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# The Moral Responsibility of the Corporate Lawyer

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# THE MORAL RESPONSIBILITY OF THE CORPORATE LAWYER

Judith A. McMorrow<sup>+</sup> & Luke M. Scheuer<sup>\*</sup>

I. WHY THE THEORIES THAT SUPPORT NONACCOUNTABILITY ARE PARTICULARLY WEAK FOR TRANSACTIONAL LAWYERS .....	280
A. <i>Zealous Representation and Nonaccountability</i> .....	280
B. <i>The Adversarial Justification and Rule of Law</i> .....	283
C. <i>The Autonomy and Citizenship Justifications</i> .....	286
D. <i>Law as a Mediating Institution for Moral Conflict</i> .....	291
II. WHY LAWYERS' CONDUCT IS NOT CONSISTENT WITH NONACCOUNTABILITY.....	294
A. <i>Lawyers Have the Freedom to Choose Clients</i> .....	294
B. <i>Choosing Clients and Cause Lawyering</i> .....	298
C. <i>The Process of Lawyering: Intruding on Lawyer Autonomy</i> .....	302
D. <i>The Process of Lawyering: Transforming the Lawyer and Information Processing</i> .....	304
III. THE PUBLIC DOES NOT EMBRACE A BROAD CLAIM OF NONACCOUNTABILITY.....	306
IV. CONCLUSION.....	308

On January 11, 2007, Charles “Cully” Stimson, then the deputy assistant secretary of defense for detainee affairs, gave a radio interview to Federal News Radio in which he stated he found it “shocking” that many of the nation’s top law firms represent detainees at Guantánamo Bay.<sup>1</sup> Stimson was

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1. Audio Recording: Charles “Cully” Stimson, Interview with Federal News Radio (Jan. 11, 2007), <http://www.federalnewsradio.com/emedial/59677.wma> [hereinafter Charles “Cully” Stimson (audio recording)]; see also Editorial, *Unveiled Threats: A Bush Appointee’s Crude Gambit on Detainees’ Legal Rights*, WASH. POST, Jan. 12, 2007, at A18 (reporting on and discussing Stimson’s interview).

implicitly equating the morality of those attorneys with the morality of their “terrorist” clients.<sup>2</sup> Stimson was blunt in his critique: “I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms.”<sup>3</sup> The legal profession’s response was swift. Many bar associations, law firms involved in Guantánamo representations, and individual attorneys distributed statements and wrote letters to the editors of newspapers, while many more lawyers talked in the hallways.<sup>4</sup> The legal profession came down firmly on the side of nonaccountability: the lawyers who were defending the Guantánamo “terrorists” were not to be morally equated with their clients.<sup>5</sup>

Nonaccountability is a fundamental and controversial tenant of the American legal system that holds that attorneys are not morally accountable for who their clients are, what their clients have done, or what attorneys will do for their clients as long as it is within the bounds of the law.<sup>6</sup> In the legal-representation

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2. Charles “Cully” Stimson (audio recording), *supra* note 1, at 3:48; *see also* Editorial, *supra* note 1, at A18.

3. Charles “Cully” Stimson (audio recording), *supra* note 1, at 3:39; *see also* Editorial, *supra* note 1, at A18.

4. *See, e.g.*, Theodore B. Olson & Neal Katyal, *We Want Tough Arguments*, LEGAL TIMES, Jan. 22, 2007, available at <http://www.law.georgetown.edu/faculty/nkk/documents/Olson-Katyal1-22-07.pdf> (calling Stimson’s remarks “unfortunate” and chiding him for attacking lawyers representing detainees and “the legal profession as a whole”); Thomas P. Sullivan, Letter to the Editor, *Right to a Lawyer Applies to Everyone*, N.Y. TIMES, Jan. 17, 2007, at A18 (defending the law firm Jenner & Block for its representation of Guantánamo Bay prisoners); Press Release, ABA, Statement by ABA President Karen J. Mathis on Remarks of Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, in January 11, 2007 Federal News Radio Interview (Jan. 12, 2007), available at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=65> (identifying Stimson’s remarks as “deeply offensive to members of the legal profession, and . . . to all Americans”); Press Release, Law School Deans, Statement of Law Deans (Jan. 15, 2007), available at [http://www.law.yale.edu/documents/pdf/News\\_&\\_Events/Law\\_Deans\\_Statement9.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/Law_Deans_Statement9.pdf) (expressing the view of over 150 law-school deans condemning Stimson’s comments: “Our American legal tradition has honored lawyers who, despite their personal beliefs, have zealously represented mass murderers, suspected terrorists, and Nazi marchers. At this moment in time, when our courts have endorsed the right of the Guantanamo detainees to be heard in courts of law, it is critical that qualified lawyers provide effective representation to these individuals.”); Nina Totenberg, *Pentagon Remark on Detainees Stuns Legal Experts*, NAT’L PUB. RADIO (Jan. 13, 2007), <http://npr.org/templates/story/story.php?storyId=6849592> (reporting New York University School of Law Professor Stephen Gillers’s comment that “[Stimson] should be sent back to basic civics classes on the American adversary system and forced to take a quiz before he’s allowed to resume his duties”).

5. *See, e.g.*, Olson & Katyal, *supra* note 4; Press Release, Law School Deans, *supra* note 4.

6. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 671 (1978) (“Lawyers have claimed, since at least the days of John Adams, that they are ‘independent’ from their clients in that they are not morally responsible for their clients’ actions.”) (internal citation omitted); *see also* Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 507–08 (1994) (describing the principle of nonaccountability and calling it “necessary to the effective working of the adversary

context, the client sets the objectives of the representation and participates in decisions regarding how to achieve those objectives; the attorney acts as a facilitator and an advisor. Under the nonaccountability theory, the attorney is not morally accountable for the objectives of the client or the consequences of achieving those objectives. Attorneys are, therefore, disincentivized to exercise their own moral judgments when choosing whom to represent.

Over the last sixty years, this concept has been both criticized and supported by academics.<sup>7</sup> Despite academic criticism of nonaccountability, the debate appears to generate little discussion among legal practitioners, the majority of whom still widely approve of the concept.<sup>8</sup>

This Article explores nonaccountability, why it holds such sway over the legal community, and, in particular, why corporate-transactional practitioners, whose roles as attorneys are least supported by the traditional arguments in favor of nonaccountability, are given this “benefit.”<sup>9</sup> This Article argues that corporate lawyers cannot accurately claim that they are not morally responsible for their work on behalf of corporate clients—clients who have a legally impaired ability to engage in independent moral reasoning, and who function in a world of relatively minimal legal oversight. In abandoning the notion of nonaccountability, this Article encourages corporate-transactional attorneys to not only think more deeply about the value of their work to society, but also to better communicate that value.

The first part of this Article defines nonaccountability. The traditional justifications for lawyer nonaccountability include: (1) the American adversary system requires each side to a dispute to have a vigorous advocate; (2) lawyers are needed to represent all people in order to serve as a check on government abuse; (3) a lawyer is often necessary to provide individuals with meaningful access to the legal system; and (4) the legal system provides a public forum for discussion of disputed moral views. These arguments, although traditionally applied to all areas of legal practice, are most persuasive when dealing with

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system”). This concept has been referred to by different names but is most commonly called “nonaccountability.” See Painter, *supra*, at 508 (referring to this theory as moral interdependence); Scott R. Peppet, *Lawyer’s Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 500–01 & n.92 (2005) (discussing different names for nonaccountability).

7. Compare Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 15 (1951) (“[T]here is nothing unethical in taking a bad case or defending the guilty or advocating what you don’t believe in. It is ethically neutral.”), with Painter, *supra* note 6, at 507–12 (arguing for “moral interdependence” of lawyers and their clients rather than “moral independence”), and David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, GEO. WASH. L. REV. 1030, 1039–40 (1995) [hereinafter Wilkins, *Race, Ethics, and the First Amendment*] (noting that both refusing and agreeing to represent clients carry “moral significance”).

8. Painter, *supra* note 6, at 557.

9. Richard Painter has criticized the allowance of nonaccountability in the corporate context, arguing that corporate attorneys are morally interdependent with their clients for their joint actions. Painter, *supra* note 6, at 553–55.

criminal proceedings and become less persuasive in the field of civil litigation. These arguments are least persuasive when the client is a business entity engaged in forward-looking transactional work. This Article focuses on business-entity clients that are not individuals or alternate identities for an individual, and that only act through others, their employees, or agents.<sup>10</sup>

As discussed later, the traditional arguments in favor of nonaccountability are not easily applied to corporate-transactional work for several reasons. First, this work does not take place in an adversary system in which there is, in theory, a neutral decision-maker and fair process. Second, corporate-transactional work generally does not act as a check on governmental power. Third, because for-profit corporations are legal fictions treated as individuals for some purposes of the law, but are not autonomous moral actors capable of free will or autonomous responsible citizenship, they lack many of the key characteristics that justify an attorney's suspension of moral judgment. Finally, transactional work generally does not arbitrate moral disputes in a public forum, but instead deals with private conduct out of the public eye.

Consequently, attorneys doing transactional work for business entities need their own justifications for nonaccountability. The most powerful argument is that by helping these clients order their future activities, lawyers can assist with preventing future illegal activity. For example, by helping a business-entity client create a sexual-harassment policy, the client might avoid incidents of sexual harassment in the workplace.

Unlike the justifications for criminal and litigation lawyering, however, the argument for nonaccountability of attorneys representing corporate clients is not systemic. Representation of a corporation that is trying to comply with environmental laws and representation of a corporation that is trying to get around the spirit of those same laws while still not violating them, deserve different moral treatment. Likewise, representing a tobacco corporation in setting up a sexual-harassment policy has a stronger claim of lawyer nonaccountability (helping the client comply with law) than representing that same corporation in bringing its product to a new and unregulated overseas market, which may be legal, but potentially immoral.<sup>11</sup> Without systematic justifications, lawyers doing corporate-transactional work for business entities must value the work by considering the morality of the work itself.<sup>12</sup>

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10. For the sake of simplicity, we will refer to business-entity clients as corporations. This Article defines transactional work as work designed to shape future conduct and taking place outside of a courtroom setting, as opposed to litigation work that deals mainly with the consequences of past actions.

11. Painter, *supra* note 6, at 555.

12. Banks have been criticized harshly for their role in the mortgage collapse that led to the recent recession. See, e.g., Hugo Dixon & Agnes T. Crane, *Facing a Pay Cut or a Pitchfork*, N.Y. TIMES, Feb. 4, 2010, at B2 (advocating that governments and regulators should lower bankers' compensation after the industry's awarding of exceedingly large bonuses in 2009). But

Corporate-transactional attorneys may also turn to a general economic argument. By helping a client achieve its legal needs, the attorney frees the client to pursue the maximum economic growth within the bounds of the law, thus enabling it to reach its full business potential. A problem with this line of reasoning is that it presumes the free market is an area where actors can claim exemption from ordinary morality simply because the market can be, but is not always, a social good.<sup>13</sup> For example, slavery had a strong market basis, but a lawyer who worked to facilitate slavery could not escape the moral implications of his work by pointing to the market.

This Article will also examine the ways in which the legal system does not support nonaccountability. Lawyers cannot escape the reality that, in the American legal system, they have broad discretion in choosing clients and can also choose to specialize in representing certain causes or types of clients.<sup>14</sup> In making these choices, lawyers sometimes align themselves with the goals and issues of their clients, such as representing pro- or anti-gun control clients, or, more frequently, lawyers align themselves with the underlying systemic goals that the legal representation advances. As a result, a lawyer's choice of clients speaks to the values of the lawyer and not just the need for a paycheck. The reality is that in many practice settings the stark separation between lawyer and client is often an artificial construct.<sup>15</sup>

This does not imply that corporate-transactional work is less valuable than litigation. In fact, many would agree that preventing the breach of laws is better than simply cleaning up after they already have been broken. After all, it is generally better to prevent pollution than to litigate over its clean up. But lawyers doing this work should recognize that they cannot rely on systematic justifications like litigators can. They are morally accountable when they facilitate actions on behalf of their clients and should take this into consideration when agreeing to represent a particular client or take on a particular assignment.

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lawyers were also instrumental to this collapse in that they facilitated many of these mortgages by securitizing the loans. Looking back on the role lawyers played, can the legal profession honestly say that lawyers did not play a part? See Steven L. Schwarcz, *Keynote Address: The Role of Lawyers in the Global Financial Crisis* 8, 16 (Duke Law Scholarship Repository, Working Paper No. 8, 2010), available at [http://scholarship.law.duke.edu/working\\_papers/8](http://scholarship.law.duke.edu/working_papers/8) (stating that “[i]t can be risky to help facilitate transactions that violate norms even though the transactions would not actually violate law”).

13. See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 126 (stating that although the only social responsibility of a business is to increase its profits, the business still must “stay within the rules of the game, which is to say, engage[] in open and free competition without deception or fraud”).

14. See, e.g., Curtis, *supra* note 7, at 15 (noting that an attorney can choose to accept a “bad case” or to represent a position in which he does not believe); Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 7, at 1039–40 (discussing a lawyer’s “moral right” to refuse a case).

15. See Painter, *supra* note 6, at 553–55 (discussing some of the ways that corporate attorneys and their clients become intertwined).

Moral accountability for transactional attorneys also does not mean that corporations do not deserve access to attorneys for their transactional needs. This Article assumes that for every corporate need, there is a lawyer who is willing to satisfy it. Lawyers, like the rest of humanity, have a broad range of moral views. For example, although many people might object to helping a tobacco company sell cigarettes to a new market, such as a country with lenient smoking laws, there will inevitably be many lawyers who see nothing wrong with this. The reality of the legal profession seems to be that as long as a client can pay, he will find a lawyer willing to represent him. But that lawyer cannot claim an exemption from a moral discussion.

This Article ultimately concludes that the American legal profession does not have a system of nonaccountability, but instead, a sliding scale of justifications. On one end of the scale is criminal litigation, in which lawyers can justify their work by referring to the system in which it takes place and not the content of the work. Civil litigation is also on this end, as it is closely aligned with criminal law because it rests within the adversary system. On the other end of the scale are corporate transactions, which are justified by the content of the work and not by reference to an overarching system of justice. But on whichever end of the scale a lawyer falls, the lawyer is not immune from having to articulate the social and moral value of the legal work. The overly broad notion that lawyers are not accountable for the goals of their clients serves as a crutch that prevents corporate lawyers from considering and articulating the moral value of their services. Corporate lawyers, and society, are better off if lawyers dig into the reason why their work offers value to the world.

## I. WHY THE THEORIES THAT SUPPORT NONACCOUNTABILITY ARE PARTICULARLY WEAK FOR TRANSACTIONAL LAWYERS

### A. *Zealous Representation and Nonaccountability*

The dominant model of lawyering over the last thirty years asserts that the lawyer is ethically bound to pursue the client's interests "zealously within the bounds of the law."<sup>16</sup> David Luban describes zealous representation as rooted in the principle of partisanship—that a lawyer must, within the constraints of professional advocacy, maximize the likelihood that the client's objectives will

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16. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1983) ("A [l]awyer [s]hould [r]epresent a [c]lient [z]ealously [w]ithin the [b]ounds of the [l]aw."); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2009) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). *But see* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 670–71 (1978) (distinguishing the "nonadvocate" lawyer from the "advocate" lawyer, arguing that the professional principles that apply to the latter should not transfer to the former).

be met.<sup>17</sup> Indeed, some lawyers interpret this to mean that everything not forbidden is compelled if it will advance the client's interests.<sup>18</sup>

The principle of nonaccountability is often discussed as a natural corollary to the idea of partisanship: if the lawyer must represent the client zealously and hold the client's goals as primary, then the lawyer should not be legally, professionally, or morally accountable for the means used or the ends achieved, as long as those means or ends are within the bounds of the law.<sup>19</sup> Advocating a position contrary to one's personal beliefs is, under this construction, "ethically neutral."<sup>20</sup> Richard Wasserstrom describes this as "role-differentiated behavior."<sup>21</sup> This notion that "lawyers are expected to give

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17. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 11 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*]. Using "zealousness" as the boundary poses significant problems because where the "bounds of the law" lie is sometimes the issue at hand. In addition, the adversarial approach usually results in the lawyer erring on the side of the client's interests when determining the bounds of the law. See DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 26 (2007) (explaining that "zealously within the bounds of the law" could mean "pushing claims to the limit of the law and then a bit further, into the realm of what is colorably the limit of the law" (internal quotation marks omitted)); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470 (1990) [hereinafter Wilkins, *Legal Realism for Lawyers*] ("[T]he claim of indeterminacy directly challenges the traditional model's assertion that legal boundaries effectively mediate between a lawyer's private duty to clients and her public commitments to the legal framework.").

18. See Wilkins, *Legal Realism for Lawyers*, *supra* note 17, at 484 (stating that because of the "open-textured nature of many legal questions, the indeterminacy thesis has the potential for generating an argumentative nihilism in which any construction of the law is as good as any other and in which there are no restrictions on zealous advocacy" (internal citations omitted)).

19. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 17, at 12 (stating that within the standard conception of American legal ethics, the principle of partisanship requires that the lawyer "must, within the established constraints on professional behavior, maximize the likelihood that the client's objectives will be attained"). Many lawyers and the official professional codes assert, either directly or indirectly, that lawyers, when acting as zealous advocates, are "neither legally, professionally, nor morally accountable for the means used or the ends achieved." Schwartz, *supra* note 16, at 673. Whether these ideas naturally follow is discussed at length below. Philosophers may have a different way to unpack the notion of responsibility and accountability. See KARL LLEWELLYN, *THE BRAMBLE BUSH* ch. X (Oceana Publ'n 1960) (1930) (discussing the nature of the legal profession and the issues arising with regard to lawyers' beliefs and those of their clients); Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 174 (2007) (reasoning that for someone to be held responsible, three conditions must be satisfied, that (1) they "faced a morally significant choice"; (2) they "[were] in a position to see what was at stake"; and (3) "the choice was truly up to [them]"); see also DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 31 (2008) ("The duties . . . impose[d] on lawyers depend on the range of objectives that clients and their lawyers may jointly pursue and the range of means that clients and their lawyers may use to pursue these objectives.").

20. Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 15 (1951); cf. Charles Fried, *The Lawyer as Friend, the Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976) (stating that it is traditionally understood and accepted that lawyers are "authorized, if not in fact required, to do some things . . . for [their] client which [they] would not do for [themselves]").

21. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RIGHTS 1, 3 (1975).



near-total primacy to their clients' interests—without regard to their social utility, without regard to the relative ability of those adversely affected to protect themselves, without regard to the advocate's own personal beliefs or human reactions" is "widely defended, although also strongly questioned."<sup>22</sup> Pronouncements by most bar associations and virtually every state's rules of professional responsibility reflect this concept of partisanship and nonaccountability at least in some form.<sup>23</sup>

The traditional arguments in favor of lawyer nonaccountability focus on certain core themes:

- *The Rule of Law/Adversary System.* The rule of law means that fair procedures are established in advance and applied without regard to whether the defendant is rich or poor, powerful or powerless, or a perceived enemy or friend.<sup>24</sup> The adversary system is our chosen method to implement the law and requires that each side have a vigorous advocate, with a neutral decision-maker assessing the merits.<sup>25</sup>

- *Check on Government Power.* The rule of law is particularly important as a check on government power because, historically, unchecked power in the name of righteousness led to significant abuses.<sup>26</sup> History also demonstrates that "[t]he more outrageous the alleged crime, the greater may be the state's temptation to ignore rights, and so the greater the need for the defense lawyer's

22. HOWARD LESNICK, BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW 4 (1992); see also Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, in ENRON CORPORATE FIASCOS AND THEIR IMPLICATIONS 793, 797 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (discussing why lawyers' responsibility cannot be limited to compliance with rules, but must extend to self-regulated ethical conduct because of the inability of any set of rules to capture the complexity of the ethical decision-making process).

23. This notion of nonaccountability is codified in what Bradley Wendel describes as the "curious non-rule" of the Model Rules of Professional Conduct, rule 1.2(b). See W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 999 & n.50 (2006) [hereinafter Wendel, *Institutional and Individual Justification*] ("Finally, there is a curious non-rule, which does not impose an obligation to represent but which nevertheless reminds lawyers 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.'" (quoting MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2009))).

24. See *infra* Part II.B; see also Christopher L. Kutz, *Just Disagreements Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 999–1000 (1994) (discussing how, according to the "liberal conception of public institutions, decisions about the exercise of public authority should be made on the basis of publicly available rules and standards that are capable of determining concrete outcomes"); Richard Wasserstorm, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975) (noting justifications for why a criminal defendant should be represented regardless of the merits of his case).

25. See *infra* Part II.B.

26. See, e.g., Anant Raut, *Why I Defend "Terrorists,"* SALON (Jan. 17, 2007), <http://www.salon.com/news/opinion/feature/2007/01/17/guantanamo> (providing a historical rationale for why Guantánamo detainees deserve attorney representation).

special knowledge.”<sup>27</sup> This argument emphasizes that only by protecting the guilty can lawyers ensure the protection of the innocent as well.

• *First-Class Citizenship/Paternalism.* Because the practice of law is so complex, it is frequently inaccessible to the average person without guidance from a lawyer.<sup>28</sup> This is problematic because access to the legal system is necessary for individuals to understand and exercise their full rights as citizens.<sup>29</sup> As gatekeepers to the law, lawyers must not appeal to their own sense of right and wrong in deciding whom to represent because, in doing so, they will deny individuals the ability to make their own moral decisions.<sup>30</sup>

• *Law as a Mediating Influence.* The law acts as a mediating force between opposing moral views in our pluralistic society.<sup>31</sup> Lawyers facilitate this moral conversation by assisting clients and should suspend their own personal moral views in order to allow this dialogue to take place in the public forum.<sup>32</sup>

These arguments are all systematic in that they justify a lawyer’s decision to represent any client without regard for the client’s goals, as long as the client has a credible claim of legality. As a mere facilitator, the lawyer is not the moral actor in this story, and the system takes care of the ethical considerations.

The two most common justifications for the principle of partisanship, and the corollary idea of nonaccountability, are reliance on the adversary system and the idea that legal representation is required to implement the rule of law in our society.<sup>33</sup> These justifications, however, provide only weak support for both partisanship and nonaccountability in corporate, nonadversarial representation.

### *B. The Adversarial Justification and Rule of Law*

The most prominent justification for lawyers’ pursuit of partisan activity is embedded in the adversary system.<sup>34</sup> The phrase “adversary system” is commonly used to describe the process by which a neutral decision-maker applies the law and procedural rules and evaluates the facts and arguments

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27. Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 2 J. INST. FOR STUDY OF LEGAL ETHICS 131, 146 (1999).

28. Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617–18 (1986) [hereinafter Pepper, *The Lawyer’s Amoral Ethical Role*].

29. *See id.*

30. *See id.*

31. *See infra* note 78 and accompanying text.

32. *See infra* Part II.D.

33. *See* Wendel, *Institutional and Individual Justification*, *supra* note 23, at 991 (discussing these justifications as a response to the question, “What sort of monstrous system is it . . . which purports to generate moral permissions for acts that would be wrong if committed outside the framework of the system?”).

34. *See* MARKOVITS, *supra* note 19, at 32, 34.

presented by zealous advocates of each side.<sup>35</sup> The notion that courts can, in theory at least, present a level playing field is a cherished belief.<sup>36</sup> As long as the case is not frivolous, the lawyer, as advocate, should not serve as judge of the merits.<sup>37</sup> Under the adversarial justification, “[i]t is particularly important that it be made as easy as possible for a lawyer to take a case that other people regard as bad,” because “[i]n a way the practice of the law is like free speech. It defends what we hate as well as what we most love.”<sup>38</sup>

The adversarial justification is at its strongest when all the institutional preconditions are present: a neutral decision-maker, competent counsel for each side, and adherence to the established procedural rules by all those involved.<sup>39</sup> When the state is asserting its power against an individual or a corporate entity, the adversarial justification takes on added significance because it serves as a check against the potential abuse of governmental power.<sup>40</sup> This is an important manifestation of the American implementation of the “rule of law.”<sup>41</sup>

Traditionally, some forms of lawyering are justified and defended simply by referring to the system in which they take place; no reference to the content of the work provided is generally necessary to defend the social value of such work.<sup>42</sup> The adversary system is a classic example because its systemic value is readily presented even if society at large falters in its commitment to this ideal.<sup>43</sup> For example, it is necessary and proper to represent a criminal

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35. Brian C. Haussmann, Note, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218, 1224–25 (2004).

36. See Wendel, *Institutional and Individual Justification*, *supra* note 23, at 1000 (“One of the institutional justifications for the legal system is that it safeguards the value of human dignity, even for repugnant people, by requiring fair treatment according to impartial procedures of adjudication.”).

37. Wasserstorm, *supra* note 24, at 6, 9.

38. Curtis, *supra* note 7, at 14, 18. Curtis discusses the importance of this concept in the context of those accused of being Communists in the 1950s needing lawyers to represent them, noting that “people who [were] . . . charged with being Communists, who heaven knows need[ed] a lawyer, what with the capering of congressional committees, [found] it hard to get counsel.” *Id.*

39. Haussmann, *supra* note 35, at 1224–25.

40. See Gillers, *supra* note 27, at 146 (discussing the role of a criminal defense lawyer to “monitor[] the government while it pursues those it most eagerly wants to convict”); Wendel, *Institutional and Individual Justification*, *supra* note 23, at 994–95 (calling the power of the state in adversarial proceedings “hostile”).

41. MASS. CONST. OF 1780, pt. 1, art. XXX (noting that, in the end, we seek “a government of laws and not of men”).

42. See Gillers, *supra* note 27, at 146 (discussing the value of the legal system and noting that the Constitution provides counsel for those who cannot afford such); see also Wendel, *Institutional and Individual Justification*, *supra* note 23, at 990–91 (using a baseball analogy to explain that criticism of a crucial facet of an institution is criticism of the institution as a whole, not merely that one part).

43. See Wendel, *Institutional and Individual Justification*, *supra* note 23, at 988 (“The . . . argument for withholding moral criticism of lawyers acting in a representative capacity

defendant accused of a heinous crime.<sup>44</sup> When Frank Armani and Frances Belge represented serial killer Robert Garrow in upstate New York, they suffered social ostracism and received death threats.<sup>45</sup> Nevertheless, Armani and Belge had a powerful justification for their decision to accept representation of Garrow: the systemic value of representing the accused and the requirement that the state prove its case beyond a reasonable doubt.<sup>46</sup> This scheme, in turn, protects the freedoms of everyone.<sup>47</sup> It forces the government to thoroughly prove its case before taking away a citizen's liberty.<sup>48</sup> Thus, lawyers like Armani and Belge serve the common good by taking on this role within the adversary system.<sup>49</sup>

The adversarial justification for nonaccountability grows weaker when applied outside the litigation context. For example, transactional work between parties does not have a neutral arbiter, such as a judge, to determine the final facts and equities of the parties. Instead, the parties largely "make" the law that will apply to the transaction in the boardroom, merger discussions, proxy fights, hostile takeovers, and a plethora of other venues where lawyers, accountants, financial strategists, and public-relations professionals craft strategy.<sup>50</sup> Yet many of those affected, including workers and communities, do not have a seat at the table. It is true that this bargaining occurs in the "shadow

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relies on reasons that are 'systemic' in the sense of deriving their force from the moral values underlying the legal system.").

44. See Wasserstorm, *supra* note 24, at 9–10.

45. TOM ALIBRANDI WITH FRANK H. ARMANI, PRIVILEGED INFORMATION 128–34 (1984) (describing the condemnation, harassment, and physical threats the lawyers received).

46. See Wasserstorm, *supra* note 24, at 9–10 (discussing the value of a trial and the importance of the attorney's role within such).

47. See Olson & Katyal, *supra* note 4 ("The ethos of the bar is built on the idea that lawyers will represent both the popular and the unpopular, so that everyone has access to justice.").

48. See Wasserstorm, *supra* note 24, at 12.

49. In such situations, the lawyer's choice to represent a client must be distinguished from what should be done during that representation.

50. See Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 109–12 (1995) (discussing the development of a contract in a transactional setting and the role of the transactional corporate attorney). The world of corporate-transactional law is largely governed by what can be negotiated between parties within the broad boundary of contract law. See *id.*

of the law,”<sup>51</sup> but the core of this corporate-transaction lawyering involves private ordering.<sup>52</sup>

Although the adversary system does not provide a systemic justification for corporate representation, there are other theories more closely tailored to transactional work.<sup>53</sup> These theories have not necessarily seeped into the common vocabulary of lawyers, but it is still crucial to explore whether they support a claim that transactional lawyers are not systematically accountable for the goals of their clients.

### C. *The Autonomy and Citizenship Justifications*

Another traditional justification for the lawyer’s partisan role—and the corollary that the lawyer is not responsible for the goals of the client—rests in the claim that the lawyer is necessary for achieving first-class citizenship.<sup>54</sup> As Professor Stephen Pepper has argued, the lawyer’s amoral role promotes the autonomy of the client and assists in implementing concepts of equality.<sup>55</sup> This argument is particularly strong with regard to the representation of the powerless.<sup>56</sup> As David Luban has observed, the “people’s lawyer” serves a political role in addressing inequality.<sup>57</sup>

Whatever force the first-class citizenship justification has regarding representing individuals or those in positions of little power, it grows significantly weaker in the context of representing entities, and even weaker still concerning the representation of for-profit corporate actors engaged in

51. *See id.* at 108–09 (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979)). The term “shadow of the law” was first used by Robert H. Mnookin and Lewis Kornhauser to discuss private divorce negotiations between parties and how they are influenced by the law. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979). The term is now used when referring to both litigation and transactional work. Rubin, *supra* note 50, at 108–09 (using the “shadow of the law” concept when discussing contract negotiations).

52. *See* Mnookin & Kornhauser, *supra* note 51, at 950 (defining “private ordering” as “law that parties bring into assistance by agreement”); *see also* Rubin, *supra* note 50, at 109–12 (noting that private agreements between parties largely determine the terms of contracts).

53. *See infra* Parts II.C–D.

54. Pepper, *The Lawyer’s Amoral Ethical Role*, *supra* note 28, at 617.

55. *See id.* at 617–18; *see also* Fried, *supra* note 20, at 1073 (noting the importance of the attorney in the adversary context because, without him, “the law would impose constraints on the lay citizen”). *But see* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 638–39 (1986) [hereinafter Luban, *The Lysistratian Prerogative*] (disagreeing with Stephen Pepper’s belief that the role of a lawyer is amoral and that individual autonomy is preferable to good conduct).

56. LUBAN, LAWYERS AND JUSTICE, *supra* note 17, at 240 (advocating “legal services for the poor” and discussing equal access to these services).

57. *Id.*; *see also* GERALD LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE 5–7 (1992) (describing examples of the “political vision and sensibility” of such “people’s lawyers” who work hard to “fundamentally redefine activist law practice as a central aspect of their efforts to change the world”).

forward-looking conduct. Autonomy in the first-class citizenship model requires an autonomous actor, that is, a moral, decision-making agent. Corporations are citizens under the Due Process clause, but it is less clear whether corporations are moral agents.<sup>58</sup> Milton Friedman's view has largely prevailed in modern corporate law—that the obligation of a corporation is to maximize profits to shareholders while not violating the positive law.<sup>59</sup> The role of corporate agents is likewise limited by their need to serve the interests of shareholders. At best, under U.S. corporate law, the corporation is decidedly amoral, encouraging profit maximization over other values. As Professor Kent Greenfield has observed, “[c]orporations have broad powers, but only a limited role . . . to make money.”<sup>60</sup> Delaware corporate law, which governs the majority of publicly traded corporations, makes profit-maximization the dominant goal of corporations.<sup>61</sup> There is a strong claim that other interests impacted by corporate action are systematically minimized under Delaware corporate law.<sup>62</sup> For example, when a corporate decision will have an extraordinary impact on shareholder rights, such as the sale of a corporation, courts will afford the directors' decisions enhanced scrutiny to assure that the shareholders receive the “best value reasonably available.”<sup>63</sup> In effect, this legal doctrine makes significant effects on non-represented stakeholders largely irrelevant.<sup>64</sup> From the perspective of moral

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58. *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889). The Supreme Court has justified calling a corporation a “person” because it conceptualized corporations as “merely associations of individuals united for a special purpose.” *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888). The ensuing 120 years of corporate law, however, have demonstrated that a corporation functions in a more complex fashion than a mere association of individuals. Reuven S. Avi-Yonah, *To Be or Not to Be? Citizens United and the Corporate Form* 1–2 (U. Mich. L. Sch. Empirical Legal Stud. Ctr., Working Paper No. 4, 2010), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1116&context=umichlwps>.

59. Friedman, *supra* note 13, at 126; see Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 42 (2004) (discussing Friedman's view as the dominant approach in corporate law).

60. Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 87, 87 (2005).

61. KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 2–3, 107–09 (2006); see William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 669 (1974) (discussing Delaware's favorable treatment of corporations).

62. GREENFIELD, *supra* note 61, at 16.

63. *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 37 (Del. 1994); see also *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986) (discussing that when a corporate bidding contest results in protecting directors from liability, the directors' action cannot withstand “enhanced scrutiny”); Troy A. Paredes, *The Firm and the Nature of Control: Toward a Theory of Takeover Law*, 29 J. CORP. L. 103, 104 (2003) (“Although the social impact of takeovers can be dramatic, the consequences for non-shareholder constituencies are arguably beside the point.”).

64. See *Paramount Commc'ns Inc.*, 637 A.2d at 44; Paredes, *supra* note 63, at 104.

analysis, this outcome is quite startling. Delaware corporate law is effectively stating that corporate officers should not consider the full impact of their conduct. At this point the first-class citizenship justification for client preference and the corollary claim that the lawyer is not accountable for the acts of the client collapse. A non-moral agent compelled by law to engage in decidedly amoral, and on occasion possibly immoral, conduct cannot claim a theoretical right to autonomy.<sup>65</sup> Nor can that non-moral agent claim a right to a lawyer's service to achieve an amoral, if not immoral, end.<sup>66</sup> And, whatever definition of morality is used, to expressly exclude the consequences of one's conduct from the analysis is an impoverished moral analysis.

Friedman bluntly questions whether a fictional entity can be subject to moral reasoning: "What does it mean to say that 'business' has responsibilities? Only people can have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities, but 'business' as a whole cannot be said to have responsibilities, even in this vague sense."<sup>67</sup> Friedman recognized the tension between maximizing shareholder value and managerial discretion (the "agency problem"), which may allow the individual manager to work for the benefit of other constituencies.<sup>68</sup> Despite the potential social benefits that may accrue when a manager acts to favor other constituencies, such as corporate employees or the general community, from the corporate shareholder perspective,

the corporate executive would be spending someone else's money for a general social interest. Insofar as his actions in accord with his "social responsibility" reduce returns to stockholders, he is spending their money. Insofar as his actions raise the price to customers, he is spending the customers' money. Insofar as his actions lower the wages of some employees [sic], he is spending their money.<sup>69</sup>

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65. Cf. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 590 (1985) ("In a substantial amount of legal practice, 'the client' is not the 'person with a problem' traditionally depicted in legal literature, but an organization with indeterminate or potentially conflicting interests. So too, the attorney often is not an independent oral agent but an employee with circumscribed responsibility, organizational loyalty, and attenuated client contact."). For example, Bill Gates deserves autonomy in part because he can decide to earn income and distribute his wealth as he chooses. Microsoft, however, lacks the ability to freely distribute corporate assets. Those assets belong to its shareholders after all, not the corporation. Thus, Microsoft, like all corporate entities, is not capable of the full range of actions necessary to be termed an autonomous actor.

66. See *id.* at 603 (noting that formalist theories of professional responsibility and ethics decried "impartial application" of the law as resulting in immoral judgments and negatively viewed lawyers who promoted such results).

67. Friedman, *supra* note 13, at 33.

68. *Id.*

69. *Id.*

The corporate social-responsibility movement has emerged in opposition to this shareholder-wealth model, urging that corporations have a moral duty to consider the consequences of their conduct beyond profit-maximization and the express limits of the law.<sup>70</sup> The corporate social-responsibility movement attempts to put the obligation on “the corporation,” providing managers who make decisions for the corporation with a legitimate basis to consider factors other than shareholder wealth.<sup>71</sup> Although this movement is a laudable endeavor, it has not had significant success in reconceptualizing corporate duties.<sup>72</sup> If the standard conception of profit maximization and the corresponding minimization of corporate moral responsibility prevail, then a first-class citizenship model cannot provide lawyers with a strong justification for nonaccountability.

Despite the continued predominance of shareholder interests under Delaware corporate laws,<sup>73</sup> many, perhaps all, of the corporate mergers and activities under those laws are in fact morally defensible to varying degrees. For example, corporate work may benefit the economy and increase efficiency, bring new products to the market, or create jobs.<sup>74</sup> Thus, in many cases, the standard corporate legal work advances the common good.

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70. See Richard P. Nielsen, *Organization Theory and Ethics: Varieties and Dynamics of Constrained Optimization*, in THE OXFORD HANDBOOK OF ORGANIZATION THEORY: META-THEORETICAL PERSPECTIVES 476, § 17.6.1, at 494 (Haridimos Tsoukas & Christian Knudsen eds., 2003) (“From a postmodern perspective, investor capitalism with its primary and optimizing concern for the shareholder wealth criterion for the most part ignores the legitimate needs of multiplicity and diversity of groups and their interests in the service of optimizing the need satisfaction of one priority group, shareholders.”). Rebecca DeWinter lauds the social responsibility movement for calling attention to various corporate practices in the apparel industry that may otherwise have gone unrecognized. Rebecca DeWinter, *The Anti-Sweatshop Movement: Constructing Corporate Moral Agency in the Global Apparel Industry*, in CAN INSTITUTIONS HAVE RESPONSIBILITIES? COLLECTIVE MORAL AGENCY AND INTERNATIONAL RELATIONS, 138, 139–40 (Toni Erskine ed., 2003). She constructs corporate moral agency as a relational concept in which there is no “preexisting-template” with which to define the rights and responsibilities ascribed to corporate actors. *Id.* Using the corporate social-responsibility movement, she presents a strong argument that the corporation’s identity as a moral agent is socially and historically constructed. *Id.* Philosopher Philip Pettit has also argued that incorporated groups can have collective responsibility. Pettit, *supra* note 19, at 171–72.

71. See Nielsen, *supra* note 70, §17.6.1, at 994–95. Organizational theorist Richard P. Nielsen notes that although the “modernist, managerial capitalist perspective” recognized the needs of multiple groups rather than solely those of the shareholders, the postmodern perspective is creating the “postmodern multiplicity perspective” in which multiple groups feel justified in purposefully avoiding supporting corporations. *Id.*

72. See David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 255 (2009) (stating that “shareholder primacy” models still dominate in the field of corporate law, and “consumer interest has been left relatively unexamined”).

73. See *supra* note 60 and accompanying text.

74. Thomas W. Ogletree, *Corporate Capitalism and the Common Good: A Framework for Addressing the Challenges of a Global Economy*, 30 J. RELIGIOUS ETHICS 79, 81–82 (2002).



Given the potential positive externalities of corporate activity, corporate lawyers will often be able to defend their choice of clients. Lawyers should not hesitate to question whether their actions on behalf of clients conform to socially beneficial conduct. Attorneys, after all, are trained to make arguments and should be well able to advance a persuasive and credible justification for their participation in a corporate matter. It is possible to defend even unpopular corporate legal work, such as the representation of a tobacco company. Although tobacco products are known to have detrimental health effects, the market and theories of individual autonomy and liberty suggest that consumers should be allowed to make their own choices, even if such choices result in harm.<sup>75</sup> Of course, the habit-forming nature of cigarettes complicates the discussion, as do concerns that information about the physical effects of cigarettes may not be widely disseminated, especially in third-world markets.<sup>76</sup> A lawyer explaining the value of distributing cigarettes would need to address these concerns.

Of course, some corporate actions, such as those in the cigarette example, will be more difficult to defend as socially beneficial. This discussion, however, serves to focus the discussion on the real issue: whether the client's goals—and the lawyer's work on behalf of the client—advance the common good. If not, the client may still be represented, though the lawyer engaged in the representation should not receive the same moral credit through the concept of nonaccountability as a lawyer whose work arguably does promote the common good.

Therefore, lawyers who work for clients that do not advance social good should pause to think about their roles in those representations and the representations' repercussions on both the lawyers' own morals and the morals of the legal profession in general. In such a representation, outsiders would likely, and unsurprisingly, conclude that the lawyer is motivated primarily by money and not a higher cause, such as promoting first-class citizenship. Additionally, the legal community should not weaken its moral responsibility by asserting that lawyers are never accountable for the goals of their clients, just as the business community would never claim that the chief executive officer of a cigarette company is not accountable for his or her actions on behalf of his company.

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75. See Harel Arnon, *Legal Reasoning: Justifying Tolerance in the U.S. Supreme Court*, 2 N.Y.U. J. L. & LIBERTY 262, 270–71 (2007) (“[W]e must allow people to make their own choices, even when they make bad ones.”). *But see* Kevin F. Ryan, *Lex Et Ratio: The Spirit of Liberty*, 28 VT. B.J. 5, 5 (2002) (“Liberty certainly entails the freedom to do wrong, but those who use their liberty for bad ends have misused a gift and may deserve to forfeit that gift.”).

76. See ROB CUNNINGHAM, *SMOKE & MIRRORS: THE CANADIAN TOBACCO WAR* 210–12 (1996).

#### *D. Law as a Mediating Institution for Moral Conflict*

A more recent, overarching theory of the morality of the lawyer's role has been advocated by Professor W. Bradley Wendel, who places law squarely at the center of moral debate.<sup>77</sup> Wendel argues that, in the American pluralistic society in which there are contested visions of what constitutes moral behavior, the law functions as a mediator of differences.<sup>78</sup> As a result, lawyers should take a law-respecting, and even a law-deferring attitude, toward moral issues when serving in their representative capacities.<sup>79</sup> Lawyers need not agree with the moral views of their clients because, as lawyers, they are facilitating the moral conversation in the legal and public arena when they assist their clients, and this conversation is a critical step in moral discernment.<sup>80</sup>

Wendel's theory offers an overarching vision of the lawyer's role, and works well in areas in which the law plays an active role in discerning particular moral questions.<sup>81</sup> The American legal system currently grapples with the moral underpinnings of a plethora of issues, such as abortion, assisted suicide, and gun control.<sup>82</sup> Many other matters of our political life, such as

protection of civil rights, the use of affirmative action, the regulation of immigration, the death penalty, the procedures governing military tribunals and detainee interrogations, and the propriety of the estate tax are all properly understood as issues that call us to think about the proper relationship between law and morality as well.<sup>83</sup>

As Stephen Gillers has argued, "[W]hen lawyers act within the rights-adjudicating apparatus . . . , its cloak of legitimacy should insulate them against charges of immorality based on a client's ends."<sup>84</sup>

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77. Wendel, *Institutional and Individual Justification*, *supra* note 23, at 987–93 (discussing the restraints that moral reasoning implies in relation to an attorney's ability to select clients).

78. See W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 364–65 (2004) [hereinafter Wendel, *Civil Obedience*]; Wendel, *Institutional and Individual Justification*, *supra* note 23, at 988; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 89 (2005); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1168–69 (2005).

79. See Wendel, *Civil Obedience*, *supra* note 78, at 382 (discussing the "obligation and respect [lawyers] owe to the law").

80. See *id.* at 384 ("[Lawyers] act in the name of society by providing a mechanism through which normative disagreements are channelled into an authoritative process of resolution.").

81. See *id.* at 382–88; see also Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 258–59 (2006) (discussing Wendel's "theory of lawyering").

82. See Wendel, *Civil Obedience*, *supra* note 78, at 380.

83. Gregory A. Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 2 (2006).

84. Gillers, *supra* note 27, at 147. Gillers establishes three additional justifications that "strengthen the argument for granting lawyers immunity from moral criticism for their clients' goals": (1) litigation is a form of public education that provides an incidental benefit; (2) litigation may uncover "new facts[] or new contexts" that "can change [the] assessment of the moral

The challenge is that the law might not intervene, despite the differing visions of morality.<sup>85</sup> But this does not end the moral discussion. Law may indeed be the superior arena for resolving the *political* question of whether the law should intervene, but few are willing to make the law itself the ultimate arbiter of moral decision-making.<sup>86</sup> To require the law to decide contested moral questions, in addition to the political question of the propriety of its intervention into the area of morality asks far too much of the legal system.<sup>87</sup>

The theory of law as a mediator of moral differences appears thinnest in those areas in which the law has expressly deferred to the private arena, as it does in corporate-transactional lawyering. With few exceptions, corporations have broad freedom to buy, sell, and split off assets, and to create new areas of business.<sup>88</sup> These actions are not part of a “rights-adjudicating apparatus,” but rather a private ordering apparatus.<sup>89</sup> Professor Rebecca DeWinter links the emergence of the corporate-accountability movement in the 1970s to the retreat of law, caused by the shrinking of the welfare state, deregulation and privatization, and the expansion of trade and investment, among other trends.<sup>90</sup> The legal vacuum created by these trends has been filled with a moral conversation that considers whether particular corporate acts advance the common good.<sup>91</sup> Much of this conversation occurs through public-relations initiatives that expose problems, such as the unfair, but not illegal, treatment of an employee or predatory, but legal, lending practices.<sup>92</sup> After the problem is exposed, the community members can have a conversation about facts (perhaps the employee was let go for other reasons or the loan rate does not justify a label of “predatory”) and about values related to the problems. (Why should a company give an employee a break? Why should a company not take advantage of a legal maneuver that causes harm to third persons?) At this

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issues”; and (3) litigation may discover or disclose “new or overlooked moral insights.” *Id.* at 148.

85. Cf. Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT’L L. 883, 889 (1995) (discussing how nations should evaluate whether a situation requires humanitarian or moral intervention by looking first to the normal state behavior and then to other principles).

86. See Ryan E. Mick, *Justifications for a Constitutional Jurisprudence of Deference to the States’ Moral Judgements*, 12 KAN. J.L. & PUB. POL’Y 379, 401–02 (2003).

87. *Id.*

88. See *Owens Corning v. Nat’l Union Fire Ins. Co.*, 257 F.3d 484, 495 (6th Cir. 2001) (stating that, as long as corporations abide by public policy and relevant corporate law, they can be very flexible in establishing their procedures).

89. See Gillers, *supra* note 27, at 149 (discussing the rights-adjudicating apparatus); Mnookin & Kornhauser, *supra* note 51, at 950 & n.1 (discussing the meaning of “private ordering”). Because these actions are in a private-ordering apparatus, “the lawyer is as morally vulnerable as any agent who provides a skill or product essential to the client’s purpose.” Gillers, *supra* note 27, at 149.

90. DeWinter, *supra* note 70, at 141.

91. See *id.* at 141–42.

92. See *id.* at 142.

point, the discussion directly addresses the rightness or wrongness of the corporate conduct. The business people who make these decisions are challenged with moral arguments that warrant a response. A recent example of this dynamic is illustrated when the leaders of major banks appeared before Congress to defend their bonuses despite receiving taxpayer bailout money in the previous year.<sup>93</sup>

The business decision-makers might attempt to justify their actions by claiming that they must pursue profits by any means that are legal. Of course, the argument against these decision-makers is that they are doing wrong as human beings, though their actions may be legally acceptable. A thoughtful business-actor might present the idea that serving as a corporate agent is always a social good and therefore he is not personally responsible for what he does in that representative capacity. This essentially amounts to claiming nonaccountability for corporate agents. However, because corporations can only act through their agents, this logic leads perilously close to a claim that corporations should be exempt from moral criticism. Another rationale of this nonaccountability claim is that the free market is a superior venue in which to resolve moral differences. But, as has been long understood, the market is capable of harshly immoral acts—slavery as a prime example—and is not exempt from questions of rightness and wrongness.<sup>94</sup> Although the market is *capable* of promoting the common good, just as people are, it is also capable of doing great harm.

Therefore, these arguments that business persons advance to justify their nonaccountability do not prevail. It makes little sense, then, that lawyers of these corporations should be able to claim nonaccountability, particularly when the legal system is no longer acting as a moral mediator. Accordingly, because the legal system defers much decision-making power to the private parties in corporate transactions, the idea that nonaccountability is justified because the law is acting as a mediating influence that will solve moral debates fails, just as the other traditional justifications for nonaccountability failed when applied to corporate transactions.<sup>95</sup>

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93. See *Bankers Defend Actions to Congress*, CBSNEWS.COM (Jan. 13, 2010, 2:00 PM), <http://www.cbsnews.com/stories/2010/01/13/business/main6091377.shtml>.

94. For a modern example, see *John Doe I v. Unocal Corp.*, 395 F.3d 932, 937, 939 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003) in which Myanmar villagers sued the defendant corporation under the Alien Tort Claims Act for aiding and abetting alleged human-rights violations including forced labor, murder, rape, and torture, in connection with the corporation's construction of a gas pipeline through the Myanmar region.

95. See W. William Hodes, *Accepting and Rejecting Clients—The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 KAN. L. REV. 977, 979 (2000) (presenting an analysis of a lawyer's concern over his client's representation).

## II. WHY LAWYERS' CONDUCT IS NOT CONSISTENT WITH NONACCOUNTABILITY

As Monroe Freedman has urged, lawyers have a moral obligation to justify the reasons they represent their clients.<sup>96</sup> Thoughtful lawyers responding to a criticism of their corporate representation might point to the inspiring tenet that everyone should have access to legal service. Although this is true, the question is whether the lawyer is responsible for whom he or she chooses as clients. The legal profession's assertion of nonaccountability regarding an attorney's choice of client is often inconsistent with the lawyer's own conduct.

### A. *Lawyers Have the Freedom to Choose Clients*

The principle of nonaccountability enables the lawyer codes of professional conduct to urge lawyers to make legal representation broadly available, including to unpopular clients and causes. The Model Code of Professional Responsibility (Model Code) urges that lawyers "should not lightly decline proffered employment" because it is the "objective of the bar to make legal services fully available."<sup>97</sup> The Model Code also exhorts that "[t]he fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally."<sup>98</sup>

Although the legal codes appear to "talk the talk" about giving representation to all, they do not fully "walk the walk." As David Luban notes, the Model Rules of Professional Conduct and the Model Code of Professional Responsibility, although establishing a strong partisanship model, are rife with escape hatches for situations in which a lawyer may not feel morally

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96. Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 111-12 (1995).

97. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-26 (1983).

98. *Id.* Drawing on an implicit model of the honorable lawyer supporting the downtrodden, the Model Code provides noble imagery: "History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse." *Id.* at EC 2-27. The Model Code recognized the danger that this conceptualization, coupled with the principle of zealous advocacy and nonaccountability, could lead to a conclusion that lawyers must always speak the words that will be in the client's best interests. Therefore, the Model Code envisioned limits: "The obligation of loyalty . . . implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client." *Id.* at EC 7-17. The language of this passage does not require a lawyer to set aside his personal feelings only in instances when he represents "the defenseless or the oppressed," but the notes to the 1980 Model Code indicate that some states envision this as applying in those circumstances. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-27 n.45 (1980).

comfortable asserting a particular position of the client.<sup>99</sup> First, the law and ethics codes recognize that “[l]awyers have considerable freedom to reject cases,” which allows them “to limit their representation so as to exclude repugnant objectives or tactics.”<sup>100</sup> The 1908 American Bar Association Canons of Professional Ethics strongly embraced complete freedom to choose clients:

No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer’s responsibility. He cannot escape it by urging as an excuse that he is only following his client’s instructions.<sup>101</sup>

Once representation is undertaken, however, the obligations are clear: “[t]he lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability.”<sup>102</sup>

By 1969, the organized bar association was willing to assert a duty to “not lightly decline proffered employment,” and the Model Code urged that every lawyer “should find time to participate in serving the disadvantaged.”<sup>103</sup> The 1983 Model Rules of Professional Conduct (Model Rules) originally urged that lawyers “should render public interest legal service.”<sup>104</sup> This provision was eventually replaced by a more detailed statement that “[a] lawyer should aspire to render at least (50) hours of pro bono public legal services per year.”<sup>105</sup>

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99. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 17, app. 1, at 393–97; *see also* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1007 (1990) (asserting that it is a common understanding that the legal codes “embody the standard conception [of legal ethics], albeit in a diffident and bleached-out form containing some significant bows to the moral activist vision”). *But see* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 121 (1990) (reviewing DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988)) (stating that lawyers do not always act consistently with Luban’s standard conception of legal ethics).

100. Ellmann, *supra* note 99, at 121.

101. CANONS OF PROF’L ETHICS Canon 31 (1908).

102. CANONS OF PROF’L ETHICS Canon 15 (internal quotation marks omitted).

103. MODEL CODE OF PROF’L RESPONSIBILITY EC 2-25, 2-26 (1983); *see also id.* at EC 8-3 (“Those persons unable to pay for legal services should be provided needed services.”); *id.* at EC 8-9 (stating that “lawyers should encourage, and should aid in making, needed changes and improvements” to the legal system).

104. MODEL RULES OF PROF’L CONDUCT R. 6.1 (1984).

105. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2009).

Although the focus of the rule is on representing the disadvantaged, the accompanying comments leave lawyers with broad discretion in choosing the recipient of their pro bono services.<sup>106</sup> Similarly, except in instances of court-appointed counsel, courts are quite reluctant to force a lawyer to take a particular client.<sup>107</sup> The bottom line is that lawyers have a wide range of choice when deciding who to represent.<sup>108</sup>

There appear to be five common reasons that lawyers choose clients: (1) a desire to obtain legal fees; (2) an agreement with the goals of the client; (3) an agreement that the representation promotes the rule of law; (4) prestige; and (5) a representation undertaken as a favor to another person. It is safe to say that most lawyers choose clients in part because the client can pay.<sup>109</sup> As Professor Howard Lesnick noted, “[g]oing where the money is is deemed to be a neutral choice; placing any other consideration on the scales bears a burden, sometimes a significant burden, of explanation and justification.”<sup>110</sup> The legal profession spends a great deal of intellectual energy asking the important question of whether lawyers should have complete freedom to choose clients;

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106. MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 1 (“Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.”).

107. See Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 7, at 1039. Particular circumstances may raise a question of whether an attorney-client relationship exists, but if a lawyer clearly articulates his or her intent not to represent a prospective client, courts are unlikely to undermine that decision. In finding attorney-client relationships, courts generally use a contract model. Additionally, a lawyer arguably has an obligation to respond promptly to a request for legal assistance. Consider the case of the Massachusetts lawyer who received a letter from a prospective client requesting legal assistance on a possible tort claim. See *DeVaux v. Am. Home Assurance Co.*, 444 N.E.2d 355 (1983). The lawyer had previously represented this client on a domestic relations matter, but, according to the court, that “[d]id not create an attorney-client relationship as to other affairs of the client.” *Id.* at 357 & n.6. The lawyer’s secretary misfiled the letter and the attorney did not discover it until after the statute of limitations had run. *Id.* at 357. Additionally, the lawyer failed to return several phone calls from the prospective client. *Id.* The court found that an issue of fact existed as to whether an attorney-client relationship existed that precluded summary judgment in favor of the attorney in a subsequent legal-malpractice action. *Id.* at 358–59.

108. See GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* 84 (5th ed. 1907) (“It by no means follows . . . as a principle of private action for the advocate, that all causes are to be taken by him indiscriminately, and conducted with a view to one single end, *success*.”).

109. The fact of attorneys receiving payment or fees has been a nettlesome issue since the early colonial days, when several colonies initially prohibited attorneys from accepting fees in court or regulating the amount of fees an attorney could receive. See PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 41–42 (1992) (discussing attorney’s fees as viewed by the colonies). Commentators have also noted the link between zeal and payment. As Professor Deborah Rhode observed, “most lawyers will prefer to leave no stone unturned, provided, of course, they can charge by the stone.” Rhode, *supra* note 65, at 635.

110. LESNICK, *supra* note 22, at 32; Fried, *supra* note 20, at 1075 (“It is undeniable that money is usually what cements the lawyer-client relationship. But the content of the relation is determined by the client’s needs, just as friendship is a response to another’s needs.”).

yet the reality that money, rather than timing or the nature of the cause, is the dominant basis for client selection is largely ignored.

One cannot help but posit that if lawyers truly believed in the first-class citizenship model they would guarantee representation to all clients regardless of ability to pay, creating a kind of universal legal service system. The fact is, only wealthy clients are first-class citizens under Pepper's model.<sup>111</sup> If lawyers are not morally accountable for the clients whom they choose to represent, it should not be surprising that many lawyers will choose those clients who are able to pay, without regard to the moral value of the clients' goals.<sup>112</sup>

The argument becomes complicated when money is a factor because money is often assumed to be the primary motive for action. Society tends to impute rationality to economic decisions. One is more likely to believe criminal defense counsel, making a minimal income as public defenders, who say they do the work because they believe in the importance of giving the poor an opportunity to have a vigorous defense, than lawyers who make the same claim while earning millions of dollars representing organized crime figures or large corporations. As David Wilkins notes, the former lawyer is referred to as a "freedom fighter," and the latter as a "mercenary."<sup>113</sup>

Although motive is important in moral reasoning, the underlying actions also require scrutiny. As to these underlying actions, it should be acknowledged that there are a variety of justifications for the moral and social value of lawyers' work.<sup>114</sup> This does not mean that litigators are somehow superior to transactional lawyers in the perceived moral hierarchy; it does mean that the justifications for legal work will not be the same. With litigators, the arguments are weighted toward the procedural aspect of the legal system—access to lawyers in the litigation process is generally of value regardless of the individual's cause.<sup>115</sup> With transactional lawyers, the justification is more likely to be substantive.<sup>116</sup> Further, this discussion is not to imply that the lawyer should not take work because of its lack of redeeming social value. Many individuals in society spend their entire careers doing work that produces neither an easily identifiable moral good nor moral evil. However, there should be less social prestige in this work because the driving force will be some form of self interest just as there is less prestige in being an

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111. See Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 28, at 617–19.

112. See Luban, *The Lysistratian Prerogative*, *supra* note 55, at 643–45.

113. Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 7, at 1056–58 (showing that, despite there being no real difference between a lawyer working for a fee and without a fee, there is a different public conception of the lawyer's intentions in each of these scenarios).

114. See Karen L. Loewy, *Lawyering for Social Change*, 27 *FORDHAM URB. L.J.* 1869, 1872–74 (2000) (stating that lawyers have a special, broad role in society to promote democracy and protect societal values).

115. See, e.g., Wasserstorm, *supra* note 24, at 9–11 (describing the importance of attorney representation during the litigation procedure); see also *supra* Part II.B.

116. See *supra* Part II.B.



executive for a socially irresponsible company versus a socially responsible company.

### B. Choosing Clients and Cause Lawyering

Not only does the legal profession provide lawyers with wide freedom to choose clients, but many lawyers also choose to work in areas in which they are likely to agree with the goals of their client, or at least not disagree.<sup>117</sup> Sociologists refer to the situation when a lawyer chooses a client because of the lawyer's personal alignment with the client's goals as "cause lawyering."<sup>118</sup> Obviously not all lawyers choose clients in this way, but consanguinity with the client plays a role in many decisions to take on a representation.<sup>119</sup> Professor Peter Margulies distinguishes between positional solidarity, which "evokes the lawyer's commitment to a client's political, social or economic goals," and operational solidarity, which "locates the lawyer as enabler of the client's ongoing activities."<sup>120</sup> Lawyers who choose to embrace both positional and operational solidarity with the client's goals must be mindful of and conform their actions to their professional and ethical obligations.<sup>121</sup>

Cause lawyers are "committed to using their professional work as a vehicle to build [a] good society," often in various substantive areas of law.<sup>122</sup> Some lawyers, motivated by a distrust of the government's power or their interest in the ostracized, choose to represent individuals against state power or to

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117. Ellmann, *supra* note 99, at 125–26 (“[L]awyers may in fact agree rather often with their clients’ choice of objectives, and this agreement may reflect that lawyers do not maintain the detachment from their clients’ goals that complete nonaccountability might support.”); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 534–36 & tbl.5 (1985) (showing that, in a study of lawyers in large law firms, 91.9% of those who had never turned down a case stated that they had never been asked to undertake a case that conflicted with their personal values). Both David Luban and Stephen Ellmann discuss the concept of “cognitive dissonance” in which the lawyer embraces the values of the client. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 17, at 402–03; Ellman, *supra* note 99, at 128.

118. See, e.g., Austin Sarat & Stuart Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* 12–13 (Austin Sarat & Stuart Scheingold eds., 2001) (“[C]ause lawyers choose clients and cases in order to pursue their own ideological and redistributive projects . . . as a matter of personal engagement.”).

119. See *id.* (discussing the differences between cause lawyering and conventional lawyering).

120. Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 174 (2003). Professor Margulies also discussed “affective solidarity,” a concept that “encompasses the bonds of empathy and trust in the attorney-client relationship.” *Id.*

121. *Id.* at 174–75.

122. Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575, 577 (2006).

advocate for socially unpopular causes.<sup>123</sup> The late William Kunstler was a well-known “[l]awyer for [s]ocial [o]utcasts,” whose personality was so closely identified with his causes that his “wild hair seemed to symbolize his distrust of government and his kinship with unpopular people and causes.”<sup>124</sup> “My purpose,” he was reported to have said, “is to keep the state from becoming all-domeineering, all powerful.”<sup>125</sup>

Similar to cause lawyering, many lawyers choose to specialize in certain types of industry.<sup>126</sup> For example, a lawyer might only represent banks or only technology companies.<sup>127</sup> As a result, these lawyers, like cause lawyers, can become experts on a particular industry and, thus, become better able to understand the mindset of their clients.<sup>128</sup>

Canon 15 of the *1908 Canons of Professional Ethics*, which states that a lawyer should not assert “personal belief in his client’s innocence or in the justice of his cause,”<sup>129</sup> sits in uneasy tension with cause lawyering. As Charles Curtis noted,

here is a canon which calls improper something which the most proper lawyers do. I suggest that its only purpose is to relieve lawyers of the necessity of expressing their opinion, so that they may never need express it unless they want to express it, and keep it to themselves whenever they choose. The canon gives a lawyer an excuse when his client wants him to espouse his cause, when all the lawyer wants to take is a case.<sup>130</sup>

Similarly, the Model Rules and Model Code continue to regulate the insertion of an attorney’s opinion into a case.<sup>131</sup>

123. See, e.g., David Stout, *William Kunstler, 76, Dies; Lawyer for Social Outcasts*, N.Y. TIMES, Sept. 5, 1995, at B6 (discussing Kunstler’s representation of unpopular causes and individuals).

124. *Id.* (“[Kunstler’s] clients’ unpopularity seemed to inspire Mr. Kunstler, who was recognized by admirers and detractors alike as a lawyer who embraced pariahs. He seemed to seek out the most loathed of people and causes.”).

125. *Id.*

126. See Lauren Nicole Morgan, Note, *Finding Their Niche: Advance Conflicts Waivers Facilitate Industry-Based Lawyering*, 21 GEO. J. LEGAL ETHICS 963, 976 (2008) (discussing “industry lawyers” and their roles).

127. See *id.* (“A lawyer may choose to specialize in any number of industries, such as gaming, nuclear power, mining, education or the airline industry.”).

128. See *id.* (noting that a primary perk to specializing is that a lawyer “can know the business, know the players, [and] understand the strategy of the client”).

129. CANONS OF ETHICS Canon 15 (1908).

130. Curtis, *supra* note 7, at 15.

131. See MODEL RULES OF PROF’L CONDUCT R. 3.4(e) (2009) (“A lawyer shall not: . . . in trial, . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . .”); MODEL CODE OF PROF’L RESPONSIBILITY DR 7-106(C)(4) (1983) (same); see also MODEL CODE OF PROF’L RESPONSIBILITY EC 7-24 (“The expression by a lawyer of his personal opinion as to the justness

Public models, such as Clarence Darrow, reinforce the power of choice. Darrow developed his legal skills as a railroad lawyer before he chose to represent labor organizers and criminal defendants.<sup>132</sup> Because lawyers have the freedom to embrace the goals of the client, and many lawyers do, the confusion of non-lawyers with regard to lawyers' claim of nonresponsibility for the choice of their clients and the clients' goals is understandable. For example, if a lawyer chooses not to represent a pro-choice organization because of the organization's beliefs, then it would suggest that the beliefs of the lawyer's pro-life clients are less objectionable to the lawyer.<sup>133</sup> As David Wilkins notes, lawyers have "a moral right to control his or her own labor," which inexorably leads to the conclusion that the decision to accept a case "carries moral significance."<sup>134</sup>

It is also unworkable to completely separate lawyers from their clients. Cause lawyers would likely categorically reject a claim that they are not accountable for the goals of their clients; in fact, they embrace those goals. A lawyer who chooses to work for a public cause or in the public realm, rather than for a large firm, will sacrifice much in terms of material reward. For example, lawyers who become prosecutors typically do so because they believe in the importance of bringing public order and justice to victims of crimes. Similarly, lawyers who become public defenders typically do so because of their belief that individuals are entitled to protections against the harsh actions of the state. Lawyers make these choices because they believe in a case, whether it be client-specific or systemic. Thus, the assertion that lawyers are not accountable for their clients' goals diminishes the sacrifice that some lawyers have made.

An additional dimension complicates the idea that lawyers are not morally responsible for the goals of their clients, or, derivatively, for their choice of clients. Typically, there is high praise of the lawyers who make monetary

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of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact.").

132. CLARENCE DARROW, *THE STORY OF MY LIFE* 57, 74–76 (1932).

133. In the American pluralistic society, experience suggests that "for every lawyer whose conscience may be pricked" by representing a distasteful client, "there is another whose virtue is tickled." Curtis, *supra* note 7, at 16. Charles Curtis's article on *The Ethics of Advocacy* stirred much controversy—among other topics, he argued that lawyers should sometimes lie for their clients. *Id.* at 7–9.

134. Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 7, at 1039–40; see Fried, *supra* note 20, at 1077–78 ("The lawyer's liberty—moral liberty—to take up what kind of practice he chooses and to take up or decline what clients he will [represent] is an aspect of the moral liberty of self to enter into personal relations freely."); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 7–8 (1988) (describing how lawyers have full discretion with regard to the clients and causes they represent); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1128 (1988) (stating that a lawyer has "a fundamental right to control [his] labor"); see also 2 ENCYCLOPEDIA OF CATHOLIC SOCIAL THOUGHT, SOCIAL SCIENCE, AND SOCIAL POLICY 607–09 (Michael Coulter et al. eds., 2007) (discussing the general rights of workers under Catholic social thought).

sacrifices to serve the common good by taking a “public interest job,” such as becoming a public defender or legal-aid lawyer. This monetary sacrifice may be particularly potent for young lawyers who serve, for example, as prosecutors to pursue what they believe is the common good. Law schools and bar associations give awards to those who work in the public interest and praise lawyers who undertake pro bono work.<sup>135</sup> Many law firms encourage their associates to perform pro bono legal services. Those firms, in turn, promote their pro bono services as evidence of the good work they have done<sup>136</sup> in order to garner respect in the legal community.<sup>137</sup> The implicit suggestion is that lawyers who choose to give up big salaries in exchange for devoting their efforts to a cause in which they believe deserve at least as much respect as lawyers who garner large salaries working primarily for their own financial gain, typically on behalf of corporate clients.<sup>138</sup> This does not mean that corporate-transactional lawyers do not deserve respect in the legal community. But, unlike lawyers who go to work for legal aid, corporate-transactional lawyers must explain the value of their work in different terms. They will need to refer to the accomplishments of the work, and not merely the system in which the work occurs.

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135. See, e.g., 2009 Kaufman Pro Bono Service Award, HARVARD LAW SCH., <http://www.law.harvard.edu/academics/clinical/news/2009-pro-bono-award.html> (last visited Jan. 19, 2011) (announcing the winners of the 2009 Andrew L. Kaufman Pro Bono Service Award from Harvard Law School); ABA Pro Bono Publico Award – Current Recipients, ABA, [http://www.abanet.org/legalservices/probono/pbp\\_current\\_recipients.html](http://www.abanet.org/legalservices/probono/pbp_current_recipients.html) (last updated Aug. 18, 2010) (describing the ABA Pro Bono Publico Award and listing the 2010 recipients); Dean Areen Receives Pro Bono Institute Award, GEORGETOWN UNIV. LAW CTR. (Feb. 23, 2004), <http://www.law.georgetown.edu/news/releases/february.23.2004.html> (announcing the recipient of the 2004 Georgetown University Law Center Pro Bono Institute Award); Kanstroom Receives Pro Bono Award, BOS. COLL. LAW (Oct. 2, 2007), <http://www.bc.edu/schools/law/newsevents/2007-archieve/10207.html> (announcing the 2007 recipient of the Boston College Law School Faculty Pro Bono Award); *Lawyering Program: Pro Bono*, RUTGERS SCH. OF LAW, <http://www.camlaw.rutgers.edu/pro-bono> (last visited Jan. 19, 2011) (describing the pro bono program at Rutgers School of Law, including the Pro Bono Award).

136. Many law firms prominently feature information about their pro bono activities by offering a link on the firm’s homepage. See, e.g., Arnold & Porter LLP, <http://www.arnoldporter.com> (last visited Jan. 19, 2011); Davis Polk, <http://www.davispolk.com> (last visited Jan. 19, 2011); Hogan Lovells, <http://www.hoganlovells.com> (last visited Jan. 19, 2011); Sullivan & Cromwell LLP, <http://www.sullivanandcromwell.com> (last visited Jan. 19, 2011).

137. According to Aristotle, society praises men when they endure a base or painful experience in return for noble objects, and pardons negative acts executed under extreme pressure that strains human nature. ARISTOTLE, THE NICOMACHEAN ETHICS bk. III, reprinted in DANIEL R. COQUILLETTE, LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY 42, 42–48 (1995). Aristotle has a strong notion of individual responsibility and holds a person responsible for voluntary acts taken with knowledge of the circumstances surrounding the act. *Id.*

138. Of course, reasonable lawyers can argue about whether and how these lawyers engaged in the common good. See Abbe Smith, *Can You be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 355–62 (2001).

### C. *The Process of Lawyering: Intruding on Lawyer Autonomy*

Once a lawyer agrees to represent a client, the loyalty owed to that client restricts the personal actions the lawyer may take in his private capacity.<sup>139</sup> Although the extent to which a client's position should interfere with a lawyer's personal actions is debatable, a consensus on broad themes is possible. A lawyer in his or her private capacity cannot directly undermine the goals that the lawyer is trying to achieve in his or her professional role. For example, it would likely be professional misconduct for a lawyer to argue in tax court for a certain interpretation of a tax ruling, while simultaneously publishing an article opposing that interpretation.<sup>140</sup> The lawyer would be publicly providing arguments for the opposing side. And any opposing counsel would prominently feature that article in briefs and arguments. More troubling is the notion that a lawyer becomes a less-effective advocate for some classes of potential clients if the lawyer takes a strong, public stand on a contentious social issue.<sup>141</sup>

Yet, even this broad distinction does not capture all the limits on a lawyer's conduct. Suppose an attorney is representing a corporation that seeks to put a power plant in a local community. That lawyer cannot represent the interests of the corporation in obtaining a zoning variance by day and serve as an organizer in the local community-action group to oppose the zoning variance by night.<sup>142</sup> A client would inevitably see the lawyer as violating a fundamental concept of loyalty.<sup>143</sup> In this example the law of zoning and

139. See CANONS OF ETHICS Canon 31 (1908) ("The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability . . ." (internal quotation marks omitted)); see also MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (2009) ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").

140. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10; see also Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 7, at 1061 (arguing that a black lawyer could not simultaneously represent both the National Association for the Advancement of Colored People and the Ku Klux Klan).

141. See Curtis, *supra* note 7, at 5. Curtis remarks:

I cannot forget what one of the very best Boston trustees once told me. He had, of course, in his many trusts large real estate holdings in Boston. He was a citizen of Boston. He told me once that he either refused to contribute to the campaigns of candidates for mayor or else he contributed to both of them, because, he said, "The assessments on the real estate I hold in trust, things being as they are in Boston, would be put in hazard if I were to come out definitely for a candidate and he lost." The better trustee, and he was a good trustee, the worse a citizen.

*Id.*

142. See MARKOVITS, *supra* note 19, at 38 (noting that, in contrast to an actor who may play a character but privately distance himself from the character's actions, an "effective advocate . . . may not disparage her client's claims and moreover must, as is commonly said, 'exude confidence and enthusiasm that contribute to the credibility of his client's cause'").

143. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (calling loyalty an "essential element[] in the lawyer's relationship to a client").

policy of site selection are closely aligned. The lawyer, therefore, would be working in one forum to undo the benefit the lawyer is trying to achieve for the client in another. This conduct is in conflict with the common conception of a lawyer's professional obligation to a client.<sup>144</sup> In reality therefore, agreeing to represent a client may possibly interfere with the moral autonomy of the lawyer.<sup>145</sup>

Sometimes the personal/professional dichotomy of a lawyer may be so difficult to balance that a lawyer cannot represent a client.<sup>146</sup> The Model Rules allow a lawyer to deny representation to a client in this case, acknowledging that the personal is not so easily distinguished from the professional.<sup>147</sup> Thus, according to the Model Rules, a lawyer should not decline to represent a client because of the client's unpopularity, but a lawyer may decline if his or her personal views would impede representation.<sup>148</sup>

Finally, the lawyer is allowed, and strongly encouraged by some legal-ethics scholars, to engage in fulsome counseling, including discussion on the moral dimensions of the client's ends and means.<sup>149</sup> Professor Paul Tremblay has observed that "the moral activism project" is "one of the most significant intellectual developments in legal ethics in the twentieth century."<sup>150</sup> The actual practice of "moral activism" is immensely more complicated than simply presenting an argument to a client.<sup>151</sup> Differences in moral assessment

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144. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (prohibiting a lawyer from allowing personal interests to interfere with the representation of his or her client); *cf.* *Johnston v. Koppes*, 850 F.2d 594, 596 (9th Cir. 1988) ("Loyalty to a client requires subordination of a lawyer's personal interests when acting in a professional capacity. But loyalty to a client does not require extinguishment of a lawyer's deepest convictions.").

145. *Painter, supra* note 6, at 517 ("Corporations are not autonomous, but rather corporate decisions are made by people standing behind the corporate entities: directors, officers, employees, and lawyers. . . . Lawyers also are not autonomous, rather their decisions and actions are determined in part by business objectives of their clients.").

146. MODEL RULES OF PROF'L CONDUCT R. 6.2(c) (permitting a lawyer to avoid appointment only when "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client").

147. *Id.*

148. *See id.* (stating that, although a lawyer may decline appointment because of repugnancy, a lawyer still must "accept[] a fair share of unpopular matters or indigent or unpopular clients" in order to fulfill the pro bono responsibility).

149. *See* Paul R. Tremblay, *Moral Activism Manqué*, 44 S. TEX. L. REV. 127, 150 (2002) (stating that a lawyer committed to moral activism is likely to have ethical discussions with his client). Legal codes of ethics also encourage the lawyer to consider morality when rendering advice. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 ("In rendering advice a lawyer may refer not only to the law but to other considerations such as moral . . . factors, that may be relevant to the client's situation."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 ("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.").

150. Tremblay, *supra* note 149, at 130.

151. *Id.*; *see also* Ellmann, *supra* note 99, at 121-23 (discussing a lawyer's action of disclosing moral advice to his client).

are rarely about the ends (for example, do not kill), but about facts (for example, this action will kill less people than the alternative action).<sup>152</sup> The very fact of engaging in a counseling discussion reflects a vision of lawyering quite far removed from a sterile claim that lawyers are not accountable for the goals of their clients.<sup>153</sup>

Closely related to this discussion, Richard Painter developed a critique of nonaccountability in the corporate context based upon the interdependence of attorneys and their corporate clients.<sup>154</sup> Painter makes the argument that in many contexts corporate attorneys are so intertwined with their clients that they are morally accountable for the clients' actions.<sup>155</sup> Although this is perhaps true in many cases, this intertwining is not necessary to create moral accountability. Even where there is no intertwining, in the corporate context lawyers are still accountable because of the nature of the client and the forward-looking, non-adversarial nature of the work.

*D. The Process of Lawyering: Transforming the Lawyer and Information Processing*

In addition to professional responsibilities that align the client and his attorney, there is a natural, human tendency to adapt to the position one advocates.<sup>156</sup> Lawyers are trained to see both sides of a disagreement.<sup>157</sup> As a result, even lawyers who do not start out agreeing with the goals of their clients often come to be persuaded by constantly repeating their clients' point of view.<sup>158</sup> Charles Curtis described this process of self-persuasion in this classic passage:

It is profoundly true that the first person a lawyer persuades is himself. A practicing lawyer will soon detect in himself a perfectly astonishing amount of sincerity. By the time he has even sketched out his brief, however skeptically he started, he finds himself believing more and more in what it says, until he has to hark back to his original opinion in order to orient himself. And later, when he

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152. See Tremblay, *supra* note 149, at 130.

153. *Id.* at 150 (noting that lawyers "committed to morally ambitious practice" are more likely to have these discussions and that accepting "moral activism" results in "more expression of disagreement and efforts at persuasion by lawyers").

154. Painter, *supra* note 6, at 511-18.

155. *Id.*

156. See E. Donald Elliot, *Against Ludditism: An Essay on the Perils of the (Mis)use of Historical Analogies in Technology Assessment*, 65 S. CAL. L. REV. 279, 284 (1991) (acknowledging the human tendency to "analogize the new to the familiar"); Tremblay, *supra* note 149, at 130 (noting that "most people believe what they want to be true" and discussing how this concept operates with regard to the lawyer and his or her client).

157. David Schuman, *Beyond the Waste Land: Law Practice in the 1990s*, 42 HASTINGS L.J. 1, 11 (1990).

158. Tremblay, *supra* note 149, at 130.

starts arguing the case before the court, his belief is total, and he is quite sincere about it.<sup>159</sup>

Psychological research has revealed the biases and information processes that push a lawyer toward believing the factual assertions of a client.<sup>160</sup> Economic incentives add an additional impetus for a lawyer to align his or her views with those of a client.<sup>161</sup> Through this mental alignment, the character of the lawyer is changed. Aristotle concluded that character is acquired through both teaching and habit, and reinforced through conduct.<sup>162</sup> If a lawyer takes on an amoral, “hired gun” approach to representation, it could have long-lasting effects on the lawyer. George Orwell’s famous essay, “Shooting an Elephant,” captured this idea vividly with this phrase: “[h]e wears a mask, and his face grows to fit it.”<sup>163</sup> Indeed, many have observed cases in which “the role consume[s] the person.”<sup>164</sup>

The dynamics of representation are, of course, more complicated than this discussion implies. The process of change works both ways. Lawyers can influence their clients through conversation and counseling—the “moral activism” noted above.<sup>165</sup> Such a conversation is not easy, and some lawyers

159. Curtis, *supra* note 7, at 13.

160. Tremblay, *supra* note 149, at 130.

161. Stephen M. Bainbridge, *Policies and Cultures of Organization: The Tournament at the Intersection of Business and Legal Ethics*, 1 ST. THOMAS L.J. 909, 917 (2004).

162. ARISTOTLE, *supra* note 137, at 47; *see also* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 NOTRE DAME L. REV. 635, 644 (2006) (“Only by putting the virtues into practice does the good become integrated in our character.”); Ian Mangham, *Character and Virtue in an Era of Turbulent Capitalism*, in THE OXFORD HANDBOOK OF ORGANIZATION THEORY 502, 504 (Haridimos Tsoukas & Christian Knudsen eds., 2003) (stating that Aristotelian logic suggests that character is “acquired through teaching and habituation”). This reflects the reality that there are few clear positions regarding ethical scenarios facing lawyers. However, simply because there may often be legitimate countervailing concerns does not imply that lawyers cannot or should not choose one position over another, or that lawyers cannot label the position they choose as the morally correct position.

163. George Orwell, *Shooting an Elephant*, in TRIAL AND ERROR: AN OXFORD ANTHOLOGY OF LEGAL STORIES 213, 213 (Fred. R. Shapiro & Jane Garry eds., 1998). One author discusses Orwell’s personal experiences and the role of the lawyer as follows:

Like Orwell, the lawyer may not like what she is doing and may not like herself very much for doing it. She may feel a stifling sense of being trapped in her role with no way out. Yet rather than face these doubts openly, the lawyer’s moral paralysis may be transmuted into anger at others, and so she may find herself experiencing the same sort of unreasoning hostility towards her clients that Orwell felt towards the Burmese people he was sent to serve.

Joseph Allegretti, *Shooting Elephants, Serving Clients: An Essay on George Orwell and the Attorney-Client Relationship*, 27 CREIGHTON L. REV. 1, 12 (1993).

164. Smith, *supra* note 138, at 397.

165. *See* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 66–67 (1994) (discussing a lawyer’s approach to a moral dialogue between his client and himself); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1546–48 (1995)



would choose to engage in this discussion only in those relatively rare situations in which the lawyer is factually certain that the client is using questionable means or pursuing a questionable end.<sup>166</sup> Other lawyers might embrace the position urged by Professor Robert Vischer, which acknowledges that moral perspective is inextricably intertwined in legal representation and should be more openly recognized.<sup>167</sup> Other lawyers might embrace corporate-transactional lawyering to assure that a richer and more nuanced dialogue occurs in the representation. With powerful corporate agents, lawyers are less likely to be concerned with paternalism and overcoming the autonomy of the corporate client.<sup>168</sup> And, although the corporate agents who partake in the discussion may feel the constraints of their corporate role, the financial pressure that those agents can exert on their attorneys should not be understated. The economic effect of a client firing a public defender as a result of a moral disagreement is much less than the effect of a corporate attorney losing a major client—and potentially much of his book of business. Both who the lawyer represents and how the lawyer embraces his or her role are choices that the legal community should not be afraid to discuss or improve by suggesting a better, normative approach. In the words of Professor Russell Pearce, we should move the conversation of moral accountability “to the center of the bar’s legal ethics conversations.”<sup>169</sup>

### III. THE PUBLIC DOES NOT EMBRACE A BROAD CLAIM OF NONACCOUNTABILITY

Historically, the messenger is often confused with the message. Several aspects of lawyering—the ability to choose clients, the social and political alignment between some lawyers and their clients, and the impact of client choice on lawyer autonomy—support the not-uncommon inference that because some lawyers align with their clients, all lawyers do. All of these lawyering aspects undoubtedly play a role in the public’s lukewarm acceptance of the concept of nonaccountability, at least as to client selection.<sup>170</sup> Moreover,

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[hereinafter Pepper, *Counseling at the Limits of the Law*] (observing how a lawyer can influence a client’s actions by providing or abstaining from providing his or her relevant knowledge of the law).

166. See Pepper, *Counseling at the Limits of the Law*, *supra* note 165, at 1546–48 (discussing the lawyer’s role when he or she believes the client is engaged in or has a goal of illegal activity).

167. Vischer, *supra* note 81, at 228–29.

168. Professors John Conley and Scott Baker pose a fascinating question of whether there has been a switch in the level of autonomy and professionalism in large firms, as compared to small firms, over the last fifty years. See John M. Conley & Scott Baker, *Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 *LAW & SOC. INQUIRY* 783, 784, 796–97 (2005).

169. Russell G. Pearce, *Model Rule 1.0: Lawyers Are Morally Accountable*, 70 *FORDHAM L. REV.* 1805, 1808 (2002).

170. Smith, *supra* note 138, at 355–62 (describing the public’s view of prosecutors and criminal defense counsel, and noting that the latter “are barely tolerated”).

the fact that an individual lawyer may sometimes reject a client because of the client's goals reinforces the view that the choice to represent a client conveys at least modest imprimatur of the client's goals.

Personal beliefs are usually manifest in acts—what a person says; advocates for; and gives time, energy, and commitment to are all outward clues as to what he or she believes. Thus, it is understandable why the public and other lawyers often impute a client's motivations to the lawyer, despite the principle of nonaccountability.<sup>171</sup> Although the public's perception is arguably grounded in a misunderstanding of the "theatre" of lawyering, lawyers need to respond to this perception lest the public lose faith in lawyers as instruments of justice.<sup>172</sup>

Ironically, the more that lawyers develop strong personal views that indicate that they are not for hire only to the highest bidder, the more others will draw an inference of a shared personal belief between the lawyer and his or her client, and the more the public will view with skepticism the claim of nonaccountability.

Because the public already associates lawyers with their clients, it is fair to ask what lawyers gain from their belief that they are not accountable. The most powerful argument is that lawyers must embrace this concept at least as to criminal-defense counsel, who represent the weakest and most unpopular members of society. Unfortunately, just the opposite of the intended result occurs. By adhering to the overly general notion of nonaccountability, lawyers sometimes fail to provide the adversarial and rule-of-law justifications that are at the heart of the criminal defense counsel's role. This failure results, in particular, from those who assert nonaccountability for areas of practice, such as corporate-transactional work, for which the justifications for nonaccountability are weakest.<sup>173</sup> If, instead, lawyers defended their actions before the public based on either systemic justifications or the content of their

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171. See, e.g., MARK J. GREEN, *THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS* 27 (1975). Green provides an example of this perception, noting attorney Dean Acheson's advocacy of South African and Rhodesian regimes:

[Covington and Burling] did represent South Africa, but not Rhodesia. Although such exploitation of public stature for private clients is disappointing, it is unlikely that a mere client could persuade someone as strong-minded as Acheson to publicly defend reactionary regimes. No, Dean Acheson deserved to be taken at his word, for he believed in the regimes he defended.

*Id.*; see also Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 388 (1987) (comparing the lawyer's role to that of an actor and stating that "the lawyer's job requires that he totally conceal his performance").

172. See Post, *supra* note 171, at 388–89. The public reaction to the lawyers' representation of unpopular clients and causes is similar to the problem that actors face when they have played "the bad guy" and find themselves stopped on the street by fans and scolded for their behavior. Lawyers, however, have more difficulty distinguishing themselves because they do not have the clear delineation between their personal and professional (their "role") behavior as do actors.

173. See *supra* Part II.

work, the public might become better educated and gain a deeper appreciation for the legal system and the value that lawyers add to society.

Ultimately, whether the legal profession accepts the principle of nonaccountability, there may be little or no difference in how lawyers choose to accept clients. As this Article has emphasized, there is a distinction between accepting the moral consequences of one's actions and altering one's behavior to avoid them. It is likely that even if there were widespread disapproval of nonaccountability in the legal profession, most attorneys would still accept the same clients as long as those clients were able to pay. Without nonaccountability, individual attorneys could be challenged based on the consequences of their work, and those attorneys would have to respond with a more thoughtful answer than a global claim that they are never accountable for their actions taken on behalf of their clients.

#### IV. CONCLUSION

Despite the pervasive notion that lawyers are never accountable for the goals of their clients, the inexorable conclusion is that the public and many lawyers believe lawyers are accountable, at least sometimes. Scholarly literature presents an increasingly common refrain: "[l]awyers must assume personal moral responsibility for the consequences of their professional actions."<sup>174</sup> It is fair for both the public and the legal community to ask individual lawyers why they chose to represent certain clients, and how the work on behalf of those clients helps the common good.<sup>175</sup>

With each client a lawyer represents, the lawyer must determine whether the justification for nonaccountability applies to his or her client's representation and must be able to respond with a forceful argument for the representation when questioned. In particular, if lawyers operate in the zone of free enterprise where nonaccountability does not apply, they need to be ready to defend their choice of representation with reference to its social value and not simply to the justice system in which lawyers practice. It is likely that most corporate lawyers can readily respond to challenges or, at the very least, make note that their work has not had a noticeable negative social impact. Occasionally, lawyers may not be able to respond to challenges to their roles as attorneys

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174. Rhode, *supra* note 65, at 643; see also Murray L. Schwartz, Symposium, *The Law Firm as a Social Institution: Ethical Perspectives on Legal Practice: Comment*, 37 STAN. L. REV. 653, 656-57 (1985) (reviewing Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 389 (1985)) (discussing Rhode's assertions).

175. This Article is certainly not alone in coming to this conclusion. See Hodes, *supra* note 95, at 982, 990 (stating that lawyers should have full freedom to choose clients, including on moral grounds, and those choices should be capable of public justification); Rhode, *supra* note 65, at 643 ("Lawyers must assume personal moral responsibility for the consequences of their professional actions."). This Article also recognizes that there may be a wealth of complications when a lawyer's personal attributes are used to overtly or subtly support the client's goals, such as a black lawyer representing the Ku Klux Klan or a Jewish lawyer representing Nazis. Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 7, at 1042.

because they see only a small part of the larger goal. And, sometimes, just sometimes, the lawyer may look at the client's goal and recognize that he or she cannot justify representing that client.

