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Articles

Legal Ethics from the Lawyer's Point of View

Daniel Markovits*

Lawyers, I suppose, were children once.
— Charles Lamb

INTRODUCTION

(THE FORM OF THE ARGUMENT)

These pages present a philosophical argument about legal ethics. Although this general approach to legal ethics is a common one, the specific form of the argument that follows is unusual and warrants some

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comment. In particular, the argument does not attempt (at least not as its primary goal) to say whether the present regime of legal ethics—the law governing lawyers as it stands—is justified or wrongheaded, nor does it attempt to say what ethical principles should ideally govern the professional conduct of lawyers. Instead, the argument takes the present regime (or some recognizable variation of this regime) as given and employs philosophical analysis to explain the moral condition of lawyers who practice under this regime. My aim is to develop an account of what it is like—of what it is like not psychologically but *ethically*—to practice law under the present regime, with a special emphasis on the moral tensions that practicing lawyers face. In this sense, my argument proceeds not from the point of view of the philosopher (or policy-maker) who stands outside the system of legal ethics as it is, but instead develops the point of view of the lawyer practicing within this system. Hence my title.

In taking this approach, I am seeking to interpret the law rather than, as yet, to change it. This is nowadays itself something of an unusual ambition. Ever since the realist revolution exploded the formalist myth that legal rules are connected to one another by logic and are independent of the rest of the normative universe, the focus of legal scholarship—and especially of interdisciplinary legal scholarship—has been on asking what values outside of the law a legal regime should serve and what system of legal rules might serve these values best. I have no desire to revive the formalist conception of law as hermetically sealed off from morals or politics, and there is anyway no less plausible site for such an ambition than the law governing lawyers, which is obviously rent through with extra-legal moral and political ideals. But I do believe that even though the law is ultimately beholden to extra-legal values, legal regimes can construct edifices of doctrinal, and indeed human, relationships that cast long shadows in the light of these extra-legal values. Life in these shadows is, then, neither purely legal nor purely independent of the law but instead consists of the patterns that extra-legal values take on when they are, to change metaphors, refracted through the prism of the law.

The distinctive forms of life and action that arise in this context—the values and ideals that are immanent in the law—will be understudied by a scholarly method that stands outside the law and proceeds with the principal purpose of shaping the law to promote one or another set of extra-legal ends. So it is, I believe, with much contemporary scholarship in legal ethics, which moves too quickly to ask what system of ethical rules should govern lawyers and thereby passes over the important question what it is like—what it is like ethically—to be a lawyer practicing under the system of ethical rules that we now have.

An effort at answering this question will, I think, readily justify itself. There is a widely remarked upon crisis in the modern legal profession, but

the character of the crisis and indeed its very existence are hotly debated.¹ If my philosophical analysis of the lawyer's point of view is right, then the lawyer's ethical position is deeply troubled and is growing ever more intractable as time passes and the legal profession evolves. Accordingly, the commonly observed crisis in the legal profession is *justified*. (Whether or not this is why the crisis is *felt*, or indeed how widely the crisis is felt at all, I am in no position to say.) Finally, the crisis in the legal profession is in this case also profound, which is to say that it reflects, and indeed is intricately involved in, other crises of moral justification that are present in the modern world.

Part of my aim, then, is to recast familiar arguments in legal ethics in unfamiliar ways in order to reveal both the depth of the lawyer's ethical crisis and the connections between this crisis and other problems of contemporary ethics.² In particular, I shall show that the principal argument of contemporary legal ethics, the adversary system excuse in its several variations, is inadequate to the moral problems that face practicing lawyers—inadequate in the strict sense that some of the most important and pressing of these problems survive even the correctness of the adversary system excuse. If I succeed in this aim, then approaching the problems of legal ethics from the lawyer's point of view will have enabled me to present these problems more clearly to the philosopher's point of view (and also to the policy-maker's) than has so far been possible. And quite apart from its intrinsic interest, this is an important first step towards the more traditional aim of solving them.

1. See, e.g., AMERICAN BAR ASS'N, YOUNG LAWYERS DIVISION SURVEY: CAREER SATISFACTION 13 (1995) (reporting that more than a quarter of young lawyers are dissatisfied with the practice of law); MARY ANN GLENDON, A NATION UNDER LAWYERS 85 (1994) (revealing that a majority of lawyers would not choose the law as a career again, and over three quarters do not want their children to become lawyers); ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 2 (1993) (arguing that the legal profession suffers "a crisis of morale"); G. Andrew et. al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 L. & PSYCHOL. REV. 113, 114 nn.6-7 (1992) (citing empirical evidence of elevated levels of depression among lawyers in Wisconsin and Florida); G. Andrew et. al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233, 240-41 (1990) (reporting that lawyers in Washington and Arizona displayed statistically significantly higher levels of depression than the general population, specifically 20% as compared to 3-9%); William W. Eaton et. al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1081 (1990) (reporting that lawyers experience decidedly higher rates of depression than the 3-5% found among the general population); Chris Klein, *Big Firm Partners: Profession Sinking*, NAT'L L.J., May 26, 1997 at A1 (noting that over 80% of surveyed partners at large law firms believe that the profession has changed for the worse); Deborah Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 284 (1998) ("Discontent with legal practice is increasingly pervasive . . .").

But see John Heinz et. al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 735 & n.3 (1999) (reporting that 84% of Chicago lawyers surveyed were either satisfied or very satisfied with their jobs, characterizing the research presented in support of discontent among lawyers as mostly "dreadful," and attributing assertions of an ongoing crisis in the legal profession to the phenomenon that "[every] generation of lawyers appears to think that the golden era of the bar occurred just before they entered it").

2. The richness and vividness of the lawyer's ethical position will also enable me to illuminate these more general ethical problems in a new way.

ONE

THE WELLSPRINGS OF LEGAL ETHICS
(TWO CHARGES OF IMMORALITY)

Lawyers in an adversary legal system inhabit an extraordinarily subtle and complex ethical position. They represent particular clients rather than justice writ large, and they represent these clients by means of “zealous advocacy,” that is, with “warm zeal.”³ Unlike legislators, adversary lawyers are not charged fairly to balance the interests and claims of all persons. Instead, they care disproportionately and at times almost exclusively about their clients’ interests. And unlike juries and judges, adversary lawyers are not charged to discern a true account of the facts of a case and to apply the law dispassionately to these facts. Instead, they try aggressively to manipulate both the facts and the law into a shape that benefits their clients. In each of these ways, adversary lawyers commonly do, and indeed are often required to do, things in their professional capacities, which, if done by ordinary people in ordinary circumstances, would be straightforwardly immoral. Criticizing, or justifying, or even just explaining this phenomenon is the central preoccupation of academic work on legal ethics.⁴

3. CANONS OF PROFESSIONAL RESPONSIBILITY Canon 15 (1908) (requiring a lawyer to represent a client with “warm zeal”); MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1969) (requiring a lawyer to “represent a client zealously within the bounds of law”); MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (1983) (requiring a lawyer to “act with zeal in advocacy upon the client’s behalf”).

This characterization focuses on lawyers acting as litigators, that is, prosecuting or defending lawsuits. Lawyers who act as negotiators or as legal compliance advisers will generally be less one-sided or aggressive than the characterization implies (although even here lawyers will be influenced by what they think they can achieve by resorting to litigation or the threat of litigation).

One should not therefore overstate lawyers’ one-sidedness or zeal. Indeed, even litigators remain officers of the court, subject to certain limitations on zealous advocacy (limitations that could undoubtedly be made more substantial than they are at present without abandoning the core of the lawyer’s adversary position). But the ethical attacks on lawyers I consider in the main text remain robust even on the most cautious account of these matters. Even the most mildly adversary lawyer remains a fundamentally different figure from the judge. And that difference, it will become clear, is enough to get my argument off the ground.

4. See, e.g., DAVID LUBAN, *THE ETHICS OF LAWYERS*, at xiii (1994) (“The problematic aspect of lawyers’ ethics . . . consists in duties (such as demolishing the truthful witness) that contradict . . . everyday morality.”); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1060 (1976) (“The lawyer is conventionally seen as a professional devoted to his client’s interests and as authorized, if not in fact required, to do some things (though not anything) for that client which he would not do for himself.”); Bruce Green, *The Role of Personal Values in Professional Decisionmaking*, 11 *GEO. J. LEGAL ETHICS* 19, 22 (1997) (“the moral inquiry into lawyers’ ethics traditionally has focused on how the professional norms [of legal practice] relate to—and, particularly, conflict with—moral principles that are common (very widely shared), universal (binding upon every person and every community), and fundamental (of utmost importance and addressing basic questions).”) (footnotes omitted); David Luban, *Introduction to THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 1 (David Luban ed., 1983) (“The authors [in this collection] address the fundamental problems of legal ethics: does the professional role of lawyers impose duties that are different from, or even in conflict with, common morality?”); Gerald Postema, *Moral*

In spite of this preoccupation, however, legal ethicists have not always been as clear as they might be about the precise nature of their ethical concern about lawyers' professional conduct, the precise sense in which this conduct would ordinarily (that is, but for the lawyers' special professional circumstances) be immoral. My own effort to make sense of the lawyer's ethical position will begin by focusing more closely on this question—by presenting a somewhat more precise characterization than usual of the features of lawyers' professional activities that render their conduct ethically troubling. This effort reveals that the charge that adversary lawyers commit ordinarily immoral acts should in fact be separated into two distinct charges. The relationship between these two charges and the effects of their distinctness on the power and relevance of several of the best-known and most important arguments in contemporary legal ethics will form the centerpiece of my investigation. It will turn out that, at least when approached from the lawyer's own point of view, legal ethics is substantially more difficult (and perhaps bleaker) than has heretofore been supposed. I will elaborate upon and defend these claims in the sections to come. In the remainder of this section, I separate out the two charges of immorality that lawyers face.

First, lawyers are partial; they prefer their clients' interests over the interests of others in ways that would ordinarily be immoral. The most famous statement of this preference, and also one of the most extreme, was of course made by Lord Brougham, who said that a lawyer “. . . by the sacred duty which he owes his client, knows, in the discharge of that office but one person in the world—THAT CLIENT AND NONE OTHER . . .” and added that a lawyer must continue pressing his client's interests “by all expedient means” and “reckless of the consequences,” and even though (as in the case of Lord Brougham's own defense of Queen Caroline's divorce case) he should “involve his country in confusion for his client's protection.”⁵ Perhaps few today (or few among Lord Brougham's contemporaries⁶) would accept so extreme a view, but the

Responsibility in Professional Ethics, 55 N.Y.U. L. REV. 63 (1980) (“Yet, lawyers also claim special warrant for engaging in some activities which, were they performed by others, would be likely to draw moral censure.”) [hereinafter Postema, *Moral Responsibility in Professional Ethics*]; Gerald Postema, *Self-Image, Integrity, and Professional Responsibility*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS*, *supra* at 286, 287-88 [hereinafter Postema, *Self-Image, Integrity, and Professional Responsibility*] (“Sometimes with discomfort, sometimes with pride, lawyers acknowledge that the legal profession permits or requires actions that would draw moral censure if performed by others.”); Bernard Williams, *Professional Morality and Its Dispositions*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS*, *supra*, at 259, 259 (“[I]t is the possibility of a divergence between professional morality and ‘ordinary’ or ‘everyday’ morality that lends particular interest to the notion of a professional morality.”).

5. 1 SPEECHES OF HENRY LORD BROUGHAM 105 (1838), quoted in LORD MACMILLAN, *LAW AND OTHER THINGS* 195 (1937). MacMillan, it should be noted, did not himself approve of this extreme position.

6. Brougham's statement probably did not represent the mainstream view among his English contemporaries, and it is not clear that even Lord Brougham himself believed what he said: he later characterized his statement, made in the course of an extraordinary trial, as “anything rather than a

essential idea—that the lawyer should be partial—remains firmly entrenched in our legal practice. At the very least, lawyers must, as Charles Fried has pointed out, dedicate greater energies to promoting their clients' interests than is consistent with the efficient, let alone fair, distribution of their professional talents.⁷ Furthermore, and much more immediately, lawyers are called on to engage their talents in support of outcomes their clients favor even when these outcomes are themselves unfair⁸—they must provide legal services and offer legal arguments in support of clients who are morally in the wrong. A tort lawyer, for example, might help a client avoid liability by pleading a technical defense involving a statute of limitations even though she knows the client committed the tort in question and has a *moral* duty to compensate the victim. Similarly, a contract lawyer might help his client escape liability by arguing that the parol evidence rule supports enforcing the terms of a writing even though he knows that the parties orally agreed to different terms, terms his client has a *moral* duty to honor.⁹

A lawyer must raise these and other legally available arguments on behalf of his morally undeserving clients. As one court has observed, a lawyer has a duty to “set[] forth all arguable issues, and the further duty not to argue the case against his client.”¹⁰ Certainly a lawyer may not

deliberate and well-considered opinion.” See WILLIAM FORSYTH, *HORTENSIVS: AN HISTORICAL ESSAY ON THE OFFICE AND DUTIES OF AN ADVOCATE* 389 n. (2d. ed. 1875); see also DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE CRIMINAL TRIAL, 1800-1865*, at 139 (1998).

In the United States, David Hoffman and George Sharswood, the two most prominent legal ethicists of the nineteenth century, both accepted what today seem surprisingly strong limits on the lawyer's partisan commitment to his clients' interests. Hoffman thought that the lawyer should “ever claim the privilege of solely judging” whether and how far to pursue his clients' cases, and that he should not pursue cases if he concluded that the client ought to lose. DAVID HOFFMAN, *2 A COURSE OF LEGAL STUDY* Resolution xiv, at 755 (2d ed. 1836). Indeed, Hoffman even thought it was wrong for a lawyer to offer purely technical defenses, for example involving statutes of limitations, against honest claims. *Id.* Resolution xiii at 754-55. Sharswood may have held similar views, for example that a lawyer “should throw up his brief sooner than do what revolts against his own sense of honor and propriety,” although in this case the interpretive question is more complicated. GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS*, 74-75 (5th ed. 1907). Sharswood, after all, originated the language of “Entire devotion of the interests of the client [and] warm zeal in the maintenance and defense of his rights . . .” that survives in the codes of ethics even today. *Id.* at 78-80.

7. Fried, *supra* note 4, at 1061-62.

8. Lawyers act unfairly in another way also. Lawyers commonly choose clients based not on the righteousness of their claims or on their need for legal services but rather based on their ability to pay fees. Thus lawyers don't just act unfairly to benefit the clients they have, they also choose clients in an unfair fashion (that is, in a fashion that creates an unfair distribution of legal services). I do not include this feature of legal practice in my main argument because lawyers' roles cannot plausibly be said to obligate them to distribute their services on the basis of people's ability to pay their fees. In civil cases, at least, probably no one has a right to a lawyer, and certainly no one has a right to whatever lawyer he can afford. Lawyers act immorally in choosing their clients, but they do so because of their greed and not because of their roles. Accordingly, this immorality is not distinctive to lawyers (doctors behave in similar ways) and is less interesting from the point of view of legal ethics, even if it is no less important in practice.

9. Charles Fried has thus observed, “[w]ould it not be intolerable if it were known that lawyers would not plead the defense of the Statute of Frauds or of the statute of limitations.” Fried, *supra* note 4, at 1085.

10. *People v. Lang*, 11 Cal. 3d 134, 139 (Cal. 1974).

undermine a client's case on the ground simply that his own beliefs—and especially his moral beliefs—instruct him that his client should lose.¹¹ Thus it is hornbook law that under the ABA Model Rules of Professional Conduct, “[a] lawyer may not sabotage a client’s lawful case because . . . the lawyer considers the cause repugnant.”¹² Indeed, the principle that a lawyer may not damage a client’s case on the ground that his conscience dictates that the client should lose is so deeply ingrained in lawyers’ professional consciousness that it is rarely tested in practice or remarked upon by courts or disciplinary tribunals. Nevertheless, in every case that I have found that has addressed the question head-on, the principle has been affirmed, either by reference to the law governing lawyers or on the basis of the procedural values immanent in the adversary system itself.¹³ One court, for example, held that a lawyer violated the principle of zealous advocacy when he wrote to his client threatening to seek contempt sanctions against her unless she made a payment ordered by a divorce decree.¹⁴ Another observed that “an attorney who adopts and acts upon a belief that his client should be convicted fails to function in any meaningful sense as the Government’s adversary.”¹⁵ And perhaps most strikingly, a third court concluded that “[t]he failure to argue the case before the jury, while ordinarily only a trial tactic not subject to review, manifestly enters the field of incompetency when the reason assigned is the attorney’s conscience.”¹⁶ In other words, it is so profoundly improper for a lawyer to compromise a client’s case because his moral conscience recommends it that this motive *in itself* renders otherwise unobjectionable conduct impermissible.¹⁷

11. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A) (1969) (a lawyer “shall not intentionally fail to seek the lawful objectives of the client”).

12. GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 6.2 at 6-5 (3d ed. 2001). Hazard and Hodes add, as an example of this principle, that where a client seeks to interpose a statute of limitations defense against a morally valid debt, “a lawyer who remains on the case may not refuse to assert the defense on the ground of his own conscience.” *Id.*

13. These are, of course, distinct sources of lawyers’ professional obligations, and the differences between them will sometimes be important. In the present context, however, the two sources converge upon the adversary ideal developed in the main text.

14. *State v. Leon*, 621 P. 2d 1016 (Kan. 1981) (applying DR 7-101 of the ABA Model Code of Professional Responsibility).

15. *Frazier v. United States*, 18 F.3d 778, 782 (9th Cir. 1994). See also *McCartney v. United States*, 343 F.2d 471, 472 (9th Cir. 1965) (“Counsel apparently misconceived his role. It was his duty to honorably present his client’s contentions in the light most favorable to his client. Instead, he presumed to advise the court as to the validity and sufficiency of prisoner’s motion, by letter. We therefore conclude that the prisoner had not effective assistance of counsel. . . .”).

16. *Johns v. Smyth*, 176 F. Supp. 949, 953 (E.D. Va. 1959).

17. Even if a lawyer may not sabotage a client’s case on grounds of her own conscience, it is of course a separate question whether she may refer to her conscience as a ground for withdrawing from the case altogether or refusing to accept the representation to begin with. Even here, however, the lawyer’s right to refer to her conscience is limited.

As regards withdrawal, the lawyer is limited by the requirement that the withdrawal may not unduly prejudice the client. See MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (1983) (suggesting that a lawyer may not ordinarily withdraw from representing a client unless the “withdrawal can be accomplished without material adverse effect on the interests of the client”); see also Postema, *Moral*

Finally, this feature of lawyer's professional conduct would survive even if the adversariness of legal practice were reduced far below current levels, for example to disapprove of pleadings of purely technical defenses—involving, say, statutes of limitations—that are today encouraged or required. Any account of legal ethics that is connected to a recognizably adversary conception of legal process will acknowledge that lawyers must prefer their clients over others in a manner that would ordinarily be immoral—that whereas impartiality requires a person to hear all sides, adversary lawyers represent one side. Thus, the principle that a lawyer may not sabotage a client's case on account of his own belief as to its merits (which amounts to the idea that a lawyer may not sit in judgment over his client) lies at the very core of adversary procedure in *any* form, as a practical expression of the structural separation between lawyers on the one hand and judges and juries on the other.¹⁸ And although the precise

Responsibility in Professional Ethics, *supra* note 4, at 84-85 (commenting that under the Model Code of Professional Responsibility “[o]nce a lawyer has undertaken to represent a client, however, permissive withdrawal is allowed only in a few restricted circumstances, none of which includes the conscience of the lawyer”) (citations to Model Code of Professional Responsibility DR 2-110 omitted).

And even as regards declining to commence a representation, where the potential client has not in any way relied on the lawyer and the lawyer's possibility for referring to her conscience should be greatest, this possibility is subject to substantial limits, both practical and legal. As a practical matter, the division of labor between judge and lawyer that the adversary system insists upon entails (as a matter of logic) that half of all legal representations proceed on behalf of clients who ought to lose. And as long as there exists any measure of agreement among lawyers as to the merits of the cases they argue, the adversary system is not practically sustainable unless many lawyers advocate on behalf of clients that they believe should lose.

Finally, on top of this practical necessity, there even exist legal limits on a lawyer's right to defer to her conscience in choosing her clients. Thus it is common for courts to conclude, for example, that “[t]he belief of a defense lawyer that his client is guilty is insufficient to excuse him from a court appointment in a criminal proceeding.” *Jones v. State*, 1987 OK CR 103 (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 2-29 (1969)); *see generally Anders v. California*, 386 U.S. 738 (1967). And the ABA Model Rules of Professional Conduct, in Rule 6.2, place quite general limits on a lawyer's right to avoid court-appointed representation on the grounds of her conscience. Although the Model Rule states that a lawyer may decline a court-appointed representation where “the client or the cause is so repugnant to the lawyer as to be likely to impair client-lawyer relationship or the lawyer's ability to represent the client,” Model Rule 6.2(c), the annotations to the Model Rules construe this right narrowly. Thus this right may not be exercised based on “such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of a civil case.” ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 6.2 annot. Indeed, Hazard and Hodes conclude that Model Rule 6.2(c) does not raise a lawyer's conscience as an ultimate justification for declining an appointed representation at all, but instead treats the lawyer's conscience as important only insofar as it has instrumental consequences for clients. Thus, Hazard and Hodes say, Model Rule 6.2(c) “applies only when . . . repugnance is of such an intensity that the quality of the representation is threatened.” HAZARD & HODES, *supra* note 12, at 840.

18. The centrality to our current legal practice of the principle that a lawyer must not sit in judgment over her client's case does not, of course, entail that this principle has no critics. William Simon, for example, has proposed an alternative view of legal ethics which he calls the “Contextual View,” whose “basic maxim is that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.” WILLIAM SIMON, *THE PRACTICE OF JUSTICE* 9 (1998). The depth of Simon's objection to the present-day practice of legal ethics, and also of his rejection of the idea that a lawyer ought not to sit in judgment over her client's case, is made apparent by his further suggestion that a lawyer—already seeking to promote justice—should “decide questions of justice . . . [by] think[ing] about them as she would if she were a judge.” *Id.* at

limits of the partiality required by the lawyer's adversary role may be open to question, and will surely vary as the details of adversary procedure receive one or another development, "the partisanship principle remains" as Geoffrey Hazard says, "at the core of the profession's soul."¹⁹ Of course, if an ordinary person, abiding by an analogous principle and disregarding her conscience, helped others to achieve ends she believed to be wrong—for example, helped people who have culpably harmed others evade liability or helped people who have made promises break their word—such open partiality would be clearly and straightforwardly immoral.

The second charge of immorality leveled at lawyers accuses them not of generic unfairness but rather of particular vices with familiar names. (This charge focuses less on whose or what interests lawyers promote and more on what lawyers *do* for clients, whoever they are and whatever positions they take.) Thus lawyers, in the course of practicing their profession, attempt to convince others of characterizations of the facts and the law that they themselves believe to be false. They engage in sharp practices—papering cases, filing implausible claims and counterclaims, and delaying or extending discovery—in order to force advantageous settlements. And they badger and callously attack truthful but vulnerable opposition witnesses in order to discredit them. Furthermore, in many cases lawyers are permitted and indeed even required to act in these ways. Although lawyers may not aid in their clients' perjury by eliciting testimony they know to be straightforwardly false,²⁰ and although lawyers

139. Although Simon goes on to say that "[t]he Contextual View incorporates much of the traditional lawyer role, including the notion that lawyers can serve justice through zealous pursuit of clients' goals," *id.*, at 11, and adds that "thinking like a judge does not necessarily mean reaching the same decisions that one would make as a judge," *id.* at 139, it is unclear how far these remarks go towards reconstructing a distinctive, and distinctively adversary, social function for lawyers. Simon certainly accepts that differences in institutional competence may sometimes lead the conclusions of judges and lawyers to diverge. But the general tenor of Simon's views is to treat these differences in institutional competence, and the adversary lawyering that they justify, as shallow and contingent features of our legal practice rather than as reflecting any deeper, intrinsic values.

In keeping with my methodological commitment to interpret rather than to assess the present practice of legal ethics, I shall not take up the merits of Simon's interesting suggestion in any general way. I should say, however, that although I am sympathetic to the suggestion that there is (much) too much adversariness in the practice of lawyering as it stands, I do believe that some adversariness has intrinsic value and I am skeptical of efforts to confine adversariness to such levels as can be defended, insecurely, by purely institutional argument. For a highly tentative account of these views, see *infra* notes 156-163 and accompanying text.

19. Geoffrey Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1245 (1991). Even the staunchest critics of the partisanship principle accept that it accurately captures the actual practice of lawyering and the law governing lawyers. William Simon, for example, calls the ideas built up around this principle, according to which "the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim," the "Dominant View" of legal ethics. SIMON, *supra* note 18, at 7. Simon adds that "[t]he Dominant View is assumed in the most important provisions of each of the two ethical codes promulgated by the American Bar Association—the *Model Code of Professional Conduct* (*sic*) of 1969 and its successor, the *Model Rules of Professional Conduct* of 1983." *Id.* at 8.

20. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (1983) ("A lawyer shall not knowingly offer evidence the lawyer knows to be false.").

may not simply misreport precedent,²¹ they are required by their duty of zealous advocacy to present colorable versions of the facts that they do not themselves believe and to make colorable legal arguments that they reject. They are “required to be disingenuous,” that is, “to make statements as well as arguments which [they do] not believe in.”²² Similarly, although lawyers may not file frivolous lawsuits or obstruct discovery,²³ they are allowed, and might in some circumstances even be required, to pursue claims for their clients which, while facially valid, are in fact pressed to gain a strategic advantage or even to distract or delay the course of a lawsuit.²⁴ And finally, even though the rules of ethics limit the extent to which lawyers may directly attack opposition witnesses,²⁵ they are required to confuse these witnesses in order to undermine even testimony they believe to be truthful—certainly they may not refuse to cross-examine a vulnerable witness solely as a matter of conscience, on the ground that they believe the witness is telling the truth.²⁶ Clients may require their lawyers to behave in these ways in the course of providing legal representation,²⁷ and in many circumstances (as when doing so is prejudicial to a client’s case) lawyers may not avoid these requirements by refusing to continue to represent the client at all.²⁸ In short, the duties

21. See MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (1983) (“A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client. . .”).

22. Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951).

23. See MODEL RULES OF PROF’L CONDUCT R. 3.1 (1983) (declaring that a lawyer may not press frivolous claims); see also FED. R. CIV. P. 11(b)(1) (requiring that those who present a submission to a court certify that “it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation”).

24. See MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 1 (1983) (declaring that while the advocate may not abuse procedure, she also “has a duty to use legal procedure to the fullest benefit of the client’s cause”).

25. See MODEL RULES OF PROF’L CONDUCT R. 4.4 (1983) (“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”).

26. As Justice White has observed, if a defense counsel “can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure, or indecisive, that will be his normal course.” *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., dissenting in part and concurring in part). See also ABA DEFENSE FUNCTION STANDARDS 4-7.6(b) [3d. ed. 1993] (“Defense counsel’s belief or knowledge that the witness is telling the truth does not preclude cross-examination.”). But note the exceptional rule that a criminal prosecutor may not use cross-examination to discredit or undermine a witness whom the prosecutor knows to be telling the truth. See AMERICAN BAR ASS’N, *The Prosecution Function*, STANDARDS FOR CRIMINAL JUSTICE 3-5.7(b) (3d. ed. 1993).

27. See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2 (1983), which leaves clients in control of the aims of a legal representation and lawyers in control of the litigation strategy to be used in pursuing these aims. This difference between ends and means is, of course, notoriously imprecise. But if it means anything, it means that lawyers may not allow their views of whether or not an outcome is morally right to determine the means they will deploy in seeking that outcome. Thus, although a lawyer may perhaps refuse to engage in sharp practices on the grounds that he believes that such practices will be ineffective, he may not refuse on the grounds that the success of these practices would make the case morally not worth winning.

28. See MODEL RULES OF PROF’L CONDUCT R. 1.16(b) (1983) (suggesting that a lawyer may not ordinarily withdraw from representing a client unless the “withdrawal can be accomplished without material adverse effect on the interests of the client”).

attached to their professional roles require lawyers to lie, to cheat, and to abuse.²⁹ All these things lawyers must do are, of course, ordinarily immoral.

A question now arises whose answer will form the foundation of the argument to come, namely what does the second charge add to the first—what do accusations that lawyers commit particular, lawyerly vices add to the accusation that lawyers unjustifiably prefer their clients over others? One answer is that these particular charges add nothing to the general charge that lawyers are unjustifiably partial, or at least that they add nothing substantial. According to this view, which I shall call the dependence thesis, the lawyerly vices are simply further elaborations or further specifications of the general charge of partiality. Lawyers prefer their clients' interests over the interests of others in ways that are unfair. How so? They will injure others by lying, cheating, and abusing if this best serves their clients' interests. These are vices, to be sure. But they are wrong only as species of unjustified partiality. They carry no independent moral weight because they involve no additional moral ideals.

I shall argue that the dependence thesis is wrong—that when lawyers are accused of lying, cheating, or abusing these accusations carry moral weight that does not depend on, and cannot be explained by, the idea that lawyers unjustifiably prefer their clients' interests over the interests of others. Furthermore, this feature of legal ethics—that the vices lawyers are accused of exhibiting cannot be reduced to forms of impermissible partiality—is not merely a surface phenomenon, and no archaeology of these vices (no matter how thorough or how deep) will ever reveal them to be merely special cases or forms of partiality. The reason for this, I shall argue, is that the two charges leveled at lawyers in the end play themselves out on two distinct moral registers, tuned to two distinct moral points of view. Accusations of viciousness are independent of the accusation of

29. These are tendentious descriptions of what lawyers do, and they are meant to be. But tendentious or not, they are commonly leveled at lawyers. *See, e.g.*, ARTHUR APPLBAUM, ETHICS FOR ADVERSARIES 175 (1999) ("Part of what adversaries in public and professional life do for a living is violate persons by deceiving and coercing them.") [hereinafter APPLBAUM, ETHICS FOR ADVERSARIES]; Arthur Applbaum, *Are Lawyers Liars?*, 4 LEGAL THEORY 63, 63 (1998) ("Lawyers might accurately be described as serial liars, because they repeatedly try to induce others to believe in the truth of propositions or in the validity of arguments that they believe to be false."); JEREMY BENTHAM, *Constitutional Code*, in 9 WORKS OF JEREMY BENTHAM 77-78 (John Bowring ed., 1843) ("Every criminal uses the weapons he is most practiced in the use of; the bull uses his horns, the tiger his claws, the rattle-snake his fangs, the technical lawyer his lies. Unlicensed thieves use pick-lock keys; licensed thieves use fictions."); Curtis, *supra* note 22, at 9 (1951) ("A lawyer is required to be disingenuous. He is required to make statements as well as argument which he does not believe in."); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998) (citing as the premises of commonplace lawyer jokes that "lawyers are hard to understand; they charge too much; they are miserable people; they lie all the time; and they should die.") (quoting David L. Yas, *First Thing We Do is Kill All the Lawyer Jokes*, MASS. LAW. WKLY, Oct. 20, 1997, at 11). Lawyers must therefore defend against such criticisms, and the defenses lawyers offer are my topic.

partiality because the two points of view these accusations address are themselves independent of each other.

The charge that lawyers are impermissibly partial appeals to what I shall call *third-personal* moral ideals, according to which morality is about a person's duty to others, always construed in light of the fact that everyone's life is as important and valuable as everyone else's, including, for that matter, her own. To answer this charge, lawyers must demonstrate that their preference for their clients' interests in fact respects or promotes everyone's interests (even those whose interests they appear to disprefer) by being a part of the proper protection of everyone's legal rights. The charges involving lawyerly vices, by contrast, all play in a very different, *first-personal* moral register, according to which morality aims to direct a person's efforts at formulating and then living up to appropriate ideals and ambitions for herself, at constructing a life that is a success from the inside and that she can (and should want to) endorse as her own, a life that displays a kind of authenticity or narrative integrity in her own mind. To answer these charges, lawyers must recast their professional activities so as to show that, rather than involving vices of the sort ordinary good people seek to disavow and avoid, these activities instead involve virtues that belong to a form of life that a person might reasonably aspire to make her own.

I shall aim to develop the distinction between third- and first-personal morality generally and to map the charges of partiality and viciousness that lawyers face onto this distinction. If I succeed, then I will have established that the dependence thesis is false and, consequently, that the positions of lawyers with respect to the two charges of immorality that they face can come apart. This will entail, most critically, that the charges involving lawyerly vices can survive a successful defense against the charge of partiality. Even if lawyers, arguing in the third-person, can persuade others (including the direct victims of their actions) that it is impartially justified for lawyers to adopt adversary practices, they will still need to construct a first-personal account of these practices that casts them as part of a life they can endorse, generating a self-understanding they can live with. Third-personal moral arguments that, instead of *rejecting* that lawyers lie, cheat, and abuse, merely seek impartially to justify that lawyers specialize in these vices, signally fail at this task. Most critically, the familiar third-personal argument (of which more later) that the lawyer's vicious role in the division of labor is impartially justified as a necessary (or even beneficial) evil is entirely unsatisfactory from the point of view of the lawyer, who does not want to think of herself as evil *at all*. If the dependence thesis is false, then the ethics of lawyers must pay separate attention to the first-personal problem of the lawyerly vices. This is, of course, precisely the kind of attention that my methodological

ambition—to understand what it is like ethically to practice law within the adversary system—recommends.

In the next two sections, I develop the distinction between third- and first-personal ethical thought that I have introduced here. Then, in section four, I take up the traditional academic presentation of third-personal legal ethics. I do so with an eye not to assessing the traditional argument on its own terms, but rather to revealing its narrowly third-personal focus, identifying the important first-personal questions that this argument leaves unaddressed, and explaining the cost that this failure to consider problems of first-personal morality imposes on practicing lawyers. In particular, I argue that even if the traditional defense of lawyers' professional conduct is right in all its particulars, the ethical condition of adversary lawyers remains enormously troubled.

Next, in section five, I develop an interpretation of certain ethical arguments involving the ethics of role that casts these arguments not (as the academic tradition would have it) as efforts to avoid the demands of third-personal moral justification, but rather as efforts to respond to the demands of first-personal moral justification that this argument has ignored. Thereafter, in section six, I consider whether these arguments, whatever their internal merits, are culturally and historically available to contemporary lawyers. I suggest that whatever might have been true in the past, first-personal arguments involving the ethics of role face significant and perhaps insurmountable hurdles *today*. (In this way, my argument may be understood as a sustained effort to illuminate Lamb's remark, which serves as my epigraph.) Then, in section seven, I consider the consequences of this fact for the contemporary legal profession, hoping to suggest a connection between my moral argument's emphasis on first-personal ethical thought and the first-personal lived experience of actual lawyers. Finally, I present two conclusions that emphasize, respectively, the philosophical optimism and cultural and historical pessimism of my argument.

TWO

TWO ETHICAL POINTS OF VIEW (THE IDEA OF INTEGRITY)

Although my main focus is on legal ethics, my argument will depend on and develop certain ideas about ethics that have a more general application and whose origins lie in the broader traditions of moral philosophy. Accordingly, I devote this section of my argument to introducing a set of quite general philosophical ideas about ethics. More specifically, I shall investigate and develop certain philosophical ideas about the independent, and possibly divergent, demands of third-personal and first-personal

ethical justification. This divergence, applied to legal ethics, reveals the falsehood of the dependence thesis and introduces into legal ethics the pathologies that are responsible, I shall argue, for the extraordinary complexity and intractability of the modern lawyer's ethical position.

The dominant theme in modern ethical thought is the idea of what I shall call third-personal impartial moral justification. This idea begins from the proposition that everyone's life is as important as everyone else's and, in particular, that each person is equally the source of independent, authoritative moral claims on all others. Accordingly, modern moral thought insists that an agent must justify her actions in terms that take into account—and indeed give equal consideration to—all persons whom they affect. Someone who does not grant equal concern and respect to all whom her actions affect denies those whom she fails to consider their equal status as sources of authoritative moral claims, and to this extent she acts immorally.³⁰

Modern moral philosophy has focused on this dominant theme, but ethics itself continues to contain a second set of ideas about ethical justification, ideas that the theme of third-personal impartial justification has not, in spite of its dominance, quite obscured or erased. These ideas approach ethical justification in what I shall call the first-person, from the

30. Both the utilitarian and the Kantian moral traditions make this focus on third-personal impartial justification central to their philosophical ambitions.

Utilitarianism's express focus on maximizing total utility is built upon an ideal of impartiality, namely that each person's utility should count equally, as under Bentham's famous dictum "everybody to count for one, nobody for more than one." See JOHN STUART MILL, UTILITARIANISM 60 (George Sher ed., 1979). (The citation to Mill here reflects something of a curiosity. Although the quoted words are attributed to Bentham by Mill, I know of no place at which Bentham actually committed his dictum to print, and Mill provides no citation. Bentham would, of course, have approved of the dictum, and he did say, in a passage that Mill's immediately prior remarks suggest Mill had in mind when making the reference to Bentham, that "[t]he happiness and unhappiness of any one member of the community—high or low, rich or poor—what greater or less part is it of the universal happiness and unhappiness, than that of any other?" JEREMY BENTHAM, *Plan of Parliamentary Reform in the Form of a Catechism, with Reasons for Each Article: With an Introduction Showing the Necessity of Radical, and the Inadequacy of Moderate, Reform*, in 3 THE WORKS OF JEREMY BENTHAM, *supra* note 29, at 433, 459.)

In the Kantian tradition, this emphasis on impartiality may be seen beginning in Kant's own work, especially in the formulation of the Categorical Imperative that commands one always to treat all others as ends in themselves and never merely as means. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 95-96 (The Formula of the End in Itself) (HJ Paton trans., 1958) (1785). It may be seen equally clearly in the efforts of modern Kantians, beginning with John Rawls, to develop Kantian moral ideas through the several mechanisms of social contract theory—mechanisms expressly designed to construct moral principles that would be generally acceptable to equally situated people. See, e.g., BRUCE ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE (1980); JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, A THEORY OF JUSTICE]; T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998) [hereinafter SCANLON, WHAT WE OWE TO EACH OTHER]; T.M. Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND (Amartya Sen & Bernard Williams eds., 1982) [hereinafter Scanlon, *Contractualism and Utilitarianism*]. The dispute between utilitarians and Kantians is properly understood as being not about the importance of impartiality to moral thought but rather about which conception of impartiality is the correct one. I will have more to say about this dispute later in this section. For an extended treatment of the idea that modern moral and political philosophy quite generally is best understood as a debate among competing conceptions of equality and impartiality, see WILL KYMLICA, CONTEMPORARY POLITICAL PHILOSOPHY (1990).

agent's own point of view. They involve the thought that ethically justified acts are those that promote the actor's success writ large (as opposed to his narrow self-interest)—his success at living according to his own suitable life plan and at achieving his own admirable ends.³¹

This theme recalls the venerable Aristotelian tradition that constructed an entire ethical theory around the idea that virtue promotes the general well-being or flourishing (*eudaimonea*) of the virtuous.³² This idea—that a person's ethics and her first-personal success are intertwined and that ethics is about forming and satisfying appropriate ambitions and desires, so that a person does well by doing good—has been thought natural (even self-evident) in many periods of human history; and the modern idea that a person's ethical duties are measured in the third-personal currency of self-sacrifice may even, viewed historically, be the more unusual position. Indeed, although this claim is not necessary for my larger argument, the modern association between ethics and self-sacrifice may find its historical origins in certain forms of perversity—including most notably in early Christian asceticism (most extremely, in the asceticism of St.

31. In speaking, as I am doing, of first-personal *ethical* justification, I shall be using language in a somewhat (although not entirely) unconventional way. The most common usage, in the philosophical tradition that I am considering, is not to limit the enquiry to *ethical* justifications but instead to consider the broader class of all *practical* reasons—that is, reasons about what to do. (Practical reason is distinguished, in the philosophical tradition, from theoretical reason—reason about what to believe.) Under the common usage, the class of practical reasons is then divided into third-personal (or “agent-neutral”) reasons and first-personal (or “agent-relative”) reasons, with the paradigmatic case of the former being moral reasons involving impartiality and the paradigmatic case of the latter being prudential reasons involving self-interest.

This broader approach has the advantage over mine of making it possible to consider how other-regarding reasons and self-regarding reasons—for example reasons of impartiality and self-interest—should be balanced against each other in reaching all-things-considered decisions about what to do. But the paradigmatic association between first-personal reasons and self-interest makes it easy to forget that first-personal reasons—reasons based not on the impartial value of others but rather on the reasoning agents' own distinctive ambitions and plans—can also be other-regarding and in this sense ethical. And, relatedly, the paradigmatic association between first-personal reasons and self-interest makes it difficult to credit that first-personal reasons may sometimes outweigh conflicting third-personal reasons in all-things-considered practical judgments.

My slightly unusual usage is designed to counteract both of these tendencies, and my substantive argument will expressly reject the two conclusions that they encourage. Thus, the problem of legal ethics that I am concerned to understand involves precisely the form of conflict between third-personal and first-personal *ethical* reasons that the conventional usage obscures. And my argument concerning this problem will insist on precisely the possibility that first-personal reasons can outweigh third-personal reasons that the conventional usage renders implausible.

32. See ARISTOTLE, *THE NICHOMACHEAN ETHICS*, bk. I chs. 4-12 (W.D. Ross, trans.), in *THE BASIC WORKS OF ARISTOTLE* (Richard McKeon ed., 1941). Plato, incidentally, also believed the just man to be happier than the unjust one. Specifically, Plato argued that “[t]he just soul and the just man then will live well and the unjust ill” and that “he who lives well is blessed and happy, and he who does not the contrary.” PLATO, *THE REPUBLIC* 353e-354a (Paul Shorey trans., 1930) in *THE COLLECTED DIALOGUES OF PLATO* (Edith Hamilton & Huntington Cairns eds., 1961). Plato's position, however, is in fact the polar opposite of Aristotle's. Thus, Aristotle took well-being to be the fundamental idea and derived an ethical theory from the conditions for promoting well-being. Plato, by contrast, took ethical obligation to be the fundamental idea and sought to explain why a person who violates the principles of ethics will always and inevitably suffer diminished well-being. (This is the source of Plato's well-known concern to show that even a person possessing the power to violate ethical principles with impunity—even, to use Plato's own example, the wearer of the Ring of Gyges—will be happiest if he nevertheless resists temptation and acts justly. See *id.* at 359c ff.).

Benedict and St. Simon the Stylite, but also, and more moderately, in the thought of St. Augustine), which sought to soften the pains of worldly impotence by teaching that self-sacrifice in this world clears the path to heaven in the next.³³

Furthermore, even though the modern view of ethics in many respects represents a substantial advance over earlier conceptions, most notably in its outward-looking recognition that a large part of ethics involves respecting other people (equally) as self-originating sources of independent moral claims,³⁴ it also introduces certain still unresolved pathologies into both ethical theory and ethical life, one of which is my subject. On the one hand, modern ideas of equality and impartiality rightly emphasize the third-personal aspect of moral argument—the idea that each person must justify her actions to others in light of the fact that her own life is no more important than theirs. On the other hand, this emphasis leads modern ethical thought to underplay certain first-personal elements of morality that remain important. In particular, modern ethical thought underplays the idea that even with equality and impartiality in place, each person continues to need to identify specifically with his own actions, to see them as contributing to his peculiar ethical ambitions in light of the fact that he occupies a special position of intimacy and concern—of *authorship*—with respect to his own actions and life plan.

Modern ethical thought has, in this way, opened up a gap between the demands of third- and first-personal moral justification. Nor has modernity been blind to this gap and to the distinctive form of subjugation involved in understanding morality solely in terms of sacrificing oneself to satisfy burdensome duties owed others or to the distinctive form of alienation involved in identifying guilt as the principal moral motive.³⁵ The

33. This view of Christianity owes much to Isaiah Berlin. See ISAIAH BERLIN, *Two Concepts of Liberty* § III *The Retreat to the Inner Citadel*, in *FOUR ESSAYS ON LIBERTY* (1969). Of course, the reference to Christianity in this context proceeds only by way of presenting a historically familiar example. There is no reason to think that the form of perverse asceticism that I am discussing is peculiarly Christian, and certainly none to think that Christianity possesses a monopoly on this form of self-abnegation. One can see, for example, a non-Christian version of such asceticism in Arthur Koestler's old communist Rubashov and his view that "honor is to be useful without fuss." See ARTHUR KOESTLER, *DARKNESS AT NOON* (1941).

Finally, as Pascal's wager makes plain, it is a dubious proposition whether asceticism adopted with this motive involves any genuine self-sacrifice at all. Indeed, even an ascetic who did not take heaven seriously might (as Berlin observed) adopt asceticism as simply a self-interested effort to limit her desires in the face of the prospect that whatever desires she has will be frustrated.

34. This idea receives its most insistent expression in the formulation of Kant's Categorical Imperative under which one should treat all rational beings never as merely means for arbitrary use by one's own will, but always as ends in themselves. See KANT, *supra* note 30, at 63-67. Not at all coincidentally, Kant also gave the wedge morality has driven between ethical life and happiness one of its most telling expressions, saying that morality is not about becoming happy but only about deserving to be happy.

35. Some third-personal impartial moral theories have tried to steal this theme's thunder by suggesting that a proper understanding of the issue reveals that only third-person impartially justified actions ever promote true well-being and success. Indeed, on certain interpretations at least, Kant himself adopts this mode of argument, when he claims that only third-person impartially justified

awareness of these difficulties is perhaps most dramatically articulated in existentialist calls for making authenticity the prime virtue of action. But the same concerns receive more cautious and also more precise attention elsewhere, from certain analytic philosophers who are sympathetic to the content of the existentialist point even if they are perhaps made uncomfortable by existentialism's methods.

Modern ethical thought has opened up a gap between the demands of third- and first-personal moral justification, and the modern lawyer has fallen in. Even if the modern lawyer can justify her morally troubling actions to third parties in impartial terms, she cannot cast them as components of a life she can happily endorse and therefore cannot construct an acceptable self-image as their author; even where the modern lawyer can justify her morally troubling actions, the justification she offers leaves her alienated from her own moral life. She suffers, as Hegel might say, the diremption of modernity. My ultimate aim is to develop this diagnosis of the modern adversary lawyer's ethical condition. To do this, I shall have to say more about the general philosophical problems involved in the split between third- and first-personal morality and the modern dominance of the third-personal. Because my aim is principally to diagnose rather than to cure the modern lawyer's ethical malady, clarity and precision matter more to me than dramatic intensity. I shall therefore focus on and develop the analytic account of the underlying philosophical problem.

The originator of the movement of thought I shall expand upon is Bernard Williams, and I begin from the same thought experiment from which he began.³⁶ Imagine that Jim is confronted by a dictator who has captured twenty political prisoners and offers Jim the following choice: either Jim must kill one of the prisoners or the dictator will kill all twenty. What should Jim do?

Now Jim is certainly in a difficult position, which, were it real, would cry out for an effort of practical and moral creativity directed at finding a way to avoid both horns of the dilemma at once. This obvious observation makes it somewhat silly to use thought experiments like the one at hand to say what a real Jim should, all-things-considered, do: a real Jim should undoubtedly consider many alternatives that the stylized rigidity of the thought experiment disallows. Instead, I shall employ the thought experiment for a more limited purpose, namely to elaborate one set of considerations that Jim should not ignore in deciding what ultimately to

actions can ever be free. See KANT, *supra* note 30 (especially ch. 3, *Passage from a Metaphysic of Morals to a Critique of Pure Practical Reason*.) I shall make no effort to present a scholarly analysis of these views here. However, I do believe, as I argue at greater length later in this section, that even these sophisticated accounts of third-personal impartial morality cannot overcome the subjugation and alienation identified in the main text.

36. See Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 98 ff. (1973) [hereinafter Williams, *A Critique of Utilitarianism*].

do, considerations that involve the independent demands of first-personal ethical justification and suggest that Jim should refuse to kill the one.

Jim, we may suppose, accepts the moral principle that one should not kill innocents. Indeed, this is probably something of an understatement—the idea that one should not kill innocents is likely foundational, or at least comes very early, among Jim’s ethical ideals. But he notes that he is presently faced with a case in which his violating this principle himself, by killing one innocent, will minimize the total number of innocents killed, by causing the dictator to refrain from killing not only that innocent but also nineteen others. Moreover, Jim’s refusing to kill the one is better for nobody, so that there is likely no third person who has any grounds for objecting to Jim’s killing. Even the one Jim kills will be killed in any case, and (barring special circumstances, such as being Jim’s lover) she has no grounds for specially objecting to being killed *by Jim*. We might even imagine that the innocents ask Jim to join them in adopting a (fair) procedure for choosing which innocent he will kill and that the chosen innocent accepts being killed by Jim’s hand. Jim’s (admittedly artificial) situation has been constructed so that it appears, on almost any accounting, to be impartially preferred for him to kill the one. Accordingly, third-personal impartial morality appears to recommend that Jim kill.

Nevertheless, Jim may have a good first-personal ethical reason for refusing to kill the one. The root of this reason is that if Jim refuses to kill, then, as Williams has observed, the result will not be simply that twenty innocents are dead or even that Jim has caused twenty innocents to die, but rather that the dictator (and not Jim) has killed twenty innocents.³⁷ This much, Williams points out, is made plain by the observation that if the dictator responds to Jim’s refusal to kill by telling Jim, “You leave me no alternative but to kill twenty,” then he is, straightforwardly, lying.³⁸ If Jim declines the dictator’s offer and refuses to kill, then he is, in some measure at least, enforcing the distinction between his agency and the dictator’s and insisting upon the moral significance of this distinction, in particular with respect to the intimacy of each of their connections to whatever killings are committed. But if Jim accepts the dictator’s offer and kills the one, then he allows himself to become a partner in the dictator’s active malevolence. If Jim kills, then he must abandon his own benevolent projects, which include (indeed begin from) the project to avoid killing innocents. Instead, Jim must allow his projects to be determined by the dictator’s evil ends. This means, to paraphrase remarks made by Thomas Nagel in a closely related context, that Jim must come himself to aim at part of the dictator’s evil—the death of the one—and must make this evil

37. *Id.* at 108.

38. *Id.* at 109.

into his own end, so that if his chosen method of killing the one fails, for example, Jim must adjust his actions to eliminate or correct the failure and accomplish the killing. If Jim accepts the dictator's offer, then he must "push[] directly and essentially against the intrinsic normative force" of his ordinary ends.³⁹

Now because of the numbers involved in this case, Jim may reasonably decide that he should in the end kill the one. He may conclude that when nineteen additional killings (or twenty times as many killings) are at stake, it is self-indulgent to refuse to kill; he may conclude that the badness of becoming the dictator's malevolent instrument is simply outweighed by the nineteen lives that his doing so will save. But even if it is right, when the numbers are large enough, for Jim to think in this way, the numbers may not always be large enough, and the moral relevance of his having killed the one will certainly not be *erased* by these ideas and will continue to be felt by Jim. Once again, nothing in Jim's situation forces *him* to kill; if Jim refuses, then the dictator, acting alone, will be the only one who kills. But if he accepts the dictator's offer, Jim must recognize that the dictator's malevolence has induced him to violate the principle—which he had adopted as his own—that one should not kill innocents and to join in the dictator's project and to make a killing his own. Indeed, it would be grotesque for Jim to ignore this fact, to deny that he has cooperated with the dictator or killed at all, and instead to congratulate himself on cooperating with the innocents or on saving nineteen lives. Jim *will* help the innocents and save lives by accepting the dictator's offer, but that's not *all* he'll do.⁴⁰

Williams uses Jim's case to emphasize and develop broader ideas about the moral importance of the special relation, which I am calling the relation of authorship, that a person has to his own actions, a relation the person does not have to other people's actions, not even to those that he could have prevented. Someone who denies the moral importance of authorship and insists that there is never a morally relevant distinction between doing something himself and failing to prevent someone else from doing the same thing—a person who thinks it straightforward that

39. THOMAS NAGEL, *THE VIEW FROM NOWHERE* 182 (1986). Nagel adds that this will produce "an acute sense of moral dislocation." *Id.*

40. Changing the terms of the example slightly makes this side of the question stronger still. Imagine that the dictator tells Jim that to save the remaining prisoners, he must kill not one but ten (or even nineteen), and that he must kill using some involved method, say a slow and deliberate torture, whose execution will command Jim's protracted effort and attention and further distract him from his own benevolent ideals and ends. (In order to continue comparing likes, we may suppose that the dictator will employ the same method on all twenty prisoners in case Jim refuses.) Although it remains impartially best for Jim to accept the dictator's offer even in these modified circumstances, the first-personal arguments for Jim's refusing the dictator's offer become even stronger. Indeed, looking ahead somewhat, one might say that if it is self-indulgent for Jim to refuse to kill, his accepting the dictator's offer involves self-indulgence of another kind—the self-indulgence of believing he can so signally betray his own ideals and yet somehow remain true to them.

Jim should kill the one—places his own decisions at the mercy of other people’s projects and thereby attacks his own moral personality. Such a person sees himself as merely a cog in a causal machine or, using Williams’s metaphor, as nothing more than a “channel between the input of everyone’s projects, including his own, and an output of optimistic decision.”⁴¹ But it is not clear how someone who understands himself in this way retains a well-defined moral self—a sense of his own distinctive moral agency—to understand. Such a person rejects the idea that certain actions are peculiarly his, that he is their author and that these actions should bear an especially close relationship to his own ideals and ambitions. Indeed, such a person’s projects are so completely determined by other people’s ideals—he adopts new interim projects so capriciously—that he cannot recognize which projects and ideals are, finally and properly, his own. He measures his moral ideals and agency as the weather measures the wind and suffers, as Williams says, “in the most literal sense, an attack on his integrity.”⁴² But this is precisely the approach to Jim’s dilemma that third-personal impartial morality—with its recommendation that Jim should accept the dictator’s offer and kill—requires. Accordingly, concerns involving authorship and integrity underwrite the independence of first-personal morality—they give Jim a reason to pursue his first-personal aim of not killing innocents even when this is not third-person impartially best.

Williams introduced the Jim example and developed the arguments that I have just rehearsed as part of an extended polemic against utilitarianism, and this historical connection has claimed a great deal of attention among moral philosophers. It has caused some philosophers to wonder whether the argument concerning integrity displays the limitations of third-personal morality in itself and the need for an independent first-personal morality or instead makes only a narrower point concerning the limitations of the particular utilitarian account of third-personal morality that Williams was, as a historical matter, addressing. According to this narrower reading, Williams’ argument demonstrates the need to replace

41. Williams, *A Critique of Utilitarianism*, *supra* note 36, at 116.

42. *Id.* at 117. Notice that this argument does not involve the suggestion that killing the one is in itself unpleasant for Jim and that this unpleasantness is more than morality can require Jim to bear. Both elements of this suggestion are perfectly sensible: Jim’s killing may do him considerable psychic harm (for example by leaving him haunted by images of a gun in his hand and a bullet striking home); and the prospect of this harm may justify, or at least excuse, Jim’s refusing to kill the one (just as, if the dictator had presented Jim with a threat rather than an offer, the prospect of physical harm might have justified or excused Jim’s decision to kill). But even though this suggestion is sensible, it plays no part in the argument of the main text, whose theme is not that Jim cannot be required to sacrifice his *interests* to the common good but rather that Jim cannot be required to sacrifice his *ideals* to the common good. This difference, which is extremely important, is reflected in the thought that where the argument identified in this footnote focuses on the distinctness of persons as *patients*—on the idea that people have a special relationship to their own well-being—the argument developed in the main text focuses on the distinctness of persons as *agents*—on the idea that people have a special relationship to their own actions and to the ideals that guide them. I shall return to this idea at the end of this section.

the utilitarian conception of the third person with another. Once this correction has been made, the narrower reading proposes, the purported independence of the first-personal will be exposed as an illusion cast by an inadequate theory of third-personal ethics. Because my own arguments concerning peculiarly legal ethics will turn on the independence of the first-personal, I shall take up and reject this narrower reading of Williams' argument before proceeding. I shall claim that although the utilitarian account of third-personal morality presents a particularly stark threat to integrity, alternative reconstructions of third-personal morality threaten integrity as well and do not, therefore, eliminate the need for independent, first-personal moral ideals.

The narrower reading of the problem of integrity is, to be sure, invited not just by the historical context in which Williams developed the problem, but also by the language Williams employed in presenting his argument, which itself reflects the particular, utilitarian version of third-personal impartial morality at which Williams was, as a historical matter, taking aim. Williams took utilitarianism to represent, and indeed in all relevant respects to embody, consequentialism—a broader class of conceptions of third-personal impartial morality. Consequentialism constructs third-personal impartial morality through a teleological theory of value, according to which, as T.M. Scanlon has said, “[t]he primary bearers of value are states of affairs, or, over time, ways the world might go.”⁴³ With this theory of value in place, consequentialism adds a theory of right action—of what persons ought morally to do—according to which “an action is morally right just in case its performance leads to the best state of affairs,” i.e. the state of affairs that contains the most value.⁴⁴ *Very* roughly, utilitarianism adds to the formal structure of consequentialism the substantive propositions that the property in virtue of which states of affairs have value is the amount of well-being that they contain, that every individual's well-being counts equally, and that the amount of well-being a state of affairs contains is an additive function of the well-being of the several individuals in that state of affairs. According to the utilitarian version of consequentialism, therefore, each person ought always to adopt the course of action, of those available to him, that contributes the most well-being to the world.⁴⁵ These features of utilitarianism led Williams to

43. SCANLON, WHAT WE OWE TO EACH OTHER, *supra* note 30, at 79.

44. *Id.* at 81.

45. This account of utilitarianism borrows heavily from Scanlon's *What We Owe to Each Other*. *Id.* at 80. In presenting this highly schematic account, I am abstracting from a host of familiar questions about, as David Lyons says, the forms and limits of utilitarianism. See generally DAVID LYONS, THE FORMS AND LIMITS OF UTILITARIANISM (1978). Thus, I do not address the question whether well-being should be understood reductively as simply the difference of pleasure over pain or whether well-being is a variegated phenomenon, with qualitative components, as in John Stuart Mill's famous discussion of higher and lower pleasures. See JOHN SMART MILL, UTILITARIANISM 10 (George Sher ed., 1979) (1861). Similarly, I do not consider whether the well-being contained in a state of affairs—the feature of the state of affairs utilitarianism calls on people to maximize—is the sum or the

speak, in discussing the threat to integrity that third-personal impartial morality poses, in terms of maximizing and causal metaphors. Williams described losing integrity in the language of inputs and outputs of optimific decision because such language figures so prominently in specifically utilitarian moral reasoning.

Moreover, the connection between the narrowly utilitarian account of third-personal morality and the problem of integrity is no mere historical or linguistic accident. Utilitarianism (which, following Williams, I am taking, metonymically, to represent consequentialist morality quite generally) does indeed present a peculiarly immediate and crass threat to the integrity of persons who follow its commands. Utilitarian third-personal morality instructs Jim to decide whether or not to kill the one on the basis of an utterly mechanical reasoning process: Jim must recognize, first, that killings are *ceteris paribus* bad (because of the loss of well-being that they involve) and that more killings are *ceteris paribus* worse than fewer killings. Second, Jim must conclude that impartial morality requires him, *ceteris paribus*, to adopt the course of action, of those available to him, that minimizes the number of killings the world contains. Third, Jim must recognize that causes and effects have arranged themselves in such a way that it is up to him whether the world contains twenty additional killings or only one. And fourth, Jim must act to secure a world in which there is only one additional killing. In all of this reasoning, the fact that the act through which Jim ensures that there is only one killing rather than twenty is to *promote that killing and indeed to commit that killing himself* appears only as an afterthought, if it appears at all. This highlights the inadequacies of the utilitarian version of third-personal impartial morality: It entails, as Christine Korsgaard has said, that “[u]tilitarians are committed to the view that it is *obvious* that Jim should kill,” whereas in fact “few people can imagine themselves in Jim’s position without some sense of dilemma.”⁴⁶ It also entails that the structure of his moral thinking requires the utilitarian to come close to adopting the view of Jim’s circumstance that I earlier characterized as grotesque, namely that, having killed the one, Jim might congratulate himself on saving nineteen lives.

The peculiar features of the utilitarian account of third-personal impartial morality therefore make it a particularly easy target for Williams’ arguments about integrity and thereby make utilitarianism a poster-child for the arguments about the independence of the first-person

average of the well-beings of the individuals that make up the state of affairs. See generally RAWLS, A THEORY OF JUSTICE, *supra* note 30, at 161-92; Gregory S. Kavka, *Rawls on Average and Total Utility*, 27 PHIL. STUD. 237 (1975). And finally, I do not take up the question whether utilitarianism calls on persons, in discharging their duty to promote well-being, to choose optimal individual actions or optimal general rules for action. See generally SMART & WILLIAMS, *supra* note 36; Robert Adams, *Motive Utilitarianism*, 73 J. PHIL. 467 (1976).

46. CHRISTINE KORSGAARD, *The Reasons We Can Share: An Attack on the Distinction between Agent-Relative and Agent-Neutral Values*, in CREATING THE KINGDOM OF ENDS 275, 292 (1996).

that it is my ultimate aim to vindicate. Certainly there is a connection between utilitarianism's cumulative conception of value and maximizing conception of right action on the one hand and, on the other, utilitarianism's peculiarly wooden insistence that once Jim can save nineteen by killing one, he has no remaining moral obligation to the one whom is called upon to kill. Utilitarianism denies that there is a separate moral cost or wrong in killing the one, a moral remainder, precisely because utilitarianism recognizes no value in that one person's well-being, or indeed in any person's well-being, apart from his marginal contribution to total well-being. Indeed, once the causal levers that exist in the world arrange themselves, as they have in Jim's case, so that an increase in one person's well-being becomes necessarily connected to a decrease in total well-being, then this person becomes, for the utilitarian, a bad rather than a good. Utilitarianism therefore does not just require Jim to violate his first-personal ideals, it also casts his violations of these ideals in an insistently and unforgivingly impersonal—and hence integrity-destroying—light. And it is precisely this obtuse approach to Jim's dilemma that makes the mechanistic metaphors through which Williams accuses utilitarian third-personal impartial morality particularly apt and the threat to Jim's integrity that those metaphors expose particularly vivid.

These observations suggest that utilitarianism's failure to accommodate integrity may be too spectacular to support my broader claim about third-personal morality's general inadequacy in this connection: They call into question utilitarianism's standing as a representative third-personal moral theory. Indeed, the observations reveal that the utilitarian approach to Jim's dilemma, whatever its implications for his integrity, also commits an error of purely third-personal morality—that it also mischaracterizes the duties of impartiality that Jim owes the innocents. In particular, utilitarianism fails to recognize that, as a matter of third-personal impartial morality, all persons have separate and individual moral value and underwrite separate and individual moral claims on others quite apart from any contributions they make to total value. As John Rawls has said in a related context, “[u]tilitarianism does not take seriously the distinction between persons.”⁴⁷ Furthermore, the utilitarian threat to Jim's integrity

47. RAWLS, A THEORY OF JUSTICE, *supra* note 30, at 27. As Rawls says, on the utilitarian view “separate individuals are thought of as so many different lines along which rights and duties are to be assigned and scarce means of satisfaction allocated in accordance with rules so as to give the greatest fulfillment of wants.” *Id.*

Rawls made these remarks as part of an argument criticizing utilitarianism for failing to recognize the demands of distributive justice—for being concerned exclusively with total well-being at the expense of every consideration about how that total is distributed (including especially whether the distribution is equal or unequal). And indeed, this particular failure of utilitarianism arises most starkly in cases such as the ones Rawls envisions, in which utilitarianism too readily sacrifices some for the greater good of others—in which the course of action utilitarianism prefers creates losers as well as winners. The distributive element is of course missing from Jim's circumstance, which has been constructed so that the one Jim is asked to kill would be killed in any case, and the sense of *sacrificing*

may perhaps be traced back to these purely third-personal errors: The inadequacy of the utilitarian analysis of Jim's case—the utilitarian failure to recognize the case's great complexity—may perhaps be explained in terms of the utilitarian failure to credit that Jim must justify any decision to kill in terms that fully respect the independent moral claims of the one he kills. And finally, this effort to pinpoint the source of the inadequacy of the utilitarian approach to Jim's case at a particular place within the peculiar utilitarian construction of third-personal morality deflates the motivation behind my claims for the independence of first-personal morality. Perhaps third-personal impartial morality, properly reconstructed to reflect the distinction between persons, can indeed explain the full complexity of Jim's case, so that the move to the independent first person becomes unnecessary and unmotivated.

The most prominent effort to develop an alternative account of third-personal impartial morality capable of capturing the full range of moral considerations that arise out of Jim's circumstance—including especially the independent moral claims against Jim that arise in the person Jim would kill—seeks to cure the mistake in the utilitarian account of Jim's position by abandoning the teleological theory of value upon which the utilitarian view of right action is founded. That theory of value, it is alleged, lies at the root of both the sense that utilitarianism leaves no room for the independent moral claims of the one and, relatedly, the compelled character of the utilitarian argument in Jim's case and the argument's consequent failure to capture Jim's dilemma. For it is the fact that value is supposed to inhere, fundamentally, in states of affairs that makes it so difficult, as Scanlon observes, for the utilitarian to contemplate how there can "be a reason not to bring something about which is not grounded in the badness of its happening, and hence equally a reason to prevent it from being brought about by some other agent or by the forces of nature."⁴⁸ Accordingly, the utilitarian will find it difficult to imagine, to paraphrase Nagel, that there could possibly be a reason not to kill someone (not to produce a state of affairs) which is not equally a reason to prevent that person from being killed (to prevent that same state of affairs from being produced) by someone else.⁴⁹ And it is this difficulty that leads the utilitarian to ignore the moral differences between Jim's killing and the

the one for the good of the others therefore does not arise. But in spite of this difference, the form of the utilitarian mistake—the failure to consider persons as individual, independent sources of moral claims—remains the same in both cases. This is not, of course, to suggest that the introduction of a distributive component to Jim's problem—say, by changing the terms of the dictator's offer so that the one Jim is asked to kill will be allowed to live if Jim refuses—is irrelevant to Jim's dilemma. Quite to the contrary, the absence or presence of this distributive component may, for non-utilitarians, determine what third personal impartial morality counsels Jim to do.

48. SCANLON, WHAT WE OWE TO EACH OTHER, *supra* note 30, at 82.

49. See NAGEL, *supra* note 39, at 178.

dictator's and to conclude (contrary to all common sense) that Jim must *of course* kill the one.

Observations like these appear prominently in Scanlon's ideas and also in Korsgaard's, both of whom unequivocally reject the teleological idea that value inheres exclusively or primarily in states of affairs and emphatically insist instead that moral value inheres, fundamentally, in relations among persons. On these views, "[t]he subject matter of morality is not what we should bring about, but how we should relate to one another."⁵⁰ Similarly, these views insist that the content of morality is not that we should maximize well-being (or some other teleological value), but rather that we should treat others always as ends and never as mere means. This requires that we treat them only in ways to which they can consent,⁵¹ or expressed a little differently, that we act only in ways that are justifiable to each person whom our actions affect (and on grounds that no person could reasonably reject).⁵² Once this true structure of third-personal impartial morality has been put in place, the argument goes, Jim's circumstances and the complex ethical intuitions they generate can be completely explained from within third-personal impartial morality, without resorting to any independent ideas involving the first person.

Korsgaard pursues this non-consequentialist line of third-personal impartial moral argument—which, engaging in another metonymy, I shall call the Kantian account—most vigorously, and she does so with the express purpose of defeating the idea that the Jim example requires philosophy to contemplate first-personal, or, as she calls them, agent-relative moral values.⁵³ She begins by observing, as I have done, the tinniness of the utilitarian failure to see a dilemma in Jim's position and

50. KORSGAARD, *supra* note 46, at 275.

51. Here Korsgaard cites, unsurprisingly, to Kant's *Groundwork*. *Id.* at 295 (citing IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 430 (Lewis White Beck trans., 1969)).

52. SCANLON, WHAT WE OWE TO EACH OTHER, *supra* note 30, at 153; Scanlon, *Contractualism and Utilitarianism*, *supra* note 30.

53. This purpose is declared in the title Korsgaard gives to her argument: "The reasons we can share: an attack on the distinction between agent-relative and agent-neutral values." See KORSGAARD, *supra* note 46, at 275. The most immediate subject of Korsgaard's attention is an earlier attempt by Nagel to come to grips with the ethical ideas involved in Jim's problem, see NAGEL, *supra* note 39, at 175 ff., and Korsgaard devotes substantial textual attention to Nagel's arguments. But in spite of styling her argument "an attack," Korsgaard's stance towards Nagel's presentation of the problem is substantially friendly. In particular, both Nagel and Korsgaard find the core of Jim's dilemma in the requirement that Jim must justify any killing he commits to his victim in a way in which he need not justify the dictator's killings to anyone. Korsgaard's disagreement with Nagel is not about this characterization of the problem but rather about the problem's solution, when it is characterized in this way. Nagel doubted whether Jim could provide the required justification; Korsgaard, as will become clear in a moment, believes that he can.

The argument in the main text will demonstrate that Korsgaard's approach to Jim's dilemma does not dissolve the problem of integrity. This argument applies to Nagel's approach to the dilemma also, and I mention Nagel here only to emphasize this fact, especially in light of Nagel's remarks, reported earlier, concerning the problem of Jim's potential moral dislocation. See *supra* text accompanying note 39. In spite of making these remarks, the bulk of Nagel's analysis of the ethical problem raised by circumstances like Jim's does not in the end focus on the problem of integrity at all.

the sense that even though Jim is in a position to save nineteen lives, he is not being offered “a happy opportunity for doing some good.”⁵⁴ Instead, Jim is being asked to stand, *vis a vis* his innocent potential victim, in the relation of deliberate, intentional killer. The fact that Jim’s killing the one will also save the other nineteen does not undo or eliminate third-personal impartial morality’s concern with this relationship. Nor does it change third-personal morality’s insistence that this relationship be justified *to that one*. The Kantian insistence that Jim must treat each person (one-at-a-time) with respect and as an end rather than a means comprehends that Jim’s obligations to the one whom he might kill are not simply extinguished by the fact that this killing will save nineteen lives. It therefore recognizes that Jim retains a special obligation to justify his killing (but not the dictator’s killings) to this victim. And for Korsgaard this generates the dilemma in Jim’s position that the utilitarian improperly ignores.

Given the connection that she has earlier drawn between treating people as ends and treating them only in ways to which they can consent, it is not surprising that Korsgaard concludes that in reasoning his way out of the dilemma, Jim must attend to what the innocents themselves, and especially his potential victim, want him to do. Specifically, Korsgaard asks us to imagine that one of the innocents “steps forward and says, ‘Please go ahead, shoot *me*, and I forgive you in advance.’”⁵⁵ Adding this feature to the example,⁵⁶ Korsgaard concludes, makes a substantial difference to the third-personal impartial moral case for Jim’s killing the one, because it includes that innocent in Jim’s deliberations and addresses his individual point of view in a way in which no utilitarian counting of total lives saved could ever hope to do. “*Very* roughly speaking,” suggests Korsgaard, “[Jim is] not treating him as a mere means if he consents to what [Jim is] doing.”⁵⁷ Finally, Korsgaard contrasts this case with one in which no volunteer comes forward and asks to be killed and, quite to the contrary, the innocents are pacifists who unanimously express to Jim that they would rather die than ask him to commit an act of violence. On these facts, says Korsgaard, the case for Jim’s killing the one becomes much harder to make out: Rather than addressing the innocents’ point of view, the decision to kill now ignores their point of view and therefore suffers “a slight taint of paternalism.”⁵⁸

54. KORSGAARD, *supra* note 46, at 292.

55. *Id.* at 296 (emphasis in original).

56. This feature was, as Korsgaard acknowledges, present in Williams’s statement of the original example. See *id.* at 292; Williams, *A Critique of Utilitarianism*, *supra* note 36. The consent of the victim, however, did not figure prominently in Williams’ discussion.

57. KORSGAARD, *supra* note 46, at 296.

58. *Id.*

The suggestion that the expressed consent of one of the innocents allows Jim to kill that innocent without treating him as a mere means and therefore renders Jim's killing consistent with Kantian third-personal impartial morality's standard of individualized justification of course requires, as Korsgaard herself observes, "*many* qualifications."⁵⁹ Obviously, "[a]ctual consent—in the sense of saying yes—can easily be spurious."⁶⁰ And the circumstances of the case at hand—in particular the fact that if the innocent withholds his consent he will be killed by the dictator in any case—should lead Jim to take a particularly dubious view of any expressions of consent that reach his ears.

But although this concern—about the validity of the innocent's consent to being killed—is indeed troubling, it can perhaps be met by the recognition that under the (admittedly strained) circumstances the innocent's consent, in addition to being actual, is also *reasonable*. He will be killed in any case, regardless of what he says and of what Jim decides. This entails, as I observed at the beginning of the present discussion, that unless the innocent specially objects to being killed by Jim, then in consenting to being killed, the innocent makes himself no worse off and the nineteen other innocents (much) better off. This feature of the situation, the Pareto superiority of Jim's killing one innocent, makes it possible to say that even though it is not reasonable for the innocents to consent to being killed *absolutely*, it is reasonable for any one of them to consent to being killed *by Jim*. Furthermore, even where no volunteer arises and actually consents to being killed, it may be reasonable for Jim, if he can develop a fair procedure for choosing which of the twenty innocents to kill, to apply the procedure and impute consent to the innocent who is chosen. As Arthur Applbaum has argued, it is surely reasonable for someone to accept a lesser violation of his person in exchange for avoiding a greater, and from an *ex ante* perspective Jim's adoption of a fair selective procedure does just this; it imposes on each innocent a chance (most likely a one-in-twenty chance) of being killed in exchange for relieving each innocent of the certainty of being killed.⁶¹

It is, of course, not clear how far this form of argument may be extended, particularly in the face of the chosen innocent's actual refusal to be killed by Jim. The fact that it is reasonable for the innocents to accept a fair procedure for selecting one of their number to be killed by Jim does not yet demonstrate, to borrow Scanlon's language and form of thought, that it is *unreasonable* for any of the innocents to reject such an arrangement. And accordingly, Applbaum is quite properly unsure whether this form of argument may be *forced* on the innocents and,

59. *Id.* at 309 n.42 (emphasis in original).

60. *Id.*

61. This argument is developed in detail in APPLBAUM, ETHICS FOR ADVERSARIES, *supra* note 29, at 136-74.

relatedly, whether, “[i]f the loser [of a fair lottery] sees a way to escape both Jim and the [dictator],. . . he is obligated to stick around.”⁶² But no matter how these (admittedly important) boundary questions are resolved, the central point of the analysis remains clear: In some circumstance, at least, Jim’s killing the one is consistent even with the requirements of individualized justification imposed by the Kantian reconstruction of third-personal impartial morality.

The Kantian argument has therefore returned, as a practical matter, to the utilitarian conclusion, although this time by a very different route—a route that recognizes substantially greater moral complexity in Jim’s situation than utilitarianism admitted. The argument has explained the reasons for which, under certain conditions at least, Jim may kill the one without disrespecting the one, that is, without treating the one as a mere means. Through this explanation, the Kantian analysis has addressed, indeed impressively addressed, some of the concerns about Jim’s choice that the utilitarian approach ignored. These were among the concerns that generated the sense of dilemma about Jim’s choice and the related sense that the utilitarian analysis rendered the choice too *easy*. I introduced the idea that Jim’s authorship and integrity depend on his preferring his first-personal aims over the claims of third-personal morality in response to the perceived inadequacies in the utilitarian view of third-personal morality. But it now appears that Korsgaard (and like-minded others) have addressed many of these inadequacies without abandoning a purely third-personal approach. The question therefore arises whether the increased sophistication of this non-consequentialist, Kantian third-personal impartial morality renders my invocation of the distinctive morality of the first person unnecessary and, indeed, misplaced.

I believe that it does not. Even after the appropriately full complexity of Kantian third-personal moral analysis is brought to bear on Jim’s dilemma, an ineliminable and important first-personal component remains in place and remains unaddressed. To be sure, the Kantian third-personal analysis of Jim’s position represents an advance over the utilitarian analysis, specifically in that it more nearly identifies the dilemmatic aspects of Jim’s circumstance and correctly locates Jim’s dilemma in the relationship that the dictator’s offer invites Jim to enter into with the one whom he kills. But this advance does not complete the moral analysis of Jim’s case or render Jim’s authorship and integrity secure. Kantian third-personal morality recognizes impartial reasons against Jim’s killing the one that utilitarianism ignores, and it may therefore call on Jim to abandon his particular concern for his own actions and to betray his first-personal ideals less often than utilitarian third-personal morality. But in appropriate circumstances, Kantian third-personal morality will still demand this

62. *Id.* at 164.

betrayal. The Kantian innovation does not change the nature of the betrayal, and when the demand is made, the threat to Jim's integrity remains the same.

Indeed, in spite of the Kantian advance, the Kantian who ignores first-personal morality risks committing an error that is similar to the grotesque error that (I have suggested) is committed by the utilitarian who insists that Jim should kill the one and congratulate himself on saving nineteen lives. The character of this error is revealed in something Korsgaard says in the course of explaining why Jim might kill a consenting innocent without violating the Kantian principle of respecting all persons, one-by-one, as ends in themselves. After admitting that any innocent Jim kills has been wronged absolutely—or, as she puts it, in the “larger moral world”—Korsgaard says that Jim and the innocents are forced by their circumstances to regard the dictator as a mere force of nature, and that there arises, therefore, a “smaller moral world within which the issue is between [Jim and the innocents].” And when an innocent agrees to be the one Jim kills, then, says Korsgaard, “in that world this [innocent] consents.”⁶³ In adopting this “smaller world” metaphor (and particularly in applying the metaphor in connection with characterizing the dictator as a mere force of nature⁶⁴), Korsgaard treats Jim as of necessity engaged in a noble cooperative project with the innocents (and against the dictator). The purpose of this project is to respect persons given the trying circumstances that Jim and the innocents collectively face, in which the death of at least one innocent has become necessary. (This purpose is achieved by the (possibly collective) adoption of a fair procedure for selecting the innocent to be killed and the subsequent (perhaps implied) consent of the innocent who is selected.) This is, of course, the Kantian analogue to the utilitarian claim about saving lives; it is an attempt to domesticate Jim's killing and render it palatable in the first person, this time casting it not in the utilitarian calculus of beneficence but rather in the Kantian frame of respectful relations.

But even though everything that the Kantian regards as third-personally morally relevant about Jim's choice is captured by describing Jim as contemplating a cooperative venture with the innocents, the “smaller world” metaphor once again presents only a partial characterization of Jim's activities in killing.⁶⁵ If Jim kills (and even if Jim kills with his victim's consent), then he is *also* engaged in a second, debased collective project *with the dictator*. And the goal of this project is to kill an innocent, whose death is, from the point of view of this project (that is, in the larger moral world), not necessary and not consensual. Once again, if Jim adopts

63. KORSGAARD, *supra* note 46, at 296.

64. For more on this, see *infra* note 67.

65. The inadequacy of the Kantian approach to Jim's dilemma is not just the product of a careless metaphor.

this project then he will have to abandon his ambition not to kill innocents and will make the killing that the project involves into an aim of his own.⁶⁶ Jim's dilemma arises because he cannot adopt one cooperative project without implicating himself in the other, because he must choose between participating in neither project or participating in both. And just as the utilitarian's exclusive focus on the fact that Jim's accepting the dictator's offer involves saving nineteen person's lives grotesquely ignores the fact that it also involves Jim in killing one, so also the Kantian's exclusive focus on the fact that Jim's accepting the dictator's offer involves him in a noble collaboration with the innocents grotesquely ignores the fact that it also involves Jim in a debased collaboration with the dictator.

The Kantian innovation in analyzing the third-personal component of Jim's dilemma has therefore left the first-personal component of the dilemma precisely where it was. Even if, as Korsgaard suggests, the one innocent can, in light of the alternatives, reasonably consent to being killed by Jim rather than by the dictator, he obviously does not (and could not reasonably) consent to being killed absolutely. Equally obviously, it remains the case, even if the one consents and Korsgaard's analysis is right, that the one suffers a great wrong when he is killed. Furthermore, it remains the case, even if Korsgaard's analysis is right, that Jim's decision whether or not to accept the dictator's offer will determine whether it is the dictator or Jim who imposes this wrong and will therefore determine the intimacy of Jim's connection to the wrong; the question of Jim's authorship of the wrong.

The problem of Jim's integrity is not resolved by the Kantian innovation in the third-personal analysis of Jim's case. Even on the Kantian view, the all-things-considered, third personally most justified course of action—the noble collaboration with the innocents—intimately involves Jim in another course of action—the debased collaboration with the dictator—that requires Jim to abandon, and indeed to betray, ideals and ambitions that

66. The Kantian might try to argue that even if Jim accepts the dictator's offer, he will be less intimately implicated in his collaboration with the dictator than in his collaboration with the innocents and that, for this reason, the smaller world metaphor involves less of a mischaracterization than I am suggesting. Specifically, the Kantian might argue (employing a distinction that is familiar in criminal law) that although Jim, if he accepts the dictator's offer, must *intend* for the project involving the dictator to succeed, he will be *motivated* exclusively by the considerations underlying his cooperation with the innocents and will for this reason reserve for himself a protective distance from the dictator's evil ends. But while the distinction between intent and motive may be helpful in other contexts, it cannot usefully be employed here. First, Jim's ordinary first-personal ambitions, like the ordinary first-personal ambitions of most decent people, include the ambition to avoid all intentional killings of innocents (and likely, even more broadly, all negligent killings) rather than only those killings that are also ill-motivated. And second, and more importantly, the ambition to avoid only ill-motivated killings cannot properly be formulated as a first-personal ambition at all, at least not where (as in Jim's case) ill-motivated is understood merely to mean inconsistent with the demands of third-personal impartial morality. As we shall see in a moment, first-personal moral ambitions must be constructed at a greater level of particularity than a generic reference to the demands of third-personal morality supports. The move to motive cannot save Jim's integrity, because it fails to account for this feature of the first person.

are near the core of his first-personal conception of the form of life he aims to achieve. To be sure, the shape of the problem is rendered slightly different under Kantianism, and the metaphor through with the problem is developed also must change. Thus the Kantian's emphasis on individualized, intersubjective justification—in the example before us, on Jim's duty to justify himself to the one whom he kills—allows her to recognize that there can be a difference between a person's doing an act herself and failing to prevent someone else from doing the same thing.⁶⁷

67. It is worth pointing out, however, that here also the Kantian approach is less than fully satisfactory, and Korsgaard's smaller world metaphor once again reveals something of the stress lines in the Kantian scheme of argument. Thus, Korsgaard says that in the smaller world into which the dictator's threat has transported them, Jim and the innocents are "forced" to view the dictator as a force of nature. See KORSGAARD, *supra* note 46, at 296. Both parts of this remark present problems in connection with the difference between a person's doing an act herself and her failure to prevent someone else from doing the same thing.

Begin with the second part of the remark—the part about viewing the dictator as a force of nature. This characterization of the dictator is of course literally false—the dictator is not a force of nature but an agent of evil—and Korsgaard obviously intends the remark to serve as a metaphor only. But it is not clear that the metaphor is a helpful one in the present context, in particular because it obscures the difference between Jim's case, in which he is asked to participate in the dictator's evil, and a formally similar but substantively different case in which Jim is called upon to make the best of an unavoidably bad situation—for example, a case in which a hospital administrator facing a power shortage asks Jim to disconnect one life support machine in order to prevent twenty such machines (including that one) from failing for want of adequate power. This new case may (perhaps) be easier for Jim, because although Jim is once again asked to commit a killing, this killing can never be characterized as unnecessary, not even in a larger world, and Jim is not being asked to join in any debased effort. Put the other way around, Jim cannot, if he refuses to kill in the hospital case, blame nature for the twenty deaths as he can blame the dictator. These differences are obscured by Korsgaard's metaphor, but they may matter to Jim because they may affect the degree of tension between Jim's first-personal ideals and the killing he is asked to commit.

Furthermore, the first part of Korsgaard's remark—the part about Jim and the innocents being "forced" to view the dictator in a certain way—also obscures important features of Jim's position. Most critically, it obscures that Jim and the innocents stand in very different relations to the dictator, not just because Jim's life is never (under any outcome) at risk, but also because the dictator has left Jim, unlike the innocents, with a genuine choice. Korsgaard's smaller world metaphor casts Jim with the innocents as among the dictator's victims, although certainly as a victim of a lesser wrong. But the fact that the dictator has left Jim with a genuine choice (especially when joined with the fact that if Jim refuses to kill the one, then the dictator will be blamed for all twenty killings) entails that Jim, in contradistinction to the innocents, can free himself from the dictator entirely. Accordingly, Jim is not so much the victim of a lesser wrong, but rather less of a victim in any sense (at least in any ordinary sense) of the word.

Korsgaard is, of course, not insensible of these problems, and she discusses some related issues at length (and with great sophistication) in another essay. See CHRISTINE KORSGAARD, *The Right to Lie: Kant on Dealing With Evil*, in *CREATING THE KINGDOM OF ENDS*, *supra* note 46, at 133 (1996). In that essay, Korsgaard takes on Kant's own well-known suggestion that it is always wrong to use deception or coercion, even in order to combat evil, and that such methods are anyway unnecessary because the evildoer retains entire responsibility for all his actions, leaving no place for blaming the person who might have coerced the evildoer out of his actions but declined to do so. See IMMANUEL KANT, *On a Supposed Right to Lie from Altruistic Motives*, reprinted in *IMMANUEL KANT: CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY* (Lewis White Beck trans., 1949). Korsgaard argues that this position represents a misplaced rigorism and is overly legalistic, and she develops, as an alternative approach to the problem, an extensive argument that is an analogue to the smaller world and force of nature metaphors she deploys in Jim's case. The aim of these arguments is to take the evildoer outside of the primary arena of moral concern and in this way to open up, jointly, a space for the moral entitlement to use coercion and deception against evil and a space for limited moral responsibility for failing to do so.

A complete discussion of Kant's and Korsgaard's ideas on these subjects is a complicated matter best reserved for development elsewhere. I have introduced these ideas here in order to note that they

And this, relatedly, allows her to resist the unattractive, overtly mechanical characterization that Williams successfully imposed on utilitarianism, namely that it required persons to see themselves as nothing more than “channel[s] between the input of everyone’s projects, including [their] own, and an output of optimistic decision.”⁶⁸ But although, unlike the utilitarian, the Kantian can recognize that (because of the dictator’s supervening responsibility) Jim’s refusing to kill the one is not *equivalent* to murdering nineteen,⁶⁹ she cannot adequately recognize that the difference between these two—the degree of intimacy of Jim’s connection to a course of action—*may properly matter more to Jim than to third parties*. And although, unlike the utilitarian, the Kantian can (because she recognizes the separate importance of all moral creatures and relationships) avoid the mechanistic cog-like account of individual agency of which Williams accused utilitarianism, she cannot adequately recognize the degree of independence each moral agent may properly claim from all others. For both these reasons, the person whose practical reasoning follows, exclusively, the Kantian conception of third-personal impartial morality once again displays an insufficiently secure relationship to his own moral ideals and ambitions. He may not quite measure his ideals and agency as the weather measures the wind, but he does nevertheless suffer, “in the most literal sense, an attack on his integrity.”⁷⁰

Perhaps Jim can, in the shadow of the dictator’s threat and offer, justify his killing either in utilitarian terms, as optimizing, or in Kantian terms, including to the one whom he would kill. But while it may be that, in the shadow of the dictator’s evil, Jim is impartially justified in killing the one, Jim is not simply *subsumed* in the dictator’s shadow. Moreover, third-personal justifications of the killing cannot resolve, and must make room for, the separate question how far and how fully Jim should enter into the dictator’s shadow. And this is necessarily a first-personal question, because it involves Jim’s considering whether to retreat (for the moment)

replicate a feature of Korsgaard’s treatment of Jim’s case and to emphasize this feature. Whereas the utilitarian’s natural response to evil is to prevent it by means of any lesser evil, the Kantian’s natural response is to withdraw into moral purity and attribute all the blame to the evildoer. Korsgaard can overcome this tendency only by treating the evildoer as beyond the reach of morality, thereby opening up the conceptual space needed to accommodate the responsibility and discretion of the person (in our case, Jim) who must respond to evil. But this approach to solving the dilemma of dealing with evil in the end just ignores one of the dilemma’s horns. Jim’s position is so difficult because he is responsible *and* the dictator is responsible, because the dictator has made Jim a compromising offer *and* left Jim free to decline. Fully understanding Jim’s position requires coming to grips with both elements of each description and balancing them against each other. Purely third-personal morality, in either its utilitarian or Kantian instantiations, cannot achieve this balance because it denies one or the other of the poles across which the balance must be achieved. By contrast, concepts like integrity and first-personal morality, although they may never render this balance secure, at least recognize both poles and thus render the balancing effort possible.

68. Williams, *A Critique of Utilitarianism*, *supra* note 36, at 116.

69. This is the flip-side of the utilitarian view that if Jim kills the one, then he has in fact saved nineteen lives.

70. Williams, *A Critique of Utilitarianism*, *supra* note 36, at 117.

from his own benevolent ideals and instead to implicate himself in the dictator's evil projects, at least in the sense of making one of these projects—the killing of the one—into his own. Jim's dilemma is not dissolved by third-personal impartial moral analysis because the problem of the intimacy of Jim's connection to the killings—of Jim's authorship—is not dissolved, or indeed even addressed, by third-personal moral analysis in either its utilitarian or Kantian forms. Nor, on reflection, could it be. Third-personal impartial moral analysis necessarily proceeds from the points of view of others, and the Kantian innovation was to focus this moral inquiry not on the single maximizing point of view of total well-being, but rather on the several, independent points of view of the innocents who might be killed. The problems of authorship and integrity that lie at the core of Jim's dilemma, on the other hand, must be addressed not from the innocents' points of view, but from *Jim's*.

THREE

THE WEIGHT OF THE FIRST-PERSONAL (INTEGRITY RE-EXAMINED)

I have argued that the problem of integrity endures across conceptions of third-personal impartial morality. Throughout this argument, I have presented integrity as a substantial value—as connected to the idea that first-personal moral ideals might sometimes outweigh third-personal moral ideals in an agent's all-things-considered practical deliberations, and certainly as underwriting deep worries when it is placed under threat. This presentation was supported by the powerful intuition that Jim's integrity, in connection with his first-personal ambition not to kill innocents, might in some circumstances give him all-things-considered most reason not to kill the one even though third-personal impartial morality, in both its utilitarian and Kantian forms, counsels that he do so.

It might be thought, however, that this view of the importance of integrity incorporates a conclusion to which I am not yet, as a general matter, entitled. For it might be thought that to set forth the structure of first-personal morality and the form of the problems that arise when third- and first-personal morality conflict is not yet to take the measure of these problems. It remains possible that although integrity is a value and first-personal moral ideals are independently reason-giving, whenever either conflicts with reasons of third-personal impartial morality, then third-personal morality must win out in all-things-considered practical deliberations. Indeed, it remains possible that integrity (and first-personal morality quite generally) involves only trivial or even self-indulgent values. I do not myself find this possibility terribly troubling. It seems to me that the strength of our intuitions concerning Jim's dilemma—the sense that, at the very least, Jim's accepting the dictator's offer and killing

the one involves an enormous ethical (and not just psychic) cost—place the burden of persuasion squarely with those who claim that first-personal morality is somehow insubstantial. Moreover, the burden of persuasion should as a general matter rest with those who cast one class of reasons as categorically dominant over another. I recognize, however, that my own intuitions are perhaps idiosyncratic in this respect, and I therefore take up the question of the weight of the first-personal.

The possibility that first-personal morality is insubstantial arises in two connected ways, by means of a two-part *hegemonic claim* of third-personal morality. First, it may be that even though first-personal moral ideas and integrity in pursuing these ideals can conflict with third-personal morality, the values involved in first-personal morality are insubstantial or, at any rate, categorically less substantial than the values involved in third-personal impartial morality. As I have admitted from the beginning, there can be little doubt that when the numbers get large enough, it becomes self-indulgent for Jim to insist on his integrity and his first-personal commitments and (for this reason) to refuse to kill. And it may be that whenever the numbers are such that it is even only marginally third-person impartially better for Jim to kill, then they are in this sense large enough, making it self-indulgent for Jim to refuse. In this case, Jim would himself become a casualty of the dictator's evil, although only in the petty sense that the dictator, having taken aim at the innocents' lives, has also claimed Jim's integrity.⁷¹ And second, it may be that, at least in a well-constructed person, first-personal ideals can never conflict with third-personal morality, so that integrity can never be threatened by third-personal morality. It may be that a well-constructed person will look to third-personal morality (and view third-personal morality as finally authoritative) in constructing his first-personal ideals and ambitions, perhaps even in the sense of adopting, as an overarching first-personal ambition, the goal to do whatever is third-personally most justified.

The two parts of this suggestion are related—they are in fact alternative developments of the same basic idea. Both introduce into the argument the question of the practical authority of persons to act for reasons besides the equal impartial claims of others, at least when these reasons conflict with such claims, as given expression through third-personal impartial morality. Limits on this authority might apply, as it were, both outside and inside of a person's first-personal ideals: both (outside first-personal ideals) to support the conclusion that it is always self-indulgent for a person to prefer, all-things-considered, her first-personal ideals and integrity over the demands of third-personal morality; and (inside first-personal ideals) in the form of the principle that a person must look to third-personal

71. I say that Jim's integrity is, in this case, a petty matter because it is, by assumption, less important, all-things-considered, than even the slightest third-personal moral consideration.

morality in forming her first-personal ideals, and perhaps even adopt, in the first person, the ideal of always doing what is third-personally most justified.

My central argument concerning distinctively legal ethics turns on the significance of integrity and on the idea that the destruction of a person's integrity involves a great loss, and it therefore also depends on the substantial weight of the first-personal to which integrity makes reference. Accordingly, it is important for me to argue that persons do indeed enjoy the practical authority to act on first-personal ideals and to protect their integrity even in the teeth of contrary third-personal moral principles. And indeed, Williams has himself recognized the need to proceed in this way in order to vindicate the importance of his observations concerning integrity and has developed two further arguments to defend the authority of the first-personal over the third. Taken together, these arguments offer resistance to both components of the hegemonic claim of third-personal impartial morality. Neither argument entirely succeeds, but it will be useful to understand both before attempting to improve upon them.

The first of these two arguments addresses the hegemonic third-personal claim in its first expression, by displaying the substantial importance that a person's first-personal projects might have in his life and proposing that it is *unreasonable* to expect a person always to sacrifice these projects, and with them his integrity, to the demands of third-personal impartial morality. (If it is unreasonable to expect a person to make such a sacrifice, then it cannot be self-indulgent for him to refuse to do so.) The argument proceeds from the idea of a person's "ground project," that is, a "project or set of projects which are closely related to his existence and which to a significant degree give meaning to his life."⁷² Williams means by this construction to capture the idea of "a nexus of projects, related to [a person's] conditions of life, . . . the loss of all or most of [which] would remove meaning [from that person's life]."⁷³ In this sense, the frustration of a person's ground project will leave that person "unclear why [she] should go on at all."⁷⁴ Jim's ground project plausibly may (although it need not) include the project of not killing innocents. If Jim, for example, made an art of gentleness or were an ideological pacifist, then his ground project would likely give a central place to not killing innocents. In such cases, any requirement that Jim must kill the one could induce Jim to question whether he had any reason to proceed at all.

72. Bernard Williams, *Persons, Character and Morality*, in MORAL LUCK 1, 12 (1981).

73. *Id.* at 13.

74. *Id.* at 12. This does not in any straightforward way entail that the frustration of a person's ground project requires him to see no reasonable alternative to suicide or even to contemplate suicide at all. For one thing, the decision to commit suicide, as much as any other decision, needs reasons to back it up. For another, as Williams says, "[o]ther things, or the mere hope of other things, may keep him going." *Id.* at 13.

Utilitarian third-personal impartial morality, as is by now plain, will require a person to abandon even her ground project whenever the web of causes develops in such a way that this abandonment maximizes utility. “That,” says Williams, “is a quite absurd requirement.”⁷⁵ Kantian third-personal impartial morality will not in practice produce quite so cavalier a treatment of ground projects, for the equally familiar reason (roughly) that the Kantian recognition that a person must justify her actions to each person whom they concern, taken one-at-a-time, has as a consequence that, under the Kantian view, a person’s commitment to her ground project will less frequently butt up against the demands of third-personal impartial morality. But the Kantian position in this regard is, once again, not structurally any different from the utilitarian, because whenever a conflict between a person’s ground project and Kantian impartial morality does arise, the Kantian will insist that impartial morality must win out. Thus there is no room, in the Kantian analysis of Jim’s dilemma, for consideration of the depth or centrality of Jim’s first-personal attachment to not killing innocents—once the innocent consents to being killed, Jim is obligated to do the killing regardless of his own ideals.⁷⁶ This is, of course, just another way of saying that even *in extremis*—when third-personal morality’s assault on a person’s integrity takes the form of requiring him to abandon not just any project but his ground project—the Kantian conception of third-personal impartial morality, like the utilitarian conception, leaves no room for the influence, or preservation, of integrity.⁷⁷

75. *Id.* at 14 (citation omitted).

76. This is strikingly reflected in Korsgaard’s analysis of Jim’s dilemma. Although Korsgaard reflects on how the *innocents’* possible pacifism might affect the Kantian analysis of the situation—by causing them to withhold their consent that one of their number should be killed—she gives, revealingly, no consideration to the question of *Jim’s* possible pacifism or how this might affect the analysis of what Jim should, all-things-considered, do. See Korsgaard, *supra* note 46, at 296.

77. The Kantian may be tempted, at this point, to respond that she would not require Jim to abandon his ground projects because the burden—the suffering—that doing so would impose on him would be greater than any person could reasonably be expected to bear. But this response fails to capture the concerns reflected in the argument about integrity, and it will fail to mollify integrity’s champions. The response treats Jim as one of the dictator’s victims and argues that to require (for example) a pacifist Jim to kill would impose on him a greater share of the total burden of the dictator’s evil than he can reasonably be expected to bear—just as no innocent has a duty to sacrifice himself by volunteering to be the one that Jim kills, so Jim has no duty to sacrifice himself by doing the killing. But the argument about integrity approaches the problem from an altogether different angle, and it is concerned not with Jim’s passive role as a victim of the dictator’s project but rather with Jim’s active role as a participant in the project.

Finally, it is worth observing (although to do so is to indulge in a distraction from the main argument) that the Kantian approach to apportioning Jim’s share of suffering itself displays familiar and significant shortcomings. For one thing, the Kantian is hard-pressed to explain why Jim’s suffering should not be dismissed as based on a moral mistake, on pacifism that cannot be justified. For another, the Kantian would limit Jim’s concern even for his justified suffering to being a special case of his concern for the suffering of all persons, perhaps as expressed through the idea of Jim’s duty to himself. But this account of morally legitimate self-interest is in the end just a moral euphemism—an effort, as Williams says, to “launder the currency of desire.” BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 50 (1985). And like most euphemisms, this one never obtains

But, at least when the threatened assault on a person's integrity takes the form of a third-personal moral demand that a person betray or abandon her ground project, the hegemony of third-personal morality, in either its utilitarian or Kantian forms, seems to involve a mistake. For, as Williams points out, "[t]here can come a point at which it is quite unreasonable for a man to give up, in the name of the impartial good ordering of the world of moral agents, something which is a condition of his having any interest in being around in that world at all."⁷⁸ This point, of course, arrives precisely where, as might happen in the case in which Jim is a committed pacifist, third-personal impartial morality requires a person to sacrifice his ground project. Integrity has sufficiently substantial content sometimes to outweigh third-personal impartial morality in all-things-considered practical deliberations because, in some circumstances at least, the sacrifice of a person's integrity leaves her with no remaining interest in practical deliberations of any kind at all.

This argument is attractive as far as it goes. But the somewhat artificial introduction of the idea of a ground project, which is more an idea of psychology than of practical reason, limits both the power and scope of the protection the argument provides against the hegemonic claims of third-personal impartial morality. To begin with, a person's aims and ambitions are not generally arranged in such a way as to produce a neatly, or even only roughly, distinguishable ground project. Instead, most people adopt and develop a large set of mutually and messily overlapping aims and ambitions, no subset of which is necessary, and many subsets of which are sufficient, for producing meaning in their lives. Accordingly, most people will have no special subset of projects that can be sensibly distinguished and isolated from their other projects, so that threats to this subset display the qualitatively distinctive features that Williams attributes to threats to ground projects, namely calling into doubt a person's reasons for proceeding at all. For this reason, an account of first-personal morality and of integrity that depends, as Williams' seems to do, on the concept of a ground project will be inevitably insecure.

Furthermore, and perhaps more importantly still, the scope of our intuitive concern for integrity is not limited to cases that involve the psychological intensity conjured up by Jim's example and rendered concrete by the idea of betraying a ground project. Instead, integrity seems equally clearly (although perhaps less dramatically) at issue when the stakes on both sides of the question are much lower, as when, for example, a member of an organization who is asked by a superior to implement a plan that he believes to be damaging must choose between sensitively

a clear view of its subject—the tangled interconnection and accommodation between morality and self-interest.

78. Williams, *supra* note 72, at 14.

implementing the plan himself or leaving someone else to implement the plan in an insensitive and yet more damaging fashion. This tame example shares the same formal structure as Jim's dilemma and raises formally analogous intuitive concerns about integrity; but it would be implausible, to say the least, to suggest that any ground project is here at play.

Williams' second argument addresses the hegemonic third-personal claim in its second expression, by focusing not on the content or importance of a person's first-personal ideals, but rather on their form, and by showing that it is untenable to require a person to cast her first-personal ideals exclusively in terms that are also third-personally acceptable. This argument begins from the observation that a person's integrity reflects, and the value of her integrity serves to protect, a set of connections and relationships among her aims, habits of response, and actions that together make up the person's distinctive *character*. Thus, when a person's integrity is intact, we say that he is acting *in character* or even that his actions and his character are *integrated*. (The threat that the dictator's offer poses to Jim's integrity arises because if he accepts the offer and kills the one, then he follows the dictator's aims rather than his own and acts, to this extent, *out of character*.) This connection between a person's integrity and her character casts the second expression of the hegemonic third-personal claim into sharp relief by presenting the question what materials are needed to underwrite the development of a person's (integrated) character. The hegemonic third-personal claim that a person's first-personal ideals must always look to (and defer to) third-personal morality will have been refuted if it can be shown that casting third-personal morality in this role is inconsistent with sustaining a distinctive, coherent, integrated character for a person.

Williams argues for precisely this conclusion, namely that a person's character cannot be dominated by the disposition to do what is third-person impartially best or, as he puts it, the disposition to promote the conclusions of casuistical argument.⁷⁹ Williams again gives his argument a psychological development, which emphasizes that questions of character are "best discussed (as are many other subjects in ethics) in a way that pays attention to the psychological form in which ethical considerations have to be embodied."⁸⁰ This approach allows Williams to recognize that the problem of character imposes a bound on people's responsiveness to the conclusions of third-personal impartial moral reasoning. The ethical

79. See Williams, *supra* note 4, at 259, 267. Here I should make clear that the argument in the main text does *not* stand for the proposition that third-personal impartial morality has no role to play in constructing a person's character. That quite absurd claim is obviously belied by ordinary moral experience, as for example by the experience of the person whose character is to be fair (or in some other way to conform, in certain circumstances, to the principles of third-personal morality). The argument presents only the much less sweeping claim that third-personal morality cannot be the exclusive or hegemonic source of a person's character.

80. *Id.*

dispositions that make up a person's character display, as Williams says, "resistance or (to change the metaphor) momentum" and this is one reason why "we can have, and we need, more than the one [or, I add, the overriding] ethical disposition of asking the question 'what ought to be done?' and abiding by the answers to it."⁸¹ And so the second version of the hegemonic third-personal claim, which insists on the dominance of precisely this one disposition, is refuted.

These observations are true and important, but they do not (once again) ultimately provide the type of defense of integrity, and of the capacity of the first-personal to resist the third in all-things-considered practical deliberations, that I am seeking. The psychological turn taken by Williams' argument leaves it open whether the inertial features of a person's psyche that cause his dispositions and character sometimes to resist the encroachment of third-personal impartial morality should be celebrated or, alternatively, lamented and, where possible, corrected or at least restrained. Perhaps the resistance to change displayed by people's characters and dispositions is just an unfortunate feature of the human condition, akin to greed or to irrationality. To be sure, all-things-considered practical reason would even in this case ignore the problematic independence of the human character only at its peril, but the engagement with character would proceed by way of being an unwanted accommodation only.⁸² Most critically, a person who discovered that he was capable in a particular instance of overcoming the integrity of his character and following third-personal impartial morality's recommendation that he abandon or betray the first-personal aims that this integrity reflected—for example, a person in Jim's circumstances who discovered that he was in fact capable of killing the one—would have no good reason not to do so.

Williams' two arguments, although persuasive in many respects, nevertheless fall short of presenting a satisfactory rejection of third-personal morality's hegemonic claim and a satisfactory vindication of the weight of the first-personal, of its capacity sometimes to outweigh the third in all-things-considered practical deliberations. However, the strengths and weakness of the arguments, when they are set against each other, point the way to a more satisfactory alternative approach. The great

81. *Id.*

82. It is also possible that the inertial mass of persons' characters, although not to be lamented, is of instrumental value only, rather than intrinsic value. Perhaps people who filter third-personal impartial morality's commands through their (intrinsically less authoritative) first-personal ideals—rather than adopting the generic ambition always to do what is impartially best in the circumstances—will, over the run of their lives, more nearly conform to third-personal impartial morality than will people who attempt to apply third-personal morality directly. This possibility once again undermines the independence of integrity and character from third-personal morality because it must accept that whenever the two are actually in conflict (whenever the instrumental value of character is insufficient to outweigh the direct concern for third-personal impartial morality in a given case) third-personal impartial morality must win out.

insight presented by both of Williams' arguments involves the differentiated character of practical reasoning. The arguments develop the idea that practical reasons must appeal to, and in this sense be reasons for, individual, distinct, separate agents, who each stand in a particularly intimate relation—a relation of authorship—to their own actions.

In particular, Williams answers the hegemonic claims of the third-personal by arguing that these claims are inconsistent with the requirement that practical reasons must appeal to the individual wills of persons who are separate in this way. On the one hand, the argument about ground projects considers the conditions that must be satisfied in order for a person's will (her individual will) to remain *engaged* in the practical project of deciding what to do at all. And on the other, the argument about character considers the conditions that must be satisfied in order for a person to sustain a separate and distinct, or as I shall say, a *coherent*, individual will at all. The rejection of the hegemonic claims of third-personal impartial morality is proposed, in Williams' arguments, to be a necessary condition in each case—that is, for both the continued engagement and the continued coherence of the wills of persons. In this way, the arguments return to, and develop and sustain, Williams' original insight, namely that the integrity of a person's distinctive will, which precisely involves the continued existence of a person as an engaged, coherent will, requires that the person sometimes prefer his first-personal ethical ideals over third-personal ideals in all-things-considered practical decision-making.

The arguments' weaknesses, by contrast, both involve the fact that Williams gives the problem of integrity a distinctively psychological development. Thus, his treatment of ground projects emphasizes the affective component of a person's engagement with the world, and his treatment of character and dispositions emphasizes the inevitable psychic mass and inertia of distinctively human first-personal dispositions. And although psychological realism of the variety that Williams pursues in his two arguments is, as Williams supposes, in general a great strength in an ethical theory, it is decidedly not a strength in the effort to answer third-personal impartial morality's hegemonic claims. This is because the third-personal moral claims of others at least plausibly arise, and exercise their authority, quite independently of any psychological facts about the agent to whom these claims are addressed. Psychological realism cannot answer the hegemony of the third-personal insofar as the third-personal does not, in the relevant way, credit psychology.

My own effort to answer the hegemonic claims of third-personal morality and to sustain the independent weight of the first-personal tries, therefore, to retain Williams' focus on integrity while avoiding William's psychological turn. I set forth from the ethical (and not merely psychological) observation that persons act, at bottom, for themselves (and

self-responsibly) and not just as delegates on behalf of some superior (and ultimately responsible) over-arching practical presence. (Indeed, the problem of integrity is a problem at all only because people act, in this way, on their own behalves—one does not worry about the integrity of mere representatives.) I then try to give the conditions for the continued integrity of persons—first for the continued engagement, and then for the continued coherence, of persons' independently responsible wills—an ethical (and not merely a psychological) development. My aim is to sketch (although I shall do no more than sketch) an account of the necessary architecture of the first person—to demonstrate that it is as a matter of ethics a necessary condition for maintaining the integrity of persons as engaged and separate agents that their first-personal ideals be able to resist the hegemony of the third-personal and sometimes even to outweigh third-personal ideals in all-things-considered practical deliberation.

First, a necessary condition for the continued *engagement* of persons' independently responsible wills is that persons act for reasons, including ethical reasons, that are distinctively their own. After all, a person who acts for reasons that are not distinctively his own is not an independently engaged agent but rather, in a very real sense, a delegate or representative who acts merely on behalf of the entity whose reasons these reasons are and not on behalf of himself. Indeed, such a person is practically disengaged in the literal sense that he makes no meaningful choices of his own but merely serves as a conduit for the choices of this other creature. For this reason, a necessary condition for the continued engagement of persons as separate agents is that they do not experience ethics exclusively as something imposed from outside of them, to which they must *submit*.⁸³ And this condition entails that only persons capable of being self-authoritative sources of their own reasons, persons who can act on reasons that spring from them and hence are, in the sense in which I have been using the term, first-personal, can sustain their separate practical engagement. Indeed, integrity requires more than that these self-authoritative first-personal reasons apply only on the periphery of a person's practical activity, perhaps in connection with the person's tastes or diversions. Instead, such self-authoritative first-personal reasons must apply also at the center of the person's practical activity and in connection with the person's ethical projects, that is, in connection with the projects whose success or failure will determine the success or failure of the person's life, all-things-considered. This is because the integrity of whole *persons* and not merely of particular ambitions is at issue, and this requires separate and independently engaged agency in respect of pursuing all-things-considered success or failure and not merely in respect of marginal

83. This suggestion is expressed in the liberating elements of Nietzsche's thought. See, e.g., FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 1-56 (Walter Kaufman ed. & trans., 1969).

or tangential projects.⁸⁴ This observation proceeds in parallel to Williams' observations about ground projects, but it gives the common theme an ethical and not just a psychological development.⁸⁵

And second, the continued *coherence* of persons as independent agents requires that these self-authoritative first-personal reasons be, at least sometimes, self-authoritative and first-personal all the way down—that is, not merely applications of third-personal ideals to peculiar facts about particular persons but rather independent of the third-personal at every level. Thus, it will not be sufficient to sustain the coherence of persons as distinct and independent agents if first-personal aims and ambitions that initially appear to conflict with third-personal morality must in the end, as Nagel has observed can happen, “get some support from the [third-personal] standpoint itself,” so that “there is [third-personal] sanction for striking the balance between [first-personal] and [third-personal] reasons

84. The hegemony of third-personal morality would be perfectly consistent with treating persons as separate and self-authoritative sources of trivial reasons, that is, reasons whose application is limited to areas in which morality takes no interest. But the separateness of persons as agents and the importance of integrity apply not merely in trivial matters but also in respect of all-things-considered practical judgments and therefore must extend to moral matters also.

85. Nagel addresses something very much like the possibility of self-authoritative first-personal reasons when he discusses what he calls “reasons of autonomy,” see NAGEL, *supra* note 39, at 166 ff, or, as Korsgaard somewhat more elegantly renames them, “ambitions,” see KORSGAARD, *supra* note 46, at 284. Here Nagel is contemplating the possibility that a person’s adopting certain ambitions might give him reasons to succeed at these ambitions—Nagel imagines that a person’s ambition to climb Mount Kilimanjaro might give him a reason to get to the top. See NAGEL, *supra* note 39, at 167. Furthermore, Nagel asks a question about such reasons that is very much like the question I am asking, namely “how far the authority of each individual runs in determining the objective value of the satisfaction of his own desires and preferences.” *Id.* at 168.

Nagel’s enquiry, however, is importantly different from mine. Nagel is concerned with the question whether a person’s ambitions might create reasons for others—third-personal reasons—to promote the success of these ambitions. (Nagel rejects this possibility, at least for ambitions other than those involved in seeking out or avoiding basic sensations such as pleasure or pain. “It seems,” he says, “too much to allow an individual’s desires to confer impersonal value on something outside himself . . .” *Id.* at 169.) But I am concerned not with whether a person’s ambitions might create third-personal reasons but rather with whether they might create first-personal reasons (which are capable of outweighing third-personal reasons). Furthermore, I am concerned with the way in which a person’s ambitions may create first-personal reasons for her that are connected to her integrity as an agent, and not just to her own welfare as a patient. For this reason, my argument is different also from the suggestion, to which Nagel is sympathetic, see *id.* at 173, that a person might properly display a limited preference for her own interests over the interests of others, and that insofar as satisfying her ambitions promoted her interests, she might therefore display a special first-personal concern for her ambitions.

The reason for the difference between my approach and Nagel’s harkens back, I believe, to my somewhat unusual construction of the idea of first-personal *morality*. See *supra* note 31. The examples Nagel thinks of when he thinks of ambitions—including quintessentially the desire to climb Mount Kilimanjaro—are self-regarding in their substance as well as first-personal in their form. This leads Nagel, when he asks about the relationship between the first-personal reasons that ambitions give rise to and third-personal reasons, to treat these first-personal reasons as involving something like the pursuit of pleasure and hence to analogize to the question of a person’s preference for his own well-being over the well-being of others instead of to the question of a person’s more intimate concern with his own actions (the actions whose author he is) than with the actions of others. My unusual construction of the idea of first-personal morality as involving reasons having to do with the treatment of others helps me to see the second possibility, as well as the first.

in a certain way.”⁸⁶ (For example, a person’s preference for his children over others, although it appears initially to conflict with the demands of impartiality, might nevertheless be third-personally justified in light of the third-personal idea that all people may, within limits, prefer their children over others.) This approach, as Nagel says, “take[s] the conflict between [first-personal] and [third-personal] back to the [third-personal] standpoint on appeal,”⁸⁷ so as to locate all final ethical authority somewhere outside of the persons who come under this authority. Such an approach cannot sustain the coherence of persons as separate and distinct agents because it casts them not as originators of their own distinct projects and plans but merely as interchangeable collection-points at which the claims of others intersect. If persons are to be distinct and independent, which is to say coherent, ethical agents, they must be authorized at least sometimes to act for reasons that are distinctively their own—distinctively first-personal—all the way down. This observation proceeds in parallel with Williams’ observations about the inertia of first-personal dispositions, but it once again gives the common theme an ethical and not just a psychological development.⁸⁸

These arguments underwrite the importance of integrity and also the conclusion that first-personal ideals can outweigh third-personal ideals in all-things-considered practical deliberations. Nor is this conclusion, although it goes against the grain of much modern moral thought, without precedent. Indeed, it is just the dual of an idea that has become familiar within the tradition of purely third-personal impartial moral thought. As I

86. NAGEL, *supra* note 39, at 202. Nagel, whose terminology is somewhat different from mine, speaks in terms of the “subjective” or “personal” where I speak of the “first-personal,” and speaks of the “objective” or “impersonal” where I speak of the “third-personal.” The bracketed words in the quotations reflect substitutions that I have made to translate Nagel’s terms into my own.

87. *Id.*

88. One final possibility bears mention. Kant himself would, I believe, have accepted something like my formal claim that the integrity of persons—their continued practical engagement and practical coherence—depends on their acting on the bases of reasons of their own, rather than as representatives or delegates of some other creature, and that this requires that persons be, in some fundamental way, self-originating sources of reasons for themselves. But Kant would have rejected, indeed emphatically so, my view that integrity therefore requires that first-personal ideals be capable of outweighing third-personal impartial morality in all-things-considered practical deliberations. Thus, Kant recognized that a person can act with integrity (or, as Kant would say, autonomously) only if he acts on reasons that are his own, rather than succumbing to rules imposed from outside, but at the same time, he thought that integrity remains compatible with (and indeed requires) always following the commands of third-personal impartial morality.

Very roughly, Kant thought in this way because he believed that the nature of freedom and reason entail that a person can act for reasons that are truly his own only when he acts consistently with reasons that all other rational beings could also accept for themselves, and that these reasons are given by third-personal impartial morality. On Kant’s view, as Korsgaard has said in a related context, “[t]he only reasons that are possible are the reasons we can share.” KORSGAARD, *supra* note 46, at 301. Kant himself defended this hugely ambitious claim by means of a metaphysical account of freedom and reason. See KANT, *supra* note 30 (especially ch. 3). I am in no position to answer this argument on its own terms, and can plead only that the burden of proof seems to me to lie with the proponent of such an argument. Finally, the complexity and sophistication of Kant’s views is so great that if answering them were indeed a precondition of proceeding in an alternative direction, then the mere existence of Kant’s views would stifle all dissenters.

observed earlier, the Kantian advance in third-personal impartial morality was to notice that utilitarianism's valuation of persons merely as participants in a single sum of interest fails, as Rawls put the point, to "take seriously the distinction between persons."⁸⁹ Certainly someone who viewed herself merely as a contributor to such a sum, and who accepted that she should sacrifice her interests whenever doing so would serve the (even only minutely greater) total interest would be rendered unable to understand some interests as peculiarly hers and to understand herself as a distinctive and self-originating independent source of claims on others. One might, therefore, say that she would, in this way, sacrifice her integrity as a patient—that is, as a bearer of interests and source of moral claims against others.

My argument concerning integrity and the independence of first-personal morality simply repeats this movement of thought with respect to persons understood not as patients, but as agents—not as bearers of interests and sources of claims against others, but as doers of acts and bearers of responsibility. The separateness of persons as agents is inconsistent with understanding persons as mere locally interchangeable delegates or representatives of a single overarching scheme of third-personal impartial ethical ideals. Someone who viewed himself in this way only, and who accepted that he should sacrifice his distinctive first-personal ideals whenever it is third-person impartially best that he do so, would be unable to understand some ideals as peculiarly his, or to conceive of himself as a free-standing, self-originating, and responsible source of ideals and values for himself. He would, in this way, sacrifice his integrity as an agent. The integrity of persons as agents and the capacity of first-personal ideals sometimes to outweigh third-personal impartial morality are thus no more mysterious than the integrity of persons as patients and the capacity of their individual interests sometimes to outweigh the common interest. One might say, finally, that persons are *examples* only and not *representatives* of the moral point of view.⁹⁰

89. See RAWLS, *supra* note 30, at 27.

90. Samuel Scheffler has also sought to develop Williams' initial insight about integrity into a sustained argument against the hegemony of third-personal morality, at least in its consequentialist form, and in favor of what he calls an "agent-centered prerogative" which permits persons sometimes to act in ways that do not produce the third-person impartially best overall state of affairs. See SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 5 (rev. ed. 1994). Three differences between my views and Scheffler's are worth mentioning and explain why my own argument has proceeded directly from Williams' ideas. Although I recite these differences together, it is worth noting that they stand in very different positions with respect to the overall movement of thought.

First, Scheffler restricts his efforts to resisting the hegemony of the consequentialist version of third-personal morality. He does not consider the possibility that even non-consequentialist third-personal morality may threaten the integrity of persons and, indeed, takes his arguments to support not resistance to the third-personal *tout court* but rather incorporation of some elements of deontological (or, as I have been saying, Kantian) views into third-personal morality. See *id.* at 4-5.

Second, although Scheffler observes that consequentialism's insistence that persons should maximize third-personal value fits poorly with "the way in which concerns and commitments are *naturally* generated from a person's point of view quite independently of the weight of those concerns

This highly abstract account of the foundations, in the idea of integrity, of self-originating first-personal ethical ideals resists the hegemonic claims of third-personal impartial morality. In this way, it quite generally defeats the dependence thesis that I introduced in connection with specifically legal ethics. In a moment, I shall return to my narrower subject and address legal ethics against the backdrop of these more general ideas. Much of what I shall say may be read as presenting a case study of the development of modern adversary lawyers' peculiar first-personal ethical ideals and the interaction between these ideals and third-personal impartial assessments of the legal profession. Accordingly, it will be useful, in attempting to understand what I shall say about specifically legal ethics, to be able to refer back to a stylized illustration of the problem of developing first-personal ethical ideals. It is therefore worthwhile, before returning to legal ethics directly, to make one more use of the Jim example in order to illustrate some of the relevant issues.

With this purpose in mind, I consider more closely why Jim cannot accept the dictator's offer while redescribing his killing under a heading that enables him to generate a first-personal account of his act that makes it consistent with his ethical aims and ideals, including the ideal that one should not kill innocents. After all, the argument that Jim's integrity depends on his drawing a distinction between his own ends and actions and the dictator's ends and actions does not yet say how Jim must conceive of the act involved in accepting the dictator's offer. If Jim can develop the right redescription of this act, then he can accept the dictator's offer and do what is third-person impartially best without sacrificing his

in an impersonal [third-personal] ranking of overall states of affairs," *id.* at 9 (emphasis in original), and although he seeks to develop a moral theory that takes adequate account of the "independence of the personal point of view," *id.* at 62, "as a fact about human agency," *id.* at 64, Scheffler makes no sustained effort to elaborate upon this idea. Although Scheffler recognizes that moral theory must be sensitive to what it is "reasonable" to demand of human agents given how their concerns and commitments arise," *id.* at 125, and although he recognizes that the idea of reasonableness must in this connection refer to "the structure of a unified personality," *id.* at 18, he presents no substantive standard of what is, in this sense, reasonable. He presents no substantive account of what I have called the "architecture of the first person."

Finally, and perhaps most importantly, Scheffler's resistance to the hegemony of third-personal morality is limited to claiming that persons *may* sometimes act in ways that are not impartially best; he expressly rejects the view that persons are sometimes *required* to act in such ways. (Scheffler expresses this position by saying that he accepts an agent-centered prerogative but rejects agent-centered restrictions. See *id.* at 5-6.) Scheffler takes this view because he believes that discretion to act in ways that are not impartially best is sufficient to protect a person's integrity, that "if someone *wants* to bring about the best state of affairs, either out of a supererogatory willingness to sacrifice his own projects or because bringing about the best *is* his project, there is no reason from the standpoint of integrity to forbid that." *Id.* at 22 (emphasis in original). Scheffler insists, therefore, that "[t]he promotion of the general good . . . can be undertaken from *within* one's personal standpoint." *Id.* at 97 (emphasis in original), and expressly rejects the view that "to have a [first-] personal point of view is to have a source for the generation and pursuit of personal commitments and concerns that is independent of the impersonal [third-personal] perspective." *Id.* at 57. This is precisely the position that I adopt. The account of the architecture of the first-person that I develop in the main text is designed to defend this position, and the discussion of legal ethics that follows aims to apply it to the professional circumstance of modern lawyers.

integrity. In this case, Jim's accepting the dictator's offer will not involve sacrificing his first-personal ideals and adopting the dictator's evil ends because, under the redescription, Jim will in fact be acting in a way that is *consistent* with his first-personal ideals. And indeed, the idea that redescribing actions in light of their indirect consequences can change how they are evaluated is a familiar one—just think of the poker player who insists that she is not lying but only bluffing. Why isn't an analogous redescription (perhaps one that emphasizes that Jim is saving lives or cooperating with the innocents) available to Jim?

Here it is necessary, I think, to proceed carefully, attending to the particular circumstances surrounding Jim's choice, including Jim's own ethical and cultural circumstances. Whether or not Jim can redescribe the killing in a way that enables him to accept the dictator's offer (and do what is third-person impartially best) without sacrificing his integrity depends on the self-originating first-personal ethical ideals that are available to Jim and on whose vindication Jim's integrity depends.⁹¹ Does Jim's ethical world-view include any self-originating projects and plans that killing the one could properly be said to serve, so that Jim can accept the dictator's offer but redescribe what he does in terms of these plans, thereby protecting his integrity?

I suspect that insofar as Jim's ethical world-view is like ours, it does not include any self-originating ethical ideals in terms of which accepting the dictator's offer can be adequately redescribed. Insofar as Jim is like us, killing innocents is so far removed from his ethical ideals and ambitions that he is simply not equipped to handle cases in which the unsentimental logic of third-person impartial morality (based on either a utilitarian calculus of human lives or a Kantian moral quarantine) requires him to kill. Jim finds himself in foreign circumstances, something Williams emphasized by making Jim literally a foreigner—a European tourist in South America. And just as Jim's body is ill-suited to protecting his health against local diseases, so his ethical world-view is ill-suited to protecting his integrity against local dilemmas. Jim's self-originating ethical ideals have developed to protect his integrity in the face of the tension between first-personal and third-personal ethical justification in his natural habitat,

91. Jim plainly cannot preserve his integrity simply by mechanically redescribing his act as a third-person impartially justified killing (either under the utilitarian maximizing metaphor or under the Kantian "smaller world" metaphor). The whole purpose of the argument up to this point has been to show that a person's integrity as an agent depends on his understanding his ethical ideals as more than mere rules-of-thumb or interim conclusions in a third-person impartial ethical argument. This is why I say that in order to accept the dictator's offer without sacrificing his integrity, Jim must redescribe the killing in a way that brings it under one of his *self-originating* first-personal ethical ideals. For Jim to focus his redescriptive effort on the fact that the killing is third-person impartially justified is for him to miss the point of his predicament, namely that ideals cast as interim conclusions in a third-person impartial moral calculus are not enough to support a person's integrity.

not in the strange and distant place that has engendered the dilemma he now faces.⁹²

By contrast, someone whose self-originating ethical ideals are better adapted to the local ethical climate might be able to accept the dictator's offer, and do the impartially best thing, without sacrificing her integrity. Imagine, for example, that the dictator offers Jane the same choice he earlier offered Jim, that he brings twenty more innocents into the prison courtyard and tells Jane: "You kill one or I'll kill twenty." Furthermore, imagine that Jane (unbeknownst to the dictator) is not a stranger to the situation but is instead the leader of an underground opposition to the dictator's rule. Although Jane despises killing innocents, her ethical circumstances do not allow her the luxury of including "never kill innocents" in her own ethical projects. Jane's self-originating first-personal ethical ideals are much more hard-hearted than this. They include securing freedom for her people and overthrowing the dictator by any means necessary (or at least by such means as don't sink to the dictator's level). And, more specifically, they include maintaining the ruthlessness and self-control needed for making difficult and unpleasant choices, including the choice to sacrifice innocents, in pursuit of these goals.

Accordingly, when Jane accepts the dictator's offer and kills the one, she *can* develop an account of her actions that makes them consistent with her first-personal self-originating ideals and that does not require her to see herself as abandoning her own ideals in favor of the dictator's simply because third-personal impartial morality requires it. Although she is, regrettably, killing an innocent, Jane is also pursuing political liberation with the courage and self-command she admires and aspires to display; and she can therefore recast the dead innocent as a casualty of a guerilla war to which she is committed, and recast her part in the killing as a battlefield decision that displays the steely virtues of effective command. Although killing the one represents a *defeat* for Jane because, against her ultimate purposes, another innocent has been killed, the killing does not represent a *betrayal* of Jane's first-personal ideals, and her integrity remains intact.

Jane's peculiar self-originating ethical ideals enable her to respond to the dictator's offer in a way that both satisfies the demands of third-personal impartial morality and preserves her integrity, something Jim could not possibly do. I have already suggested that this difference may

92. Even if Jim refuses to kill the one, he will, of course, have a great deal to reproach himself for—specifically, nineteen unnecessary deaths—and so it is tempting to carry the thought in the main text even further and to suggest that there is no way for Jim to escape the situation with his integrity intact. But to say that Jim cannot escape the situation without grounds for self-reproach falls short of saying that these grounds must always sound in a loss of integrity. Indeed, if Jim refuses to kill the one, the most natural thing to say about this decision will not be that he *sacrificed* his integrity but rather that he valued his integrity *too highly* (more highly than the third-personal values that recommend that he kill).

not be a coincidence, that Jim's failure at squaring the demands of third- and first-personal ethical justification may be tied to the fact that the circumstances of the dictator's offer were entirely foreign to him, and Jane's success may be tied to the fact that the offer found her in familiar circumstances. This suggestion is strengthened by the observation that when Jim and Jane face the dilemmas posed by peacetime political action, their positions will likely be reversed. Jim, for example, finds no threat to his integrity in acceding to the results of an election his side has lost. He does not view this as a betrayal of the ideals that led him to vote for the losing side, but instead re-describes his acquiescence as part of pursuing another of his ideals, namely the self-possessed, calm, and steady practice of democratic legitimacy. Jane, on the other hand, will find acceding to the results of an election she has lost enormously threatening to her integrity. Jane's self-originating ideals focus on the executory virtues—on the capacity effectively and even ruthlessly to exercise authority—and she cannot plausibly recast acceding to the results of an election she has lost in terms of the pursuit of these virtues. If Jane, recognizing the third-personal impartial ideal of democratic legitimacy, accepts in peacetime the outcome of an election she has lost, then she does so at the cost of sacrificing her integrity, just as Jim could kill in wartime only at the cost of his integrity. This, presumably, is one reason why successful revolutionaries famously find it so difficult to adapt to peaceful politics.

In peacetime, the joint demands of third-personal and first-personal moral justification are best satisfied by those whose self-originating first-personal moral ideals involve democratic virtues; in time of revolution, these joint demands are best satisfied by those whose self-originating first-personal moral ideals involve the executory virtues. Furthermore, each political environment seems to breed those self-originating moral ideals that are most consistent with the demands third-personal impartial morality imposes in that environment: people who live in the circumstances of legitimate politics tend to develop democratic virtues; and people who live in revolutionary circumstances tend to develop executory virtues. This suggests a hypothesis that I shall never defend, but introduce now because keeping it in mind will make the coming discussion of peculiarly legal ethics more interesting. Perhaps the threat of loss of integrity affects practical reason in much the same way in which the threat of inconsistency affects theoretical reason: the conflict between the demands of first- and third-person moral justification may be the practical analog of the theoretical idea of cognitive dissonance. People cannot save their integrity by abandoning all independent first-personal ideals and aiming simply to do that which is third-personally impartially best, just as they cannot avoid cognitive dissonance by abandoning all particular beliefs and adopting only a generic belief in "the truth." But people might, over time, come to adopt self-originating moral ideals that

do not conflict with the demands third-personal impartial morality commonly imposes on them given their circumstances.⁹³

FOUR

LEGAL ETHICS IN THE THIRD-PERSON (THE CHARGE OF PARTIALITY AND THE ADVERSARY SYSTEM DEFENSE)

The argument of sections two and three revealed that the dependence thesis is, as a general philosophical matter, false: claims that a person's conduct violates first-personal ethical ideals do carry content that is independent of the claim that this conduct violates the third-personal ideal of impartiality. Nevertheless, the academic tradition in legal ethics—in particular, the academic tradition that treats legal ethics as a distinctively *philosophical* problem (rather than, for example, a sociological problem)—has generally proceeded on the assumption that the dependence thesis is true. (Although academic legal ethicists have not expressly formulated the dependence thesis, that is only because they have not attended to the distinction between third- and first-personal morality in light of which the dependence thesis arises.) Academic legal ethicists have by and large proceeded as if the real problem of legal ethics were the third-personal problem of the lawyer's partiality and the lawyerly vices were nothing more than special (perhaps particularly egregious) cases of this partiality.⁹⁴ Accordingly, this tradition has been built around analyzing

93. Note that this phenomenon, even though it involves a connection between third-personal and first-personal morality, does not involve the view, which I have rejected, that a person's first-personal ideals should simply be always to do that which is third-person impartially best. The description in the main text provides a positive account of the biographical background and development, as it were, of first-personal ideals. The rejected view is a normative claim about the appropriate content of first-personal ideals. The difference between the two is most vividly presented in cases involving changed external circumstances, for example the development of democratic politics following a successful armed revolution, in which first-personal ideals come no longer to fit the third-personal scenery, and a tension between first- and third-personal ethics arises. This stickiness of first-personal ethical ideals, and the ensuing tension between first- and third-personal ethics, are precisely the phenomena whose legitimacy the rejected normative claim denied. They are also phenomena to which my argument concerning legal ethics will return.

94. Some limited exceptions to this general way of proceeding exist. Here I have in mind primarily efforts to make the lawyerly vices independent subjects of investigation, generally under the headings of the professional character or professional disposition of lawyers. See, e.g., Postema, *Moral Responsibility in Professional Ethics*, *supra* note 4; Postema, *Self-Image, Integrity, and Professional Responsibility*, *supra* note 4; Williams, *supra* note 4. Even these efforts to consider the lawyerly vices do not, however, address the possibility that these vices may raise ethical questions that are distinctively first-personal and hence *independent* of the problem of the third-personal justification of the lawyer's professional activities (and the problem of the lawyer's partiality). Instead, these efforts focus on the third-personal analysis of professional dispositions, for example (as in Williams's case), on the third-personal question what professional dispositions it is impartially best for lawyers to have.

Other commentators do focus on the first-personal costs of the strains that practicing law places on a person's character, but they focus principally on the psychological, rather than the ethical, costs that adversary lawyering imposes on adversary lawyers. See, e.g., Wayne D. Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice*, 3 J. LEGAL

the charge that lawyers are impermissibly partial, and in particular around investigating the suggestion that lawyers' behavior appears partial only because it is, as it were, taken out of context. In fact, so the argument goes, everyone's rights are best protected by a legal system in which each party to a dispute enjoys the services of a lawyer who cares exclusively about its rights, so that lawyers' exclusive concern for their clients is only one part of a moral division of labor whose aim (as lawyers know perfectly well) is to secure impartial justice for all.⁹⁵ On this argument, which remains the mainstay of academic legal ethics, the adversary lawyer's seemingly partial behavior is impartially justified because the adversary system is impartially justified.

Of course, it is anything but self-evident that everyone's rights are in fact best protected by a legal system in which lawyers care exclusively about their clients. The adversary system defense of lawyers' behavior needs elaboration: theoretical elaboration of an account of rights that explains, at the very least, why each person's rights aren't attacked by other people's zealous lawyers; and practical elaboration of an empirical account of how adversary procedure in fact functions to reach substantively just (rights-respecting) results. Both subjects have received considerable attention from legal ethicists, although the first has perhaps been more adequately addressed than the second.⁹⁶

PROF. 107, 116 (1978) (commenting on the "psychic consequences" that the author suffered as a result of the sharp practices he engaged in as a litigator); Edwin H. Greenbaum, *Attorneys' Problems in Making Ethics Decisions*, 52 IND. L.J. 627, 630 (1977) (observing the tension between lawyers' moral sensibilities and the imperatives of adversary legal practice and commenting that "[c]oping with the resulting internal conflicts is a part of every attorney's personal agenda").

The sustained argument that comes nearest to considering the questions that I am addressing appears in William Simon's critique of the adversary principles he calls the "Dominant View" of legal ethics, which he claims suffer the failing, among others, that they deprive lawyers of meaningful work and cause them to suffer alienation. See SIMON, *supra* note 18, at 109-37. Even Simon's account, however, remains critically different from mine, in that Simon finds the source of lawyers' alienation in the Dominant View's failure to connect lawyers' professional activities to the *third-personal* ideal of justice that the legal profession purportedly serves and in the Dominant View's requirement, moreover, that lawyers participate in injustice. For Simon, therefore, claims concerning the alienation of adversary lawyers are part and parcel of a *third-personal* argument that adversary lawyers behave in impermissible partial ways. (Simon does at one point suggest in passing that the adversary lawyer's role might be degraded even if the adversary system could be impartially justified, *see id.* at 76, but he never returns to or develops this idea, and he does not develop the distinction between first- and third-personal morality on which any development of the idea necessarily relies.) For me, on the other hand, claims concerning the integrity of adversary lawyers will belong to a first-personal argument that retains its force even if lawyers' professional activities can be third-personally, that is, impartially, justified.

95. Division of labor arguments, made famous by Emile Durkheim in *THE DIVISION OF LABOR* (G. Simpson trans., 1933), have in the past three decades been applied to a wide range of moral problems. See, e.g., LUBAN, *supra* note 4, at 78-81; THOMAS NAGEL, *Ruthlessness in Public Life*, in *MORTAL QUESTIONS* 85 (1979).

96. For early accounts of the adversary system defense, see MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Monroe Freedman, *Professional Responsibility and the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); and Fried, *supra* note 4. For an extensive, highly sophisticated, and skeptical survey of the various versions of the adversary system defense, see DAVID LUBAN, *LAWYERS AND JUSTICE* 50-104 (1988). Another subtle reconstruction and critique of the adversary system defense may be found in APPLBAUM, *ETHICS FOR*

Unsurprisingly, all the attention has raised more questions than it has settled. Does the adversary system defense of the lawyer's behavior apply only in the criminal context, where a lawyer protects her client's liberty from the might of the state, or also in the civil context, where only money is at stake and the other side is just another private person? Does the adversary system defense apply only in litigation, where strict procedural rules regulate adversary lawyering, or also in the free-form environment of negotiation and deal-making? Does the adversary system defense apply only in an ideal world, in which access to lawyers is justly distributed, or also in our world, in which some people enjoy more (and more effective) legal representation than others? And, finally, does the adversary system defense apply at all when the substantive law is unjust?

Answers to questions such as these inevitably call for a retreat from extreme adversary positions such as Lord Brougham's view, reported earlier, that the lawyer's duties are to his client "reckless of the consequences" and though he "involve his country in a confusion."⁹⁷ When clients employ the courts to promote their private interests against other (often weaker) private parties, when there is no judge to referee adversary negotiations and ensure that they conform to fair procedure, when some people (poor consumers subjected to harsh credit terms) are disproportionately unlikely to be represented by adversary lawyers and other people (women rape victims) are disproportionately likely to be attacked by adversary lawyers, and when the substantive outcomes the law aims at are themselves unjust, it seems unlikely that everyone's rights will be best respected when lawyers ignore these imperfections and care only about their clients.

The philosophical literature on legal ethics has responded to this call, developing arguments about how the adversary system must be moderated to account for complications and imperfections such as the ones just mentioned.⁹⁸ Furthermore, legislatures and courts have joined the movement towards moderation. Official codes of legal ethics, for example, have moved towards requiring lawyers to reveal a client's perjury (even if

ADVERSARIES, *supra* note 29. These sophisticated accounts go beyond the simplistic thought that adversary lawyering is justified because it is always best for everyone and instead consider the adversary system as a fair system of social cooperation to which people might owe allegiance even in cases in which it does not immediately benefit them. *See id.* ch. 6. They also go beyond the simplistic thought that the adversary system might not in the end be best for all and instead develop deontological arguments that point out that because rights are at issue, a successful development of the adversary system defense "will have to do more than simply invoke the balance of consequences," *id.* at 177, but will instead have to be "reasonably acceptable" even to those whom it harms. *Id.* at 258.

97. Quoted in MACMILLAN, *supra* note 5, at 195. For a similarly extreme view, see Freedman, *supra* note 96. Such extreme positions, although out of academic fashion today, display a remarkable pedigree. Samuel Williston, for example, once argued that a lawyer who discovers a damaging fact in the course of litigation has a duty to remain silent even when he knows that the judge's decision will be critically influenced by the fact. SAMUEL WILLISTON, *LIFE AND LAW* 271 (1940).

98. *See generally* APPLBAUM, *ETHICS FOR ADVERSARIES*, *supra* note 29; DAVID LUBAN, *supra* note 96.

they have otherwise continued to impose startlingly strict duties to preserve client confidences more generally).⁹⁹ And legislatures have enacted, and courts have upheld, statutes that protect certain particularly vulnerable witnesses from destructive cross-examination.¹⁰⁰

But although these movements to moderate the adversary system and tame the adversary lawyer involve substantial reforms, they do not amount to a call to eliminate the adversary system altogether. Nearly all the critics agree (at least their positions entail) that *some* version of the adversary system should remain in place. They continue to believe that lawyers should represent particular clients—that is, that lawyers should argue one side of a legal dispute. And they continue to believe that lawyers should, or at any rate in the end must, choose which clients to represent on some basis other than their own personal sense of who ought to win, which means that lawyers will sometimes represent clients, and argue sides, that they believe ought to lose. To reject these positions is to claim in effect that lawyers should sit in judgment over their clients or, in more practical terms, that there should be no lawyers save for judges (or judges' assistants), no lawyers whose role is something other than determining how legal disputes *should* be resolved. This view, as section one illustrated, precisely negates the adversary system (in any form), and it is not prominent in the contemporary academic debate about legal ethics. Instead, the academic debate remains firmly concentrated on the adversary system and firmly centered within the adversary system defense, focusing not on eliminating adversariness altogether, but rather on important questions concerning the form of adversary procedure that in fact impartially protects everyone's rights.

But this focus, important as it is, ignores a second question, which emphasizes the lawyerly vices and asks what legal ethics looks like not in the third- but rather in the first-person—that is, from the point of view of the lawyer whom the adversary system requires to embody these vices. This second question will survive any disposition of the first because, as I have suggested, all (or nearly all) agree that even after the adversary system has been adjusted in response to third-personal impartial criticism,

99. Opinion 287 of the committee on Professional Ethics and Grievance of the American Bar Association, issued in 1953, held that a lawyer who revealed a client's perjury committed "a direct violation of Canon 37" of the 1908 ABA Canons of Professional Responsibility, which required a lawyer to "preserve his client's confidences." Today, by contrast, the reigning interpretation of the 1983 ABA Model Rules of Professional Conduct is that while a lawyer does, under Rule 1.6, have an obligation to keep his client's confidences, "Rule 3.3(b) provides that a lawyer's duty of candor toward the tribunal should be honored even if compliance requires disclosure of confidential information." MODEL RULES OF PROF'L CONDUCT R. 3.3(b) cmt (1983). *See also Nix v. Whiteside*, 475 U.S. 157 (1986) (claiming in dictum that Rule 3.3 and its comment require even a criminal defense lawyer to disclose a client's proposed perjury to the court after all other efforts to prevent the perjury have failed).

100. *See, e.g., Maryland v. Craig*, 497 U.S. 836 (1990) (upholding the constitutionality of a Maryland law protecting victims of child abuse from facing cross-examination in the defendant's physical presence).

so that it actually protects everyone's rights, it will remain genuinely adversary. Lawyers will remain advocates rather than judges, which, as we have seen, is all that is required for them to continue to commit the familiar lawyerly vices. Even in a more mutedly adversary system, lawyers will continue to lie, cheat, and abuse, because they will continue to persuade others of arguments they do not themselves believe, to exploit unfair strategic advantages, and to discredit and attack honorable and truthful opponents. Lawyers practicing in a suitably moderated adversary system will, to be sure, commit these wrongs less freely and less brutally than they do in the (largely) unreconstructed adversary system that exists today. But the fact that legal ethics in an ideal adversary system plays in a muted register does not eliminate the fact that lawyers in such a system continue to do things in their professional capacities that would ordinarily be immoral.

Although the first-personal ethical problems that I have been discussing continue to face lawyers even in an ideal adversary system, they have not received much attention. To put it bluntly, philosophical legal ethics has been too concerned with the third-personal question whether adversary lawyering can possibly impartially protect everyone's rights (and what form such impartially acceptable adversary lawyering must take) to spend much energy considering the first-personal perspective. Philosophical legal ethics has therefore neglected the first-personal question where even the conclusion that (some version of) adversary procedure is impartially justified leaves the lawyer who must, in the name of this procedure, continue to commit what would ordinarily be first-personal wrongs. This is the question I have been preparing to address and to which I now turn.

The charges that lawyers lie, cheat, and abuse do not evaporate simply because the adversary system within which lawyers commit these vices is impartially justified. These charges are in effect charges that good people who, acting as lawyers, render adversary service on behalf of their clients violate and abandon the virtuous ideals and projects according to which they would ordinarily (that is, but for their professional roles) seek in the first-person to regulate their lives. Even if the adversary system is impartially justified, so that lawyers who commit the lawyerly vices can justify their behavior in the third person (including to their victims), this will not yet settle the question of how each particular lawyer should ethically evaluate her own viciousness.

Indeed, the reasons for which the adversary system defense falls short of giving lawyers an adequate first-personal justification of the fact that they lie, cheat, and abuse have been made familiar by the last sections' more general discussion of the relationship between third- and first-personal ethics and, in particular, by the discussion of Jim's case. An ethical person aims, as part of her general ethical ambitions, to be honest, to play fair, and to treat others kindly. A lawyer whose adversary role requires her to

lie, cheat, and abuse must subvert or abandon these ambitions to the demands of the adversary system, just as Jim might abandon or subvert his ambition not to kill to the demands of the dictator. To be sure, the lawyer may recognize (as indeed Jim may recognize) that this abandonment is, impartially speaking, for the best. But this doesn't change the fact that it is distinctively *her* abandonment. When a lawyer performs her duties within the adversary system, *she herself* lies, cheats, and abuses, just as when Jim accepts the dictator's offer, *he himself* kills. If, however, she refuses to perform her adversary duties, then the bad consequences fall most intimately on someone else's account, just as if Jim refuses the dictator's offer, then the result will be that the dictator, *and not Jim*, does the killing. An adversary lawyer who treats the adversary system defense as the last word in legal ethics fails to recognize the distinction between her own aims and actions and other people's aims and actions. She sees herself not as an independent moral agent, but rather as a cog in a causal machine or a draftee in a scheme not of her own making. And a lawyer who sees herself in this way loses her moral integrity, just as Jim lost his integrity. She becomes alienated from her actions and ideals and loses, as Jim lost, the sense of herself as a moral chooser specially responsible for shaping her own life according to her own authoritative, self-originating aims and ambitions.

Participating in the adversary system assaults the good adversary lawyer's integrity. Indeed, this assault is particularly damaging, much more damaging, in fact, than the more dramatic assault the dictator commenced against Jim's integrity. Jim's saving lives requires only a single act of killing, isolated from the rest of his life by the outlandishness of the circumstance that the dictator contrived to put him in. Killing the one requires Jim to abandon his own peculiar ends and become a participant in the scheme in which the dictator plays so large a part. But the circumstances that might persuade Jim that he should abandon his first-personal ends in the service of third-personal morality, and that might cause Jim to lose his integrity, are so far removed from the circumstances of Jim's day-to-day life that Jim might conclude that in more ordinary circumstances it will (almost) always be best for him to remain true to his own ends. Jim's loss of integrity, although real, might remain isolated and contained.¹⁰¹ The adversary lawyer, by contrast, can serve impartial

101. Notice, however, that even this argument can do only limited service on Jim's behalf. Once Jim has accepted the principle that he should sacrifice his integrity when the actions of others make it impartially best for him to do so, then the most he can say for maintaining his integrity in his day-to-day life is that, as it happens, the circumstances do not then require the sacrifice. But this is a shaky foundation indeed. It remains uncertain how often the world will be so arranged that it is impartially best for Jim to abandon his own ends even in ordinary life. And it is uncertain whether a person whose attachment to his own ends hangs by only the thin thread of circumstance can properly be said to have adopted or even articulated any ends as his own at all. He seems, instead, merely to be following rules of thumb, which treat him as an undifferentiated component of the larger world and do not, properly speaking, support his integrity at all.

morality only by habitually abandoning her own ends and performing what would ordinarily be wrongs, so that wrongdoing becomes a familiar part of her life, an element of her (professional) character. Her condition is, in this way, analogous not to Jim's, but rather to another case I imagined only in passing, in which the dictator tells someone he must make a career of killing and torture in order to prevent even more killing and torture. And the adversary lawyer's sacrifice of her integrity, although less dramatic than Jim's, is commensurately more complete.

When, in the course of performing her professional duties, the adversary lawyer lies, cheats, and abuses, she alienates herself from her own actions and ethical ideals and views herself as merely a component part of the scheme of adversary justice; and, in this way, she sacrifices her integrity to the requirements of the adversary system. Furthermore, the adversary system defense does nothing to alleviate the adversary lawyer's loss of integrity; indeed, it does not even address the problem of this loss. The adversary system defense proceeds in the third-person, arguing that in spite of appearances lawyers can in the end justify their professional activities to the world at large. But the adversary lawyer's loss of integrity is a first-personal problem, which arises because even if she can justify her professional activities to the rest of the world, the adversary lawyer must still explain her professional activities to herself so as to make them fit (or at least not clash) with her more general first-personal ethical aims and ideals, her first-personal account of the life of which she wishes to claim authorship. The adversary system defense cannot do this, and cannot protect the adversary lawyer's integrity, because it does not even address the lawyer's point of view.

FIVE

LEGAL ETHICS IN THE FIRST PERSON (THE ETHICS OF ROLE AND THE LAWYERLY VICES)

Academics (especially the philosophically inclined) who write about legal ethics focus, in the third person, on the charge of partiality, which they seek to answer by means of the adversary system defense. But it is also possible to address questions of legal ethics in a very different way, by focusing, in the first person, on the charges involving lawyerly vices, and on answering these charges by means of a very different form of argument, one involving the ethics of role. Of course, if the dependence thesis were true, then this alternate focus would involve a distinction without a difference, and the role-based arguments that the new approach encouraged would have to be seen, finally, as alternatives (or even substitutes) for third-personal impartial moral argument. And indeed, academic legal ethicists, most of whom I have suggested do subscribe (at

least implicitly) to the dependence thesis, have generally understood role-based arguments in just this way, as attempts to evade or pre-empt impartial morality. This has led academics to adopt a skeptical, even scathing, attitude towards role-based approaches to legal ethics.

I begin this section by laying out these positions about the ethics of role—both the construction of the argument and the academic effort to dismiss it. Next, I shall propose that the academic response, although quite sensible as far as it goes, involves a fundamental misunderstanding of the arguments that the role-based approach advances. This misunderstanding most likely arises because academics have implicitly accepted the dependence thesis, whereas the best interpretation of role-based arguments about legal ethics rejects the dependence thesis and understands these arguments as addressed not in the third-person and to the charge of partiality, but rather in the first-person, to the independent charges involving the lawyerly vices. On this understanding, role-based arguments represent efforts to protect the integrity of lawyers against the threat that charges of lawyerly vices continue to pose even after the charge of partiality has been refuted. (In view of this, role-based arguments are, unsurprisingly, most commonly invoked not by academics assessing the practice of law from the outside but by practicing lawyers trying to make peace with their own professional activities.) I shall spend the last half of this section developing an example of how a successful version of these role-based arguments might go. This sets the stage for the final phase of my argument, in which I assess, on their own terms, whether these role-based arguments can possibly succeed at preserving the modern adversary lawyer's integrity.

Practical lawyers may respond to moral criticism of their professional activities by pointing out that when lawyers act in their professional capacity, they act not as ordinary people but instead as *occupants of a role*, and by insisting that this fact is essential to evaluating the things that they do as lawyers. In one not very interesting sense, this is what the adversary system defense has been saying all along. Lawyers perform functions (and are subject to regulations) which, given the moral division of labor, mean that they may do certain things ordinary people may not do (and also, of course, that they have certain duties other people do not have). The things lawyers may do, the adversary system defense says, turn out to include being partial and also lying, cheating, and abusing. But, critically, this conclusion of the adversary system defense is itself part of a larger impartial moral argument; it depends on the fact that everyone's rights are best protected when lawyers may do these things. Understood in this way, remarks about the lawyer's role are just a short-hand for ideas about the moral division of labor and the adversary system defense—they offer a plausible route into these arguments, but they do not do anything more. Most importantly, role-based arguments understood in this limited

way do not provide any means for defending against the charges involving the lawyerly vices when these are understood as being independent of the charge of partiality and therefore as continuing to threaten lawyers' integrity even after the charge of partiality has been defeated.

And indeed, those who engage the ethics of role, who point out that lawyers act not as people *simpliciter* but rather as the occupants of social roles, generally go on to make another rather more substantial claim. They add that the fact that lawyers are acting in role, instead of being merely a part of ordinary moral affairs, in fact *insulates* them from certain forms of ordinary moral evaluation, so that their actions cannot be assessed by the standards of ordinary morality but only in terms of the principles and rules that make up the lawyer's role. At the root of this suggestion lies the idea that because lawyers act in roles, the only accurate descriptions of what they are doing proceed in terms of these roles. Accordingly, the descriptions on which ordinary moral evaluations of the lawyers' actions depend are inadequate, and the moral evaluations in question do not apply. The lawyer simply hasn't done what ordinary morality seeks to evaluate him for doing, and what he has done cannot be described in terms that ordinary morality can evaluate.

This form of argument, which I shall call *role-based redescription*, has for centuries been employed by lawyers to defend their morally questionable actions. For example, David Luban reports the case of the eighteenth-century lawyer James Giffard, who sought to protect his client's illegitimate possession of an estate by commencing a fraudulent murder prosecution against the rightful owner. Although Giffard sought to have the innocent owner falsely convicted and hanged, he refused to accept that he had done anything blameworthy. When Giffard was asked, "[d]id you not apprehend it to be a bad purpose to lay out money to compass the death of another man?," he answered, "I make a distinction between carrying on a prosecution and compassing the death of another man."¹⁰² Giffard claimed that because he had acted in role, only role-based descriptions of his actions could possibly be accurate. In particular, the description that the *person* Giffard had sought to have a man killed was not accurate; the only accurate description being that the *lawyer* Giffard had carried out a prosecution. And the only evaluative question to ask about Giffard's action described in this way is whether he prosecuted well or badly, whether he was good or bad as a lawyer. On Giffard's view, the question whether he had acted morally well or morally badly in the ordinary sense simply doesn't apply.

Modern lawyers also defend their professional activities by precisely analogous, if somewhat more modest, versions of this argument. When

102. *Annesley v. Anglesea*, 17 How. St. Trials 1139, 1248 ff. (1743), cited in LUBAN, *supra* note 96, at 5.

they are subjected to moral criticism for lying, cheating, or abusing, they insist that the criticism does not apply because they simply have not done the things the criticism describes. Instead, lawyers say, their actions must be described in the context of their roles: lawyers who make arguments that they do not themselves believe are advocating rather than lying; lawyers who take advantage of unfair bargaining power are displaying procedural skill rather than cheating; and lawyers who attack a truthful but damaging witness are cross-examining rather than abusing. Furthermore, lawyers insist, these role-based descriptions are the only ones that accurately capture what it is that the lawyers are in fact doing. They argue that the role “lawyer” is logically prior to—one might say constitutive of—the things lawyers do. And they claim, therefore, that there is simply no way to understand cross-examination, for example, except by reference to the adversary judicial process and the lawyer’s role in it, including the requirement that she must seek to undermine the testimony even of truthful hostile witnesses.¹⁰³ In particular, lawyers argue, these activities cannot be accurately understood in ordinary moral terms. Because moral descriptions do not begin from the lawyer’s role, they cannot accurately capture actions that are possible only in terms of the role. Thus, lawyers who focus on the lawyer’s role seem to suggest, the only evaluations one can sensibly apply to lawyers’ role-based activities are lawyerly evaluations. Ordinary moral criticisms that lawyers lie, cheat, and abuse must therefore be misplaced.¹⁰⁴

It is clear at once that this version of the argument involves a very different conception of role from the one that appeared in the adversary system defense. There, the lawyer’s role was merely a placeholder, or stepping-stone, in an argument involving ordinary moral evaluation, a part of the moral division of labor. Here, the lawyer’s role stands on its own bottom, as an independent evaluative scheme that competes with ordinary moral evaluation. This makes it important to ask how the competition between the two schemes should be decided. Can role-based redescription

103. The idea that roles may be logically prior to the actions done within them comes from John Rawls’s idea of practice rules, see John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955), and John Searle’s idea of constitutive rules, see JOHN SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 33-42, 50-53 (1969) and *THE CONSTRUCTION OF SOCIAL REALITY* (1995). For a subtle development of these ideas in the context of legal ethics (to which the account I present in the main text owes a substantial debt), see APPLBAUM, *supra* note 29, at 76 ff.

104. In fact, this argument depends on one further idea, namely that the lawyer’s role does not internalize moral content that makes ordinary morality a part of the lawyer’s role morality. I suspect that the lawyer’s role has in fact incorporated some ordinary moral ideas into its role-morality, but that the two moral views nevertheless remain sufficiently distinct so that this doesn’t undercut the role-based argument. For more on this question, see APPLBAUM, *supra* note 29, at 98 ff.

Here it is worth pointing out that even though the *substance* of the lawyer’s role-morality converges on the *substance* of ordinary morality, the lawyer’s morality may remain distinctively a *role*-morality, because the *authority* of the lawyer’s morality may continue to depend not on ordinary morality, but on the lawyer’s role. Of course, instead of being merely recast (as this note imagines), the lawyer’s role might be eliminated entirely, so that the lawyer’s morality loses both its distinctive substance and its distinctive authority. I take up one important form of this last suggestion later on in the argument.

enable the lawyer successfully to resist ordinary moral ideas, in particular the ordinary moral idea that lawyers display the lawyerly vices—that they lie, cheat, and abuse?

The resolution of this question depends, I propose, on how the idea is understood. On the one hand, the accusations that lawyers lie, cheat, and abuse might be understood, under the dependence thesis, as merely further specifications of the third-personal charge that lawyers are impermissibly partial. In this case, no effort to resist such charges through role-based redescription can possibly succeed. On the other hand, these accusations might be understood, rejecting the dependence thesis, as invoking independent moral ideals that survive the defeat of the charge of partiality and sound in first-personal morality. In this case, efforts at role-based redescription stand a chance of success. I shall consider each possibility in turn.

I have already indicated that academics writing about legal ethics generally accept the dependence thesis. They view the charges involving the lawyerly vices not as independent moral claims but instead as further specifications of the one important moral claim, namely that lawyers are unacceptably partial. (On this view, claims that lawyers lie, cheat, and abuse are just a rhetorical shorthand—or perhaps a rhetorical thrust—developed in connection with the fundamental claim that they promote their clients' interests more extensively than impartiality allows.) Accordingly, academics have taken a dim view of practical lawyers' attempts at role-based redescription, which they have seen as a self-serving and anti-egalitarian effort to escape impartial morality by hiding behind what amounts, in the end, to no more than a club. Applbaum, for example, has said that “the redescriptive strategy seeks to pre-empt [moral] evaluation and bypass the hard work of moral argument.”¹⁰⁵ Unsurprisingly, the academics have concluded that this effort cannot possibly succeed; they have rejected the very idea that a role could ever insulate its occupant from impartial moral evaluation, that impartial morality could ever be replaced by F.H. Bradley's ideal of “my station and its duties.”¹⁰⁶

One reason academic legal ethicists have given for adopting this dismissive stance is that roles are themselves in need of impartial moral justification,¹⁰⁷ justification which cannot possibly proceed in terms of role-based concepts (which would be circular) but must instead be independent of the roles at issue, addressing people not as occupants of roles but as moral agents *simpliciter*. There are some roles, for example torturer, that no moral person may ever accept; and there are other roles

105. *Id.* at 67 ff.

106. F.H. BRADLEY, *ETHICAL STUDIES* ch. 5 (2d ed. 1927). David Luban reports that Bradley borrowed the phrase from the Anglican catechism. LUBAN, *supra* note 96, at 106.

107. LUBAN, *supra* note 96, at 128ff.

that every moral person must renounce whenever they impose certain requirements on him, as a person must renounce being a soldier whenever this role requires that he commit a war crime. Thus it is always a sensible, and furthermore a moral, question to ask of someone whether she ought to be in her role—whether a role that requires her to act as she does is justified. And this question cannot be asked without describing what the role involves not just in the role’s own terms but in terms of third-personal impartial morality. Lawyers cannot employ role-based redescription to avoid the charge of partiality because the very role on which such redescription is based is itself in need of impartial moral justification.

Furthermore, and in the present context also more importantly, role-based redescription’s insistence that only role-based descriptions accurately capture what role-inhabitants are in fact doing is simply mistaken. It is a familiar observation that all actions may be described in many different terms and also that the answer to the question which of an action’s many descriptions is accurate turns on the context in which the action is described. Thus, for example, when a young man asks a woman to marry him and gives her a gemstone ring, he may say he is demonstrating his love, a sociologist who is skeptical of marriage may say that he is marking her as his property, and a tax collector may say that he is transferring wealth. And indeed, the man may be doing all of these things—all three descriptions might be accurate and appropriate answers to certain forms of the question “what is the man doing?” The man will say that he is in fact demonstrating his love; the sociologist will say that the man’s species of sexual love involves a possessory instinct; and the tax collector will say that, love or no love, the woman is richer than she was before. Furthermore, and this matters crucially, people who are interested in one of the three descriptions need not care that this description is rejected by people who are interested in another description. The fact that the young lover refuses to think of the ring in economic terms will not, for example, deter the tax collector from finding that a wealth transfer has taken place.¹⁰⁸

A lawyer who wishes to employ role-based redescription to defeat the charge of partiality must, therefore, explain why people whose primary interest is in third-personal impartial moral evaluation should care about the fact that descriptions of the lawyer’s actions that stand outside the lawyer’s role and proceed in impartial moral terms cannot adequately comprehend these actions’ lawyerliness. But third-personal impartial morality, at least, does not defer to non-moral descriptions in this way—it does not care that its evaluations fail to do justice to the role-related

108. Later on, it will be important that in some circumstances those who are interested in one description may care about how people with other descriptive interests respond to it. The sociologist, for example, cares whether the young lovers view the ring exclusively as a symbol of pure love or also as an indication of future earnings potential.

elements of what lawyers do. This is because impartial morality forms a background that roles can never obscure or, as Williams puts it, because a role is something a person is, but never what he is.¹⁰⁹ Indeed, philosophers attacking role-based redescription have introduced the idea of the persistence of third-personal impartial morality in precisely this connection.¹¹⁰ When impartial morality asks whether a lawyer impermissibly prefers her clients' interests over other people's by making false arguments, exploiting an illegitimate bargaining position, or attacking a hostile witness, it simply doesn't care whether these descriptions miss the fact that the lawyer is zealously advocating, skillfully advising, or cross-examining. These terms may indeed be central to describing accurately what the person is doing as a lawyer, but they do not matter to whether or not the person is impartial.

The central point behind all this, the reason for which lawyers cannot in the end escape the charge of partiality by hiding behind their role, has, I suspect, to do with the *audience* to which lawyers must address their defense against this charge. Role-based redescription cannot succeed as a defense against the charge that lawyers are impermissibly partial because this charge calls for a defense that proceeds in the third-person and is addressed to all people (since all people are entitled to the benefits of impartial treatment). But role-based redescription appeals to values and ideals that only role-inhabitants recognize, and those who do not recognize the values inherent in the lawyer's role will not find it any cost that third-personal impartial moral evaluation and the descriptions it involves ignore these values. Accordingly, lawyers must answer the charge that they are unacceptably partial—whether made nakedly or in the guise of a theory of the (dependent) lawyerly vices—in terms whose currency remains good even outside of the lawyer's role and can be converted into the universal language of third-personal impartial morality, for example, by means of the adversary system defense.

These arguments demonstrate that academic legal ethicists are, in a sense, right to treat efforts to defend lawyers' professional activities by means of role-based redescription dismissively. Efforts to use role-based redescription to defend against the charge that lawyers are impermissibly partial, including efforts to defend against the charge of partiality articulated, under the dependence thesis, in terms of the lawyerly vices, cannot *possibly* succeed. The two structural features of role-based redescription that I have just rehearsed render it unsuited to third-personal impartial moral argument: first, roles are themselves in need of third-person moral justification, something internal-to-role arguments cannot provide; and, second, the concerns that third-person impartial moral

109. See BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 55 (1972).

110. See, e.g., APPLBAUM *supra* note 29, at 91 ff.

argument addresses ensure that the descriptions it employs will persist, regardless of their ability to capture the essence of social roles. In both cases, role-based redescription's fundamental shortcoming involves a mistake of audience. Insofar as the lawyerly vices are understood in terms of third-personal impartial morality, lawyers must address them by means of arguments that appeal to everyone, including people who have no interest in, or sympathy for, the lawyer's role. But this is a service that role-based redescription, by its very nature, cannot ever perform.

As long as the accusations that lawyers lie, cheat, and abuse are understood, through the dependence thesis, as surrogates or even synonyms for the charge of partiality, role-based redescription cannot answer them. But, as I have been suggesting all along, this is not the only sense in which these accusations may be understood; nor, I suspect, is it the only sense in which the lawyers against whom the accusations are directed do understand them. Even after the charge that lawyers are impermissibly partial has been defeated, perhaps by the constellation of arguments that make up the adversary system defense, the accusations involving the lawyerly vices, now playing in the register of *first-personal* morality, retain their sting. Understood in this way, the accusations that lawyers lie, cheat, and abuse insist that even if the lawyer's professional activities are impartially justifiable, they involve a betrayal of the first-personal ends and ideals—involving honesty, fair-play, and kindness—that good people ordinarily make their own. And even if it is impartially best for lawyers to lie, cheat, and abuse—just as it was impartially best for Jim to kill an innocent—doing so involves a betrayal that the good lawyer's integrity cannot, for now-familiar reasons, withstand. This is the movement of thought that the effort at role-based redescription—which, it is now revealed, plays in the first-person rather than in the third—is suited to resist. And the academic attack on role-based redescription, although quite sensible as far as it goes, mostly misses this argument's point.

Does role-based redescription succeed at this more limited, integrity-preserving task? Common experience, and also some of the ideas I have been developing here, suggest that it might. Certainly, role-based redescription is a familiar means by which people avoid first-personal moral criticisms in contexts other than the law. Prizefighters, for example, think of themselves as boxing rather than as assaulting their opponents; and executioners think of themselves as administering (executing) legal punishments rather than as slaughtering defenseless people. Of course, redescriptions like these will never evade the demands of third-personal impartial morality (a lesson that academic legal ethicists quite rightly

insist on driving home¹¹¹), but they are not meant to. Instead, *if* the practices in question can find their third-personal impartial justifications elsewhere (perhaps in a theory of voluntariness—boxing—or in a theory of just punishment—executions),¹¹² then role-based redescrptions can allow good people who inhabit these roles to preserve their integrity.

The effort to preserve integrity by means of role-based redescription proceeds in two stages. First, role occupants replace the first-personal ideals and ambitions that good people ordinarily have—ideals that their roles require them to betray—with new first-personal ideals and ambitions supported by their roles. Prizefighters, for example, replace ideals that condemn physical violence (especially hand-to-hand violence) with ideals that organize and distinguish among kinds of violence by reference to values such as courage, athletic grace, technical skill, and fair-play,¹¹³ and executioners replace ideals that condemn killing the defenseless with ideals of unflinching, dispassionate, and efficient service to the administration of justice.¹¹⁴ And second, role-occupants redescrbe certain of their actions through their roles, using terms that lead these actions to be judged (in the first-person) through role-specific rather than generic first-personal moral ideals. Thus, prizefighters describe their punches as exhibitions of the art of boxing rather than as simple violence; and executioners describe their killings as part of the administration of punishment rather than as attacks on the defenseless.

In this way, role-based redescription allows role-occupants to do what has been judged in the third-person to be impartially acceptable, or indeed required, without having to betray their own ideals and sacrifice their integrity.¹¹⁵ The importance of this service may be seen, once again, by considering the difference between Jim's position and Jane's in my earlier example. Both Jim and Jane are impartially justified in killing (indeed, they are justified on almost identical terms). But Jane's military role gives her access to first-personal ideals that are not available to Jim. And these ideals enable Jane to redescrbe the killing in terms of values she

111. For a skillful application of the argument specifically to the case of executioners, see Arthur Appbaum, *Professional Detachment: The Executioner of Paris*, 109 HARV. L. REV. 458 (1995).

112. It goes without saying that these catch-phrases do not provide the required third-personal justifications, and indeed that none might be available.

113. That these principles of boxing are genuine ethical values, rather than merely excuses for brutality, may be seen from the fact that living up to them involves condemning violence outside the ring and even condemning certain forms of violence within the ring—for example, the blow below the belt. Indeed, boxers may find such forms of violence more abhorrent than do ordinary people, whose ethical responses in these areas are less finely developed.

114. That these are genuine ethical ideals, rather than merely excuses for slaughter, may be seen from the fact that living up to them involves condemning unofficial killings. Indeed, executioners may condemn some killings—for example, private revenge killings—on an unusually subtle moral register, finding them particularly unpalatable.

115. The fact that the actions in question are impartially best means that role-occupants can defend their own allegiance to their roles in the third-person, even if they cannot convince others to accept these roles for themselves.

recognizes and to treat the act as her own without betraying her first-personal moral ends and, consequently, to do what is impartially best without sacrificing her integrity as an agent. Indeed, this difference between Jim and Jane is so significant that it may underwrite a difference between what each of them should, all-things-considered, do.

The lawyer's effort at integrity-preserving role-based redescription, which in its proper form begins only *after* the lawyer's role has received a third-personal impartial moral justification (perhaps by means of the adversary system defense), proceeds along structurally analogous lines. First, lawyers replace certain of the first-personal ideals and ambitions that good people ordinarily have (ideals and ambitions that are incompatible with the demands third-personal impartial morality places on those who occupy the lawyer's role) with specifically lawyerly ideals and ambitions. And second, with these ideals and ambitions in place, lawyers recast their professional activities in terms of the lawyerly role-ethic and the lawyerly virtues this ethic describes. The lawyer's role, if it can be sustained, provides enormously fertile ground for developing the distinctive virtues and characterizations that this effort at integrity-preserving role-based redescription contemplates (much more fertile ground, incidentally, than roles such as prize-fighter or executioner could ever provide).

The two most important of the distinctively lawyerly virtues—the virtues that serve as foundation stones for the lawyer's effort at integrity-preserving role-based redescription—reflect distinctively lawyerly conceptions of *loyalty* on the one hand and *statesmanship* on the other. These are both, of course, familiar ideas, and their familiarity arises not just as a general matter but also in the specific context of legal ethics, so that I could profitably devote many pages simply to elaborating and commenting upon what others have said in this regard.¹¹⁶ Nevertheless, I shall strike out in a new direction, giving lawyerly loyalty and statesmanship new articulations that are specifically designed to fit the peculiar structure of argument I have been developing. Furthermore, my accounts of these virtues will set out from an unlikely starting point, namely John Keats's ideas about the nature of poetic sensibility, in particular his idea of negative capability.¹¹⁷ I shall try to draw an analogy between the lawyer and the poet, an analogy that casts the lawyer's role in our political life in the same mold as the poet's role in our spiritual life.

116. For a familiar elaboration of the idea of lawyerly loyalty that provides friendly competition to the account I shall develop, see Fried, *supra* note 4, at 1071. But note that although Fried does expend some effort on characterizing the lawyer's role, his focus, which remains true to the academic tradition I have been describing, is on finding a third-personal impartial justification for the lawyer's adversary practices.

For the most sophisticated and attractive version of the orthodox account of lawyerly statesmanship, see KRONMAN, *supra* note 1.

117. Keats introduces the term "negative capability" in JOHN KEATS, *Letter to George and Tom Keats*, 21, 27? Dec. 1817, in LETTERS OF JOHN KEATS 43 (Robert Gittings ed., 1970).

This analogy, strange though it may seem,¹¹⁸ is in fact a species of the familiar analogy, most famously developed by Plato in Book IV of *The Republic*, between the state and the soul.¹¹⁹

To begin with, the loyalty that the lawyer provides her client may be analogized to Keats's view of the service the poet provides his subject: just as the poet effaces himself, maintaining "no identity" of his own but instead continually working merely as a medium "filling some other body—The Sun, the Moon, the Sea . . .,"¹²⁰ so also the lawyer effaces herself, maintaining no voice of her own but instead continually working merely as a mouthpiece, speaking for her client.¹²¹ And just as the self-effacing poet enables his otherwise insensible subjects to come alive through him, so also the lawyer enables her otherwise inarticulate clients to speak through her. In this way, the lawyer's role casts the restrained and impersonal (because unreciprocated) loyalty the lawyer offers the client as a characteristically lawyerly virtue: a loyalty based not on reciprocal advantage, but rather on an unusually selfless empathy (something that should not be confused with self-sacrificing generosity). Ordinary good people acting in ordinary circumstances adopt the first-personal moral ambition to hear all sides and consider all points of view but then to reach an all-things-considered judgment, to make up their own minds. But the good lawyer, acting in her professional capacity, adopts the first-personal moral ambition to take her client's part and, steadfastly suppressing her own ego, loyally to change her position as her client requires. The good lawyer aims to see, negatively capable, through her client's eyes.¹²²

In addition, the statesmanship the lawyer provides society may be analogized to Keats's view of the service that the poet provides

118. The analogy is not, as it happens, without precedent. Charles Curtis observed the analogy nearly half a century ago, when he proposed to "[c]ompare the lawyer with the poet whose speech goes to the heart of things," and added, quoting Thoreau, that the lawyer "is that one especially who speaks civilly to Nature as a second person and in some sense is the patron of the world. Though more than any he stands in the midst of Nature, yet more than any he can stand aloof from her." Curtis, *supra* note 22, at 23 (quoting VII WRITING OF HENRY DAVID THOREAU 289 (1906)).

119. Note, however, that where Plato's analogy is between two harmonies—between a state governed by the wise and a soul governed by reason—the analogy that I shall develop is between two disharmonies. The lawyer and the poet both preside, as we shall see, over perpetual conflict. (Plato, of course, had his own views about poets, see PLATO *supra* note 32, at 603(a) ff., and I shall not even try to address the complicated question of the relation between Plato's account of poets and Keats's.)

120. JOHN KEATS, *Letter to Richard Woodhouse, 27 Oct. 1818*, in LETTERS OF JOHN KEATS, *supra* note 117, at 157.

121. As MacMillan says, "[i]n pleading a case, an advocate is not stating his own opinions. It is not part of his business and he has no right to do so." MACMILLAN, *supra* note 5, at 181.

122. The lawyer's self-effacement, her refusal to judge for herself what is all-things-considered best, explains the enormous confidence the client places in his lawyer. "The client often confides to his advocate's hands all he holds dearest—his goals, his reputation, his happiness, and sometimes even his life. Such a trust seems to transcend ordinary relations of debtor and creditor." *Id.* at 182-83. And such a trust depends on the lawyer's negative capability, on the fact that the lawyer will self-effacingly empathize with whatever claims the client places before him, and will press these claims single-mindedly, rather than developing his own personal ideas about how to balance the client's claims against any competing claims that exist.

understanding: just as the poet's capacity "of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason . . . remaining content with half knowledge"¹²³ allows insight, however uncertain, to which the over-bright light of scientific reason leaves us blind, so also the lawyer's capacity of sustaining all sides of an argument, of equivocating without any irritable reaching after a conclusion, of remaining content with persuasion rather than proof, enables a procedural justice, however reserved, to which the over-impassioned flame of substantive right leaves us insensible.¹²⁴ And just as poetic uncertainty preserves the intellectual imagination and promotes accommodation among inconsistent beliefs, so also lawyerly uncertainty preserves the practical imagination and promotes accommodation among incompatible interests. Ordinary good people acting in ordinary circumstances aim to promote the all-things-considered judgments they have themselves formed. But the good lawyer follows Keats's dictum "to make up one's mind about nothing—to let the mind be a thoroughfare for all thoughts. Not a select party."¹²⁵ The good lawyer, acting in her professional capacity, employs this distinctive subtlety of mind to construct compatible possibilities where others see contradictory certainties, to distract attention away from the deepest conflicts, to redirect energies towards shallower matters, and in this way to preserve the accommodation among incompatibles on which every social order rests.¹²⁶

Poets are keepers, guardians, and expositors of our inner sensibilities, of our spiritual relationship to the world around us, because their self-effacement and tolerance of uncertainty allow them to speak on behalf of things in all their variousness, and not merely for themselves. And, similarly, lawyers are guardians of our outer sensibilities, of our material interests and political culture, because their loyalty and statesmanship enable them to act on behalf of their clients' many concerns—and to speak from their clients' many points of view—and not merely on their own behalves. Furthermore, the lawyer can employ this account of the distinctively lawyerly virtues in the second stage of her effort at integrity-preserving role-based redescription. She can recast her professional activities to reveal that charges of lying, cheating, and abusing mis-

123. KEATS, *supra* note 117, at 43.

124. In this feature, my account of negative capability displays some similarity to certain ideas Roberto Unger has developed under the same heading. See, e.g., Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 650-53 (1983).

125. KEATS, *supra* note 117, at 43.

126. Note that the virtues in each of these pairs—the poet's distinctive self-effacement & uncertainty and the lawyer's distinctive loyalty & statesmanship—are intimately related: the poet owes his understanding of multiplicity and mystery to his capacity to see through other bodies rather than only as himself; and the lawyer owes her subtlety of perception and her powers of accommodation to her unusually developed powers of empathy.

describe what lawyers do; that instead of these ordinary vices, the lawyers' professional activities display distinctively lawyerly virtues.

The lawyer can point out that the ordinary person's broad constructions of these vices—according to which all undue deceit involves lying, all unfair manipulation involves cheating, and all unkind harm involves abusing—depend on making all-things-considered substantive judgments and assertions of self (necessary for reaching conclusions about what is undue, unfair, and unjust) that are incompatible with the lawyer's negative capability, with her self-effacement and uncertainty. And in place of these common constructions, the lawyer can erect her own, narrower accounts of lying, cheating, and abusing, accounts that exchange the conclusive judgments of truth, fairness, and kindness on which the ordinary person's judgments rely for ideals about possibility, procedure, and ambiguity that are more compatible with the lawyer's negative capability. Thus, the lawyer will say that she does not lie when she presents an argument she doesn't believe because her role is to be a mouthpiece for articulating what might be true rather than a decision-rule for determining what is true; the lawyer will say that she does not cheat when she promotes an outcome that is substantively unfair because her role is to open the judicial process to all sides rather than to determine which side should finally prevail; and, the lawyer will say that she does not abuse when she attacks meritorious witnesses because her role is to expose the weakness in all positions, even the most deserving.¹²⁷ In this way, the lawyer who has already justified her professional activities in the third-person can turn to her role to develop a set of professional values, and an account of her professional activities that proceeds in terms of these values, that she can endorse in the first-person, thereby preserving her integrity.

Of course, this effort will not be costless to the lawyer. Just as social roles give their occupants access to forms of first-personal moral life from which others are excluded, so also do roles exclude their occupants from the more ordinary forms of first-personal moral life they displace. (Prizefighters, for example, cannot be gentle, executioners cannot be compassionate, and military commanders such as Jane cannot be

127. Of course, even as the lawyer rejects the narrow constraints imposed by ordinary accounts of lying, cheating, and abusing, her own account of these concepts does not entirely do away with constraints of this type. The lawyerly reconstruction of lying, cheating, and abusing is not a veiled invitation to completely unconstrained adversary zeal but instead contains an implicit instruction to avoid such behaviors as would undermine negative capability itself. Thus, the lawyerly account of lying focuses on actions—for example, destroying evidence or suborning perjury—that help clients disguise rather than reveal themselves; the lawyerly account of cheating focuses on actions—for example, artificially inflating litigation costs to keep cases from ever reaching court—that close off rather than open up the judicial process; and, the lawyerly account of abusing focuses on actions—for example efforts to induce juries to ignore witnesses by appealing to racial or sexual prejudice—that close down rather than open up ambiguity. Accordingly, as even this brief footnote makes plain, the lawyerly reconstruction of lying, cheating, and abusing, far from inviting unconstrainedly zealous advocacy, leaves in place substantial limits on the adversary process, albeit limits whose precise contours must be developed on another occasion.

sentimental.) Accordingly, lawyers who achieve negative capability must abandon certain first-personal moral ideals and ambitions (and certain self-understandings) in the process. Thus, the lawyer's self-effacing loyalty, his commitment to speaking his client's part rather than his own, means that "[n]o advocate can be a *sincere* . . . man in the performance of his daily business,"¹²⁸ something that can have remarkably deep, absolutely chilling consequences for the lawyer's character. This is illustrated by the extraordinary story Charles Curtis tells about Arthur Hill, the lawyer who represented Sacco and Vanzetti (taking a case, Curtis says, and not adopting a cause) and who, twenty years later, still refused to express his own opinion about their guilt, telling Curtis, "I have never said, and I cannot say, what I think on the subject because, you see, Charlie, I was their counsel."¹²⁹ And, similarly, the lawyer's statesmanship, his capacity to argue all sides and his allegiance to procedures rather than outcomes, makes him unsuited to moral leadership. The lawyer will, as Bacon says, "desire rather commendation of wit, in being able to hold all arguments, than of judgment in discerning what is true; as if it were a praise to know what might be said and not what should be thought."¹³⁰ And finally, and unsurprisingly, these two shortcomings of the lawyer are themselves related. Because lawyers' experience of life is at once infinitely various and absolutely vicarious—because lawyers' "experience of human affairs is made up of an infinite number of scraps out of other people's lives"—they "see so much of life in one way, too little in another to make safe guides in practical matters."¹³¹ Even as the lawyer's distinctive virtues make him the guardian of our political life, they render him incapable of leading it.

This is, of course, a real cost to the lawyer. But it is in an unsurprising and in any case entirely unavoidable cost. People forming their life plans and first-personal moral ambitions must always choose among incompatible goods, so that the pursuit of some virtues forecloses the pursuit of others and there can never be, as Isaiah Berlin might say, a life without loss.¹³² And at the same time, the development of the role-based

128. MACMILLAN, *supra* note 5, at 1 (emphasis added). The similarity between my account of the lawyer and Keats's account of the poet reappears even at this level of detail, and is so striking as to be worth pointing out again. Thus, just as (I have said) the lawyer cannot be sincere, nor (Keats says) can the poet be: "It is a wretched thing to confess; but it is a very fact that not one word that I [the poet] ever utter can be taken for granted as an opinion growing out of my identical nature—how can it be when I have no nature?" KEATS, *supra* note 120, at 158.

129. Quoted in Curtis, *supra* note 22, at 17.

130. FRANCES BACON, *Essay 32: Of Discourse*, in THE ESSAYS 160 (John Pitcher ed., 1985).

131. F. S. OLIVER, ORDEAL BY BATTLE 201 (1915).

132. Indeed, the thought that this kind of loss is particularly acute in the context of adopting a profession is itself familiar. MacMillan, for example, observes that just as lawyers display role-vices alongside their role-virtues, so also do doctors and clergyman (the two other great professions in MacMillan's England). Thus, the doctor, MacMillan says, must acquire an eerie and unsettling "calmness in the presence of the emergencies and tragedies of life," a calmness that is hard not to connect to indifference. MACMILLAN, *supra* note 5, at 259. And the clergyman, who has "[b]y his

lawyerly virtues performs a great service for the lawyer, a service whose value far outweighs these costs. It gives the lawyer who has already answered the charge of partiality in the third-person (perhaps by means of the adversary system defense) a means of defending against the additional, first-personal charges that lawyers lie, cheat, and abuse. Before this development, the lawyer had no choice but to accept these first-personal charges and to understand his professional activities as betraying his own ideals and sacrificing his integrity in order to do what is impartially best. But now, with the account of his role in place, the lawyer can resist the first-personal charges and preserve his integrity by insisting instead that his professional activities embody his own, distinctively lawyerly first-personal ideals, the ideals I have articulated under the heading “negative capability” and developed by analogy to Keats’s account of the poet.

Furthermore, these ideals and the lawyerly virtues they underwrite are not merely make-shift principles, constructed out of sealing wax and string as part of an improvisational effort to salvage the lawyer’s integrity, an effort one might dismiss as a cheap philosophical trick. Instead, they reflect deep and venerable values, which reveal the lawyer’s role to involve a high calling. On the one hand, the lawyer’s self-effacing loyalty to his client earns him the client’s deepest trust, a trust much deeper than that involved in more ordinary relationships. And on the other hand, the lawyer’s statesmanship enables him to moderate and stabilize social relations which otherwise threaten to break apart. “[L]ife and liveliness,” Stuart Hampshire says, “within the soul and within society, consists in perpetual conflicts between rival impulses and ideals,” so that a steward is required to “preside[] over the hostilities and find[] sufficient compromise to prevent madness in the soul, and civil war or war between peoples.”¹³³ Together with the poet, who is to the individual mind what the lawyer is to political society, the lawyer takes on this stewardship.¹³⁴ These are both lofty ambitions indeed: taken together, they earn the lawyer the status of guardian of our material interests and political culture. Certainly they are substantial enough to make for honorable first-personal moral ambitions, ambitions that preserve the integrity of the lawyer who can sustain them.

Of course, the version of integrity-preserving role-based redescription I have presented here cannot possibly settle any substantive question of legal ethics. I have only *asserted* an account of the lawyer’s role, and it has been an enormously simplified, highly stylized account at that. A

profession . . . circumscribed his freedom, for he has pledged himself to certain beliefs which he cannot question if he is to remain in his profession,” becomes peculiarly susceptible to “dogmatism with its ugly companions, intolerance and persecution, and casuistry, with its accompanying lack of candor.” *Id.* at 260.

133. STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 189 (1989).

134. Hampshire, with a nod to Heraclitus, proposes that “justice” is this steward, *id.*, a suggestion that (uncharacteristically for Hampshire) turns to a concept when what is plainly needed is a way of proceeding and a form of personality.

properly developed account of the lawyer's role, one capable of supporting specific, functionally complete characterizations of the lawyerly virtues and specific redescrptions of lawyers' professional activities in terms of these virtues, involves an order of subtlety completely different from anything I have displayed here. But my aim has been to address not the substance of legal ethics but rather the prior question of its form. And, details aside, I have demonstrated that role-based redescription is the right form of argument for preserving the lawyer's integrity against attacks asserting that even if his behavior can be impartially justified, it remains, as a matter of first-personal morality, vicious. Indeed, the very feature of role-based redescription that renders it formally unsuited to third-personal impartial moral argument, namely the problem of audience (the fact that role-based redescription appeals only to people who have already accepted the role from which it begins) makes it ideally suited to first-personal moral argument. The only person this form of role-based redescription must persuade is the lawyer who employs it to preserve his integrity, and he presumably does accept the role that lies at its core, which is also the role he inhabits.

Still, the fact that role-based redescription has the right form for preserving the lawyer's integrity does not yet mean it can actually succeed at this task. Everything turns on whether the lawyers whose integrity needs preserving actually can develop the unusual, negatively-capable first-personal moral ideals that I have described. Up until now, I have simply assumed that lawyers' roles can sustain the differences between their first-personal ethical ideals and the more ordinary first-personal ideas adopted by good people generally. In the next section of my argument, I consider what a role must be like in order to support its occupants in developing role-based first-personal moral ideals, and I ask whether or not the modern adversary lawyer's role is in fact like this. I conclude that the modern adversary lawyer's role cannot underwrite role-based, distinctively lawyerly first-personal ideals and, finally, suggest that this failure may contribute to the crisis in the contemporary legal profession.

SIX

THE CULTURE OF ROLE (INSULAR AND COSMOPOLITAN ROLES)

I have said a great deal about how role-based redescription can perform the philosophical task of protecting role-occupants from losing their integrity in the face of first-personal ethical criticism, but I have not so far said anything about when role-based redescription is as a practical matter available, about what a role must be like for it to provide this service. What features or characteristics must a role have in order to underwrite its

occupants' replacing their ordinary first-personal ethical ideals and ambitions, and the descriptions of their activities that these support, with new ideas based on the role, thereby resisting certain forms of ordinary first-personal moral criticism? What must a role be like in order to support integrity-preserving role-based redescription?¹³⁵

Although I have not addressed this question directly, the fact that it arises (and also the fact that it is important) should come as no surprise. The account of Jim's position that I presented in sections two and three made it clear that a person cannot just *choose* integrity-preserving redescriptions of his actions based on nothing more than a simple act of individual will. And the contrast between Jim's position and Jane's suggested that cultural support is one important element of integrity-preserving redescription. Jim could not redescribe his killing the one as consistent with his first-personal ideals, whereas Jane could, and one reason for this difference is that certain executory virtues, involving ideals of ruthless but effective command, were culturally familiar to Jane but not to Jim.¹³⁶ It is now time to develop further some of the ideas first raised by the contrast between Jim and Jane and to ask on which side of this contrast the modern lawyer falls.

When a person presents an impartial moral defense of her activities, she must address this defense, in the third-person, to the world at large, but when (after having presented this defense) she engages in integrity-preserving role-based redescription, she may proceed in the first-person, addressing only herself. In order to preserve the integrity of someone whose actions (even though they are impartially justified) violate the first-personal ideals ordinarily adopted by good people, role-based redescription need only persuade that person herself that these ideals do not apply to her peculiar circumstances, circumstances that are more

135. Here I should note that this approach to sustaining the lawyer's negative capability departs significantly from Keats's view of the poet's negative capability. Poetic negative capability, for Keats, had to be achieved out of the poet's inner resources rather than on the back of an external institution such as a social role. This feature of Keats's views no doubt contributed to his belief that, as Kenji Yoshino has pointed out to me, poetic negative capability was a sign of greatness, which most poets fail to achieve. (Lionel Trilling observes that for Keats, negative capability depends, "upon the strength of one's sense of personal identity. Only the self that is certain of its integrity and validity can do without the armor of systematic certainties." Lionel Trilling, *Introduction to THE SELECTED LETTERS OF JOHN KEATS* 29.) Because I am holding out the possibility that even ordinary lawyers might achieve lawyerly negative capability, the suggestion that they might receive external support in this endeavor becomes particularly important to my view.

136. The same point may be made in another way also, by reconsidering Jim's position after changing the ethical culture he is assumed to come from. In my original presentation of Jim's case, I assumed Jim's ethical culture to be very much like our own. But now imagine Jim to come from a very different, much more heroic ethical culture, one which regards death at the hands of an enemy as specially bad, as involving *defeat* or even *insult* and not just tragedy. Such a culture might accord distinctive ethical value to a friendly killing aimed at preventing an unfriendly one, and might make a virtue out of the self-command necessary for committing this type of killing. And if Jim came from such a culture (instead of coming from a culture like ours), he might be able to preserve his integrity even as he killed the one, by describing the killing in terms of this virtue, as belonging to the pursuit (rather than the betrayal) of his own heroic first-personal ethical ideals.

properly approached in terms of distinctive role-based first-personal ideals. Accordingly, role-based redescription's success depends, in effect, on whether or not it is proposed authentically, that is, in good faith. This is, of course, a much more relaxed standard than the strict standard of general persuasiveness by which third-personal efforts to answer charges of partiality are measured. Nevertheless, even this lax standard establishes some limits on what a role must be like in order to underwrite integrity-preserving role-based redescription. The role must, after all, be able to support its occupants' good faith views of their activities. This makes it worth asking what a role must be like in order for its occupants, acting in good faith, to see the world through its terms.

The remarks I have made about the contrast between Jim's position and Jane's begin to develop an answer to this question. In particular, I have said that Jim could not simply *decide* to redescribe his act without reference to killing the one because a bare act of will cannot create a role capable of underwriting role-based redescription. It is a deep feature of human psychology, so deep as almost to be a feature of reason itself, that one cannot simply choose what to believe, including what to believe about the nature of one's own actions.¹³⁷ Good faith belief is, in an important sense, not discretionary; it is compelled by certain features of the circumstance in which it is formed, including, but not limited to, the truth about the object of belief.¹³⁸ Jim's position illustrates that someone who wishes to protect his integrity by appealing to role-based redescription must come to the role—he cannot create the role to order in an effort to make the redescription available. Jane's case—the fact that role-based redescription was available to Jane—illustrates the most natural way for a person to come to a role, namely for the role to have been established by the attitudes, expectations, and activities of many others combining to create a practice or even a culture.¹³⁹

137. This view is connected to the familiar idea that practical reason (reason about what to will and how to act) and theoretical reason (reason about what to believe) are distinct capacities.

138. I do not mean to suggest that the will is never involved in generating good faith beliefs but only that good faith beliefs cannot themselves be the product of a single discrete act of will, a single discrete choice. People constantly choose which questions to pursue and which to avoid, and which evidence to emphasize and which to ignore, and these choices affect what they come to believe. People choose, that is, how to go about forming beliefs. But although these choices influence which beliefs people do in the end form, this is very different from the case the main text contemplates, in which people choose, directly, what to believe. This kind of case almost certainly involves pathologies of belief, as in Aquinas's idea that to learn to believe in God one must first pray to him or, more familiarly, in the common case of the person who refuses to accept a lover's infidelity.

139. I say that this is the most natural way for a person to come to a role, rather than that it is the only way, because the fact that good faith beliefs cannot be chosen does not by itself require good faith role-based redescription to be built upon culturally established roles that have many occupants. A clique or a family or even an individual person could possibly create a role capable of sustaining role-based redescription as long as the role was more than just a tool employed to disguise purely willful redescription. I suspect, however, that in practice very few people have the imagination and force of personality to create a genuine role all on their own. To do so would involve a kind of genius such as appears, for example, in Robert Frost's successful effort to construct and assume the originally foreign and fanciful persona of a stylized New England farmer. These remarks naturally return to Keats's

Of course, the role will involve a *sub*-culture only. The threat to a person's integrity and the need for role-based *re*-description arises, after all, because people do not ordinarily see the person's actions in the terms set out by his role and consequently insist on describing his actions as vicious. Ordinary people will insist that the right way to describe lawyers' professional activities (regardless of their roles) is in ordinary first-personal moral terms, saying that they lie, cheat, and abuse.¹⁴⁰ They will resist the role-based ethical framework on which lawyers try to hang role-based redescrptions—the framework whose foundational ideals, I have suggested, are loyalty & statesmanship, and the negative capability that these involve. Furthermore, ordinary people will resist not just the particular development I have given the lawyerly virtues (which I have always said is provisional only), but also the very ideas at the heart of the lawyer's role-ethic. More specifically, where lawyers give the concepts lying, cheating, and abusing legalistic developments, according to which their application depends narrowly on the desires and expectations of the people involved in an interaction, their ordinary accusers give lying, cheating, and abusing much more expansive and informal treatments, according to which their application depends primarily on the imposition of avoidable harm. And where lawyers give loyalty, statesmanship, and the other negatively-capable role-based virtues that they associate with their profession loose and expansive interpretations, their accusers interpret these virtues narrowly and view them skeptically, insisting that goodness depends not on self-effacing empathy but on purity of heart.

This conflict is, of course, just a reprise of the by-now familiar idea that every action may come under a wide range of descriptions depending on the aims and conceptual schemes adopted by the describer, and that each of these many descriptions may be accurate when assessed from the point of view of someone who has adopted the appropriate conceptual scheme. But the lawyer who seeks to employ role-based redescription to preserve his integrity is in a very different position from the lawyer who must answer the charge of partiality, because he need not address the world at large but may instead proceed in the first-person, addressing only himself. The lawyer who has already satisfied the demands of third-personal impartial morality and who employs role-based redescription to preserve his integrity need not worry that his accusers continue to reject the values and descriptions in terms of which he conceives of his activities as long only as he finds these values and descriptions persuasive himself.

views about the elusiveness of poetic negative capability and its connection to poetic greatness. *See supra* note 135.

140. Applbaum expresses the ordinary person's point of view when he says that "on the question of *moral* deformation, it may be that some socially useful roles require the development of vices and the suppression of virtues, so that good professionals become bad people." APPLBAUM, *supra* note 29, at 66.

But—and this is the crucial point here—the lawyer can successfully employ role-based redescription to defend his integrity only if he continues to find the redescription persuasive even in the face of the fact that it is rejected by others, indeed by most or all others who are not themselves lawyers. If rejection by non-lawyers undermines the lawyer's own belief in role-based redescription, then such redescription cannot save the lawyer's integrity because it will not present him with an alternative to viewing his professional activities as involving a betrayal of his own ends (even if this betrayal is impartially justified).

Accordingly, a role can underwrite integrity-preserving role-based redescription only insofar as it is *authoritatively insular* in matters of first-personal ethics, that is, only insofar as role-occupants, who take their first-personal ethical ideals and ambitions from the role rather than from ordinary morality, are not shaken by the fact that others reject these ethical concepts or even reject the role outright (claiming that the role is simply ethically bankrupt).¹⁴¹ Above all, if a role is to be capable of underwriting integrity-preserving role-based redescription, it may not be *cosmopolitan*. Its occupants must not think of themselves as members of a role-independent ethical culture, as coming under a duty to satisfy the ethical opinions of the world at large. Thus, the very element of roles that rendered them structurally unsuited to defending lawyers (in the third-person) against the accusation of partiality is absolutely central to their capacity to support lawyers' integrity (in the first-person) in the face of the independent charge that they lie, cheat, and abuse.

Is the lawyer's role sufficiently insular to support her integrity? I suspect that many historical roles—for example, clerical, military, and merchant roles—were sufficiently insular; certainly they resisted the incursions of the outside world. These historical roles commonly exercised strict control over who might enter the role and subjected new role-occupants to long periods of apprenticeship, designed to alter their habits and dispositions to conform to the role's standards. Furthermore, historical roles were self-governing, claiming primary (and sometimes even exclusive) authority to resolve disputes amongst role-members: churches, armies, and even guilds, for example, all staffed and operated their own court systems.¹⁴² These features of historical roles suggest that such roles were in fact insular, that role-occupants engaging in first-personal ethical thought neither looked nor felt any need to look beyond their roles, and indeed that even persons outside the roles recognized and respected the

141. This idea further supports my earlier suggestion (made in footnote 139 and the accompanying text) that roles capable of supporting integrity-preserving role-based redescription will generally involve a culture in which many, many people participate. Once again, few individuals or small groups have the psychological fortitude to sustain their insularity against the whole world.

142. See, e.g., WILLIAM MITCHELL, *ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* (1904) (describing the work of merchant courts); BRIAN L. WOODCOCK, *MEDIAEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* (1952) (describing the work of church courts).

roles' distinctive status concerning first-personal ethics.¹⁴³ Taken as a unit, the roles were no doubt accountable, in the third-person, to society in general (although the form of this third-person accountability was as a historical matter, almost certainly not impartial). But the internal affairs of the role may have remained strictly internal, governed by role-bound rather than ordinary ethical standards. Furthermore, I suspect, although I shall assume rather than argue this position here, that the role of lawyer remained similarly insular well into the nineteenth century.¹⁴⁴

But whatever may have been true historically, the modern lawyer's role is not any longer sufficiently insular to sustain integrity-preserving role-based redescription. Over the course of the twentieth century, the key elements of insularity have all been eliminated from the lawyer's role, which has been given a systematically cosmopolitan reconstruction. First, lawyers have lost exclusive control over membership in the legal profession—the license to practice law has been characterized by the Supreme Court as a right, which people may not be deprived of without due process of law.¹⁴⁵ Second, legal education has moved from the apprenticeship to the university. Instead of learning by emulating the practices and habits of mind of established practitioners, young lawyers today learn in classrooms using generally available texts (available to non-lawyers as well as to lawyers) presented by professors (and not practitioners) whose allegiance is to general academic standards of truth

143. Arthur Applbaum's ethical portrait of Charles-Herni Sanson, Executioner of Paris throughout the period of the French Revolution, reveals the extremes of insularity that historical roles sometimes attained. Sanson appears to have lost himself, completely and utterly unselfconsciously, inside his role, accepting no ethical ideas or authority from outside the role. Furthermore, as the fact of Sanson's longevity reveals, this view of Sanson's role-insularity and unaccountability to ordinary morality was widely shared. Sanson executed noblemen at the beginning of the revolution, moderates during the Terror, and, finally, Robespierre himself; but no side ever charged Sanson with the partisan causes his executions served, or indeed treated him as anything other than the technical functionary his role declared him to be. See Applbaum, *supra* note 111.

It is worth noting that this extremely insular account of roles, though it may have been dominant, was not uniformly accepted even in past centuries. Montaigne, for example, quite explicitly proposed a cosmopolitan account of roles, saying "we must play our part [our role] duly, but as the part of a borrowed character. Of the mask and appearance we must not make a real essence, nor of what is foreign what is our very own." MICHEL DE MONTAIGNE, *Of Husbanding Your Will*, in THE COMPLETE ESSAYS OF MONTAIGNE 3 (Donald Frame ed., 1958). Furthermore, Montaigne, ever modern, realized that this account of roles has profoundly disturbing ethical implications for their occupants, much like the implications I have developed here. Thus, Montaigne believed that because "in any government there are necessary offices which are not only abject but also vicious," some citizens must "sacrifice their honor and their conscience . . . for the good of their country." MICHEL DE MONTAIGNE, *Of the Useful and the Honorable*, in THE COMPLETE ESSAYS OF MONTAIGNE, *supra*, at 600.

144. Tocqueville's famous remark that American lawyers had acquired "the tastes and habits of the aristocracy," including a "repugnance to the actions of the multitude" and a "secret contempt of the government of the people," certainly supports this conclusion. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284 (H. Reeve trans., P. Bradley ed., 1945).

145. See *Spevak v. Klein*, 385 U.S. 511 (1967) (holding that lawyers may not be disbarred for exercising their privilege against self-incrimination) and *In re Ruffalo*, 390 U.S. 544 (1968) (holding that lawyers may not be disbarred without procedural due process). These cases are used by Geoffrey Hazard to illustrate the legal profession's loss of self-governance in *The Future of Legal Ethics*, *supra* note 19, at 1255.

rather than to specifically lawyerly ethical ideals. And third, and most importantly, the nature, source, and status of the ethical principles governing lawyer's professional conduct have all changed dramatically (even though the literal content of these principles has not changed very much).¹⁴⁶ In 1908, the American Bar Association articulated, in its Canons of Professional Ethics, general ideals of legal ethics presented, in Geoffrey Hazard's words, as "fraternal admonitions" expressing the point of view of "right thinking lawyers."¹⁴⁷ By 1969, the Canons had been replaced by the ABA's Code of Professional Responsibility, which, although still developed by lawyers behind closed doors, now included specific, legally binding disciplinary rules.¹⁴⁸ And finally, in 1983, the ABA produced the Model Rules of Professional Conduct—specific, legally cognizable rules drafted by a quasi-legislative process involving non-lawyers and sharing, to a great degree, in the authority of ordinary public law.¹⁴⁹

As recently as in the nineteenth century, lawyers controlled membership in their profession, educated and acculturated their own, and governed themselves fraternally according to their own role-based ideals and standards. Today, by contrast, outsiders can force their way into a legal profession that is educated and develops ethical sensibilities according to cosmopolitan academic standards and whose internal governance comes under the cosmopolitan authority of ordinary law. These observations point to the fact that, unlike lawyers in past centuries, modern lawyers can no longer get their first-personal ethical concepts from within the legal profession. Indeed, this shift in the nature of the lawyer's role has become, under a range of related headings, one of the commonplaces of the sociology of contemporary lawyers. Hazard, with a nod to Weber, has

146. I owe this point, as well as many others in the discussion that follows, to Geoffrey Hazard, *The Future of Legal Ethics*, *supra* note 19.

147. *Id.* at 1249-50.

148. *Id.* at 1251.

149. *Id.* at 1253. Hazard adds that more specific regulations governing lawyers in particular areas have undergone similar transformations. Thus the Securities Exchange Commission has challenged the bar's authority to determine the ethical responsibilities of securities lawyers, the treasury has raised similar challenges regarding tax practice, and the courts have imposed legal controls on the practice of corporate and insurance law. *See id.* at 1256-57; *SEC v. National Student Mktg. Corp.*, 457 F. Supp. 682, 712 (D.D.C. 1978) (finding a lawyer who did not prevent his client from violating securities laws guilty of aiding and abetting securities violations); Michael C. Durst, *The Tax Lawyers' Professional Responsibility*, 39 U. FLA. L. REV. 1027 (1987); and *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (subjecting the attorney-client privilege for a corporate client to the case-by-case right of shareholders to show cause that the privilege should not be invoked).

Ted Schneyer has taken issue with this characterization of the shift in the nature of legal ethics, at least in the context of banking law. *See* Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639 (1994). Schneyer emphasizes the fact that even in the new regulatory schema, courts and legislatures remain reluctant to interfere in areas in which they perceive lawyers to have a near monopoly on expertise. But even if Schneyer is right here (and he may well be), his argument misses the point of the account in the main text, namely that the source of *authority* for regulating lawyers has shifted from the bar to the legislature. That a legislature turns to lawyers to determine how its authority should be exercised does not change this fact.

summed up the change by saying that the legal profession has been transformed from a “traditional” institution in which authority rests on “the sanctity of age-old rules” into a “bureaucratic” institution in which the authority of rules depends on their “expediency” or “value-rationality.”¹⁵⁰ Robert Gordon puts the same point slightly differently, saying that in the ethics of lawyering “internalized norms” have become “legalized,” that is, “converted into rules-backed-by-sanctions.”¹⁵¹ And Sol Linowitz finds in this trend a threat to the very survival of the lawyer’s professional role, claiming that “one of the hallmarks of professional status is that professionals discipline themselves.”¹⁵² My own way of putting the point is to say that the lawyer’s role, which was insular, has become cosmopolitan. Lawyers no longer develop their first-personal moral ideals exclusively within their roles, and they can no longer resist the authority of the ordinary first-personal moral concepts employed by the world at large.

SEVEN

LEGAL ETHICS FROM THE LAWYER’S POINT OF VIEW (COSMOPOLITANISM AND THE MODERN LAWYER)

These observations make it possible to return to my initial question and to ask (now that all the components of the problem have been explained and put into place) what it is like (what it is like ethically) to be a modern, cosmopolitan adversary lawyer. Our adversary legal system requires lawyers not only to display ordinarily impermissible partiality in favor of their clients, but also to subordinate their ordinary first-personal ethical ideals of honesty, fair play, and kindness to a professional role in which they must, in some measure or other, lie, cheat, and abuse. Furthermore, although third-personal impartial justifications of the lawyer’s professional activities—for example, the division of labor argument embodied in the adversary system defense—may resolve the ethical problem raised by the lawyer’s partiality, they do not resolve the ethical problems raised by the accusations that lawyers display certain familiar vices, especially when these problems are considered from the lawyers’ own points of view. This is because arguments like the adversary system defense ask lawyers to abandon, in the name of third-personal impartial morality, the first-personal ideals that they admire and the forms of life that they aspire to achieve and instead to become, themselves, liars,

150. HAZARD, *supra* note 19, at 1255 (citing MAX WEBER, *ECONOMY AND SOCIETY* 217, 226 (G. Roth & C. Wittich eds., 1968)).

151. Robert W. Gordon, *Is Law Still a Profession? Was it Ever One? And Does it Matter?* Inaugural Lecture as Johnston Professor of Law, Yale University 10 (Mar. 24, 1998) (manuscript on file with author).

152. SOL M. LINOWITZ, *THE BETRAYED PROFESSION* 140 (1994).

cheats, and abusers. In this way, third-personal justifications of the adversary system, even when they succeed on their own terms, place the integrity of lawyers under threat by asking lawyers to pursue courses of action and adopt forms of life that separate lawyers from their first-personal ambitions and ideals.

Furthermore, although role morality might in principle salvage the lawyer's integrity even in the face of this threat, and although an attractive, distinctively lawyerly role-ethic can be articulated, the increasing cosmopolitanism that modernity has imposed on the lawyer's role renders such a role-ethic culturally unavailable to modern lawyers and in this way secures the assault on their integrity. Put succinctly, modern adversary lawyers are required to subordinate their ordinary ethical ideals to the imperatives of their professional role, but this role has been rendered too insubstantial (too cosmopolitan) to provide lawyers with alternative, role-based ethical ideals that might help them to carry this burden. Modernity has opened up a gap between the demands of third-personal and first-personal ethical justification, and modern lawyers have fallen in.¹⁵³

Nor is there any easy or straightforward solution to the modern adversary lawyer's ethical troubles. Abiding by my self-professed aim at diagnosis rather than cure, I shall leave for another occasion any sustained analysis of the problem of improving the ethical condition of modern lawyers. But it is worth pointing out here, by way of emphasizing the depth of the ethical troubles that I have diagnosed, that each of the two most obvious efforts to improve the ethical circumstances of lawyers fails to come to grips with one of the forces contributing to the ethical dilemma that lawyers face. On the one hand, familiar calls to return the bar to the "professionalism" of past eras—calls, in effect, to recreate the insularity of the lawyer's role—fail to credit the weight of the reasons behind the legal profession's increasing cosmopolitanism.¹⁵⁴ Modernity, quite properly skeptical of social roles wherever they appear, has for good egalitarian

153. The modern adversary lawyer's position is far from unprecedented in this regard. Modernity, acting in the service of egalitarianism, has quite generally dismantled forms of social organization and control that involved insular social roles and replaced these with cosmopolitan social structures (most notably bureaucracies). This process has dramatically expanded the range of application of third-personal impartial morality and has consequently also expanded the class of people who might fall subject to an integrity-threatening conflict between third- and first-personal ethical ideals. (This observation is just one way of giving structure to one of the commonplaces of the communitarian critique of modernity, namely the claim that modern social organization engenders widespread alienation).

Nevertheless, although the threat to modern adversary lawyers' integrity is certainly neither unprecedented nor exceptional, lawyers plausibly do suffer an unusually stark, unusually powerful version of the threat. This is because the third-personal impartial justification of lawyers' professional conduct takes the form (in the adversary system defense) of a division of labor argument. And the division necessarily involved in this argument will inevitably separate lawyers from first-personal ideals that they hold dear.

154. For a typical example of the genre, see LINOWITZ, *supra* note 152.

reasons dismantled most insular social roles and replaced them with impartial cosmopolitan forms of social organization and governance. This is just the practical development of the philosophical skepticism about role-morality that I described in section five. Thick and insular roles are, as Applbaum says, quite generally “suspect to liberals who have no nostalgia for societies divided into castes, estates, or classes, and who fear any retreat from the idea of universal humanity.”¹⁵⁵ Accordingly, any backward-looking attempt to recreate the traditional, insular social role of the lawyer comes (if it comes at all) only at a very great cost. This reveals, finally, that the contemporary lawyer’s ever-increasing cosmopolitanism, although it may be a historical phenomenon, is not merely of fleeting, local, or in any narrow sense contingent concern. Instead, the contemporary lawyer’s cosmopolitanism is inextricably intertwined with the conditions of modern moral and political justification and describes (although of course only in rough outline) the way things will be with lawyers for as long as the broader conditions of modernity persist.

On the other hand, the most prominent alternative to the backward-looking effort to retrieve the lawyer’s traditional role, namely a forward-looking effort to cast a new role for lawyers that is more acceptable to modernity’s egalitarian ideals (a role whose substantive norms fit more naturally with its cosmopolitan form), fails to credit the importance of the virtues associated with the traditional lawyer’s role. The central theme of this forward-looking effort is to replace the lawyer’s negative capability, and the duties of zealous advocacy and client loyalty that are the institutionalized professional expression of this negative capability, with a more affirmative account of legal ethics, according to which lawyers’ professional duties look less to their clients’ aims and more, and more directly, to their own visions of justice. This idea has produced many variations on its central theme, to be sure.¹⁵⁶ But the structural relation to the current argument of this new justice- rather than client-centered version of legal ethics remains stable across these variations. And it is most vividly illustrated by focusing on one of the justice-centered accounts of legal ethics in particular, namely the legal realist account of the lawyer’s professional duties and social role.

Legal realism, I suspect, may profitably be understood to reconstruct first-personal legal ethics in precisely the forward-looking way that I have been describing, specifically by recasting the lawyer as an *administrator* of impartial justice. In this way, the legal realist rejects *tout court* what she sees as the sentimentality of all insular first-personal visions of the lawyer’s role that focus on the lawyer’s distinctive relation to her

155. APPLBAUM, *supra* note 29, at 47.

156. See, e.g., SIMON, THE PRACTICE OF JUSTICE, *supra* note 18; Postema, *Moral Responsibility in Professional Ethics*, *supra* note 4.

particular clients, including my account of lawyerly negative capability. A lawyer who thinks in this realist way understands her professional activities as a means of promoting her own justice-based and impartial—which is to say cosmopolitan—ends. Her distinctive lawyerliness, moreover, comes not from participation in any insular role that might arouse liberal concern, but rather from the fact that she is willing mercilessly to manipulate laws and legal institutions in pursuit of cosmopolitan ends. Her distinctive lawyerliness comes from a surfeit rather than a deficit of cosmopolitanism, as it were.¹⁵⁷ A lawyer who thinks in this way, a realist lawyer, adopts a tame version of Jane's soldierly first-personal ethic, according to which the executory virtues are king and the goal is causal efficacy at doing impartial justice as she sees it: she prides herself on her tactical skills and also on her thick-skinnedness, her disciplined willingness to make sacrifices (including sacrifices of virtues) for the greater good. She therefore finds no threat to her integrity in the fact that the professional means by which she pursues her ends may involve lying, cheating, and abusing. Like Jane, the realist lawyer has excised gentility from her first-personal ideals and is willing (and prides herself on being willing) to adopt brutal means as long as they are necessary to just ends.¹⁵⁸ In this way, the realist lawyer can sustain her integrity even in the face of her professional activities, and she can, as Llewellyn himself said, "merge" her "trade, culture and profession all in one."¹⁵⁹

But while the realist reconstruction of legal ethics (like other justice-rather than client-based accounts) may perhaps save the lawyer's integrity from the trap that I have made it my aim to reveal, the realist efforts involve the legal profession in costs of their own. In particular, although some lawyers—I am thinking specifically of public interest lawyers who (turning Arthur Hill's motives on their head) adopt causes rather than cases—may succeed at using the realist gambit to bridge the gap between first- and third-personal ethical justification, the costs of populating an entire legal system exclusively with legal realists would be enormous. Even if the lawyer's role-ethic of negative capability cannot be sustained in the modern world, the difficulty it answered—the difficulty of regulating the "perpetual conflicts between rival impulses and ideals" that

157. Such a lawyer recites approvingly Llewellyn's "old anecdote of Marshal"—"Judgment for the plaintiff. Mr. Justice Story will furnish the authorities." KARL LLEWELLYN, *THE BRAMBLE BUSH* 33 (1960).

158. Such a lawyer believes, with David Hare's reforming Labour politician, that "[d]oing good is easy. The world needs people who'll fight evil as well. Yes, and that's a much dirtier business, much harder, it needs more discipline, it needs much more skill . . . it means being serious." DAVID HARE, *THE ABSENCE OF WAR* 84 (1993).

159. LLEWELLYN, *supra* note 157, at 153. One of Studs Terkel's interviewees—a lawyer who abandoned a job representing an insurance company to become a cause lawyer in the realist mode—reports a similar idea, saying: "My work and my life, they've become one. No longer am I schizophrenic." STUDS TERKEL, *WORKING* 539 (1972) (reporting statement of Philip da Vinci).

threaten all forms of social order¹⁶⁰—remains. The realist lawyer cannot help the law preside over the conflict because she self-consciously declares herself to be outside of the law and a part of the conflict,¹⁶¹ and this is why modern society has never allowed all, or even most, of its lawyers to act like realists.¹⁶² Instead, modern society entrusts its stability to lawyers whom it instructs to obey client- rather than justice-centered rules of professional ethics. These are the principles referred to in the opening section of my argument, which require lawyers to distance their professional activities from their own ideals and to pursue ends and deploy means on behalf of their clients that they would not pursue or deploy on their own behalves.

These observations, of course, merely repeat the conclusions of the longer argument, presented in section five, that the associated ideas of negative capability and of the procedural virtues underwrite an attractive, and indeed even a *necessary*, distinctively lawyerly role ethic.¹⁶³ But now

160. HAMPSHIRE, *supra* note 133, at 189.

161. Here it is worth recalling an observation I made earlier regarding Jane's first-personal ethic, namely that the integrity of a person who adopts this executory ideal is threatened whenever procedural values require her to accept an outcome she disapproves of. Just as the traditional lawyer, like Jim, finds his integrity threatened when called on to betray his own values in the name of outcomes, so the realist lawyer, like Jane, finds her integrity threatened when called on to betray her own values in the name of procedures.

162. If modern society did allow its lawyers to act like realists, then it would have to establish (and staff) some alternative institution through which to regulate ineliminable social conflict and give each side its due. And that would merely shift, rather than resolve, the ethical difficulties I have been discussing. Furthermore, such alternative institutions may be observed in societies, most notably on the European continent, that have adopted inquisitorial rather than adversary legal procedures, and whose courts therefore aim at efficient and accurate administration rather than at the resolution of social conflict. My own sense is that the most prominent of these alternative institutions is the European political party, which (like the adversary lawyer but unlike its American counterpart) serves its constituents rather than the nation at large. It would be interesting to see whether the moral difficulties I have addressed are repeated in connection with European political parties.

163. It is important to emphasize that, as I say in the main text, the proposition that negative capability and the procedural virtues (whether they inhere in lawyers or elsewhere) are politically necessary is neither an assumption nor a tautology, but rather the conclusion of an argument in political philosophy. I sketched in outline that argument (but I *only* sketched it, and *only* in outline) in section five, but both the proposition and the argument I sketched in its defense are of course contested. William Simon, for example, identifies alternatives to highly adversary views of legal ethics which would reconstruct the legal profession, at least, without any reference to negative capability or any other fundamentally procedural virtue (any virtue that understood procedure as intrinsically legitimating and not just as a rule of thumb adopted in the service of some substantive value). Simon's preferred alternative is, of course, his own "Contextual View" of legal ethics, according to which lawyers should act so as best to promote substantial justice. *See, e.g.*, SIMON, *supra* note 18, at 9. This view is interesting, in the present context, in particular for the completeness of its rejection of my view of the necessity of negative capability and procedural virtue. Whereas the view commonly associated with cause lawyering, for example—the view that lawyers should take sides, and become partisans, in an ongoing political dispute—allows that negative capability and proceduralism might be necessary at some other place in the political system (besides the lawyer's), Simon's Contextual View appears to suppose that politics can do without negative capability and proceduralism altogether. This is entailed by the fact that the Contextual View's command that lawyers promote justice supposes that lawyers can sensibly seek justice without applying negative capability and the procedural virtues, and indeed even without hearing all sides, which is precisely what I argued in section five is impossible. That argument was, of course, tentative and incomplete, and it will necessarily remain so. A more complete argument would, among other things, revisit some of Simon's many examples of how lawyers might reason under the Contextual View in order to reveal (as I think it is possible to do) that this reasoning

that modernity's (justified) hostility to insular roles in general, and to the insularity of the lawyer's role in particular, has been laid bare, the darker side of this necessity is revealed. Thus, although the ethical circumstances of lawyers might well always have been in one way or another tense, the ethical circumstances of modern lawyers are distinctively difficult. The social and political needs that lawyerly negative capability answers remain undiminished, and the institutional arrangement by which lawyers serve these needs through a client- rather than justice-centered code of professional ethics remains in place. But the undoing of the insularity of the lawyer's role over the past century or so has rendered modern adversary lawyers incapable of *adopting* negative capability and the lawyerly virtues as first-personal ideals. Instead, modern adversary lawyers can answer society's demands only by *mimicking* these virtues. And the price of mere mimicry is the lawyer's integrity.

The argument has therefore returned to its very earliest beginning and in particular to my methodological claim about the value of approaching legal ethics not from the philosopher's or policy-maker's but rather from the lawyer's point of view. I suggested that this approach would vindicate itself by explaining why the commonly observed crisis in the legal profession is justified. That justification—which proceeds in terms of the problem of the lawyer's integrity and the (increasing) obstacles raised up against role-based solutions to this problem—is now in place. The legal profession, it turns out, has reason to be in crisis, and this crisis should be deep and deepening. Of course, as I have said from the outset, the philosophical conclusion that contemporary lawyers would be justified in feeling themselves to be in crisis, indeed in a crisis of the most intense and pervasive variety, does not yet demonstrate that such a professional crisis as lawyers in fact feel has philosophical causes, or indeed even that lawyers in fact feel any crisis at all. Thus, on the one hand, the reasons lawyers have for experiencing a professional crisis may be over-determined. Lawyers, especially young lawyers, work increasingly long hours,¹⁶⁴ and, especially in large city firms, increasingly work on tasks far removed—by two or three layers of seniority—from the clients and causes of action that they supposedly serve. These features of law-firm life, which can make practicing law at once stressful and uninteresting, are certainly plausible candidates for explaining any professional

achieves its concrete results only by suppressing ideas and principles that make up one or the other side of the dispute that the contextual view aims to resolve.

164. See GLENDON, *supra* note 1, at 300 (claiming lawyers' billable hours have increased dramatically over the past decade); Patrick Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (making the same claim). See also LORRAINE DUSKY, STILL UNEQUAL 171-72 (1996); Carl T. Burges, *The Death of an Honorable Profession*, 71 IND. L. J. 911 (1996); Nancy D. Holt, *Are Longer Hours Here to Stay?* A.B.A.J., Feb. 1993 at 62, 64; Benjamin Sells, *Stressed-Out Attorneys*, S.F. DAILY J., May 25, 1994 at 3A.

dissatisfaction that lawyers feel. And, on the other hand, the extent and pervasiveness of lawyers' dissatisfaction is, as I have said, itself contestable and contested,¹⁶⁵ and some lawyers will unsurprisingly fail to feel the ethical tensions that my arguments reveal that they should.¹⁶⁶

But although some modern lawyers no doubt feel professionally dissatisfied for banal reasons only, and others manage to avoid feeling dissatisfied at all, these commonplace facts do not reduce the significance of my philosophical argument. Although the connection between philosophical ethics and lived experience is without doubt complicated and perhaps even attenuated, there can be similarly little doubt that it is also pervasive and profound. Quite simply, one cannot imagine Jim's escaping from the dictator's offer unconcerned and unscathed. And once the isomorphism between Jim's circumstance and the circumstances of modern adversary lawyers has been laid bare, an easy and uncomplicated escape for these lawyers becomes similarly incredible. Certainly the indifference of which the New Testament accused the lawyers of an earlier era—"Ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers"¹⁶⁷—is no longer possible. Instead, modern lawyers' literal integrity is at stake and under threat in their professional lives, and the threat endures whether lawyers notice it or not. Finally, and in light of this, the New Testament's view of lawyers is perhaps best replaced by Anthony Kronman's warning: the practice of law is at risk of "los[ing] its status as a calling and degenerat[ing] into a tool with no more inherent moral dignity than a hammer or a gun."¹⁶⁸

TWO CONCLUSIONS

(COMEDY AND TRAGEDY)

My argument, from its methodological beginning (its focus on the lawyer's point of view) right through to its conclusions (concerning integrity, roles, and the costs of cosmopolitanism) has been an exercise in applied philosophical ethics: I have developed abstract, and in some sense quite general, philosophical ideas about ethics, to be sure; but I have developed these ideas in the service of understanding the particular ethical circumstances of modern adversary lawyers and in the shadow of the cultural context in which these lawyers practice their profession.

Both elements of this approach are important. First, concerning what is philosophically possible, the state of play does not look too bad from the lawyer's point of view. The philosophical argument began from the observation that the charge that lawyers lie, cheat, and abuse is

165. See Heinz et. al., *supra* note 1.

166. I say unsurprisingly because the human capacity for suppression is familiar and profound.

167. *Luke* 11:46.

168. KRONMAN, *supra* note 1, at 364.

independent of the charge that they are impermissibly partial and plays in a distinct moral register. Lawyers who seek to defend their professional activities cannot content themselves with arguing, in the third-person, that their preference for their clients is impartially justified, but must, in addition, develop first-personal arguments specifically designed to demonstrate that they do not commit these lawyerly vices. A lawyer who cannot defend her professional activities in the first-person must see herself as betraying her own ethical ideals, and even if she *can* defend her activities in the third-person, her integrity as an agent cannot survive the betrayal.

At the same time, however, the philosophical argument recognized that although role-based redescription cannot insulate lawyers from the requirements of third-personal impartial morality (and philosophers are properly dismissive of the suggestion that it can), role-based redescription has the right *form* to allow lawyers whose activities are impartially justified on other grounds to preserve their integrity in the face of the charges that they lie, cheat, and abuse. Role-based redescription can allow lawyers to recast their professional activities in their own minds, replacing the vices attributed to them by common first-personal morality with role-based, distinctively lawyerly virtues, recasting their professional lives by reference to these virtues and in terms they can endorse, and, in this way, preserving their integrity. Finally, the philosophical argument has displayed a *substantively* attractive version of a distinctively lawyerly role ethic, involving negative capability and the procedural virtues, upon which lawyers might focus their efforts at role-based redescription. As a philosophical matter, where the focus is on what is conceptually possible, the lawyer's ethical position has been vindicated, and my argument has the structure of a comedy.

But the cultural and historical components of my argument, which focus on our actual world rather than on what is possible, cast the modern lawyer's professional activities in a very different light. Modernity has not changed by much the substantive content of the lawyer's professional duties—some version of the adversary system remains and will remain in place, so that lawyers' professional obligations continue to require them to pursue a client- rather than justice-centered professional ethics, and the first-personal charges of lying, cheating, and abusing continue to apply to modern lawyers. Furthermore, this state of affairs is not purely historically contingent, but instead serves the political need for a class of persons who practice negative capability and proceduralism and can therefore assist in sustaining political order in the face of ineliminable social conflict. At the same time, however, modernity has, over the last century or so, systematically altered the form of the lawyer's professional role, eliminating the incidents of insularity—autonomous control over the education, membership, and conduct of the bar—from the lawyer's role

and recasting the role as cosmopolitan. A role that is cosmopolitan in this way cannot sustain distinctive first-personal ideals and ambitions in its occupants and therefore cannot underwrite its occupants' integrity.

Taken together, these developments entail that even as modern society depends on its lawyers to mimic negative capability and proceduralism, it denies modern lawyers the cultural resources that they would need in order to fashion these practices into their own, distinctively lawyerly, first-personal ethical ideals. Instead, modern society leaves its lawyers to defend their professional lives through the third-personal impartial adversary system defense, all the while remaining in the grip of anxiously cosmopolitan first-personal ethical ideals. But this form of reasoning requires lawyers to understand their professional activities as displaying, instead of distinctively lawyerly virtues, ordinary vices, and it therefore requires lawyers to understand themselves as villains and to abandon their integrity. This is not, of course, to deny that modern society has good political reasons for insisting that its lawyers mimic negative capability and good egalitarian reasons for undercutting the lawyer's traditional insular role; nor does it entail that the modern lawyer's villainous self-understanding or her sacrifice of her integrity involves a mistake. But it does reveal that modern lawyers are villains neither by inclination nor by choice, but rather because they have been cast as villains by historical forces beyond their control. And this, of course, is itself just a roundabout, modern way of articulating a thought that less cosmopolitan ages would have given a much more elegant expression, namely that my argument has the form of a tragedy and that lawyers are *tragic* villains.

