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23 Geo. J. Legal Ethics (forthcoming, 2010)

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# How Must a Lawyer Be? A Response to Woolley and Wendel

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DAVID LUBAN\*

Alice Woolley and Brad Wendel tackle an important but underdiscussed problem in legal ethics: the problem of connecting normative theories about professional duties with a plausible psychology of action. As they felicitously put it, legal ethics must answer not only questions about what a lawyer must do, but also questions about how a lawyer must be—their shorthand, I take it, for “how a lawyer must be in order to do what (according to the theory) a lawyer must do.” They plausibly suggest that ethical theories offer not only maxims of obligation and moral reasoning, but also idealized portraits of the moral agent. Actions that come easily to one personality type may be excruciatingly painful or embarrassing to another. Once we notice this crucial connection between actions and personality, we open up a new dimension for evaluating the theories: evaluating the portrait of the moral agent implicit in the theory.

Viewed in this light (they argue), theories of legal ethics that might otherwise seem plausible can fail if they turn out to require lawyers to be an implausible kind of person, in one or more of the following ways: someone who is a misfit in the professional settings in which lawyers ordinarily work; someone who must possess cognitive capacities and moral virtues at an unrealistically high level; or someone whose overall personality turns out to be morally undesirable. Here I am paraphrasing the three criteria Woolley and Wendel specify for evaluating conceptions of how a lawyer must be: “whether that conception is functional, realistic or desirable.”<sup>1</sup>

Using these criteria, they raise doubts about the theories of William Simon, Charles Fried, and me. According to Woolley and Wendel, Simon’s theory requires lawyers who are mavericks, and my theory requires lawyers who are (excessively?) moralistic; both are highly individualist to an extent that might make the legal profession impossible to regulate, and both require lawyers who are unusually smart and unrealistically free from cognitive biases. Fried’s theory, on the other

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<sup>1</sup> Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 *GEO. J. LEGAL ETHICS* XX, 38 (2010).

hand, requires lawyers whose combination of moral skepticism, institutional complacency, and uncritical loyalty to clients may be morally undesirable.<sup>2</sup>

Embedded in Woolley and Wendel's critique of Simon, Fried, and me is their own picture of "how an ethical lawyer should be." Woolley and Wendel are particularly concerned with the regulation of the legal profession, and thus with lawyers' attitudes toward law in general, particularly toward professional regulations. That attitude should be, in a phrase Wendel has used elsewhere, one of "civil obedience."<sup>3</sup> Intellectually, the lawyer should be a master of the law of lawyering: disciplinary rules, tort and agency rules, and agency regulations of lawyer conduct. She should recognize professional duties as obligations of political morality, not individual morality.<sup>4</sup> And she should obey these duties, even if they conflict with her own moral convictions. In other words, she should be law-abiding as a matter of political principle. Transposing this requirement into the psychological categories Woolley and Wendel favor, it appears that she should be emotionally identified as a citizen first and a moralist second; and, further, that she should be temperamentally capable of suppressing her urge to pass moral judgment. It would be interesting to ask the same questions of Woolley and Wendel's ideal lawyer that they ask about Simon, Fried, and me; that is beyond the scope of this paper, though, and I will content myself with responding to their criticisms.

In the comments that follow, I first discuss Woolley and Wendel's three criteria for evaluating "how a lawyer must be." Woolley and Wendel do not explain the connection between these criteria, nor whether the criteria are consistent with each other, nor whether they are independent of each other. In my view, asking whether a conception of the moral agent is functional, realistic, or desirable are quite different questions. In Section I, I discuss the criterion of realism, under two possible interpretations: that a conception of a moral agent is unrealistic if it is, quite literally, impossible for agents to fulfill, and that the conception is unrealistic if it is merely difficult to fulfill. I argue that neither Simon's conception nor mine is impossible, and that being difficult to fulfill is not in itself a legitimate reason for rejecting a conception of moral agency. This section concludes by contrasting my conception of ethics as choice under the practical assumption of human freedom with Woolley and Wendel's more deterministic approach.

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<sup>2</sup> In this response I shall have nothing to say about Woolley and Wendel's discussion of Fried. My focus is on their discussion of my own view and Simon's view, which are much nearer to each other than either is to Fried's.

<sup>3</sup> W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

<sup>4</sup> Woolley & Wendel, *supra* note 1, at 37.

Section II takes up the issues of functionality and desirability. I argue that neither Simon’s theory nor mine requires a lawyer with a dysfunctional or undesirable personality. In the conclusion, I speculate that focusing (as I do) on the ethical demands of professional life, without discussing the many other dimensions of being human, may make a theory sound more relentlessly moralistic than it really is. A book exclusively devoted to ethics is not an assertion that ethics is our exclusive devotion.

## I. “REALISTIC”

### A. “BEING UNREALISTIC” UNDERSTOOD AS IMPOSSIBILITY

Start with the requirement of realism, about which I shall have the most to say. At one point, Woolley and Wendel ask whether Simon’s theory and mine are “the equivalent of wanting basketball players who are 12 feet tall.”<sup>5</sup> In an obvious way, any ethical theory must be at least minimally realistic: it cannot require the impossible—the meaning of Kant’s famous maxim that “ought” implies “can.”<sup>6</sup> A moment’s thought shows that this maxim applies not only to the physical possibility of doing what the moral theory says we must do, but also to the intellectual possibility of carrying out the kind of deliberation the theory asks of us, and the emotional possibility of motivating ourselves to do what we ought.

At the very least, “ought implies can” means that a moral theory must not be too computationally complex for the human brain. Woolley and Wendel worry that William Simon’s account of legal ethics—which apparently requires sophisticated legal analysis at every turn—might place unrealistic cognitive demands on lawyers. As Woolley and Wendel note, “Simon’s lawyer is very much intended to be the counterpart to Dworkin’s ideal judge Hercules, who is called upon to construct a coherent political-normative account that explains and justifies the holding in any given case.”<sup>7</sup> That means that the good lawyer, for Simon, is “a person of awesome cognitive capabilities.”<sup>8</sup> Some years ago, I voiced a similar concern about Simon’s theory.<sup>9</sup> But obviously Simon’s approach is not *literally* impossible in the sense of being too computationally complex for

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<sup>5</sup> *Id.* at 32.

<sup>6</sup> Immanuel Kant, *On the Common Saying: That May Be Correct in Theory, but It is of No Use in Practice* (1793), reprinted in THE CAMBRIDGE EDITION OF THE WORKS OF KANT: PRACTICAL PHILOSOPHY, at 289, \*8: 287 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996)(1793) [hereinafter PRACTICAL PHILOSOPHY]. Kant doesn’t use the modern “ought implies can” formulation, which first appeared in Sidgwick’s *The Methods of Ethics* (1st ed. 1874).

<sup>7</sup> Woolley & Wendel, *supra* note 1, at 20.

<sup>8</sup> *Id.* at 21.

<sup>9</sup> David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 893-96 (1999).

the human mind. The analyses Simon offers in *The Practice of Justice* are complex to roughly the extent that an exam answer in a law school class on labor law or tax policy is complex. To determine whether (in Simon's example that Woolley and Wendel borrow) union busting by a university is substantively unjust, the university's counsel needs to analyze the purposes and policies behind statutes and apply her analysis to the university's situation. In my earlier paper about Simon, I worried that it is unrealistic (meaning impossible) to expect super-sophisticated reasoning from lawyers operating under deadlines. Simon actually agrees with this, and argues that when the lawyer is operating under time or resource constraints, she must fall back on "presumptive responses to broad categories of situations."<sup>10</sup>

I am inclined to accept this response. Of course in the university hypothetical, the lawyer almost certainly has time to think through whether the representation is just; but, if she has not, a "presumptive response" might be that union busting is almost certainly inconsistent with the broad (and just) purposes of the National Labor Relations Act. Even with such a presumption, the analysis of legal justice is not a trivial exercise, but it is hardly above the pay grade of a university counsel who works on labor-management issues. If, for example, her boss were to ask her to produce a legal memorandum detailing the arguments the union local might make if the case ended up in litigation, the lawyer would probably come up with something very similar to Simon's analysis.

Thus, Simon's theory does not really require the impossible. But what if it did, at least for some lawyers? Suppose that some lawyers simply don't have enough upstairs to successfully do the kind of analysis Simon asks of them. Then, arguably, "ought implies can" mitigates moral criticism for getting the wrong answer.<sup>11</sup> However, it doesn't relieve them of the obligation to try to figure out what substantive legal justice requires, even if they get it wrong. Surely it is open to Simon to respond that he offers his examples only as "model answers"; the injunction at the heart of his theory is that lawyers should value substantive justice and aim to figure it out using standard methods of legal analysis, not that they must get the same answers Simon does.

#### B. "BEING UNREALISTIC" UNDERSTOOD AS PSYCHOLOGICAL DIFFICULTY

So much for the requirement that ethical theories must be rejected as unrealistic if they ask the impossible; it is a valid criterion, but it does not

<sup>10</sup> WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 157 (1998).

<sup>11</sup> How much intellectual error mitigates blameworthiness is of course open to debate. We usually do not accept the excuse of intellectual incapacity from professional people (lawyers, doctors, engineers) when they malpractice; but we might if getting the right answer demands extraordinary brilliance.

rule out very much. But there is another, weaker sense of realism that concerns difficulty rather than impossibility. This notion routinely appears, for example, in public debates about how best to address the social problem of teenage sex, pregnancy, and STDs. Some people promote abstinence-only. Others criticize abstinence-only as unrealistic. By “unrealistic,” the latter don’t mean that abstinence is physically or cognitively impossible. What they mean is that abstinence is an uphill struggle, uphill enough that abstinence-only education is likely to fail.<sup>12</sup> Given the intensity of sexual desire, teens’ susceptibility to peer group pressure, adolescent impulsivity, and Mother Nature’s hormone cocktail, it is *unrealistic* to expect many teenagers to abstain from sex, even if in some sense they agree with their high school teacher about the virtues of abstinence.

Obviously, the difficulty of abstinence is not the same as literal impossibility. Kant illustrated the difference with a characteristically ghastly example:

Suppose someone asserts of his lustful inclination that, when the desired object and the opportunity are present, it is quite irresistible to him; ask him whether, if a gallows were erected in front of the house where he finds this opportunity and he would be hanged on it immediately after gratifying his lust, he would not then control his inclination. One need not conjecture very long what he would reply.<sup>13</sup>

This seems to be the main sense in which Woolley and Wendel use the term “unrealistic”—not to assert that an ethical stance requires lawyers to be something that is literally impossible for them to be, but merely that it demands an uphill struggle. For example, they comment that Simon’s requirement that lawyers should be committed to impartial justice “seems rather unrealistic in a world in which both clients and law firms are committed to a distinctive set of norms, not necessarily those of impartial justice.”<sup>14</sup> Plainly they don’t mean that the human brain is incapable of

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<sup>12</sup> A recent study has apparently cast doubt on assertions that abstinence-only is doomed to failure. Tamar Lewin, *Quick Response to Study of Abstinence Education*, N.Y. TIMES, Feb. 2, 2010, at A18. Let me make clear that I am not taking sides in the debates over the efficacy of abstinence education or the morality of teenage sex; I am simply using it as an example.

<sup>13</sup> Immanuel Kant, *Critique of Practical Reason* (1788), reprinted in PRACTICAL PHILOSOPHY, *supra* note 6, at 163, \*5:30. Of course some might disagree as to the predicted outcome, as Thom Gunn did in his very naughty little poem *Courage, A Tale*, in THOM GUNN, COLLECTED POEMS 292 (1994).

<sup>14</sup> Woolley & Wendel, *supra* note 1, at 18. On the merits, this remark seems a bit question-begging against Simon — it assumes that other lawyers in the law firm are not going to have the commitment to impartial justice that Simon commends; but of course Simon is commending the pursuit of justice to all the lawyers in the firm, and the

impartial justice (tell that to a judge, whose job description requires impartial justice). They mean that it is unrealistic to expect lawyers to go against the grain of the institutions in which they work and against the clients who pay them.

This is where the psychological concepts Woolley and Wendel invoke—not only cognition, but also “disposition or personality,”<sup>15</sup> or again “emotion, dispositions, and virtue”<sup>16</sup>—come in. A morality that requires people to act in a way that runs against the grain of their dispositions, personality, or emotions is an unrealistic morality. It’s just too damn hard. Or, flipping the argument around, a morality that requires people to *be* the kind of person to whom such acts don’t run against the grain is unrealistic if most of us are not that kind of person. Thus they write, “It seems odd to ground a general theory of ethical lawyering, intended to be applicable to all lawyers, on a complex of personal characteristics that occurs only infrequently, in the form of exceptionally courageous and individualistic people.”<sup>17</sup>

I am not convinced that this is a legitimate way of criticizing a moral theory, for several reasons. First, and most important, is that any acceptable moral theory will be unrealistic in this sense. Consider the famous Milgram experiments in social psychology, in which subjects are set the task of punishing another subject with escalating electrical shocks for getting wrong answers in a memorization exercise. In reality, the shocks are fake and the other subject is a confederate of the experimenter; the purpose of the experiment is to see how far people will go in following a patently outrageous order. Milgram’s stunning finding is that almost two-thirds of the subjects he tested went all the way to a seemingly-lethal shock level (despite screams from the man at the other hand, pleas about his heart condition, and eventual ominous silence).<sup>18</sup> The findings were robust across many replications in many cultures.<sup>19</sup> Apparently, most of us

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problem of a lawyer going against the grain arises only when we assume a world in which only a few lawyers adopt Simon’s approach to ethics while most of the lawyers around them, including those in their firm, do not. Under that assumption, any system of legal ethics will be unrealistic.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 33.

<sup>18</sup> STANLEY MILGRAM, OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 56-57 (1974); *see also* ARTHUR G. MILLER, THE OBEEDIENCE EXPERIMENTS: A CASE STUDY OF CONTROVERSY IN SOCIAL SCIENCE (1986). I analyze these experiments in some detail in chapter 7 of DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 237 (2007), “The Ethics of Wrongful Obedience.”

<sup>19</sup> *See* MILLER, *supra* note 18, at, 86-87. The experiments seem to have leaked over to popular culture, in unscientific replications of the Milgram experiment by TV producers in the U.K. and France. See the British video at <http://www.youtube.com/watch?v=y6GxIuljT3w>; on the French version, see *French Contestants Torture Each Other on TV Game of Death*, U.K. TELEGRAPH, Mar. 17, 2010,



find it extremely difficult to disobey orders from an authority figure, even when the orders are destructive and absurd.

A disquieting consequence of Milgram's experiments is that any morality that requires disobedience to authorities when they issue destructive orders is, in the sense we've been discussing, "unrealistic": most people apparently find it excruciatingly difficult to disobey an authority figure to his face. But any defensible morality will require defiance under such circumstances. It follows that realism cannot, by itself, be a criterion for judging ethical theories. Ultimately, the charge of psychological unrealism is a legitimate objection to a moral theory only if we have other, substantive grounds to doubt the theory's prescriptions, as we clearly do not when the prescription is "don't inflict major damage on an innocent person merely because your boss tells you that that is your job." Contrary to Woolley and Wendel, psychological realism is not an independent evaluative ground for ethical theories.

A clarification is in order to distinguish the preceding discussion of "unrealism" in ethics from a similar-sounding but actually quite different debate familiar in the contemporary literature of moral theory. For four decades, philosophers have debated the so-called "demandingness objection," according to which it counts against a moral theory that it places enormous demands on people. Bernard Williams originally raised this as an objection to utilitarianism, which seemingly requires us to spend every waking moment maximizing utility, leaving no space for projects that matter to us simply because they matter to us.<sup>20</sup> The demandingness objection often arises in discussions of our obligations to aid distant others: the "bottom billion" of desperately impoverished people in the developing world.<sup>21</sup> But it can also arise in connection with supposed obligations to "live green," reduce your carbon footprint, eat only locally

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available at <http://www.telegraph.co.uk/news/worldnews/europe/france/7457780/French-contestants-torture-each-other-on-TV-Game-of-Death.html>. For a video, see <http://www.youtube.com/watch?v=ZCamiWs-KMs&NR=1&feature=fvwp>.

<sup>20</sup> See Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 110, 115-16 (J.J.C. Smart & Bernard Williams eds., 1970). As Gilbert Harman vividly puts it, "Consider your own present situation. You are reading a philosophical book on ethics. There are many courses of action open to you that would have much greater social utility....According to utilitarianism, therefore, you are not now doing what you ought morally to be doing and this will continue to be true through your life [unless you drop everything and devote yourself to life-saving activities]." GILBERT HARMAN, THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS 157 (1977).

<sup>21</sup> Perhaps the best-known example of a moral argument that invites the demandingness objection is Peter Singer's famous *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229 (1972), which argues that residents of wealthy countries have stringent moral obligations to contribute to famine relief to a point far beyond anything we ordinarily recognize. One well-known attempt to work out the demandingness objection is SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM (1982); a recent effort in the context of global aid is GARRETT CULLITY, THE MORAL DEMANDS OF AFFLUENCE (2004).

grown vegetables, avoid products made by child laborers, and the like.<sup>22</sup> Who wants to spend hours each week finding out where your vegetables come from? There are strong arguments that the demandingness objection really does offer a legitimate critique of overbearing moral obligations. Plainly, the demandingness objection bears a family resemblance to the objection that a moral theory imposes unrealistic demands on agents. Would it be inconsistent to accept the demandingness objection but not the unrealism objection?

I think not, because the two objections are less related than they seem. In its basic form, the demandingness objection arises in connection with obligations that seem to know no bounds—paradigmatically, “positive” obligations to aid others. You can always spare another dollar to the needy; you can always volunteer another evening. (Oscar Wilde supposedly said that the trouble with socialism is that it takes up too many evenings.) Here, the impossibility of cabining the obligation seems like a strong objection to regarding it as a legitimate moral expectation. But theories of legal ethics like Simon’s and mine are not like this. They don’t feature positive obligations or obligations to aid others at their core; and they don’t impose Obligations Without Borders.<sup>23</sup> They are unrealistic in a different sense, namely that they may create awkward moments of saying no to clients and partners on a more frequent (but not super-frequent) basis than lawyers have to do now.

Awkward moments, though, are hardly an objection to a view of lawyers’ ethics, and they do not support the suspicion that an ethical view that generates awkward moments is unrealistic. The Model Rules of Professional Conduct are filled with rules that contemplate awkward moments. A lawyer whose client commits perjury must urge the client to voluntarily rectify it, letting the client know that if she doesn’t the lawyer will.<sup>24</sup> A lawyer “should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”<sup>25</sup> Lawyers must tell people who pay their fees to represent a third party that the fee-payer has absolutely no say in the representation.<sup>26</sup> Corporate counsel sometimes has to give “*Miranda* warnings” to powerful executives, telling them that she represents the company, not the executives, and won’t necessarily keep the executives’ confidences.<sup>27</sup> Likewise, corporate

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<sup>22</sup> Judith Lichtenberg, *Negative Duties, Positive Duties, and the “New Harms,”* 120 ETHICS (forthcoming April 2010)(page proofs on file with author).

<sup>23</sup> I consider and respond to versions of the demandingness and unrealism objections in DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 139-44 (1988), in the section titled “Is It Too Much to Ask?”.

<sup>24</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) cmt. 10 (2007) [hereinafter MODEL RULES].

<sup>25</sup> MODEL RULES R. 2.1 cmt. 1.

<sup>26</sup> See MODEL RULES R. 5.4(c).

<sup>27</sup> See MODEL RULES R. 1.13(f).

counsel may have to go over the head of her boss to report misconduct to higher authority within the corporation.<sup>28</sup> Law firm associates must refuse partners who tell them to do things that the associate knows to be unlawful or unethical, for example backdating a document to cover up the partner's missing a deadline.<sup>29</sup> A lawyer must blow the whistle to disciplinary authorities if she "knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"; that includes lawyers in her own firm.<sup>30</sup> So even the regulatory framework that Woolley and Wendel believe lies at the heart of legal ethics is unrealistic in the sense that it can require lawyers to have very difficult conversations, the kind that leave you sleepless the night before and make your heart pound when you pick up the telephone.

None of this is to say that worries about realism play no part in ethics. Sometimes we excuse people for doing the wrong thing in the face of psychological pressure. This is equivalent to excusing them because—given their personality and the psychological pressure they are under—holding them to a rigorous moral standard is unrealistic. But excuses cannot become so universal that they amount to a blanket "Get Out of Conscience Free" card, as they would if the charge of "being psychologically unrealistic" were invariably allowed to pare back the scope of obligation. In my own analysis of the Milgram experiments, I distinguish between situations in which psychological pressure can excuse wrongful behavior from those in which it cannot on the basis of whether the psychological disposition exploited by the pressure is morally creditable or morally discreditable.<sup>31</sup> Whether or not my analysis is

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<sup>28</sup> See MODEL RULES R. 1.13(b).

<sup>29</sup> See MODEL RULES R. 5.2(a); see also MODEL RULES R. 8.4(c).

<sup>30</sup> MODEL RULES R. 8.3(a).

<sup>31</sup> LUBAN, *supra* note 18, at 253-60. The inspiration behind this distinction is Victoria Nourse's analysis of the heat-of-passion defense in criminal law, which can mitigate murder charges to manslaughter. Nourse proposes that the heat-of-passion defense is legitimately available to the parent who shoots his daughter's rapist, but should not be available to the man who shoots his girlfriend when she announces that she is leaving him. Of course the homicide is wrong in both cases. But the murderous disposition in the former case tracks a legitimate moral judgment that the rapist deserves punishment; in the latter case, the murderous disposition tracks an illegitimate moral judgment that his girlfriend is a kind of property that has no right to leave him. Victoria Nourse, *Passion's Progress*, 106 YALE L.J. 1331, 1390-93 (1997). On my analysis, deference to authority in the Milgram scenario can ultimately be traced to a morally discreditable disposition to value our own favorable self-image to an excessive degree. That is because I follow Milgram in diagnosing the obedience phenomenon as a consequence of the step-by-step increments in the shocks. For a subject to break off at a high level would involve recognition by the subject that the nearly-as-high shocks he or she had been administering are wrong, and that would be admitting horrible moral error. "For," as Milgram writes, "if he breaks off, he must say to himself: 'Everything I have done to this

correct, it seems clear that *some* distinction must be drawn between ethical theories that are objectionably unrealistic and those about which the response to the charge of unrealism must be: “Tough luck: realistic or not, this is what morality requires.” In either case, psychological unrealism properly belongs in a theory of excuses, not in the set of criteria for evaluating ethical theories.

A related objection to using unrealism as a criterion for criticizing moral theories is that it may lead us to set our sights too low. There is a familiar argument in criminal law that publicizing the defense of duress would make people less reluctant to give in to pressure to commit crime (because they know the defense is available), and thus would lead to too much crime.<sup>32</sup> I am suggesting an analogous concern here: that overemphasis on people’s psychological resistance to moral requirements will lead us to conclude that lawyers are never obligated to follow them.

Finally, I’d like to reemphasize a point I made earlier in connection with Woolley and Wendel’s critique of Simon. Part of what makes complying with so-called “high commitment” theories of legal ethics<sup>33</sup> psychologically difficult is this: we imagine that the lawyer who adopts Simon’s view or mine is all alone in a law firm where nobody else has adopted the same view. Of course it is psychologically difficult being the lone dissenter. But perhaps the right question is not, “Is it psychologically realistic for a lawyer to follow Luban’s or Simon’s injunctions in a legal environment where other lawyers mostly accept the standard conception?” Perhaps a better question is, “Is it psychologically realistic for a lawyer to follow Luban’s or Simon’s injunctions in a legal environment where the other lawyers mostly accept ‘high commitment’ ethics?”

This observation suggests that the best focus on ethical reformers is on institutions and laws, not individual moral exhortation of lawyers (of course the two are not mutually exclusive)—a point that Woolley and Wendel themselves make.<sup>34</sup> As Judith Lichtenberg has argued, perhaps the time has come to stop arguing about moral demandingness and, instead, ask how institutions can harness psychology on behalf of high

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point is bad, and I now acknowledge it by breaking off.’ But, if he goes on, he is reassured about his past performance.” MILGRAM, *supra* note 18, at 149.

<sup>32</sup> Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 632-34 (1984).

<sup>33</sup> The term is Simon’s: William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 654-55 (2003) (referring to “ethics reflecting a high level of commitment to third party and public interests”). Both his ethical theory and mine would qualify as “high commitment” in this sense.

<sup>34</sup> See Woolley & Wendel, *supra* note 1, at 37.

commitment ethics.<sup>35</sup>

One way to do this is by changing ethics regulations and other laws so that morally difficult behavior is backed by the force of law, and lawyers can tell clients or others, “I could lose my license for doing that...” Woolley and Wendel mention the Sarbanes-Oxley Act, with its “reporting up the line” requirement for lawyers confronting possible client fraud.<sup>36</sup> They might also have noted that Sarbanes-Oxley drove the American Bar Association to amend Model Rule 1.13(b) so it conforms to Soxley’s requirement. In recent years, other rule changes have brought the Model Rules into closer alignment with proposals of “high commitment” ethicists—for example, by broadening MR 1.6(b) to include confidentiality exceptions ranging over a wider category of client wrongdoing, and adding MR 3.8(g) and (h) to make prosecutors reveal evidence of wrongful convictions.

These amendments raise an interesting question: how did the bar decide that the new rules are superior to their predecessors? In my opinion, it is no coincidence that these recent rule changes all align with high commitment ethics, nor that they mostly align with common (i.e., extra-professional or “lay”) morality. Under common morality, it is *wrong* for a lawyer to keep confidential the knowledge that a client is about to swindle someone out of their life savings, and it is wrong that a prosecutor might conceal new evidence that an innocent person is rotting in prison. On my account of legal ethics, the gap between professional morality and common morality should shrink, and in this sense the new regulations reflect right answers. It is noteworthy that the organized bar has not always agreed, and in the case of broadening exceptions to confidentiality, the bar notoriously dug its heels in for decades to defend the wrong answer. One virtue of revisionary conceptions of ethics is that they may provide criteria and perhaps even impetus for law reform that a legal ethics centering on “civil obedience” to existing regulations does not.

### C. REALISM AND DETERMINISM

Ultimately, the main criticism that ethical theories such as Simon’s and mine are unrealistic seems to be that the facts of psychology set limits to moral choice. A fundamental difference between Woolley and Wendel’s theory of agency and my own is that they appear to be determinists while I am not. They are less than entirely clear on this issue. At one point they discuss with approval psychologist David Matsumoto’s claim that a “complex interaction of forces ... determine how individuals

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<sup>35</sup> Judith Lichtenberg, *Famine, Affluence, and Psychology*, in PETER SINGER, UNDER FIRE: THE MORAL ICONOCLAST FACES HIS CRITICS 229 (Jeffrey A. Schaler ed., 2009); *but see* Peter Singer, *Reply by Peter Singer*, in *id.* at 259.

<sup>36</sup> Woolley & Wendel, *supra* note 1, at 37.

actually think or behave at any particular moment in time. Situational factors and personality together determine behavior....”<sup>37</sup> This is the language of determinism.

Later in the same paragraph, Woolley and Wendel amend Matsumoto’s “situation plus personality determine behavior” model to a somewhat more complex one, adding “that it is not only personality, morality and/or situation that will determine that individual’s actions,” but also “affective states,”<sup>38</sup> that is, emotional states. In one way, this is simply another version of determinism— affective states and morality join with personality and situation to determine behavior. But the claim is a bit more than that, because Woolley and Wendel include morality among the factors that “affect how she responds to a particular circumstance, and how she chooses to act in that circumstance.”<sup>39</sup> Here they sound less determinist, because they speak not only of “how she responds” but also “how she chooses,” and apparently morality affects how she chooses. Though it has overtones of determinism, this is closer to the language of free will.

I regard the entire subject of ethics as having to do with choice, and thinking about choice—that is, about what I should choose, here and now—requires me to suppose that I can make a choice. That is the practical standpoint, and I accept Kant’s argument that adopting the practical standpoint requires us to postulate our own freedom to choose.<sup>40</sup> Viewed from the practical standpoint, morality is not just one deterministic factor among others, bumping me wherever the forces resolve. Rather, morality is something that lays a claim on me, which I must decide whether to honor or not. Morality enters the stage precisely when determinism exits, at the moment when we adopt the practical standpoint and try to puzzle out the right thing to do.

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<sup>37</sup> *Id.* at 10.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Immanuel Kant, *Critique of Practical Reason* (1788), reprinted in PRACTICAL PHILOSOPHY, *supra* note 6, at 246, \*5:132; see HENRY E. ALLISON, KANT’S THEORY OF FREEDOM 40-41 (1990). As I have written elsewhere,

This point is less mysterious than it sounds. A theoretical belief in determinism is perfectly superfluous from the practical point of view. Suppose you are trying to decide whether to do your laundry now or tomorrow. As a determinist, you are convinced that you have no freedom to choose on this or any other issue: que sera, sera. What next? Do you simply settle back in your chair and say to yourself, “I await the inevitable workings of the laws of physics!” as though you are a marionette waiting for the puppet master to jerk your strings? Plainly, that is simply a bizarre way of deciding not to do your laundry now. From the practical standpoint, determinism is always one thought too many.

David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1441 n. 27 (2008).

## II. “FUNCTIONAL” AND “DESIRABLE”

Recall that Woolley and Wendel aim to evaluate conceptions of how a lawyer must be according to whether they are realistic, functional, and desirable. Having discussed the criterion of realism, I now turn to the questions of whether Simon’s theory or mine presupposes a lawyer with a dysfunctional or undesirable personality. My answer is no.

### A. “FUNCTIONAL”

I take it that by asking whether “how a lawyer must be” under a given ethical theory is functional, they mean to ask whether a lawyer who is “like that” will function well in typical workplace settings, where “function well” means two things: well for the lawyer and well for the organization. They obviously think that the answer is no for Simon. They portray the ideal lawyer in Simon’s ethics as a maverick who does not play well with others. She is “disagreeable,” and may even be “incapable of a healthy existence within an institutional context.”<sup>41</sup> They may think the answer is no for me as well. For, like Simon, my lawyer “is extremely mistrustful of claims of authority to obedience,”<sup>42</sup> and she “will be required to think and justify her actions in terms of a conceptual vocabulary that is disfavored in the environment in which she works,” because she uses the language of morality, to which large-firm lawyers are distinctively averse.<sup>43</sup>

Now in one way these arguments are similar to the argument about psychological realism: they presuppose that the “high commitment” lawyer is working in a law firm staffed almost entirely by non-high commitment lawyers. But it is not clear that asking about functionality under this assumption is the right question. As suggested earlier, Woolley and Wendel should ask whether the high commitment lawyer is functional in a law firm of the like minded.

After all, if an institution is designed so that functioning ethically within it requires undesirable traits, why should we use this as a criticism of the ethical theory rather than a criticism of the organization? The years framed by the Enron collapse on one end and the financial crash on the other were filled with organizations that rewarded irresponsibility, risk

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<sup>41</sup> Woolley & Wendel, *supra* note 1, at 22.

<sup>42</sup> *Id.* at 26.

<sup>43</sup> I’m not entirely guilty as charged here. Although I have occasionally described client counseling as moral dialogue, I am also on record with the following: “And client counseling, in turn, means discussing with the client the rightness or wrongness of her projects, and the possible impact of those projects on ‘the people,’ *in the same matter-of-fact and (one hopes) unmoralistic manner* that one discusses the financial aspects of a representation.” LUBAN, *supra* note 22, at 173 (emphasis added).

taking, greed, and dishonesty. It may be that honesty is not “functional” in such an institution, but why think that is a strike against honesty rather than a strike against the institution?

Woolley and Wendel might respond that no organization can tolerate employees who are habitually mistrustful of authority and are willing to break the rules. However, I don’t think matters are so clear.

On the first point, I find Woolley and Wendel’s description of my own view as mistrustful of authority slightly misleading because it is ambiguous. I do not mean that those who run organizations are usually bad enough to warrant mistrust—that would be a baseless and paranoid thing to believe, and I nowhere assert it. Rather, I believe that the division of labor and knowledge in complex organizations, combined with well-known organizational dynamics such as “groupthink,” can lead to organizational misdeeds that nobody in the organization recognizes as such.<sup>44</sup> Lawyers should mistrust authority only in the sense that they should try to become aware of whether their own judgment has become unhinged by the organization’s culture or structure; in this sense, mistrusting authority is the flip side of a certain kind of self-mistrust: the self-scrutiny and skepticism of which Socrates is the exemplar—the simple commandment to *stop and think*.<sup>45</sup> Can an organization tolerate people who stop and think? I see no reason why not; a better question is whether organizations can tolerate people who don’t.

What about people prepared to break rules? That is a harder question, and the answer will turn on the nature and purpose of the organization—some require tighter chains of command and greater obedience than others. This is more than I can go into here. Suffice it to note that even armies require soldiers to disobey orders if they are manifestly illegal, and often encourage improvisation and exercise of judgment among officers in the field. Law firms obviously have looser chains of command than armies and generally provide lawyers with significant autonomy. I am unpersuaded that either the organizational structure of law firms or the regulatory system would be damaged by lawyers who exercise independent moral as well as professional judgment.

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<sup>44</sup> See LUBAN, *supra* note 18, at 267-97; David Luban, *Making Sense of Moral Meltdowns*, in *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 357 (Susan D. Carle ed., 2005), *revised in* *MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY* (Deborah L. Rhode ed., 2006); *see also* Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 *ST. LOUIS U. L.J.* 941 (2007); Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 *BROOK. L. REV.* 629 (1997).

<sup>45</sup> See LUBAN, *supra* note 18, at 296-97. My philosophical inspiration here is HANNAH ARENDT, *Thinking and Moral Considerations*, in *RESPONSIBILITY AND JUDGMENT* 159 (Jerome Kohn ed., 2003).



Woolley and Wendel write, “Assuming it is possible to reform the cultures of law firms, government offices, and in-house legal departments, the last thing one would want in a lawyer is a disposition to regard established rules and procedures as optional guidelines, to be disregarded whenever the lawyer believed justice or morality would be better served.”<sup>46</sup> This is an ingenious argument, which seems to turn the tables on *soi disant* ethics reformers like Simon and me by showing that our theories may actually be the enemies of successful reform. But it is not a sound argument, because it begs crucial questions.

First, it begs the question of whether the best way to reform organizational culture would in fact be to create channels for lawyers to exercise greater independent moral judgment; Woolley and Wendel seem to assume that the answer is no, but it is not obvious why. Second, Woolley and Wendel’s argument begs the question whether the reformed organization would be more just and moral, so that the need to disregard procedures would diminish and the problem they raise become less urgent. Again, they apparently assume that the answer is no—although it is unclear in that case what the “reform” was meant to accomplish. Third, they assume that the reform is thorough enough “that following the procedures will do better in the long run, as compared with relying on the judgment of individuals.”<sup>47</sup> That is not true of all reforms, and Woolley and Wendel have not actually shown that it is true of any. Fourth, and most obviously, the argument starts with the “assume a can opener” nonchalance often attributed to economists: “Assuming it is possible to reform the cultures....” What if the cultures have not been reformed, or not reformed adequately? Do we still want lawyers who follow orders and stick to the rules? Why is that “functional”?

#### B. “DESIRABLE”

Finally, Woolley and Wendel suggest that the personality traits and dispositions that go with high commitment ethics may be undesirable. “The point here is not to ask whether the acts prescribed, if accomplished, would be desirable. But it is to ask whether the type of lawyer who would be able to accomplish those acts in a given case is the type of lawyer we would want to have across *every* case, across the totality of the legal system as a whole.”<sup>48</sup>

This is indeed an intriguing and important question, but unfortunately Woolley and Wendel do not answer it. Instead, they argue that the type of lawyer presupposed by Simon is rare—“ a complex of personal

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<sup>46</sup> Woolley & Wendel, *supra* note 1, at 33.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 32.

characteristics that occurs only infrequently, in the form of exceptionally courageous and individualistic people.”<sup>49</sup> This is not an argument that Simon’s ideal lawyer’s traits are undesirable. On the contrary, it is an argument that they are more desirable than we dare hope.

The nearest that Woolley and Wendel come to arguing that the ideal is undesirable is this: “the type of person who can resist the pressures of institutional compliance, cannot function easily within an institution. Her dispositional capacity to resist institutional compliance makes institutional compliance something she cannot do well or easily.”<sup>50</sup> On its face, this seems plausible; but on closer reflection, I am not convinced.

Note first that Woolley and Wendel seem to equate desirable personality traits with those that facilitate institutional compliance. Surely that is not true of all institutions. Indeed, this seems like an argument about functionality (in the sense discussed earlier) rather than desirability.

More importantly, Woolley and Wendel seem to be trading on an equivocation. They refer to a lawyer’s “dispositional capacity to resist institutional compliance.” Which is it, *disposition* or *capacity*? My theory, like Simon’s, does assume a *capacity* to resist institutional compliance when morality or justice requires it. But it doesn’t assume a *disposition* to resist institutional compliance, in the everyday sense of being a contrarian, a know-it-all, a temperamental anarchist, a pain in the neck. Institutional compliance probably is something that the House Contrarian “cannot do well or easily,” but my version of moral activism doesn’t require you to be the House Contrarian, and I don’t think Simon’s theory does either. Blurring together disposition and capacity into “dispositional capacity” makes their argument look plausible, but it conceals a logical jump from the proposition that a lawyer has the capacity to resist institutional compliance (when she should) to the proposition that she has a disposition to do so even when she shouldn’t. Nothing entitles them to the jump.

The word “disposition” is something of a term of art within both philosophy and psychology. In ordinary language, we usually use the word to refer to someone’s overall personality, as in the sentence “She has a sunny disposition.” In philosophy, by contrast, a disposition is understood in a more fine-grained way as a propensity to behave in a specific way: for example, ordinary window-glass has a disposition (i.e. propensity) to shatter when struck by a flying brick. Human dispositions in this sense are psychological states linking act or behavior types to specific stimuli, as in this kind of ordinary language usage: “He tends to lose it (i.e. has a disposition to become irrational) when he sees his ex-wife with another man.” Here, disposition-talk is not a broad brush

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<sup>49</sup> *Id.* at 33.

<sup>50</sup> *Id.* at 36.

description of someone's overall character, but rather a narrow explanation of particular behavior.<sup>51</sup>

Ethicists typically use the term “dispositions” to describe something in between the broad and the narrow: character traits such as cautiousness or its opposite, recklessness; and, especially, character traits that are morally significant, such as courage or honesty (or their opposites, spinelessness and mendacity). These are what we ordinarily label virtues and vices; philosophically, the idea of regarding virtues as dispositions to perform acts of a certain kind (e.g., courageous or honest acts) derives from Aristotle.<sup>52</sup> They are “dispositions” in the philosophical sense of propensities to behave in certain ways, but they span whole categories of behavior rather than highly specific behaviors like “losing it when he sees his ex-wife with another man.”<sup>53</sup>

Woolley and Wendel have somewhat contradictory views about the ethicist's and psychologist's in-between notion of dispositions: at one point in their article they criticize the notion of moral character, which seems “neither identifiable nor predictive of conduct.”<sup>54</sup> Earlier, however, they define dispositions—which, as we've seen, belong to the apparatus of their own favored theory—as “[u]niversal dispositions such as courage, honesty, justice, respect for dignity and equality of others, as well as role dispositions or virtues, such as zealousness or fidelity.”<sup>55</sup> As far as I can see, universal dispositions *are* character traits, nothing more and nothing less, and I am left unsure whether Woolley and Wendel believe in them or not; I assume they do, given their references to virtues such as courage and fidelity.

A virtue like courage might plausibly be called a dispositional capacity, because it is—in the sense just described—a disposition, and it is also a capacity in the sense that it makes certain things possible. But what is courage? The traditional understanding of courage, like other virtues, is Aristotle's assertion that it is the mean between two extremes (in this case

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<sup>51</sup> There are serious questions about whether dispositions are genuine properties, and also about the explanatory usefulness of dispositions, which often seem circular. (“He lost his temper because he has a disposition to lose his temper” doesn't really explain very much.) These issues are not to the point here.

<sup>52</sup> Aristotle, *Nicomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1736, Bk. I, ch.8, 1098b33 (Jonathan Barnes ed., 1984). In this translation the word “state” translates the Greek word *hexis*, usually translated by “disposition.”

<sup>53</sup> This is also the way that social psychologists use the term “disposition.” See, e.g., Edward E. Jones, *The Rocky Road From Acts to Dispositions*, 34 AM. PSYCHOLOGIST 107, 107 (1979).

<sup>54</sup> Woolley & Wendel, *supra* note 1, at 34.

<sup>55</sup> *Id.* at 11.

cowardice and recklessness).<sup>56</sup> This is an important idea, because it highlights what’s wrong with Woolley and Wendel’s argument that someone with a dispositional capacity to resist authority will not be able to obey authority well or easily. For an Aristotelian, the virtuous person is one who obeys when it is appropriate and disobeys when it is inappropriate, and who knows one from the other.<sup>57</sup> That is the mean between being stubbornly contrarian and being mindlessly servile. Woolley and Wendel seem to presume that no such mean exists: if you have the capacity to disobey on the right occasions, it will also be a disposition to disobey on the wrong occasions. I don’t see why this conclusion is correct.

### III. CONCLUSION

At one point, Woolley and Wendel write that “Simon and Luban... rely on lawyers to be relentlessly focused on justice or morality.”<sup>58</sup> This paints a grim picture of lawyers dragging justice and morality around like a ball and chain, or perhaps burning with the fanatical, moralistic zeal of latter-day Savonarolas. I certainly don’t see matters that way. By and large, lawyers do not go frantically through life encountering one moral dilemma after another like challenges in a video game. Lawyers like to think that they do good in the world, and by and large I see no reason to doubt it. My theory requires that lawyers be “relentlessly focused” on morality only in the sense that they cannot hide behind their role or the adversary system to release themselves from moral obligations that they would have if they weren’t lawyers. They need be no more relentlessly focused on morality than non-lawyers are.

In one sense, morality *is* relentless, in that it sets out ideals that nobody fully complies with. I have done discreditable things in my life and—without meaning any disrespect to the reader—so have you. Perfect rectitude might actually require a kind of saintliness that is not necessarily the all-round best life for a human being.<sup>59</sup> Where morality fits in with art, sports, love, fun, and excitement—not to mention failure, heartbreak, and other losses in a well-lived life—is not wholly obvious, and it is not an issue that legal ethicists typically address. If you write a book on ethics, setting out a moral ideal, it will inevitably appear that it demands

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<sup>56</sup> See Aristotle, *supra* note 52, at 1747-48, Bk. II, ch. 6, 1106b14-1107a3 (on virtue as the mean between extremes); *id.* at 1748, Bk. II, ch. 7, 1107a32-1107b3 (courage as the mean between rashness and cowardice).

<sup>57</sup> Aristotle asserts that the mean that constitutes virtue is “the intermediate not in the object but relatively to us,” *id.* at 1747, Bk. II, ch. 6, 1106b5-6, i.e., the appropriate; and earlier he states that “the agents themselves must in each case consider what is appropriate to the occasion.” *Id.* at 1744, Bk. II, ch. 2, 1104a7-8.

<sup>58</sup> Woolley & Wendel, *supra* note 1, at 32.

<sup>59</sup> The classic treatment of this subject is Susan Wolf, *Moral Saints*, 79 J. PHIL. 419 (1982); see also SUSAN WOLF, *MEANING IN LIFE AND WHY IT MATTERS* (2010).

saintliness and a relentless focus on morality. But that is an illusion born simply of the fact that it is (after all) an ethics book. Perhaps, then, it is *not* necessary to ask not only what a lawyer must do but what that means a lawyer must be—because the things a lawyer must be are not exhausted by ethics.