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Philosophical Legal Ethics: Ethics, Morals, and Jurisprudence

by

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***Philosophical Legal Ethics: Ethics, Morals, and  
Jurisprudence***

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## **Panel for ILEC IV – Philosophical Legal Ethics: Ethics, Morals and Jurisprudence**

*Is it possible to rescue the concept of role-differentiated morality from the seemingly devastating criticisms leveled at the “standard conception” of legal ethics as amoral lawyering? The famous question posed by Charles Fried, “Can a good lawyer be a good person?” accepted the premise that “good lawyers” are professionally obligated to pursue the interests of their clients even when doing so would “use the law to the prejudice of the weak or the innocent” and detract from the common good. Fried argued that the lawyer’s role as partisan advocate for her clients is morally justified by the relationship between the person and the legal system; each of us should be free to pursue lawful purposes, and can indeed claim a right to be free to act as we choose within the “bounds of the law”.*

*Some legal ethicists who initially responded to Fried (or like Wasserstrom wrote contemporaneously with him) argued that the idea of legal boundaries provides inadequate protection against the harm lawyers cause others in the pursuit of their clients' interests. Partisan duty infuses the way lawyers interpret the “bounds of the law,” pushing legal limits past their ordinary meaning and intended purpose to embrace any colorable interpretation that the law could sustain.*

*Other legal ethicists have rejected the premise that lawyers’ ethical duties demand instrumentalist partisan interpretation of the “bounds of the law,” and have looked increasingly to jurisprudential and political theory to explore the interpretive stance that it is appropriate for lawyers to take with respect to the “bounds of the law.” This re-animation of the debate in philosophical legal ethics has motivated more general scholarly interest and attention.*

Our proposal is to engage the questions about the theoretical basis of legal ethics in the form of a roundtable discussion between participants who represent both the moral critiques of the standard conception and those who seek to rehabilitate it on grounds of jurisprudential or political theory, with audience participation. To make the discussion focused and engaging, participants will each provide a 3-5 page (no more!) paper on a question related to the evolving discipline of philosophical legal ethics (below). The papers will be distributed shortly before the conference, and at the conference each participant will have 5-10 minutes to discuss their views. That will then be followed by an open discussion/question and answer session between the participants and the audience.

***Is the concern of legal ethics the morality of lawyers, the morality of clients, or the morality of laws?***

## Panel for ILEC IV – Philosophical Legal Ethics: Ethics, Morals and Jurisprudence

### Tim Dare

Is it possible to rescue the concept of role-differentiated morality from the seemingly devastating criticisms leveled at the “standard conception” of legal ethics as amoral lawyering? I’ve offered a defence of a modified version of the standard conception of the lawyer’s role that answers ‘yes’ to at least a (moralized) version of this question.

The critique of the current reading of the standard conception is wide ranging and claims at least that:

- lawyers acting under the standard conception are alienated from ordinary morality,
- are invited to deny responsibility for the things they do (and so to deny their status as moral agents, capable of choosing to do otherwise),
- are rendered morally insensitive in ways which impair their ability both to live a satisfactory life outside of their professional roles and to perform their professional roles adequately
- are likely to find their work deeply unsatisfying because of the sometimes striking discord between the apparently obvious concern of law and lawyers with justice and morality, and the reality of practice under a conception which separates the moral obligations of the lawyer from those of the rest .

In the face of that critique, commentators have, in various ways, sought to make the lawyer’s role more directly amenable to the demands of ordinary morality. I argue that that is a mistake: that a modified version of the SC is essentially the right way of conceiving of the ethical obligations of lawyers.

My overall strategy is straightforward. I argue that lawyers have *moral* grounds for regarding themselves as having duties to their clients which may allow or require them to act in ways which would be immoral were they acting outside of their professional roles (so I’m not very keen on the description of this as an ‘amoral role’: I think it’s a deeply moral, albeit morally autonomous, role). Roughly, I rely an account of the role of law in modern liberal communities according to which its primary function is to mediate between reasonable but inconsistent views about what we ought to do, and in which it does that by allocating rights to settle ‘what will we do’ questions, without purporting to settle ongoing debate about what we ought to do.<sup>1</sup> If the moral justifications of the lawyer’s role can be defended, many of the criticisms of the standard conception fall away. Most generally, if there are moral reasons for taking the standard conception seriously, then we should not too readily accept the claim that the conception alienates lawyers from morality, or overdraw the conception's break between ‘personal’ or ‘ordinary’ morality on the one hand and professional morality on the other. An adequate personal or ordinary morality will entail a proper respect for the moral demands and permissions of professional roles.

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<sup>1</sup> Conceiving of law in terms of this role leads me to have doubts about Dworkinian accounts of the role of principles in judicial reasoning. I think such accounts undercut the capacity of law to mediate between reasonable but inconsistent views about how we should live. Even if one accepts some such account in judicial contexts, where judges are required to give reasons and are subject to appeal and review, however, it seems more troubling to encourage lawyers to adopt the approach given the absence of opportunity for public review.

The moral argument also suggests a solution to the crisis of morale. I argue that the standard conception recognises the vulnerability of clients within client/professional relationships, and that contemporary liberal communities rely to a considerable extent upon the practice of law as conceived by the standard conception. Law so practiced allows people who are committed to a range of diverse but reasonable views about how we should live to form stable and just communities. The lawyer's role so conceived is one in which lawyers should take a good deal of satisfaction. The crisis of morale that troubles so many commentators is attributable, I suggest, to a failure to appreciate the moral justification for the role rather than to any general licensing of immoral professional conduct.

Further, once the moral arguments for the standard conception are made explicit, those arguments themselves suggest limits to the things lawyers may justifiably do within their professional roles. The moral implications of the standard conception are often mischaracterised. Commentators suggest that the conception requires lawyers to secure any advantage the law can be made to give: to be what I call hyper-zealous and many of the most trenchant criticism of the SC flow are responses to hyper-zeal. But I argue that the standard conception, understood in light of its proper moral justification, requires no such thing: It justifies a more limited and moderate sphere of professional conduct than is commonly supposed, requiring lawyers to be what I have called mere-zealous, zealously pursuing only their clients' legal entitlements (as opposed to mere advantages).<sup>2</sup> The idea, put in the terms of the panel question, is that restricting legitimate advocacy to mere-zeal will go some way toward reducing the "use the law to the prejudice of the weak or the innocent" and addressing the interpretation of "partisan duty" which leads lawyers to "interpret the "bounds of the law" [in ways which lead them to] push legal limits past their ordinary meaning and intended purpose to embrace any colorable interpretation that the law could sustain".<sup>3</sup>

In addition, I argue, the model I defend allows us to conceptualize an important feature of ethical legal practice. I make use of John Rawls' distinction between constitutive and practice rules to defend the claim that role differentiated obligation are possible, and to show how an institution and the roles it supports might be designed with reference to the resources of broad based morality and yet it be the case that the occupants of those institutional roles are not at liberty to appeal to broad based morality from within their roles. Rawls's model allows us to maintain a 'clean break' between role morality and broad based morality without making it the case that standards of ordinary morality have no place in the evaluation of

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<sup>2</sup> It may seem (perhaps correctly!) that this feature of the model requires a theory interpretation, to explain how lawyers are to know when an advantage offered by a rule is a 'right' or a 'mere advantage'. For the moment, I am inclined to think the objection is not too troubling. I offer the analogy of the jurisdiction to prevent 'abuse of process'. Abuse of process is defined functionally: an abuse is the use of legal proceedings for purposes other than those for which those processes were intended. Identifying abuses requires just the sort of reasoning through the point of laws and legal processes which I argue underpins the distinction between 'legal rights' and mere advantages'. So, for the moment at least, I offer an ostensive response to the interpretative objection: "How do we draw the distinction? Like that!".

<sup>3</sup> The distinction between mere-zeal and hyper-zeal leads me to reject at least a simple version of the idea, attributed Fried in the question for the panel, that "each of us should be free to pursue lawful purposes, and can indeed claim a right to be free to act as we choose within the "bounds of the law". We need to spell out 'lawful purposes' more carefully. Some of our purposes are lawfully only 'accidentally' or 'collaterally' and, on my account, we cannot always insist on the help of lawyers to pursue such purposes. Thinking about this recently, I wonder whether the mere-zeal/hyper-zeal distinction (or the legal right/lawful advantage distinction which underpins it) might be supported by Hohfeldian analysis, though I have not got very far with that project.

professional conduct.<sup>4</sup> Conceptualizing the lawyer's role in these Rawlsian terms, this is to say, contributes to the argument, alluded to in the previous paragraph, that the break between role morality and ordinary morality should not be overdrawn.

It also has another function. According to the model, a lawyer noticing, for instance, that a statute of limitations or current rules or practices of cross examination have produced results regrettable from the perspective of ordinary morality cannot act, *qua* advocate, other than the existing rules of the practice recognize. The role is constituted by those rules and the actions available to her are settled by the role. I have argued however, that the model allows us to see more clearly than we otherwise might, how role occupants are able to move between roles. The relevant move here is between the roles of advocate and 'reformer'. The Rawlsian model makes very clear how and why we might conceive of lawyers as subject to an obligation to work to improve the fit between role and ordinary morality where, in some respect, the institution, built with reference to the resources of ordinary morality, has come apart from ordinary morality. *Qua* advocate, lawyers, confronted with such a case will normally have to stick with their clients, helping the client secure their rights under the law. When the client's case is complete, however, the lawyer may well bear a responsibility to take on the role of law-reformer, arguing for reform which their legal expertise and familiarity with the particular case may have made especially clear.

Some of the most troubling strands of the critique of the standard conception raise concerns about the ways in which the conception calls upon professionals to distance themselves from their lay-persona, from the claims of ordinary morality, from the circumstances in which they act, from the people they engage with when acting as role-occupants, and so sacrifice their integrity. I attempt to address these concerns about integrity on a number of fronts. As a conceptual matter, I defend an account of integrity according to which it rests on a commitment to critical reflection upon one's role(s) and a readiness to follow the implications of that reflection. My (immodest) hope is that I can tie this account of integrity to my substantive account of the lawyer's role by suggesting that some such account should be accepted by the reflective lawyer. The account addresses the substantive threats to integrity in a number of ways: it seeks to minimize the conflict between the demands of role morality and those of ordinary or broad based morality by limiting the excesses of advocacy; it offers a model of professional roles which, while insisting on a 'clean break' between role morality and broad based morality, nonetheless recognizes the contribution of ordinary morality at the point of institutional design; it offers a moral argument for the particular role differentiated demands of the lawyer's role, suggesting that there are reasons of ordinary morality to take those demands seriously; and it shows that lawyers have a professional moral obligation to engage in a constant process of law reform, aimed at promoting fit between the lawyer's role morality and broad based morality.

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<sup>4</sup> Using Rawls' distinction in this way requires a response to Arthur Applbaum's powerful argument that the distinction in fact shows us that the conduct of role occupants cannot (without some fancy moves involving enduring descriptions) be the subject of moral criticism from outside the role.

I don't imagine any of this amounts to a knock-down response to the critique of the standard conception, – or that there is not more which needs to be addressed (an account of the conditions for legitimate conscientious objection, for instance). I think it goes some way to responding to the critique of the standard conception, though, and so supports a 'yes' to the panel question.

**Katherine Kruse**  
**William S. Boyd School of Law, University of Nevada, Las Vegas**

When I was a senior in college, I faced a moral dilemma: I wanted desperately to go to graduate school, but I did not think it was possible for me to be a good philosopher and a good person. After drifting through the first two years of college, I had withdrawn from school and spent a year supporting myself as a cook and a bank teller. During that year, I encountered people with various kinds of trouble—from criminal charges to immigration problems—and I came to see myself as privileged. I also came to understand that if properly directed, my natural intelligence could position me to make a tangible difference in the lives of others. I went back to school because I saw education as a tool that would enable me to help people less fortunate than myself; I had decided to become a lawyer.

When I returned to college and engaged in my studies with this new sense of purpose, I fell accidentally in love with the study of philosophy. With all the suffering in the world, I did not think I could morally justify devoting my life to the academic pursuit of abstract ideas, but I made what I perceived at the time to be a selfish choice: I went to graduate school because I couldn't deny myself the opportunity to follow my passion. Within two years, my moral values caught up with me, and I transferred to law school. A formative experience was attending a talk by an appellate public defender about what he did for a living: he said he lost about ninety percent of his cases, but he went to prison every month and listened to the stories of prisoners--mostly young black men whose lives society had thrown away--and that his job was to tell their stories in ways that would make people listen and care. After graduating from law school, I followed a path similar to his. It took another eleven years of working and teaching in a prison legal assistance



clinic for me to realize that to fully flourish as a person, I needed to find a way to honor my passion for academics as well as my moral impulse to put my talents to use in concrete service to others.

This story from my life helps explain a couple of things about my answers to the questions about legal ethics and the morality of lawyers, clients and the law. First, the question of whether a good lawyer can be a good person has never been very interesting to me, because the answer has always seemed so obviously to be “yes.” The question of *how* one can best use one’s expertise and social position as a lawyer (or philosopher or real estate agent or salesperson) to improve the lives of others and to add value to the world is much more interesting, but I don’t see it as central to legal ethics. In my view, we all face that question as persons, not as lawyers. Second, my own experiences make me acutely aware how complicated moral reasoning is: how difficult it is to understand and prioritize our own values; how easy it is to rationalize selfish impulses; how often our duties to ourselves and others conflict; how difficult it is to define our duties to the common good; and how what seems right (or wrong) in the moment may utterly fail the test of time.

The answers to which I gravitate in legal ethics are essentially client-centered. In part, this is because the morally problematic behavior of over-zealous partisanship has never struck me as a problem of lawyers who weigh their duties to clients too heavily. Such partisanship occurs too infrequently among lawyers whose clients are unable to pay handsomely for hourly work; and it is received with too much suspicion by even well-heeled clients when they get their billing statements. Social scientists almost invariably view lawyers as jockeying for status and protecting their own interests rather than putting

their clients' interests at the forefront: classic examples include Blumberg's analysis of plea bargaining as a "confidence game";<sup>5</sup> Sarat & Felstiner's study of the way divorce lawyers talk to their clients;<sup>6</sup> and Langevoort & Rasmussen's model explaining why business lawyers "skew the results" by overestimating legal risk.<sup>7</sup> I am inclined to view the "adversary system excuse" as a mask behind which lawyers hide the pursuit of their own interests at the expense of their clients and the public, a perversion of lawyers' partisan duties rather than a fulfillment of them. To address the problem of overzealous partisanship, in my view, partisanship must be conceptualized to curb lawyer self-interest and put clients more truly at the center of legal representation.

With respect to the morality of clients, my view is that lawyers should facilitate their clients' sound moral decision-making.<sup>8</sup> Facilitating sound client decision-making is harder than it seems. It requires lawyers to suspend their professional tendency to "issue-spot" their clients by honing in on the legally relevant facts and constructing their clients' objectives in terms of legal claims and remedies. The professionalized construction of clients as walking bundles of legal interests emphasizes what clients are entitled to get from the law and de-emphasizes concerns that carry normative content, such as the client's values, the client's reputation and standing in the community, and the preservation of the client's relationships with others. It takes studied effort to look carefully and listen

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<sup>5</sup> Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15 (1966).

<sup>6</sup> AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995).

<sup>7</sup> Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L. J. 375 (1997).

<sup>8</sup> I have developed the ideas in the following two paragraphs more fully in two articles. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLIN. L. REV. 369 (2006).

attentively for the larger context of a client's situation. It is much easier to fish for the facts that will help define a client's objectives based on pre-existing legal categories. But the legal aspects of a client's situation are only one facet of a larger and more complex situation in which legal interests and entitlements interact with financial, reputational, political, moral and other non-legal concerns. Lawyers are experts on the law; but clients are the experts on their own lives.

Facilitating clients' sound moral judgment, however, does not mean that lawyers should take a "hands-off" approach as legal technicians simply implementing their clients' stated objectives. People don't seek legal advice from lawyers on most matters, nor do they pursue legal intervention to resolve most disputes. When clients come through the door, they are often in the grip of anger, fear, disappointment or betrayal, any of which can affect sound moral decision-making just as they affect prudent self-interested judgment. Given the complexity of moral decision-making, it is appropriate for lawyers to question their clients' stated objectives and to treat those objectives as subject to change with the passage of time. The underlying value of client autonomy need not be equated with getting a client what the client says he or she wants in the moment. It is fully consistent with helping clients make the best use of the formality and finality of legal structures to resolve a situation or dispute in a way that suits the client's long-term interests, preserves the client's important relationships, and honors the client's values.

With respect to the morality of law, lawyers do have the expertise and are better situated than their clients to understand and invoke the purposes of law as a constraint on the pursuit of their clients' objectives. The jurisprudential bane of legal ethics is the legal

realist conception of law as indeterminate, manipulable and nothing more than the prediction of official behavior, which has been identified as the implicit operating jurisprudence of practicing lawyers. The realist conception of law is seen as an invitation to lawyers to "game" the law in pursuit of their clients' selfish interests. (Or, if you take the more cynical view of the legal profession, as an opportunity for lawyers to further their own interests at the expense of clients and the public).

Legal realism also provides the conceptualization of lawyers as lawmakers by positing that the "law in action" includes the behavior of lower-level legal officials who apply and enforce law. The lawmaking role of lawyers in advising and counseling their clients "in the shadow of the law" forms a theoretical basis for establishing lawyers' jurisprudential duties to interpret the law responsibly. I take the conceptualization of lawyers as lawmakers to be an important plank in the theoretical platform on which jurisprudential theories of legal ethics are built: in this category I would put Simon's view that lawyers have a jurisprudential duty to interpret law according to its internal principles of justice; and Wendel's view that lawyers have a duty of fidelity to positive law as society's resolution of contested moral issues. (If I am wrong about this, I invite them to clarify or correct me).

Although my own views on the jurisprudence of legal ethics are not yet fully formed, I question the conceptualization of lawyers as lawmakers in the shadow of the law. This conceptualization creates a lawyer-centered mechanism for determining the legitimacy of law, in which lawyers judge and screen interpretations of law that meet or do not meet operative criteria of legitimacy. While information about law's purposes and enforcement are matters of legal expertise, assessments of law's legitimacy--whether to

respect the law or how much respect to accord the law--are lay judgments that more properly belong with clients. I view the "shadow of the law" as a testing ground where the dictates of positive law interact with social norms and earn legitimacy. Legitimacy is earned as people come to respect law as authoritative; it is not earned to the extent that people reject law as nothing more than power backed by sanctions and seek to avoid its reach. Lawyers have a jurisprudential duty to situate their clients to make appropriately informed assessments about the legitimacy of law by explaining law's scope and enforcement within the context of a sympathetic account of law's underlying purposes.

## I. Not Morality at All, and Certainly Not Morality as Regulative Ideal

**Daniel Markovits**

Philosophical legal ethics should abandon what most have taken to be its central task – the effort to develop moral principles capable of guiding and indeed of regulating lawyers’ professional lives. Philosophers who engage the practice of law should instead seek to reconstruct the contribution that this practice makes to the political authority of retail dispute resolution.

To begin with, the quest for a regulative moral ideal that might guide lawyers’ professional conduct is not philosophically very interesting. Lawyering is not in the end a distinctive moral practice. Rather, it is simply one case among many of moral conduct in the shadow of partial and hence potentially agent-relative reasons. This broader class of cases spans from promise at the thin end (promisors acquire obligations to perform even when it is not best overall that they do so) to the affective relations associated with love at the other. A lawyer’s obligations to her client fall somewhere in between, in a space that they share, roughly, with the obligations of agents and fiduciaries more generally. There are philosophical things worth saying about all of these cases, but they have mostly already been said. And whatever they are, they apply to lawyers, who are not special in respect of their partiality, in the usual way. I take this to be as true of my previous efforts to discuss lawyerly partiality as of anyone else’s. Although I perhaps wrote as if lawyers are special, they are not. Everything that I said (at least everything true that I said) applies with very little modification to other agents. Once again, there is nothing to see here; legal ethics should move on.

Legal ethics should avoid the quest to govern lawyers’ professional conduct through regulative moral ideals for another reason also. Philosophical ethics is quite generally not well-suited to producing regulative guides to moral life.

This is, to be sure, decidedly the minority view. Ever since Plato’s peculiar introduction of ethics in *The Republic* – through reporting Socrates’s question “How should one live?” and then recounting a series of efforts to go about answering it – the dominant tradition of moral philosophy has taken the subject to possess a recursive structure. Rational reflection about the good life, Socrates’s question suggests, might be expected to produce regulative principles for living – rules for how one should live – which might themselves be rationally applied and pursued.

Moral philosophy is thus brought, simply in virtue of the question from which it begins, into a very close connection with its subject, that is, with morality itself. Given the question that he takes as his starting point, it is natural – *necessary*, really – for Socrates also to say, as he famously did, that the unexamined life is not worth living. Moreover, it is natural and necessary that he means by this that the living and the examining – reflection and self-reflection – should employ the same, rational, faculty.

The good man, after all, is one in whom the rational part of his tri-partite soul dominates the other two.

There is, however, no reason to think, as a general and purely formal matter, that normative ethics *must* have this recursive structure. To the contrary, there are good reasons to think that it need, and perhaps even should, not do. Perhaps most immediately, normative ethicists are conspicuously *not* better people than others, and legal ethicists are conspicuously not more ethical lawyers. This is probably most often explained, among philosophers, by observing that although philosophical understanding does indeed render a person better able accurately to discern principles for living well, it does not enable her better to live by the principles that she adopts. This, philosophers say, is because moral philosophy does not decrease immoral appetites or increase self-control.

That is plainly not a good explanation. For one thing, if moral philosophy really could produce even this narrowly cabined moral improvement, then moral philosophy surely would help the moral philosophers who pursue it be on balance more moral than others. They would not, to be sure, require less self-control or possess more; but they would deploy whatever self-control they do possess in directions that more accurately track flourishing. And, relatedly, it would render moral philosophers useful to others interested in how they should live, because philosophers might help guide others concerning the regulative principles that they should adopt for themselves, even if they do not always manage to live by them and even if philosophers cannot close the gap between ambition and achievement. In fact, however, moral philosophers are not better than other people even in this weak and narrow way; rather they are *no* better than others.

Moreover, it is highly doubtful that moral philosophers actually do enjoy even the narrowly cabined, and practically impotent, advantage in living well that they sometimes claim. Non-philosophers notoriously do not seek philosophical advice for living, in an effort to leverage philosophers' theoretical understanding in their own efforts to live well. Applied ethics is a vanishingly small and un-influential field compared to economics, psychology, management studies, religion, and even self-help. And where applied ethicists do gain influence, they tend to stray from their philosophical activities, which is why applied ethics is held in relatively low esteem within the philosophy profession. Indeed, common opinion probably holds that ethics is an area in which reflection on balance destroys knowledge, or at least in which those who reflect too much, at least about regulative principles, cannot be good *naturally*.

Another class of reasons against the necessity of beginning from Socrates's question arises from the fact that other areas of philosophy – including areas located near normative ethics – reject that question's recursiveness. *Meta*-ethics is one example: any number of meta-ethical views ascribe a rational status to their own propositions that they deny to the ethical propositions whose nature they study. Moreover, another field of practical philosophy, *aesthetics*, expressly abandons recursiveness even in its normative mode. Even aestheticians who take themselves to be elaborating normative principles that explain what beauty is (rather than just meta-aesthetic ideas concerning the nature of

claims about beauty), do not take themselves to be explaining how to produce beauty. Indeed, an essential part of being a self-respecting aesthete nowadays is to deny that one is developing regulative principles for making art. And ethicists, their express methodological commitments to the contrary notwithstanding, implicitly make a similar concession. Moral philosophy, after all, is identified in distinction to philosophy of mind, say, or metaphysics, and not to immoral philosophy.

Happily, Socrates's question is not, in fact, the only properly philosophical question that one might ask about ethics. Rather than asking how one should live, one might ask: "what is a good life like?" This question is clearly amenable to the methods of philosophy. It is, after all, no different formally from any number of other plainly philosophical questions, ranging from metaphysics ("what is substance like?") to philosophy of mind ("what is intention like?") to philosophy of language ("what is reference like?"). And in this formulation, the basic question of ethics leaves open whether or not understanding philosophical answers to it will help a person living the life that they describe.

All of these ideas might naturally be applied specifically to legal ethics. On this approach, the basic question for philosophical legal ethics is not how should lawyers regulate their professional practices? Rather the basic question for philosophical legal ethics asks what kind of a practice lawyering is? What are lawyering's immanent norms and how are these related to other moral ideals? How does lawyering fit into modern ethical life more generally? None of these questions calls for philosophical derivations of regulative ideals. All are morally deep and important, and all are amenable to philosophical analysis. Virtually no philosophical legal ethics takes up these questions, however. And the core methods and concerns of the field should therefore change.

This methodological reorientation will naturally produce a substantive reorientation for legal ethics also. The reason is that even the briefest engagement with the immanent structure of the law governing lawyers reveals that this body of law is not so much a moral as a *political* construction. (This should not be surprising, as a positive moral law is virtually impossible, whereas positive law is the first and central achievement of politics.) That is, the law governing lawyers is not so much concerned with the nature or content of an individual life well-lived as with how to sustain solidarity in the face of entrenched and intractable disagreement about the good life.

The positive law reflects an integrative achievement. When various factions (interested and moral) come together to adopt a particular piece of positive law, and to affirm its authority, they fix which resolution of their disagreements they will obey even in the face of ongoing disagreement about which resolution it would have been best for them to adopt. (This achievement, incidentally, is qualitatively the same wherever the authority of positive law is jointly acknowledged by competing factions. It does not depend nearly so much on the democratic character of positive law as most contemporary commentators presume.)



It is less often noticed that the resolution of individual disputes, at retail, has a similar structure. When individual disputants accept the authority of a particular adjudication, they similarly fix which resolution to their dispute they will obey in the face of their ongoing disagreement about which to adopt. The legal order that establishes processes of individual dispute resolution concerning the application of substantive law thus displays an immanent authority that runs in parallel to the authority of the mechanisms of wholesale dispute resolution that govern the enactment of substantive law. The law governing lawyers belongs to centrally to the practices of retail-dispute-resolution. A legal ethics that seeks to discern the immanent norms of the practice of law will therefore ask, insistently, what lawyering contributes to the authority of retail dispute resolution and how the law governing lawyers supports this contribution.

This should be the central question for philosophical legal ethics. It has, however, been virtually totally ignored. Talcott Parsons took up the question sociologically a half-century or so ago, and the law and society movement has looked in on Parsons's insights every now and then. Lon Fuller's work on adjudication has mined a similar vein but has also been largely ignored. More recently, I have tried to organize and provide a philosophical foundation for their insights for the special case of the adversary trial. None of these efforts (and especially not mine) has had much to say about how lawyers contribute to retail dispute resolution outside of trials, including in particular through contractual negotiations (including, but not limited to, through settlement contracts).

Almost forty years after Fried asked the question from which our discussion takes its theme, therefore, the most important features of legal ethics remain almost totally mysterious.

## Locating Morality in Legal Practice: Lawyer? Client? The Law?

Stephen Pepper    University of Denver  
 Sturm College of Law

When practicing lawyers, law professors, and scholars in our field speak of “legal ethics” they almost always are thinking about the ethics of the practice of law, the ethics involved in accomplishing legal work for clients. For that reason I think it more precise and helpful to refer to our field of inquiry as “lawyers’ ethics,” and thus to phrase our question as: “Is the concern of lawyers’ ethics the morality of lawyers, the morality of clients, or the morality of laws?” I would guess that we all think that the answer is “all three,” and as I have rephrased it, I would say “all three” with a possibly decreasing degree of directness.

*Morality of Lawyers (1)*    “Can a good lawyer be a good person?” What are the foundations from which we determine and structure our understanding of right and wrong in regard to the professional conduct of lawyers? Law is intended to be a public resource, available to all. That means we all have something like an entitlement to know and use the law that limits, channels and empowers us. The basic function of lawyers, of the legal profession, is to provide access to law for those who can’t access it without assistance. We presume that law is created and intended to have a positive effect (although this is a controvertible claim, appropriate for the third aspect of our question), and that it is intended to be available to all. By providing access to this “good,” lawyers in the aggregate perform a morally justifiable (and arguably admirable) function. This functional foundation for the ethics (and consequent morality) of lawyers is structural, institutional and general.

But what about the retail level? Lawmakers create law intended to have a positive effect. But what they create is general, usually relatively rough, often rules of thumb. Even if we are willing to presume that in the aggregate law has a good or positive effect, we know that often in the specific it does not. Law (particularly facilitative law such as contract or corporate) is often a neutral tool; it can be used to good or bad effect. (The exclusionary rule, to take an example from a quite different field, shields the guilty along with the innocent.) At the level of the specific usage of the law by the client enabled by the lawyer, can we still conclude that the lawyer’s function is morally justifiable? Should we create an ethical structure for lawyers in which law is not generally available, in which each lawyer in each instance functions as a lawmaker to determine whether or not the specific use of the law is allowable or not? Or is how and whether to use the law a choice to be made by each of us, perhaps with the assistance, guidance and advice of a (preferably ethical) lawyer? (See “*Lawyer 2*” below.) Are lawyers primarily in service to clients, facilitating access to law? Or are they primarily delegated agents of the state, making law on a situation by situation basis? The values of equal access to law and of

the autonomy of each individual suggest that each lawyer ought not make law for each situation. In addition, clients, particularly individual clients, are often dependent and vulnerable in relation to their lawyers, and the lawyers are in a position to be tempted to exploit that vulnerability by making choices that serve the lawyer's interests rather than the client's. (There are also practical problems with the alternative. Consider for a moment the lawyer as arbiter model. Would we not have some entrepreneurial law student develop a site to match sophisticated clients with morally, policy or politically like-minded lawyers to avoid the problem of moral screening of otherwise lawful conduct? Would powerful, sophisticated corporations even need such a web site to locate lawyers likely to approve usages of the law facilitative to their purposes and goals?) On the level of the particular instance, providing "neutral" access to law is thus morally justifiable and arguably admirable, although often more problematic than at the remove of the general, structural and institutional. I have made this argument more elaborately before ("The Lawyer's Amoral Ethical Role"), and, as might be expected, I disagree with the opening premise of our topic that the criticisms of this understanding and role are "seemingly devastating."<sup>9</sup>

Imagine for a moment the well-known example of a debtor who admits to his lawyer that he owes a substantial amount of money. The client debtor is significantly better off financially than the creditor and the debt is currently due and unpaid. This is a "just" debt, with no obvious reason or justification for not repaying. The lawyer's consideration of the surrounding facts reveals that there is a statute of limitations or statute of frauds defense under the facts that will prevent court enforcement of the debt—it is a just and admitted debt, but unenforceable under the law. There is a general moral consensus in our society that, all other things being equal, one should pay one's just debts. If one has borrowed and used someone else's money under promise of repayment, one ought as a matter of common morality to repay. Should the lawyer enforce this consensus moral understanding on the client, and refuse to plead the technical defense if the matter goes to litigation? Should the lawyer, perhaps, not even inform the client of the existence of the valid defense? The lawmakers (legislative and judicial) have chosen a bright line rule, knowing it will sometimes result in injustice. Should our regime of lawyers' ethics change that bright line to an "under all the circumstances" moral decision by the particular lawyer? (Similarly, should the choice of whether or not to invoke the exclusionary rule in a criminal proceeding be an all things considered, under these particular circumstances, moral decision by the lawyer?) I have suggested above that: (a) law as a public good, (b) equal access to that public good, (c) the autonomy of individuals, (d) the vulnerability of clients to their lawyers, and (d) the natural tendency

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<sup>9</sup> . Consider Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 American Bar Foundation Research Journal 657, 662-673, and whether the critique, or the critique of the critique, is more persuasive.

of lawyers to take advantage (intentionally or inadvertently) of their client's vulnerability, all suggest that these decisions should be for the client, not for the lawyer.

*Morality of Lawyers (2)* Thus the general role (the structural or institutional role) of the lawyer's function is directly concerned with the morality of lawyers. There is a second dimension on which lawyers' ethics (aka "legal ethics") can be (and I would suggest ought to be) quite directly concerned with the morality of lawyers. When the client's access to or use of the law is morally problematic, the lawyer ought to counsel with the client concerning that problem. If the lawyer has concluded that the client's use of the law may be morally wrongful, that ought to be made clear to the client. The lawyer can counsel the client that it will be the client, and not the lawyer or the law, who will be primarily responsible for a morally wrongful but lawful use of the law.<sup>10</sup> In the just debt/technical defense situation, for example, the lawyer might ask why it is that the client is considering resisting paying an admitted debt, or is seeking advice about that possibility. Or she might find some other gentle, respectful way to initiate moral deliberation with the client about the debt and its repayment. The lawyer would explore with the client the fairness, justice, and morality aspects of the situation and options. Depending on the client's response to the "why" question, she might ask whether the client thinks it is "right" or "fair" for the creditor not to be repaid the money he gave to the client and that the client has used. These are difficult conversations to contemplate, but with skill and sensitivity perhaps not so difficult to accomplish. The lawyer can assist the client to draw out and clarify his values. The lawyer can respectfully influence client choice and conduct without manipulating or dominating it. The interchange can, and should, run both ways. It is quite possible the client will persuade the lawyer that what she first thought was morally wrongful is in fact justifiable. (Instruction in legal writing for law students is required for accreditation of law schools, and instruction in written and oral advocacy is usually included for first year students. Instruction in the arguably more basic and fundamental lawyering skill of counseling is, unfortunately, not required and commonly not provided.)

Lawyers too often repress their moral perception and intuition. To the extent they choose to engage in this aspect of the ethics of lawyering, they can exercise, develop and refine their moral perception, intuition, reasoning and counsel. To the extent lawyers, to the contrary, repress this aspect of their understanding and do not develop these skills, they contribute to the moral coarsening of our common culture. The unstated or background message between lawyer and client can be quite influential in this regard.

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<sup>10</sup> . "It ought to be part of the lawyer's ethical obligation to clarify that merely because one has a legal right to do x, doing x is not necessarily the right thing to do. The lawyer ought to ensure that the client is aware that x, though lawful and otherwise advantageous to the client, may well be morally unjustifiable." Pepper, *Lawyers Ethics in the Gap Between Law and Justice*, 40 South Texas L. Rev. 181, 190-91 (1999).

Imagine two different lawyers' reactions to the client's hesitation at repaying the "just debt." One lawyer, taking the "bad man" or "hardball" approach to law and human relations, suggests, either implicitly or explicitly, that if the law does not require repayment, only a "sap" would part with money he doesn't have to. Another lawyer, more along the lines I've suggested in the paragraph above, wonders whether it is "right" or "fair" for the creditor to not be repaid the money owed, even if the law will not require it. Will the difference in attitude of these two lawyers on occasion influence the attitude, and consequent choices, of the client? Which of these two lawyers would you prefer as your legal counsel?

### *Morality of Clients*

With this possibility of respectfully influencing the choices and conduct of the client through lawyer-client deliberation and moral counsel, we connect to the second topic of our question and have a bridge joining the morality of clients with the morality of the practice of law. Years ago I wrote that "[m]orality comes through the door with the client." The lawyer can attempt to bring out and develop that morality, and can also bring her own moral perception and understanding of the situation. Tom Shaffer thinks lawyers should be less concerned with client autonomy and more concerned with client goodness. I think lawyers should be concerned with both. Autonomy trumps—it is the client's life and law is a publicly available resource that frequently requires the assistance of a lawyer—but there is a large potential role for moral influence. With both our students and practicing lawyers this is a dimension of law practice we should teach, encourage and try to model. (Client autonomy trumps, that is, unless the lawyer decides she is unwilling to assist the particular client conduct at issue. Issues relating to when and whether withdrawal from the matter, or from assisting the client altogether, is ethically appropriate are beyond the range of this brief response.)

The corporation as a client is particularly problematic in this regard. What is the morality coming through the door with the corporate client? What is it that the lawyer is drawing out? Here we have the risk of amoral ethics squared. The corporate executive's defined institutional role is to maximize shareholder value or profit; the lawyer's is to provide access to the law; each has a defined role morality that arguably subordinates, or is at least significantly different from, ordinary morality. Neither "amoral" role needs to be exclusive, however. Corporate management can choose to repay the just debt, and it will not be considered a waste of corporate assets despite the available legal defense. The lawyer can remind the client of values that may be implicated in addition to the usually presumed ones of maximizing either material welfare or freedom. It may not be the defined professional role of either to figure out what is the morally right thing to do, all things considered, but being concerned with that question is not outside or contrary to either role. In fact, deliberation concerning the "all things considered" ordinary morality question is likely to enhance both roles. It would leaven business/legal decisions with a

moral dimension too often minimized or repressed, and would certainly improve the moral aspect of the professional lives of both lawyers and executives.

*Morality of Law* As enacted a legal provision is a generality, often a rule of thumb, intended in the aggregate to serve particular policy and moral purposes. (And, as Brad Wendel has emphasized, these purposes are often compromises of contending values and moral understandings.) The lawyer, however, is present at a specific potential application of that legal provision. At that point application of the law may or may not serve those moral or policy purposes and values, the compromise intention may have little or no connection to the specific facts, or the legally directed or facilitated result may be perverse in relation to generally accepted values or the particular values underlying the legal provision. A statute of frauds or limitations embodies an awkward policy and value compromise. It contemplates and tolerates just debts being extinguished, but it does not seem quite accurate to say that is its purpose. A legal provision's moral/policy compromise is up in the air and abstract; lawyer and client are down on the ground where the law's effect will be concrete and specific. At that point—where it's not abstract—lawyer and client can measure and evaluate all the actual circumstances and potential effects involved in whether or not and how to use the law. Lawyer and client can discuss and consider all this and reach a decision reflecting the client's values and interests (as partly refined and developed by that conversation). These values and interests should at least take into consideration those embodied in the legal provision, but they are unlikely to be the only ones implicated in the decision, and certainly not always the most important. The lawyer can inform the client of the purposes of the statute of frauds, and how those purposes are inapposite to the circumstances of the admitted just debt. One can imagine the multiple factors that might be relevant to a corporation's decision as to whether or not to assert the defense in a particular situation, including the nature of the client and the creditor, their relationship, and management's view of the values and value compromises instantiated in the applicable legal provisions and the overall situation.

I'm inclined to think that the "morality of the law" is best incorporated in the practice of law through day-to-day counseling, education and deliberation between lawyer and client (and I envision that process as very much a two-way conversation). The lawyer should, when practicable, provide the client with a full spectrum view of the law: 1) the straight, neutral or objective application of the law to the situation (the on the surface, most obvious, or most likely intended or understood meaning); 2) the more capacious alternative understandings or applications of the law as it could be interpreted, argued or manipulated (by both "sides" if this is a contested or negotiated matter); and 3) the purposes of the law or the values and policies it is designed to serve. This counseling may well be part of or inextricable from the broader moral conversation described above in the "*Morality of Lawyer 2*" section. Through this process the morality of the law can interact with the morality of the client and that of the lawyer.

*Conclusion* All of this assumes a greater degree of moral consensus than many of you may believe exists. Here, I think, we tend to exaggerate fundamental differences. For most questions that arise in day-to-day legal practice I would guess there is a fair amount of agreement on the morally right conduct. In the just debt example, all other things being equal, most agree that one ought to repay what one has borrowed on the promise of repayment. (The recent ferment over strategic mortgage default arises from the unease of not repaying balanced against factors that suggest all other things aren't equal: the expectation of the parties may not have included further repayment beyond giving up the home upon default, and there may be far less than clean hands on the part of the financial institution holding the debt.) We tend to agree it is morally wrong to cause needless pain, suffering, or harm; that it is better to be generous than selfish; better to be kind than hurtful; and so on. Moral deliberation between lawyer and client is likely to draw more attention to that agreement and to some extent actualize it. It is also a part of the ethics of lawyering that can enable and enliven morality in lawyer, client and the law.

**ILEC Jurisprudence Panel**  
**Bill Simon**

**LEGAL ETHICS SHOULD BE PRIMARILY A MATTER OF PRINCIPLES, NOT  
RULES**

Is legal ethics most fundamentally a matter of differentiated professional morality or of general ordinary morality?<sup>11</sup> My direct answer would be “both”. It’s useful to distinguish the two perspectives. Different methods, sources of authority, and jurisdictional norms apply to each. But the lawyer is both a role occupant and a general moral agent and thus is subject to both types of norms, and I don’t think it is important to give priority to either.

I want to give a longer indirect answer to the question by addressing a distinct but overlapping issue – whether legal ethics practice norms should take the form of – in Dworkin’s terminology – rules or principles. Here I think the question of priority is important. My answer is: principles. I think the yearning for rules is pathological and that much prominent theorizing about legal ethics errs by catering to it or at least by failing to squarely repudiate it.

One way the issue of rules v. principles overlaps the issue of law v. morality is the occasional tendency to think of law in terms of rules and morality in terms of principles. But this tendency does not survive reflection. Law can be about principles (Dworkin); morality can be about rules (Kant).

Legal ethics theory often begins by elaborating a master value and then deriving a more specific set of practical norms from it (more often than not, something that looks a lot like the ABA Model Rules). A key issue in this move is whether the specific norms the master value generates are rules or principles. Does the master value give us a set of more specific considerations that the practitioner is to weigh in the circumstances of the

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<sup>11</sup> The question, as posed, asks that we also consider whether it might also be about the “client’s morality.” I think this is one option too many. Lawyers, of course, should respect their clients’ values, but they should do so because of a morality grounded in law or the lawyer’s own commitments. Until the client is constituted by these latter norms as a role occupant entitled to special respect, she is – morally -- just a random stranger seeking assistance.



particular case? Or does it give us a set of rules that dictate conduct even in the face of (what the lawyer strongly believes) are weightier competing considerations?

Consider Pepper, Wendel, and Markovits.

-- For Pepper the master values are access-to-law and liberty. According to Pepper, they translate into norms of strong client loyalty. But what happens when client loyalty does not serve any client interest that we could associate with liberty or access-to-law and infringes the liberty or access-to-law interests of another person? Say the client X has assaulted Y. Y has filed a claim that X privately concedes is valid, but Y has filed mistakenly in the wrong jurisdiction. If the lawyer for X does not inform Y of her mistake, the statute of limitations will expire and Y will have no remedy.

For Wendel, the master value is coordination. Coordination translates into values of respect for law, Purposively understood, and a more limited client loyalty. But what happens in situations where respect for law impedes coordination? (Such situations are very common. What the French call the “strike of zeal” and what Bob Kagan and Eugene Bardach call “going by the book” refer to the use of law enforcement to disrupt social coordinaton.) For example, Kansas and some other states have laws that preclude automobile sellers who do not have an in-state sales facility from delivering a new car to a purchaser within the state. Everyone concedes that the statute is an act of naked rent seeking on the part of Kansas dealers. Should a lawyer assist a client in evading (or outright violating) this statute? [I can think of reasons not to, including the possibility of getting in trouble and deference to the democratic authority of the legislature, but the reasons have nothing to do with coordination. Coordination cuts toward violation, at least if we can do it secretly, so we don’t have to worry about a slippery slope.]

For Markovits, the master values are client/citizen self-assertion and political legitimacy. For the lawyer, they translate into norms of strong client loyalty. But what should the lawyer do when the client wants to take an aggressive position for reasons that will reduce the legitimacy of the outcome (as the client herself and others perceive it)? Say the client wants the lawyer to impeach a truthful witness in order to help establish a claim she does not believe is valid. She thinks that the legal system is corrupt and incompetent and her success will confirm that view.

If I understand them, Pepper and Wendel seem committed to rule-type answers to these questions. I'm not clear about Markovits. We could read him to say that "lying" and "cheating" are only permissible on behalf of a position sincerely held by the client, but if so, his ethic puts him more radically at odds with existing professional norms than he acknowledges.

In all three cases, it would be possible to assert an interpretation of the master value (liberty, coordination, legitimacy) that simply tracked the conduct required by the more specific rules. (So liberty and political legitimacy means just whatever you can get when your lawyer follows the Model Rules; coordination is just whatever happens when people obey the law). Of course, this is circular reasoning. I don't expect any of my three friends to embrace it explicitly, but if they respond to my hypotheticals by trying to show that there is no tension between the specific practices I mention and their master values, then I will suspect them of tacitly moving toward this position.

The argument for rules seems to depend on an additional premise that mediates between the master value and the specific norms/rules. This is the assumption that lawyers are not good at contextual judgment. Lawyers may be prone to biases or may lack information. Or individual lawyers faced with comparable circumstances will decide inconsistently, and hence, introduce inequity. Or lawyer decisions, even when justifiable in isolation, may trigger cascades of unjustifiable behavior that would send us down a slippery slope. Note that, to advance the case for rules, the argument has to assert a systematic tendency on the part of individual lawyers to make bad judgments. There's no reason why an individual lawyer making a contextual judgment can't take into account such matters as the limits of her and knowledge and capacities, the danger of a slippery slope, and the danger of inconsistency. The claim on behalf of rules has to be that, in general, lawyers will make such judgments badly.

I think there are three core problems with the argument for rules:

1. The claim about the unreliability of individual lawyer judgment must be a comparative one. Individuals have limited information and competence with respect to the circumstances and effects of individual judgments. Compared to what? Presumably compared to the information and competence centralized rule-making institutions have with respect to general circumstances and aggregates. Although this position seems

clearly entailed by the rules position, I have yet to see anyone make a serious case for it. Perhaps individual lawyers will often mis-estimate the effects of refusing to cross-examine a truthful witness, but do we really think that, collectively, their judgments will be less reliable than a rule-making body trying to decide the aggregate effects of a rule forbidding or requiring lawyers to do so?

2. If lawyers are bad at contextualized judgment, what are they good at? Ambitious visions of professionalism have consistently portrayed contextualized judgment as the core skill of the professional. As the ABA put it in EC 3-5, “The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client.” No one would ever think of defining the duty of care to clients in terms of Dworkinian rules. [Duties owed nonclients, of course, are weaker than duties owed clients. But the issue is not the strength of the duty, but the form it should take – rules v. standards. If lawyers’ duties to clients are premised on a highly-developed capacity for complex judgment, I don’t see how the design of duties to strangers could be premised on the lack such capacity.]

3. The arguments do not take account of the moral cost of rules in alienating the lawyer from the values underlying the norms pertinent to her situation and hence from the larger conception of law that gives meaning and dignity to her role. The most appealing promise of professionalism is to reconcile individual creativity and public service, personal ambition and social need. Rules, even if justified in some long-term aggregate sense, betray this promise. A lawyer forced by a rule to cross-examine a truthful witness is at best like Williams’s Jim, forced to shoot a hostage in order to save the lives of others.

**The Morality of Lawyers or the Morality of Laws:  
Making Sense of the Idea of an Institutional Legal Ethics  
Brad Wendel**

Social and professional roles really wouldn't be much of a puzzle in ethics if they only prescribed heightened duties. A person's role as a parent, teacher, or public official burdens that person with additional obligations, over and above those that attach to being a moral agent generally. I have duties to take care of my children, for example, going well beyond the positive duties I owe to further the welfare of people generally. Professional ethics only becomes problematic when it posits exclusionary obligations or permissions – that is, role-specific prescriptions that supersede or outweigh what would otherwise be requirements of ordinary morality. The standard conception of legal ethics supposedly requires a lawyer “to put to one side considerations of various sorts — and especially various moral considerations — that would otherwise be relevant if not decisive.”<sup>12</sup> The exclusionary character of the lawyer's role creates genuine duties, but also leads to the charge that lawyers are inhabiting a simplified moral universe without justification.

Talking about the exclusionary character of professional morality of course requires that we get clear on the baseline of ordinary morality, which is purportedly excluded by duties specific to the professional role. The modifier “ordinary” on morality is intended to capture the idea of moral principles that apply to us simply as people, as moral agents full-stop, not as occupants of social roles or institutions. Ordinary morality is to be contrasted with the obligations that may arise for occupants of social roles. One way to understand a role in normative terms is as a shorthand way of describing a cluster of obligations, permissions, and aspirations that apply by virtue of standing in a particular kind of relationship with others – what I call the nexus view.<sup>13</sup> A role, and associated role-specific obligations (which may be in the form of rules), are all merely summaries of obligations that exist apart from the role. The obligations of the role are accordingly transparent to moral analysis. The reasons lawyers give to justify their actions are translated into ordinary moral reasons, and analyzed as such.

Some social roles, however, appear to involve not a nexus of ordinary moral reasons, but specific obligations that are different in kind from, and potentially conflict with, what would otherwise be the moral requirements that would apply to someone differently situated.<sup>14</sup> These role-specific considerations all make a claim that other reasons should

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<sup>12</sup> Richard Wasserstrom, “Lawyers as Professionals: Some Moral Issues,” 5 *Human Rights* 1, 3 (1975).

<sup>13</sup> See, e.g., Arthur Isak Applbaum, *Ethics for Adversaries* 46 (1999) (“are roles merely shorthand for a nexus of obligations, values, and goods that have moral weight without appeal to role as a moral category?”); David Luban, *Lawyers and Justice* 125 (1988) (“the appeal to a role in moral justification is simply a shorthand method of appealing to the moral reasons incorporated in that role”).

<sup>14</sup> See, e.g., Tim Dare, *The Counsel of Rogues?: A Defense of the Standard Conception of the Lawyer's Role* 34 (2009) (“Role-obligations . . . are moral requirements whose content is fixed by the function of the role, whose normative force flows from the role, and that apply to an individual by virtue of their status as a role- occupant.”).

not have priority in the analysis of the rightness or wrongness of the lawyer's actions. They either exclude otherwise applicable moral reasons, or at least are thought to outweigh them in most cases. Whatever metaphor one uses — exclusion, trumping, outweighing, etc. — the idea is that reasons associated with a role are reasons not to act on other reasons, those that would apply to a similarly situated agent not acting in that role. They are what Raz would call second-order reasons, that is, reasons not to act on reasons.<sup>15</sup>

Roles and the duties associated with them take shape within larger practices, and these practices must be justified on the basis of some moral good that the practices achieve. The question then arises why this is not simply the “nexus” view previously described, which holds that the concept of role is merely a shorthand way of referring to otherwise existing moral obligations, as they are specified in a particular social context. The problem with the nexus view, as applied to legal ethics, is that it may be insufficiently sensitive to the institutional or political context in which lawyers practice. One way of understanding the “ordinariness” of ordinary morality is that it is fundamentally non-institutional in character. When we say that people ought to honor values such as dignity and truth in their relations with one another, we imagine that these relations are unmediated by structures of government, either state government or something less informal, belonging to the institutions of civil society. When the interests of people come into conflict, morality provides resources for figuring out whose interests should take precedence, but the setting one generally presupposes is some kind of small-scale interaction, which one imagines might be resolved through reasoning and dialogue. In the case of larger-scale disagreement, institutions provide ways of handling conflict in a way that does not depend directly on the ordinary moral values at stake. Legal institutions in particular have virtues that are related to impartiality, the fairness of the procedures they provide for dealing with conflict, and their capacity to treat people with equal dignity and respect. As soon as relations among persons are governed by something more formal, it is natural to look to the properties of those institutions as a source of values and reasons.

One of the central questions in theoretical legal ethics is whether the toolkit of moral concepts that should be brought to bear on the analysis is the same toolkit that is used elsewhere in moral philosophy, or whether it is tied to professional roles, institutions, or values in a distinctive way. I have argued that legal ethics is part of a freestanding political morality, which gains its structure and obligatory force from the situation of compliance with morality in communities.<sup>16</sup> This does not mean that these values are unrelated to ordinary morality, only that they may not be reducible in a straightforward way to ordinary moral considerations. The relationship, rather, is indirect, with ordinary moral values going into the justification of a set of institutions, practices, and associated normative ideals. For example, the political-moral notion of an individual as a *citizen*

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<sup>15</sup> Joseph Raz, *The Authority of Law* 17, 22, 27 (1979); Joseph Raz, *The Morality of Freedom* 33 (1986).

<sup>16</sup> W. Bradley Wendel, *Lawyers and Fidelity to Law* (2010). This paper is taken from this forthcoming book.

implies reciprocity and rough equality in the way one is treated by state actors and institutions. The political theory of John Rawls begins with this kind of distinctive political idea: “The philosophical conception of the person,” Rawls writes, “is replaced in political liberalism by the political conception of citizens as free and equal.”<sup>17</sup> Similarly, legality, or the rule of law, suggests a number of evaluative criteria, including impartiality and the commitment by the government to be bound by generally applicable rules. There is an irreducible aspect of public-ness to this way of understanding the rule of law. Thus, it is not clear that it can be translated into ordinary moral terms without significant distortion, even though all of the animating ideas — justice, equality, reason-giving, and so on — are cognizable within ordinary morality.

A case described by David Luban provides an excellent illustration of the difference between an ordinary morality-based approach to legal ethics and one that focuses more on the moral properties of institutions. The case involves a prosecutor in the Manhattan District Attorney’s office who allegedly threw a case in favor of the defense, because he was personally convinced of the innocence of the accused.<sup>18</sup> The prosecutor, Daniel Bibb, had been asked to conduct an internal investigation of a murder prosecution, and after a two-year review, concluded that two men in prison were innocent. Defense lawyers representing the two men had obtained a court hearing into the possibility that newly discovered evidence would show their innocence. Bibb urged his supervisors to ask the court to set aside the convictions, but the supervisors ordered him to go to the hearing and present the strongest case for the government. Rather than following this instruction, Bibb helped the defense lawyers sort through the new evidence, persuaded reluctant witnesses to testify who could offer testimony helpful to the defendants, told the witnesses what questions to expect at the hearing, and refused to attempt to undermine the credibility of the witnesses on cross-examination. Commenting on the case, Stephen Gillers said Bibb should be disciplined for subverting the government’s case. Luban responded that Bibb deserved a medal, not a reprimand.

The debate between Gillers and Luban can be understood as turning on the weight a lawyer should give to ordinary moral considerations when serving in a representative capacity. As Gillers put it, Bibb may be entitled to his conscience, but his conscience permits only withdrawal from the case, not throwing for the defense. Luban, by contrast, believes that the role of a prosecutor incorporates a significant component of ordinary moral decision-making. The role of a prosecutor is to seek justice, not to win at all costs. Luban concedes that the positive law governing prosecutors specifies that the “seek justice” maxim should be understood in certain narrow ways, including an obligation not to pursue a prosecution without probable cause, and duties to turn over potentially exculpatory or mitigating evidence. Still, he argues for a substantive ethical conception of the prosecutor’s role in which seeking justice means more than merely complying with

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<sup>17</sup> John Rawls, “Reply to Habermas” in *Political Liberalism* 380 (1993).

<sup>18</sup> See Stephen Gillers, *Regulation of Lawyers* 489-501 (8<sup>th</sup> ed. 2009)

requirements stated in disciplinary rules and constitutional law. At a minimum, seeking justice means “you shouldn’t try to keep people behind bars if you think they didn’t do it.” Fidelity to law cannot possibly mean actively seeking to keep someone in jail if a lawyer has a sincere, well founded belief that he is innocent.

The weakness in Luban’s argument is that it overlooks the institutional context of Bibb’s decision. The whole point of institutional decision-making processes is that one person’s sincere belief about something is only an input into the process. Bibb’s certainty of the innocence of the two defendants is not conclusive of what ought to be done with their cases. A conclusive decision comes only after each actor in the system does its job, presenting what necessarily is a one-sided, partisan view of the evidence. The relevant process here is not just the adversary system, in which opposing evidence is presented by defense counsel (who may have secured the reversal of the convictions anyway, without Bibb’s assistance), but also includes intra-office review procedures and the chain of command that necessarily facilitates decision-making in large organizations. Significantly, Bibb’s supervisors disagreed with him, concluding that there was good reason to believe the two men were guilty. Why should we trust Bibb’s belief more than the belief of his supervisors? Presumably they made their decision upon consideration of all of the evidence developed by Bibb in the internal investigation. Bibb can be made to seem like a hero in this case only by stipulating that he made the right analysis of the innocence of the defendants, but that simply begs the question, because the office hierarchy and the internal investigation process are set up for the purpose of reaching conclusions about whether there is enough evidence of guilt or innocence to justify going to trial.

More generally, the valorization of lawyers like Bibb, who act on the basis of their own beliefs about what justice requires, reflects a pervasive distrust of institutions by legal ethics scholars. There is a tendency to presume that if an institutional process has reached one conclusion (e.g. “sufficient evidence of guilt”) and an individual actor has reached the contrary conclusion, the individual must be right. No one can deny that institutions can reach unjust results, and can pressure or socialize individuals into doing wrong. The Milgram experiments, Stanford Prison Experiment, and other findings of social psychology demonstrate that people in groups respond to subtle behavioral cues, and unconsciously rationalize away ethical qualms, all in the service of some collective end which may be appalling (such as administering life-threatening electrical shocks). The response to this observation, however, is not to rely more extensively on individual ethical decision-making, because the whole point of these findings is that individual judgment can be corrupted by situational factors. Instead of calling upon people to do the right thing, either explicitly or implicitly by praising lawyers like Daniel Bibb, we should seek more effective regulatory approaches to ensure that institutions do not become corrupt. One may respond that, in the event of some regulatory failure, individual decision makers may still be in a position to avoid injustice. Whether there may be a better way to safeguard against wrongful convictions is one thing, but it is quite

another to say that Bibb should not take personal moral responsibility for avoiding a wrongful conviction if there has been some systemic failing.

Daniel Bibb's defenders may respond that Bibb's actions were based on his belief about facts, not contested normative concepts like the public interest. Luban, for instance, has long been a vigorous critic of the claim that the adversary system can be justified on its utility at finding out factual truth.<sup>19</sup> Adversarial litigation is often animated by a concern to suppress relevant facts, not disclose them; a great deal of discovery practice in civil litigation is aimed at ensuring that one's adversary does not find out the whole truth. Underfunded parties may lack the resources to conduct a thorough investigation, so not only will they be ignorant of facts within their opponents' knowledge, but they may also be unaware of facts they might otherwise have been able to discover, given more time and money. It is certainly not inconceivable that, in the course of a two-year internal investigation, Bibb was able to learn previously unknown evidence suggesting the innocence of the two defendants. On the basis of this evidence, Bibb believed his office should do something to ensure the acquittal of the defendants.

The crucial elision in this argument comes between the word *evidence* and the inference to conclusions about facts. Assuming Bibb acquired evidence, it still remains to be determined, somehow, whether the defendants are factually guilty or innocent. Because matters of the weight, sufficiency, and credibility of evidence are things about which people can disagree, we have set up various institutional processes for dealing with this disagreement. Adversarial litigation is one such process, but so are intra-office chains of command and review procedures. Institutions such as law firms and prosecutors' offices are set up, in part, with a view toward making reliable decisions about what should be done, in light of the evidence known to the lawyers in the organization. These decisions are often made against a background of good faith disagreements about the right conclusion to draw from the evidence. In this case, Bibb presented to his supervisors all of the evidence he learned, and the supervisors concluded that there was sufficient reason to continue to believe that the defendants were guilty. There must be some reason to believe that Bibb is more likely to have weighed all of the relevant evidence correctly. Bibb would not be "ducking his moral responsibility" if he had complied with the procedures of his office. Rather, doing the morally responsible thing means respecting the institutional scheme that is set up to accomplish some morally worthwhile end.

The Bibb example helpfully illustrates my overall argument, which is that a lawyer has a very weighty moral reason to act with reference to client entitlements and work through established procedures, rather than acting on the basis of ordinary moral notions like truth and justice. This obligation of fidelity to law holds in reasonably just, well functioning political systems, and depends on the capacity of the system to enable people to arrange their relationships with each other with reference to rights established in the name of the

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<sup>19</sup> David Luban, "The Adversary System Excuse," in *The Good Lawyer* (David Luban, ed., 1983).



community as a whole. Acting preemptorily, on one's own beliefs about what justice requires, or drawing one's own conclusions about what the facts are that bear on a matter, exhibits disrespect for the legal system and thus for one's fellow citizens. The lawyer's duty is not absolute, and there may be circumstances in which an injustice is so patent, and the result mandated by the regular functioning of the legal system so intolerable, that no person could, in good conscience, believe that exhibiting fidelity to law is the right thing to do, all things considered. There will, of course, be disagreement about which cases fall into this category, but the important thing for the purposes of this argument is to note that the obligation of fidelity to law is very weighty, and lawyers should regard as exceptional any case of deviation from a result supported by client legal entitlements.

**The Legitimate Concerns of Legal Ethics**  
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*“Pooh always liked a little something at eleven o'clock in the morning, and he was very glad to see Rabbit getting out the plates and mugs; and when Rabbit said, "Honey or condensed milk with your bread?" he was so excited that he said, "Both," and then, so as not to seem greedy, he added, "But don't bother about the bread, please.””<sup>20</sup>*

A recent article in the New York Times distinguished between the practice of philosophy and the practice of law.<sup>21</sup> It suggested that the concerns of philosophy are by their very nature unconstrained by the dictates of time or by community conventions and norms. The philosopher may be in the world, but he is not of the world. The lawyer, by contrast, can escape neither time nor the facts and vagaries of the world; his task is to use whatever skills he has to make the most of them.

Whatever the (in)accuracy of this exercise in stereotyping, lawyers who think about philosophy, or philosophers who think about lawyers, have neither the posited philosopher’s luxury of time, nor the posited lawyer’s ability to ignore broader or more abstract implications of his daily work. Accomplishment of the exercise requires bringing abstraction and thoughtfulness to bear on questions that are fundamentally practical and of “this world.”

For the purposes of this session, which is intended to allow reflection on a set question – *Is the concern of legal ethics the morality of lawyers, the morality of clients, or the morality of laws?* – the significance of this observation is that it indicates, and explains, the multi-faceted nature of legal ethics and, hence, the necessarily multi-faceted concerns it must have. Whether, and in what way, legal ethics should be concerned with the morality of lawyers, clients or laws, depends on why it has chosen to concern itself – what practical question or inquiry is the exercise in more abstract or unconstrained thinking to illuminate? Further, in “this world” most questions, most of the time, cannot be satisfactorily resolved through a single analytical framework. Legal ethics does not

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<sup>20</sup> A.A. Milne, *Winnie the Pooh* (1926)

<sup>21</sup> Simon Critchley, “What is a Philosopher?” Opinionator Blog, New York Times, May 16, 2010 ([www.nytimes.com](http://www.nytimes.com))

have a concern, it has concerns and, much of the time, the morality of many things must be considered for its concerns to be meaningfully illuminated.

Before I defend that position, I have a preliminary observation: legal ethics should never be concerned with the morality of *lawyers* or of *clients*, but only with the morality of the acts lawyers or clients take (or propose to take). Or, to put it slightly differently, to the extent that legal ethics focuses on lawyers or clients, the concern must be with what lawyers and clients do, not with who they are. This is for several reasons that I have set out in more detail elsewhere and will only allude to here. First, to the extent moral character exists it is not easily identified.<sup>22</sup> Single or even several instances of behaviour do not necessarily indicate whether a person has the virtue (or vice) associated with that behaviour. Thus, saying we only want lawyers to represent clients with honest characters would not give much indication to lawyers as to which clients they should represent. Second, even if moral character does exist, it correlates poorly with conduct across circumstances; requiring that lawyers have honest characters would not ensure honest actions in the various circumstances of legal practice. Third, with perhaps an exception or two, the majority of the practical questions with which legal ethics concerns itself – such as what should a lawyer do? – focus squarely on acts of the lawyer or client. Given that, to the extent morality is relevant, it is the morality of the act, not of the actor, that matters.

That observation merely reframes the question, of course. It does not change my answer, which is, first, that whether, and in what way, legal ethics should be concerned with the morality of laws, or of the acts of lawyers or clients, depends on why it has concerned itself; and, second, that, much of time, the morality of all of those things must be considered, to answer a question in a satisfactory way.

Consider this example. In Alberta, the Code of Conduct states that when a client discloses the intention to commit suicide, the lawyer must treat that disclosure as confidential unless either the lawyer has some reason, other than the suicide intention itself, to question the client's mental capacity, or some other exception to confidentiality

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<sup>22</sup> By moral character I mean (channeling MacIntyre) a collection of virtues or vices that enable or inhibit the accomplishment of good conduct.

applies, such as client consent. For a legal ethicist, this provision, and the scenario it addresses, raises a number of questions. If faced with a suicidal client, what should a lawyer do? What facts or principles are properly relevant to the lawyer's decision? Is the regulation a good one, or should the obligation be different – e.g. one of disclosure? If a lawyer does not disclose the threat, as the rule requires, can the lawyer view her actions as consistent with a life well-lived? Considering how an ethicist might answer these different questions indicates, I think, that an answer that views the question from only one of the proffered perspectives might miss something important but that, as well, which perspective will be the most relevant and useful depends on which question is asked. And this is the case regardless of the specific position one takes on the controversies and debates of the philosophical legal ethics literature.

This is because, as was noted at the outset, philosophical legal ethics exists at the intersection between the abstraction of philosophy and the tangible problems of the real world. So that when it answers questions like “what should the lawyer do”, it must account not only for abstract principles (whatever those may be), but also for how the person about whom the question is being asked – the lawyer – will be thinking and feeling in that moment of deciding. Its position on the abstract debate does not eliminate the tangible manifestation of the questions it is asking (just as the tangible manifestation does not necessarily indicate the abstract principles necessary to answer the question).

Thus, that a lawyer faced with a suicidal client will consider what the law requires or permits, suggests that a legal ethicist employing abstract principles to think about what the lawyer should do must consider the morality of the laws that govern the lawyer's conduct. *How* the legal ethicist considers the morality of laws will properly vary with the abstract principles the ethicist employs. Ethicist A may emphasize the morality of the legal system as a whole, including the lawyer's role within the system, rather than on the particular law. What the lawyer should do, will simply follow from what the law permits or requires, provided the legal system is a moral one. Ethicist B may emphasize analysis of the law without distinction from morality; that ethicist might identify what the lawyer should do through identifying what the law truly requires, in a Dworkinian sense. Ethicist C may assess the morality of applying the law so as to preclude disclosure. Ethicist C's concern is with the relationship between legality and morality in a particular

situation where they may be in conflict, and the answer to what the lawyer should do will depend on whether morality or legality is identified as pre-eminent value in that instance. One way or another, though, a legal ethicist thinking about what the lawyer should do, will think about the morality of law. The need to consider the morality of the law follows from the practical problem posed; how the morality of law is analyzed follows from the abstract principles embraced.

The lawyer faced with the suicidal client though, will not stop at identifying her legal obligations. If she has any moral sensitivity or judgment at all, she will go on to think about the apart-from-legality moral implications of following the law in this instance. What if the client dies? What if the lawyer could, by one phone call, have prevented the client from losing what life might have provided, and also prevented injury to his spouse, children and friends? Those questions will occur to the lawyer, and that means that they should also occur to and be considered by the legal ethicist who advises her. What, apart from legality, does morality require in this situation? If ordinary morality would require disclosure, or some other helping behaviour, then that must have implications for how the legal ethicist thinks about the problem. That implication will, again, vary with the abstract principles embraced by the ethicist. Ethicist A may thus propose the idea of a moral remainder – the irreducible cost that arises from choosing when personal and professional morality conflict in a particular circumstance. Ethicist B may simply have incorporated the morality of the lawyer's act into the Dworkinian analysis. Ethicist C may argue that the law should be ignored in this particular situation. But none of A, B or C can assert that the morality of the lawyer's action plays no part in the analysis, because the lawyer's legitimate concern with the morality of non-disclosure (or disclosure) requires that the ethicist account for it too.

Further, when one thinks about the problem from the perspective of the lawyer, it may be that some accounts for how morality matters become more compelling than others. Telling a lawyer about moral remainders, for example, might sound a bit like saying, “drag, huh?” rather than providing analysis or guidance of use to the lawyer struggling with the dilemma.

Finally, if a lawyer (or ethicist) has a position on the morality of suicide *per se*, the morality of the client's conduct in intending to commit suicide may also be a relevant aspect of the analysis. If the lawyer (or ethicist) believes that suicide is not immoral, but is rather a matter of personal conscience and choice, or that suicide is permissible in this instance because the client has a terminal illness and no children, that will affect how the lawyer perceives the situation and, again, will need to be accounted for by a legal ethicist analyzing what a lawyer should do if faced with that situation.

What if the question asked of the legal ethicist is, instead, whether the regulation is a good one, or should be different? In this instance the abstract principles of philosophy intersect with the concerns of the real world in a different way, with the result that the shape and necessity of considering different perspectives changes. An ethical assessment of regulation will consider the morality of law, but not in terms of the relationship between the morality of law and individual action. The analysis will, instead, be more jurisprudential. Thus, a formalist approach to the law governing lawyers, would require considering whether the law in its current form coheres to the internal rationality of the law governing lawyers. A democratic legitimacy approach would consider the origins and process of the rule's enactment. A natural law approach would consider the relationship between the law and the substantive morality the law is to reflect. And a positivist approach would simply involve determining whether the rule is recognizable as law, without much consideration of its morality, one way or another.

Would the morality of the actions of the lawyer or the client be a concern with this question? It would be in a natural law analysis. But it should also matter for a formalist or positivist, because laws don't exist in the air; they apply to real people in real circumstances, who are affected by their terms. Assessing the validity of a law with clear moral implications for those to whom it applies without considering the morality of the actions that would follow from compliance with that law, would be to miss something important. It may not be as significant as it was with respect to the first question, but it is still something to be accounted for.