

Legal Ethics: The Integrity Thesis

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TABLE OF CONTENTS

I.	THE ROLE-DIFFERENTIATION THESIS	554
A.	<i>Moral Nonaccountability</i>	555
1.	<i>The Argument from Moral Nonaccountability</i>	556
2.	<i>Critique of the Argument from Moral Nonaccountability</i>	560
B.	<i>Partisanship in Lawyering</i>	572
1.	<i>The Argument from Partisanship</i>	572
2.	<i>Critique of the Argument from Partisanship</i>	575
II.	THE JURISPRUDENTIAL FRAMEWORK	580
A.	<i>The Argument from Legal Positivism</i>	580
B.	<i>Critique of the Argument from Positivism</i>	582
III.	THE INTEGRITY THESIS	587
A.	<i>Reading the Standards</i>	587
1.	<i>Good and Bad Readers</i>	587
2.	<i>The Good Reader Reads the Standards with Integrity</i>	589
B.	<i>The Normativity Principle</i>	591
C.	<i>The Principle of Integrative Positivism</i>	595
1.	<i>Permissive Standards Providing for Moral Discretion</i>	596
2.	<i>Mandatory Standards: Legal and Moral Reasons Overlap and Pre-empt Prudential Reasons</i>	598
3.	<i>Mandatory Standards Incorporating Moral Reasons</i>	599
4.	<i>Mandatory Standards Conflicting with Some Moral Reasons</i>	602
D.	<i>Reasons for Action</i>	604
IV.	CONCLUSION	608

Many people smile at that popular T-shirt slogan from Shakespeare: "First, let's kill all the lawyers."¹ Its message and the accompanying smile illustrate the hostility many Americans feel towards the legal profession.² However,

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1. W. SHAKESPEARE, KING HENRY VI, PART II, act IV, scene II, at line 86.

2. This hostility is dramatized by popular jokes like: "Question: Why did the research scientist substitute lawyers for rats in his laboratory experiments? Answer: Lawyers breed more rapidly, scientists become less attached to them, and there are some things that rats just won't do." Post, *On The Popular Image Of The Lawyer: Reflections In A Dark Glass*, 75 CALIF. L. REV. 379, 379 (1987). The history of expressions of such negative feelings is of long standing. Post begins the tale of the genre with St. Luke in the New Testament: "Woe unto you also, ye lawyers! for ye lade men with burdens grievous to be borne. . . ." *Id.* at 379 (quoting Luke 11:46). See also L. FRIEDMAN, A HISTORY OF AMERICAN LAW 94-96, 303-04; A. ROTH & J. ROTH, DEVIL'S ADVOCATES: THE UNNATURAL HISTORY OF LAWYERS (1989). "Comments about lawyers in the Bible, in fourteenth- and six-

Shakespeare's words, when placed in context, relate the intent of conspirators to take over the state and get rid of those who might protect the peace and the law of the land—the lawyers.³

Our society loves to hate lawyers. Yet, at the same time, there is a deep respect for the rule of law and, thus, a need for those who administer it.⁴ Much of the ambivalence about lawyers reflects a more general ambivalence about the adversary system of justice. On the one hand, imagining ourselves as defendants in a criminal trial, we want to be represented by the toughest, roughest, smartest attorney we can find. On the other hand, hearing horror stories of rape victims being torn to shreds on the witness stand, of obstetricians giving up their practices because of the claimed impact of malpractice actions brought against them, and of divorcing couples continuing to fight for years after their dissolution, we wonder if adversary justice and the lawyers who provide it simply cost too much.

teenth-century England, in Renaissance Europe, and in America from the colonial period down to the present show a remarkably constant picture: a mixture of honorable distinction and popular dislike." *Mindes & Acock, Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177, 184 (footnote omitted). Recently, President Bush's press secretary was asked the meaning of the reference in the President's latest speech promising government help "to restore common sense and fairness to America's medical malpractice system." Press Secretary Fitzwater declared: "Lawyers certainly deserve all the criticism they can get. . . . Those are universally held feelings by everyone who has ever dealt with the legal establishment." *The Times Union (Albany)*, Feb. 24, 1990, at A-2.

3. Shakespeare's *King Henry VI, Part II* relates the tale of Henry the VI's marriage to Margaret of Anjou, daughter of the king of Naples in the midst of the rivalries between the houses of York and Lancaster, known as the "War of the Roses." Richard, Duke of York, pretender to the English throne, stirs up Jack Cade to rebellion in Act IV. In Scene II, the conspirators meet on Blackheath, their talk filled with examples of class rivalries. Conspirator John Holland complains: "The nobility think scorn to go in leather aprons. . . . [Y]et it is said, 'Labour in thy vocation:' which is as much to say as, let the magistrates be labouring men; and therefore should we be magistrates." George Bevis replies: "Thou has hit it; for there's no better sign of a brave mind than a hard hand." W. SHAKESPEARE, *supra* note 1, at lines 14-23. Jack Cade and Dick the butcher and "infinite numbers" of others now appear. Cade promises to reform England: "All the realm shall be in common. . . . [T]here shall be no money; all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers, and worship me their lord." To which Dick replies: "The first thing we do, let's kill all the lawyers." Cade responds: "[T]hat, I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er should undo a man? . . . I did but seal once to a thing, and I was never mine own man since. . . ." *Id.* at lines 77-94.

4. If lawyers were an evil, they were, however, a necessary evil. Only in the very beginning could the colonies even try to make do without lawyers. . . . But as soon as a settled society posed problems for which lawyers had an answer, or at least, a skill, the lawyers appeared in force, and flourished despite animosity.

L. FRIEDMAN, *supra* note 2, at 85-86.

Judge Irving R. Kaufman of the Second Circuit Court of Appeals points out:

The age-old disapproval of members of the bar, and its fashionable contemporary counterpart, obscure the benefits lawyers produce. Attorneys encounter society's most complex economic problems, its thorniest social and political issues and its thousands of criminals, victims and disputants. The lawyer must confront the most virtuous and most malevolent aspects of our community, and attempt to bring order and discipline out of the chaos of human affairs. My years as a lawyer and a judge have all but inured me to the criticism leveled at the profession. My experience has proved the validity of Abraham Lincoln's observation that 'as a peace-maker, the lawyer has a superior opportunity of being a good man.' In a world of contentious human beings, a community without lawyers would be far from Utopia.

N.Y. Times, Aug. 14, 1983, at A-19.

In recent years, a number of legal scholars have taken a critical look at this adversary model and its premises.⁵ They contrast the role assigned to lawyers as relentless advocates for their clients with the obligations we all have as citizens to promote fairness and justice. Finding the two incompatible, they label the incompatibility "role-differentiation." Role-differentiation signifies that the ethical obligations one undertakes as a lawyer are distinct from and supersede the ethical obligations one is under in one's non-professional everyday life. Role-differentiation is widely assumed whether it is regarded positively or negatively. Thus, one group of commentators, led by Professor Monroe Freedman,⁶ has no difficulty defending a sharp distinction between legal and other ethics. Another group, the "role-differentiation critics," claim that "the standard conception of a lawyer's role"⁷ makes it impossible to be both a good person and a good lawyer. They ascribe this disjunction to the ethical standards of the legal profession itself and advocate radical revisions to the lawyer's role.⁸

Few have criticized the role-differentiation assumption,⁹ and no one has yet successfully refuted it. Many practicing lawyers accept this "standard conception" as requiring them regularly to separate their professional actions from their personal values. The prevailing scholarship in legal ethics does not challenge them. Many law teachers, particularly those responsible for teaching legal ethics,¹⁰ also socialize students to treat role-differentiation as the inevitable consequence of adopting a professional ethic. Ironically, even critics of role-differentiation thus reinforce the view that the law's professional standards prescribe a role morality for lawyers distinct from the common morality that guides all persons in their daily lives. However well intentioned, their work maintains that a great divide exists between being a good person and being a good lawyer.

5. See, e.g., M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) [hereinafter *LAWYERS AND JUSTICE*]; Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 *VAND. L. REV.* 697 (1988).

6. M. FREEDMAN, *supra* note 5.

7. The phrase seems to have been proposed by the philosopher Gerald Postema. Postema, *Moral Responsibility in Professional Ethics*, 55 *N.Y.U.L. REV.* 63, 73 (1980) [hereinafter Postema 1980]. It is adopted by the legal philosopher David Luban in his book, *LAWYERS AND JUSTICE*, *supra* note 5, at xiv-xv.

8. See, e.g., *LAWYERS AND JUSTICE*, *supra* note 5, App. I at 393. The appendix seeks to demonstrate "that the standard conception—the principles of partisanship and nonaccountability—accurately represents leading themes in the official rules of the American legal profession. I believe that it does, and that this is so regardless of whether the lawyer is in a courtroom, or advocacy, setting." *Id.* at 393.

9. But see, e.g., Ellmann, *Lawyering for Justice in a Flawed Democracy* (Book Review of D. LUBAN, *LAWYERS AND JUSTICE*), 90 *COLUM. L. REV.* 116 (1990); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976); Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613; Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 *WIS. L. REV.* 1529.

10. See, e.g., G. HAZARD AND S. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 17-31 (1990) [hereinafter *HAZARD & KONIAK*]; J. SUTTON AND J. DZIENKOWSKI, *TEACHER'S MANUAL TO ACCOMPANY CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS* 32 (1990); *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 142-71 (Hazard & Rhode eds. 1985). An all day workshop on teaching professional responsibility at the 1990 convention of the Association of American Law Schools included presentations by Professors Luban, Menkel-Meadow, Schneyer and Simon emphasizing role-differentiation issues. *Teaching Legal Ethics: A Symposium*, 41 *J. Leg. Educ.* (Mar. 1991).

Accordingly, their attempts to "reform" the lawyering process end up rejecting professionalism.¹¹

This article contests the role-differentiation approach to legal ethics. If one were to print a T-shirt slogan expressing its thesis, it would be: "Good lawyers must be good persons." It will be argued that the so-called "standard conception of the lawyer's role" in fact is not standard at all. Surely, some lawyers do bad, even evil, acts in the name of lawyering. But to characterize the basic framework of the profession itself as promoting and protecting such behavior is simply mistaken.

Instead, this Article proposes the integrity thesis, which provides a better reading of the law of lawyering and hence a better interpretation of what constitutes the standard conception of lawyering. Lawyering, like living, often requires making difficult choices among important, competing values. To assist attorneys in making ethical decisions the standards mandate some choices based on the thoughtful experience of attorneys particularly concerned with the ethics of the profession. According to what will be called "the Normativity Principle," lawyers have a special obligation to obey the law of lawyering when the rules are mandatory. The law of lawyering also encourages lawyers to exercise discretion and to choose actions consistent with their own moral values. The integrity thesis offers a theory of how to exercise this discretion properly. Moreover, while role-differentiation critics seek to make lawyers accountable for the morality of their clients' acts, this article instead proposes "the Boundaries Principle," to explain why this approach is morally wrong. The role-differentiation thesis reads the professional standards in their worst possible light. The integrity thesis reframes the professional perspective and demonstrates its possibilities for integrating one's cherished personal values with one's obligations as an attorney.

I. THE ROLE-DIFFERENTIATION THESIS

The role-differentiation thesis claims that the requirements of the professional role force lawyers to regularly make ethical choices in their legal capacity that they would not make otherwise. Critics of role-differentiation claim that the "standard conception of lawyering" required by the law of lawyering demands that attorneys practice role-differentiation. They argue that the conventional requirements of the professional role sharply distinguish between an attorney's moral obligations as a person and his or her moral obligations as a

11. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 [hereinafter Simon 1978]. A decade later, while affirming general support for his earlier article, Simon acknowledged he "was mistaken to argue in an earlier article that the critique of conventional advocacy presented there required abandoning the lawyer's professional role." Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084 n.1 (1988) [hereinafter Simon 1988]. As will be seen below, however, *infra* notes 31-33, very little support is given professionalism as conceived by the profession itself by the later article. Luban's 1988 book, *LAWYERS AND JUSTICE*, *supra* note 5, also leaves little, if any, room for respect for the professionalism of lawyering.

lawyer, privileging¹² the latter.¹³ The "standard conception of the lawyer's role"¹⁴ thus functions to prevent integration of self and role. For example, some argue that individuals personally committed to truthfulness, frankness, and fair dealing in their everyday interactions may be required by their professional obligations when negotiating on a client's behalf to engage in what is euphemistically called "puffing" and other forms of "white lies."¹⁵ Lawyers thus cannot be persons of integrity¹⁶ because they must choose between either being a good person or a good lawyer.¹⁷

The literature criticizing role-differentiation contains two arguments to support the views both that lawyers are required to practice role-differentiation by their professional obligations and that these requirements generally prevent attorneys from being both good lawyers and good persons at the same time. They are the argument from moral nonaccountability and the argument from partisanship. Part I of this Article will take up each of these arguments and rebut each one in turn. Underlying both of these arguments is a mistaken jurisprudence, which will be termed the argument from positivism. Part II will present this argument and its refutation. Part III will offer an alternative view of lawyering and ethics—the integrity thesis.

A. *Moral Nonaccountability*

According to the role-differentiation thesis, the "standard conception of lawyering," as memorialized in the ethical guidelines of the profession, posits a total separation between personal morality and the law of lawyering. The most serious consequence of this separation of law and morals is that lawyers are not held morally responsible for the actions they take on behalf of their clients. Critics of role-differentiation generally refer to this aspect of the standard con-

12. The concept of "privileging" conveys the idea that a particular point of view, value, or argument isn't merely preferable to others but displaces, dominates, and trumps all others. See, e.g., Stier, *Privileging Empiricism in Legal Dialogue: Death and Dangerousness*, 21 U. C. DAVIS L. REV. 271 (1988).

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

14. See *supra* note 7 and accompanying text.

15. See, e.g., White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926.

16. Postema claims that integrity of personality "is not possible under the present conception of the lawyer's role, as exemplified by the Code of Professional Responsibility." Postema 1980, *supra* note 7, at 64.

17. Luban contributed to and edited a book, *The Good Lawyer*, examining the question of whether good lawyers can be good persons. In a later book of his own, Luban juxtaposes role morality and common morality to make this point and claims that the role morality required by the "standard conception" is sometimes inconsistent with the common morality required of good persons. "[T]he fundamental complaint is that a role morality such as the standard conception amounts simply to an institutionalized immunity from the requirements of conscience." LAWYERS AND JUSTICE, *supra* note 5, at xxi. The question is asked: *Can a good lawyer be a good person?* in G. BEILOWS & B. MOULTON, *THE LAWYERING PROCESS: NEGOTIATION* 288 (1981). Postema writes:

[I]t is not possible to separate questions regarding the proper responsibilities of a lawyer ("What is involved in being a good lawyer?") from the sorts of questions persons considering lawyering as a career might ask themselves (including, for example, "Can a good person be a good lawyer?")

.....

Sometimes with discomfort, sometimes with pride, lawyers acknowledge that the legal profession permits or requires actions that would draw moral censure if performed by others.

Postema, *Self-Image, Integrity, and Professional Responsibility*, 286, 287-88, in *THE GOOD LAWYER* (D. Luban ed. 1983) [hereinafter Postema 1983]. See also, Simon 1978, *supra* note 11; Wasserstrom, *supra* note 13.

ception of lawyering as the "principle of moral nonaccountability."¹⁸ The role-differentiation criticism of the moral neutrality of lawyers is presented below as the argument from moral nonaccountability. This argument is central to the critics' theory of what constitutes the profession's "standard conception of lawyering." There follows a refutation of the critics' claim that in order to be persons of integrity, lawyers should be required by their professional standards to be morally accountable for their clients' goals.

1. *The Argument from Moral Nonaccountability*

Role-differentiation critics characterize lawyers as mere legal technicians who assist clients to achieve their goals regardless of the content of those goals and using whatever lawful means are required.¹⁹ Lawyers, therefore, do not act on the basis of moral considerations that attach to them as independent persons. In his seminal 1975 article, the philosopher Richard Wasserstrom suggests: "[I]t is the nature of role-differentiated behavior that it often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive."²⁰ Wasserstrom made two major criticisms of lawyering based on such behavior. First, he claimed that lawyers as professionals may be forced by the demands of the lawyer-client relationship to be "at best systematically amoral and at worst more than occasionally immoral in [their] dealings with the rest of mankind."²¹ Second, the "lawyer-client relationship . . . is morally objectionable because it is a relationship in which the lawyer dominates and in which the lawyer typically, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion."²² Role-differentiation critics argue that the amorality, or even immorality, of lawyers is a function of "the standard conception" of lawyering which wrongly requires lawyers not to be morally accountable for their clients' goals.

For example, in deciding whether or not to take on a particular representation, Wasserstrom claims that lawyers should, but do not, properly evaluate the goals of such a representation:

Suppose that a client desires to make a will disinheriting her children because they opposed the war in Vietnam. Should the lawyer refuse to draft the will because the lawyer thinks this is a bad reason to disinherit one's children? Suppose a client can avoid the payment of taxes through a loophole only available to a few wealthy taxpay-

18. Luban notes that the label "principle of nonaccountability" comes from Murray L. Schwartz who writes: "When acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved." Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673 (1978), reprinted in *LAWYERS AND JUSTICE*, *supra* note 5, at 7.

19. Postema 1980, *supra* note 7, at 80.

20. Wasserstrom, *supra* note 13, at 3.

21. *Id.* at 1. Wasserstrom distinguishes the professional role from that of one's moral obligations in general by asserting: "[W]here the attorney-client relationship exists, it is often appropriate and many times even obligatory for the attorney to do things that, all other things being equal, an ordinary person need not, and should not do." *Id.* at 5.

22. *Id.* at 1. Ironically, as will be seen below in the discussion of the integrity thesis and the Boundaries Principle, the very paternalism criticized in this second objection is encouraged by the proposed remedy of moral accountability.

ers. Should the lawyer refuse to tell the client of a loophole because the lawyer thinks it an unfair advantage for the rich? Suppose a client wants to start a corporation that will manufacture, distribute and promote a harmful but not illegal substance, *e.g.*, cigarettes. Should the lawyer refuse to prepare the articles of incorporation for the corporation?²³

Critics of role-differentiation understand such neutrality to have a number of negative consequences. First, according to the role-differentiation thesis, it is not possible for attorneys to be both good persons and good lawyers within the "ideology of advocacy."²⁴ Lawyers have to divide themselves into separate beings. One is a person who is guided by the requirements of common morality.²⁵ The other is a lawyer who is guided solely by role morality.²⁶ The need to justify one's actions by different standards, depending upon whether or not one is functioning as a lawyer, necessitates engaging in compartmentalization. The different parts of one's self that wind up in the resulting compartments may not function coherently with one another from a moral point of view. This division destroys one's integrity as a person.²⁷

Second, the requirements of the lawyer's role force attorneys to perform solely as legal agents, never as moral agents, in their client representation. Thus, lawyers are cut off from their own moral values in working with clients. The role-differentiation critic, Gerald Postema, emphasizes that such moral neutrality forces lawyers to adopt a "strategy of detachment" that:

yields a severe impoverishment of moral experience. . . . Since the characteristic activities of the lawyer require a large investment of his moral faculties, the lawyer must reconcile himself to a kind of moral prostitution. . . . [He] is alienated from his own moral feelings and attitudes and indeed from his moral personality as a whole.²⁸

Third, attorneys are not accountable for the moral harms to third parties or to society that result from their client representation. Because of moral nonaccountability, lawyers presently are *not* morally responsible for what may happen to the children of the testators who disinherit them because of their political activities or to those who become ill from smoking cigarettes or to the general society for the reduction in public funds that may result from tax incentives built into the tax code.

23. Wasserstrom, *supra* note 13, at 7-8.

24. Simon 1978, *supra* note 11. See *infra* discussion at notes 31-33.

25. The term "common morality" is used generally by the role-differentiation critics without much explication. It is adopted here to represent both conventional morality, the norms generally agreed to as morally right by a particular culture, and critical morality, that which is right independent of any recognition by any cultural group. For our purposes, we need not go any further than this into a very complicated philosophical issue.

26. Luban explains that role-differentiation depends on a:

theory of role morality [that] takes off from a distinction between universal moral duties that bind us all because we are all moral agents and special duties that go with various social roles . . . [so that] conflicts sometimes arise between "common morality" and "role morality." When such conflicts arise, the theory asserts that role morality must take precedence. This notion . . . explains how people in certain social roles may be morally required to do things that seem immoral.

LAWYERS AND JUSTICE, *supra* note 5, at xx.

27. Postema 1983, *supra* note 17, at 286.

28. Postema 1980, *supra* note 7, at 78-79. Postema is the role-differentiation theorist who has most extensively addressed the issue of integrity.

Role-differentiation critics disparage moral nonaccountability and would have lawyering guided otherwise. For example, Luban would replace the principle of moral nonaccountability with "lawyering with accountability" or "moral activism." He has "a vision of law practice in which the lawyer who disagrees with the morality or justice of a client's ends does not simply terminate the relationship, but tries to influence the client for the better."²⁹ Simon envisions an alternative to morally neutral lawyering, which he calls "non-professional advocacy," which will "increase the client's concern for the impact of his conduct on others."³⁰

Perhaps Simon goes the furthest in his criticism of moral neutrality, which he attributes to professionalism itself. He defines professionalism "as the notion that the law is an apolitical and specialized discipline and that its proper development and application require that legal ethics be elaborated collectively by lawyers in accordance with criteria derived from their discipline."³¹ For Simon,

29. *LAWYERS AND JUSTICE*, *supra* note 5, at 160. There are two instances in which Luban would not hold a lawyer morally responsible for a client's ends and yet would provide representation. These would involve situations in which the lawyer acts on behalf of a principle like free speech. An example is the ACLU's representation of the Nazis or of pornographers. Another is acting as a lawyer "for the damned." This is a lawyer "who takes on those cases that no one else will come near, cases in which the client has for one reason or another rightly become odious or untouchable in the eyes of mankind." *Id.* at 162. The new version of the Code of Professional Responsibility recently adopted in New York urges lawyers to represent unpopular clients by adopting the position that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." 14 *THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY* EC 2-27 (New York State Bar Association, 1990). Luban really can't have it both ways.

30. Simon 1978, *supra* note 11, at 133. Simon describes his 1988 article as "an elaboration of what I previously called 'non-professional advocacy.'" Simon 1988, *supra* note 11, at 1084 n.1. Luban's alternative view of morally accountable lawyering would forbid "modes of practice that inflict morally unjustifiable damage on other people, especially innocent people." *LAWYERS AND JUSTICE*, *supra* note 5, at 157. Simon's later elaboration makes the claim that the standards of the profession provide either categorical norms or what he terms "private norms" which "connote standardlessness and nonreviewability." Simon 1988, *supra* note 11, at 1090. The invalidity of this caricature will be demonstrated below in the discussion of the integrity thesis in Section III. Simon proposes that lawyers should have ethical discretion, as a matter of legal rather than moral obligation, to nullify certain professional obligations like maintaining confidentiality. After weighing all the factors that bear on the legal merit, the lawyer determines whether the substantive purpose would be better served by some other action. As will be seen below, the major strength of the article, its elaboration of what properly goes into the process of determining an ethical action, can be usefully subsumed under the integrity thesis' reasons for action analysis, *infra* at notes 220-35.

31. Simon 1978, *supra* note 11, at 133. This is a definition devoid of any recognition or support for the value of the concept of professionalism, however. *Contra* the impassioned dissent of Supreme Court Justice O'Connor: One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

Shapiro v. Kentucky Bar Association, 486 U.S. 466, 488-89 (1988) (O'Connor dissented from the Court's holding that lawyers' solicitation of legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems is protected speech under the first and fourteenth amendments). For a view of professionalism that emphasizes its integration with self, see Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987).

professionalism requires lawyers to rely exclusively on legal rules rather than morality (understood as personal or social norms) when, as lawyers, they make ethical decisions. Instead, Simon believes lawyering should be guided by "non-professional advocacy." He argues that lawyers should function solely on the basis of their individual convictions in determining what ethical choices to make. The non-professional advocate should be directed exclusively by personal ethics, and the legal relationship requires that "advocate and client must each justify himself to the other. This justification need not embrace the person's entire life, but merely those aspects of it which bear on the dispute."³² Thus, Simon rejects the use of decisions of a professional collectivity, memorialized in the Model Code of Professional Responsibility and the Model Rules of Professional Conduct,³³ in framing appropriate standards for an individual to use in making professional ethical judgments.

[T]he very notion of a profession—as distinguished from a mere technique—implies the possession of certain character-defining traits or qualities. . . . [T]he dispositional habits which the practice of law both requires and encourages have a bearing not only on what a person can do (like the habit, say, of touch-typing) but on who he or she is as well (like the habits of generosity and temperance).

Id. at 841 (footnote omitted).

32. Simon 1978, *supra* note 11, at 133.

[Non-professional advocacy would] require that every moral decision be made by the individual himself; no institution can define his obligations in advance. . . . [T]he individual may be called upon to answer for his decisions by any other individual who is affected by them. No specialized group has a monopoly which disqualifies outsiders from criticizing the behavior of its members. Second, personal ethics require that individuals take responsibility for the consequences of their decisions. . . . The non-professional advocate presents himself to a prospective client as someone with special talents and knowledge, but also with personal ends to which he is strongly committed. . . . If the two sets of ends coincide, then a strong alliance on behalf of these ends is possible. If the two sets of ends are irreconcilably opposed, then no relationship will be possible.

Id. at 131-32.

The critique of the argument from moral nonaccountability appears below, but a few specific comments to the particulars of Simon's position are in order here. "Non-professional advocacy" vitiates the very foundation of the lawyer-client relationship by making the lawyer accountable to all interested parties. Under these conditions there can be no loyalty to a client. This is apparently Simon's intent, and it should be made very clear. The idea of clients and lawyers negotiating over the ends of representation is nothing new; it happens in most representations every day. However, the instances in which clients have such clearly abhorrent ends and lawyers such clearly formulated objections are much rarer than Simon's rhetoric would suggest. The official professional standards clearly recognize the propriety of refusing or terminating representation under these conditions as well as giving permission for lawyers to try and persuade clients to behave otherwise. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983) [hereinafter RULES] and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-110 (1980) [hereinafter CODE].

33. "[E]ach state's highest court has promulgated a code of behavior for its lawyers. Since 1970, in virtually every state, this code was based on the ABA Model Code of Professional Responsibility." T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 28 (1987).

The Model Code was adopted by the House of Delegates of the American Bar Association on August 12, 1969, to become effective for ABA members on January 1, 1970. It has been amended several times since. The current Code replaced the earlier Canons of Professional Ethics, which had been adopted in 1908, and which in turn had been based on the Alabama State Bar Association's Code of 1887, which had found its origins in Judge George Sharswood's, A Compend of Lectures on the Aims and Duties of the Profession of the Law (1854).

Id. at 28 n.*. "[T]he ABA adopted the Model Rules of Professional Conduct in 1983. . . . It is important to understand, however, that the 'Model' Code and 'Model' Rules are only models. The code of ethics that governs the lawyers licensed in a given state are the rules adopted by that state's supreme court." *Id.* at 28.

[A]s of spring 1989, 29 states have adopted all or significant portions of the Model Rules in some form. (Several states, including New York, Vermont, and Massachusetts, have rejected the Model Rules. California also has chosen not to adopt the Rules, but has amended its Rules of Professional Conduct to incorporate some Model Rule provisions. A similar effort is underway in New York.)

In sum, role-differentiation critics see moral nonaccountability as the central harm of "the ideology of advocacy." The moral implications of a clients' goals are supposed to be irrelevant when lawyers are not held morally accountable for the ends sought and achieved through their legal representation. Lawyers perform amoral and even immoral acts for clients that they would not perform otherwise. By doing so, attorneys may thus be "good" lawyers, according to role morality and within the parameters of "the ideology of advocacy," but they forfeit their integrity which requires acting on the dictates of common morality. Therefore, these critics claim lawyers cannot be good persons.

2. Critique of the Argument from Moral Nonaccountability

The role-differentiation thesis implies that it is not possible to be both a good person and a good lawyer because the moral standards for personhood and lawyerhood are different. Good lawyers may be required to promote client goals that are morally wrong. Role morality holds lawyers nonaccountable for this immoral conduct even though common morality condemns it. Thus, good lawyers cannot function both as good attorneys and remain persons of integrity. There are two problems with this moral nonaccountability argument. The first is the fact that role-differentiation critics ask the wrong question. The second is that the requirement of moral accountability violates a more vital value, the Boundaries Principle.

The Four Elements Analysis. To ask whether one can be both a good person and a good lawyer is to ask the wrong question. This question itself assumes an odd disjunction between one's professional and personal lives. In both contexts at different times, one plays a multitude of roles—friend, spouse, parent, legal counselor, advisor, advocate, officer of the court, legal reformer. Role-differentiation critics ask if it is possible to play roles that call for different moral considerations and still remain a person of integrity. A preferable approach to thinking about ethics provides an analysis based on four elements: (1) persons who (2) act (3) in circumstances (4) for reasons.³⁴ The first element, agency, assumes that persons are free moral beings.³⁵ The second element, act, focuses

S. GILLERS & R. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS xii (1989). On September 1, 1990, New York's modification of the Code went into effect after adoption April 5 by the state's four Appellate Division Departments. *Special Supplement, Professional Disciplinary Rules*, N.Y.L.J. (May 14, 1990) [hereinafter *Special Supplement*]. The Code is organized differently from the Rules.

The Ethical Considerations [ECs] are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations. The Disciplinary Rules [DRs], unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

S. GILLERS & R. SIMON, *supra*, at 206 (citing *Preliminary Statement, MODEL CODE OF PROFESSIONAL RESPONSIBILITY*).

34. The author is grateful to Professor Steven J. Burton, her spouse, for bringing this analytical framework to her attention. See S. BURTON, *JUDGING IN GOOD FAITH* (publication forthcoming).

35. It should be emphasized that in this framework there is a single integrated being who weighs the various reasons for action derived from her different circumstances. One major reason for action is always one's character, which provides dispositions to act on certain reasons in all circumstances. See *infra* text accompanying notes 40-46. For an understanding of the interaction between character and life, see M. NUSSBAUM, *THE FRAGILITY OF*

on what actions people might take, not their beliefs.³⁶ The third element, circumstances, highlights the importance of the context within which persons act. Few physical acts are always right or wrong regardless of their circumstances. And the fourth element, reasons for action, calls for justifications for the actions that are taken on the basis of appropriate standards of conduct invoked by the context.

When persons act in circumstances for reasons, the agent examines and weighs the various reasons for different actions from the point of view of an actor, not an observer. This is not a distinction between subjective and objective perspectives. Observers focus on behavior; they describe and explain or predict it with relative degrees of objectivity or subjectivity. In contrast, the actor understands what he or she has chosen to do in a fundamentally different way.³⁷ For example, a parent uses a thermometer, measures his young child's temperature, finds it registers 101 degrees Fahrenheit, and concludes the child has a fever. Up to this point the parent has been an observer. The parent shifts to the perspective of an actor when he considers what to do about it—whether to give aspirin or a tepid bath. He may decide on the latter because of concern about the potential harmful effects of aspirin to a young child. In deciding on the best action, the parent may need to consider a number of reasons for and against a number of alternatives.

Since both the decision maker and any subsequent evaluator of that decision will be examining reasons for action, not only behavioral descriptions, explanations and predictions, the centrality of the actor's point of view is particularly important. This is not just a bid for empathy, a plea not to judge before "walking a thousand miles in the other person's moccasins." There is a significant conceptual issue here. A lawyer facing an ethical decision is more like the parent deciding what to do about the child's fever than observing simply that a

GOODNESS (1986) [hereinafter NUSSBAUM]. For an excellent discussion of character and lawyering, see Kronman, *supra* note 31.

36. Practical deliberations involve deciding what I ought to do, that is, what actions I ought to take, under the particular circumstances before me and given the set of reasons invoked by those circumstances. They do not involve judgments about what to believe or hypotheses about what might cause me to take any particular action. Practical deliberations thus depend on the application of practical reason, which is:

the capacity of a human being to act intentionally in various circumstances on reasons for action, notably norms. It stands in contrast to "scientific" or "theoretical" reason, which concerns the capacity of a human being to form beliefs about the world based on reasons for beliefs, notably observations. Philosophers of law have treated law as practical reason in this sense intensively since H.L.A. Hart dramatized the importance of the law as provider of reasons for action, to be understood with respect for the point of view of participants in a legal practice. Joseph Raz, in particular, is a leading philosopher of law who, more than any other, has identified and worked out many of the analytical implications of law as practical reason.

Burton, *Law As Practical Reason*, 62 S. CAL. L. REV. 747, 747-48 (1989) (footnotes omitted).

37. The fever example that follows illustrates by means of two syllogisms the difference between theoretical reason resulting in a belief and practical reason resulting in an act. Theoretical Reason—Step One (p1): temperatures more than 98.6 degrees signal a fever; Step two (p2): the child's temperature is more than 98.6 degrees; Step three (conclusion): Therefore, the child has a fever. Practical Reason—Step one (p1): when a child has a fever, take remedial action; Step two (p2) (the conclusion of the theoretical syllogism): the child has a fever; Step three: (conclusion): Therefore, take remedial action. The conclusion of the first, theoretical syllogism is a belief while the conclusion of the second, practical syllogism is action.

fever exists. A legal reason makes a difference to what a legal actor ought to do; yet it may escape the observer's notice altogether.³⁸

The role-differentiation thesis, when it claims role morality vitiates a lawyer's integrity as a person, mistakenly focuses on the first element of agency. The thesis claims that someone is a different person when she functions as a lawyer from when she functions otherwise. This is a basic mistake. The correct focus should be on the third element—the circumstances. It is the circumstances of action, not the persons, that make the difference when persons who are attorneys perform legal functions.³⁹ Under this analysis, persons when acting as lawyers have special duties to their clients which arise just because they are performing legal rather than other functions. Anyone, when acting as a lawyer, would have the same duties.⁴⁰ In the circumstance of representation lawyers will consider a number of reasons to determine the actions they should take. The reasons to be considered will be different from the reasons to be considered for acting in a different context, for example, in the circumstance of being a parent.⁴¹

38. The distinction was explained by Joseph Raz as follows:

External statements about the law are statements about people's practices and actions, attitudes and beliefs concerning the law. Internal statements are those applying the law, using it as a standard by which to evaluate, guide, or criticize behaviour. . . . Endorsement of a rule includes, therefore, a disposition to make internal statements.

J. RAZ, *THE AUTHORITY OF LAW* 154 (1979) (footnote omitted) [hereinafter *AUTHORITY*].

39. The philosopher Virginia Held also noted this point:

To answer the question whether some roles—namely, "professional" roles—are such that persons in them may justifiably perform actions that it would be wrong for persons not in those roles to perform, I think we can best start by seeing the ways in which this formulation of the question is misleading. "Ordinary" morality addresses itself to the differing circumstances persons find themselves in.

Ordinary morality requires different actions for similar persons in different circumstances. And persons with different abilities should act differently in similar situations. This does not mean that there is a separate morality for one person as distinct from another, but rather that morality provides that persons in different circumstances and with different abilities have different obligations.

Held, *The Division of Moral Labor and the Role of the Lawyer*, in *THE GOOD LAWYER* 60, 67 (D. Luban ed. 1983).

40. Role morality is incompatible with the requirement that ethical decisions be generalizable or universalizable across persons. Thus, when Martha claims an act she performed was the right thing to do, she can be correct only if that act would be the right thing for anyone to do under those circumstances. See P. SINGER, *GENERALIZATION IN ETHICS* (1962).

41. Among ethicists, role-differentiation critics are not alone in mistaking obligations that depend on circumstances and reasons as attaching instead to persons universally. For example, Professor Geoffrey Hazard recently argued against the premise of conventional morality "that there are concrete obligations which every person owes to every other person." Hazard, *My Station As A Lawyer*, 6 GA. ST. U.L. REV. 1, 7 (1989). Hazard contends:

Universality is assumed to be the essence of ethical norms, their necessary property. This presupposition necessarily excludes detailed consideration of the particular stations of particular individuals or sets of individuals. It excludes consideration of whether an actor's station may determine how far he can or should give effect to universal obligations imposed by the moral codes.

. . . By definition, professional ethics concerns a subset, or norms specifically governing some subset, of people who have a specific station in life, a particular vocation. These stations include not only those of lawyers but also those of doctors, public accountants, . . . and spouses at home.

. . . .

. . . [T]he characteristics of a vocation immediately introduce considerations that are excluded in the conventional ethical discourse. For example, a distinguishing characteristic of a "lawyer" is that, in the usual practice setting, the lawyer has a client. The client is a person to whom the lawyer has certain special responsibilities that are not owed equally to persons who are not the lawyer's clients.

Id. at 13-14.

One's integrity as a person is not destroyed by distinguishing among the reasons for action⁴² in different circumstances. For example, if one is in the circumstance of being a parent and faced with two drowning children, only one of whom is one's own child and only one of whom there is time to save from death, justifying the decision to save one's own child rather than the other child would not require recourse to anything called role morality.⁴³ Parenthood creates a special set of duties, including special obligations to one's own children in preference to other children, whose invocation is well supported by the tenets of common, ordinary, conventional morality. Anyone, in the circumstance of acting as a parent, would have that obligation. If you are a passenger on a train, there is a train wreck and you escape injury, you have no special obligation to put yourself at risk and try to save any of the other passengers either legally or

Application of the Four Elements Analysis to Hazard's discussion demonstrates that, by failing to distinguish between persons and circumstances, he misconceives the universalization requirement in ethics. Universalization does not, as Hazard supposes, latch onto persons in the abstract. Rather, it latches onto acts that are situated in real circumstances. Accordingly, all persons are universally obligated to act according to moral principles applicable to all persons *in similar circumstances*. See I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 26-72 (L. Beck trans. 1969). Persons are not all obligated to do the same thing regardless of the circumstances. The reason is that reasons for action are dependent on the circumstances of action. Accordingly, a person who has made a promise to another, or who represents another as her lawyer, or who holds official office, due to such facts may have different ethical obligations from those in other situations.

42. The discussion of "reasons for action" in the text is based on the work of Professor H.L.A. Hart, Professor Joseph Raz and Professor Steven Burton. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 79-88 (1961) [hereinafter *CONCEPT*]; J. RAZ, *PRACTICAL REASON AND NORMS* (1975) [hereinafter *PRACTICAL REASON*]; Burton, *supra* note 34. See extensive discussion of hypothetical demonstrating a reasons for action analysis, *infra* at Part III, Section D.

43. From his focus on persons and the different roles they perform, Wasserstrom too would find no difficulty with preferring the interests of one's own children to those of other children.

[I]t could be argued that part of the idea of what it is to be a parent is to prefer the interests of one's own children over those of other children. If there were no disposition to do so and no roles backing and reinforcing that disposition, one would have to revise substantially what is in fact meant in social terms by being a parent.

It could also be claimed, moreover, that I have misdescribed these cases because, for instance, the interests of one's own children are simply not comparable to those of other children so that it is a mistake of a different sort to say that the role of parent blocks parents from attending to the welfare of other children in a morally suspect way. The claims involved are simply not all of the same type. One has a duty to care for one's own children; there is no duty of the same sort to care for other children. If one is only being charitable or benevolent if one does attend to the interests of other children, while one is neglecting one's duty in failing to attend to the interests of one's own children, then there is no reason to think that one is acting other than morally when one attends to the interests of one's own children as the role of parent requires.

Wasserstrom, *Roles and Morality*, *THE GOOD LAWYER* 25, 33 (D. Luban ed. 1983).

Apparently the role morality associated with parenthood does not trouble Wasserstrom as does the role morality associated with lawyering. Yet he makes no argument for distinguishing between the two. Rather there seems to be an intuitive acceptance of the special duties owed by parents to their own children but no parallel acceptance of special duties owed by lawyers to their clients. Instead, Wasserstrom argues that proponents of justifying lawyers' actions on the basis of a role morality founded on special duties to clients shifts "the burden of argument and proof . . . [to] those who seek to justify the differential consideration and treatment of members of the moral community that takes place as a result of role-defined reasoning." *Id.* at 34. Role-differentiation criticism thus imparts a negative connotation to role morality. Of course, the argument from integrity does not adopt the position that morality can be parsed into common morality and role morality. There is no need to do so when the ethical discourse is based on a consistent, integrated agent operating in different circumstances that provide different reasons for action.

morally.⁴⁴ But what if you are hired to be a bodyguard for an executive taking the train, do you have any obligation because of the special circumstance of your being a bodyguard? You have a special duty to try and save the executive, even at risk to yourself. But, once again, you have no moral duty to anyone else on the train. It would be absurd to argue that persons who serve as bodyguards on trains are different persons while performing that function and that their actions are justified only by recourse to role morality.⁴⁵ Anyone, in the circumstance of acting as a bodyguard, would have that obligation.

It makes no sense to evaluate the morality of an action in one set of circumstances by comparing it to another set of circumstances in which the facts are significantly different. Simply put: A bodyguard, parent, or lawyer *should not* act exactly as they should if they weren't in those circumstances. Comparing what one does as a lawyer, and labeling this role morality, to what one would do if one were not functioning as a lawyer, and labeling this common morality, is a mistake. The fact of acting as a lawyer makes a moral difference.

The Boundaries Principle. Role-differentiation critics complain that lawyers do not take moral responsibility for their clients' actions. They would remedy such lawyering by requiring moral activism of attorneys. The direction of a legal representation would depend on the lawyer's moral compass rather than that of his or her client. Moreover, lawyers would be held responsible for any moral harms suffered by third parties or society as a result of their representation of a client. This aspect of the role-differentiation thesis may be its most troubling. It violates a far more fundamental principle, one which requires lawyers to respect the boundary between themselves as independent moral agents and their clients as independent moral agents.⁴⁶ The Boundaries Principle, in contrast, affirms the moral autonomy of *both* the client and the attorney.

44. It should be noted that both in tort and criminal law, there have been some developments favoring a greater appreciation of the advantages of a societal norm of good samaritanism. For example, Vermont law provides:

A person who knows that another is exposed to grave physical harm shall, *to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others*, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

Vt. STAT. ANN. tit. 12, § 519(a) (1989) (emphasis added). The emphasis highlights the fact that even the good samaritan need not put herself at risk. Moreover, those who do not put themselves at risk to assist others would not be criticized for moral cowardice, either.

45. The truth of this perspective is even indirectly acknowledged by William Simon, but it becomes lost by his focus on role. Thus, Simon correctly writes that "[p]ersonal ethics apply to people merely by virtue of the fact that they are human individuals. The obligations involved may depend on particular circumstances . . . but they do not follow from social role or station." Simon 1978, *supra* note 11, at 131.

46. The following discussion of the Boundaries Principle places special emphasis on the dangers of substituting the lawyer's moral values for that of his or her client to counter the role-differentiation critics' emphasis on good lawyering being synonymous with moral activism. However, the problem of respect for client autonomy in practice is more complicated than this since lawyers often infringe on client autonomy to foster other values such as efficiency. Professor Elizabeth Warren was kind enough to offer me the following example:

We have an extremely complicated bankruptcy structure. To help a client make a reasoned, autonomous decision about the choices available in consumer bankruptcy . . . would take about twenty hours of attorney time in a typical case. No debtor in bankruptcy can afford that. Instead, attorneys develop shorthand routes to decisions and bring an enormous amount of pressure on debtors to 'decide' things consistently with the attorney's view of how things generally ought to go. Is such an attorney morally reprehensible for stealing the client's autonomy? Of course, this attorney could develop a largely pro bono practice or send

Lawyers are morally responsible for their own acts, including their decision whether or not to represent particular clients and help them achieve their objectives. They are not responsible for their clients' acts. Thus, a lawyer is accountable for the advice on estate law and family relationships he or she gives a testator but not the decision of that client to go ahead and disinherit her children for opposing the Vietnam war.⁴⁷ A lawyer is responsible for the decision to represent a client who wants to file a lawsuit against a cigarette company but should take no moral pride in the client's decision to sue. Lawyers are morally responsible for the kinds of arguments and tactics they decide to use on behalf of a client, but clients are responsible for the morality of the goals those arguments and tactics seek to further.

Moral independence from clients⁴⁸ permits lawyers to recognize and respect the boundary between themselves as moral beings and their clients as separate persons with a distinct and equally valid capacity for moral conduct. A lawyer, within limits, must refrain from judging the morality and determining the goals sought by a client out of regard for that client's own autonomy as a moral agent and as an affirmation of the lawyer's own moral independence within the circumstances of the lawyer-client relationship. Thus, the Rules specifically provide that a "lawyer shall abide by a client's decisions concerning the objectives of representation. . . ."⁴⁹ Moreover, the permissive structure of many of the standards that seek to regulate a lawyer's ethical decisions can be understood as reinforcing this proper boundary between lawyer and client in their professional relationship with one another.

all debtors packing who don't have several thousand dollars to pay the fees, but I don't think those are realistic solutions. In effect, it seems to me, we have structured the legal system here to usurp client autonomy.

Letter to the author, August 14, 1990. See also E. WARREN & J. WESTBROOK, *THE LAW OF DEBTORS & CREDITORS*, 392-97, 399-400 (2nd ed. 1991).

This example emphasizes the need to recognize that the Boundaries Principle is not absolute. It can be outweighed by other legitimate considerations. Whether an attorney can be faulted morally under these circumstances would, I believe, depend on the reasons for limiting the sharing of information for decision with a client. Professor Warren's example identifies legitimate reasons—consideration for a client's limited resources combined with a desperate need for assistance—which justify the attorney's balancing of the client's interests. However, if bankruptcy lawyers were processing clients with no consideration of their particular needs in order simply to maximize the lawyer's income, such a reason to infringe on client autonomy would not be justified.

47. Schneyer provides an excellent analysis of this example from Wasserstrom in terms illustrative of the Boundaries Principle when he suggests first that the lawyer has a responsibility to fully discuss with the testator both the lawyer's concerns and the testator's reasons for disinheriting the son. But if the lawyer then refused to draft the will "after a full discussion, even though he was convinced that disinheriting the son was proper by the client's moral rights, I would be inclined to see the refusal as an act of intolerance . . ." Schneyer, *supra* note 9, at 1563.

48. This is what the role-differentiation critics call the principle of moral nonaccountability. See *supra* notes 18-33 and accompanying text.

49. Rule 1.2(a) goes on to place authority for deciding on means in the hands of the lawyer. Thus, lawyer and client have independent responsibilities in shaping the representation. The client determines the purpose to be achieved, but the lawyer is no mere instrument of the client's wishes. Thus, while DR 7-101, "Representing a Client Zealously," admonishes at (A)(1) that a lawyer shall not intentionally fail to seek the lawful objectives of his or her client, it also permits a lawyer to decide to avoid the use of offensive tactics. DR 7-101(B) reinforces the view of the lawyer as an independent moral actor by declaring both that a lawyer may exercise his or her own professional judgment to waive or fail to assert a right or position of a client where permitted and to refuse to aid or participate in conduct the lawyer believes "to be unlawful, even though there is some support for an argument that the conduct is legal." CODE, *supra* note 32, DR 7-101.

The standards of the profession more directly emphasize the lawyer's autonomy in rules such as that which provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁵⁰

Lawyers promise to represent the client's interests. They hold themselves out as loyal advocates and thereby induce reliance. They are entrusted with a client's secrets and fate for limited purposes. To use his or her position as client confidante and representative as a pretext to advance the lawyer's own moral or political agenda is to act in bad faith.⁵¹ The decision to function as a person in the circumstance of serving as an attorney means one has decided to forgo that opportunity.⁵²

An example from family life may help illustrate how respect for boundaries serves to re-inforce respect for individual moral autonomy. Your two-year-old son hits another child and grabs his toy. In these circumstances, you do have a moral responsibility both to remedy the situation and to teach your child the errors of his actions. However, when your twenty-five-year-old son borrows a friend's car, drives it carelessly, and damages it, you are not responsible, legally or morally. Your son is now an independent moral agent. If you do take responsibility for his actions, you fail to recognize his independent moral status and engage in self-aggrandizement in the guise of parental guilt. You overstep the proper boundary between parent and adult child—a boundary that was gradually erected as your son grew into adulthood. If you fail to respect this boundary, you deny your son his own separate moral identity.⁵³

A client is an adult, not a child.⁵⁴ As a practical counselor,⁵⁵ lawyers should respect the boundary between themselves and their clients as indepen-

50. ABA Model Rule 2.1.

51. See, e.g., the illustrative case of "Allowing A Personal Agenda to Color Legal Advice," § 2.1: 103 in I. G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, 502 (2d ed. 1990) [hereinafter HAZARD & HODES].

52. See Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

53. Would your moral responsibility be greater had you assisted your son in borrowing his friend's car—a situation more analogous to the instrumental role lawyers perform for clients? You would probably feel some additional regret at your own bad judgment or bad luck, but I do not believe that you are morally responsible for an unexpected negative outcome just because you rendered some assistance in obtaining the means used to achieve it. The situation is more troubling if you helped your son borrow a car, knowing he was a poor driver, because you didn't want to loan him your car. Once again, your reasons for action would be faulty, but your moral errors would be your own and not those of your son.

54. Even when a client is a child, one who has reached the age of reason, usually around age twelve for legal purposes such as having a right to be heard about his or her preferences in a custody matter, the child client's wishes are to be respected by the attorney always when acting as a representative (e.g., law guardian) and even often when serving as a guardian ad litem, although judgments of "the child's best interest" play a more prominent role when acting in this capacity. See, e.g., the discussion in *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977); Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. FAM. L. 1 (1977-78).

55. A practical counselor assists clients to decide what they ought to do, what actions they ought to take, in the particular circumstances before them and by identifying the set of reasons relevant to the action. Such reasons may include legal, moral, personal, prudential, etc., considerations. Practical counseling also assists clients to decide how to prioritize or weigh their different reasons for action, though the eventual decision on what to do, the

dent moral agents. It is their job to help their clients identify the range of reasons for action they should consider in their situation—legal, moral, personal, and prudential. It is not their job, however, to breach the bounds of their clients' moral integrity and, directly or indirectly, impose the lawyers' moral preferences on their clients.⁵⁶

Moreover, respecting these boundaries does not foreclose the lawyer from acting in a normative capacity. One helpful way to portray this function is in terms of Joseph Raz's concept of detached normative statements.⁵⁷ Raz gives the example of a Christian saying to his Orthodox Jewish friend who is about to eat something like a pork-filled dumpling unwittingly, "You ought not to eat that."⁵⁸ Such a statement is fully normative, yet the Christian speaks from the point of view of one who understands the Kosher laws without endorsing or following them. Attorneys similarly may suggest to a client what her reasons for action are in light of the client's goals without necessarily endorsing those values.⁵⁹

outcome of this weighing, remains the client's responsibility to take. Thus, Rule 1.2(a) provides that a "lawyer shall abide by a client's decisions concerning the objectives of representation" with some limitations. RULES, *supra* note 32, Rule 1.2(a). No specific counterpart was provided for in the Code, *see* CODE, *supra* note 32, EC 7-7.

56. Wolfram has captured the qualities of being a practical counselor when he writes:

It is much more important for the lawyer to understand that legal issues come attached to *autonomous persons* who typically have lived with their problems and will continue to live with their solutions or failures to solve them. Client problems are not only—and perhaps not even primarily—legal. They must be seen in all their dimensions, including moral, psychological, and economic dimensions beyond the strictly legal. Also important is the lawyer's self-awareness—an understanding of the lawyer's own humanity and its important involvement in every representation.

C. WOLFRAM, MODERN LEGAL ETHICS 688 (1986) (emphasis added). "[C]onscience is offered, not asserted." Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231, 241 (1979).

57. PRACTICAL REASON, *supra* note 42, at 175-77.

58. Cited in H.L.A. HART, *ESSAYS ON BENTHAM* 154 (1982).

Raz's distinction between committed and detached normative statements focuses attention on a little-noticed but important feature of moral discourse. It is a feature of such discourse that normative statements may be made both by those who themselves accept the relevant principles as guides to conduct and standards of evaluation and those who do not so accept them. Statements made by the former are committed statements and are to be contrasted with statements made by those who speak from the point of view of those who accept the principles and so speak as if they themselves accepted them though they do not in fact do so. Such statements are detached. . . . Similar normative statements [referring to example in text] of law (not merely statements about the law) may be made from the point of view of one who accepts the laws of some system as guides to conduct, but though made from that point of view are in fact made by one who may be an anarchist and so does not share it.

Id. at 154.

59. Role-differentiation critics, nonetheless, complain that "the moral detachment of the lawyer adversely affects the quality of the lawyer-client relationship." Postema 1980, *supra* note 7, at 80. Postema makes the further curious observation that the lawyer

views himself not as a moral actor but as a legal technician. In addition, he is barred from recognizing the client's moral personality. The moral responsibilities of the client are simply of no interest to him. Thus, paradoxically, the combination of partisanship and neutrality jeopardizes client autonomy and mutual respect (two publicly stated objects of the standard conception), and yields instead a curious kind of *impersonal* relationship.

Id.

Setting aside questions about the accuracy of this description, this claim that partisanship and neutrality jeopardize client autonomy is contradicted by the Boundaries Principle. Such critics would abrogate respect for the client and the lawyer's autonomy to further some 'higher goal,' such as "whether assisting the client would further justice." Simon 1988, *supra* note 11, at 1083.

Reference to another professional field with a strong adherence to the centrality of the professional-client relationship may illustrate why the Boundaries Principle is necessary and how it contributes to the integrity of both lawyers and clients. Suppose one is a therapist specializing in marriage counseling. A woman comes for assistance in deciding on whether or not she should continue in her marriage or should seek a divorce. In working with this woman, does the counselor have a moral obligation to take responsibility for whether divorce is or is not morally right? Suppose a man who is a homosexual seeks assistance from a therapist. Does the therapist have a moral responsibility for guiding this man toward heterosexuality or toward making peace with his sexual orientation depending on whether or not the therapist considers homosexuality to be morally right?

These examples should make it clear that choosing between the values of commitment and marriage or independence and divorce is a moral decision for the client but not for the marriage counselor. Choosing whether to live a life consistent with one's sexual orientation despite societal opprobrium is a decision for the client and not for the therapist to make. In fact, if the counselor or therapist has strong feelings one way or the other about the morality of divorce or of homosexuality, they shouldn't engage in marriage counseling or work with homosexuals since such strongly held values are likely to lead them to intrude on their clients' moral autonomy by breaching the proper boundary between themselves and their clients as independent moral beings.⁶⁰

60. Of course, there are limits for both therapists and lawyers in their non-judgmental approach to professional services. If a client comes to a therapist to discuss child abuse, in many jurisdictions the therapist is legally responsible for reporting the client to legal authorities. Although lawyers have not yet been made mandatory reporters of child abuse, they are clearly forbidden to counsel or assist a client to break the law. See, e.g., Model Rule 1.2(d) and 3.3(a)(2). For an example of appropriate counseling see Marecek, *Counseling Adolescents With Problem Pregnancies*, 42 AM. PSYCHOLOGY 89 (1987). Deciding on what client goals would further justice as Professor Simon would have the lawyer do, Simon 1978, *supra* note 11, is surely equally as intrusive and disrespectful as a therapist deciding to further marriage or heterosexuality. Role-differentiation critics might reject analogies to psychotherapy on the grounds that legal professionals cannot be compared to other practitioners. For example, William Simon argues:

The analogies to such roles as doctor and priest are fundamentally misleading. For unlike the relations defined by these roles, the lawyer-client relation is fundamentally impersonal and other-regarding. . . . In the case of doctors and priests, the principal impact of the professional's activity occurs within the professional relation in the form of the change which the patient or penitent undergoes. But in the case of lawyers, the principal impact occurs *outside* the professional relation. The client benefits only to the extent that outsiders are affected.

Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 501-02 (1980).

An example which illustrates how specious this argument is would be to consider the circumstance of a surgeon operating to remove a bullet, exquisitely close to a vital artery, from a Mafia don. If the surgeon permits herself a millimeter of error, she will lose her patient and save hundreds of persons from drug addiction, misery and death. The impact of the doctor's remembering her Hippocratic oath is not so significant in terms of its consequences for the don himself as it is in terms of its effect on outsiders. Simon's description of the lawyer-client relationship is normatively impoverished. It underestimates the impact on clients of being assisted to think about what they ought to do in a particular situation by examining the range of reasons for action and exploring the consequences of their choices. This is a function encouraged by, for example, Rule 2.1 providing that when serving as an advisor "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." RULES, *supra* note 32. The Comment to Rule 2.1 notes at [2]:

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. . . . Although a lawyer is not a

Lawyers are fully accountable for their own acts—but not for their clients' acts.⁶¹ Clients' goals are a part of the circumstances in which the lawyer acts and can make a difference. The lawyer's evaluation of the morality of a client's acts are certainly relevant to the decision whether to undertake a representation as well as whether or not to terminate one already undertaken.⁶² Some lawyers may well feel obligated to refrain from representing a cigarette manufacturer because of their personal abhorrence of the product produced. Most lawyers would feel obligated to withdraw from a representation were their client to attempt to associate them in lying to a court.⁶³ But these lawyers would be taking

moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

RULES, *supra* note 32, Rule 2.1 comment. This richly normative perspective is totally overlooked by role-differentiation critics like Luban, who in Appendix 1 of his book, *LAWYERS AND JUSTICE*, *supra* note 5, defends the basis for his "standard conception" and never examines this aspect of the Rules. It also ignores the legal profession's increasing attention to the centrality of the counseling function to the lawyer-client relationship. The Model Rules illustrate this point by their attention to the lawyer as counselor in Rule 2.1. See the excellent discussion in HAZARD & HODES, *supra* note 51, beginning at 497. See generally, R. BASTRESS & J. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING* (1990); G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* (1978); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING* (1977); D. BINDER, P. BERGMAN & S. PRICE, *LAWYERS AS COUNSELORS* (1990); L. BROWN & E. DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* (1978); R. REDMOUNT & T. SHAFFER, *LEGAL COUNSELING* (1976); R. REDMOUNT, *LEGAL INTERVIEWING AND COUNSELING* (1980); M. SCHOENFIELD, *INTERVIEWING AND COUNSELING* (1981); T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1987); A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976). See also counselor requirements beginning at Rule 2.1 *SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION* 162 (West, 1989 ed.) [hereinafter *SELECTED STATUTES*].

61. Thus, EC 7-17 of the Code provides that the duty of loyalty to a client is a professional duty and "implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. . . . [H]e may take positions on public issues and espouse legal reforms he favors without regard to the individual view of any client." CODE, *supra* note 32, EC 7-17 (1980). Rule 1.2(b) provides that a "lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities." RULES, *supra* note 32, Rule 1.2(b).

62. DR 2-110 (Withdrawal from Employment) at (C) (Permissive Withdrawal) (1)(e) of the Code specifically contemplates such reasons for action by providing for permissive withdrawal of a lawyer from representing a client who "insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules." CODE, *supra* note 32. Rule 1.16(b)(3) also provides for permissive withdrawal when "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." RULES, *supra* note 32, Rule 1.16(b)(3). The Rule is more far reaching than DR 2-110 since it permits such withdrawal even when the case is before a tribunal so long as the tribunal does not order the lawyer to continue representation. RULES, *supra* note 32, Rule 1.16(c).

63. Although the standards would appear to offer clear guidance on this issue, like all rules, they have engendered a lively debate over interpretation. For example, the Code at DR 7-102 modifies the requirement of representing a client zealously by adding that such representation must be within the bounds of the law and at (A)(4) requires that a "lawyer shall not . . . [k]nowingly use perjured testimony or false evidence." CODE, *supra* note 32, DR 7-102. Professor Monroe Freedman created a firestorm over this issue by pointing out that "the conscientious attorney is faced with what we may call a trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court." M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 28 (1975). The Rules would appear to dispense with the problem in jurisdictions which have adopted them since, Rule 3.3 (a)(4) requires that "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." RULES, *supra* note 32, Rule 3.3(a)(4). Rule 3.3 (b) explicitly says that the requirement of candor to the tribunal applies even if "compliance requires disclosure of information otherwise protected by Rule 1.6 . . .," which addresses the duty of confidentiality. RULES, *supra* note 32, Rule 3.3(b). But even a jurisdiction which adopts the position contained in the Rules leaves attorneys still to solve additional issues such as how does one "know" one's client intends to commit perjury? Even assuming one does "know," what are the appropriate remedial measures and will they successfully balance one's obligations to one's client, the tribunal and the system of justice? Should one communicate this constraint on the obligation of confidentiality to the client, and, if so,

responsibility for the morality of their own acts in these circumstances, not those of their client.

Clients should *not* be accountable to their lawyers for the moral consequences of their actions. If lawyers disagree with the personal and social values promoted by a clients' goals, they need not represent the client. Lawyers have an obligation both to themselves and to their potential clients to consider carefully whether a particular representation may be morally repugnant to them *before* undertaking that representation. Often too little attention is given to this issue before beginning a representation.⁶⁴

If lawyers were to make themselves responsible for the moral consequences to third parties and society in general of their clients' objectives, the proper boundary between lawyer and client as independent moral beings would be breached. The evils of paternalism⁶⁵ are as serious a danger to the lawyer-client relationship⁶⁶ as is the likelihood that lawyers would be unable to extricate

when? See also *Nix v. Whiteside*, 457 U.S. 157 (1986), Appel, *Nix v. Whiteside: The Role of Apples, Oranges, and the Great Houdini in Constitutional Adjudication*, 23 CRIM. L. BULL. 5 (1987), and LAWYERS AND JUSTICE, *supra* note 5, at 199 n.44 for further complications.

64. Of course, as legal practice involves ever larger firms, a lawyer's ability to independently determine whether or not he or she wishes to work for a particular client becomes more restricted. In 1984 a law firm of 85 attorneys would be considered one of the 250 largest firms in the country; by 1989 the cutoff point grew to 125 lawyers. N.Y.L.J. (Sept. 18, 1989). "In the late 1950s only 38 law firms in the United States had more than fifty lawyers . . . [B]y 1985, over 500 had fifty-one or more lawyers . . ." Galanter & Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 749 (1990) (footnotes omitted). See generally Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships In The Large Law Firm*, 37 STAN. L. REV. 503 (1985); Rosen, *The Growth of Large Law Firms and its Effect on the Legal Profession and Legal Education: The Inside Counsel Movement, Professional Judgment And Organizational Representation*, 64 IND. L.J. 479 (1989). There is no easy panacea for this problem. Obviously, careful investigation of a firm and its values and procedures before associating with it becomes more crucial. However, I recognize that I am writing from the relative security of academia and that much of what I say may at best be aspirational in a real world hedged in by bigger firms, fewer jobs and less access to partnership.

65.

[C]lients go to professionals for their superior knowledge and skills; such knowledge and skill is a defining feature of a profession. However, many decisions require balancing legal or health concerns against other client interests. As many authors have noted, crucial professional decisions involve value choices. They are not simple choices of technical means to ends, and even choices of means have a value component. Professionals have not had training in value choices. Even if they had, they might not know a client's value scheme sufficiently to determine what is best for him when everything is considered. . . . To deny clients authority and responsibility by adopting the paternalistic model is to deny them the freedom to direct their own lives. Clients are not capable of determining the precise nature of their problems, or of knowing the alternative courses of action and predicting their consequences or carrying them out on their own. They need and want the technical expertise of a professional to do so. However, they are capable of making reasonable choices among options on the basis of their total values. They need professionals' information in order to make wise choices to accomplish their purposes.

Bayles, *The Professional-Client Relationship*, in ETHICAL ISSUES IN PROFESSIONAL LIFE, 113, 117-18 (Callahan ed. 1988).

66. Critics of role-differentiation would not favor paternalistic behavior in situations involving vulnerable individuals who lack material power. The paradigmatic case envisioned by the critics who press for moral accountability is that of the large, powerful corporation whose driving motivation of achieving material gain regardless of the costs to individuals, society or the environment needs to be constrained. Granted such irresponsible and rapacious clients surely exist, to make lawyers responsible for directing their energies in more benign directions is simply futile. However, there is a vast middle ground of clients between the all vulnerable and the all powerful. For these clients the role-differentiation reading of the professional standards ignores opportunities for their lawyers to encourage them to take actions mutually beneficial to themselves, their associates and their society without usurping their ultimate capacity and right to make such important value decisions for themselves. Role-differenti-

themselves from morally repugnant representations.⁶⁷ It is essential, therefore, for lawyers to respect the proper boundary between themselves and their clients to avoid intruding on their clients' moral autonomy and to protect their own.

In their treatment of role theory, role-differentiation critics have converted an abstract concept, role, into a thing which not only exists but can engage in practical acts. They have transformed a conceptual, abstract fiction—role—into something real, particularized, and capable of practical action.⁶⁸ However, moral actions depend on the activities of persons, who make choices about what they ought to do in particular circumstances. A person's conception of his or her role will influence these choices, but it is the person, not the role, who makes the choices.

Once the ethical framework of analysis is clarified and it is understood that the role-differentiation thesis mistakenly focuses on persons rather than circum-

ation critics portray a bleak picture of a win-lose situation in which advocacy for clients necessarily is at the expense of innocent and vulnerable third parties as well as society in general. Increasingly, however, thoughtful lawyers are recognizing that it is often possible to achieve better results for clients while, at the same time, generating benefits for other parties to a dispute as well as third parties. This approach is characterized as one which focuses on the interests that underlay positions, separates the people from the issues, and looks for options for mutual gain on the basis of principled resolutions. See, e.g., R. FISHER & W. URY, *GETTING TO YES* (1981); D. LAX & J. SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986).

67. Luban rather cavalierly dismisses concerns about paternalism. He complains that one of the major errors of the "standard conception" in general and moral nonaccountability in particular is to worry that if the lawyer does not adopt the client's ends, more or less as the client herself initially conceives of them, she is being an elitist, a paternalist, or a moral bully. An attempt actively to engage the client in moral dialogue, a transformation of her ends to something the lawyer finds more morally acceptable and vice-versa is viewed as an infringement on the client's autonomy, which the lawyer is supposed to be enhancing.

LAWYERS AND JUSTICE, *supra* note 5, at 167. Thomas Nagel provides a particularly helpful discussion of balancing considerations of autonomy and paternalism:

There are two other types of coercion whose justification seems clear: prevention of harm to others and certain very basic forms of paternalism. In both these types of case, we can make an impersonal appeal to values that are generally shared: people don't want to be injured, robbed, or killed, and they don't want to get sick.

.....

The problematic cases are those in which either the impersonal value to which I appeal to justify coercion would not be acknowledged by the one coerced, or else it conflicts with another impersonal value to which he subscribes but which I do not acknowledge, though I would if I were he.

.....

... [T]he liberal position avoids two contrary errors. To accept as an authoritative impersonal value everyone's interest in doing what he wants to do, for whatever reason . . . is to give too much authority to other people's preferences in determining their claims on us. To accord impersonal weight to our own values, whatever they are . . . is on the other hand not to give others enough authority over what we may require of them.

Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 224-26 (1987). As the nature of law practice continues to change so that attorneys are increasingly caught up in large, impersonal bureaucracies, there is increasing concern with maintaining integrity in lawyering. But this is not a matter that calls for so radical a move as professional adoption of the need for moral accountability for clients' goals. Rather the issue is keeping the management of the large firm focused on its responsibilities as professionals guided by principles outside the market.

68. This transformation of a concept into something real is called reification. Its hypothesized importance to law has been most thoroughly examined by writers generally associated with the critical legal studies movement. See, e.g., Davis, *Critical Jurisprudence: An Essay on the Legal Theory of Robert Burt's Taking Care of Strangers*, 1981 WIS. L. REV. 419, 420-21 n.4, 427-29; Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980). Ironically, William Simon, as well as other role-differentiation critics, are associated with this movement, which has made a fetish of denouncing the rule of law as at best illusory and most likely a deliberately misleading fabrication of those who rule by examining the process of reification in the law.

stances, the foundation for the argument for moral nonaccountability is destroyed. In addition, the Boundaries Principle demonstrates that holding lawyers accountable for the moral consequences of their clients' acts is, in fact, wrong.⁶⁹

B. *Partisanship in Lawyering*

A critical problem for lawyering as a profession is determining just how far loyalty to a client should be carried. As Professor Schwartz puts it: "When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail."⁷⁰ Role-differentiation critics maintain that, according to the "standard conception of lawyering," zealotry is bounded only by the limitations of what is lawful. Moreover, lawfulness is very narrowly defined by these critics. Their arguments for this view are presented first. The following section demonstrates that the established constraints on lawyer zeal have a much broader reach than the critics acknowledge.

1. *The Argument from Partisanship*

As indicated above, role-differentiation critics portray lawyers as legal technicians, unaccountable for the morality of a clients' ends. In addition, they claim that lawyers decide what means to use to achieve their clients' purposes constrained only by evaluations of effectiveness and professional regulations, which are inadequate.⁷¹ Thus, morality as to means is replaced by partisanship. Moreover, role morality is used to justify hyperzealous legal tactics⁷² that may otherwise be immoral. Partisanship is supposed to be a role obligation of lawyering that, according to Luban, "identifies professionalism with extreme partisan zeal on behalf of the client."⁷³ As a consequence, a lawyer's sole obligation in deciding on what tactics to use to further her clients' goals is based only on

69. It should be emphasized, however, that lawyers do have access to a powerful tool in their ability to make use of the law and an accompanying moral obligation to make wise and responsible choices as to whom and what to represent.

70. See Schwartz, *supra* note 18, at 673. Schwartz calls this the "principle of professionalism," which Luban subsumes under Simon's rubric of partisanship. *LAWYERS AND JUSTICE*, *supra* note 5, at 7 n.6.

71.

This principle [of partisanship] prescribes that the lawyer work aggressively to advance his client's ends. The lawyer will employ means on behalf of his client which he would not consider proper in a non-professional context even to advance his own ends. These means may involve deception, obfuscation, or delay. Unlike the principle of neutrality, the principle of partisanship is qualified. A line separates the methods which a lawyer should be willing to use on behalf of a client from those he should not use. Before the lawyer crosses the line, he calls himself a representative; after he crosses it, he calls himself an officer of the court.

Simon 1978, *supra* note 11, at 36-37.

72. Examples of such hyperzeal include making "truthful opposing witnesses look like liars or fools . . .;" fighting "for their client's 'right' to oppress and exploit, if the client wishes it;" defeating "just claims on technicalities if it can be done;" and keeping "information confidential though it means ruination for a hapless third party." Luban, *Introduction*, in *THE GOOD LAWYER* 1-2 (D. Luban ed. 1983).

73. *LAWYERS AND JUSTICE*, *supra* note 5, at xx.

what is most likely to succeed.⁷⁴ Lawyering thus becomes more like a sport than a profession.⁷⁵ All that counts is who wins so long as no rules of the game are broken.⁷⁶ Even on questions of legal strategy, lawyers retain no independent evaluative moral function.

Critics of role-differentiation claim the "standard conception of lawyering" encourages lawyers to use every possible technique at their command so long as it is within the bounds of the law. They believe the profession's ethical standards embolden lawyers to interpret constraints on partisanship as minimal. For instance, Luban dismisses attempts to constrain the excesses of partisanship with notions like good faith. The Code provides: "In his representation of a client, a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by *good faith* argument for an extension, modification, or reversal of existing law."⁷⁷ Luban contends that some lawyers will simply rationalize their behavior by translating good faith into a mere belief "that the argument or contention is up to professional standards of what may acceptably be offered." Others, whom he characterizes as instrumentalist lawyers, will treat good faith "as a manipulable legal term rather than as a moral limit."⁷⁸

74. Postema claims "the principle of partisanship requires the lawyer zealously and with exclusive loyalty to pursue the client's objectives . . ." Postema 1983, *supra* note 17, at 311 n.9.

75. The label "profession" is not used here in the pejorative way it is applied by Simon in his 1978 article. Simon 1978, *supra* note 11. See also positive approaches to law as a profession by Justice O'Connor and Professor Kronman, *supra* note 31.

76. For a text that promotes such a vision of partisanship, see D. NISSMAN & E. HAGEN, *THE PROSECUTION FUNCTION* (1982); for a criticism of such a narrow view of the obligations of lawyering, see the review essay by Belsky, *On Becoming and Being a Prosecutor*, 78 Nw. U.L. REV. 1485 (1984). See generally R. GRUTMAN, *LAWYERS AND THIEVES* (1990); Underwood, *Adversary Ethics: More Dirty Tricks*, 6 AM. J. TRIAL ADVOCACY 265 (1982).

77. CODE, *supra* note 32, DR 7-102(A)(2) (emphasis added). The Rules provide similarly that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a *good faith* argument for an extension, modification or reversal of existing law." RULES, *supra* note 32, Rule 3.1 (emphasis added). Rule 11 of the Federal Rules of Civil Procedure also provides, in part:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a *good faith* argument for the extension, modification or reversal of existing law . . .

FED. R. CIV. P. 11 (emphasis added).

78. LAWYERS AND JUSTICE, *supra* note 5, at 17. This may be a correct characterization of the "instrumental lawyer." The problem is that Luban treats such readers of the professional standards as typical and the paradigmatic example of the kind of attorney to whom the law of lawyering is addressed. Compare the discussion by the major commentators in HAZARD & HODES, *supra* note 51, on Rule 3.1, and its federal judicial counterpart, Rule 11, where the meaning of good faith as a limit on advocacy has been litigated. Hazard and Hodes note the increasing tendency of courts to require lawyers to meet an objective rather than a subjective standard to avoid being sanctioned for frivolousness. A richer understanding of good faith would portray lawyers as recognizing the tremendous responsibility they carry when they are given such wide discretion to decide on their own behavior. By becoming lawyers they understand they have forgone various opportunities to take actions that might well be permitted were law not a profession (as well as a business) and if they did not have duties to the legal system and the general society in addition to their clients. Cf. S. BURTON, *JUDGING IN GOOD FAITH* (forthcoming); Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith," 94 HARV. L. REV. 369 (1980). Although in the last decade and a half the legal profession has become increasingly responsive to the market, one of the primary forces responsible for these developments, the Supreme Court, has repeatedly affirmed the special obligations attendant on law as a profession. For example, in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), the Court upheld the discipline of a lawyer for soliciting clients in person for pecuniary gain. On the same

The argument from partisanship does not recognize that curbs on zealotness may depend on the setting in which lawyering may occur. Hyperzeal is the postulated requirement regardless of whether lawyers are advocating for a client in a courtroom, negotiating with another lawyer, or counseling clients in their private offices. Their representation in any of these settings, according to "the standard conception," is bridled only by strategic considerations and not by concern for personal or social norms of behavior or by obligations to the legal system itself.⁷⁹

Moreover, according to the "ideology of advocacy," lawyers have no responsibility to refrain from undermining the moral authority of law by avoiding the use of tactics that may be detrimental to this authority.⁸⁰ Thus, they should use whatever loopholes they can find in the law to promote their clients' ends regardless of the consequences to respect for the law's authority. The principle of partisanship turns the "lawyer into a mere instrument of the client's interests."⁸¹ To treat "law and legal arguments as mere instruments . . . undermines the authority of the law."⁸² Instrumentalist lawyers are said to display contempt for the law.⁸³ For Luban, this is the most significant cost of partisanship since the authority of law depends on its generalizability. Those who act as partisans and seek to take advantage of every legal loophole that might conceivably be available to a client undermine the credibility of the law itself as seeking to be both just and fair and hence demean the moral authority of the law.

Although parasitic on the principle of moral nonaccountability, the principle of partisanship, interpreted by role-differentiation critics as requiring hyperzeal in selecting the means used to achieve the goals of a legal representation, contributes its own set of ills to lawyering. Because partisan advocacy is unconstrained by moral considerations, it results in adversarial excesses that themselves serve to undermine the legitimacy of the law. A possible metaphor for understanding the costs of hyperzeal to the respectability of law would be to

day as the *Ohralik* decision, however, the Court rejected the state's punishment of a lawyer who sought to further political and ideological goals through solicitation by mail. *In re Primus*, 436 U.S. 412 (1978).

79. Role-differentiation critics simply ignore provisions in the standards requiring lawyers to preserve the integrity of the legal system itself and their obligations to serve as officers of the court. *See, e.g.*, rules like Rule 3.3 on Candor Toward the Tribunal and Rule 3.4 on Fairness to Opposing Party and Counsel. EC 9-6 of the Code proclaims: "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts . . ."

80. Luban argues for justifying an obligation to obey the law, *i.e.*, the moral authority of law, on the basis of the "generality requirement."

To use a law for its loophole value is to treat it as though the loophole is its central case and reflects the law's real purpose. And if that is the dominant way the law is used, its legitimate purpose becomes irrelevant, practically speaking. Functionally, the law serves to favor special interests, and therefore it fails the generality requirement. Abusive tax shelters are a paradigmatic illustration. . . . [T]he instrumentalist lawyer seems indifferent to the distinctive feature that alone makes a law more than coercion: its generality, the fact that it implicates all in the community and shapes their condition.

LAWYERS AND JUSTICE, *supra* note 5, at 48-49. For some examples of lawyers acting just as role-differentiation critics claim, see the description of the merger and acquisition specialist, Joseph Flom, and his associates during the Conoco takeover in P. HEYMANN & L. LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 106 (1988).

81. LAWYERS AND JUSTICE, *supra* note 5, at 13.

82. *Id.* at 16.

83. *Id.* at 17.

compare the sports of tennis and ice hockey. Recall that when John McEnroe had temper tantrums on the tennis court and threw his racket at the referee for making calls against him, the crowd booed and commentators considered him a spoiled brat who was detracting from the high standards of sportsmanship required in tennis. However, ice hockey players are expected to engage in whatever brutality they can get away with on the ice, and the game is considered a rough sport where sportsmanship bows to winning at all costs. The kind of partisanship envisioned as central to lawyering turns law into ice hockey.

2. Critique of the Argument from Partisanship

The role-differentiation thesis claims that lawyers determine the means to pursue their clients' goals constrained only by concern for effectiveness. They serve as amoral or even immoral legal technicians and often engage in hyperzeal since winning is their sole concern. Role-differentiation critics, however, mischaracterize the reach of zealotry in partisanship by treating hyperzeal as paradigmatic of what constitutes good lawyering in their "standard conception." Thus, they fail to read the Code requirement that lawyers shall represent clients zealously⁸⁴ either in its entirety or in conjunction with its mate, which requires lawyers to represent a client within the bounds of the law.⁸⁵ Thus, they simply ignore the fact that the Code, for instance, specifically recognizes that zealotry permits lawyers to avoid offensive tactics,⁸⁶ to exercise their professional judgment to waive or fail to assert a right or position of their client,⁸⁷ and to refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.⁸⁸

In fact, the professional standards propose *bounded zeal* rather than hyperzeal as paradigmatic of good lawyering. An attorney's zeal in client representation is bounded in three ways. It is explicitly constrained by professional ethical standards and local, state and federal rules that regulate lawyering directly. Less directly, it is limited by substantive law such as the law of torts that determines what constitutes defamation or intentional infliction of emotional distress. Most significantly, zeal is bounded by the fact that its justification, client loyalty, is not unlimited. Although loyalty is a central value of lawyering, it is not preemptive of all other values. For example, attorneys must be equally protective of the integrity of the legal system itself by fulfilling obligations as

84. CODE, *supra* note 32, DR 7-101.

85. CODE, *supra* note 32, DR 7-102. DR 7-102 describes the standard for representing a client as requiring zealotry, and (A)(1) provides initially that "[a] lawyer shall not intentionally: fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules." The "ideology of advocacy" supposedly sets no constraints on a lawyer's choice of means to implement zealous advocacy at this point. However, DR 7-101 (A)(1) concludes with the phrase "except as provided by DR 7-102(B)."

86. CODE, *supra* note 32, DR 7-101(A)(1).

87. CODE, *supra* note 32, DR 7-101(B)(1).

88. CODE, *supra* note 32, DR 7-101(B)(2).

officers of the court which may directly compromise client interests.⁸⁹ Role-differentiation critics mischaracterize client loyalty as subservience to the client's will.⁹⁰ However, loyalty is "faithful adherence to one's promise."⁹¹ It is the content of the promise of representation, therefore, that determines the reach of client loyalty.

The promise requires exclusivity of representation, devotion and competence, and a commitment to confidentiality.⁹² The pledge of exclusivity entails the core commitment to avoid conflicts of interest in that representation. Lawyers avoid such conflicts of interest by excluding as reasons for action consideration of their own interests or the interests of third parties in determining what course of action to take on behalf of a client. Loyalty to clients is a value embedded in a larger context. It does not preclude lawyers from considering and discussing with clients their obligations to justice and to the legal system.⁹³ Moreover, the ethical standards of the profession are quite clear that lawyers not only must be loyal to their clients, but they must also protect the integrity of the legal system itself.⁹⁴

89. Thus, Rule 3.1 requires lawyers to bring only nonfrivolous claims. Rule 3.3 requires attorneys to be candid in their dealings with a tribunal while Rule 3.4 calls for fairness towards an opposing party and counsel. See RULES, *supra* note 32, Rules 3.1-4.

90. The principle of partisanship turns the "lawyer into a mere instrument of the client's interests." LAWYERS AND JUSTICE, *supra* note 5, at 13.

91. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 480 (1981).

92. RULES, *supra* note 32, Rules 1.1, 1.2, 1.6, 1.7, and CODE, *supra* note 32, DR 6-101(A)(1), DR 5-101(A), DR 5-105(A). As the Boundaries Principle holds, the promise of loyalty as expressed through maintaining confidences does not obliterate the lawyers' moral independence and condone lying. See S. BOK, LYING 154-73 (1979).

93. Particularly when lawyers act as advisers about future actions rather than as advocates in litigation about past activities, the standards emphasize the need for a more balanced partisanship. See, e.g., CODE, *supra* note 32, EC 7-3 comment at n.9.

Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser . . . The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal advisor in a line of conduct that is immoral, unfair, or of doubtful legality. In saving himself from this unworthy involvement, the lawyer . . . must be at pains to preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do.

Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1161 (1958). The more recently adopted and now dominant Rules divide the professional obligations of the lawyer as counselor from that of the lawyer as advocate. Rule 2.1, Advisor, provides that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." RULES, *supra* note 32, Rule 2.1. Role-differentiation critics are not content to merely weaken the loyalty to client obligation when they insist on moral accountability which requires being responsible to third parties and society as a primary obligation of lawyering. In so doing, they reorder priorities central to any essentially dyadic relationship. It is the kind of reordering we criticize in those who decide to become parents and then place their children's interests after concern for their work. It is entirely appropriate for the lawyer to share his or her concerns with the client but it would be presumptuous and intrusive for the lawyer to assume that once the client has had the opportunity to share the lawyer's reflections that the client should not be free to decide to balance reasons differently and determine on a course of action which might not be the lawyer's most valued option. If the lawyer feels strongly enough, withdrawal from representation is usually an option in civil cases.

94. Rule 3.3, for example, requires candor toward the tribunal. Conditions are now set for the classic confrontation between competing loyalties—loyalty to clients by not revealing their confidences (Rule 1.6) including their intention to lie to a tribunal and loyalty to the profession and the legal system by protecting the tribunal from lies in order to maintain its integrity. The Code and Rules resolve the confrontation differently. The Rules, which control professional practice in the majority of the states, give precedence to the duty of candor and thus loyalty to the tribunal trumps the value of client loyalty so long as revelation of a client confidence will keep the "proceedings . . . as free of fraud as the lawyer can reasonably make them . . ." HAZARD & HODES, *supra* note

Loyalty also involves a pledge by lawyers to devote their "intellectual, emotional, and professional resources in order to further the client's interests."⁹⁵ This aspect of loyalty is captured by the requirements of competence and confidentiality in a legal representation. Making a promise to another person gives extra weight to considering client interests in deciding what to do, but it does not exclude all other reasons for action. The promise of competent and confidential representation does not foreclose a lawyer from considering and acting on reasons that may outweigh the obligation of loyalty. On the one hand, attorneys cannot properly decide to violate their promise of competence because they can make a lot of money by representing a client in an area of law about which they are totally ignorant.⁹⁶ On the other hand, they should not and need not adhere to their promise of confidentiality when their client seeks to make them an accomplice to perjury or to the death of an innocent person.⁹⁷ One can debate the scope of overriding considerations, but the Code and Rules clearly qualify the duty of loyalty to recognize requirements of social responsibility.

Lawyering does not require the kind of hyperzeal that characterizes the principle of partisanship. The role-differentiation thesis treats examples of hyperzeal by lawyers *in practice* as constitutive of the professional ethic.⁹⁸ They proffer extreme examples of partisanship and amorality as paradigmatic of the profession's preferred practices.⁹⁹ Such examples can be found and so do have some descriptive accuracy.¹⁰⁰ But the ethic of the profession is not coincident

51, at 355. The lawyer's obligation is to protect the integrity of the process, but the "advocate is not transformed into a policeman enforcing truthfulness in litigation." *Id.* at 355.

95. C. WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 56, at 146.

96. In fact, Schneyer has argued persuasively that the client-regarding behavior labeled partisanship by the role-differentiation critics rather than being a manifestation of the zealotry required by the "standard conception" is more readily understood as a result of "the common financial, psychological and organizational pressures of law practice." Schneyer, *supra* note 9, at 1543.

97. See generally *infra* text accompanying notes 210-19.

98. Schneyer's review of the empirical evidence, spotty as it may be, demonstrates that the critics haven't painted a fair picture of attorneys. He concludes: "[T]hese empirical studies show that lawyers in their various roles do not as a matter of course do things for clients that are contrary to the lawyers' personal values or harmful to the legitimate interests of third parties." Schneyer, *supra* note 9, at 1550.

99. In fact, of course, hyperzeal is not paradigmatic of practice at all. Very little research has been done in this area, but what little has been reported suggests a far more complicated picture of lawyer practices than the role-differentiation critics claim. For instance, Schneyer reported on an unpublished study by sociologist Donald Landon of 200 trial lawyers who practice in small communities. Rather than finding evidence of hyperzeal, the study found the lawyers were "reluctant to pursue their clients' initial aims without considering the appropriateness of these aims. Indeed, they often approached their cases as mediators. . . . Landon's advocates were unwilling to use sharp tactics to gain an advantage over a lawyer they knew and regularly dealt with." Schneyer, *supra* note 9, at 1546-47.

100. Luban, *e.g.*, quotes Judge Miles Lord's remarks to the officers (and presumably their lawyers as well) in the Dalkon Shield products liability case:

[W]hen the time came for these women to make their claims against your company, you attacked their characters, you inquired into their sexual practices and into the identity of their sex partners. You exposed these women and ruined families and reputations and careers in order to intimidate those who would raise their voices against you. You introduced issues that had no relationship whatsoever to the fact that you planted in the bodies of these women instruments of death, of mutilations, of disease.

LAWYERS AND JUSTICE, *supra* note 5, at 152. Luban cites a well known casebook in professional responsibility for this quotation, S. GILLERS & N. DORSEN, *REGULATION OF LAWYERS* 609 (1985). In their second edition, Gillers and Dorsen include an excerpt from a book by Morton Mintz on the Dalkon Shield case in a section on *Ethics in Advocacy and Hardball*. They conclude the section by asking: "Does a client have a right to have his or her counsel engage in such tactics? Short of creating new sanctions for this new kind of conduct, can the bar realisti-

with the practice of its least honorable members. The prevailing ethic depends on what conduct is criticized.¹⁰¹ It is a mistake to treat what some lawyers may generally do as characteristic of the accepted legal ethic. It would be like taking the empirical fact of an increase in medical malpractice lawsuits as evidence for a new normative principle that the medical profession no longer believed that doctors should take due care in the treatment of their patients.¹⁰² Hyperzeal is

cally expect to reverse the 'race to the cellar'?" S. GILLERS & N. DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 529 (1989) [hereinafter GILLERS & DORSEN]. Query whether such a formulation of the issue does not contribute to fostering hyperzeal? For empirical support for the proposition that the client-above-all perspective shapes the way lawyers resolve ethical issues, see K. MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK (1985). *But see* Schneyer, *Getting From (Is) to (Ought) in Legal Ethics: Mann's Defending White Collar Crime*, 1987 AM. B. FOUND. RES. J. 903. *See also* sociologist Douglas Rosenthal's study of personal injury lawyers for evidence of the use of hyperzeal in encouraging clients to lie about the extent of their injuries, D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 45 (1974); the report of former litigator Wayne Brazil on failures to report adverse legal authority to the court, Brazil, *The Attorney as Victim: Toward More Candor about the Psychological Price Tag of Litigation Practice*, 3 J. LEGAL PROF. 107, 111 (1978). A. Goldman, who is also a role-differentiation critic, suggests in his book on professional ethics, which includes a chapter on legal ethics, the example of the relentless cross-examination of a rape victim about her prior sexual conduct in order to degrade and demoralize her, A. GOLDMAN THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 102-03 (1980).

101. CONCEPT, *supra* note 42, 52-56. For criticism of teaching an unbridled advocacy model, see Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69 (1982).

102. Of course there are some lawyers who engage in tactics that display hyperzeal who would claim that such behavior is required by their professional obligations. "Not only do most criminal defense lawyers view their role as requiring unwavering loyalty to their clients, but this client-above-all perspective shapes their resolution of hard ethical issues." Uphoff, *The Role Of The Criminal Defense Lawyer In Representing The Mentally Impaired Defendant: Zealous Advocate Or Officer Of The Court?*, 1988 WIS. L. REV. 65, 66. Nonetheless, the leadership of the American Bar Association sees lawyers as having a much more complex set of ethical obligations than simple client partisanship. For example, in reflecting on the meaning of professionalism, L. Stanley Chauvin, Jr., President of the ABA for 1989-1990, recently wrote:

The idea of professionalism embraces a higher standard of conduct than the minimums set forth in the ABA Model Rules of Professional Conduct and in the ethics codes of the various states. Professionalism means we accept and abide by lifelong obligations that come with the practice of law—obligations to clients, to the courts, to our brothers and sisters at the bar, to public and private employers, to opposing counsel and parties, and to the public in general. But if we're going to retain the right to call ourselves professionals, we have to go beyond what the code requires. We have to emphasize the spirit of the law and aspire to a higher standard. There is a great tradition in this profession that needs to be preserved. We will preserve that tradition and emphasize our roles as problem solvers to the same degree that we maintain our love for truth and justice.

Meaning of Professionalism, 1 PROF. LAW. 16 (Summer 1989) (interview with L. Stanley Chauvin, Jr.). Moreover, even the basic controls on zealotry required by the Model Rules, for example, are far more constraining than popular presentations of "lawyers in action" like a television program such as "L.A. Law" might portray. The premier authorities on interpreting the Rules, Geoffrey Hazard and William Hodes, write:

Part 3 of the Model Rules sets forth an important list of special rules for advocates. Significantly, almost all of them are *limitations* upon an advocate's conduct. Part 3 draws heavily upon Canon 7 of the Code of Professional Responsibility, copying verbatim many of its specific limitations, but also capturing its essential teaching that lawyers must represent clients "zealously," but "*within* the bounds of the law." The emphasis on limitations is not hard to explain. In the ethos of partisan representation, American lawyers don't need any special exhortations to be zealous when acting as advocates. To use one of many sports images that may be applied to courtroom lawyers, they are like fighters answering the bell. In light of this predisposition, the drafters of both codes realized that lawyers need to be reminded of the other half of their duties as advocates—their duty to the court, the public, and even their adversaries. It is not true that anything goes," [sic] even hardball is played according to rules. Or as Robert Kutak once wrote, "it may be a dog-eat-dog world, but one dog may eat another only according to the rules. . . ." The justification for imposing additional limitations on advocacy—which concededly can work to the disadvantage even of clients who have engaged in no wrongdoing is twofold. First, society at large has an interest in maintaining the efficiency of its tribunals. Second, society has an interest in assuring that its most coercive processes are, and are perceived to be, fair. The idea that lawyers have an enforceable duty to be 'fair' to

regularly criticized by leading members of the legal profession and punished by the judiciary.¹⁰³ Sharp practices are neither condoned nor encouraged by the standards of the profession.¹⁰⁴

The role-differentiation thesis is also self-contradictory. It characterizes lawyers as amoral practitioners of hyperzeal who place client loyalty above all other values. However, the capacity to assume the duty of loyalty to another person such as a client requires the agent to have the capacity for moral action. Persons who can neither perceive what they ought to do nor commit themselves to that required action, lack the capacity to create a professional relationship of attorney to client. Yet, the thesis argues that as a consequence of the principle of partisanship, lawyers are deprived of their moral personhood and serve solely as legal technicians. Treating lawyers as mere instruments of a client's will vitiates the essential quality that founds the capacity for loyalty at all. Instruments of another's will cannot even engage in making the promise of loyalty. The instrumental characterization denies lawyers the very moral autonomy constitutive of personhood that is the predicate for being able to promise to be loyal as a legal representative.¹⁰⁵ It is not possible to serve merely as the instrument of

nonclients contradicts the simplistic conception of the lawyer as hired gladiator, but it has always been a fundamental theme of the law of lawyering, as opposed to professional mythology.

HAZARD & HODES, *supra* note 51, at 328-328.1 (1988 Supp.) (emphasis in original).

103. Thus, at an annual retreat to examine selected issues in criminal justice organized by the Association of the Bar of the City of New York, Professor Richard Uviller of Columbia Law School and a former prosecutor criticized the defense bar and urged his listeners "not to allow mistaken or exaggerated notions of the role requirements imposed upon us by the adversary model to deprive us of the central feature of our professional identity: the capacity for and the sound exercise of judgment." GILLERS & DORSEN, *supra* note 100, at 539 (1989). At the same meeting, Professor Anthony Amsterdam of New York University Law School, who has served as both a prosecutor and a defense lawyer, detailed the aspects of prosecutorial behavior he found "inappropriate or questionable." *Id.* These included the tendency to see the prosecutorial role "as nothing but that of the legal technician or the power-broker waging adversarial combat." *Id.* The Appellate Division of the Supreme Court of New York took the law firm of Sullivan and Cromwell to task in a series of blistering opinions for its hyperzeal in knowingly misusing the state's discovery rules to obtain the opposing party's confidential information in a surrogate's court case and disqualified the firm from continuing its representation. *In re Beiny*, 129 A.D. 2d 126, 517 N.Y.S.2d 474 (1st Dept. 1987); *In re Beiny*, 132 A.D. 2d 190, 522 N.Y.S.2d 511 (1st Dept. 1987); appeal dismissed 71 N.Y.2d 994, 524 N.E. 2d 879, 529 N.Y.S.2d 277 (1988). See also *Campbell Indus. v. M/V Gemini*, 619 F.2d 24 (9th Cir. 1980) (affirmed decision of trial court to disqualify plaintiff's experts from testifying for defense because ex parte discussions violated discovery rules); *Kiefel v. Las Vegas Hacienda, Inc.*, 39 F.R.D. 592 (N.D. Ill. 1986), *aff'd*, 404 F.2d 1163 (7th Cir. 1988) (intentional cross-examination to mislead jury to believe testimony would be impeached, when in fact no impeachment followed justified new trial and assessment of costs and attorney fees against abusing defendant and defense counsel).

104. See Schneyer, *supra* note 9, at 1551-57.

105. For example, Postema claims that:

. . . the standard conception [of lawyering] calls for a sharp separation of private and professional morality The conception requires a public endorsement, as well as private adoption, of the extreme strategy of detachment The good lawyer leaves behind his own family, religious, political, and moral concerns, and devotes himself entirely to the client. But since professional integrity is often taken to be the most important mark of personal integrity, a very likely result is often that a successful lawyer is one who can strictly identify with this professional strategy of detachment The maximal strategy [of identification with the professional role] yields a severe impoverishment of moral experience. The lawyer's moral experience is sharply constrained by the boundaries of the moral universe of the role. But the minimal strategy [of distancing oneself from one's professional activities] involves perhaps even higher personal costs. Since the characteristic activities of the lawyer require a large investment of his moral faculties, the lawyer must reconcile himself to a kind of moral prostitution . . . he is alienated from his own moral feelings and attitudes and indeed from his moral personality as a whole [I]t . . . involves a substantial element of self-deception [T]he lawyer who must detach professional judgment from his own

another's will and still retain a moral personality capable of entering into a relationship of loyalty to another. To institute and to maintain a lawyer-client relationship depends on lawyers' moral capacity to assume the responsibilities entailed by the promise of representation.

II. THE JURISPRUDENTIAL FRAMEWORK

The prior sections of this Article have demonstrated that the role-differentiation critics have seriously misconceived the standard conception of lawyering articulated in the ethical standards of the profession. This next part will demonstrate that one of the basic reasons for this error lies in their mistaken conception of the jurisprudence of legal positivism,¹⁰⁶ which they correctly see as the dominant legal philosophy of American law. Their conception of legal positivism will be presented first followed by a critique of their argument from legal positivism.

A. *The Argument from Legal Positivism*

William Simon, a leading role-differentiation critic, best explains the basic jurisprudential framework adopted by the role-differentiation critics. He contends that the dominant view of lawyering in American society was provided by legal positivism. Simon introduces his interpretation of positivism and then attacks this conception.¹⁰⁷ Simon's understanding of "positivist legal theory" has three main features: (1) it "emphasizes the separation of law from personal and social norms";¹⁰⁸ (2) it connects law "with the authoritative application of force";¹⁰⁹ and (3) it posits "the systematic, objective character of law."¹¹⁰ For our purposes, the most important point is that legal positivism is supposed to separate law and morals and to privilege law.¹¹¹ Law is understood as a descriptive set of statements about what the law *is*, not a prescriptive set of statements about what the law *ought to be*. The separation of law and morals is seen as complete, leaving law as a discourse devoid of normativity.¹¹² That is, law is

moral judgment is deprived of the resources from which arguments regarding his client's legal rights and duties can be fashioned.

Postema 1980, *supra* note 7, at 78-79. *But see* Kronman's view of detachment, *supra* note 31, at 853.

106. Professor Postema should be exempted from this claim. *See* Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982).

107. Simon 1978, *supra* note 11. The paper is both lengthy and complicated. I do not attempt to evaluate the article in its entirety here. For its impact on other role-differentiation theorists, see *LAWYERS AND JUSTICE*, *supra* note 5, at 173 n.34, 329 n.21. For its continuing relevance in characterizing positivism, note its inclusion in the very recent casebook by HAZARD & KONIAK, *supra* note 10, at 27.

108. *Id.* at 39.

109. *Id.*

110. *Id.*

111. *Id.* Simon acknowledges that his conception of legal positivism is a pastiche and simplification that lumps together such diverse philosophers of law as Austin, Hart, Holmes and Kelsen. *Id.* at 39 n.24.

112. Distinguishing between assertions that are normative and those that are descriptive or empirical is central to law but rarely addressed. *But see* Stier, *Privileging Empiricism in Legal Dialogue: Death and Dangerousness*, 21 U.C. DAVIS L. REV. 271 (1988). Herewith, an illustration—when the Supreme Court holds that after viability, a state may intervene to foreclose a woman from choosing to abort, it is making a normative statement. It is asserting that once a fetus is viable a state ought to have the right to protect its interests even though such an intervention burdens the woman's right to make procreative choices. There is no experiment that can be done to

emptied of all moral considerations not specifically incorporated into the official standards and related legal enactments.

Law, according to Simon's interpretation of legal positivism, is supposed to *supplant* morality. Consequently, a lawyers' ethical duties are determined solely by legal and never by general moral considerations. The law of the profession, as reflected in the ethical standards of the profession, primarily the Code and the Rules,¹¹³ are interpreted on this basis. These standards are supposed to be the exclusive source of ethical professional guidance, devoid of moral content. When they are unclear or leave discretion,¹¹⁴ accordingly, the lawyer is supposed to be free of further moral responsibility.¹¹⁵

Simon's conception of the positivist perspective on lawyering, which he terms the "ideology of advocacy,"¹¹⁶ has a number of significant consequences for the life of a lawyer. Excluding considerations of morality from lawyering turns lawyers into mere predictors of what courts will do: "The lawyer's various other services as advocate are all ancillary to this basic task of prediction. In litigation, he simply sets in motion the system which vindicates (or refutes) his prior predictions."¹¹⁷ As a kind of primitive social scientist, lawyers merely examine what courts did in the past and use this information to calculate what they are likely to do in the future. The "ideology of advocacy" reduces legal advocacy to doing whatever will be effective rather than what is right in law or morals. Therefore, lawyers use moral rhetoric solely in the interest of persuasion and without regard to considerations of justice. The truth or rightness of what is said becomes irrelevant. The only issue is whether the lawyer can convince the judge to adopt her point of view. The "ideology of advocacy" directs lawyers to detach themselves from responsibility for the moral consequences of their clients' goals. Positivist lawyers, as characterized by Simon, thus have no duty to evaluate the justice of their clients' ends nor bear any responsibility for any moral harms caused by their efforts to achieve those ends. Lawyers function as legal technicians whose sole obligation is to accomplish their clients' purposes.¹¹⁸

determine whether or not this view is correct. It is based simply on considerations of policy, *e.g.*, viability provides a "bright line" boundary, or principle, *e.g.*, "it is wrong to abort post-viable fetuses because of their close resemblance to babies." On the other hand, when the Supreme Court requires that women who are minors can be restricted in ways adult women cannot because of differences in their capacities to make procreative choices unaided by their parents, the Court is making a descriptive statement, whose truth or falsity can be determined by collecting the relevant empirical data.

113. See *supra* note 33.

114. Simon in his 1988 article empties the standards even further by claiming they do not even permit discretion but only openings for the exercise of private norms which are standardless and nonreviewable. Simon 1988, *supra* note 11, at 1090.

115. This accounts for the criticisms discussed *supra* notes 34-69, 84-105 and accompanying text. The principle of moral nonaccountability and the principle of partisanship.

116. See Simon 1978, *supra* note 11, *passim*.

117. *Id.* at 41.

118. "[I]t is often appropriate and many times even obligatory for . . . the lawyer [to be] an amoral technician." Wasserstrom, *supra* note 13, at 5-6.

B. Critique of the Argument from Positivism

Simon's role-differentiation critique, followed by most other critics, is founded on this mistaken understanding of legal positivism.¹¹⁹ It is the premise that leads to characterizing the ethical standards of the profession as effectively legislating a conception of lawyering devoid of morality. By demonstrating that the jurisprudential foundation of the role-differentiation thesis is essentially flawed, this section will show that the resulting edifice—the "standard conception of lawyering"—cannot be maintained.

The central tenet of role-differentiation jurisprudence—that "the ideology of advocacy" posits a total divide between law and morals—is simply mistaken. Rather, legal positivism asserts that there is no *necessary* connection between law and morals—not that there is *no* connection.¹²⁰ Positivists from Bentham to Austin to Hart to Raz insist that law should be and often is moral.¹²¹ But law's failure to be moral does not make it something other than law. As Hart wrote in his definitive statement:

What both Bentham and Austin were anxious to assert were the following two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.¹²²

Of course entire legal regimes have existed and do exist where law has little to do with morals. Legal regimes such as the Nazi rule in Germany and the now disintegrating system of apartheid in South Africa are evil legal systems, but for positivists they are legal systems, nonetheless.¹²³ Far from deprivileging

119. Simon 1978, *supra* note 11, at 39-42. Simon is in good company in making this error since H.L.A. Hart in a footnote points out the recantation of Karl Llewellyn:

In the first edition of *THE BRAMBLE BUSH*, Professor Llewellyn committed himself wholeheartedly to the view that "what these officials do about disputes is, to my mind, the law itself", and that "rules . . . are important so far as they help you . . . predict what judges will do. . . . That is all their importance, except as pretty playthings." In the second edition he said that these were "unhappy words when not more fully developed, and they are plainly at best a very partial statement of the whole truth. . . . [O]ne office of law is to control officials in some part, and to guide them even . . . where no thoroughgoing control is possible, or is desired [T]he words fail to take proper account . . . of the office of the institution of law as an instrument of conscious shaping"

H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 71 n.40 (1983) (citations omitted) [hereinafter *ESSAYS*]. Simon has yet to recant.

120. *CONCEPT*, *supra* note 42, at 181-207; *ESSAYS*, *supra* note 119, at 49; *AUTHORITY*, *supra* note 38, at 37-163.

121. Hart points out that "Austin spoke of the 'frequent coincidence' of positive law and morality and attributed the confusion of what law is with what law ought to be to this very fact." *ESSAYS*, *supra* note 119, at 54 n.18 (quoting J. AUSTIN, *THE PROVIDENCE OF JURISPRUDENCE DETERMINED* 162 (Library of Ideas ed. 1954)). Moreover, Hart notes that "neither Bentham nor his followers denied that by explicit legal provisions moral principles might at different points be brought into a legal system and form part of its rules, or that courts might be legally bound to decide in accordance with what they thought just or best." *Id.* at 54-55.

122. *ESSAYS*, *supra* note 119, at 55.

123.

A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them. It may be conceded that the German informers, who for selfish ends, procured the punishment of others under monstrous laws, did what morality forbade; yet morality may also demand that the state should punish only those who, in doing evil, did what the

morals, positivism's effort to separate the law as it is from the law as it ought to be creates a standpoint from which to criticize the law when it is unjust.¹²⁴

For a legal positivist, law and morals can have three significant relationships relevant to the present discussion. First, to a significant extent law and morals may overlap with one another. Thus, the law against murder parallels an almost identical moral prohibition. Second, the law may incorporate moral concepts and standards by express reference. For example, American criminal law generally requires blameworthiness for conduct to be subject to criminal penalties.¹²⁵ Third, the law may leave a person with discretion together with a permission to use that discretion for moral reasons. State bar committees on admissions to practice have such discretion in the "good moral character" requirement.¹²⁶

The official standards of professional ethics have moral content in all three ways. First, both the moral law and the professional law generally prohibit stealing. The standards do not simply declare "thou shalt not steal" but carefully limit the conditions under which an attorney may, for example, engage in financial dealings with a client.¹²⁷ They copy and elaborate on a moral principle.

state at the time forbad. This is the principle of *nulla poena sine lege*. If inroads have to be made on this principle in order to avert something held to be a greater evil than its sacrifice, it is vital that the issues at stake be clearly identified. A case of retroactive punishment should not be made to look like an ordinary case of punishment for an act illegal at the time. At least it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law, that this offers no disguise for the choice between evils which, in extreme circumstances, may have to be made.

CONCEPT, *supra* note 42, at 207.

124.

Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose the lesser of two evils must be grasped with the consciousness that they are what they are. The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another. . . . This is surely untrue. . . . If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted. . . . [W]hen we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.

ESSAYS, *supra* note 119, at 77-78.

125. Thus, strict liability crimes are rare since such crimes impose liability without fault. W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 242-43 (1986).

126. Thus, the Code of Recommended Standards for Bar Examiners provides that the lawyer licensing process is incomplete if only testing for minimal competence is undertaken. The public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers.

A Review of Legal Education in the United States, Fall, 1989, Law Schools and Bar Admission Requirements 72 (1990) (A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR).

127. For example, DR 5-104(A) provides that lawyers "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." CODE, *supra*

Second, the duty of loyalty exemplifies a requirement of professional ethics that arguably incorporates morals into the official rules. Thus, the good person/good lawyer question that is the foundation for role-differentiation analyses of professional ethics may as readily stem from conflicts between different moral principles as from conflicts between reasons for action derived from morals and from law. Which kind of conflict is at issue may simply be a function of the terms of analysis. For instance, a conflict between the moral principle, do not do harm, and the legal principle, be loyal to one's client, can as readily be characterized as a conflict between two moral principles, do not do harm and keep one's promises.

Third, much of both the Code and the Rules provide lawyers with opportunities to decide for themselves whether or not to take a particular action. For example, the exercise of discretion is provided for in the standards regarding withdrawal from representation.¹²⁸ Perhaps the aspect of the standards that most dramatically illustrates the centrality of permissiveness and the opportunity for exercising one's own moral judgments relates to the question of revealing the intentions of a client to commit a future crime. Both the Code, expansively,¹²⁹ and the Rules, more narrowly,¹³⁰ permit such revelations at the discretion of the attorney. Role-differentiation critics, by treating the official standards of professional ethics as exclusive standards, regard them as functioning as mandatory legal rules without room for the exercise of personal, relevant moral judgments. But many are permissive and thus allow a role for morality in their application.

Positivism's insistence that law and morality inhabit conceptually independent yet often related domains preserves useful distinctions among law, politics and morals which help make it possible for us to function as a pluralistic democracy.¹³¹ Thus, for example, women who are religious Catholics can decide for themselves not to have an abortion because they feel personally that such a

note 32, DR 5-104(A). The Rules are more elaborate than the Code in seeking to limit and control financial transactions between attorney and client. See, e.g., RULES, *supra* note 32, Rule 1.8, which among other things, at (c) flatly prohibits a lawyer from writing a will which might benefit the lawyer unless the lawyer is related to the testator.

128. Thus section (b) of Rule 1.16 provides for permissive withdrawal under a range of circumstances including that "(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." RULES, *supra* note 32, Rule 1.16(b)(3). Comparable provision is made in the Code. CODE, *supra* note 32, DR 2-110(c).

129. DR 4-101(C)(3) provides that a lawyer "may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." CODE, *supra* note 32, DR 4-101(C)(3) (emphasis added). Notice that the option of revelation exists regardless of the seriousness of the proposed crime.

130. Rule 1.6(b)(1) provides that a "lawyer may reveal [confidential] information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." RULES, *supra* note 32, Rule 1.6(b)(1).

131. Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 246 (1985).

[T]rue liberalism requires . . . a distinction between what justifies individual belief and what justifies appealing to that belief in support of the exercise of political power . . . [L]iberalism should provide the devout with a reason for tolerance.

[T]here is a highest-order framework of moral reasoning . . . which takes us outside ourselves to a standpoint that is independent of who we are.

[W]hen we look at certain of our convictions from outside, however justified they may be from within, the appeal to their truth must be seen merely as an appeal to our beliefs, and should be treated as such unless those beliefs can be shown to be justifiable from a more impersonal standpoint.

decision would be morally wrong while at the same time recognizing and accepting the legal right of other women to make such choices without state interference.¹³²

Far from deprivileging morals, positivism's effort to separate the law as it is from the law as it ought to be creates a standpoint from which to criticize law when it is unjust. It does not confuse law with good law. Positivism, just because it does separate law and morals and distinguishes law from *good* law, encourages the thoughtful lawyer to ask, "even though the law permits me to do this action, what *ought* I to do?"¹³³ If one regularly decides one ought to act contrary to some particular law of the profession; or if some standard provides reasons for action that cannot be justified, then that law needs to be changed. Positivism simply does not prescribe a blind adherence to the law, as the "ideology of advocacy" contends. Rather, the standpoint of criticism offered by separating law and morals can lead to attempts to reform the professional standards and to principled disobedience. It also gives lawyers the capacity to decide to withdraw from a morally repugnant representation or even from the profession itself. Positivism would not preclude lawyers, and in some circumstances might even encourage them, to foment a professional revolution.

Sometimes lawyers and the profession make mistakes and deserve criticism, but critics of the role-differentiation thesis do not make such a narrow criticism. They impugn the morality of professionalism itself by claiming that

We accept a kind of epistemological division between the private and the public domains: in certain contexts I am constrained to consider my beliefs merely as beliefs rather than as truths, however convinced I may be that they are true, and that I know it. This is not the same thing as skepticism. Of course if I believe something I believe it to be true. I can recognize the possibility that what I believe may be false, but I cannot with respect to any particular present belief of mine think that possibility is realized. Nevertheless, it is possible to separate my attitude toward my belief from my attitude toward the thing believed, and to refer to my belief alone rather than to its truth in certain contexts of justification.

Nagel, *supra* note 67, at 229-31 (footnote omitted).

132. Rudolph Guiliani, a Republican candidate for Mayor of New York City, issued a statement about abortion through his press secretary that "although the former federal prosecutor, who is a Roman Catholic, opposed abortions due to his religious and moral views, as mayor he would continue to fund all abortion services that are currently provided." N.Y. Times, July 6, 1989, at B1 & B5. Mario Cuomo, the Democratic Governor of New York state is reported as

sending a strong message to proponents of abortion . . . that he would reject legislation limiting abortion in ways sanctioned by the United States Supreme Court on Monday. The Governor, a Roman Catholic who has often spoken about his efforts to reconcile his position on abortion with the teachings of the Church, said nothing in the Supreme Court decision had changed his opinion "about the right to abortion or the right of poor people to receive funding."

N.Y. Times, Aug. 6, 1989, at A1.

133. Hart criticizes a German writer for the extraordinary naivety [of his] view that insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality. Rather this terrible history prompts inquiry into why emphasis on the slogan "law is law," and the distinction between law and morals, acquired a sinister character in Germany, but elsewhere, as with the Utilitarians themselves, went along with the most enlightened liberal attitudes. . . . [E]verything that he says is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law. As if this, once declared, was conclusive of the final moral question: "Ought this rule of law to be obeyed?" Surely the truly liberal answer to any sinister use of the . . . distinction between law and morals is, "very well, but that does not conclude the question. Law is not morality; do not let it supplant morality."

ESSAYS, *supra* note 119, at 74-75.

positivism through the "ideology of advocacy" obliterates any function for morality in professional ethics. It may be that part of this error is attributable to confusing the empiricism of Oliver Wendell Holmes with the legal positivism of H.L.A. Hart.

Holmes did characterize law as solely a matter of prediction about the application of state coercion.¹³⁴ For Holmes, law is directed at the bad man:

You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.¹³⁵

In contrast, Hart's approach to law is richly normative while still preserving respect for the advantages of distinguishing law as it is from law as it ought to be. The kind of account of law favored by Holmes and wrongly attributed by the "ideology of advocacy" to positivism¹³⁶ is rejected by Hart. Law is not merely understood in coercive terms as the command of a sovereign backed by force:

It is easy to see that this account of a legal system is threadbare. One can also see why it might seem that its inadequacy is due to the omission of some essential connection with morality. The situation which the simple trilogy of command, sanction, and sovereign avails to describe, if you take these notions at all precisely, is like that of a gunman saying to his victim, "Give me your money or your life." The only difference is that in the case of a legal system the gunman says it to a large number of people who are accustomed to the racket and habitually surrender to it. Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.¹³⁷

Ethics is not a predictive social science any more than is law.¹³⁸ It deals with questions of right and wrong and is normative rather than empirical. It does not depend on theories about the relationships between observable stimuli and responses which can be measured. It is practical. Ethics, itself, is a process of reasoning, in particular circumstances, about what one *ought* to do, what actions one *should* take. Guidance in such deliberations may be sought from law, religion, morals, politics or other sources to supply the content, the reasons for action, that determine one's ethical choices. In some situations, the law and

134. "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts . . . the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

135. *Id.* at 459.

136. And, in turn, wrongly attributed to the standards of the profession. "[T]he Code of Professional Responsibility is not designed for Holmes' proverbial 'bad man' who wants to know just how many corners he may cut, how close to the line he may play without running into trouble with the law." *General Motors Corp. v. City of New York*, 501 F.2d 639, 649 (2d Cir. 1974).

137. ESSAYS, *supra* note 119, at 59.

138. For both ethics and law, the social sciences can provide information about, for example, what reasons people give for different moral decisions or the consequences of different laws on various interpersonal arrangements. This information may, in turn, have some impact on moral or legal decision making, but it does not tell decision makers what they ought to do either morally or legally.

common morality¹³⁹ often may offer entirely compatible reasons for action. However, on occasion, their guidance will conflict, just as different moral principles may conflict with one another in particular circumstances.

Role-differentiation critics thus have constructed their understanding of what constitutes the standard conception of lawyering on a mistaken jurisprudence. They wrongly treat the concern of legal positivists to retain the conceptual distinction between law and morals as a determination to expunge all normativity from the law. This mistaken jurisprudential framework is the underlying structure upon which the criticisms of the law of lawyering are based. Part I demonstrated that the arguments from moral nonaccountability and partisanship fail on their own terms. This Part shows that the very foundation of the critics' analysis fails to stand up to close inspection because it does not recognize the ways in which positivism makes room for moral consideration.¹⁴⁰

III. THE INTEGRITY THESIS

In this final Part, the integrity thesis proposes a standard conception of lawyering which allows for the separation of law and morals under the Code and the Rules. Ethical lawyers can find ample room to have integrity when acting as lawyers within this standard conception. Section A examines the role of character which predisposes attorneys to read the standards either to find ethical guidance or to evade constraints on self-interest whenever possible. The integrity thesis reads the standards as they are addressed to those seeking ethical guidance—persons of good character—presumably including those who sit on bar disciplinary committees. Sections B and C posit two principles to explain how good readers can interpret the standards and maintain their integrity—the Normativity Principle and the Principle of Integrative Positivism.

A. *Reading the Standards*

1. *Good and Bad Readers*

The professional ethical standards are addressed to adult readers with already formed characters that may or may not dispose them to being persons of virtue. To draw too sharp a distinction for expositional purposes, persons of good character need no rules to have dispositions for acting ethically. However, they may benefit from the guidance that a good set of rules provide. The law of lawyering is designed to be read, first, by lawyers with good character who are disposed to be good lawyers. Such persons meet the good reader¹⁴¹ requirement

139. The term common morality is used here consistent with Luban's contrasting role morality and common morality. *LAWYERS AND JUSTICE*, *supra* note 5, at 105-07. It refers to what people conventionally agree is the right or good thing to do in contrast to critical morality, which is understood to be what the right or good may really be, although we may be unable to actually know it.

140. In contrast, the Principle of Integrative Positivism, discussed *infra* at notes 177-219 will demonstrate how moral and legal considerations relate to one another and contribute to reading the standards with integrity.

141. Compare James Boyd White's "ideal reader":

As we work through a text, we are thus always asking who the "ideal reader" of this text is . . . [In contrast to a literary text], the legal text is authoritative. Whether you like it or not, as the reader of a

by seeking to read a text honestly and implement it fairly.¹⁴² For good readers, the integrity thesis proposes a way of understanding the standards agreeably with their characters. In contrast, persons of bad character will not be induced to act as persons of virtue simply by providing them with a set of rules. They will read the rules as Holmes' bad man¹⁴³ or Luban's instrumental lawyer¹⁴⁴ would, in search of the limits to what they can get away with. Lawyers with less admirable dispositions must be controlled by the coercive power of the law rather than the guiding content of the rules. For these readers of the standards, the rules provide for sanctions and hence prudential reasons to act as required.

Since the bad reader "has as much reason as a good one for wishing to avoid an encounter with the public force,"¹⁴⁵ the law of lawyering must be more than merely hortatory. It must be enforced. The bar itself may discipline its members and thus provide a remedy for deficiencies in lawyering by punishing and deterring unethical conduct. Sanctions that may be levied in such circumstances can range from private censure to suspension and ultimately to disbarment.¹⁴⁶ Of course, to be effective such discipline of attorneys who violate the standards must occur regularly.¹⁴⁷ There is ample evidence to suggest that this

statute, contract, trust, or judicial opinion you are in the first instance its servant, seeking to make real what it directs. But its authority is not unquestioned. When the text is once understood, it is checked, not only against other parts of the reader's being—other standards and sentiments and wishes—but against other parts of the literature of the law. How does this text, so read, fit within the larger legal culture? . . . There is a sense in which no text is great except as it is made so by readers who perceive its possibilities. . . . Accordingly, the "ideal reader" remains a useful idea in reading law . . . Instead of asking what a statute, opinion, or constitutional provision "means," as if we expected a one-sentence response, we can ask what it means in a different way: How would the ideal reader contemplated by this document, indeed, constituted by it, understand its bearing in the present circumstances?

J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* 270-71 (1984). See also, R. DWORKIN, *LAW'S EMPIRE* (1986). "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." *Id.* at 225.

142. By definition, such a reading entails integrity which is defined as "soundness of moral principle . . . especially in relation to truth and fair dealing." *THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY* 368 (1981).

143. See *supra* text accompanying note 135.

144. See *supra* text accompanying note 78.

145. See *supra* text accompanying note 135 for Holmes' description.

146. GILLERS & DORSEN, *supra* note 100, at 287-89.

147. Thus, commentary [1] to Rule 8.3 on "Reporting Professional Misconduct" notes:

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. . . . An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

RULES, *supra* note 32, Rule 8.3 (commentary [1]). However, the Rule and the commentary acknowledge that reporting should be focused on significant and not mere technical violations. "[3] . . . This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule." S. GILLERS & R. SIMON, *supra* note 33, at 188. Sanctions that result from such discipline must also be made known to be effective deterrents to unethical practices, particularly to other members of the profession, and, arguably, to members of the public. In many states, the results of grievance procedures are required to be kept confidential by the professional ethics rules. For example, Florida Rule 3.7-1 requires most such matters to be kept confidential. However, a recent case declared such a requirement violates the first amendment. *Doe v. Florida Supreme Court*, 58 U.S.L.W. 2465 (Feb. 20, 1990).

is not the case, and that the profession has been derelict in this regard.¹⁴⁸ There are also private remedies that individuals can invoke to penalize some unethical practices, such as malpractice actions.¹⁴⁹ Moreover, there is evidence of clients' increasing recourse to and success in bringing such actions.¹⁵⁰

2. *The Good Reader Reads the Standards with Integrity*

The capacity to apply moral principles fairly and honestly is founded on good character and is essential to being a good lawyer. The significance of good character is recognized by the professional standards in the good character requirement for admission to the bar.¹⁵¹ Thus, the good reader must first be a person of good character who is capable of interpreting the law of lawyering consistently with moral principles.

Good lawyers are good readers of the standards; they read the rules with a commitment to probity. Good lawyers are also effective advocates in part because they are honest persons. After all, the ability to evaluate the credibility of others, such as a witness, is a key factor in good lawyering.¹⁵² There certainly may be a few clients and a few witnesses who fool everybody about their honesty. However, the ability of a lawyer to evaluate another person's veracity requires a blend of intuition and experience that cannot be achieved by someone who does not him- or herself have an internalized understanding of what it means to be an honest person. Basically honest persons may choose on occasion to act dishonestly, but they know that this is what they are doing. This does not

148. "Enforcement has proved weakest in the areas of greatest concern to clients: inattention, incompetence, delay, client property, and fee abuses." Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953, 958. Before discipline can be imposed, violations must be reported. Other lawyers are in the best position to make such reports, but they are loath to do so. See, e.g., Ad Hoc Comm. on Grievance Procedures, Ass'n of the Bar of the City of N.Y., *Report on the Grievance System* 41 (1976) (analyzes infrequency of complaints by attorneys against other attorneys); Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577 (1989); Green, *Through a Glass Darkly: How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201 (1989); Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491; Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?*, 1974 U. ILL. L. REV. 193, 201; Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 1977; Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95; Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509 (1978). Rule 8.3 narrows the Code's requirement at DR 1-103(A) on lawyer reporting of misconduct by fellow attorneys. Lawyers are required to report professional misconduct under the rule that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as lawyer." RULES, *supra* note 32, Rule 8.3. Enforcement of the disciplinary rule reporting requirement was apparently virtually nonexistent. "[A] general reporting rule would be subject to massive civil disobedience that would in turn make it difficult to prosecute even clearcut and egregious cases. The compromise limits the rule to cases of known violations that directly implicate the integrity of the legal profession." HAZARD & HODES, *supra* note 51, at 939.

149. GILLERS & DORSEN, *supra* note 100, at 243-73; Underwood, *Taking And Pursuing a Case: Some Observations Regarding 'Legal Ethics' And Attorney Accounts*, 74 KY. L.J. 173 (1985-86).

150. Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO N.U.L. REV. 1 (1982) (from 1970 to 1975 the number of successful malpractice claims against attorneys increased by 25%).

151. Thus, the Code at EC 1-3 admonishes: "Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character." Commentary to Canon 1 of the Code emphasizes that "good character in the members of the bar is essential to the preservation of the integrity of the courts." SELECTED STATUTES, *supra* note 60, at 5 n.2.

152. My appreciation to Kate Waits and Marty Belsky for stimulating this insight.

mean that the circumstances of lawyering may not sometimes or even often create difficult choices among competing worthwhile values. And basically fair and honest lawyers may occasionally make bad choices. Human goodness is fragile and all humans may err on occasion.¹⁵³

Given that lawyers may be just as frail as the rest of humanity when it comes to acting always for good reasons, it is important to understand what constitutes living a life of good character. Persons of good character are disposed both to recognize and to choose that which is good or right¹⁵⁴ when engaged in the process of practical reasoning. Volumes of philosophy have been devoted to this subject.¹⁵⁵ Only a brief sketch can be attempted here.¹⁵⁶ The capacity for practical reason, a function critical to good character, is not a skill like mathematical computation, which is learned as a set of rules to be applied scientifically to a problem from the point of view of an impartial reader. It is more like the ability to perceive when a painting is beautiful or well done.¹⁵⁷ "[I]t is, centrally, the ability to recognize, acknowledge, respond to, pick out certain salient features of a complex situation . . . [I]t is gained only through a long process of living and choosing that develops the agent's resourcefulness and responsiveness."¹⁵⁸ On those occasions when the person of good character is

153. Martha Nussbaum has beautifully portrayed the fragility of human goodness:

That I am an agent, but also a plant; that much that I did not make goes towards making me whatever I shall be praised or blamed for being; that I must constantly choose among competing and apparently incommensurable goods and that circumstances may force me to a position in which I cannot help being false to something or doing some wrong; that an event that simply happens to me may, without my consent, alter my life; that it is equally problematic to entrust one's goods to friends, lovers, or country and to try to have a good life without them—all these I take to be not just the material of tragedy, but everyday facts of lived practical reason.

NUSSBAUM, *supra* note 35, at 5.

154. Both good and right are used since I do not wish to get into the complicated philosophical history of the differences between the two and which should be preferred as a guide to ethical choices. *See, e.g.*, W.D. ROSS, *THE RIGHT AND THE GOOD* (Hackett Publishing ed. 1988) (Right applies to acts that are morally obligatory as distinct from morally good, which is broader, *e.g.*, applies to persons. Right refers to the thing done while morally good to the motive from which it is done.); I. MURDOCH, *THE SOVEREIGNTY OF GOOD* (1985); Rawls, *The Priority of Right and Ideas of the Good*, 17 *PHIL. & PUB. AFF.* 251 (1988) (The right and the good are complementary, but the right has priority. Worthy conceptions of the good, those that respect the principles of justice, should be treated neutrally by the state and thus all citizens are free to affirm any such conception without either being assisted or hampered by the state.)

155. The starting point for this tradition is ARISTOTLE, *THE NICOMACHEAN ETHICS* (Weldon trans. 1987). *See* NUSSBAUM, *supra* note 135, for a contemporary treatment.

156. This is based on Martha Nussbaum's presentation of the philosophy of Aristotle in NUSSBAUM *supra* note 35. The other major philosophical school which has addressed practical reason is based on the work of the German philosopher, Immanuel Kant, whose focus is on reasoning rather than on character. *See, e.g.*, I. KANT, *CRITIQUE OF PRACTICAL REASON* (L. Beck trans. 1956); I. KANT *FOUNDATIONS OF THE METAPHYSICS OF MORALS*, *supra* note 41.

157.

Art transcends selfish and obsessive limitations of personality and can enlarge the sensibility of its consumer. It is a kind of goodness by proxy. Most of all it exhibits to us the connection, in *human* beings, of clear realistic vision with compassion. The realism of a great artist is not a photographic realism, it is essentially both pity and justice . . . [H]uman life is chancy and incomplete. It is the role . . . of painting to show us suffering without a thrill and death without a consolation. Or if there is any consolation it is the austere consolation of a beauty which teaches that nothing in life is of any value except the attempt to be virtuous.

I. MURDOCH, *supra* note 154, at 87.

158. NUSSBAUM, *supra* note 35, at 305.

faced with a moral quandary, she must puzzle out the right course of action by means of her capacity to think and reason about moral values.

This capacity to grasp what is good or right¹⁵⁹ is a quality of personhood which disposes one to appreciate and make virtuous choices. It is achieved through a process of moral instruction that involves both reason and passion—that is, it is both cognitive and emotional. It results in “a reverence for a plurality of values, for stable character, and for the shared conventions of which character, through moral education, is the internalization.”¹⁶⁰

Thus, one's character is the foundation upon which one builds lawyering skills. Good character cannot be created by professional training. The person who undertakes to become an attorney must approach the law disposed to becoming a good lawyer sensible to the daily process of practical deliberation required to live a life in the law of integrity.¹⁶¹

B. *The Normativity Principle*

Even if the good lawyer is disposed to be virtuous, however, it remains to be demonstrated that the law of lawyering has any special claim of authority for such persons.¹⁶² The Normativity Principle holds that lawyers are a special class of citizens whose membership in the legal profession provides them with a *prima facie*¹⁶³ obligation to obey the law of lawyering.

Contemporary political philosophers reject the earlier view that law, just because it is law, ought to be obeyed.¹⁶⁴ However, they still recognize that some laws are obligatory for some classes of people.¹⁶⁵ The integrity thesis maintains that the law of lawyering has normative force for lawyers. The relationship between attorneys and the law that regulates them as professionals provides a special case distinguishable from the general issue of whether any citizen is obligated to obey the law.

Lawyers are specially obligated to obey the law of lawyering for two related reasons. First, membership in the legal profession provides access to a state authorized and regulated monopoly that provides economic, intellectual, and other personal benefits to persons licensed to practice law. By accepting, and

159. Attempting to further analyze values like good and right, although appropriate for philosophers, eventually comes down to that which cannot be spoken. “What we cannot speak about we must pass over in silence.” L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 189 (D. Pears & B. McGuinness trans. 1961).

160. NUSSBAUM, *supra* note 35, at 310.

161. Kronman, *supra* note 31.

162. After all, there are those who claim that professional regulations are designed primarily to shield attorneys from public accountability and contribute to the monopoly over legal services that simply serves to enrich lawyers. See, e.g., Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 275 (1985).

163. For a discussion of the different meanings of “*prima facie*” in philosophy and law, see Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 952 (1973).

164. See, e.g., J. RAZ, *THE MORALITY OF FREEDOM* 97-105 (1986); Smith, *supra* note 163; *Symposium in Honor of A.D. Woozley: Law and Obedience*, 67 VA. L. REV. 3-248 (1981); *Symposium: The Duty to Obey the Law*, 18 GA. L. REV. 727-966 (1984).

165. This would include that rather small group of persons who directly consent to be obligated to obey the law, for example, judges. See, e.g., Smith, *supra* note 163, at 960-61. For a discussion of the centrality of consent to the adoption of a set of rules by a community, see Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 133 (1987).

enjoying these benefits, attorneys incur concomitant special obligations. One of these is the duty to obey the law of lawyering. Second, this is a duty undertaken by consent. It is not imposed. When lawyers take a special oath upon admission to the bar of a state,¹⁶⁶ they voluntarily and knowingly¹⁶⁷ agree to abide by the regulations of the profession. Of course, this obligation to obey is a prima facie reason for action which can be overridden by a lawyer's ultimate obligation to promote just legal institutions when the professional rules are not just and efforts to reform them fail.

The Normativity Principle recognizes that there are three consequences for lawyers created by their membership in the bar. First, the ethical standards adopted by the profession provide ethical guidance which normally should be followed by members of the legal profession. However, their authority is rebuttable. Second, they cannot be dismissed cavalierly as they have been by some of the role-differentiation critics. They remain guidelines for action until their presumptive normative force is defeated by good reasons. Finally, the Normativity Principle acknowledges that there may be other moral reasons that may override the standards' authority and lead appropriately to civil disobedience and submission to sanctions.

By mandating certain actions, the standards tell persons serving as lawyers that they should take the required action in these circumstances¹⁶⁸ because by joining the bar they have agreed to follow the ethical guidelines developed by the profession and given legal authority through adoption as law by the state judiciary.¹⁶⁹ Moreover, given the complexity and time pressures of contemporary legal practice, the standards may help lawyers on some occasions by relieving them of the need to think through every professional ethical question as it arises in their practice. It would certainly be inefficient for every motorist to think about the advantages of coordinating traffic patterns before deciding to stop at a red light. However, the norms of practice do not exhaust the domain of reasons for action to be pondered.

True dilemmas arise when the mandatory norms, which claim to pre-empt the field of inquiry, support actions different from and arguably less preferable than those directed by non-legal reasons. In so far as some actions have been thus mandated by the professional standards, lawyers are precluded from independently acting on these contrary reasons for action. But the Normativity Principle, operating in tandem with the Principle of Integrative Positivism, recognizes that because the normative force of law and morals remain independent, legal pre-emption does not necessarily include moral authority. At a minimum

166. C. WOLFRAM, *supra* note 56, at 849.

167. The knowing component is verified by the fact that most lawyers must take and pass a special ethics examination, the Multistate Professional Responsibility Exam (MPRE), in order to practice law. Thirty-seven states require this examination. *Comprehensive Guide to Bar Admission Requirements* 1990, 19 (Chart VI) (A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR AND THE NAT'L CONF. B. EXAMINERS).

168. It is understood that some reasons are never right in any circumstances. These are usually what might be termed *ad hominem* reasons—for example, reasons based on race, gender, or sexual orientation when these qualities have no rational relationship to determining one's actions.

169. See a description of process for making standards law in L.R. PATTERSON & T. METZLOFF, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* 57-107 (3d ed. 1989).

attorneys may work to reform the objectionable norms. Acting contrary to a mandatory norm, however, is still a violation. Its moral status will depend on the reasons for taking the action. The bad reader who seeks personal and impermissible advantage should be subject to moral opprobrium and sanctioning. The good reader,¹⁷⁰ acting out of conscience, may be respected as a conscientious objector but will still be subject to sanctions.

In addition to acknowledging the prima facie authority of the law of lawyering, the Normativity Principle also obligates lawyers to consider when situations require them to use discretion and consider reasons for action based on morals and other non-legal values. The permissive structure of some of the standards requires lawyers to consider for themselves what actions they ought to take depending on their own moral values and prudential concerns. The significant discretion thus provided bespeaks a commitment to fostering integrity in good readers of the standards. Thus, the law of lawyering explicitly provides that it is not the exclusive source of guidance when lawyers must decide what they ought to do in particular professional situations. The Rules emphasize that they do not "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a *framework* for the ethical practice of law."¹⁷¹

The law of lawyering encourages attorneys to use moral standards to fill the substantial indeterminacies left in the structure of professional ethics by both the Rules and the Code. For example, the preamble to the Rules indicates: "Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and *moral* judgment guided by the basic principles underlying the Rules."¹⁷² The Code states that the "[a]dvice of a lawyer to his client need not be confined to solely legal considerations In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is *morally* just as well as legally permissible."¹⁷³

Readers of good character are deliberately left by the standards with the responsibility for making some difficult ethical decisions because of the ways in which the standards treat the relationship between law and morals. This perspective is cogently articulated by the legal ethicist Charles Wolfram in his discussion of the more recently promulgated Model Rules:

170. In engaging in such a process of practical reasoning, good readers should also consider the process by which the law of lawyering is created. The professional standards have been developed by the representatives of a professional group, and the process of developing such standards is political and represents the views of generally democratically selected members of the profession, although their representativeness may be subject to question. For example, there are those who claim: "The membership . . . is being left increasingly to conservative, business-oriented lawyers" *A U.S. Judge Campaigns for the 'Soul' of the ABA*, NAT'L L.J. 1, 10 (Oct. 28, 1985). The standards are based on reasons which have sufficed to persuade a majority of such representatives that certain standards are preferable to others. Morality, however, is a matter of determining what is the right action to take. It is the best approximation of truth one can make for oneself and not a matter of voting for what one might wish to be the case. It is personal and should not be subject to majority rule.

171. S. GILLERS & R. SIMON, *supra* note 33, at 8 (emphasis added).

172. *Id.* at 7 (emphasis added).

173. CODE, *supra* note 32, EC 7-8 (emphasis added).

The refusal of the drafters of the Model Rules to engage in a drafting process in which some lawyers would be required to yield to the view of others on matters of personal morality implies that matters of conscience are too important to be logrolled in the process of arriving at compromised statements of professional morality It is a mistake to conclude that because a social order cannot legislate or form a consensus upon moral issues, it is not meaningful for the individual members of that social order to consider the morality of law or of personal choice.¹⁷⁴

By acknowledging the relevance of morals in their texts and by couching much of their guidance in permissive terms, the professional standards deliberately make room for lawyers to exercise their discretion in determining what is the right action for them to take independently of the law of lawyering. Nonetheless, the role played by discretion in the standards does not and should not swallow up the standards themselves. Much of the law of lawyering remains mandatory. Although, even when the legal rules are clear, recognition that they approximate what can be achieved politically in a particular time and place may reinforce the decision of the hardy few to be conscientious objectors in their self-determination.

Both bad and good readers of the standards are challenged by the permissive structure of much of the standards. Bad readers must fill the gaps in guidance by determining whether it is prudent to do nothing that is not required or whether their self-interest lies in some action and what that may be. For example, suppose a lawyer has a practice essentially defending drug dealers. He may have a client who the lawyer knows is involved in continuing sales of marijuana laced with a substance which can cause irreversible brain damage to those who use it. Under the Rules, the lawyer would be permitted to reveal confidential information about the client to "prevent the client from committing a criminal act that the lawyer believes is likely to result in . . . substantial bodily harm."¹⁷⁵ Not only might the bad reader decide to remain silent under these circumstances but her reasons for doing so would be bad reasons like concern for losing clients and fees. If her silence was determined by fear of reprisals by the clients' friends and thus fear for her life, it would be harder to dismiss such a reason and to label the lawyer a bad reader. Good readers are not foreclosed from acting prudently, but the judgments they must make require even more. They must also integrate and balance possibly competing legal, moral and prudential reasons for action. The good reader who defends drug sellers might justify her silence by reference to some moral value like the centrality of confidentiality to maintaining a relationship with the criminal client and affording that client a fair representation under the conditions provided by the current adversary system of justice.¹⁷⁶

174. C. WOLFRAM, *supra* note 56, at 70.

175. RULES, *supra* note 32, Rule 1.6(b)(1).

176. There has been a lengthy debate in the legal ethics literature on the moral justification for the adversary system. For example, the noted legal ethicist, Thomas Shaffer, contends that "the adversary ethic is a unique claim of moral immunity for lawyers." Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988). See also Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985). On the other hand, David Luban, one of the foremost critics of the adversary system, concludes in his recent book that at least for questions of criminal culpability, which pit the weak individual against the strong state, and more generally for all such "David and Goliath" situations, it is better than any viable alternative in the present United

C. *The Principle of Integrative Positivism*

Part II demonstrated that although law and morals are separate normative domains, they very often are compatible with one another. Retaining the distinction between law as it is and law as it ought to be facilitates our capacity to recognize and either change or reject evil laws. Nonetheless, so long as bad law remains in force, it still has legal authority over those it governs.¹⁷⁷ The Principle of Integrative Positivism applies this perspective to the law of lawyering and makes the following claims: (1) The ethical standards of the profession have both legal and moral normative force for lawyers. (2) Lawyers thus are obligated to obey the law of lawyering. (3) However, this is a prima facie obligation which can be defeated by superior moral reasons. (4) Nonetheless, even if the moral authority of some aspect of the standards is thus rebutted, it still retains its legal power so those who disobey it may be sanctioned for their actions. (5) Members of disciplinary committees have a duty to determine, always as good readers, whether a standard has been violated and what the proper sanction should be in light of the reasons the lawyer had for taking such a course of action. (6) Individual attorneys must decide for themselves when, if ever, disobedience is morally warranted. (7) In doing so they should engage in a reasons for action analysis.

To facilitate making such an analysis, this section examines the ways in which law and morals relate to one another within the law of lawyering. The relationship of law and morals within the standards is complex.¹⁷⁸ One way to better understand it is in terms of the following four categories. First, situations where the standards are permissive and hence provide the lawyer with discretion to balance for him or herself reasons derived from law other than the standards, morality and prudence. In addition, some of the law of lawyering provides

States. LAWYERS AND JUSTICE, *supra* note 5, at 50-93. This author has long been a critic of the adversary system, see, e.g., Stier & Hamilton, *Teaching Divorce Mediation: Creating a Better Fit between Family Systems and the Legal System*, 48 ALB. L. REV. 693 (1984); Stier, *Child Custody and Mediation*, in CHILD CUSTODY & VISITATION LAW & PRACTICE, (Matthew Bender, 1987). Nonetheless, Luban's "pragmatic" justification for the adversary system's existence under limited circumstances, LAWYERS AND JUSTICE, *supra* note 5, at 92, should at least be treated as a prima facie reason for its having value when a defense lawyer reasons about what to do about maintaining client confidences.

177.

Does the morality, with which law must conform if it is to be good, mean the accepted morality of the group whose law it is, even though this may rest on superstition or may withhold its benefits and protection from slaves or subject classes? Or does morality mean standards which are enlightened in the sense that they rest on rational beliefs as to matters of fact, and accept all human beings as entitled to equal consideration and respect? . . . If so, the enlightened morality which recognizes these rights has special credentials as the true morality, and is not just one among many possible moralities. These are claims which . . . cannot alter, and should not obscure, the fact that municipal legal systems . . . have long endured though they have flouted these principles of justice.

CONCEPT, *supra* note 42, at 201. By distinguishing law from morals, the professional standards, which regulate the ethics of legal practice, acknowledge this problem and require lawyers to exercise independent moral choice in deciding what to do in many professional situations.

178. The complex relations of law and morals more generally have been explored recently in Fletcher, *The Meaning of Morality*, 64 NOTRE DAME L. REV. 805 (1989); Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784 (1989).

mandatory¹⁷⁹ rules which should be read in light of the Principle of Integrative Positivism. For mandatory rules, the relationship of law and morals falls into three additional categories: law and morals may *overlap*; the law may *incorporate* morals; and finally, law and morals may *conflict*.

1. *Permissive Standards Providing for Moral Discretion*

Much of the law of lawyering makes room for morals by giving lawyers discretion in determining what they ought to do. The language of some standards is deliberately couched in permissive rather than mandatory terms. Thus, lawyers "may reveal" certain categories of confidential information.¹⁸⁰ Such language creates the kind of flexible regulation that leaves room for lawyers to exercise their own discretion in balancing moral and prudential reasons for action. Professor Wolfram points out:

Clearly, most lawyer decisions are open-ended and discretionary in the sense that a lawyer can choose between a variety of tactics or outcomes with no fear of violating any legal rule. In making those decisions, lawyers rely on some innate sense of proper behavior. One lawyer's sense might be the result of a very well thought out and consciously followed system of moral values. Another lawyer's sense might be nothing more complicated than an instinct that a lawyer may engage in any conduct that leads to a higher fee. Both lawyers are making moral decisions about the rightness or wrongness of conduct.¹⁸¹

Of course, the lawyer who is guided solely by the size of his or her fee is acting for the wrong reason. Nonetheless, the professional standards in effect may allow lawyers to do so by constructing regulations which are often permis-

179. Even mandatory standards may leave room for judgment calls, however. Hazard and Hodes give the example of Rule 1.8(c) which

absolutely prohibits a lawyer from drafting an instrument in which he or she is to receive a "substantial" gift from a client. The prohibition is not only absolute, but is reinforced by the absence of a provision permitting a client to waive the protection of the Rule. On the other hand, the Rule does not apply at all if the gift involved is not "substantial." A lawyer who is asked to draft an instrument in which he is to be given a gift that is not trivial must therefore first make a "judgment call" about the substantiality of the gift. A gift might be judged substantial or insubstantial depending upon the wealth of the donor, the financial situation of the lawyer, or perhaps upon some *a priori* view of "substantiality" derived from estate planning experience. Whatever judgment the lawyer makes, the process of making it will be a moral dialogue with himself. The lawyer must ask himself: "Am I the kind of lawyer who, in a close case like this one, will take advantage of the inherent ambiguities of language? Or am I the kind of person who will err on the side of self-denial?" He will also ask himself such questions as: "What are the chances that anyone will question my decision? What will be the consequences if the decision is questioned? What if my decision is held to have been erroneous?" Conceiving the dialogue in this way does not necessarily suggest the "right" answer, for other considerations—including some with moral overtones—may be relevant. For example, a lawyer faced with the foregoing dilemma might legitimately tip the balance towards accepting the gift if he believed that the client would be upset at the thought that there is any question of his lawyer's honesty. Or the lawyer could rightly judge that the client would be annoyed at having to waste time and money finding another lawyer to draft the document. On the other hand, the balance could be tipped toward refusing to draft the document if the lawyer fears that a subsequent "undue influence" lawsuit might be brought, even if such a suit would have little chance of success.

HAZARD & HODES, *supra* note 51, at 561. This example could easily be translated into a reasons for action analysis. Under such an analysis, the prudential reasons cited at the conclusion—upsetting the client or risking a lawsuit—do not seem to justify tipping the balance one way or the other.

180. RULES, *supra* note 32, Rule 1.6(b). In contrast, Rule 1.6(a) provides that a "lawyer *shall not* reveal information . . ." *Id.* at Rule 1.6(a) (emphasis added).

181. C. WOLFRAM, *supra* note 56, at 69.

sive.¹⁸² Generally, it is up to the individual lawyer to balance various reasons for action when his or her choice affects the attorney's personal integrity rather than the integrity of the system of justice itself. When the justice system itself is at issue, personal discretion may be more limited.¹⁸³

Thus, both the Code and the Rules mandate the protection of client confidences when they relate solely to past crimes and neither the lawyer nor a tribunal is involved. This makes good sense since harm to third parties and society has already occurred and cannot be rectified by allowing attorneys to breach their duty of loyalty to their clients. However, information about *future* crimes is another matter. Here the standards deliberately resort to permissive rather than mandatory language. "A lawyer *may reveal* [confidential] information . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."¹⁸⁴ In this instance, lawyers must take responsibility for their action or inaction.

182.

[Such] statements are equivalent to saying that one has no obligation either to perform it or to refrain from it, or that one is required by law, or by morality, neither to perform nor to refrain from that action Permissions play a special role in practical reasoning. Reasons for action impose practical constraints, constitute requirements to act in a certain way and not in others. Permissions indicate the absence of constraints. To state that one is permitted to act in a certain way is to say that one will not be acting contrary to reason in doing so.

AUTHORITY, *supra* note 38, at 86, 89.

183. For example, lawyers are mandated by both the Code and the Rules to protect the confidences of clients and are forbidden to reveal information about *past* crimes that clients have admitted committing to their lawyers. *See* RULES, *supra* note 32, Rule 1.6 and CODE, *supra* note 32, DR 4-101. Maintaining confidentiality in these circumstances strengthens the bond of loyalty of attorney to client and thus, arguably, the capacity of the justice system to perform its function. Nonetheless, the more recently promulgated and more widely adopted Rules mandate an exception to such loyalty when it would undermine the truth-seeking function of a tribunal because of the use of false evidence or failure to reveal adverse authority. Confidentiality must also be abrogated when it would undermine the integrity of lawyer advocates by enlisting their services in misleading a tribunal. *See* RULES, *supra* note 32, Rule 3.3. Hazard and Hodes point out that

Rule 3.3 is part of the package of Rules that speak to situations in which a lawyer may *not* be able to do all that a client would like him to do. It is another reminder that there is no unqualified right to the services of a lawyer. Rather, there is a right to assistance only if the lawyer's tasks can be accomplished within the bounds of law.

HAZARD & HODES, *supra* note 51, at 349.

184. RULES, *supra* note 32, Rule 1.6(b)(1) (emphasis added). DR 4-101(C)(3) of the Code provides that a "lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." CODE, *supra* note 32, DR 4-101(C)(3). Hazard and Hodes argue that additional limits on the confidentiality principle, proposed by the Kutak Commission but rejected by the ABA House of Delegates, "are so necessary that they will almost certainly be read back into Rule 1.6, one way or another, by courts and practicing lawyers." HAZARD & HODES, *supra* note 51, at 91. Both these exceptions, "disclosures in order to 'rectify' a completed crime or fraud that the lawyer had unwittingly helped bring about, and disclosures needed to 'comply with (other) law'" would strengthen the lawyer's integrity. *Id.* Hazard and Hodes point out that confidentiality is intended not only to benefit present clients, but also to assure that *future* clients will freely confide in counsel. In cases where a client uses an innocent lawyer to commit a crime or fraud, however, and the misconduct is discovered by the lawyer, the lawyer should be allowed to rectify the harm, at the cost of client confidences, precisely because it will teach *future* clients that they may not successfully use lawyers in this fashion. If clients bent on fraud are "chilled," so much the better. . . . Allowing lawyers to breach the rule of confidentiality in order to rectify a completed fraud would diminish, to some extent, client belief that confidentiality will be maintained in nonfraud situations. But providing complete assurance to innocent clients can be achieved only by allowing exploitative clients to make the lawyer an instrument of fraud and then prevent him from rectifying the harm. No amount of rhetoric about the sanctity of client confidences can avoid the necessity for a trade-off between these consequences. Furthermore, *no* version of

The standards recognize that weighing the reasons for and against protecting the confidentiality of the lawyer-client relationship when a contemplated crime is at issue requires a personal, case-by-case process, which permits each lawyer to be the judge of his or her own circumstances. The ingredients of this process will vary for good and bad readers. The latter will not include moral considerations in their decision making. Good readers, however, are not precluded from ethically deciding to be prudent when permitted to do so. The Principle of Integrative Positivism recognizes that attorneys can both preserve their integrity and take actions which are personally advantageous so long as such decisions are neither illegal nor immoral.¹⁸⁵

2. *Mandatory Standards: Legal and Moral Reasons Overlap and Pre-empt Prudential Reasons*

What should an associate in a law firm do when asked by a partner to sign an amended pleading because doing so will give the firm leverage in their settlement negotiations? The associate has a number of reasons to comply with this request as well as other reasons to refuse it. One set of reasons relate to the prudence of following the wishes of a superior. Thus, the fact the associate wants to keep and advance in his or her job creates prudential reasons to comply. There may also be an ethical obligation to give at least some deference to the authority of the more senior and experienced attorney.¹⁸⁶ In addition, in light of both the professional and moral duty of loyalty, the associate has an obligation to try and obtain the best possible settlement for the firm's client, consistent with other obligations.

On the other hand, the professional ethical standards forbid making an assertion that is frivolous.¹⁸⁷ The associate must judge whether or not amending a pleading for tactical purposes would violate this prohibition.¹⁸⁸ If it would, there are federal and state court rules that also prohibit such actions and pro-

the rule of confidentiality actually requires that confidentiality be preserved at the cost of compelling lawyers to be the instruments of fraud.

Id. at 92.

185. It would be both self-righteous and foolish to prescribe martyrdom as an essential ingredient of integrity.

186. The authority of a supervising attorney is specifically recognized in the Rules, though not in the Code. Rule 5.1(c)(2) holds a supervising attorney responsible for rule violations of subordinate attorneys, and Rule 5.2(b) provides that a "subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." RULES, *supra* note 32, Rules 5.1(c)(2) and 5.2(b).

187. RULES, *supra* note 32, Rule 3.1 (Meritorious Claims and Contentions). DR 7-102(A)(1) provides that a lawyer may not "[f]ile a suit, assert a position . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." *Cf.* Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 OSGOODE HALL L.J. 353 (1986).

188. The associate cannot pass the buck on this and take a "just following orders" position. Rule 5.2(a) on the "Responsibilities of a Subordinate Lawyer" provides: "A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person." RULES, *supra* note 32, Rule 5.2(a). The commentary to this rule notes: "[I]f a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character." S. GILLERS & R. SIMON, *supra* note 33, at 139. Does the comment vitiate the rule by creating an exception, "knowing," that swallows the rule? Not according to the authoritative interpretation of Hazard and Hodes:

vide for monetary sanctions.¹⁸⁹ If the associate decides ultimately that it would be wrong to sign the pleading as requested because it is frivolous then this decision would be supported by the congruence of both morals and law.¹⁹⁰ Good readers of the standards would have no conflict here since, under the Principle of Integrative Positivism, prudential reasons for action are simply pre-empted under this interpretation of these facts. Bad readers of the standards would be faced with a problem since if they refuse to sign the frivolous pleading, they will be subject to possible negative consequences by their superior. However, if they go ahead and sign to avoid punishment within the firm, they may face sanctioning by a court. Their calculus of eventual action will depend on the severity and likelihood of each potential sanction.

3. *Mandatory Standards Incorporating Moral Reasons*

Law and morals mutually reinforce efforts by both the Rules and the Code to assure integrity, for example, by incorporating the general moral prohibition against dishonesty into much of the law of lawyering.¹⁹¹ This commitment to

The example assumes that a subordinate lawyer has filed a frivolous pleading (a violation of Rule 3.1), but has filed it at the direction of a supervisor. Did the junior lawyer "know" of the pleading's character? If we assume that the subordinate never read the papers, but simply filed them while at the courthouse on another matter, he should not be found guilty of violating Rule 3.1, for he had no knowledge of the violation, and had no reason to be on inquiry. Suppose, however, that the junior lawyer read the pleading and thought it was frivolous, but concluded that he must be in error because his supervisor would never file a frivolous pleading. According to Rule 5.2(b), the disciplinary liability of the junior lawyer in the second variation should depend upon whether it was "arguable" that the pleading was not frivolous. If the pleading was clearly frivolous, the subordinate lawyer may not escape responsibility by contending that his supervisor is responsible for both of them under Rule 5.1. That would be to say that a junior can never "know" that his supervisor is the problem rather than the solution.

HAZARD & HODES, *supra* note 51, at 460.

The Code has no comparable provision. Interestingly, while the newly modified New York Code incorporates some aspects of Rule 5.1 on the "Responsibilities of a Partner or Supervisory Lawyer" as DR 1-104, it does not include Rule 5.2. *Special Supplement*, *supra* note 33. This may be because Rule 5.2(a) is superfluous since DR 7-102(A)(1) already forbids actions that "would serve merely to harass or maliciously injure another" and (2) prohibits unwarranted claims. CODE, *supra* note 32, DR 7-102(A)(1) and (2). This superfluity also exists under the Rules (Rule 3.1), but Hazard and Hodes point out with regard to Rule 5.2(a):

It may have a limited independent purpose, however. A number of disciplinary cases hold that a lawyer's junior or subordinate status may mitigate punishment if a violation is proven against him; Rule 5.2(a) serves as a caution to junior lawyers not to misread those cases as establishing a principle of excuse, rather than one of mitigation.

HAZARD & HODES, *supra* note 51, at 460.

189. Consider Federal Rule of Civil Procedure 11, which, as recently interpreted by the Supreme Court in *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120 (1989), would hold the actual signer of the pleading responsible rather than the firm. Consider also state rules, such as Rule 130 in New York, which extends liability to the whole firm, but unlike the Federal Rule of Civil Procedure 11, caps liability at \$10,000. N.Y. CODES, R. & REGS., tit. 22, §§ 130-1 (1988).

190. This may be the correct outcome from an ethical point of view even if it may occur infrequently because of the prudential consideration raised in the text. It is to be hoped that supervising partner and associate will be able to talk about whether a good faith claim in fact exists, aside from any tactical considerations, and whether by signing the associate may be subjected to federal or state sanctions. Of course limited state sanctions, such as the \$10,000 cap in New York and the federal restriction to the actual signer, may limit these remedies so that they are merely treated as a cost of doing business. See *supra* note 189, (Thanks to Mark Vohr for this point.)

191. In discussing the various methods for protecting client confidences when lawyers switch firms, Judge Farnan rejected the popular "Chinese Wall" metaphor because it

tends to cast a shadow of disrepute on attorneys separated in this manner from their professional colleagues. The implicit assumption is that the wall, if high and thick enough, will resist an errant attorney's

honesty is manifested in many aspects of the standards including rules that address the lawyer's relationship to a client,¹⁹² and the attorney's relationship to the justice system itself.

Professional integrity is strengthened by standards that link honesty and good practice such as Rule 8.4 which defines professional misconduct as engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."¹⁹³ The principle of honesty is also specifically incorporated into rules that govern dealings with third persons¹⁹⁴ and prospective clients. Thus, the Rules require communications, such as advertisements giving information about a lawyer's services, to be neither false nor misleading.¹⁹⁵ Once a representation has begun, the

lack of discretion, and calm public mistrust through prophylaxis. . . . Instead, the Court believes that the more logically consistent, honest, and straightforward approach is to credit members of the legal profession with a certain level of integrity. This emphasis on the ethical rules themselves, rather than a presumption that they will be circumvented, should more effectively promote public respect for the bar. In effect, the Rules enjoin the attorney to guard his client's secrets in an affirmative and deliberate manner, through self-imposed silence. Canon 4 and Rule 1.6, which mandate maintenance of a client's confidences, have an independent significance.

Baglini v. Pullman, Inc., 412 F. Supp. 1060, 1064 n.11 (E.D. Pa.), *aff'd*, 547 F.2d 1158 (3d Cir. 1976).

192. The closest example of what amounts to an express requirement of honesty to clients may be Rule 7.1 which provides that when lawyers communicate to clients regarding their services they "shall not make a false or misleading communication." RULES, *supra* note 32, Rule 7.1. This is then defined as a communication that "(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (b) is likely to create an unjustified expectation about results the lawyer can achieve. . . ." *Id.* at Rule 7.1(a) and (b).

193. RULES, *supra* note 32, Rule 8.4(d). This is substantially similar to DR 9-101(C).

194. Rule 4.1 states: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 (confidentiality)." RULES, *supra* note 32, Rule 4.1. *See supra* notes 180, 183-84 for discussion of Code and Rules with respect to balancing obligations of candor and maintaining client confidences. The Code provides that "[i]n his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact." CODE, *supra* note 32, at DR 7-102(A)(5). The more recently and more widely adopted Rules evince a particular concern for maintaining the integrity of the attorney by shielding lawyers from being forced into silence about clients' past criminal fraudulent activities and involving attorneys indirectly. Thus, the authoritative commentary to Rule 1.6 on maintaining confidentiality of information provides at section [15] that after a lawyer has exercised his or her discretion to withdraw from representation when "the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct" [14], the lawyer may then give "notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like." RULES, *supra* note 32, Rule 1.6 (commentary). As reported *supra* at note 33, New York, which is a Code state, has adopted a modification of the Code. New York's modification incorporates this approach to withdrawal into the Code itself at DR 4-101 dealing with the preservation of confidences and secrets of a client. (C)(5) states that a lawyer may reveal

[c]onfidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

Special Supplement, *supra* note 33. This affirmation of the need to protect lawyers from client dishonesty is apparently in response to the notorious OPM case. *See* P. HEYMANN & L. LIEBMAN, *supra* note 80, at 184.

195. RULES, *supra* note 32, Rule 7.1. Comment to the Rule notes that "[w]hatever means are used to make known a lawyer's services, statements about them should be *truthful*." S. GILLERS & R. SIMON, *supra* note 33, at 157 (emphasis added). The Code provides under DR 2-101(A) that a "lawyer shall not . . . use . . . any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." CODE, *supra* note 32, DR 2-101(A).

standards may preserve integrity by permitting disassociation of the lawyer from a client's dishonest conduct.¹⁹⁶

Attention to the integrity of the lawyer-client relationship is provided by standards which infuse honesty into regulations governing such aspects of the relationship as communications regarding fees,¹⁹⁷ consultation with clients as to potential conflicts of interest,¹⁹⁸ and the protection of client property.¹⁹⁹ Moreover, the standards do not permit a lawyer to counsel a client to be dishonest by breaking the law.²⁰⁰

The significance of honesty to preserving the integrity of the justice system itself is articulated most clearly by special requirements of candor to a tribunal.²⁰¹ It is also illustrated by provisions requiring lawyers to avoid even the appearance of impropriety, including an admonition to neither state nor imply that they are "able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."²⁰²

Sometimes, whether or not a particular moral standard is incorporated²⁰³ into the legal standards themselves will depend on which particular state rules apply. In fact, since the adoption of the Model Rules, there is increasing variability among the states with regard to their ethical standards.²⁰⁴ For example, the dilemma of what to do about the client who has confided he committed the crime for which an innocent person is due to die, discussed below,²⁰⁵ might depend on which state rules are authoritative. Thus, a lawyer practicing in Florida, Nevada or New Mexico arguably may be required by the standards themselves to reveal the necessary confidential information to protect the innocent person on death row. In these three states Rule 1.6 provides an exception to the requirement of maintaining client confidences and requires "that a lawyer *shall*

196. For example, Rule 1.16 allows termination of the lawyer-client relationship when (b)(1) "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent"; and (b)(2) "the client has used the lawyer's services to perpetrate a crime or fraud." RULES, *supra* note 32, Rule 1.16. Other standards link honesty to other professional requirements to strengthen professional integrity too. Thus, Rule 8.1 on bar admission forbids making "a false statement of material fact." *Id.* at Rule 8.1. DR 1-101(A) is substantially the same. CODE, *supra* note 32, DR 1-101(A).

197. RULES, *supra* note 32, Rule 1.5.

198. *Id.* at Rule 1.7.

199. *Id.* at Rule 1.15.

200. Rule 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ." *Id.* at Rule 1.2(d).

201. Rule 3.3(a)(1), "Candor Toward the Tribunal," forbids a lawyer either him or herself from making "a false statement of material fact or law to a tribunal," and (a)(2) requires disclosure to avoid assisting a client from committing a criminal or fraudulent act with respect to the tribunal. *Id.* at Rule 3.3. Moreover, Rule 3.3(a)(3) further makes the lawyer responsible for protecting the integrity of a court by requiring the lawyer "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." *Id.* This last requirement is substantially identical to DR 7-106(B). The rest of Rule 3.3 provides additional protections.

202. CODE, *supra* note 32, DR 9-101(C). Essentially similar to Rules 8.4(e), 7.1(b) and 1.2(e).

203. Recently, Lerman reported instances of deception by attorneys of their clients which she claims are not covered by the standards. Lerman, *Lying To Clients*, 138 U. PA. L. REV. 659, (1990). The generalizability of her findings are highly questionable since they are based on a sample of only twenty lawyer interviews. For a more expansive view of what would constitute an appropriate standard for honesty, see Menkel-Meadow, *Commentary: Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal For a Golden Rule of Candor*, 138 U. PA. L. REV. 761 (1990).

204. *See infra* note 236.

205. *See infra* text accompanying notes 224-25.

reveal information necessary . . . (2) to prevent death or substantial bodily harm to another."²⁰⁶

According to the Principle of Integrative Positivism, when the rules of lawyering are mandatory and incorporate morals as illustrated by this section, they constrain the behavior of both good and bad readers. For the good reader the requirement of honesty strengthens a general disposition to be truthful. The specifics of various provisions which seek to reinforce honesty are treated as helpful guides for accomplishing an already accepted purpose. Thus, for example, the constraints of Rule 1.15 on safekeeping client property are understood to provide assistance to the lawyer as much as providing protection to the client. Keeping a client's property and funds separate from that of the lawyer²⁰⁷ is a sensible method for assuring that even honest lawyers don't make an error.

The bad reader is also constrained by such specifics because they may put limits on opportunities for acting solely from self-interest when required to serve as a professional fiduciary.²⁰⁸ Moreover, as dishonesty in the handling of client funds becomes more readily detectable and punishment more predictable,²⁰⁹ bad readers are encouraged to adhere to the honest practices demanded by the profession to avoid being sanctioned.

4. *Mandatory Standards Conflicting with Some Moral Reasons*

This is the category of interaction between law and morals which can provide the most difficulty for some persons in applying the Principle of Integrative Positivism. When there is clear legal authority that mandates action incompatible with personal morals, the Principle provides that the standards take precedence in guiding professional decisionmaking.²¹⁰ Thus, no matter how much one might want to warn the poor widow not to continue to do business with her departed husband's former partner because he has defrauded her in the past, if

206. S. GILLERS & R. SIMON, *supra* note 33, at 39 (emphasis added). It is of interest to note that the 1979 Proposed Model Rules Draft originally provided under Rule 1.6 that "(c) A lawyer shall disclose information about a client (1) to the extent necessary to prevent the client from committing an act that would . . . result in wrongful detention or incarceration of a person." *Id.*

207. RULES, *supra* note 32, Rule 1.15(a). The comparable requirement of the Code is DR 9-102(A).

208. The comment to Rule 1.15(a) provides that a "lawyer should hold property of others with the care required of a professional fiduciary." S. GILLERS & R. SIMON, *supra* note 33, at 79. The recently adopted modifications to the Code in New York cabin even more narrowly the opportunities for abuse with the unusually detailed provisions of DR 9-103 on "Preserving Identity of Funds and Property of Others: Fiduciary Responsibility: Maintenance of Bank Accounts: Recordkeeping: Examination of Records. . . ." *Special Supplement, supra* note 33.

209. Taking a client's money without authorization, even if temporarily and with an intent to return it, will almost always result in serious discipline. In some jurisdictions disbarment is nearly automatic. This misconduct has become easier to detect as a result of random audits of attorney trust accounts by authorized state agencies.

GILLERS & DORSEN, *supra* note 100, at 292.

210. This statement is not meant to foreclose the possibility of having recourse to conscientious disobedience. See *supra* text accompanying notes 178-210. The point is that in terms of one's *legal* duty, the standards trump personal conscience. One may still decide to act contrary to one's legal duty because of overriding moral considerations. Such civil disobedience, in turn, may be perfectly consistent with the continuing legitimacy of the general legal regime itself. Thus, Waldron points out that "a regime may be morally legitimate even though disobedience to its law is not always wrong." Waldron, *supra* note 165, at 139.

one represents the partner, the standards forbid revealing this former crime.²¹¹ Even after withdrawing from representing such a reprehensible client,²¹² one cannot ethically reveal his prior fraud.²¹³

This kind of situation presents no dilemma for the bad reader who is not guided by independent moral considerations. In fact, in so far as the bad reader's self-interest is tied to continued representation of the client who has defrauded his dead partner's widow, the requirement of silence is perfectly agreeable. However, the good reader is confronted with a dilemma. On the one hand she may find it morally repugnant to permit her former client to continue fleecing the widow, while on the other hand her promise of confidentiality and loyalty prevent her either from reporting the former wrong or informing the widow so she can protect herself from future dishonesty. This dilemma cannot be resolved by reliance on the Normativity Principle alone. According to that Principle, lawyers have a special moral obligation to obey the rules of their profession.²¹⁴ However, the Principle of Integrative Positivism emphasizes that this is a *prima facie* obligation which can be defeated by superior moral reasons. Nonetheless, the Principle maintains the continuing legal validity of the standard so that attorneys who become civil disobedients can be subject to sanctioning for violating the law of the profession. This is the kind of situation that leads ethicists like Simon to disavow the authority of the standards and seek to substitute a version of discretion bridled only by the lawyer's moral accountability.²¹⁵

However, there are weighty moral reasons, aside from those embedded in the standards themselves, for silence as much as for revelation. The information about the fraud was obtained in the context of an attorney-client relationship based on the promise of confidentiality. We would be shocked were a priest to reveal a penitent's confession of having regularly stolen from the collection plate. It would be no excuse that the sums were great and the church very poor. Moreover, even were a stronger moral case to be made for violating the client's confidences and hence for disobeying the standard's mandate of silence, this does not mean that such conscientious objection can be required. Even the good reader cannot be expected to choose civil disobedience in these kinds of situations. Such behavior may be desirable, but moral courage is something only the self-righteous demand of all of us at all times.

What can be demanded of those who think the standards should be different is a conscientious effort to change them. One such effort recently came to fruition in New York. In the notorious *OPM* case lawyers practicing in New

211. RULES, *supra* note 32, Rule 1.6 and CODE, *supra* note 32, DR 4-101.

212. Rule 1.16 (b)(2) permits, but does not mandate such withdrawal if "the client has used the lawyer's services to perpetrate a crime or fraud." RULES, *supra* note 32, Rule 1.16(b)(2). DR 2-110(C) provides for withdrawal under the Code although it does not contain language relating to a past crime or fraud as does (b)(2). CODE, *supra* note 32, DR 2-110(c). The modified New York Code has incorporated the language of Rule 1.16(b)(2) into DR 2-110(C)(1)(g). *Special Supplement*, *supra* note 33.

213. As comment [21] to Rule 1.6 notes "[t]he duty of confidentiality continues after the client-lawyer relationship has terminated." S. GILLERS & R. SIMON, *supra* note 33, at 35.

214. See *supra* text accompanying note 163.

215. Simon 1988, *supra* note 11.

York in the 1970s and 80s had no way under the Code to entirely disentangle themselves from an ongoing fraud committed by their clients.²¹⁶ Were a similar situation to arise today, the lawyers would, under the recently modified New York Code, at least be able to withdraw a representation by them which was materially inaccurate or which might contribute to a continuing fraud by the client.²¹⁷ Such revelation, however, is permitted²¹⁸ and not mandatory. In deciding how to use their discretion in such circumstances, lawyers should apply the kind of reasons for action analysis called for by the Principle of Integrative Positivism²¹⁹ and illustrated in the final section.

D. *Reasons for Action*

Integrity depends on the reasons which determine the legal actor's actions.²²⁰ Thus, for example, an attorney may be appointed to appeal the conviction of an indigent criminal defendant and may refuse to argue all the potential claims his client proposes to raise. As the Supreme Court has held,²²¹ a lawyer is not required to raise all the issues on appeal which a client wishes to have argued, but may exercise discretion so long as he does not do so for the wrong reasons. Such *wrong* reasons would include the lawyer acting out of "a strong interest in having judges and prosecutors think well of him, and, if he is working for a flat fee—a common arrangement for criminal defense attorneys—or if his fees for court appointments are lower than he would receive for other work, [so that] he has an obvious financial incentive to conclude cases on his criminal docket swiftly."²²² On the other hand, the attorney acts for the *right* reasons if his decision is based on the judgment that the "mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one"²²³

The good reader engaged in practical reason chooses to act on good reasons for action. But there may be situations where good legal and moral reasons exist for conflicting actions. In such circumstances, integrity requires the good reader to carefully balance the respective moral and legal reasons and to act as indi-

216. P. HEYMANN & L. LIEBMAN, *supra* note 80.

217. The modification of DR 4-101, "Preservation of Confidences and Secrets of a Client," provides at (C)(5) that a lawyer may reveal "[c]onfidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." *Special Supplement, supra* note 33.

218. DR 4-101(C): "A lawyer *may* reveal . . ." *Id.* at S-10 (emphasis added).

219. "(6) Individual attorneys must decide for themselves when, if ever, disobedience is morally warranted. (7) In doing so they should engage in a reasons for action analysis." *See supra* text accompanying note 38.

220. Admittedly, stated reasons may not represent the "true" reasons for action; however, the integrity thesis does not claim to present a theory of motivation. Moreover, as emphasized earlier, the proposed analysis is addressed to lawyers of good character who honestly seek to reflect on what course of action is warranted under the circumstances of their situation. For attorneys of bad character, the law of lawyering must rely on coercion.

221. *Jones v. Barnes*, 463 U.S. 745 (1983) (Defense counsel assigned to prosecute an appeal from a criminal conviction has no constitutional duty to raise every nonfrivolous issue requested by the defendant.).

222. *Id.* at 761 (Brennan, J., dissenting).

223. *Id.* at 752 (quoting Justice Jackson, *Advocacy Before the Supreme Court*, 25 TEMPLE L.Q. 115, 119 (1951)).

cated by the stronger reasons. For example, a favorite hypothetical in teaching about professional ethics is to pose the dilemma of representing a client who confesses that he actually committed the murder for which another person is soon to be executed.²²⁴ Because of the special circumstance of representing this criminal client, one has the legal duty to keep his confession confidential. At the same time, lawyers, by virtue of being morally autonomous persons, also have the moral duty to prevent the death of an innocent person.²²⁵ For anyone else—except a priest and, perhaps, a parent—knowledge of this confession presents no dilemma. Thus, if a lawyer overhears this confession while sitting in a bar, moral and legal reasons all cut in the same direction. The lawyer is free to report what was overheard; she is also free both morally and legally to remain silent. Assuming the lawyer unsuccessfully tried everything possible to persuade her client to share this information with the proper authorities and save the innocent person about to be executed, she now confronts conflicting moral and legal reasons for action.²²⁶

Conflicting reasons for action arise from the lawyer's responsibilities to other people generally and to a client by virtue of the special circumstance of being a lawyer. The lawyer must choose among these reasons those with the greater weight in order to decide whether to keep this confession confidential or to reveal it. Either act may be ethical. If there were some clear moral duty to report the confession and no room within the standards to do so, then attorneys would be faced with the classic problem that may result in civil disobedience. Equally problematic would be a situation in which revelation would be required by the law of lawyering but would violate a moral obligation that superseded any legal reason for reporting the confession.

In fact, there are good moral and legal reasons available to support either silence or disclosure. Preserving client confidences because of the promise of loyalty is a good moral reason for maintaining one's silence. Such an action can readily find legal support in the confidentiality provisions of the professional standards.²²⁷ Under the facts of this unusual and extremely troubling hypothetical, revealing client confidences in order to save an innocent life obviously can

224. For example, one well-known casebook in legal ethics poses the question:

A lawyer assigned to represent an indigent criminal defendant charged with homicide learns, in the course of questioning the defendant and preparing the defense, that the client had committed another homicide for which an innocent person has been convicted. The convicted person has been sentenced to death and her appeal is pending before the state supreme court. What, if anything, should or must the lawyer do?

GILLERS & DORSEN, *supra* note 100, at 392. The Hazard and Koniak casebook has a particularly good discussion of the problem. See HAZARD AND KONIAK *supra* note 10, at 294-310.

225. This does not mean that lawyers and others are required to intervene when riding the subway when another passenger is threatened by a gunman. Such an intervention would be a morally good thing to do, but we are allowed to forego doing that which is moral when prudential reasons like preserving our own lives are also at issue. We don't even need such a dramatic excuse as self-preservation to excuse failure to act since many morally right acts are, in fact, supererogatory, more than can be expected morally of most persons.

226. This particular problem is typical of the kind of extreme dilemma often used in teaching about professional ethics. Such dilemmas may have heuristic value—they may facilitate teaching about thinking about ethics. However, they have the serious cost of treating extreme instances of practice as paradigmatic and may contribute to the appeal of role theory. Most lawyers probably never actually face this kind of dilemma in the course of a lengthy legal career.

227. RULES, *supra* note 32, Rule 1.6, and CODE, *supra* note 32, DR 4-101.

be justified morally. Support for this decision can also be located in the standards of the profession, but less readily.

For example, the purpose underlying the exception to confidentiality for future crimes is clearly to prevent serious harm to third parties.²²⁸ Even if allowing an innocent person to die may not be a crime, if the purpose of the confidentiality exception is to prevent future serious harm to the innocent,²²⁹ one may want to implement the more general legal principle by an expansive interpretation of the crime requirement. Moreover, as argued earlier,²³⁰ the underlying jurisprudence of the standards is sufficiently flexible and permissive to

228. RULES, *supra* note 32, Rule 1.6(b)(1). A counterargument to this view might be that the language of the Rule is very narrowly crafted to require reasonable belief on the part of the lawyer that the client will commit a crime likely to result in imminent death or substantial bodily harm. Silence in allowing someone else to die for a murder you committed, is not actually killing another person. The state is the agent of the innocent person's death. However, if such silence is arguably some sort of less serious crime, can the lawyer's revelation be justified by the limited language of the present rule? Hazard and Hodes provide an excellent analysis of the legal and moral issues involved. They point out that there is a "strong presumption of nondisclosure" and that the exception for imminent death or substantial bodily harm merely permits

lawyers to balance harms in what was essentially a moral dialogue with themselves. Everyone agreed that a code of conduct must at least *permit* lawyers to reveal a planned murder, for a prohibition of such disclosure would be wholly unacceptable on moral grounds. There was similar agreement concerning a planned bodily assault. The basic dispute therefore simply came down to whether the profession should *prohibit* disclosure in situations one step less serious [such as serious fraud]. By permitting disclosure in situations of serious fraud, the Proposed Final Draft would have forced lawyers to make a moral judgment in each such case, balancing the important present and future "payoff" of the confidentiality rule against the immediate harm to the intended victim. The moral position of the profession in society would also have been weighed in the balance. Under the proposed Rule, a lawyer who had mere knowledge of impending client frauds, but did nothing to stop them, could *not* have been disciplined. However, he would have to accept moral responsibility both for himself and his brothers and sisters at the Bar. In amending Rule 1.6(b)(1), the ABA House of Delegates narrowed the exception to its minimum defensible core, took away the lawyer's discretion, and predisposed of the moral issue. The command of this provision is now clear, especially given the history just recounted: lawyers who have knowledge of an impending client fraud, and who cannot plausibly be charged with participation or facilitation . . . *must* suffer in silence. Although the present text reflects a laudable desire to minimize the exceptions to confidentiality, it goes too far. Many lawyers will chafe under a rule that promises to punish them if they do what they know is morally right. The public, when it understands the implications of the final version of this exception, will deride the profession once again—this time with great justification—for imperiously decreeing that its "ethics" supersede prevailing notions of morality. This overly narrow exception has already caught the eye of the press, which has decried it as an expression of the "hired gun" mentality. A sound exception, of course, should not go to the other extreme and *require* disclosure. The confidentiality principle has its own claim to moral force, and it should only be outweighed when the potential harm is clear and present, as well as serious. The Proposed Final Draft had it right: the intermediate cases should be left to the conscientious judgment of the responsible lawyer on the scene.

HAZARD & HODES, *supra* note 51, at 102-03. *But cf.* New Jersey RPC 1.6 which both requires revelation at (b), "shall reveal," and includes "substantial injury to the financial interest or property of another" as a basis. NAT. REP. LEGAL ETHICS & PROF. RESP., vol. III (1990).

229. Another plausible analysis of this problem would be to treat the confidence that my client is prepared to let an innocent person die for the murder he has committed as not a matter of protection of information about past crimes but as an occasion to make me an accessory to the future death of another person. Prevention of serious future bodily harm to others is arguably permitted by the standards themselves. For example, Rule 1.6 at (b)(1) permits a lawyer to reveal confidential information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death . . ." RULES, *supra* note 32, Rule 1.6(b)(1). It is not clear, of course, whether the criminal client's silence violates a criminal law in the particular jurisdiction in question. Some may claim that revelation of the confidence makes the lawyer responsible for her own client's death, but this is specious. The client created his liability by his prior murder. This analysis is analogous to Luban's excellent treatment of the perjurious client who simply has no right to the assistance of his lawyer in telling a lie. LAWYERS AND JUSTICE, *supra* note 5, at 201.

230. See *supra* text accompanying notes 178-85.

allow room for overriding moral concerns in certain limited circumstances, of which this is arguably one. Thus, the standards, when read as a whole, may provide support for the decision to reveal by reference to the Code provision at DR 1-102(B) that a "lawyer shall not: (5) Engage in conduct that is prejudicial to the administration of justice" or "(6) Engage in any other conduct that adversely reflects on his fitness to practice law." Arguably, permitting an innocent person to die for a murder committed by one's client undermines the very foundation of what constitutes justice and would certainly vitiate an attorney's "responsibility [to stand] 'as a shield' . . . in defense of right and to ward off wrong."²³¹

Of course, lawyers who give greater weight to reasons which support their duty to protect innocent life and choose to reveal their client's confession should inform their client of their decision and resign from the representation.²³² Subsequently, some of them may even be disciplined by an authoritative committee of their peers for this decision. Such a committee can weigh these duties differently than the attorneys, and the lawyers must be prepared to suffer the consequences of such a difference in opinion about the right course of action to take.²³³ It is also possible that their peers will vindicate their choice.²³⁴ Those

231. Commentary to DR 1-102, SELECTED STATUTES, *supra* note 60, at 8 n.14 (1989). Rule 8.4 also includes in its definition of misconduct at (d) engaging "in conduct that is prejudicial to the administration of justice." RULES, *supra* note 32, Rule 8.4.

232. The eventual consequences for the client as well as the innocent person on death row remain unclear even if the defending attorney reveals the confession. The confession itself is not likely to be admissible evidence in either a subsequent investigation or trial for murder of the confessing client because of the attorney-client privilege. Spahn, *Making and Breaking the Attorney-Client Privilege*, 35 PRAC. LAW. 65 (Jan. 1, 1989). Whether or not the governor will pardon the innocent on death row will depend on many factors out of the control of the revealing attorney.

233. As indicated earlier, if found guilty of a violation of the rules of the profession, lawyers can be disciplined by sanctions ranging from a private reprimand by a disciplinary committee to disbarment, which generally involves an indefinite or permanent exclusion from the bar. *See supra* text accompanying note 146. Of course, as also indicated earlier, since the bar has been notoriously delinquent in exercising its disciplinary powers, *see supra* note 148 and accompanying text, it is unlikely that it would do so in these circumstances. Moreover, it could be argued that good reasons for action should constitute a mitigating factor in decisions about appropriate sanctions for misconduct. Good character, reputation and lack of a prior record already serve to mitigate punishment. ABA/BNA LAW. MANUAL. PROF. CONDUCT. 101:3201 (1986). However, it remains the essence of civil disobedience that it may be morally required although it both demands exceptional courage to undertake and resolution to endure its penalties. In this Luban and I are generally in agreement. He writes:

Professional ethics can tell a lawyer not to cut corners; my point is that it cannot tell her to cut throats.

When moral obligation conflicts with professional obligation, the lawyer must become a civil disobedient.

(And yes: if the professional obligations are part of an enforceable code, the lawyer may have to run the risks of other civil disobedients.)

LAWYERS AND JUSTICE, *supra* note 5, at 156.

234. One approach to arguing for such vindication might utilize what are essentially reasons for action proposed by Professor Simon in his 1988 article. For example, Simon uses the notorious Valdez case, developed by G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 586-91 (1978) to demonstrate how his theory might be applied. In the scenario, provided both on videotape and in the book, Mr. and Mrs. Valdez have brought a tort action for the wrongful death of their son. They are represented by an inexperienced attorney who has not done sufficient research either to find out about a crucial change in the law from contributory to comparative negligence nor to determine that a key witness has recalled information that would be critical to the success of his clients' case. The defending insurance company is represented by an experienced negotiator, aware of both these issues, and the question raised by Simon is whether or not the insurance company attorney should disclose the change in the law. This is a problem that raises no issue with respect to the application of the Normativity Principle since the Code and Rules currently provide minimal constraint as to the negotiation role and the change in law is not a client confidence. Simon argues that

who read the professional standards as mandating confidentiality, trumping all other considerations rather than a prima facie obligation, missed the debate on the perjurious client.²³⁵

IV. CONCLUSION

Role-differentiation critics have mistakenly postulated a "standard conception of lawyering" that does not permit lawyers to be persons of integrity. The critics have debated the wrong question by applying role theory rather than the four elements analysis to the fact that persons who are attorneys may make different moral decisions depending on whether or not they are functioning as lawyers. Of course lawyers can be good persons; what matters is whether or not they act for the right reasons in the special circumstance of serving as an attorney.

the critical concern for the defense lawyer should be whether the settlement likely to occur in the absence of disclosure would be fair (in the sense that it reasonably vindicates the merits of the relevant claims). On the facts given, it seems probable that the settlement would not be fair. The plaintiff's lawyer probably set her [this rote use of the female pronoun is confusing since in the videotape and script the lawyer is male] bottom line well below the appropriately discounted value of the plaintiff's claims because of her mistake about the law. Here the defense counsel's responsibility is to move the case toward a fair result, and the best way to do this is probably to make the disclosure [of the change in law] and resume the negotiation.

Simon 1988, *supra* note 11, at 1099. Later Simon provides an excellent characterization of this proposition in terms of a reason for action: "[W]ithout disclosure the plaintiff will be deprived of a substantive legal entitlement to recover for negligently inflicted losses." *Id.* at 1114. This would be a reason for the act of disclosure whose force is strengthened by reference to the professional standards' requirement of disclosure to a tribunal of "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." RULES, *supra* note 32, Rule 3.3(a)(3). DR 7-106(B)(1) is substantially identical. If the case went to court, the defense lawyer would be required to disclose. Since this case will never get to court and since there is so little supervision of the negotiation process, the attorneys are all the more obligated to protect the fairness of the process. One way to do so is to protect the integrity of that process in ways similar to those protections provided for adjudication. This concern for the substantive purpose to be served is similar to the analysis above arguing that revelation of the confession is justified because it serves to protect the integrity of the administration of justice. As Simon correctly points out, his analysis is consistent with examining *legal* reasons for action and need not invoke *moral* reasons. Simon 1988, *supra* note 11, at 1114. Simon acknowledges that "the distinction between legal and nonlegal commitment has some importance in delimiting the sphere of the discretionary approach, since the approach does not address decision making involving nonlegal commitments." *Id.* In contrast, the integrity thesis provides a means for considering the entire range of reasons for action—legal, moral, prudential, etc.

235. See *supra* notes 183-84. Of course, there are those who would argue that perjury is the exception that proves the rule. The protection of confidences about past crimes does allow for only very narrow exceptions under the Code (*i.e.* those states that do not nullify the constraints of DR 7-102(B) (permits revelation of past fraud when the client refuses to do so to the affected person or tribunal) with the added phrase "except when the information is protected as a privileged communication.") The standards of the profession, however, do not function like some monolithic structure guiding the practices of lawyers in all fifty states. Particularly since the development of the Model Rules in 1983, states have modified both Code and Rules to craft a range of approaches to such central concerns as confidentiality. For example, Model Rule 1.6(b) provides:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

RULES, *supra* note 32, Rule 1.6(b). However, states like Arizona, Arkansas, Connecticut, Indiana, and Wyoming, although they have enacted the substance of the Model Rule, have expanded Rule 1.6(b)(1) to cover additional crimes. NAT'L. REP. LEGAL ETHICS & PROF. RESP., *supra* note 228.

The critics' arguments from moral nonaccountability and partisanship both fail. In fact, as the Boundaries Principle demonstrates, it would be morally wrong to hold lawyers morally accountable for the acts of their clients because doing so is disrespectful of the moral autonomy of both the attorneys and those they have promised to serve.

The integrity thesis demonstrates that the correct standard conception of lawyering provides ample opportunity for attorneys to integrate their responsibilities to the profession and their own cherished moral values. Lawyers, as the Normativity Principle holds, have a special obligation to obey the law of lawyering but, as the Principle of Integrative Positivism maintains, this is a *prima facie* obligation only. Lawyers remain responsible for balancing their legal and moral obligations for themselves and may conscientiously decide to disobey the law of lawyering so long as their reasons for doing so are good reasons.

