.

238. *Id.*

to personal conscience, and yet, the principle must not be confused with self-righteousness or willful egoism. The ownership principle recognizes self-interest of legal professionals in making a living and striving for professional excellence, but the principle also endorses altruism that motivates legal professionals to subordinate self-interest to a greater cause.

1. Malpractice and Incompetence

The ownership principle includes the responsibility for legal malpractice and ineffective assistance. Knowledge-based competence, well-honed lawyering skills, care-centered conduct, meticulous preparation, and general alertness are the professional tools of practicing lawyers.[239] Ill-equipped lawyers representing clients are responsible for engaging in legal malpractice in civil cases and providing ineffective assistance in criminal cases.[240] Generally, ineffective assistance of counsel in criminal cases refers to the defense attorney's defective performance that materially alters the outcome of the case to the defendant's detriment.[241] Legal malpractice in civil cases may also stem from incompetence, even though a competent lawyer may be charged with malpractice for negligence and other irresponsible behavior that undermines the client's case.[242] The term "legal malpractice" involves the "failure to render professional services with the skill, prudence, and diligence that an ordinary and reasonable lawyer would use under similar circumstances."[243]

239. The misreading or misapplication of a prior case is also a failure of legal reasoning. "[W]here the court finds that an alleged mistake of law is the result of professional incompetence based on erroneous advice, general ignorance of the law or lack of knowledge of the rules, or unjustifiable negligence in the research of the law," professional malpractice is manifest. Fidelity Fed. Sav. & Loan Ass'n of Glendale v. Long, 345 P.2d 568, 570 (Cal. Dist. Ct. App. 1959) (citations omitted).

240. Lawyers in criminal cases are frequently alleged to have committed legal malpractice. *See* Pamela Glazner, *Ethics Year in Review*, 46 SANTA CLARA L. REV. 957, 990 (2006) (examining California claims of malpractice and ineffective assistance of counsel).

241. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984). This seminal capital punishment case on the right to effective assistance of counsel has spawned massive legal commentary debating the standards for ineffective assistance of counsel. *See, e.g.*, Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77 (2007); Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard For Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147 (2001).

242. 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1.1, at 4–5 (2010). For example, professional competence has been found wanting in cases where the matrimonial attorney failed to properly assess the percentage of marital asset the client would likely be awarded if the case went to trial. Ziegelheim v. Apollo, 607 A.2d 1298, 1305 (N.J. 1992).

243. BLACK'S LAW DICTIONARY 1044 (9th ed. 2009).

In both civil and criminal cases, lawyers enjoy a range of professional maneuvering.[244] Trial strategies may fail for a number of reasons other than incompetence. A tactical or even strategic failure per se does not demonstrate incompetence.[245] The ownership principle would require lawyers to accept the legal consequences associated with incompetence and negligence. However, the ownership principle is not confined to ineffective assistance and legal malpractice. Competent and well-prepared lawyers cannot set aside personal conscience in providing legal services.

2. Self-Righteousness

The ownership principle must be distinguished from self-righteousness. Justice Felix Frankfurter aptly remarked, "[S]elf-righteousness gives too slender an assurance of rightness."[246] In commenting upon the judicial misconduct of Judge Jeffrey V. Boles, the Indiana Supreme Court described Judge Boles as "a bright, energetic, intense, aggressive, and often intimidating advocate who is both blessed and cursed with an advanced case of self-righteousness."[247] These qualities "can often serve substantial public good," the court opined, but they are not suitable for judges who must dispassionately balance all sides presented in private disagreements.[248] Self-righteous legal professionals not only hold the belief of being absolutely right on a certain legal matter but are unwilling to be self-critical or open to counter-viewpoints. Personal conscience without self-criticism can lead to self-righteousness.[249] The ownership principle does not endorse self-righteousness that lacks self-criticism and is closed to learning and enlightenment.

3. Ethical and Psychological Egoisms

Closely related to self-righteousness are behavioral dynamics of psychological egoism and ethical egoism.[250] A brief discussion of these egoisms illuminates the differing normative foundation of the ownership principle. The ownership principle has little in common with psychological egoism, and the two must never be confused. Conceptually related to utilitarianism, psychological egoism explains that individuals indeed act to maximize their own interest, welfare, pleasure, or utility, even if told

244. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010).

245. *See, e.g.*, Gans v. Mundy, 762 F.2d 338, 343 (3d Cir. 1985) (holding that decision to exclude former client's employer in original lawsuit not legal malpractice as a matter of law).

246. Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring).

247. *In re* Boles, 555 N.E.2d 1284, 1291 (Ind. 1990).

248. *Id.*

249. *See supra* Part III.B.

250. For an introductory understanding of ethical egotism, see Edward Regis, Jr., *What is Ethical Egoism?*, 91 ETHICS 50 (1980).

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otherwise. Thomas Hobbes championed psychological egoism in his political and legal theories.[251] The actual pursuit of self-interest, including selfishness, is the core attribute of psychological egoism, arguably rooted in human nature. Critics point out that an extreme version of psychological egoism could lead one to be a "dismal self-seeking brute."[252] Rogue lawyers have been accused of lying and deception to aggregate personal utility, a conduct that might fall under psychological egoism. These lawyers, however, breach and not affirm the normative standards of professional conduct.

Ethical egoism, in its rudest form, has been defined as a moral doctrine under which persons ought to care only for themselves.[253] As explained by Ramon Lemos, who coined the term psychological egoism, ethical egoism is a prescriptive doctrine, whereas psychological egoism is a descriptive phenomenon.[254] Ethical egoism is a prescriptive doctrine that urges persons to maximize their self-interest, even if they do not want to. It does not assume that individuals are indeed psychologically predisposed to maximize self-interest at all costs. A more nuanced version of ethical egoism implicates that a person's internal sense of right and wrong, including self-interest, supplies reasons for holding beliefs, making decisions, and taking actions.[255] In this sense, ethical egoism perhaps overlaps the concept of personal conscience.

Both psychological and ethical egoisms are contrary to the ownership principle, because legal professionals must diligently manage legal affairs of others, though they are compensated for professional services. Lawyers cannot accumulate personal gains by sacrificing the client's interests, ignoring laws, and breaching professional ethics. Ethical egoism, however, may share some elements with the ownership principle, since under both concepts legal professionals would make decisions and act according to consciential convictions. Even in this similarity, however, a significant distinction remains. In ethical egoism, no other truth or moral code or laws but the person's internal prescriptions are the drivers of judgment and action. The ownership principle cannot be reduced to a personal code of convictions. Legal professionals render conscientious service within the context of laws and professional ethics. In the intertwined realm of law, ethics, and personal conscience, no legal

251. F.S. McNeilly, *Egoism in Hobbes*, 16 PHIL. Q. 193, 193 (1966). *But see* Bernard Gert, *Hobbes and Psychological Egoism*, 28 J. HIST. IDEAS 503, 503 (1967) (arguing Hobbes's work was incompatible with theories of egoism).

252. *See* BERNARD WILLIAMS, PROBLEM OF THE SELF: PHILOSOPHICAL PAPERS 1956–1972, at 251 (1973).

253. *See* D. Goldstick, *Refutation of "Ethical Egoism"*, 34 ANALYSIS 38, 38 (1973).

254. Ramon M. Lemos, *Psychological Egoism*, 20 PHIL. & PHENOMENOLOGICAL RES. 540, 540–41 (1960).

255. Ethical egoism is a prescriptive doctrine that urges persons to maximize their self-interest, even if they do not want to. It does not assume that individuals are psychologically predisposed to maximize self-interest at all costs. *Id.* at 541.

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professional is permitted to render professional services strictly under the dictates of any form of egoism.[256]

4. Self-Interest

The ownership principle is not opposed to self-interest. The principle allows charging fees, even significant fees, for legal services. Pleadings, motions, briefs, contracts, and other legal texts are drafted for monetary compensation. Judges are compensated for judicial services, including writing opinions. Academic writings too have a monetary dimension. Few products involving law or legal reasoning are written for aesthetic, altruistic, or non-monetary purposes. The nexus between legal services and money is not inherently offensive, nor is it a source of shame for the legal profession. Like medical and accounting services, legal services cannot be delivered without compensation.[257] The cost of legal services is related to the complexity of research and legal analysis. Hard cases and innovative transactions are more expensive than routine legal services.

Professor Gillian Hadfield makes an impressive argument that "[t]he price of legal services, as determined by a market for lawyers in a market democracy, increases as legal human capital accumulates, specialization becomes more extensive, and law becomes more complex as it adapts."[258] Two distinct factors increase the price of legal services: quantity and complexity of legal materials. When a huge body of legal materials consisting of statutes, cases, and regulations is critical for understanding, interpreting, and resolving factual and legal issues, sifting through the sheer quantity of law requires intellectual labor and a higher level of competence. The rigor of legal analysis becomes even more demanding when legal materials are complicated or convoluted. Legal materials can be dense due to inept drafting and inherent tedium of the subject matter. The compounded effect of quantity and complexity compels specialization, creating market pockets in select areas of law as fewer lawyers invest the needed personal and intellectual resources to develop and maintain the requisite competence. Such market pockets increase the price of legal services.[259]

While recognizing the complex markets of legal services, the ownership principle does not demand that legal professionals set aside self-interest, nor

256. Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1143–44 (2009) (discussing egoisms in the context of adversarial practice).

257. Lawyers invest huge sums of money, mostly borrowed as interest-bearing student loans, for obtaining legal education. They have professional and practical reasons to charge fees for legal services they provide to clients.

258. Gillian K. Hadfield, *Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 56 DEPAUL L. REV. 401, 418 (2007).

259. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 964–65 (2000).

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does it require that they pursue self-interest. The ownership principle allows for altruism and working for the benefit of the poor and the powerless in the community. Legal professionals who devote their legal talents to serve pro bono causes act as much under the ownership principle as do others who use law as a means of accumulating personal wealth.[260] Some legal professionals provide legal services just to maximize self-interest and in doing so abandon personal conscience, cut corners with ethics, and subvert laws. The maximization of self-interest by any means necessary profoundly offends the ownership principle.

B. Synthetic Consciousness

Personal conscience, an important normative component of the ownership principle, is a dynamic entity that changes, develops, and matures as legal professionals gain legal knowledge and understand professional ethics.[261] Law students, for example, initiate their law studies with notions of personal morality, fairness, and justice. The study of law reinforces some of their personal notions while it challenges others. Many law students undergo a transformation of consciousness during the course of legal studies. Some leave the law school with a highly modified personal conscience.[262] Others continue to retain some notions of morality, fairness, and justice that are not fully compatible with laws. The tension between legal education and personal conscience is inevitable, and the two rarely fuse to become one permanently.[263] The active interaction between law and personal conscience does not end upon graduation from the law school. It continues as long as legal professionals are engaged in rendering legal services. Lawyers, judges, law professors, and other legal professionals continue to develop personal conscience in complex ways. Some legal professionals may actively strive to fuse personal views with laws thereby creating a synthetic consciousness, while some may partition their consciousness between personal and professional domains.

The ownership principle does not make the herculean demand that legal professionals develop synthetic consciousness with respect to each and every point of law. No legal professional can possibly endorse each and every aspect of the legal system. In a complex legal system, laws incorporate multiple

260. Some lawyers may provide pro bono services to gain experience that they can later use to serve paying clients.

261. *See, e.g.*, Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (admitting that his views on jurisprudence have changed over time).

262. Richard L. Abel, *Choosing, Nurturing, Training and Placing Public Interest Law Students*, 70 FORDHAM L. REV. 1563, 1566 (2002) (noting that students lose public interest commitment during law school).

263. Joshua E. Perry, *Thinking Like a Professional*, 58 J. LEGAL EDUC. 159, 164 (2008) (arguing that students must strive to avoid the detachment of personal from professional).

visions and values. Some legal professionals may advocate a robust right to freedom of speech but oppose the right to abortion. Some may endorse the individual right to bear arms but may wish to suppress hate speech. Some may argue that public schools should teach the Biblical view of creation along with the Darwinian conception of evolution. Even in a specific area of law, legal professionals may agree with some laws but not with others. In family law, for example, legal professionals may sincerely disagree over such fundamental issues as the definition of marriage. Amidst a thousand points of conflict, legal professionals cannot develop a synthetic consciousness in complete harmony with laws as they exist at any given time. Accordingly, the ownership principle does not demand that legal professionals either own or disown each and every piece of law.

Seasoned legal professionals who invest intellectual resources and accumulate practical experience in legal niches may be positioned to develop synthetic consciousness. Lawyers are free to choose the area of law that matches their values and interests. Except for early in the career, when some fresh law graduates may not find jobs of their liking, most legal professionals are unlikely to continue to practice in areas of law that offend their deeply held values. Legal professionals gravitate both toward law practices that they enjoy and with respect to topics they find morally comfortable.[264] Given the variety of legal jobs, most attorneys can choose an area of law that suits their personal conscience.

The ownership principle exerts connectionist influence on legal professionals. It modifies their personal conscience to bring it in harmony with laws and provides critical perspective on laws that cannot be reconciled with personal conscience. This kinetic interaction between laws and personal conscience that the ownership principle generates sharpens personal responsibility. Experts heavily invested in specific fields of law develop sophisticated understandings of the law. They not only know what the law is, but they also know how the law ought to be improved.[265] In small ways, legal professionals may even strive to change the law and bring it in conformity with their personal conscience. Sometimes changes are revolutionary. In 1954, Thurgood Marshall and a committed team of lawyers persuaded the United States Supreme Court to overturn racial segregation laws that had been protected under the Constitution.[266]

264. This may not be true for lawyers in a tough job market or in areas where law practice offers fewer subject matter opportunities.

265. Paul J. Wahlbeck, *The Development of a Legal Rule: The Federal Common Law of Public Nuisance*, 32 LAW & SOC'Y REV. 613, 623 n.6 (1998) (noting that seasoned lawyers may take cases when they expect the court decision to result in legal change).

266. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). *See also* David L. Faigman, *Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus*

C. Responsibility for Legal Services

Among legal professionals, lawyers are well positioned to take the ownership principle seriously as they can choose to practice in any area of law that does not offend their personal conscience. They can find cases to promote social and economic causes consistent with their personal sense of justice and morality. Activist lawyers belong to all shades of political ideologies, championing diverse and sometimes diametrically opposing causes and agendas.[267] Liberal activist lawyers pursue left-of-center causes, whereas conservative activist lawyers advocate right-of-center agendas.[268] Even cause-oriented lawyers practicing law in areas of personal commitment may find it hard to completely agree with the interests, tactics, and behavior of their clients.[269] No lawyer imposes her own solutions on the client regardless of the client's wishes. Likewise, not every wish of the client may receive the lawyer's support. Some separation from clients is inevitable and perhaps healthy for all parties involved.

While codes of professional responsibility have moved away from an emphasis on zealous advocacy toward a more balanced idea of professional responsibility, realities of the market may force lawyers to suspend conscience and the concomitant ownership principle and embrace a more practical attitude. Clients demand exclusive loyalty from lawyers and prefer representation unaffected by lawyers' personal values. Dictated by realities of the market, lawyers may accept cases that violate their personal conscience. Lawyers struggling to support their families and to pay off hefty student loans may ill-afford to choose cases that their conscience freely approves. They know that if they decline personally uncomfortable cases, there are plenty of lawyers willing to take those cases and the fees. In many cases, therefore, fees may override conscience. A fee-driven market may promote the dissociation paradigm under which legal professionals practice law divorced from personal conscience.

Facial Distinction in Constitutional Law, 36 HASTINGS CONST. L.Q. 631, 631–32 (2009) (discussing Marshall's preparation for overturning the constitutional segregation doctrine).

267. *Compare* William C. Duncan, *Speaking Up For Marriage*, 32 HARV. J.L. & PUB. POL'Y 915 (2009) (defending the traditional concept of marriage as between man and woman), *with* Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005) (arguing in favor of marriage equality).

268. For a history of the emergence of liberal and conservative activist lawyers, see STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008).

269. Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 433, 448 (1996) (stating that representing a civil-disobedience client can be difficult, because the lawyer's success requires both identifying with the client and obeying the legal system's strictures).

1. Adversarial Model

The dissociation paradigm—rather than the ownership principle—seems to dictate the dynamics of the adversarial model under which opposing attorneys tell their clients' story through pleadings, versions of evidence, and client-favoring arguments to an impartial jury.[270] Few would dispute that opposing attorneys present the case not in accordance with any neutral or objective principles but from the client's viewpoint. Each attorney is "biased" in promoting interests of the represented client. Each attorney would emphasize pieces of evidence and arguments of law that best promote the client's case. This professional bias from each side is tolerated on the theory that a neutral judge and an impartial jury would see through the bias and choose a legally defensible outcome from among the competing versions of the case presented through litigation.[271] Thus, the litigation model exonerates contesting attorneys from personal responsibility if they are promoting the client's case within the bounds of law and professional ethics.

In litigation, contesting lawyers must embrace the cause of their client.[272] They must believe in what they are saying and doing, even if they do not agree with the cause of their client. Lawyers must fake sincerity even when they are internally conflicted and experiencing ratio-moral tensions or cognitive dissonance. This will to deceive the judge and the jury is part of the job description of a successful litigator. Deception in the courtroom requires lawyers to be perfect actors. Critics, however, argue that judges and juries can see through deception and feigned sincerity and that lawyers cannot succeed in persuading a judge or jury into something they themselves do not believe.[273]

Litigation frequently stems from past legal events, such as a tort, breached contract, or violated constitutional right. If the client suffered undeserved harm, the lawyer can empathize with the client; in such cases rarely would the lawyer experience ratio-moral tensions between the client's case and the lawyer's conscience. Remedying an undeserved wrong is part of the personal

270. *See* Strickland v. Washington, 466 U.S. 668, 669 (1984) (stating that ineffective assistance of counsel can so undermine the adversarial process as to produce unjust outcomes).

271. *See* Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 BUFF. L. REV. 357, 367–68 (2010) ("[The Federal Rules of Evidence] do not demand that lawyers take any particular steps to support or attack witness' credibility. It is assumed that the nature of the adversarial process provides the necessary inducement.").

272. *See* Daisy Hurst Floyd, *Candor Versus Advocacy: Courts' Use of Sanctions to Enforce the Duty of Candor Toward the Tribunal*, 29 GA. L. REV. 1035, 1036 (1995) (quoting MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 2 (1983) (highlighting the attorney's duty to "zealously" represent the client).

273. *Cf. id.* at 1049–50 (describing the increased use of sanctions by judges to solicit candor from lawyers).

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conscience of lawyers.[274] Difficulty arises when the client is seeking an undeserved remedy or, worse, when the client has perpetrated a wrong that the lawyer must defend. In defending the client's legal interests embedded in past events, the lawyer cannot undo the harm that the client might have perpetrated. The lawyer need not deny the wrong that the client has committed. However, the lawyer must protect the client from undue penalties and punishments.

2. Advising and Settlement

The ownership principle can function more effectively when lawyers advise clients.[275] Lawyers do not advise clients to commit crimes or civil wrongs, for any such advice holds the lawyer responsible as an accomplice and a wrongdoer.[276] In such cases, personal responsibility turns into a crime or civil liability. Few lawyers would cross such a threshold. As noted above, advising clients is a huge part of professional services. Advising is frequently about present and future family and business matters. Lawyers manage and structure significant parts of individual and corporate life.[277] Even during litigation, lawyers are advising clients about merits and demerits of settlement and about numerous other developments that affect the clients' present and future interests. In their role as advisers, the ownership principle requires lawyers to speak the truth, stay intact with personal conscience, and render the best advice that is consistent with law and that will minimize future disputes.

Likewise, the ownership principle requires lawyers to settle disputes in the realm of honesty and fairness.[278] Since an overwhelming majority of civil and criminal cases are settled (or plea-bargained) rather than fully litigated,[279] lawyers have more opportunities in rendering legal services consistent with the ownership principle. In proposing a reachable settlement, the lawyer must not

274. After receiving legal education, few lawyers would hold that undeserved wrongs must not be compensated, although they might disagree over the definition of an undeserved wrong.

275. *See* Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 228–29 (2006) (arguing that the lawyer's personal moral convictions cannot be severed from attorney-client discourse).

276. Firpo v. United States, 261 F. 850, 853 (2d Cir. 1919) ("To advise a client to commit an act which is a crime makes the lawyer an accomplice, and at common law he would be an accessory."). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2010) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .").

277. Lawyers, for example, write wills, manage estates, propose and execute tax strategies, draw contracts, effect commercial transactions, and assist in the adoption of children.

278. *See* ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS § 2.1 (2002) (Sec'n of Litigation, ABA); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1136–37 (1975).

279. *See* Blanca Fromm, Comment, *Bringing Settlement out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 664 (2001).

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deceive the client.[280] The client must freely consent to the terms of the settlement. However, most clients are deferential to their lawyers and give serious consideration to terms of settlement that the lawyers recommend. Thus, while conventional rhetoric paints the lawyer as the client's mouthpiece in settlement conferences, the reality is much more complex. In actuality, the lawyer and the client might be (or should be) engaged in a more interactive relationship. If lawyers are competent and conscientious on both sides, the settlement is rarely a rip-off against any party. Attorneys aiming at unjust deals rarely succeed in serving their clients well. Competent and conscientious lawyers reach for just settlements that benefit clients, work in reality, and do not deceive the opposing party.[281]

Generally, therefore, lawyers have little excuse for providing advice and settlement services under the dissociation paradigm. They must not suspend personal conscience to increase billable hours, lie to clients, or deceive opponents. Assertive clients may want to use lawyers as instruments for their transactions. They may desert lawyers who filter the client's interests through notions of truthfulness and fairness.

D. Fusion Prerogative

The fusion prerogative is the institutional power of certain privileged legal professionals to apply the ownership principle. By merging professional- and personal-selves and by refusing to authenticate their separation, these privileged professionals need not practice the dissociation paradigm. The fusion prerogative empowers legal professionals to render legal services from an integrated-self. The fusion prerogative mitigates the need for gaming since legal professionals acting from an integrated-self need not use reasoning as a mask or subterfuge to hide their conscience or values.

It is in this context that Justice Blackmun made the connectionist response to my assertion that he sees no distinction between what the law is and how the law ought to be understood.[282] In responding to my legal positivist question,

280. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 759–60 (1990) (recommending that law firms create an environment where deception and lies to clients are not tolerated). *See also* ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS § 3.1.4 cmt. (2002) (Sec'n of Litigation, ABA) ("The duty to keep the client informed respecting settlement discussions is an inherent component of the responsibility to let clients make ultimate determinations respecting the objectives of the representation.").

281. *Cf.* Henry Ordower, *Toward a Multiple Party Representation Model: Moderating Power Disparity*, 64 OHIO ST. L.J. 1263, 1296 (2003) ("[T]he lawyer who recommends courses of action to her clients that produce distributional fairness may be serving the client better than those who encourage and legitimate exploitation of power advantages.").

282. In 1986, when Justice Harry Blackmun visited Washburn University School of Law, I asked him this question: "In deciding cases, do you ever consider the distinction between what

Justice Blackman was authenticating the ownership principle under which he, as a decision maker for the United States Supreme Court, interprets laws and the Constitution without experiencing ratio-moral tensions or cognitive dissonance. He was under no cognitive pressure to game the system or engage in intellectual dishonesty, and he had no need to separate his personal understandings from his professional understandings of laws.

1. Hierarchy of Judges

In a free and independent judiciary, high courts are institutionally privileged to exercise the fusion prerogative.[283] For example, the United States Supreme Court is free to interpret the Constitution and overrule past precedents.[284] Supreme Court Justices interpret the Constitution, laws, cases, and regulations according to their personal ideologies. Even though some Justices swing in their ideology, many others are firmly committed to advancing their personal jurisprudential views and policy preferences. Justices need not split their mind into two and agonize over the contrived dichotomy. The ideological warfare at the Supreme Court is most noticeable because Justices do not hide their personal views and rarely apply the law contrary to personal views and values. Because Justices are free to practice their personal views of law, great controversies and political battles are fought over their nomination and confirmation processes. The fusion prerogative claims that legal professionals analyze problems using an ownership mind in which there exists a complex connectionist web of laws, ethics, and personal conscience.

A weaker form of the fusion prerogative might also be available to trial courts. Functioning at the bottom of judicial hierarchy, trial courts work under the burdens of all the courts above them. One might argue that they are the most institutionally handicapped to exercise the fusion prerogative. While it is true that trial courts must apply the rules articulated in upper level courts, trial courts have the most power to interpret the admission and weight of facts. Although procedures and appellate review restrain the discretion of trial courts in admitting and weighing evidence, trial courts continue to enjoy great powers in deciding cases under the ownership principle. A small minority of cases are appealed.[285] Furthermore, standards of review are frequently deferential to the

law is and what law ought to be?" Justice Blackmun replied in the negative. Interview with Harry Blackmun, United States Supreme Court Justice, in Topeka, Kan. (1986).

283. *Cf.* Republican Party of Minn. v. White, 536 U.S. 765, 799 (2002) (Stevens, J., dissenting) (stating that unless on the highest state court, judges have a duty to follow mandatory precedent, the applicable statutory laws and the Constitution, rather than their personal views).

284. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1111 (2008) (stating that the Court has the power to overrule precendents).

285. For example, during the twelve-month period ending on March 31, 2010, there were 359,594 criminal and civil cases filed in United States district courts; in that same period, only

findings of trial courts.[286] Knowing the functioning of the court system, trial judges need not abandon the ownership principle. They may not have the fusion prerogative working in their favor, but they have tremendous power to shape the nuances of the trial.

It might be argued that intermediate appellate courts might be in the worst institutional position to exercise the fusion prerogative. Unlike trial courts, they have limited powers to interpret the facts of the case in a radically different manner.[287] They must reckon with facts as they find them in the record. In matters of law, they have no institutional privilege to override Supreme Court precedents. They are thus sandwiched between the proverbial rock and a hard place, that is, between facts from the trial court and law from the Supreme Court. Although they have some wiggle room at both ends not to divorce themselves from the ownership principle, they might be hard pressed to tilt toward the dissociation paradigm. Yet, some intermediate appellate courts are known for their daring exercise of the fusion prerogative and decide cases in ways that other intermediate courts do not even attempt.[288]

2. Lawmakers

Lawmakers are in the most privileged position to exercise the fusion prerogative. In making laws, they need not separate their professional-selves from their personal-selves, nor do they need to engage in deceptive reasoning in defending, opposing, or supporting a piece of legislation under consideration. They can vote with their conscience every time a proposed bill is on the floor of the legislature. In a democratic system under which lawmakers are elected, the lawmakers are accountable to their constituencies. A lawmaker who consistently acts contrary to the wishes of the electorate may not get reelected. If a lawmaker is responsive to their constituency or wishes to be reelected, the lawmaker may have to embrace the dissociation paradigm.

56,790 appeals were filed in the United States Courts of Appeals. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010 (2010), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/front/IndicatorsMar10.pdf.

286. Amanda Peters, *The Meaning, Measure, And Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 240 (2009).

287. *See id.* at 239.

288. The Ninth Circuit enjoys the reputation for being overly-assertive and independent, even to the extent of defiance of the United States Supreme Court. Akhil Reed Amar & Vikram David Amar, *Does the Supreme Court Hate the Ninth Circuit?: A Dialogue On Why That Appeals Court Fares So Poorly*, FINDLAW'S WRIT (Apr. 19, 2002), http://writ.news.findlaw.com/amar/20020419.html. *But see* Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, 1 (2003) (arguing that the Ninth Circuit is reversed at approximately the same rate as other circuits).

The lawmaker may vote for a bill that the constituency prefers even though the lawmaker is personally opposed to it.

In addition to voters' pressure, lawmakers may not exercise the fusion prerogative for several other reasons. If a lawmaker must raise monies for reelection, resourceful groups demand favorable legislation as a quid pro quo for monies given to campaigns.[289] The lawmaker may thus be compelled to separate personal views and values and vote for a bill that pleases his sponsors. The lawmaker may also be under party pressure to vote for bills that the party leadership promotes.[290] Even though lawmakers are under no legal obligation to vote with the party, the party pressure is a political reality that few lawmakers can resist on a continual basis. In reality, therefore, lawmakers in a complex democratic system are under numerous conflicting pressures of constituents, contributors, and party leaders. Facing these forces, lawmakers cannot always exercise the fusion prerogative.

V. THE ART OF GAMING

This part argues that under the combined effect of the dissociation paradigm and ownership principle, legal professionals have developed the art of gaming. Gaming occurs when legal professionals, perhaps to minimize ratio-moral tensions and the associated discomfort of cognitive dissonance, portray personal preferences as the inescapable consequence of law and legal reasoning.[291] When legal professionals cannot openly embrace the ownership principle, particularly when they disagree with the letter and spirit of specific laws, they, in order to comply with the dissociation paradigm, resort to gaming and use legal reasoning as a subterfuge to implement personal preferences.[292] For example, judges could pretend that the legal outcome in a case is the inevitable result of legal reasoning even though they know that they could have produced a different and even opposite legal outcome with alternative legal reasoning within the domain of valid laws.[293]

289. *See* Dale Rubin, *Corporate Personhood: How The Courts Have Employed Bogus Jurisprudence To Grant Corporations Constitutional Rights Intended For Individuals*, 28 QUINNIPIAC L. REV. 523, 571–72 (2010) (documenting significant campaign contributions of healthcare companies to members of Congress who opposed health care reforms).

290. *See* K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 247 (2005) (stating that many legislators do not even read the bills and that their votes are based on party pressures and campaign contributions).

291. *See* John Gava, *Dixonian Strict Legalism,* Wilson v Darling Island Stevedoring and Contracting *in the Real World*, 30 OXFORD J. LEGAL STUD. 519, 524 (2010).

292. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 817 (1935) (cloaking economic prejudice as legal logic).

293. *See* 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, 204 (1984).

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Since the legal system demands that legal opinions and decisions be cast in the form of legal reasoning, legal professionals develop the art of gaming. For gaming professionals, therefore, legal reasoning is no more than an exterior layer placed over personal preferences. Gaming professionals adopt the dissociation paradigm as a ruse, pretending that the legal analysis has determined the legal outcome.[294] Gaming also undermines the ownership principle because gaming professionals deny that their personal conscience has dictated the legal outcome. Denying personal responsibility, gaming professionals undermine both the dissociation paradigm and the ownership principle. In some cases, gaming professionals use the legal apparatus to deceive the intended audience and are fully aware of the nature of the deception.[295]

Subversion shares elements with gaming, though subversion is a fundamental negation of law whereas gaming tinkers with the law without throwing it away.[296] Subversion is thus a more severe form of gaming. Some legal professionals subvert the law to placate personal conscience. Even in subversion, legal professionals pay lip service to the dissociation paradigm and pretend that law dictates the outcome.[297] Subversion, though a threat to the integrity of laws, may or may not be offensive to notions of justice.

For example, legal professionals determined to subvert discrimination laws may undermine the system but console themselves that they are serving a greater good and paving the way for the demise of oppression. Subversion, however, may also undercut what others consider to be fair and just laws. Subversion for the sake of subversion is rare. Whether subversion is good or bad is a value judgment and often relies on the facts and circumstances of the subversion. In subverting laws, lawyers and judges may render services consistent with their personal conscience. Legal professionals may face exacting sanctions, including prison time, if they subvert laws without successfully hiding subversion under the dissociation paradigm.

294. *See* Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship And Naive Legal Realism*, 83 ST. JOHN'S L. REV. 231, 241–42 (2009) (discussing the false belief that legal analysis is objective).

295. *See, e.g.*, Isaac Franklin Russell, *The Indian Before the Law*, 18 YALE L.J. 328, 333 (1909) (describing the use of laws to strip rights from Native Americans).

296. In ancient traditions, intellectuals were viewed with suspicion because the very concept of reasoning was associated with subversion. C. DELISLE BURNS, GREEK IDEALS: A STUDY OF SOCIAL LIFE 35 (Haskell House Pub., 2d ed. 1974) (1917). In the modern legal tradition, however, legal reasoning is both respected and viewed with suspicion. *See* Cass R. Sunstein, Essay, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2591 (2006) (noting the attack on legal reasoning by modern legal realists).

297. *See, e.g.*, THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW, 1849–1970, at 277 (Richard Bardolph ed., 1970) (noting how critics decried *Brown v. Board of Education* as "sociological jurisprudence" and "subversion of the Constitution").

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A. Secrecy of Gaming

Gaming in most cases is a personal secret. Only the conformer of the art knows that he or she is gaming.[298] The legal professional adopts a line of reasoning to support a legal outcome but knows that the reasoning is intellectually unsound or that it does not comply with laws. Gaming cloaks personal views in conventional reasoning. The gaming professional uses cases and statutes to offer arguments that support the outcome. On the surface nothing appears to be out of order, yet the professional knows that reasoning is a cloak rather than a determinative factor. Aware of gaming, the legal professional knows that legal reasoning can, with equal force, lead to a different or even an opposite outcome. In fact, the gaming professional may concede in his own mind that the weight of authority, or a more credible interpretation of past precedents and statutes, does not support the professional's personal views. Yet, the professional games the process of reasoning, believing for a host of reasons, ranging from noble sentiments for justice to questionable motives, that the professional's views ought to dictate the outcome of the matter under consideration.[299] Unless the legal professional confesses, the gaming remains a personal secret. In some cases, astute readers and perceptive listeners might be able to sense that the professional is gaming the process of legal reasoning. However, since ad hominem attacks are no longer part of respectable discourse, accusations of gaming are circumscribed.[300]

Legal professionals, particularly judges and law administrators, rarely reveal the actual grounds underlying their decisions.[301] They employ legal reasoning to mask hidden agendas, including prejudice, bias, ideology, and personal views. Gaming professionals manipulate legal reasoning for desired legal outcomes. It is similar—although not the same—to the concept of rationalization studied in psychology to explain the behavior of persons who use logic and reasoning to justify decisions, acts, or beliefs prompted by different mental processes. Rationalization is the mental processes that justifies a decision, action, or belief.[302] Rationalization can be as much self-

298. *But see* Wayne Brazil, *Professionalism and Misguided Negotiating*, *in* THE NEGOTIATOR'S FIELDBOOK 697, 706 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) (alluding to the ability of judges to detect some overt manipulations of the judicial system).

299. *See, e.g.*, Cohen, *supra* note 292, at 817 ("[L]egal reasoning on the subject of trade names is simply economic prejudice masquerading in the cloak of legal logic.").

300. Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 739 (2004).

301. *See* Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. REV. 747, 761 (1998).

302. Eugene H. Sloane, *Rationalization*, 41 J. PHIL. 12, 12 (1944). Ernest Jones, who first used "rationalization" in this context, did not confine the term to any mental pathology, but supported the broader meaning of the term to include "justification for our opinions and theories

deceptive as it can be other-deceptive.[303] By contrast, gaming is a fantasy that cheats only the other participants in the system. In some cases, rationalization is an after-thought rather than a pre-thought to defend a course of action.[304] Gaming is a pre-thought, deliberate, rationalization of decisions and conduct prompted not strictly by law but also by other considerations including the call of personal conscience. In gaming, legal professionals may profess to be applying the law but know that they are manipulating the law to obtain desired outcomes.

In theory, legal reasoning determines legal outcomes, positions, actions, and judgments. Legal reasoning is associated with good faith intellectual efforts to reach sound decisions by discarding extraneous considerations.[305] Even when legal reasoning draws on other disciplines such as sociology or economics, it remains anchored in legal sources. Legal reasoning connotes the positive power of law.[306] By contrast, gaming connotes negativity and is associated with bad faith rationalization to construct and defend positions, decisions, and actions.[307] Gaming converts psychological factors (that motivate legal professionals) into normative elements derived from law.[308] The conversion is fraudulent. Despite these differences, it is difficult, in reality, to determine whether a legal professional is engaged in gaming or sincere legal reasoning.

Gaming as a secret art flourishes when the legal system supplies vast normative space within which legal decisions may be made. The 5-4 Supreme Court decisions[309] testify to the existence of vast normative space within which legal professionals, lawyers and judges, relying on the same legal materials, can advocate and reach differing and in some cases opposite legal outcomes.

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as well as for our conduct." *Id.* (citing ERNEST JONES, *Rationalization in Everyday Life*, *in* PAPERS ON PSYCHOANALYSIS (3d ed. 1923)). Jones read that seminal paper at the First International Psychoanalytical Congress in Salzburg on April 27, 1908. *Id.* at 12 n.1.

303. ROBERT AUDI, PRACTICAL REASONING 173 (1989).

304. MORRIS R. COHEN, AMERICAN THOUGHT: A CRITICAL SKETCH 216 (Felix Cohen ed., 1954).

305. *See* Khan, *supra* note 5, at 269 (Professor Delaney advises first-year law students to avoid injecting "extraneous notions of morality, justice or fairness" when analyzing a case).

306. *See id.* (quoting J. DELANEY, LEARNING LEGAL REASONING 2 (rev. ed. 1987) ("Professor Delaney prefers to familiarize first-year students to positivist legal consciousness by having them 'read, think, talk and write like a lawyer, not like a philosopher, ethicist, economist, sociologist, researcher or politician.'"). Here, by positive power I mean the power of legal reasoning to shape outcomes.

307. For example, an employer may dismiss an employee for race-based reasons but would rarely admit to doing so. The employer would most likely offer a reason acceptable under anti-discriminations laws, such as poor job performance. Thus, the employer is engaging in gaming.

308. *See* Gava, *supra* note 291, at 524.

309. For a detailed analysis of these decisions, see Robert E. Riggs, *When Every Vote Counts: 5–4 Decisions in the United States Supreme Court, 1900–90*, 21 HOFSTRA L. REV. 667 (1993).

When legal reasoning is susceptible to variant interpretations, legal professionals are free to implement personal preferences under the cover of objective laws. Critical legal theorists have exposed the vulnerability of laws and legal reasoning to the art of gaming.[310] Radical criticisms might take the position that law is simply irrelevant because smart and skillful legal professionals can always find a way to translate personal preferences into respectable legal reasoning without revealing the secrets of their hearts.[311]

The incantation of magical phrases[312] with art and sophistication is part of secretive gaming. The magical phrases of law are both real and unreal. Lawyers rely on magical phrases to empower competing versions of stories, hoping that decision makers will be influenced in their favor. Judges express doubts about magical phrases that lawyers invoke to achieve litigation goals. Commenting on the right of public employees to go on strike, for example, the Indiana Supreme Court Chief Justice disagreed with the notion that a strike by public employees is a strike against the sovereignty of the government.[313] "The conflict of real social forces cannot be solved by the invocation of magical phrases like "sovereignty."[314] In other cases, judges sought to think beyond magical phrases such as "a blank sheet,"[315] "notice,"[316] or "opportunity to respond."[317]

Ironically, judges themselves use magical phrases to legitimize opinions. Magical phrases such as "due process," "strict scrutiny," "best interests of the child," and numerous others in every field of law evoke powers to legitimize decisions and support conforming narratives. No narrative bereft of magical phrases is considered respectable or creditworthy.[318] Legal realists[319] have made this point with utmost clarity.[320]

310. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (discussing how different rhetorical modes influence substantive legal problems); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784 (1983) (noting that judges are political actors motivated by their own interests and proposing that constitutional theory developed, in part, as a restraint on those motivations).

311. STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 191 (1985).

312. "Due process of law," "strict scrutiny," and "unconscionability," for example, are magical phrases that lawyers and judges use to legitimize their respective narratives.

313. Anderson Fed'n of Teachers Local 519 v. Sch. City of Anderson, 251 N.E.2d 15, 20 (Ind. 1969) (DeBruler, C.J., dissenting).

314. *Id.*

315. Exxon Research & Eng'g Co. v. NLRB, 89 F.3d 228, 233 (5th Cir. 1996).

316. Clements v. Airport Auth. of Washoe Cnty., 69 F.3d 321, 332 (9th Cir. 1995).

317. *Id.*

318. For example, the landmark desegregation case of *Brown v. Board of Education*, 347 U.S. 483 (1954), has been criticized for its lack of legal rooting and its reliance on sociology. *See* JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 68 (2001).

Magical phrases inscribed in legal texts may draw legitimacy from a democracy that confers powers on elected officials to enact laws and invent the magical phrases of law. The Constitution, the ultimate treasury of law, is the supreme text of magical phrases.[321] Magical phrases adorned in Supreme Court cases draw legitimacy from the majesty of the Court and its occupants. Magical phrases found in scholarly works draw legitimacy from the intellectual power of the academy gifted with time and resources to imagine, reflect, synthesize, and critique legal ideas. Each magical phrase has its own impressive origin, history, catalogue of achievements, and a sacred station in the magic house. Some phrases are, of course, more powerful than others.[322] Magical phrases are repeated over decades in countless instances. Their authenticity is rooted in sophisticated theories of normative legitimacy. On the totem pole, some magical phrases are etched higher than others. Some fall out of grace,[323] while some stand the vicissitudes of time.[324]

In legal reasoning, as in magic, the performer knows the power of illusion, but the performer also knows that the illusion has no inherent power. The illusion is empty of reality. For the audience, the performer erases the distinction between illusion and reality. But in his or her mind, the performer is obsessively conscious of the difference between illusion and reality. The power of the performer lies in first knowing the difference between illusion

319. For a historical evaluation of legal realism in America, see generally AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993).

320. Realism and its intellectual progeny, including critical race theory and gender jurisprudence, exposed the artificial chasm between the personal and professional dimensions of the legal analyst. A legal analyst can pretend to separate his or her personal self from legal reasoning. This dissociation, however, cannot be taken seriously. *See id.* at xiv ("The Realist credo is often caricatured as the proposition that how a judge decides a case on a given day depends primarily on what he or she had for breakfast.").

321. The magical words found in the first ten Amendments—freedom of speech, right to bear arms, unreasonable searches and seizures, due process of law, speedy and public trial, cruel and unusual punishments, and others—have been pivotal in the development of constitutional rights. *See* U.S. CONST. amend. I–X.

322. "Interstate commerce," a powerful magical phrase, though not explicitly mentioned in the Constitution, has been invoked in expanding the federal legislative reach. *See* U.S. CONST. art. I, § 8, cl. 3 ("commerce . . . among the several states"); REBECCA S. SHOEMAKER, THE WHITE COURT: JUSTICES, RULINGS, AND LEGACY 195 (2004) (describing the expansion of federal powers through a expansive interpretation of the commerce clause).

323. "Separate but equal," a constitutional fiction signifying segregation laws under the Fourteenth Amendment, is no longer a respectable phrase. *See* ANN WALLACE SHARP, SEPARATE BUT EQUAL: THE DESEGREGATION OF AMERICA'S SCHOOLS 4 (2007) (recognizing that the "fallacy of 'separate but equal' was obliterated in the American courts").

324. "Best interests of the child," a magical phrase in family law, continues to inform legal rulings and analysis. *See* JOSEPH GOLDSTEIN ET AL., *Introduction to the Paperback Edition* of THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE, at xiii, xiii (paperback ed. 1998).

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and reality and then making the skillful effort to erase the difference.[325] The skillful performer does not deny the existence of illusion but rather concentrates on hiding the method and persuading the audience that what they are witnessing is real. The audience realizes that the magic it is watching is unreal. In many cases, the audience, immersed in a state of innocence or self-foolery, is unwilling and perhaps unable to see the gap between illusion and reality. The magician successfully eliminates the distinction between illusion and reality partly through skill and partly because the audience has purchased tickets for self-deception. Thus, magic exists because the performer and the audience have signed a contract for the enjoyment of illusion.

In law, however, the consumers of legal and judicial services have signed no such contract. Legal professionals may enjoy the performance of legal reasoning, but the consequences of legal reasoning are not illusions; they are real and include losing property, liberty, and even life. To make such losses bearable for the losing party, legal phrases may be chanted and hallowed in creative ways.[326] The public, however, has a right to demand that lawyers and judges not play games but engage in conscientious legal reasoning and own the consequences of legal outcomes rather than hide behind the mask of the dissociation paradigm.

B. Gaming by Judges

Kevin Burke, a judge for the Minnesota District Court of Hennepin County, argues that a commitment to "procedural fairness" is the (magical) key to the delivery of justice that litigants would accept.[327] Judge Burke seems to sincerely believe that litigants are much more likely to accept court decisions and appreciate the rule of law if judges listen to litigants, respect them, and explain the decisions they make. Sophisticated reasoning derived from complex statutes and case precedents, which litigants may not comprehend, is insufficient to persuade a losing party that the rule of law has been enforced. The rule of law is a perception rooted in the ordinary courtroom behavior of

325. *See* MAGIC: STAGE ILLUSIONS, SPECIAL EFFECTS AND TRICK PHOTOGRAPHY 27 (Albert A. Hopkins ed., Dover Publ'n 1976) (1898) (noting that the magician has great incentive to keep the workings of the most entertaining tricks a secret because those tricks require the most stage fittings and apparatuses).

326. Jessie Allen, *A Theory of Adjudication: Law as Magic*, 41 SUFFOLK U. L. REV. 773, 774–76 (2008) ("In law, as in ritual magic, transforming the meaning of a set of social circumstances can happen *through* common formal and performative techniques that may look like mere distractions . . . . [T]hey may provide a mechanism through which official legal decisions take on some of the affective power of lived experience and so generate the . . . commitment that leads to social transformation.").

327. Judge Kevin Burke, *Understanding the International Rule of Law as a Commitment to Procedural Fairness*, 18 MINN. J. INT'L L. 357, 365 (2009).

judges.[328] A respectful judge who conducts a fair hearing generates more goodwill about the rule of law than a disrespectful judge who knows the intricacies of law and delivers a legally perfect decision. "For judges and many lawyers, the single most difficult concept to accept is that most people care more about procedural fairness—the kind of treatment they receive in court—than they do about winning or losing the particular case."[329]

The courtroom atmospherics, including judicial respect for litigants, are important for the dispensation of justice.[330] However, Judge Burke does not address the more difficult question of the hazards of explaining decisions to litigants. Few trial judges, for example, would inform litigants that they have lost a case under an "unfair" or "unjust" statutory provision, because any such explanation, though honest in the judge's view, would not satisfy the losing litigants.[331] Likewise, few trial judges would say to litigants that the precedent under which the case was decided no longer makes sense.[332] Surely, the judge can explain the law under which the case is decided. This explanation might indeed be persuasive if the judge agrees with the rationale of the law. The explanation, however, will lack personal commitment if the judge disapproves of the applied law.[333]

In explaining decisions, therefore, judges must choose either the dissociation paradigm or the ownership principle. Under the dissociation paradigm, the judge must censor the negative personal views about the soundness of the applied law. This censoring, however, might weaken the explanation since the judge would have preferred that the laws were otherwise. The judge's lack of commitment might come through in the explanation. The judge may deform the law and decide the case according to his or her personal notions of morality, fairness, and justice. In such a scenario, the judge knows that the losing party would have prevailed had the judge applied the law as is, rather than modifying it to suit the judge's personal notion of justice. In either case, the judge will experience personal dishonesty and practice a form of

328. *See id.* ("The rule of law must create an atmosphere in the courthouse that allows litigants to feel that they are important and their case is not trivial.").

329. *Id.* at 367.

330. *See* Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 499 (2008).

331. While lower courts are bound to apply an "unjust law," the high court may overrule the unjust law. *See, e.g.*, Villareal v. State Dep't of Transp., 774 P.2d 213, 216 (Ariz. 1989) (quoting City of Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972)) (recognizing that the court may overrule unjust "judge-made" law).

332. *Cf. id.* (stating that the Arizona Supreme Court had no reluctance to overrule a law that was "out of step with the times").

333. Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHI.-KENT L. REV. 415, 462 (1999) (arguing that judges are unlikely to write persuasive legal opinions if they themselves are not convinced of the right answer).

deception. Further, the judge must experience a split personality. Indeed, the explanation might backfire as litigants and lawyers might be sense the judge's deception.

C. Gaming by Lawyers

Geoffrey Hazard calls law practice a "Machiavellian calling," since it is necessary for a lawyer "to be a great feigner and dissembler."[334] Lawyers game the legal system for a legion of reasons, some unworthy of professional respect and some honorable. Some lawyers engage in gaming to fight for justice, fairness, and other ideological goals compatible with their personal conscience. Some game the system for monetary reasons. Some adopt the dissociation paradigm and voluntarily remove their conscience from the practice of law, while others care little for systemic justice or personal conscience but are ready and willing to serve clients. I have discussed cynical advocacy in depth in another article.[335] Subscribing to no moral principles, cynical lawyers would serve any clients capable of paying for legal services. But money alone may not explain cynical advocacy. Similarly, some gaming lawyers are so preoccupied with winning the case that they have little regard for the law, higher law, or personal conscience.[336] They are the consummate practitioners of what works.

Courts repeatedly take notice but rarely speak positively of what they call "clever lawyers."[337] Courts point out that the clever lawyers can construct "multiple meanings for any word in any context."[338] And, a vague, convoluted, and conflicting statute furnishes "fertile ground for clever lawyers to breed wasteful litigation."[339] In fact, no statute, no matter how clearly it emblazons the lawmakers' intentions on its face, can preempt lawyers from finding ambiguity in it.[340] The courts also recognize the power of lawyers to draft "a truly byzantine document" that subverts market conventions and

334. Geoffrey C. Hazard Jr., *Law Practice and the Limits of Moral Philosophy*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 75, 89 (Deborah L. Rhode ed., 2000) (quoting NICCOLÒ MACHIAVELLI, THE PRINCE 70 (Luigi Ricci trans., Modern Library 1950)).

335. *See* Liaquat Ali Khan, *Advocacy Under Islam and Common Law*, 45 SAN DIEGO L. REV. 547 (2008).

336. *Cf.* United States v. Doe, 860 F.2d 488, 494 n.4 (1st Cir. 1988), *vacated sub nom.*, United States v. Garay, 921 F.2d 330 (1st Cir. 1990) (criticizing the motif of "'winning' at all costs").

337. *In re* Tousa, Inc. 422 B.R. 783, 864 n.51 (Bankr. S.D. Fla. 2009) ("There is something inherently distasteful about really clever lawyers overreaching.").

338. Athridge v. Aetna Cas. & Sur. Co., 351 F.3d 1166, 1172 (D.C. Cir. 2003).

339. Bender v. Glendenning, 632 S.E.2d 330, 346 (W. Va. 2006).

340. Abbott Labs. v. Young, 920 F.2d 984, 995 (D.C. Cir. 1990).

customary understandings.[341] Likewise, the narrative power of lawyers cannot be overemphasized as they can describe even a "garden variety" fraud as a lawful transaction.[342]

Courts deny relief when they sense that lawyers or their clients are gaming the legal system.[343] A criminal defendant, for example, may game the criminal justice system and forgo DNA testing at trial in the hope that other evidence would be found insufficient for conviction. After conviction, however, the defendant demands the DNA testing in the hope that contamination or some other mishap could support the defendant's innocence. Of course, clients need the help of lawyers to strategize the game. The defendant's lawyer, who knows that the DNA testing would hurt the client at trial, may advise the client not to take the test. In so advising, the lawyer, too, is gaming the system even though the lawyer is not violating any laws.[344]

Gaming lawyers develop the reputation of feared creatures who skillfully manipulate the legal process in "befogging the case; . . . holding back and concealing the truth; . . . pulling the wool over the eyes of the judge and of the jury; . . . distorting the facts; [or] . . . misleading or bullyragging the witnesses."[345] This reputation may follow the gaming lawyers in all cases. The gaming lawyers, desperate to serve their clients, can fail by the very methods they mobilize to win the case. Gaming is a self-defeating proposition as it presupposes that the gaming lawyer is smarter than the judge and jury and would be able to outfox them into believing a certain version of the story favorable to the client. In the gaming process, however, the lawyer can reveal what is being concealed and befoul the courtroom air with mistrust. When the gaming lawyer loses trust of the judge or the jury, even favorable facts and laws do not translate into favorable rulings for the client. Gaming, therefore, can be a highly unreliable and self-defeating tool of legal reasoning.

D. Gaming by Law Professors

Among legal professionals, law professors enjoy the most extensive freedom to render professional services consistent with the ownership principle. Unlike lawyers, law professors, in their teaching, academic writings, and professional presentations, represent no clients and have no pressure to

341. Subaru Distribs. Corp. v. Subaru of Am., Inc., No. 98-5566, 2002 WL 188473, at *24 (S.D.N.Y. Feb. 5, 2002).

342. Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1391 (7th Cir. 1990).

343. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2329 (2009) (Alito, J., concurring) (proposing denial of relief for post-conviction DNA testing when defendant refuses to undergo testing at trial).

344. *Id.* at 2314.

345. R.S. Gray, S.F. Bar Ass'n, Reorganization of the Bar as a Necessary Means to Justice, Address Before the California Bar Association Annual Convention (Nov. 21, 1913), *in* CAL. BAR ASS'N, PROCEEDINGS OF THE FOURTH ANNUAL CONVENTION 70, 84 (1914).

bend the law or engage in gaming to serve vested interests. Unlike judges, law professors are under no doctrinal pressure to adhere to precedents or to prevailing interpretations of statutes. They are free to critique the law as is and offer amendments, new visions, and new directions that the law, in their view, must take. Law professors can freely advise lawmakers and judges to improve the quality of legal services and demands of justice. This academic freedom to provide analyses and critiques of law rejuvenates the legal system that may otherwise function under the dead weight of precedents and doctrines. A legal system that does not guarantee robust academic freedom risks a stultified regime of laws shorn of sincere and fruitful criticisms.[346]

As a matter of law, however, academic freedom is far less than a constitutional right or liberty.[347] During the communism scare in the United States, the Supreme Court upheld the academic freedom of universities and colleges, declaring that "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[348] These are comforting words for academics engaged in exploring ideas consistent with their personal conscience. Note, however, that this academic freedom belongs to academic institutions and not to individual professors.[349]

The threat to academic freedom may not derive from the state but from academic institutions themselves. A question arises whether academic institutions can restrict the contents of professors' scholarship and teaching. The Supreme Court jurisprudence offers no clear answer to this question. Law professors as citizens enjoy the protection of the First Amendment, but they are also employees of universities and colleges. Free speech protections available to professors as citizens may not be available to them as university employees.[350] College and university professors frequently fail to obtain relief from courts when they assert academic freedom contrary to institutional

346. *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 960 n.71 (2009) ("Professors do not have academic freedom to violate professional norms at will, yet professional norms ought to be subject to criticism and disagreement.").

347. William E. Thro, *Academic Freedom: Constitutional Myths and Practical Realities*, 19 J. PERSONNEL EVALUATION IN EDUC. 135, 137 (2007).

348. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

349. Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 829 (1983) (explaining the recognition of institutional academic freedom and pluralism). *But see* Areen, *supra* note 346, at 948 n.11 (recognizing debate whether academic freedom applies to individuals or only institutions).

350. Public employees, such as prosecutors, do not enjoy unrestricted expressive activities within the scope of their employment. Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).

policies.[351] Even though colleges and universities rarely prevent individual professors from exercising personal conscience in scholarly writings, no constitutional right protects any such professorial freedom. Theoretically, public universities may restrict contents of teaching and scholarship,[352] forcing professors to engage in dissociative scholarship. Even if content-restrictive university regulations are not formulated, practical methods—such as promotion, salary, and even collegial respect—may be employed to deter law professors from engaging in intellectually honest scholarship emanating from deeply held passions against social wrongs, injustices, or excesses of law.[353]

Some law professors may resort to gaming the system by engaging in technical scholarship that has little to do with their personal conscience, personal morality, or personal sense of justice.[354] First, law professors may write in a formal, objective, dispassionate style, which offers description but no prescription, analysis but no experience, objectivity but no emotion, and trite expressions but no heartfelt language.[355] Second, they may respond to institutional pressure by withholding personal views from scholarship, particularly if judicial positions are their attainable ambition. An ideologically transparent scholarly record, whether liberal or conservative in content, is a formidable burden to carry through the confirmation process of the Senate Judiciary Committee. Third, and most important, law professors may fear the tenure process[356] and the allegation that their scholarship is radical or subversive. Even tenured law professors, who engage in iconoclastic

351. *See, e.g.*, Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001) (holding that public university professor lacks First Amendment right to contest school's grading procedures); Urofsky v. Gilmore, 216 F.3d 401, 414 (4th Cir. 2000) (recognizing professors lack right of academic freedom to decide contents of their scholarship); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (concluding that public university professors have no First Amendment right to decide what they teach).

352. *Garcetti*, 547 U.S. at 423 (holding that speech by public employees made pursuant to their official duties is not entitled to First Amendment protection).

353. *See* Robin D. Barnes, *Natural Legal Guardians of Judicial Independence and Academic Freedom*, 77 FORDHAM L. REV. 1453, 1471–72 (2009) (analyzing the case of John Yoo, the author of the Bush Administration torture memos, and the public pressure to fire him from his tenured faculty position).

354. *See* Markovits, *supra* note 333, at 462 ("In my judgment, the failure of law professors to take legal argument seriously in the 'conviction' sense has also had a number of socially undesirable consequences.").

355. *But cf.* Angela P. Harris & Marjorie M. Shultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1804 (1993) (recommending a classroom culture that is engaged, passionate, and rich in intellectual discourse).

356. Professors may fear the tenure process despite the fact that it is designed to promote academic freedom without sacrificing the professor's economic security. *See* Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125, 172 (2009) (arguing that the purpose of tenure is, and ought to be, assurance of academic freedom of teaching and research).

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scholarship, may lose the opportunity to teach at prestigious law schools. Under these combined pressures, law professors may engage in mechanistic, doctrinal scholarship that adds jargon to the field but does nothing to expose and reform its subterranean value-structure.[357]

Despite dissociative pressures, few law professors, particularly after they are tenured, choose to engage in insincere scholarship divorced from personal conscience. And even fewer law professors would choose to live with a dead conscience and abandon moral judgment. In fact, the pendulum has shifted toward highly personalized scholarship as more and more law professors offer scathing criticisms of law and the legal system.[358] These criticisms are derived from race, gender, sexual orientation, economics, and a legion of other ideological perspectives. It would be highly unusual for law professors to decline ownership of these writings, argue that they were simply explaining the law as it is, and claim personal conscience has no place in the academy.

While most law professors engage in intellectually upright scholarship, money-driven gaming has infected the academy. One commentator points out that law reviews fail to screen writings tied to financial interests.[359] "[C]orporations and conservative think tanks with corporate underwriters, continue to fund research for the purpose of presenting their findings to courts in order to discredit jury verdicts that awarded punitive damages against them."[360] Prestigious scholars with access to prestigious journals may be solicited to engage in "hired-gun research."[361] For example, a prestigious team of scholars received funds from Exxon to conduct research on jury awards of punitive damages.[362] The authors concluded that juries are ill-equipped to assess punitive damages in dollar amounts.[363] And they were able to publish their research in the Yale Law Journal. No accusations have been made to assert that the research was tainted. However, the United States Supreme Court refused to rely on this research in a case on punitive damages.[364]

357. This form of scholarship, however, is rarely rewarded with "tenure at the better law schools." Michael Livingston, *Confessions of an Economist Killer: A Reply to Kronman's "Lost Lawyer"*, 89 NW. U. L. REV. 1592, 1602 (1995) (book review).

358. *See* Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353, 359 (2008) (describing how criticisms of the legal realists in the middle of the twentieth century shifted legal scholarship from a traditional formalist account of the common law to a more instrumentalist perspective).

359. Shireen A. Barday, Note, *Punitive Damages, Remunerated Research, and the Legal Profession*, 61 STAN. L. REV. 711 (2008).

360. *Id.* at 712.

361. *Id.*

362. Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2071, n.††† (1998) (acknowledging corporate support).

363. *Id.* at 2142.

364. Exxon Shipping Co. v. Baker, 554 U.S. 417, 501 n.17, (2008) ("Because this research was funded in part by Exxon, we decline to rely on it.").

Corporate-funded research permeates numerous fields of science on the theory that a collaborative relationship between corporations and the academy can accelerate the invention and manufacturing of products beneficial for the public in general. This "win-win" strategy, however, works more to the benefit of corporations rather than the public; in some cases, the corporate-funded research is *detrimental* to the safety and health of the general public.[365] Pharmaceutical companies, for example, regularly fund research to promote drugs and biologics.[366] Money can corrupt academic research when researchers manipulate the data to advance corporate interests. Academic researchers would not need to engage in a wholesale fraudulent research but subtly tilt the research in favor of corporate clients. The extent to which money-driven research has infected legal scholarship remains to be documented.

CONCLUSION

This Article has argued that professional responsibilities arise within the connectionist web of laws, ethics, and personal conscience. Lawyers, judges, and law professors must not renounce personal conscience in providing professional services. Willful reasoning derived from personal conscience alone, however, cannot be the driver of legitimate reasoning. Legal professionals must pursue cognitive coherence by connecting personal conscience with the knowledge of laws and ethics. Lawyers must not accept the dissociation paradigm that forces them to game the system or surrender personal conscience in serving clients. Judges must not accept the dissociation paradigm that forces them to game legal reasoning or serve as conscience-free enforcers of laws. If legal reasoning derived from binding legal sources yields multiple solutions to a legal problem, judges must choose the solution most compatible with their personal conscience. This choice, though regularly exercised by high-court judges, is available to all judges. Of all legal professionals, law professors are in the most privileged position to teach and write in the connectionist domain of laws, ethics, and personal conscience. They have little excuse to turn off personal conscience in teaching and writing. A legal profession, which values legal professionals as fully integrated human

365. *See* Peter Lurie & Allison Zieve, *Sometimes the Silence Can Be Like the Thunder: Access to Pharmaceutical Data at the FDA*, 69 LAW & CONTEMP. PROBS. 85, 85 (2006) (arguing that greater corporate involvement in clinical science and the culture of secrecy it brings may inhibit the free flow of scientific data and thus slow the scientific development of beneficial products).

366. *See* Keith J. Winstein & David Armstrong, *Top Pain Scientist Fabricated Data in Studies, Hospital Says*, WALL ST. J., Mar. 11, 2009, at A12 ("A prominent Massachusetts anesthesiologist allegedly fabricated 21 medical studies that claimed to show benefits from painkillers like Vioxx and Celebrex.").

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beings rather than mere service-providers separated from their inner values, cannot owe rigid adherence to the dissociation paradigm.