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# LAWYERS AND LOYALTY

MICHAEL K. MCCHRYSAL\*

## I. INTRODUCTION

Admonitions to be loyal flow freely in discussions of lawyering. Geoffrey Hazard warns that "[i]n the relationship with a client, the lawyer is required above all to demonstrate loyalty."<sup>1</sup> Charles Wolfram emphasizes: "Whatever may be the models that obtain in other legal cultures, the client-lawyer relationship in the United States is founded on the lawyer's virtually total loyalty to the client and the client's interests."<sup>2</sup>

The concept of loyalty is a fulcrum in the persistent struggle to define the nature of lawyering. William Simon, for example, characterizes the conventional discourse on legal ethics in terms of models that emphasize loyalty to the client versus loyalty to the public.<sup>3</sup> As Simon's characterization suggests, legal ethicists fundamentally disagree about the relation between the lawyer's moral obligations to the client and those to the community, an issue of practical importance because these obligations are potentially in conflict in every representation.<sup>4</sup> The central question in legal ethics, concisely phrased by Charles Fried, is whether "a decent and morally sensitive person can conduct himself according to the traditional conception of professional loyalty and still believe that what he is doing is morally worthwhile."<sup>5</sup>

This question arises because loyalty, as it happens, has a cost. Loyalty influences behavior; it impels one to do what, in the absence of loyalty, one would not do; it changes the moral equation for deciding on a proper course of action.

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1. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 21 (1987).

2. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (1986) (citations omitted).

3. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084-90 (1988).

4. *Id.*

5. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1065 (1976).

To use Monroe Freedman's famous examples, the duty of loyalty has been used to justify the following conduct by a lawyer:

cross-examin[ing] for the purpose of discrediting the reliability or credibility of an adverse witness whom [the lawyer] know[s] to be telling the truth . . . put[ting] a witness on the stand when [the lawyer knows the witness] will commit perjury . . . and [giving a] client legal advice when [the lawyer has] reason to believe that the knowledge [the lawyer gives the client] will tempt [the client] to commit perjury.<sup>6</sup>

Similarly, the duty of loyalty has been used to justify a lawyer's advice to a client on how to avoid the effects of a fair tax or a regulation in the public interest and also to justify a lawyer's assertion of a technical defense to defeat a debt that the client admits she owes.<sup>7</sup>

Loyalty, in other words, has been used to justify deception and unfairness. It can change the moral equation to produce an undesirable result. How, then, does loyalty come to carry such weight? Is it worthy of the weight it is assigned?

Because loyalty is central to the continuing discussions of the lawyer ethos, as recognized by Fried, Simon, and other scholars,<sup>8</sup> an understanding of the lawyer's loyalty obligation to clients is important. A satisfactory explanation of loyalty in lawyering, however, has yet to be developed. Certainly, many lawyers have engaged in illuminating discussions of various loyalty dilemmas

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6. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). Professor Freedman does not express his justification for these assertions by use of the word "loyalty," but cites the duty of "entire devotion to the interest of the client" in Canon 15 of the Canons of Professional Ethics and the Canon 37 duty to "preserve his client's confidences." *Id.* at 1470. Canon 15 also provides that a lawyer "must obey his own conscience and not that of his client." See also John T. Noonan, Jr., *The Purpose of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1491 (1966).

7. Fried, *supra* note 5, at 1063-64.

8. See, e.g., Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1161 (1990) ("The same polls that show that the public disrespects lawyers for their amoral manipulation of the legal system also show that the public values lawyers for their loyalty and partisanship."). As Professor Subin states:

If, however, lawyers can justify such [arguably wrongful] actions on the ground that they are in the service of the lofty principle of loyalty, it may be possible to avoid feelings of guilt, or at least discomfort, over using distasteful means or providing assistance in the achievement of distasteful ends. Loyalty is ennobling . . . .

Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1171 (1985).

and of the implications of more or less expansive duties of loyalty to the client. Usually, however, these discussions offer no significant inquiry into the nature of loyalty itself. Loyalty is simply assumed to be essential, in some measure, both in defining the lawyer-client relation and in assuring that potential clients trust lawyers enough to buy their services.<sup>9</sup>

My purpose is to consider the nature of the lawyer's loyalty obligation itself, drawing on the surprisingly scant treatment of the concept of loyalty by philosophers and legal writers.<sup>10</sup> Loyalty is a complex concept. Whether it carries moral weight and how much weight it should be accorded depend substantially on the circumstances in which the loyalty argument is invoked. For this reason, an understanding of the lawyer's loyalty obligation will not resolve all of the dilemmas created by the loyalty principle. Nevertheless, when loyalty is understood, many of the moral questions it provokes are brought into sharper focus. For example, an understanding of when loyalty claims are valid enables lawyers to avoid certain moral conundrums. This chance for avoidance is possible because loyalty to a client, as a moral obligation of lawyers, is largely contractual in nature—a thesis this Article develops in detail.

Disloyalty can be expressed in various ways and with various goals in mind. In particular, lawyers who are disloyal for reasons of moral compunction—what I call scrupulous disloyalty—can implement a decision to be disloyal by abandoning the client, disclosing client confidences, or even lying to the client. Moreover, scrupulous disloyalty by the lawyer can be for the purpose of either avoiding personal responsibility for the client's wrongful conduct or defeating the client's wrongful plan. The methods and goals of disloyalty have played (and must play) an important role in defining the lawyer's loyalty obligation to a client. Those

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9. The relation between loyalty and trust intuitively seems inescapable, although each may certainly exist without the other. We learn little about loyalty, however, from the bare knowledge that it often engenders trust. Trust, like loyalty, may seem to be a good thing, but this observation falls short of a theory of loyalty. More particularly, we still must discover what loyalty is, whether (or under what conditions) it is good, and what its necessary limitations are, if any.

10. John Ladd ascribes this scant treatment in the philosophical literature to loyalty's historical association with obsolete idealist theory and odious political movements such as Nazism. John Ladd, *Loyalty*, in 5 *THE ENCYCLOPEDIA OF PHILOSOPHY* 97 (Paul Edwards ed., reprint ed. 1972) (1967). Ladd also attributes the lack of philosophical attention to loyalty to the ascendancy of empiricist and utilitarian theory that denies any distinctive status to loyalty because it regards the moral status of loyalty as wholly dependent on its benign or mischievous consequences. *Id.*

dimensions of loyalty are discussed in this Article as well, with particular attention given to the crude solutions to loyalty dilemmas offered by ethics rules.

The crucial question of whether lawyer disloyalty, in various forms, is justifiable in particular contexts involves normative moral considerations that are not, themselves, my immediate concern. My purpose is to explore the set of moral considerations that specifically relate to the lawyer's obligation of loyalty to the client, without determining how those considerations should be balanced against competing moral considerations in particular cases. I presume, as do legal ethics rules,<sup>11</sup> that scrupulous disloyalty to a client is sometimes justified or even required. My hope is to contribute to an understanding of some of the concerns that properly influence lawyers' decisions as to the limits of loyalty owed to a client.

## II. THE NATURE OF LOYALTY

Loyalty, as the term is popularly used, is a mixed bag that includes both petty and profound attachments of wildly varying strengths. The loyalty that moves martyrs is of a far different order than the loyalty that prompts a sports fan to root for a particular team. Still, some characteristics are common to all loyalties. Loyalty is a term of relation; it must know an object. It also describes the relation, implying at least a preference for the object and, perhaps, even a devotion to it. Finally, loyalty requires action; the preference (or devotion) must be expressed through conduct.

Most loyalties are essentially social in two respects. First, the objects of most loyalties can be described in human terms. Loyalty to one's family, for example, is directed to the group of persons who comprise the family. Even loyalty to one's country is, in large measure, loyalty to one's fellow citizens or to the national leaders. Second, loyal action generally has consequences for other people. For example, support for one's country in time of war has consequences for both fellow citizens and citizens of the enemy nation. Even loyalty to a sports team is thought to inspire the athletes being cheered and to discourage their opponents, a phenomenon contributing to the widely recognized "home field advantage."

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11. See *infra* notes 179-207 and accompanying text.

The loyalty of a lawyer toward her client generally is social with respect to both the client being served and the consequences of the representation. Even with respect to corporate clients, the objects of the lawyer's loyalty can be viewed as some or all of the persons who have a stake in the corporation.<sup>12</sup> Moreover, the lawyer's loyal action will have consequences for those persons who are or who stand behind the client and for the client's adversary, if any, as well.

Loyalty becomes a term of moral discourse when it involves social action. Its role in moral discourse has been variously described. Strict utilitarians view loyalty as generating false moral arguments because, for them, the moral status of loyalty depends wholly on its consequences.<sup>13</sup> Others argue that loyalty has independent moral value, but that moral questions cannot be resolved simply by reference to a loyalty obligation.<sup>14</sup> At the opposite extreme from utilitarians, some have suggested that loyalty is an ultimate good or a first principle.<sup>15</sup>

The view that loyalty is a first principle seems embedded in much of the rhetoric of loyalty. Consider Justice Cardozo's famous dicta in *Meinhard v. Salmon*:<sup>16</sup> "the standard of loyalty for those in trust relations is without the fixed divisions of a graduated scale"<sup>17</sup> and "[u]ncompromising rigidity' has been the attitude of courts of equity when petitioned to undermine the 'rule of undivided loyalty' by the 'disintegrating erosion' of particular exceptions."<sup>18</sup> The work of Josiah Royce, the turn-of-the-century idealist philosopher whose work has strongly influenced the philosophical discourse on loyalty as a moral value, displayed this same exuberance: "In loyalty, when loyalty is properly defined, is the fulfillment of the whole moral law."<sup>19</sup>

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12. But see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 109 (criticizing the idea that one can look behind corporate clients to regard the lawyer-corporate client relation as a relation with concrete individuals).

13. See Ladd, *supra* note 10, at 98 (noting that utilitarians and empiricists find that loyalty has no special moral significance); Andrew Oldenquist, *Loyalties*, 79 J. PHIL. 173, 180 (1982) ("Utilitarians would argue that our duty is to Humanity and that doing what benefits your neighborhood or country is wrong if it prevents a greater good for a larger whole.").

14. See MARCIA BARON, *THE MORAL STATUS OF LOYALTY* (1984); Ladd, *supra* note 10, at 98; Oldenquist, *supra* note 13, at 182-87 (advocating a balancing of the degree of good or harm at stake against the strength and breadth of the loyalty at issue).

15. See, e.g., Oldenquist, *supra* note 13, at 180.

16. 164 N.E. 545 (N.Y. 1928).

17. *Id.* at 547.

18. *Id.* at 546 (quoting *Wendt v. Fischer*, 154 N.E. 303, 304 (N.Y. 1926)).

19. JOSIAH ROYCE, *THE PHILOSOPHY OF LOYALTY* 15 (1908).

The powerful loyalty obligation described by Cardozo and Royce is understandable only in relation to the proper objects of such loyalty. Loyalty may be directed to diverse objects, not all of which justify a strong bond of loyalty. The next three sections of this Article discuss the possible objects of loyalty, which can be loosely characterized as consisting of two types: people and social causes. After discussing each of these types of loyalty, I conclude this part of the Article with a consideration of the general role of loyalty in moral decisionmaking.

#### A. *The Objects of Loyalty*

Because loyalty must know an object, we are apt to judge the worthiness of others' loyalties by the objects of their loyalties. Thus, for example, loyalty to a hateful government that wages genocidal war against its citizens is apt to earn our scorn. Given this, how do we explain that loyalty to a spouse who suffers from a dread disease that imposes heavy costs upon her family is apt to win our admiration? The admirable quality lies not in the ill spouse, but in the loyalty toward her. Indeed, if the ill spouse were a ne'er-do-well, not particularly deserving of loyalty, we might consider the loyalty even more admirable. Thus, we can see that the value of loyalty depends upon its object, but it does not depend *solely* upon its object.

Writers have offered two radically different perspectives on the proper objects of loyalty. Writing in the early part of the twentieth century, Royce argued that the only proper objects of loyalty are causes that have social significance.<sup>20</sup> John Ladd and Andrew Oldenquist, writing more recently, see loyalty as more fundamentally a relation between persons.<sup>21</sup> These different views mark an important distinction because loyalty to causes partakes of an ideal, and loyalty to an ideal may be uncompromising. Loyalty to persons, however, partakes of the real far more than of the ideal. Human beings are subject to human frailties, including errors of judgment and egocentrism. Uncompromising loyalty is difficult to defend in the face of such frailties.

The distinction between the objects of loyalty is worth exploring because the strength of the lawyer's loyalty obligation depends upon it. More particularly, if the lawyer's loyalty to a client involves a more idealized form of loyalty, such as loyalty

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20. *Id.* at 20.

21. Ladd, *supra* note 10, at 97-98; Oldenquist, *supra* note 13, at 175-82.

to the adversary system and the importance of the client's personal autonomy (that is, arguably worthy causes), one can then assert the lawyer's loyalty obligation in very powerful terms. Conversely, if loyalty to a client is, fundamentally, loyalty to another person, it is subject to greater moral limitations.

Monroe Freedman's spirited defense of the adversarial system and David Luban's attack upon it, along with Luban's treatment of both the lawyer and the client as independent moral actors, suggest the powerful implications of how the lawyer's loyalty obligation is conceived.<sup>22</sup> Freedman, for example, after defining the loyalty obligation in an idealized way, defends a very expansive confidentiality rule and strong client control of the representation.<sup>23</sup> Luban, on the other hand, who describes the lawyer's loyalty obligation in more personal terms, would significantly limit the confidentiality rule and emphasizes the importance of lawyer decisionmaking in the representation.<sup>24</sup>

It is important, then, to consider the proper objects of loyalty. Royce viewed loyalty as being properly applied only to a worthy cause.<sup>25</sup> For Royce, a worthy cause is something objective, possessing value beyond that which the loyal individual attaches to it. In this respect, worthy causes are somewhat impersonal or superpersonal. On the other hand, for Royce, a worthy cause is never wholly impersonal, for it must be social as well.<sup>26</sup> It must be such as to bind two or more persons—such as members of the family or citizens of the country—into the unity of a single life.<sup>27</sup>

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22. MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

23. FREEDMAN, *supra* note 22, at 87. As Freedman states, "The ideal of lawyer-client trust and confidentiality . . . remains the 'cornerstone of the adversary system and effective assistance of counsel,' and fidelity to that trust is, indeed, 'the glory of our profession.'" *Id.* at 108 (quoting *Linton v. Perrini*, 656 F.2d 207, 212 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982) (holding that trial judge denied a defendant his Sixth Amendment right to choose counsel) and *United States v. Costen*, 38 F. 24 (C.C.D. Colo. 1889) (upholding the disbarment of a lawyer for breaching his client's confidences)). "If a lawyer chooses to represent a client, however, it would be immoral as well as unprofessional for the lawyer, either by concealment or coercion, to deprive the client of lawful rights that the client elects to pursue after appropriate counseling." *Id.*

24. LUBAN, *supra* note 22, at 202-34 (arguing for limits on confidentiality in civil cases and in the representation of large or bureaucratic organizational clients). Luban further suggests "that rules be redrafted to allow lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends." *Id.* at 159.

25. ROYCE, *supra* note 19, at 18-19.

26. *Id.* at 20.

27. *Id.* at 107.

Loyalty, for Royce, has a social aspect to it, for it seeks to unite persons to a common cause.<sup>28</sup> It is never "merely a relation of one individual to other individuals."<sup>29</sup> Loyalty between people is not properly characterized as an attachment to one another but rather as a devotion to the tie that binds them, to their unity, "which is something more than either of them, or even than both of them viewed as distinct individuals."<sup>30</sup> Loyalty to the ill spouse, in Royce's view, would not be to the person of the spouse, but to the tie that binds the couple together, to the marriage and the promises and expectations it entails.<sup>31</sup> Loyalty to another individual cannot give one's life a guiding purpose, which is a central feature of loyalty according to Royce.<sup>32</sup> Only objects that serve the quest for the good are worthy of the life devotion required by Royce's form of loyalty.

The notion of a weak loyalty, one that might be legitimately betrayed, seemed unacceptably paradoxical to Royce.<sup>33</sup> Weak loyalties do involve a paradox: loyalty supposes fidelity to its object; weak loyalty supposes limited fidelity. Limited fidelity may be oxymoronic. Loyalty, by its very nature, could be an absolute term that becomes incoherent, in Cardozo's words, under "the 'disintegrating erosion' of particular exceptions."<sup>34</sup>

Contemporary writers are less troubled by the seeming paradox of limited loyalty and are less inclined to find that loyalty is properly given only to idealized causes. John Ladd,<sup>35</sup> Andrew Oldenquist,<sup>36</sup> and Marcia Baron<sup>37</sup> assert that Royce's prescription of loyalty to causes more accurately describes devotion to ideals, not "loyalty," as the term is commonly used. To these writers, "loyalty" involves a possessive attachment to real objects, usually people or groups of people, not to ideals. Baron explains the distinction:

[L]oyalties involve an ineliminable first-person (possessive) pronoun: "my" (or "our"). This means that I can only be loyal to

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28. *Id.* at 257.

29. *Id.* at 226.

30. *Id.* at 20.

31. *See id.*

32. *Id.* at 42.

33. *Id.* at 30-38.

34. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (quoting *Wendt v. Fischer*, 154 N.E. 303, 304 (N.Y. 1926) (Cardozo, J.)).

35. Ladd, *supra* note 10, at 97.

36. Oldenquist, *supra* note 13, at 175.

37. BARON, *supra* note 14.

*my X*, but more importantly that to be loyal to my *X*, I must think of it under the description "my *X*" rather than merely as an *X* which has the qualities *a*, *b*, and *c*. The reason is that otherwise I am committed to a kind of *X*, not to this *X*. If I am committed to a kind of *X* but not to some particular *X*, then I do not yet have any reason for preferring my *X* to other *X*'s of the same kind. And yet if I am loyal to my *X* (e.g., my country), I *do* . . . prefer it or value it more than other *X*'s of the same kind (e.g., other democratic countries).<sup>38</sup>

Not surprisingly, Ladd, Oldenquist, and Baron reject Royce's assumption that loyalty, to be coherent, must be uncompromising. Ladd asserts that loyalties naturally come into conflicts in which one loyalty must be favored over another.<sup>39</sup> Oldenquist believes that "each loyalty determines obligations only *prima facie*."<sup>40</sup> Baron generally concludes that "claims of loyalty are overridden by duties of justice."<sup>41</sup>

While Royce characterized too narrowly the possible objects of loyalty, the contemporary writers suffer from the same flaw. Loyalty to an ideal aptly describes the conduct of individuals who steadily work in support of a cause but do so through changing friendships and organizational affiliations.<sup>42</sup> Loyalty to a cause may differ from loyalty to people and other real objects, not because one is loyalty and the other is not, but because loyalty to a cause may be uncompromising in a way that loyalty to people cannot be.

### B. *Loyalty to a Cause*

One of the central problems of loyalty to any object is whether it subjugates personal autonomy in an unacceptable way. Stated differently, the problem is whether we can be free (and respon-

38. *Id.* at 4.

39. Ladd, *supra* note 10, at 98.

40. Oldenquist, *supra* note 13, at 182. Oldenquist continues:

As in any case of conflicting normative considerations, sometimes a person will judge his family or national obligations to take precedence over wider societal obligations and sometimes he will not. It depends, among other things, on how much is at stake in each domain, on the possibility of a given action satisfying both loyalties to differing degrees, and on the 'strengths' of the loyalties themselves.

*Id.* at 187.

41. BARON, *supra* note 14, at 25.

42. Che Guevara, Dr. David Livingstone, and Moses Malone are examples that come to mind.

sible) moral actors and be loyal at the same time. Royce recognized that, having decided on a cause deserving of loyalty, "[h]aving surrendered the self to the chosen special cause,"<sup>43</sup> one owes a duty of fidelity to the cause. He likened loyalty to an "ethical marriage"<sup>44</sup> that prohibits one from "turning back from the cause once chosen."<sup>45</sup> To some very great extent, Royce's loyalty locks one into a course of behavior.

Notwithstanding this lock, Royce claimed that "[t]he only way to be practically autonomous is to be freely loyal."<sup>46</sup> Autonomy, in Royce's view, is found in the freedom to choose the causes worthy of one's loyalty. No one can impose upon us a cause to which we are bound to be loyal.<sup>47</sup> Absent the autonomous choice of a cause, the fidelity demanded of loyalty would be impossible. Thus, although loyalty may be a lock, it is a lock we freely place upon ourselves, so that even as we choose our lock, we express our autonomy.

Royce's rejection of the paradox of limited loyalty creates the risk of being morally bound to do, for the sake of loyalty to a cause, apparently immoral acts. A cause, however morally worthy, sometimes may require conduct that seems morally wrong. Royce contemplated this dilemma and devised a solution that brought him right back into the paradox of limited loyalty: "Only a growth in knowledge which makes it evident that the special cause once chosen is an unworthy cause . . . only such a growth in knowledge can absolve from fidelity to the cause once chosen."<sup>48</sup>

If, at any given time, loyalty to a cause seems worthy, it is because our universe of then-known facts seems to make it so. As our knowledge grows, Royce recognized that we may learn facts that require our betrayal of causes to which we had previously been loyal.<sup>49</sup> The close relationship between knowledge and worthy loyalty is apparent. As Royce acknowledged, "[t]ruth seeking and loyalty are therefore essentially the same process of life merely viewed in two different aspects."<sup>50</sup>

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43. ROYCE, *supra* note 19, at 190.

44. *Id.* at 191.

45. *Id.* at 190.

46. *Id.* at 95.

47. *Id.* at 120. "My cause cannot be merely forced upon me. It is I who make it my own. . . . However much the cause may seem to be assigned to me by my social station, I must cooperate in the choice of the cause, before the act of loyalty is complete." *Id.*

48. *Id.* at 191.

49. *Id.*

50. *Id.* at 314.

Even loyalty to an ideal is subject to legitimate betrayal. Loyalty is an imperfect moral force; it is undertaken with limited knowledge, and unanticipated countervailing moral forces sometimes may outweigh it. This observation does not deny the importance of loyalty, especially to a cause well-chosen; it simply recognizes that we have few moral absolutes in this world, and loyalty is not among them.

Monroe Freedman's recent work suggests a Roycian loyalty to causes, upon which Freedman carefully constructs a theory of legal ethics.<sup>51</sup> Freedman's causes are the adversary system<sup>52</sup> and client dignity and autonomy under the law.<sup>53</sup> Out of loyalty to these causes, Freedman develops a powerful duty of loyalty to the client.<sup>54</sup>

Recognizing that loyalty to his causes is an imperfect moral force, Freedman notes several significant limitations to that loyalty. He holds a lawyer morally accountable for the particular clients and causes the lawyer chooses to represent.<sup>55</sup> He also suggests requiring the lawyer "to reveal confidences to the minimum extent necessary to avoid death or serious (*i.e.*, life-threatening) bodily harm."<sup>56</sup> In addition, he implicitly supports prohibitions on threatening criminal charges, making gifts or loans to judges, *ex parte* communications, and some other traditional limits on zealous advocacy.<sup>57</sup>

In sum, Freedman, like Royce, regards loyalty, when properly directed, as a powerful moral force. Even so, Freedman recognizes that limits to its power exist and that in some circumstances, such as when human life is at stake, more powerful moral forces overtake loyalty. People may disagree as to the limits of loyalty, but it does have limits, even when it is most powerfully defined in terms of loyalty to an ideal cause.

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51. FREEDMAN, *supra* note 22.

52. *Id.* at 13-42 ("[T]he available evidence suggests that the adversary system is the method of dispute resolution that is most effective in determining truth, that gives the parties the greatest sense of having received justice, and that is most successful in fulfilling other social goals as well.").

53. *Id.* at 43-64 ("One of the essential values of a just society is respect for the dignity of each member of that society. Essential to each individual's dignity is the free exercise of his autonomy.").

54. *Id.* at 50 ("Once the lawyer has chosen to accept responsibility to represent a client, however, the zealotness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause.").

55. *Id.* at 66-70.

56. *Id.* at 103.

57. *See, e.g., id.* at 82-86.

### C. *Loyalty to People*

If loyalties to ideal causes necessarily admit of legitimate betrayal, then loyalties to people (who rarely approach the ideal) presumably are subject to similar limitations. Therefore, in compelling circumstances and for sufficient cause, we may be morally required to betray our lovers, children, parents, friends, and clients. An extreme illustration will prove the point because if betrayal of those to whom we are most loyal is ever legitimate, then the limited nature of the loyalty obligation to persons is generally established. All that remains is to work out the circumstances in which disloyalty is legitimate.

First, consider an extreme illustration: A parent's adult child suffers from a serious mental illness exhibited by homicidal behavior. The child has killed often, and the parent believes the child will continue killing until she is captured and restrained. The child wants to be free to continue killing. The parent discloses the child's whereabouts to the police, who capture and restrain the child. Has the parent been disloyal to the child? If so, is this disloyalty justifiable?

The parent's conduct certainly seems morally legitimate. The child is committing grave wrongs. Innocent people are suffering at the child's hands, and more suffering will occur unless the parent acts. The parent's moral choice to value the lives of innocent people over the freedom of her child seems unassailable in this context.

Whether the parent's conduct is disloyal is the more perplexing question, particularly because loyalty to people often involves the difficult problem of paternalism. The parent may conclude that she acted for the child's own good, even though the child may not see it that way. If the question of disloyalty is assessed from the child's present perspective, the parent's conduct may appear to be disloyal. If the question is assessed from the parent's paternalistic perspective, the conduct may appear to be loyal; the parent has concluded that she is acting in the child's best interests as well as in the public interest.

Paternalism can be used to justify almost any form of disloyalty to people prompted by moral scruples. If the paternalism excuse works—that is, if loyalty is measured by my judgment of what is best for you rather than by your judgment—legitimate betrayal prompted by moral scruples may be a superfluous concept. This follows from the premise that doing what is morally right is best for each of us in the long run. If conduct is in your best interests, how can it be disloyal?

When paternalistic conduct, viewed as loyal by the actor but disloyal by the object, enforces the actor's moral judgment, the conduct is described best in Roycian terms as being loyal to truth and the good rather than loyal to the person who is the object of the conduct. Thus, the paternalistic loyalty excuse, when employed in the enforcement of the actor's moral judgment, is not loyalty to people but loyalty to a cause, in the Roycian sense. For this reason, the parent who discloses the whereabouts of her mentally ill and dangerous child on the basis of a moral judgment is not being loyal to her child, even if she believes that her child will benefit from her conduct.

This conclusion does not dispose completely of the paternalism problem with loyalty to people. Paternalistic loyalty does not always involve moral scruples. A soccer coach may give the game ball to another child on the team rather than to her own child, who played the best game, not because she wants to be fair, but because she wants to encourage her child to play harder in the next game. In her child's view, the coach may have been disloyal. In the coach's view, she has been loyal to her child by watching out for her long-term interests. In any event, the coach's action is not prompted by moral scruples.

Similarly, the parent of the mentally ill and dangerous child may turn in her child so that the child receives medical or psychological treatment. The parent may not weigh heavily the moral claims of innocent victims in deciding on her course of action. The parent may honestly believe that she is being loyal to her child, not to her sense of right and wrong independent of her child's best interests. Has she, then, acted loyally to her child, even though her child, knowing all the facts, does not believe she has?

Loyalty to people entails the critical interpretive problem of deciding from whose perspective one should view the conduct. Conduct that appears disloyal to the object may be loyal from the perspective of the actor. Moreover, different information possessed by the actor and object may lead to different beliefs concerning the loyalty of the actor's conduct. Loyalty to people is bilateral; it involves both a duty on the actor and a claim by the object.

If loyalty is viewed from the object's perspective and paternalistic standards are disallowed, the actor may confront the dilemma that loyalty to a person requires conduct that the actor believes is not in the person's best interests. Loyalty, as thus defined, may require the actor to harm intentionally the object's

interests, albeit at the object's direction or with her consent. Loyalty in this form, carried to its extreme, requires instantaneous responses to the most recently expressed desire of the object. Not only does this deny the autonomy of the actor, it misaligns the very relationships that ordinarily inspire meaningful loyalty, such as family bonds and friendships.<sup>58</sup>

It would serve no useful purpose to define loyalty exclusively in terms of either the actor's or object's perspective while rejecting the other perspective. The actor's motivation to be loyal is important, as is the object's sense of betrayal. Neither reality can be obliterated by defining loyalty in some particular way. Conduct will be viewed from different perspectives, and, at times, the assessment of whether the conduct is loyal or disloyal will turn more on the perspective than on anything inherent in the conduct.

The problem with paternalistic loyalty is the problem with paternalism generally. Paternalism, which we may define in Duncan Kennedy's terms as overruling a person's choice in their own best interest,<sup>59</sup> denies autonomy and dignity to its object. When loyalty is involved, loyal service to another is transformed by paternalism into control over another.

Paternalistic loyalty is especially troubling in the lawyer's role, in which concern for the autonomy and dignity of the client is the principal justification for that role.<sup>60</sup> Not surprisingly, legal ethics rules generally prohibit the lawyer's paternalistic control of the representation, unless the client is under a disability of some sort, and even then the rules are ambiguous.<sup>61</sup> Thus, ethics

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58. See P.S. Atiyah, *Contract as a Promise: A Theory of Contractual Obligation*, 95 HARV. L. REV. 509, 527 (1981) (book review) ("The proposition that a person is always the best judge of his own interests is a good starting point for laws and institutional arrangements, but as an infallible empirical proposition it is an outrage to human experience.").

59. The definition is taken from Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 572 (1982). Kennedy suggests that his definition may be too limited, that paternalism may also involve forms of intervention in the lives of others that do not consist of "overruling" the other's choices. For purposes of the present discussion of loyalty, however, the definition is adequately descriptive.

60. See, e.g., *infra* notes 96-97 and accompanying text; FREEDMAN, *supra* note 22, at 57; LUBAN, *supra* note 22, at 85-87.

61. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1989) (stating that the client determines the objectives of the representation and should be consulted as to means); *id.* Rule 1.14 (concerning client under a disability). *But see generally* David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (discussing circumstances in which a lawyer can justify her paternalistic actions toward a client).

rules legislate a required response to the problem of paternalistic loyalty, but this does not make the problem go away. Rather, the rules simply direct lawyers to live with the guilt of harming their clients by acceding to their clients' self-destructive wishes.

Let me conclude this discussion of paternalism with three observations: first, moral judgments that override the object's choice for the actor's conduct may be couched in terms of paternalistic loyalty but more plausibly reflect a Roycian loyalty to the good; second, paternalistic actions, which appear disloyal to the object, cannot be categorically defined as either loyal or disloyal because the issue more accurately involves the justification for paternalism than the justification for (dis)loyalty to the person; third, disloyalty to people sometimes has nothing to do with paternalism. An actor may be disloyal for good reasons or bad, which, in any event, may be conceived in nonpaternalistic terms.

Loyalty to people involves a second complication in addition to paternalism: the problem of disparities of information between actor and object. The actor and the object may either agree or disagree as to whether the actor's conduct was loyal to the object. Disagreement as to the actor's (dis)loyalty may result from differences in perspective or information. In some cases of disagreement, if the parties had the same information, they would agree as to the (dis)loyalty of the actor's conduct. By the same token, there may be instances of mistaken agreement, for example, in which the object agrees that the actor's conduct was loyal, but if the object knew all of the facts, she would no longer agree.

Information disparities can cause parties to form a poorly founded—and, perhaps, transient—belief as to the actor's (dis)loyalty. As with paternalism, the problem of information disparities is not, strictly speaking, a loyalty problem, and it is unlikely to be resolved by loyalty theory. More realistically, loyalty theory must wend its way around the problems of paternalism and information disparities without resolving them. Nevertheless, these problems are endemic in loyalties to people.

The lawyer's duty of loyalty to the client is often conceived in terms of loyalty to a person, rather than to a cause or ideal. As Charles Wolfram notes, "[T]he client-lawyer relationship is an intensely personal one,"<sup>62</sup> which explains the general freedom of

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62. WOLFRAM, *supra* note 2, at 147.

lawyers to determine whether to undertake the representation of a particular client. David Luban's criticism of the attorney-client privilege as applied to bureaucratic organizations<sup>63</sup> and his relaxed standards of confidentiality in civil suits<sup>64</sup> also suggest that loyalty to a client can be conceived in highly personal terms.

The strict dichotomy between loyalty to causes and loyalty to people generally dissolves in discussions of the lawyer's loyalty obligation to a client. The lawyer's loyalty springs from both personal and institutional sources, which combine to make the lawyer's loyalty obligation powerful. At the same time, the lawyer's loyalty obligation, like all loyalties, is not so powerful as to override all competing concerns in all cases.

#### *D. Loyalty as an Organizing Principle*

Royce saw loyalty as providing structure and meaning to an active life. Andrew Oldenquist, although rejecting much of Royce's theory, shares Royce's view that loyalty is a pivotal concept in positively shaping the individual and society.<sup>65</sup> Loyalty, in Oldenquist's view, involves shared ownership.<sup>66</sup> If I am loyal to something, I regard it as *mine*, whether it is my family, my clients, my community, my law school, or my country. For most loyalties, others may regard the same object as *theirs*. When numerous people are loyal to the same object, it becomes *ours*, a shift "of the greatest moment"<sup>67</sup> because a community is thereby defined.

Oldenquist sees loyalty as being different from, but sharing features with, both egoism and impersonal morality:

Loyalty is neither egoism nor impersonal morality. It is not self-interested, because people can sacrifice, in the name of loyalty, their happiness and even their lives, and it probably is this element of potential self-sacrifice that makes most people classify motives of loyalty as moral motives. Moreover, reasons of loyalty have a general appeal among members of a society

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63. LUBAN, *supra* note 22, at 232 ("The argument that the privilege is necessary for the sake of human dignity fails because a corporation is not a human being.").

64. *Id.* at 202-05 ("[I]t is absurd . . . to argue that forcing the civil defendant to choose between lying and revealing facts that indicate that she indeed owes compensation affronts her human dignity more than permitting her to preserve her honor by eluding a just judgment affronts the human dignity of her victim.").

65. See Oldenquist, *supra* note 13, at 174-77.

66. See *id.* at 175-76.

67. *Id.* at 176.

whereas a self-interested reason appeals only to the agent. But neither is loyalty impersonal morality, since an obligation of loyalty depends on viewing a thing as one's own. In terms of the logic of the reasons they provide, loyalties are a third category of the normative, distinct from both self-interest and impersonal morality.<sup>68</sup>

Because the object of loyalty is viewed as a noninstrumental good, group loyalties can establish moral communities in which the common good is defined as the flourishing of the object of loyalty, and, consequently, the flourishing of the group that shares the loyalty. Within these moral communities, Oldenquist finds that standards of impersonal morality operate to protect impartially the members, at least in respect to their investment in the loyalty defined common good.<sup>69</sup>

Group loyalties are especially relevant to feelings of alienation, according to Oldenquist.<sup>70</sup> Oldenquist defines alienation in terms of the absence of an expected sense of loyalty.<sup>71</sup> One is alienated from her community, in Oldenquist's view, if she does not regard it as her own and does not much care what happens to it or what it looks like.<sup>72</sup> In this sense, group loyalty is the opposite of alienation, and group loyalties can produce benefits to the individual and the group just as alienation produces corresponding harms to the individual and, potentially, the group. Oldenquist, like Royce, thus finds that certain loyalties, such as to the

68. *Id.*

69. *See id.* Aristotle made a similar point:

*For in every community—between every set of persons who are united by a common objective or a common interest—there is commonly held to be some form of justice—some specific conduct that is just, in that the members have the right to expect such conduct of each other . . . . Popular opinion and popular practice, then, seem to show that friendship and justice are both found between any and every set of persons who are united in a community.*

. . . .  
*. . . [T]he object and the closeness of the community between any set of persons determines the extent and the nature of the rules which govern their conduct toward each other, and we may therefore conclude that it will determine the closeness of the bond of friendship which exists between them. The proverb which says "the property of friends is common" is right: for friendship can only exist between those who are in a community of some sort—i.e. between those who have something in common.*

ARISTOTLE, *NICHOMACHEAN ETHICS*, BOOKS VIII & IX 51-52 (Geoffrey Percival trans., *Aristotle on Friendship* 1940) (emphasis in original, indicating translator's explanation) (footnote omitted).

70. Oldenquist, *supra* note 13, at 187-91.

71. *See id.* at 187-88.

72. *Id.* at 187.

community, should be actively encouraged because of the good they can do.<sup>73</sup>

Oldenquist recognizes that one may hold many group loyalties, which may be thought of as radiating in ever-larger concentric circles from the individual.<sup>74</sup> The point at the center of the circles is oneself, and, moving out, we can locate such loyalties as family, neighborhood, community, country, and species.<sup>75</sup>

Loyalties may come into conflict. An expressway that is good for my community may be bad for my neighborhood, and a tax credit that is bad for my country may be good for my family. In Oldenquist's view, neither wider nor narrower loyalties always takes precedence over the other.<sup>76</sup> This observation is true, in large part, because good and harm come in degrees: it is possible that a small harm to my family will produce a large benefit to my country, but it is equally possible that a small benefit to my country will produce a large harm to my family.<sup>77</sup> Loyalties contribute to moral equations such as these, but they do not always resolve them.<sup>78</sup>

Loyalty, then, can be an organizing principle for moral decisionmaking in the sense that many moral issues often require a choice between loyalties. Choosing between loyalties involves a form of cost-benefit analysis in which the greatest good for the greatest number is a factor, but not the rule.<sup>79</sup> The loyalty dilemmas that lawyers face are often of this sort, in that loyalty to a client may require disloyalty to the lawyer's family, community, or nation. General loyalty principles do not categorically resolve these dilemmas. Rather, loyalty dilemmas must be re-

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73. See *id.* at 191-93. The key to developing community loyalty, according to Oldenquist, is to make the community different, in a positive way, from other communities. Differentiating features that make our community better are essential to our thinking the community is ours. Oldenquist suggests that architecture and public art can help do this.

74. *Id.* at 179-80.

75. *Id.*

76. See *id.* at 179-82.

77. See *id.* at 182.

78. Aristotle noted that "unjust conduct is accounted the more unjust, the closer the tie of friendship which binds the parties together." ARISTOTLE, *supra* note 69, at 52. If "loyalty" is substituted for "friendship" in this observation, it supports Oldenquist's point that wider loyalties do not always take precedence over narrower loyalties, because narrower loyalties, such as to one's family, often involve closer ties. At the same time, Aristotle asserted the preeminence of the "political community," at least in relation to communities "formed for *nothing more than* the pleasure of their members." *Id.* at 55 (emphasis in original, indicating translator's explanation). It seems unlikely that Aristotle would regard the family in this light. See *id.* at 24.

79. Oldenquist, *supra* note 13, at 180-82.

solved through a complex moral assessment, in which loyalty concerns figure prominently but consequences must be considered as well.

Thus, moral questions often are resolved by an assessment of the strength of the loyalties at stake and the good or harm that is done to each of the competing objects of loyalty by acting in a particular way. Loyalties to individual clients and to the institutional role of the lawyer (however that role is defined) are likely to be relatively strong loyalties, but this concept speaks to only one part of the equation. The other part of the equation consists of the consequences of any contemplated course of action.

Monroe Freedman, for example, recognizes both of these dimensions of moral reasoning in concluding that a lawyer should divulge client confidences to the minimum extent necessary to save a human life.<sup>80</sup> For Freedman, although loyalty to a client should be very strong, it is not as strong as his commitment to the sanctity of life, a value that is "of unique importance."<sup>81</sup> He justifies this priority by explaining that "the occasions on which a lawyer's divulgence of a client's confidence is the only thing that stands between human life and death are so rare that a requirement of divulgence would pose no threat to the systemic value of lawyer-client trust."<sup>82</sup>

In other words, Freedman first addresses the moral question of whether loyalty to a client or the sanctity of life deserves the greater commitment. He then assesses the harm that is done to the institutional value of lawyer-client trust by preferring the sanctity of life over loyalty to the client. Freedman's analysis implies that if divulging confidences to save a life would pose a serious "threat to the systemic value of lawyer-client trust,"<sup>83</sup> he might reverse his view on the morality of such divulgence.

Deontological and utilitarian concerns are melded in this form of moral decisionmaking. The values at stake and the consequences of a particular course of action must both be weighed in determining proper conduct. For this reason, categorical preferences for one value (or loyalty) over another are of limited use because they ignore the consequences of proposed conduct in particular circumstances.

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80. FREEDMAN, *supra* note 22, at 102.

81. *Id.*

82. *Id.* at 102-03.

83. *Id.*

### III. REASONS FOR THE LAWYER'S LOYALTY OBLIGATION

Part II of this Article developed certain themes about loyalty. In particular, loyalty is a term of relation, and the possible objects of loyalty are both people and causes. The moral value of loyalty has also been discussed, in a preliminary way, with the conclusion that a theory of uncompromising loyalty that is not subject to legitimate betrayal has not been persuasively advanced. Thus, loyalties may be legitimately betrayed if the proper circumstances are present. Nevertheless, the value of loyalty has been defended, and this defense includes the claim that the value of loyalty depends partially, but not solely, on the value of its object.

This Part of the Article expands upon the justifications for the lawyer's loyalty obligation to clients. The first section adopts a Roycean approach in which lawyers may measure their loyalty obligations in relation to a professional ideal. The second section considers Charles Fried's theory of the lawyer's loyalty obligation, based on a friendship analogy and a concern for client dignity and autonomy. The third section advances a contract theory of the lawyer's loyalty obligation. Finally, the fourth section of this Part addresses certain efficiency concerns underlying the lawyer's loyalty obligation. These discussions lay the groundwork for identifying the limits of the lawyer's loyalty obligation.

#### A. *Loyalty to a Professional Ideal*

The traditional notion of a profession as an occupation pursued "in the spirit of public service"<sup>84</sup> is a social cause, in the sense that Royce uses the term, that could inspire loyalty. Indeed, Royce illustrates the concept of loyalty at work in a profession by describing how a loyal judge would decide a case:

Were I a loyal judge on the bench, whose cause was my official function, then my judicial conscience would be simply my whole ideal as a judge, when this ideal was contrasted with any of my present and narrower views of the situation directly before

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84. See *Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association*, 112 F.R.D. 243, 261 (1986) [hereinafter *Report of the Commission on Professionalism*] (quoting ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES, WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS* 5 (1953)).

me. If, at a given moment, I tended to lay unfair stress upon one side of a controversy that had been brought into my court, my ideal would say: But a judge is impartial. If I were disposed to decide with inadvised haste, the ideal would say: But a judge takes account of the whole law bearing on the case. If I were offered bribes, my judicial conscience would reject them as being once for all ideally intolerable. In order to have such a judicial conscience, I should, of course, have to be able to view my profession as the carrying out of some one purpose, and so as one cause. This purpose I should have learned, of course, from the traditions of the office. But I should have had willingly to adopt these traditions as my own, and to conceive my own life in terms of them, in order to have a judicial conscience of my own.<sup>85</sup>

Similarly, lawyers may be guided by a professional ideal in which loyalties to the client, the legal system, and the community are component parts.

In developing a professional ideal, lawyers can envision a proper balance of the conflicting loyalties to which they will be subject in their work. Ethics rules exemplify a formal effort to do just that, and much legal scholarship is, of course, properly devoted to the same purpose.

Thus, a professional ideal can help us identify our loyalties as lawyers and gauge the strength of each such loyalty. A professional ideal can even propose certain moral priorities, such as whether the preservation of life or the discovery of truth is generally more important than loyalty to a client. The difficulty with formulations of any professional ideal, however, is that the balance of loyalties cannot properly be determined, once and for all, without considering the consequences of conduct in particular circumstances. Because good and bad come in degrees, we cannot know how a conflict in loyalties should be resolved without knowing the circumstances in which we must prefer one loyalty over another. This is not because consequences finally determine conflicts of loyalties, but because consequences influence the determination, along with the relative strengths of the loyalties in conflict.

Monroe Freedman's conclusion that the preservation of life is more important than loyalty to a client<sup>86</sup> provides a useful illustration. If any categorical moral priority makes sense, it is the

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85. ROYCE, *supra* note 19, at 174-75.

86. See *supra* notes 80-83 and accompanying text.

value of preserving human life. From this premise, Freedman concludes that client confidences should be divulged to the minimum extent necessary to prevent a death, even though the death will not result from criminal conduct by the client.<sup>87</sup>

Suppose that, to prevent a death, the lawyer must put her client's life at risk. Suppose further that the client is an undercover police officer who discloses to her lawyer that a criminal group she infiltrated planned to assassinate an extremely dangerous member of the group. Should the lawyer disclose this plan knowing that the client will inescapably be placed at serious risk if the disclosure is made? What if the consequences of the disclosure are not that the client's life will be placed at risk but that the undercover assignment will be blown and the chance for building a case against a group of deadly criminals will be lost?

For me, these difficult questions lead to this conclusion: even the most clear-cut moral priorities can lose their force in unanticipated and extraordinary circumstances. The purpose of this conclusion is not to deny the worth of establishing moral priorities when constructing a professional ideal; its purpose is only to recognize the limits of the enterprise.

David Luban implicitly recognizes the limited usefulness of priorities for moral values when he proposed categorical restrictions on the partisan zeal of lawyers, including restrictions:

- (1) on modes of practice that inflict morally unjustifiable damage on other people, especially innocent people;
- (2) on deceit, i.e., actions that obscure truths or that lure people into doing business under misapprehensions, even if these are legally permissible;
- (3) on manipulations of morally defensible law to achieve outcomes that negate its generality or violate its spirit; and, in general,
- (4) on the pursuit of substantively unjust results.<sup>88</sup>

These restrictions are morally sensible in the abstract and suggest moral concerns that are entitled to great weight in a lawyer's choice of professional action. The moral weight of the loyalty obligation is presumptively inferior, in Luban's view, to the weight of the moral concerns expressed in these restrictions.<sup>89</sup> Luban recognizes, however, that these moral priorities establish

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87. FREEDMAN, *supra* note 22, at 102-03.

88. LUBAN, *supra* note 22, at 157.

89. *Id.*

only presumptions; he recognizes that when an "extraordinary justification" exists, a lawyer may legitimately act loyally toward the client and disregard the suggested restriction.<sup>90</sup>

Luban's caution in offering moral guidance for all time and in all circumstances is well-placed. Unanticipated circumstances can change the moral equation. Again, this caution should not lead to a blanket condemnation of the prescriptive moral principles advanced by a professional ideal but only to a recognition of their limitations.

### *B. Loyalty and Client Autonomy*

If generalities captured in a professional ideal cannot resolve adequately all of the loyalty dilemmas that lawyers may confront, perhaps a better understanding of the source of loyalty within the lawyer-client relation can. This approach, in any event, was Charles Fried's project. Rather than proceeding from the standard of the ideal professional, Fried adopts the standard of the good man, not the saint, to measure professional conduct. Fried's standard is "moral sufficiency,"<sup>91</sup> not moral perfection. For the person whose conduct is morally sufficient, Fried asserts that one should neither condemn nor compel another to do more, even though much more could be done.<sup>92</sup>

Fried's scaled-down version of moral conduct permits him to establish norms of conduct that, within prescribed limits, do not allow exceptions. Fried's norms, which he characterized as "categorical norms" that entail "limited absolutism,"<sup>93</sup> absolutely forbid acts that intentionally produce certain specified wrongs.<sup>94</sup> Fried defines "intention" to include only results "chosen either as one's ultimate end or as one's means to that end."<sup>95</sup>

With this formula of limited absolutes to guide him,<sup>96</sup> Fried advances a theory of the lawyer's duty of loyalty to a client that

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90. *Id.*

91. CHARLES FRIED, *RIGHT AND WRONG* 194 (1978).

92. *Id.*

93. *Id.* at 9-13.

94. Among the wrongs Fried identifies are physically harming and lying to another. Fried carefully outlines the contours of how and when such conduct is wrong. *Id.*

95. *Id.* at 22.

96. The use of the term "absolute" has its problems, although it is the term that Fried uses. The categories of wrongs to which Fried's absolute prohibitions attach have fuzzy edges, as do the requirements of action and intent. Moreover, the absolute prohibitions do not apply in catastrophic or trivial situations, adding more fuzzy edges. The paradox of absolutes with fuzzy edges is inherent in all deontological regimes.

justifies the knowing assistance of a lawyer in some legal, but morally wrongful, conduct by the client. Stated differently, Fried concludes that a lawyer may be morally required, in certain circumstances, to assist in a client's intentional commission of a moral wrong. Thus, Fried advances a loyalty theory that values loyalty independently, apart from the moral consequences of the lawyer's conduct.

Fried reaches this expansive duty of loyalty to the client by pursuing the premise that, in a reasonably just society, an individual has rights, among which is "the right not to be subjected to legal constraints except in accordance with duly enacted and applied rules of law."<sup>97</sup> Moreover, the existence of these rights implies, to Fried, an entitlement for individuals "to learn what their rights are and to assert those rights."<sup>98</sup> If it is morally good that people have rights and the autonomy to assert them, then it is morally good, in Fried's view, for the lawyer to advise the client of her rights and assist her in asserting them. If the client is morally wrong in asserting particular legal rights in particular circumstances, that is not the lawyer's responsibility. The lawyer has intended only to assist her client in exercising her rights, which is morally good; the lawyer has not intended, in the sense that Fried defines that term, the harmful consequences that follow.

Fried distinguishes between "wrongs that a reasonably just legal system permits to be worked by its rules and wrongs which the lawyer commits himself."<sup>99</sup> The former wrongs are those that the law not only permits "but specifies the details by which the result is reached. Your conduct as a lawyer is efficacious only insofar as legal institutions have created the occasion for it. What you do is not personal; it is a formal, legally defined act."<sup>100</sup>

Wrongs of this sort include "using the defense that a contract was not put in writing or that the suit was brought too late and so defeating what you know to be a just claim against your client."<sup>101</sup> Similarly, the lawyer acting on the client's behalf may "pursue socially noxious schemes, foreclose the mortgages of widows or orphans, or assist in the avoidance of just punishment,"<sup>102</sup> again, in Fried's view, without acting immorally.

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97. FRIED, *supra* note 91, at 181.

98. *Id.* at 182.

99. *Id.* at 191.

100. *Id.* at 192.

101. *Id.*

102. *Id.* at 191.

Conversely, wrongs for which Fried does not absolve the lawyer involve offenses against the victim's integrity as a rational moral being. More particularly, these offenses are not peculiarly permitted by law, so that the moral quality of such acts "obtains without and within the context of law."<sup>103</sup> Wrongs of this sort include telling lies and humiliating witnesses.<sup>104</sup> Fried asserts that these are wrongs that cannot be done solely in a representative capacity: "[I]t is like stabbing someone in the back 'just' in a representative capacity. The injury and betrayal are not worked by the legal process, but by an act which is generally harmful quite apart from the legal context in which it occurs."<sup>105</sup>

Fried distinguishes, therefore, "between the lawyer's own wrong and the wrong of the system on which the client chooses to rely."<sup>106</sup> He concludes that: "[t]he lawyer is not morally entitled, therefore, to engage his own person in doing personal harm to another, though he may work the system for his client even if the system then works injustice."<sup>107</sup> Fried does not merely absolve the lawyer for assisting in the client's intentional wrong pursuant to a legal right; he requires the lawyer to provide this assistance, if the lawyer undertook to represent the client. The assistance given the wrongdoing client is demanded of the lawyer by an "iron requirement of loyalty."<sup>108</sup> Fried does not expand upon the moral foundations of the requirement of loyalty, except to describe the client as a limited-purpose friend who is "entitled to all the special consideration *within* the limits of the relationship which we accord to a friend or loved one."<sup>109</sup>

Fried's loyalty theory, then, depends in part upon an analogy between the roles of lawyer and friend. Through his friendship analogy, he transforms permissible conduct in aid of a client into required conduct. Fried offers this "classic definition of friendship": "he acts in your interests, not his own; or rather he adopts your interests as his own."<sup>110</sup> Having once undertaken this strong bond of limited friendship, the lawyer is captive to the client's interests, for "it is the client's needs which hold the reins—legally and morally."<sup>111</sup>

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103. *Id.* at 192.

104. *Id.*

105. *Id.* at 192-93.

106. *Id.* at 192.

107. *Id.* at 193.

108. *Id.* at 168.

109. Fried, *supra* note 5, at 1071.

110. *Id.*

111. *Id.*

Fried does not explore the nature of the loyalty duty in friendships. In fact, he displays some ambivalence as to the scope of the duty. He describes the duty, at one point, as an "iron requirement"<sup>112</sup> without which there is in fact nothing to the relation beyond what the instantaneous application of justice and efficiency requires.<sup>113</sup> Yet, at other points, Fried speaks more modestly of loyalty as giving a "kind of preference, special consideration, or extra measure of care"<sup>114</sup> to the friend.

His friendship analogy to the lawyer's loyalty obligation to a client is flawed by the extravagant claim that he makes in his "classic definition of friendship." Does friendship really involve adopting the friend's interests as one's own, even when the friend defines her interest as requiring the commission of a moral wrong? Do we believe that our friends' interests are ever meaningfully served by their commission of moral wrongs? It may be paternalistic, but it seems more plausible that friends are most loyal by steering one another toward fulfillment of their moral obligations, not breach of them, and certainly not by assisting them in their wrongdoing.

Fried's analogy of the lawyer-client relation to friendship does not work. Fried attempts to strengthen the lawyer-client bond by analogizing it to friendship, but then he calls upon lawyers to do for clients what they would not do for real friends—actively assist them in committing moral wrongs. We do not actively assist a friend in committing a moral wrong because we are loyal to the friend. We know the friend would be diminished by the commission of such acts. Now, to be sure, if the friend proceeds to commit the wrong without our help, we remain loyal to the friend. We do not end our friendship because a friend has done something wrong. We steer our friend toward moral conduct, and when we fail, we stick with our friend, focusing on her goodness, and begin the process once again.<sup>115</sup>

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112. FRIED, *supra* note 91, at 168.

113. *Id.* at 174.

114. Fried, *supra* note 5, at 1068-82.

115. Percival attributes a similar point to Aristotle, asserting that when our friends do evil things, "[o]ur highest duty, then, is to continue the friendship in the hope of reforming our friends." ARISTOTLE, *supra* note 69, at 103 (emphasis in original, indicating translator's explanation). Aristotle was speaking here of the "friendship between good men" rather than friendship based on utility, which Aristotle did not regard as friendship in the true sense. *Id.* bk. VIII, at 23. To the extent that Fried's friendship analogy has merit, the friendship between a lawyer and client would be based on utility.

For other critiques of Fried's friendship analogy, see Edward Dauer & Arthur Allen Leff, *Correspondence*, 86 YALE L.J. 573 (1977); Alan Donagan, *Justifying Legal Practice in the Adversary System*, in DAVID LUBAN, *THE GOOD LAWYER* (1983); William H. Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV. 29.

For the lawyer, this continuing loyalty of friendship often does not exist. Remember, Fried defends the lawyer who assists a client in committing a moral wrong through enforcement of a legal right. After the wrong is done, the lawyer's work generally is done as well. The continuing loyalty of the real friend is not required of the lawyer, except within the narrow concerns of confidentiality and conflict of interests. Indeed, consistent with Fried's theory and ethics rules, the lawyer is free to take cases against the former client, even to assist some new client in committing a moral wrong against the former client, as long as it is done in an unrelated matter for another legally entitled client and involves no breach of confidences. What kind of friendship is this?

The option of turning on the former client when the representation is ended is approved by ethics rules<sup>116</sup> and, apparently, by Fried. Fried does not morally limit the lawyer's choice of clients. According to Fried, a client may be accepted for whatever reason: "idealism, greed, curiosity, love of luxury, love of travel, a need for adventure or repose."<sup>117</sup>

Thus, Fried proposes a strong theory of loyalty to the client that absolutely protects the lawyer's autonomy in choosing clients; categorically enslaves the lawyer to protect the client's autonomy; then finally permits the lawyer to attack that same client in some new, unrelated matter. The friendship analogy and the loyalty principle derived from it simply do not wash.

Fried's loyalty theory is ostensibly bolstered, but ultimately undercut, by his friendship analogy. Nevertheless, his loyalty theory is also justified on other grounds. Fried's theory of right and wrong conduct as applied to the lawyer could still be a viable basis for a loyalty theory. The aspect of Fried's loyalty theory that *requires* the lawyer's assistance upon acceptance of the client fails because his friendship analogy fails, but his theory of right and wrong, which *permits* the lawyer's assistance, has different underpinnings and is far more carefully elaborated.

Recall that Fried's theory of right and wrong in the professional legal role proceeds from the justification of legal rights and the corollary justification of a right to learn and assert one's legal rights. The moral right to assert a legal right is not unqualified. Fried acknowledges that it is morally wrong for a person to

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116. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1989) (permitting a lawyer, acting on behalf of a new client, to sue a former client in a new and unrelated matter).

117. Fried, *supra* note 5, at 1089.

exercise her legal rights in some situations, for example, to avoid a just punishment for a crime or to avoid the payment of a just debt.<sup>118</sup> In categorizing certain conduct as absolutely wrong and thereby condemning it, Fried clearly limits the proper exercise of personal autonomy. At the same time, Fried asserts that persons should have the autonomy to choose whether to act morally or immorally, at least in the context of asserting legal rights, and that the lawyer who stands ready to facilitate that choice, by agreeing to assist the client in acting immorally, is doing good precisely because she is safeguarding the client's autonomy.

There are paradoxes in this construct. Legal rights are good, even though their assertion may be bad. Moreover, it is good that one has the autonomy to assert one's legal rights, even though the exercise of that autonomy may be bad. Finally, lawyers do good in safeguarding the autonomy of clients to assert legal rights, even though the exercise of that autonomy by the client may be bad. At bottom, then, Fried asserts that lawyers do good by safeguarding, within the limits of the law, the autonomy of clients to do bad.<sup>119</sup>

The celebration of autonomy suggested by this argument reflects a moral priority that is unjustifiable, particularly when it permits one to willfully harm another for purely selfish reasons by conduct that Fried asserts is itself morally wrongful. Nevertheless, we can allow that personal autonomy within the limits of the law is a positive moral value. To make this allowance, however, is a far cry from assigning it the highest moral value, more valuable even than life itself.

If Fried grossly overstates the moral weight to which personal autonomy is entitled, as I believe he does, the "iron requirement of loyalty" he advances must be overstated as well. Nevertheless, if the client's personal autonomy within the legal process is entitled to some moral weight, then the lawyer's loyalty obligation to the client is also entitled to some moral weight. This is due to the client's relative inability to assert her personal autonomy within the legal process without the aid of a lawyer.

The recognition that the lawyer's loyalty obligation has moral weight is important. This recognition suggests, for example, that David Luban creates a false dichotomy when he asserts that

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118. FRIED, *supra* note 91, at 182.

119. Fried, of course, asserts that lawyers do good in many other ways as well.

moral obligations take precedence over professional obligations.<sup>120</sup> Luban fails to recognize that strictly professional obligations can entail moral obligations, particularly the moral obligation of loyal service to the client.

If loyalty to the client should sometimes prevail over competing moral claims on the lawyer, the lawyer's loyalty obligation itself must carry moral weight. Fried's analysis, despite its shortcomings, is valuable in identifying the client's dignity and autonomy under the law as one source of the lawyer's moral obligation to be loyal.<sup>121</sup> The next section offers additional support to the claim that the lawyer's loyalty obligation has moral weight.

### *C. Promises to be Loyal*

The lawyer-client relation is generally voluntary on the part of both parties.<sup>122</sup> The lawyer's promise to provide loyal service, the consent of the client to part with money, the disclosure of private information in exchange for that promise, and the client's reliance on the promise attend the formation of a lawyer-client relation.

The promise of loyalty can be implied from the Anglo-American tradition of the lawyer role, because loyalty is intrinsic to that role as it is commonly understood by lawyers and clients alike. The lawyer's promise of loyalty, derived from the tradition of the lawyer role, is an example of "a usage of trade," as that term is used in the Uniform Commercial Code (U.C.C.) sections 1-201(3) and 1-205(2).<sup>123</sup> Under these provisions of the U.C.C., the terms of an agreement implicitly include "any practice or method of dealing having such regularity of observance . . . as to justify an expectation that it will be observed with respect to the transaction in question."<sup>124</sup> Absent an express agreement to the

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120. LUBAN, *supra* note 22, at 155 ("[W]hen professional and moral obligations conflict, the moral obligation takes precedence.").

121. *See also* FREDMAN, *supra* note 22, at 57 ("[T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy, that is, by counseling clients candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them, and by assisting clients to carry out their lawful decisions.").

122. There are cases in which a lawyer is required to represent a client, but these cases describe a small fraction of the work that lawyers do. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1989) ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause."). In addition, clients are sometimes assigned counsel, especially indigent clients, but again, this representation forms a relatively small part of the universe of lawyer-client relationships.

123. U.C.C. §§ 1-201(3), 1-205(2) (1991).

124. *Id.* § 1-205(2).

contrary, it is only fair that the lawyer's promise of loyal service be an implied term of every representation agreement.

The lawyer's promise to be loyal, coupled with the client's consent to part with valuable possessions in reliance on the lawyer's loyalty, gives loyalty moral weight. As Patrick Atiyah observed, "Morally, few would doubt that, *prima facie* at least, a promise is *per se* binding."<sup>125</sup> Interestingly, Atiyah questions whether contemporary support exists for that very proposition.<sup>126</sup> Certainly, in the law, bare promises are not always binding. On the other hand, when a promise is reasonably relied upon by the person to whom the promise is made, the moral weight of the promise is generally conceded, and usually the law compensates the relying promisee, at least to the extent of the detriment suffered because of the reliance.

Contemporary contract theory provides at least three different approaches to when a moral and legal obligation to keep a promise arises. H.L.A. Hart and John Rawls locate the obligation at the earliest time possible, that is, upon the making of the promise. Atiyah describes their position:

[Their] explanation posited the existence of a "practice," whereby promises could be made, and if made, had to be performed. To make a promise was to take part in this practice, and to take part in a practice, like taking part in a game, was to enjoy its benefits and hence to subject oneself to its rules. To promise was to join a club; one got the benefit of membership, and it was therefore reasonable, and moral, to accept the burdens of membership as well.<sup>127</sup>

A second approach, advanced by Randy Barnett, is that the moral duty to keep promises arises from the consent of the promisor to part with something of value.<sup>128</sup> Contracts transfer

125. P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193, 210 (1978).

126. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 652-59 (1979).

127. *Id.* at 654. Charles Fried adopts a similar view. CHARLES FRIED, *CONTRACT AS PROMISE* 14-17 (1981) ("An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance."); *see also* Sissela Bok, *Can Lawyers Be Trusted?*, 138 U. PA. L. REV. 913, 917 (1990) ("A third fundamental moral constraint is likewise universally stressed: that on betrayal, or going back on one's word.").

128. Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 299 (1986) ("[T]he consent of the rights holder to be legally obligated is the moral component that distinguishes valid from invalid transfers of alienable rights in a system of entitlements.").

rights, in Barnett's view, and consent to the transfer of the right, subject to the conditions of the consent, establishes the right in the promisee.<sup>129</sup> A right consensually transferred becomes the right of the transferee, and it is usually morally wrong for the transferor (promisor) to withhold the right after consenting to its transfer.

Atiyah offers a third approach that emphasizes whether the promisor has received a benefit for the promise or the promisee has reasonably relied upon the promise to her detriment: "Surely, nobody can doubt that, morally speaking, promises are more strongly binding where payment has already been received, or where there is a clear and significant act in reliance which would worsen the position of the promisee if the promise were not performed."<sup>130</sup> Moral obligations of a contractual sort arise, in Atiyah's view, from the receipt of benefits or the inducement of others to act to their detriment.

Thus, in his *Essays on Contract*, Atiyah asserts that "it is a mistake to believe that there is (or is often) a moral obligation (or a strong moral obligation) to observe a promise which has not been paid for or relied upon."<sup>131</sup> Atiyah's ambivalence can be tolerated, however, because promises "do not usually remain unrelieved upon for very long."<sup>132</sup>

This reliance is certainly true in most legal representation, in which clients usually rely on the lawyer's promise of loyalty at the outset of the representation. This reliance is exhibited by the client's disclosure of information and by the client foregoing identical representation in the matter by another lawyer. A client's reliance on a lawyer's promise to be loyal assuredly gives moral weight to the duty of loyal conduct under each of the three approaches recognized in contemporary contract theory.

The moral weight of the lawyer's loyalty obligation, attributable to the lawyer's promise to be loyal and the client's right to personal autonomy within the limits of the law, supports a presumption in favor of loyal conduct, even if that presumption sometimes may be overcome by weightier moral concerns.<sup>133</sup> The

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129. *Id.* at 299-300.

130. Atiyah, *supra* note 125, at 219.

131. PATRICK ATIYAH, *ESSAYS ON CONTRACT* 44 (1986).

132. *Id.* at 31. Atiyah sometimes uses the term "reliance" in a very expansive sense, including the mere expectation of performance as a form of reliance. See ATIYAH, *supra* note 126, at 2-4.

133. Cases may exist, however, in which client reliance is lacking or even perverse. A client may decide to abandon a claim for reasons unrelated to the lawyer's advice, while

function of loyalty in this limited view is that loyalty to the client requires a particular course of conduct unless good reason exists to act otherwise. In this way, the lawyer's loyalty obligation operates in much the same way that Rawls characterizes the duty to obey the law: "a presumption in favor of compliance in the absence of good reason to the contrary."<sup>134</sup>

The lawyer's loyalty obligation carries moral weight, but its justification is grounded in practical considerations as well. The section that follows explores some of these considerations.

#### *D. Loyalty and Efficiency*

Several utilitarian justifications for loyalty have already been suggested. Josiah Royce, for example, justified loyalty in terms of the benefit it confers upon the loyalist in providing meaning and direction to her life.<sup>135</sup> Andrew Oldenquist sees loyalty as a countermeasure to alienation.<sup>136</sup> Charles Fried justifies loyalty by a lawyer to a client in terms of supporting the rule of law in a reasonably just system, which is a benefit to both society and the client.<sup>137</sup>

Those who are disloyal without apparent good reason are consigned to the annals of villainy, whose volumes contain such notorious names as Judas, Delilah, and Benedict Arnold. Although betrayal of one's God, lover, or country may be legendary wrongs,

walking out of the lawyer's office. Understanding how reliance can be found in this situation is difficult.

An extreme example of perverse reliance is the disingenuous client who retains a lawyer for a modest sum and provides the lawyer with confidential information about a matter, not to enable the lawyer to represent the client, but to disqualify the lawyer from representing the client's adversary. The story has made the rounds of the disgruntled spouse in a small town who consulted with all of the lawyers in town about her contemplated divorce before choosing a lawyer and then sought to disqualify all of the lawyers she consulted from representing her spouse in the divorce. Although these cases are far from the norm, perhaps special account should be taken of circumstances in which the client's reliance is perverse.

134. John Rawls, *The Justification of Civil Disobedience*, in *MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS* 193 (James Rachels ed., 1971).

The analogy between the duty of loyalty and the duty to obey the law is especially pertinent given the derivation of the word "loyalty." "Loyalty" is derived from the French *loi*, which means law in the generic sense of that which ought to be obeyed. See Sophie Bryant, *Loyalty*, in 8 *ENCYCLOPAEDIA OF RELIGION AND ETHICS* 183-88 (1916).

135. See *supra* notes 25-33 and accompanying text. Ultimately, Royce's justification for loyalty is less utilitarian than idealist and egoist. Nevertheless, Royce emphasized the instrumental value of loyalty in ordering a person's life.

136. See *supra* note 70-73 and accompanying text.

137. See *supra* notes 97-98 and accompanying text.

betrayals in professional and business life are likewise villified, at least when perpetrated without good cause. Although the case for uncompromising loyalty may be weak, the case for an unconditional freedom to betray is weaker still.

Disloyalty without good reason can impose a heavy cost without a compensating benefit. Marcia Baron illustrates this point by suggesting what would result if engineers were free to disclose the trade secrets of their employers and former employers.<sup>138</sup> In a competitive market, a company with disloyal employees could not compete successfully, and, if such disloyalty were commonplace in the market, the incentive for a company to invest in the development of new products would be seriously compromised.<sup>139</sup> In both cases, the social benefit, if any, of the disloyal behavior does not begin to offset the cost imposed by that behavior.

In the context of legal practice, a prevailing "ethos" of disloyalty would certainly discourage many potential clients from employing lawyers. Consider the risk in hiring a lawyer who could not be trusted to be loyal to one's interests. What confidential information could be disclosed to such a lawyer? What matters could be entrusted to her care? In some short-term lawyer-client relationships involving no private information, the risk may not be great, but this fact hardly describes the vast majority of the work done by lawyers. Without loyalty to the client, the usefulness of lawyers would be seriously reduced. Moreover, an "ethos" of lawyer disloyalty would cause havoc in a competitive economy.

These considerations highlight some practical benefits of the lawyer's loyalty obligation to clients. Using tools of the social sciences, Albert Hirschman identifies an additional practical benefit of loyalty, one particularly germane to law practice: the tendency of loyalty to correct deficient performance, or, in the case of clients, to inspire responsible behavior.<sup>140</sup> The balance of this section discusses Hirschman's ideas about the contribution of loyalty to efficiency.

Hirschman describes the role of loyalty in a firm or organization, in relation to the phenomena of "exit" and "voice," concluding that loyalty may contribute to the efficient management of affairs.<sup>141</sup> "Exit," as developed in economic theory, refers to the

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138. BARON, *supra* note 14, at 10-12.

139. *Id.* at 11. Richard Posner has made the same argument. *See, e.g.,* Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978).

140. ALBERT HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 77-105 (1970).

141. *Id.*

actions of customers who stop buying a firm's product and of members of an organization who leave the organization.<sup>142</sup> When the exit option is exercised, economists expect that revenues drop or membership declines and "management is impelled to search for ways and means to correct whatever faults have led to exit."<sup>143</sup>

"Voice," a term borrowed from political theory, is exercised when a firm's customers or an organization's members express dissatisfaction to management or others.<sup>144</sup> The rational response by management to expressions of dissatisfaction is to "search for the causes and possible cures of customers' and members' dissatisfaction."<sup>145</sup> Thus, exit and voice are mechanisms that impel management to become more efficient or, more broadly, to get on the right track.<sup>146</sup>

The availability and attractiveness of the exit and voice options vary greatly depending upon the person and the context. To use a simple example, an individual consumer of mass-produced, inexpensive, nondurable consumer goods ordinarily would express dissatisfaction by exercising the exit option rather than the voice option, if better brands of the same consumer product are available at the same cost. This result occurs because, in this context, exercising exit is less costly than exercising voice, and voice is less likely to achieve the desired result.

On the other hand, a firm that buys expensive durable products from a particular manufacturer over many years may well exercise the voice option rather than the exit option when it first notices a decrease in the quality of the product. The voice of this customer is likely to be heard, and the cost of exit for the customer may be quite high.

The decision to elect the exit option or the voice option, when one is dissatisfied, depends upon many factors, including the perceived likelihood that voice will produce the desired result, the quality and cost of alternatives in the event of exit, and loyalty. The nature of the organization from which the exit option or to which the voice option may be exercised is also significant and, often, controlling:

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142. *Id.* at 4.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

In a large number of organizations one of the two mechanisms is in fact wholly dominant: on the one hand, there is competitive business enterprise where performance maintenance relies heavily on exit and very little on voice; on the other, exit is ordinarily unthinkable, though not always wholly impossible, from such primordial human groupings as family, tribe, church, and state. The principal way for the individual member to register his dissatisfaction with the way things are going in these organizations is normally to make his voice heard in some fashion.<sup>147</sup>

In circumstances in which both the exit option and the voice option are available, loyalty influences the election. Hirschman finds a strong relation between loyalty and voice. The more one believes that her voice will be heard, the more one is likely to be loyal, loyalty deriving in part from the perceived effectiveness of one's voice. Similarly, the more loyal one is, the more one is likely to use voice rather than exit because the cost of exit is higher in personal terms.<sup>148</sup> Moreover, Hirschman argues that loyalty is beneficial, because it prompts the use of voice to correct an organization's deficiencies. Hirschman concludes that "loyalty, far from being irrational, can serve the socially useful purpose of preventing deterioration from becoming cumulative, as it so often does when there is no barrier to exit."<sup>149</sup>

Loyalty is a self-imposed barrier to exit, and, like most barriers to exit, it serves to stimulate voice. Voice needs such stimulation. As Hirschman observes, exit is neat compared to the "messiness and heartbreak" of voice.<sup>150</sup> The neatness of exit is largely attributable to its certainty, unlike the risk of failure involved in voice. In addition, exit involves a "clearcut either-or decision,"<sup>151</sup> while voice is "essentially an *art* constantly evolving in new directions."<sup>152</sup>

If exit and voice both communicate dissatisfaction to management, why be concerned that exit is often more attractive than voice? Hirschman finds that the most quality-conscious persons are first to exit in many circumstances.<sup>153</sup> Moreover, these persons are most likely to effect a positive change by use of voice.

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147. *Id.* at 76.

148. *Id.* at 77-78.

149. *Id.* at 79.

150. *Id.* at 107.

151. *Id.*

152. *Id.* at 43.

153. *Id.* at 50-52.

In an employment context, for example, if employee dissatisfaction is widespread, the most marketable employees have the greatest incentive to exit the firm, because exit for them can be accomplished at little cost. Moreover, because of their value as employees, exit by the most marketable members of the firm will cause further deterioration of the firm, perhaps so much deterioration that the firm will be unable to correct its deficiencies. In addition, these same employees often may be most effective in correcting by use of voice the deficiencies leading to the general dissatisfaction. Thus, in contexts such as this, voice is superior to exit in terms of correcting deficiencies and avoiding further deterioration.

When exit is a readily available option, Hirschman sees loyalty as the key to an election of voice over exit. Loyalty locks the loyalist into the organization a little longer, thereby creating greater incentive to exercise voice. At the same time, the exercise of voice is made more effective by the loyalist's threat of exit, whether that threat is explicit or implicit.<sup>154</sup> This result occurs because, if the loyalist is of value to the organization, the risk of the loyalist's exit will itself be an incentive to correct the deficiencies of the organization.<sup>155</sup>

To sum up the discussion thus far, Hirschman finds that organizational deficiencies can be corrected by either exit or voice, that voice is more effective than exit in correcting deficiencies in some contexts, and that loyalty delays exit and encourages voice. Loyalty has less value when exit is difficult or impossible, because the incentive for voice is already present in those circumstances. According to Hirschman, however, dangers arise in imposing too high a price for exit.<sup>156</sup>

When exit is difficult or impossible, the threat of exit is ineffective. In some contexts, such as the family, this situation encourages resort to voice. In other contexts, the absence of the voluntary exit option discourages voice because exercise of voice may provoke a forced exit that entails difficult burdens, for example, loss of livelihood. Thus, if the objective is to encourage

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154. *Id.* at 82-86.

155. *Id.* But see Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 722-26 (1987), in which Ellmann expresses concern about the coercive nature of threats to withdraw and their effect on the client's freedom of self-determination. Ellmann supports strongly clients' competence and entitlement to make decisions, consistent with the theory of client-centered practice. See also DAVID BINDER & SUSAN PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

156. See HIRSCHMAN, *supra* note 140, at 96-98.

voice, a high price for exit may prove to be counterproductive in some organizational contexts. Moreover, exit has its virtues. Not only is exit an important mechanism for correcting organizational deficiencies, but the realistic threat of exit gives greatest effect to voice.

Hirschman's theory has important implications for the lawyer's duty of loyalty to a client. Assuming that the lawyer's objective is to steer the client toward lawful and morally responsible behavior, Hirschman's work suggests that exit and voice are effective mechanisms for doing so. If a client proposes improper conduct and the lawyer exits (withdraws) too quickly, the opportunity to put the client on the right track may be compromised, if not lost. By exercising voice, the lawyer is in the best position to influence the client toward proper conduct. On the other hand, if exit by the lawyer is made too difficult, the effectiveness of the lawyer's voice will be compromised because voice is most effective when accompanied by the realistic threat of exit, whether that threat is express or implied. Hirschman's work thus suggests that the duty of loyalty to the client should be strong enough to lock the lawyer into serving the client a little longer, so that voice more likely will be exercised. The duty of loyalty, however, should not be so strong as to deprive the lawyer of the realistic possibility of exit, for if the duty is so strong as to foreclose exit, the lawyer's voice will be less effective.<sup>157</sup>

Hirschman's functional analysis of loyalty suggests that loyalty plays a constructive role in professional relationships, but that a

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157. How often lawyers withdraw from the representation of paying clients who seek lawful, but morally wrongful, objectives is unknown. Perhaps the issue rarely arises because of an ethical compatibility between clients and the lawyers they choose, a compatibility made likely by cognitive dissonance, a phenomenon discussed by Hirschman. *Id.* at 91-96; see also Lon L. Fuller, *Philosophy for the Practicing Lawyer*, in *THE PRINCIPLES OF SOCIAL ORDER* 287-88 (Kenneth I. Winston ed., 1981), in which Fuller comments on cognitive dissonance for the lawyer:

In those instances where he had some doubts about the client's case at the beginning, these doubts evaporate after he has worked on the case for a few days; his client's cause then comes to seem at once logical and just. He worries a little that he might have experienced the same conversion had he been working on the other side, but this slight concern does not detract from his zeal or his desire to advance his client's interests.

*Id.*

Perhaps, the dilemma is common but, as with the investments by many multinational corporations in South Africa, the moral scruples of lawyers have taken second seat to the profit motive. This concern seems particularly legitimate when even the American Bar Association condemns widespread commercialism in the legal profession. See *Report of the Commission on Professionalism*, *supra* note 84, at 251. The Report asks whether the legal profession has "abandoned principle for profit." *Id.*

theory of loyalty that absolutely forbids disloyalty is inefficient in many organizational settings. Moreover, the relationship between client and lawyer is one such setting in which a limited loyalty obligation may be efficient. In combination with other utilitarian justifications for the lawyer's loyalty obligation, Hirschman's theory gives further support to the need for the lawyer's loyalty obligation, subject to limitations.

#### IV. LIMITS ON THE LOYALTY OBLIGATION

Beginning principles of a theory of loyalty for lawyers have already been suggested: the lawyer's loyalty obligation to clients is practical and has moral weight that a lawyer must consider in deciding on a course of action. In some circumstances, the loyalty obligation may be less weighty than other moral concerns. Professional ideals of lawyer conduct, which presume to resolve loyalty dilemmas, are generally useful but may not provide correct moral solutions in unanticipated circumstances.

In the following sections, I advance some additional principles forming a theory of loyalty for lawyers. Among these principles are that the lawyer's loyalty obligation is defined by its scope as well as its strength, that the loyalty obligation dictates caution in agreeing to represent clients, that the lawyer's reasons for disloyal behavior are crucial, and that the legitimacy of disloyal behavior is influenced by the methods, goals, and costs it entails.

##### A. *The Scope of the Lawyer's Loyalty Obligation*

Disloyalty has meaning only in relation to valid claims of loyalty; no disloyalty can exist when loyalty is not owing. Marcia Baron distinguishes valid claims of loyalty from bogus claims,<sup>158</sup> and this distinction is essential to identifying the scope of a lawyer's loyalty obligation. For example, a client might assert that her lawyer was disloyal by purchasing a competitor's product rather than her product, but the lawyer *as a lawyer* has no duty of loyalty of this sort. Baron labels such loyalty claims "bogus" because they conflate loyalty in the performance of a role with a more thorough-going loyalty as a person.<sup>159</sup> If the duty of loyalty to a client arises only by virtue of the lawyer-client relationship, the scope of that loyalty is limited by the relationship. The

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158. BARON, *supra* note 14, at 15-16.

159. *Id.*

lawyer, thus, may prefer to buy someone else's products, play golf with others, even vote for the client's opponent in an election for a public office, without being disloyal. The lawyer's loyalty obligation is limited by the scope of the services that the lawyer promises to provide.

Fried also distinguishes valid loyalty claims from invalid ones and concludes that "the lawyer must scrupulously contain his assistance and advocacy within the dictates of the law."<sup>160</sup> A lawyer should not promise *as a lawyer* to do what is unlawful, nor should she imply such a promise. The lawyer's implied promise of loyalty, derived from the American tradition of the lawyer role, cannot be understood to entail a promise to act illegally. Nor does the "client's autonomy within the law"<sup>161</sup> justify illegal conduct by the lawyer. Thus, the lawyer's loyalty obligation to a client is also limited by the law.

### 1. *Legal Limits on Loyalty*

That loyalty is limited by legality may be logical, but it is also troubling. The limits of legality are often uncertain, and so the promise of loyalty must be uncertain as well. This uncertainty raises the problem of whether the lawyer's loyalty obligation should extend to all that is arguably legal. It is my position that the lawyer may agree to be loyal only within the fairly certain bounds of legality. When a lawyer's proposed or actual conduct enters the fog of uncertain legality, she has passed the limits of loyalty.

If loyalty is limited by legality, there is no useful sense in which loyalty is promised when legality is uncertain. Suppose, for example, that a client demands the return of a document in the lawyer's possession. The document constitutes evidence that the client has committed a crime that authorities are just beginning to investigate. If the client clearly will destroy the document if the document is returned to her, the lawyer may be guilty of obstruction of justice in returning the document to the client knowing that the client will destroy it. Unfortunately, the scope of obstruction of justice statutes is unclear in many jurisdictions,

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160. Fried, *supra* note 5, at 1081. Fried recognizes that lawyers may choose at times to defy immoral laws to further a client's rights, but in such cases the lawyer goes beyond her duty *as lawyer* (or as Fried terms it, "travels outside the bounds of legal friendship"). *Id.*

161. *Id.* at 1073.

and the lawyer may be uncertain as to whether the return of the document to the client would be a crime under the circumstances. If the loyalty obligation applies even though the legality of the proposed lawyer conduct is uncertain, the lawyer would be required to commit what might later be judged a criminal act.

To press the lawyer into possibly illegal conduct by means of the loyalty obligation undermines the lawyer's role of maximizing client autonomy *within the legal system*. The lawyer's role becomes contradictory and incoherent if the lawyer is obligated to engage in possibly illegal conduct, as in this illustration by delivering the document to the client. Moreover, the loyalty dilemma may be exacerbated rather than relieved by extending the loyalty obligation into the realm of the possibly illegal. The lawyer's self-interest in behaving lawfully suddenly conflicts with the lawyer's obligation to behave loyally. Wise judgments about the limits of lawful conduct may be even more difficult for the lawyer faced with this conflict.

On the other hand, the limits on loyalty required by legality can be a trap for the client, whose ignorance may encourage a reliance wider than the loyalty that a lawyer can reasonably promise. A foreseeable gap between the lawyer's promised loyalty and the client's expected reliance should prompt the lawyer to advise the client of the legal limits on the lawyer's loyalty obligation. This advice follows from the consensual nature of the lawyer's loyalty obligation. A lawyer can generally satisfy the duty to advise by instructing the client that the lawyer must operate within the strict limits of the law in representing a client. In many circumstances, even this sort of warning may be unnecessary because of the unlikelihood that a misunderstanding will occur. The client's foreseeable reliance on the lawyer's agreement to be loyal imposes on the lawyer a duty to clarify the scope of that agreement when misunderstandings are likely to occur.

## 2. *Contractual Limits on Loyalty*

Loyalty also may be limited by the lawyer's express agreement with the client, subject to some limitations.<sup>162</sup> This follows from the promise-consent-reliance basis for the duty of loyalty. The duty of loyalty has moral weight, in part, because the lawyer

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162. This limitation is also recognized by ethics rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1989) ("A lawyer may limit the objectives of the representation if the client consents after consultation.").

and client agree that the lawyer will be loyal and the client relies on that agreement. The scope of the agreement upon which the client reasonably relies substantially defines the scope of the moral duty. As the agreement is made more express and narrow, the moral duty is thereby limited.

For example, a lawyer's loyalty may be limited by an agreement to handle some client matters but not others. Thus, a lawyer may agree to represent the client in relation to her tax problems but not in unrelated litigation in which the client is involved, and no duty of loyalty should arise with respect to that litigation. In addition, a lawyer and client may agree in advance that the lawyer will pursue some client objectives but not others, such as seeking damages for a nuisance but not an abatement.

The right to limit a lawyer's loyalty by prior agreement is subject to limitations, however. The terms of the lawyer-client agreement can never be fully expressed and consented to at the outset of the representation, given the complex traditions and laws that define the lawyer-client relation. Some elements of the relation will always be drawn from the traditions and laws defining the lawyer's role. If vital aspects of those traditions and laws are expressly excluded from the agreement, the relation is no longer one of lawyer and client; the essential features of the lawyer-client relation are lacking, and so the relation must be of some other sort. This factor may explain in part the prohibition against an agreement prospectively limiting the lawyer's liability to a client for malpractice; such an agreement is inconsistent with the lawyer's agreement to perform as a lawyer.<sup>163</sup> Thus, the agreement to serve the client as a lawyer must include essential features of the lawyer-client relation, as various traditions and laws define that relation. Certainly, the loyalty obligation is, in some dimension, one such essential feature.

A second qualification to the right to limit the lawyer's duty of loyalty by prior agreement is closely related to the first: the client must give informed consent to the agreement. Client consent to limitations on the lawyer's agreement to be loyal defeats a client's claim of reasonable reliance on a more expansive agreement. Uninformed consent, however, hardly improves the lawyer's moral position.<sup>164</sup>

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163. *See id.* Rule 1.8(h). The Model Rules also provide that "the client may not be asked to agree to representation so limited in scope as to violate" the lawyer's duty to provide competent representation. *Id.* Rule 1.2 cmt.

164. Ethics rules recognize the same consideration. A lawyer may limit the objectives

The lawyer and client possess the power to define the lawyer-client relation by their agreement, but this power is limited in important respects. The power of the parties to define their relation is limited by the traditions and laws that define the relation. Moreover, because the relation may evolve over the course of time, especially if significant factgathering and decisionmaking are required, the relation may require periodic redefinition. As Ian Macneil observes: "In complex relations, obligations, often heavily binding ones, arise simply out of day to day operations, habits, customs, etc., which occur with precious little thought by anyone about the obligations they might entail, or about their possible consequences."<sup>165</sup>

Macneil suggests that events, perhaps as much as agreements, traditions, and laws, reshape the obligations that arise under contracts involving complex relations. This point about relational contracts threatens the promise-consent-reliance foundation for the lawyer's moral obligation of loyalty. This threat can be addressed without denying it in several ways.

First, contracts may be considered as falling on a continuum, with transactional contracts at one end and relational contracts at the other end. Transactional contracts are typically "one-shot deals between relative strangers"<sup>166</sup> occurring in a market in which other parties make nearly identical exchanges (such as buying bolts at the hardware store). Relational contracts are more complex and usually occur over an extended period of time (for example, employment contracts and the internal contracts governing institutional arrangements). Some legal representation is more transactional, such as a single small collection matter for a one-time business client. Some legal representation is more relational, such as service as in-house counsel for a corporation. Most legal representation falls somewhere in the middle of the continuum, although probably toward the relational end.

Second, the express terms of an agreement are most relevant in equitably identifying the obligations of parties to transactional contracts. In discrete, one-shot transactions, Macneil concedes that the express and consented-to terms of the contract work

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of the representation only if the client consents after consultation. *Id.* Rule 1.2(c). "Consultation" is defined as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Id.* Terminology.

165. Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 Wis. L. Rev. 483, 503.

166. PETER LINZER, A CONTRACTS ANTHOLOGY 68 (1989).

fairly well in defining the obligations of the parties.<sup>167</sup> In contracts of this sort, a client's reliance on a loyalty disclaimed in the agreement seems especially unreasonable.

Third, the express terms of an agreement remain relevant in relational contracts, although the complex and changing circumstances of relational contracts often diminish the importance of the express terms in equitably identifying the obligations of the parties. Fixed and reliable planning generally requires some degree of express understanding between contracting parties and these express understandings continue to contribute to an equitable identification of the parties' obligations. At the same time, the need for flexibility in relational contracts reduces the importance of express understandings.

Finally, even in relational contracts, the parties have the power periodically (even continually) to redefine their agreement to meet changed circumstances. This is especially true in legal representation, when collaborative decisions are often required throughout the course of the representation.

Thus, the lawyer and client may shape the lawyer's loyalty obligation by agreement, but not necessarily in any way they choose and not necessarily for all time. Agreed-upon limitations on the lawyer's duty of loyalty generally should be valid, but not if the limitations are inconsistent with the lawyer role or if circumstances change too greatly, and only if the client gives an informed consent to the limitation.

### 3. *Summary*

The limits of the lawyer's loyalty obligation to a client inhere in the lawyer role and may be defined, to some extent, by the express agreement of the parties. Some limits are established by law; the loyalty obligation *as a lawyer* cannot compel the lawyer to act illegally. Other limits arise by virtue of the tradition of the lawyer role. Lawyers should clarify the extent of their loyalty obligation if a client misunderstands the limits involved.

#### B. *Client Selection*

When a lawyer agrees to represent a client, some duty of loyalty to the client arises. Two central problems are presented: To what extent are lawyers free to reject cases, thereby avoiding

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167. *Id.*

loyalty obligations? To what extent are lawyers free to accept cases, thereby incurring loyalty obligations?

These questions are discussed in a vast body of thoughtful literature,<sup>168</sup> although not necessarily with a focus on loyalty concerns. Those discussions need not be repeated here. Nevertheless, as my phrasing of the questions suggests, loyalty concerns are relevant to questions of client selection. In particular, lawyers should be cautious about incurring loyalty obligations, especially when loyalty dilemmas are likely to arise.

A morally responsible lawyer should be concerned about the valid client loyalty claims to which she will be subject. Valid loyalty claims can give rise to loyalty dilemmas, in which the lawyer is compelled to do what, in the absence of the loyalty claim, she would consider wrongful. We should be loath to put ourselves in a position in which our conduct unavoidably will entail a moral wrong, either in the form of disloyalty or, if we remain loyal, in committing some other form of moral wrong.

The risk of confronting a loyalty dilemma is especially great in relational representation agreements, which may impose unforeseeable demands upon the lawyer, demands that the lawyer would avoid if given the prior opportunity. The risk is also great when the lawyer agrees to represent a client notwithstanding the foreseeability of a particular loyalty dilemma.

In every representation, a lawyer has some risk of a loyalty dilemma arising, although the risk usually is quite small. As the risk increases, either because the representation is more relational than transactional or because a dilemma is specifically foreseeable, caution in agreeing to the representation should increase as well.

Risk, foreseeability, and caution—the language of negligence—hardly provide a substantive prescription for conduct. Loyalty concerns do little to refine client selection issues, except to underscore the significance of those issues and discredit the position that lawyers are ethically free to represent whomever they wish for whatever reasons.<sup>169</sup>

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168. See, e.g., FREEDMAN, *supra* note 22, at 49-50; FRIED, *supra* note 91, at 179-83; LUBAN, *supra* note 22, at 282-88; WOLFRAM, *supra* note 2, at 571-78.

169. See, e.g., Fried, *supra* note 5, at 1076-80. "The lawyer's liberty—moral liberty—to take up what kind of practice he chooses and to take up or decline what clients he will is an aspect of the moral liberty of self to enter into personal relations freely." *Id.* at 1078.

### *C. Reasons for Disloyalty*

Disloyalty may be intentional or inadvertent, and it may be prompted by good reasons or bad. My concern is principally with intentional disloyalty, even though the effect of disloyalty may be the same whether it is intentional or inadvertent. By intentional disloyalty, I mean the lawyer's implementation of a decision to privilege some concern over the lawyer's loyalty obligation to the client.

According to this definition, disloyalty requires that the lawyer implement the decision to be disloyal. Disloyalty in the lawyer's heart will not do. Just as loyalty takes form only in loyal conduct, so too disloyalty takes form only in disloyal conduct. The temptation or plan to be disloyal, so long as it remains inchoate, may be transient. It lacks the finality (and the potential consequences) of an implemented decision.

Decisions may be implemented either by action or by the failure to act. A lawyer, for example, may implement a decision to be disloyal by failing to object to the introduction of certain evidence or by failing to insert a provision in a contract or other document. Although actions and omissions may have different moral weight in other contexts, loyalty establishes a duty to act in a certain way. For this reason, when a failure to act defeats a valid claim of loyalty, the inaction is equally as disloyal as an action that defeats a valid claim.

Limiting disloyalty to instances of decisions to be disloyal excludes inadvertent conduct. The lawyer who unthinkingly blurts out a confidence or who does not see that certain damaging evidence is inadmissible and so fails to object to its introduction may be guilty of disloyalty, but not in the sense discussed in this Article. Inadvertent disloyalty may certainly be condemned and punished, but it implicates far different moral concerns than intentional disloyalty.

Intentional disloyalty suggests a weighing of the loyalty obligation against some competing concern and choosing to privilege the competing concern. This process involves moral decisionmaking because the lawyer's loyalty obligation has moral weight. The reasons for disloyalty are too numerous to catalogue. Some gross categorizations may be useful, however.

#### *1. Self-Interested Disloyalty*

Lawyers sometimes are disloyal to a client in order to secure a financial or other material benefit or to avoid a harm to

themselves. Lawyers who advance their own interests at their clients' expense ordinarily could not justify adequately their disloyal conduct. In some circumstances, however, even self-interested disloyalty may be justified.

The extent to which loyalty is owing may depend on the client's fulfillment of reciprocal promises. For example, if a lawyer agrees to provide loyal service in exchange for a fee, and the client fails to pay the fee as agreed, the lawyer may be disloyal to the extent of breaching her duty to continue to provide legal services. The disloyal conduct in this example may be prompted solely by the lawyer's financial self-interest and, yet, may be justified.<sup>170</sup>

Self-interested disloyalty may even be justified in some cases in which the client keeps her part of the bargain. Suppose, for example, that a lawyer agrees to handle certain matters pro bono for a destitute client. The lawyer later discovers, and could not have anticipated, that the legal matters are extraordinarily complex and require enormous expenditures of time and money to bring to a conclusion. Again, the lawyer, solely for reasons of financial self-interest, may be justified in acting disloyally to the extent of withdrawing from the representation.<sup>171</sup>

These examples involve self-interested disloyalty by withdrawing from the representation of a client. More egregious forms of self-interested disloyalty sometimes may be justified as well. The Model Rules of Professional Conduct permit lawyers, for reasons of self-interest, to disclose confidential client information in limited circumstances, for example to enable the lawyer to defend herself against criminal charges or civil claims based upon conduct in which the client was involved.<sup>172</sup>

These examples of lawful self-interested disloyalty do not suggest a coherent theory of when lawyer self-interest justifies disloyalty to a client. Charles Wolfram intimates that the exception to the confidentiality rule founded on lawyer self-interest may reflect little more than that lawyers drafted the Rules.<sup>173</sup>

Contrary to the implication of the Model Rules, the lawyer's self-interest will never justify disloyalty to a client, given the moral weight of the loyalty obligation, unless, in the circumstances, the lawyer's self-interest has considerable moral weight

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170. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(4) (1989). For a discussion of when client abandonment is disloyal, see *infra* notes 183-89 and accompanying text.

171. See *id.* Rule 1.16(b)(5).

172. *Id.* Rule 1.6(b)(2).

173. WOLFRAM, *supra* note 2, at 308 ("An exception addressed only to the special needs and fairness claims of lawyers naturally arouses strong suspicions of special pleading.").

of its own. Perhaps, when a client has violated her promises to the lawyer, the lawyer's dignitary interests assume adequate moral weight to justify withdrawal from the representation. In addition, when a legal matter assumes totally unanticipated proportions, the lawyer may have a weighty moral claim for avoiding the indentured servitude that continued representation would entail. Finally, if the client's wrongdoing will impose criminal or civil liability upon the lawyer, the lawyer may have a moral right to defend herself by disclosing confidential information about the client.

My purpose is not to defend these ethics rules that permit self-interested disloyalty by lawyers. Indeed, the rules may go too far in some directions and not far enough in others. However, the moral weight of the lawyer's loyalty obligation to clients can be overcome only by weightier moral concerns. When disloyal conduct in the lawyer's self-interest has weak moral justification, the conduct is morally wrongful, irrespective of what the lawyer stands to lose.

Thus, utilitarian calculations are irrelevant when self-interested disloyalty lacks moral justification. Even if the lawyer stands to profit greatly from disloyal acts that minimally harm the client, the disloyalty is still wrongful if it has no independent moral justification. Perhaps the lawyer could buy her freedom from the loyalty obligation by giving the client something of value to secure her release, but barring that circumstance, the disloyalty is unjustified.

Arguably, compelling cases of disloyalty arise when the lawyer can attract a substantially more remunerative client by abandoning an existing client in order to avoid a conflict of interest. The benefit to the lawyer may be great by changing clients, and the first client may be able easily to secure equally effective representation from another lawyer. As financially compelling as this case may be, a good reason for disloyalty is not present. The essence of loyalty is service and self-sacrifice. Loyalty is stripped of all substance if self-interested disloyalty is justified by economic considerations alone.

## *2. Legally Compelled Disloyalty*

Lawyers are legally required to be disloyal to their clients in some instances. In a sense, this behavior does not constitute disloyalty at all, because a client's claim of loyalty that requires

a lawyer to act illegally is invalid.<sup>174</sup> Nevertheless, because a claim of loyalty may be valid up to the point that adherence to the claim requires illegal conduct, the lawyer's legally required conduct has the appearance of disloyalty.

The most striking examples of legally compelled "disloyalty" involve legal duties to disclose confidential client information, for example when disclosure is necessary to avoid a fraud on a court or when confidential information is outside the scope of the lawyer-client evidentiary privilege and the lawyer is compelled to testify. Other examples include prohibitions against filing frivolous claims and defenses, ex parte communications with judges, and direct communications with persons who are represented by counsel. All of these forms of conduct could be presumptively required by valid claims of loyalty on the lawyer as a lawyer, except for their illegality. The presumption of loyal conduct does not arise in these cases because no valid claim of loyalty compels the lawyer to act illegally.

### 3. *Scrupulous Disloyalty*

The law sometimes permits, and even condones, wrongful conduct, and lawyers are sometimes prompted to be disloyal out of concern for the public good or the welfare of third parties. These cases often present the most difficult moral dilemmas arising from the lawyer's loyalty obligation.

It is relevant here to reassert the principle that lawyers should avoid loyalty obligations (that is, reject cases) in which the likelihood of disloyal behavior is great. The problem with this prescription is that it begs the question of when disloyal conduct will be appropriate or required for reasons of the public good or the welfare of third parties. If lawyers are free to be disloyal whenever their personal scruples dictate, the agreement to serve loyally seems illusory because it may be breached unilaterally for reasons that seem unpredictable. Moreover, if lawyers are free to be disloyal whenever their personal scruples dictate, lawyers would seem to be free to have no scruples. Both implications are unacceptable: lawyers are demigods of morality and are absolved from the obligations of moral conduct.

Nevertheless, lawyers find themselves in circumstances in which competing moral claims require a choice, and the moral weight of the client's loyalty claim may be less than that of the competing

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174. See *supra* notes 160-61 and accompanying text.

moral claim. When this situation occurs, scrupulous disloyalty is justifiable, and may even be required. Monroe Freedman argues, for example, that preserving the life of a third party involves greater moral weight than loyalty to a client, irrespective of the extent of the valid loyalty claim that the client may assert.<sup>175</sup> Charles Fried finds that humiliating a witness is not justified by the duty of loyalty to a client.<sup>176</sup> Marvin Frankel subordinates the duty of loyalty to the value of determining the truth and, thus, would require lawyers to report to the court and opposing counsel the existence of both relevant evidence and witnesses upon which the lawyer does not intend to rely.<sup>177</sup> Murray Schwartz concludes that the lawyer's loyalty obligation does not justify efforts "to obtain an unconscionable advantage over another person."<sup>178</sup>

When a competing moral claim outweighs the client's loyalty claim, the lawyer is morally obligated to prefer the competing claim. Lawyers are not demigods of morality, nor are they absolved from the obligations of moral conduct. Lawyers are bound by moral obligation just as all actors are, but among the moral obligations to which lawyers are bound is the obligation to honor valid loyalty claims of the client, in the absence of superior moral claims.

Positive law will never be able to specify all of the circumstances in which a competing moral claim will be superior to the client's valid loyalty claim. Loyalty dilemmas are not susceptible to reliable categorical solutions because the weight of valid loyalty claims and competing claims vary radically according to the circumstances of the case. Even though specific guidance through rules may be impossible, it is clear that scrupulous disloyalty is sometimes justified, and it is possible to identify several important variables bearing on its justification. The next section discusses some of those variables.

*D. Implementing the Decision to be Disloyal: The Methods, Goals, and Costs of Disloyalty*

An approach that makes lawyers demigods of morality not subject to moral obligations (beyond those that also constitute

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175. FREEDMAN, *supra* note 22, at 102-04.

176. FRIED, *supra* note 91, at 190-93.

177. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1057 (1975).

178. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 685-86 (1978).

legal obligations) seems the ultimate in arrogance. Yet, this very formulation finds some support in Model Rule of Professional Conduct 1.16, which permits a lawyer to abandon a client, even if withdrawal has a material adverse effect on the interests of the client, whenever the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.<sup>179</sup> Lawyers are nowhere in the Rules required to feel repugnance toward any particular client objectives, nor are they limited by the Rules with respect to what objectives they may consider repugnant. Scrupulous disloyalty may be implemented under the Rules ordinarily only by client abandonment, although, in limited and important circumstances, disclosure of client confidences is also permitted.<sup>180</sup>

The subject of scrupulous disloyalty has supported a vast trade in ideas among legal writers, who have attempted to impose moral obligations on lawyers without thereby making them demigods of morality who freely may disregard the loyalty principle.<sup>181</sup> Many lines have been drawn to demarcate when scrupulous disloyalty is permitted or required. This section discusses the three principal methods by which a decision to be scrupulously disloyal may be implemented: by abandoning the client, by disclosing client confidences, or by lying to the client.<sup>182</sup> The various goals and costs of disloyal conduct are addressed as well.

### 1. *Client Abandonment*

Client abandonment does not always involve disloyalty. If client abandonment were invariably disloyal, the corporate counsel who changed jobs after fifteen years in the client's legal department would engage in disloyal conduct. The promise of loyalty as a lawyer does not include life-long representation, although some loyalty obligations, such as confidentiality, are life-long in their duration. The servitude of life-long representation is often inefficient, as Hirschman concludes in noting that voice can be

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179. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1989).

180. See *id.* Rules 1.6(b), 3.3(a)(2).

181. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1 (1988); Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990); Subin, *supra* note 8.

182. It is possible, of course, to implement the decision to be disloyal by switching sides and actively working to defeat the client's objectives. This form of implementation also requires abandonment, disclosure, or lying, or perhaps a combination of them.

effectively quieted when exit becomes too costly.<sup>183</sup> More importantly, lawyers do not generally promise to provide life-long service, nor do the traditions of the lawyer's role entail life-long service.

It does not follow, however, that client abandonment is never disloyal. The agreement to provide loyal service as a lawyer necessarily includes an agreement to provide some services. When the lawyer is retained for a particular matter, the lawyer and client often contemplate that the lawyer will see that matter through to its conclusion. Even when less than this result is reasonably contemplated, the lawyer agrees to be of some help. Client abandonment is disloyal when the lawyer withdraws prior to completion of the agreed service.

If, in every representation, the duty of loyalty by continued service extends at least to expressly promised services, the extent of the duty generally is determined by the understanding between lawyer and client. The understanding may be express, as when the lawyer agrees to draft a will, negotiate the sale of property, or handle an appeal. In other cases, the understanding may be more nebulous, as when an attorney agrees "to look into" a matter in contemplation of possible litigation or agrees to generally advise a client about the client's proposed conduct. The common thread running through all cases is that the lawyer agrees to do *something*, and it is the extent of that agreement that defines the lawyer's duty of loyalty by continued service.

The duty of loyalty by continued service is not defined solely at the outset of the representation, although it is invariably defined to some extent at that time. As the representation proceeds, the understanding between lawyer and client as to what the lawyer will do may change. In this sense, the duty of loyalty by continued service is constantly evolving.

The foregoing discussion is preliminary to an assessment of scrupulous disloyalty by client abandonment, because it is important to determine when client abandonment is disloyal. The presumption in favor of loyal conduct creates a presumption against client abandonment in circumstances in which a valid loyalty claim to the lawyer's continued service exists. This presumption operates irrespective of the extent to which client abandonment imposes a cost on the client.

Disloyalty by client abandonment always imposes some cost on the client, if only in terms of the client's hurt feelings,

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183. HIRSCHMAN, *supra* note 140, at 97.

annoyance, or inconvenience. The cost of disloyalty by client abandonment, however, varies significantly depending on the circumstances. Disloyal client abandonment early in the representation may impose few costs other than the inconvenience of securing new counsel. Abandonment at critical points in the representation, however, can cost the client the objective for which representation was sought.

The lawyer's goals in being scrupulously disloyal by client abandonment may differ as well. The scrupulously disloyal lawyer's goal may be simply to avoid personal participation in the client's unacceptable plan, or she may want to defeat the plan.

The Model Rules of Professional Conduct provide little discouragement to disloyalty by client abandonment. Taken at face value, Rule 1.16 permits lawyers to abandon their clients at any time and for any reason "if withdrawal can be accomplished without material adverse effect on the interests of the client."<sup>184</sup> Lawyers may abandon their clients, consistent with the Rule, even if the client will suffer a material adverse effect, whenever "a client insists upon pursuing an objective that the lawyer considers . . . imprudent."<sup>185</sup> Unlike other provisions of the Model Rules,<sup>186</sup> Rule 1.16 contains no objective standard for limiting what a lawyer may subjectively regard as an "imprudent" client objective warranting withdrawal even at a significant cost to the client. The only protection afforded the client who is disloyally abandoned is that, upon withdrawal, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests."<sup>187</sup>

In addition to giving the lawyer broad discretion to abandon her client disloyally, the Model Rules require withdrawal if "the representation will result in violation of the rules of professional conduct or other law."<sup>188</sup> As previously suggested,<sup>189</sup> a lawyer has no loyalty obligation to commit illegal acts, and the provisions for required withdrawal implement this principle.

In sum, the Model Rules express concern about minimizing client harm when lawyers abandon their clients, but broader

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184. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1989); see also *id.* Rule 1.3 cmt. ("Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.").

185. *Id.* Rule 1.16(b)(3).

186. See, e.g., *id.* Rules 1.6(b), 1.7.

187. *Id.* Rule 1.16(d).

188. *Id.* Rule 1.16(a)(1).

189. See *supra* notes 160-61 and accompanying text.

loyalty concerns are strikingly absent. Even a fickle lawyer enjoys substantial protection under Rule 1.16. The Model Rules fall far short of enforcing the lawyer's loyalty obligation of continued service in all circumstances in which that obligation exists, although, of course, lawyers are free under the Rules to honor the obligation.

Thus, the cost to the client of disloyal abandonment is given some weight, but not determinative weight, under the Model Rules. Moreover, the lawyer is free to disloyally abandon a client for almost any reason. The loyalty obligation of continued service, when it is morally owing, is given very short shrift under the Model Rules. The Rules permit disloyalty by abandonment in circumstances in which it would be morally wrongful, for example, when little or no moral justification for withdrawal is present.

## *2. Disclosing Client Confidences*

Scrupulous disloyalty by disclosing client confidences also may reflect either the lawyer's goal of avoiding personal participation in a client's unacceptable plan or of defeating the plan. Also, it may occur prior to the client's proposed course of conduct or afterward.

Disclosure requires a recipient of the information. Harm to the betrayed client may be more or less serious depending on who receives the information. An intended victim may be warned so that the harm to the victim can be averted, or the police may be informed so that the client may be caught in the wrongful act or otherwise held accountable for it. These different forms of disclosure obviously impose different costs on the client.<sup>190</sup>

Scrupulous disloyalty by disclosing client confidences to avoid harm to third persons is one of the most divisive subjects in legal ethics. Charles Wolfram described disagreements over exceptions to the confidentiality provisions of the proposed Model Rules as "the most heated professional and public controversy" concerning the Rules.<sup>191</sup> David Luban described the controversy as "bitter" and "vituperative."<sup>192</sup>

Disclosure of client confidences is often the best means of protecting third persons from wrongful conduct by the client. It

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190. The Model Rules require minimization of the harm to the client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1989) (stating that disclosure is permitted only to the extent necessary to prevent the harmful consequences).

191. WOLFRAM, *supra* note 2, at 670.

192. LUBAN, *supra* note 22, at 181.

can be a means for the lawyer to do good, rather than simply to do no harm. At the same time, it usually imposes greater costs on the client than withdrawing from representation, and, in that way, disclosure usually is a more intense form of disloyalty than withdrawal.

It is not surprising that disclosing client confidences for good reason is so controversial, considering that it often involves both greater good and greater evil than withdrawal, especially compared to a withdrawal that is propitiously handled to minimize client harm. Disloyalty by disclosure raises the stakes for all concerned, and it usually requires greater justification.

The Model Rules, which in some circumstances permit disloyalty by client abandonment without requiring any justification,<sup>193</sup> are, for the most part, quite restrictive with respect to disloyalty by disclosing client confidences. Disloyalty by disclosure is generally permitted to protect the lawyer herself from adverse legal consequences and third parties from dire bodily harm.<sup>194</sup> Disloyalty by disclosure is required, in some circumstances, to prevent a tribunal from being deceived.<sup>195</sup> On the other hand, the Rules prohibit disclosure without client consent in many circumstances in which a third party or the public in general may be seriously harmed by the client's intended conduct.

The provisions permitting self-interested disloyalty by disclosure privilege the lawyer's legal rights over loyalty to a client.<sup>196</sup> To some extent, this conclusion is consistent with the principle that the lawyer has no loyalty obligation to engage in illegal conduct. That principle was defended on the basis that the lawyer's promise of loyalty extends only to legal conduct and that the purpose of furthering the client's autonomy within the

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193. See *supra* notes 183-89 and accompanying text.

194. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b).

195. *Id.* Rule 3.3(a)(2).

196. See *id.* Rule 1.6(b)(2). I characterize the interest being protected as the lawyer's legal rights. This characterization may be narrower than what the rule contemplates. The comment to the Rule permits disclosure even though no formal proceeding has been commenced and, perhaps, even though no formal proceeding is likely to be commenced. *Id.* cmt. *Dispute Concerning Lawyer's Conduct* 1. At its outer reaches, the Rule may permit self-interested disloyalty by disclosure simply to protect the lawyer's reputation, even though the lawyer's silence may involve no foreseeable adverse legal consequences to her. See generally Jennifer Cunningham, Note, *Eliminating 'Backdoor' Access to Client Confidences: Restricting the Self-Defense Exception to the Attorney-Client Privilege*, 65 N.Y.U. L. REV. 992, 997 (1990) ("[C]ourts must begin to impose restrictions on the use of the expanded self-defense exception to protect client confidences from unwarranted intrusions by self-interested attorneys and overreaching third parties.").

law does not warrant illegal conduct by the lawyer.<sup>197</sup> A client, therefore, should not be permitted to gain an unlawful advantage over the lawyer, for example through an unfounded malpractice action or by refusing to pay a lawful fee, by asserting a loyalty obligation of confidentiality.

The Rules, however, do not limit the lawyer's self-interested disloyalty by disclosure to instances in which the client is seeking an unlawful advantage over the lawyer.<sup>198</sup> Under the Rules, for example, the lawyer has a legal right to disclose confidences in mounting a defense to discipline charges, a proceeding in which the client may be on the sidelines and seeks no advantage of any sort.<sup>199</sup>

The self-interested disloyalty by disclosure permitted by the Rules does not provide for the wholesale protection of lawyers. Under the Rules, Lawyer *A* may not disclose client confidences to protect Lawyer *B* against discipline charges, even though Lawyer *B* is wrongly accused and may take a fall without Lawyer *A*'s help. Thus, the principal concern of these provisions is the protection of the individual lawyer's legal rights and not some broader interest in protecting the legal rights of all lawyers or third persons. The message seems to be that each of us is entitled to render our own first-hand account in asserting or defending our legal rights, although we may be denied use of others' accounts. In this sense, the Rules place lawyers on equal footing with others, not in a superior position.

Nevertheless, the Rules provide crude standards for self-interested disloyalty by disclosure. When self-interested disloyalty by disclosure is permitted, lawyers are not required to weigh their benefit in disclosing against the cost to the client. The lawyer may disclose only "to the extent the lawyer reasonably believes necessary"<sup>200</sup> to vindicate her legal rights, but this restriction does not seem to prohibit the lawyer from disclosing to avoid a minor harm to herself even though the disclosure will seriously harm the client.

The Rules are also crude in their treatment of injuries to third persons. Disclosure is permitted only to prevent "imminent death or substantial bodily harm" to third persons.<sup>201</sup> Obviously, other

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197. See *supra* notes 160-61 and accompanying text.

198. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b).

199. See *id.* Rule 1.6(b)(2) cmt. *Dispute Concerning Lawyer's Conduct* 1, 2.

200. *Id.* Rule 1.6(b).

201. *Id.* Rule 1.6(b)(1).

significant injuries can befall third persons, including extended imprisonment, financial hardship, and the destruction of personal relationships. Disloyal disclosure is not permitted to avoid these injuries to third persons, even though the client may have little or nothing to gain by the lawyer's silence.

The permissive disclosure rules, by virtue of their permissive language, allow lawyers to weigh the costs to clients of disclosure against the benefits to themselves and others before deciding whether to disclose disloyally confidential information. When disclosure is prohibited or required under the Rules, no such weighing is allowed. In these cases, moral reasoning by the lawyer is ostensibly preempted. One effect of this preemption is to complicate the lawyer's moral decisionmaking by throwing into the equation the prospect of civil disobedience and its untoward consequences.

Under the withdrawal provisions of the Rules, lawyers are always free to make morally sound decisions as to disloyalty by client abandonment, although they are also free to make morally unsound decisions. The same freedom is allowed under confidentiality rules involving the lawyer's self-interest with respect to her own legal rights. On the other hand, the confidentiality rules do not always permit the lawyer to engage in responsible moral action when the rights of third persons are involved. The loyalty obligation of confidentiality is categorically privileged over many moral concerns involving third persons, even though, in some circumstances, those moral concerns should prompt disloyalty by disclosure.

### 3. *Lying to Clients*

The lawyer may lie to the client by continuing to represent the client, but doing so subversively, defeating the client's objectives from inside without the client even knowing it. This form of disloyalty seems particularly pernicious in that it entails morally troublesome conduct even apart from the disloyalty itself. It would be too great a digression to enter the tangle of philosophical arguments about lying, why it is wrong and when it is justifiable.<sup>202</sup> Legal ethics rules categorically prohibit lying, even to nonclients.<sup>203</sup>

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202. See, e.g., SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978); FRIED, *supra* note 91, at 54-78 (1978).

203. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1989) (stating that lawyers

Lying to a client sometimes may be the most effective means of defeating a client's wrongful plan. Even so, the wrongfulness of lying, especially to a client, raises serious doubts about whether this form of disloyalty is ever justifiable. The most likely context in which lying to a client would be defended is the paternalistic lie "for the client's own good."<sup>204</sup> Sissela Bok offers a cautionary appraisal of paternalistic lies:

[P]aternalistic lies, while they are easy to understand and to sympathize with at times, also carry very special risks: risks to the liar himself from having to lie more and more in order to keep up the appearance among people he lives with or sees often, and thus from the greater likelihood of discovery and loss of credibility; risks to the relationship in which the deception takes place; and risks of exploitation of every kind for the deceived.<sup>205</sup>

I can imagine no case in which disloyalty by lying to the client would be justified by a goal of avoiding participation in the client's wrongful plan. Client abandonment always would be a morally superior means to avoid participation than would lying. Circumstances may exist, however, in which a client's plan can be defeated only by lying; circumstances in which neither abandonment nor disclosure is likely to defeat the client's plan. Lies in this context may be paternalistic or for the benefit of a third party or the public.

One practical factor that militates against lying, even in the most extreme circumstances, is that lying often would disable the lawyer from encouraging the client to do what is right. When the lawyer's position is known to the client, the lawyer's lie may be less believable. Certainly, the happiest outcome is for the

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are prohibited from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation"). *But see id.* Rule 4.1 cmt. (stating that certain misrepresentations in negotiation may be permissible); *see also* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 663 (1990) ("Lawyers deceive their clients more than is generally acknowledged by the ethics codes or by the bar.").

204. "If a deceptive statement is necessary to accomplish some legitimate purpose, such as protecting someone from needless harm, one might consider the deception justifiable *unless* the speaker could have accomplished the same purpose without deception." Lerman, *supra* note 203, at 678 (emphasis added); *see also* Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761 (1990) (suggesting paternalistic deception may be justified in circumstances in which lawyers withhold information they themselves would not want to know if they were in their clients' positions).

205. Bok, *supra* note 202, at 218-19.

client to abandon the wrongful plan. The lawyer who lies to the client presumably concludes that this best possible solution will not work. Before a lawyer abandons the solution that is most acceptable morally, extraordinarily compelling reasons to do so must be present. Disloyalty by lying to the client is difficult to justify under almost any imaginable set of facts.

#### *4. Costs of Disloyalty*

A wide range of costs can accompany scrupulous disloyalty, depending on how the decision to be disloyal is implemented. Although it seems reasonable to conclude that stronger reasons are required for more costly disloyalty than for disloyalty that imposes smaller costs, this conclusion is troubling. It countenances, in some circumstances, the lawyer sitting by and letting the client accomplish a wrongful objective (or employ wrongful means) after the lawyer's withdrawal, while it prohibits the lawyer's active efforts to defeat the wrongful objective (or wrongful means). In other words, it sometimes privileges doing no harm over doing good. A moral universe so constructed seems built upside down.

Notwithstanding this considerable problem, it is sometimes better to resolve loyalty dilemmas by doing no harm rather than by doing good knowing that some harm will result as well. Utilitarian considerations dictate that we should not impose more serious harm on a client to avoid a lesser harm to others. Moreover, we may reach moral decisions with more or less certainty that we are right. We may conclude that a client's plan is wrongful, although still entertaining some doubt that it is wrongful. Even more to the point, we may decide that we must be scrupulously disloyal, although still abhorring the disloyalty that we plan.

These problems can be solved if scrupulous disloyalty is inappropriate in cases of such moral qualms, but this solution misses the point. The duty and presumption of loyal conduct should insure moral qualms. A lawyer should doubt the rectitude of her decision to be disloyal; and a moral universe that recognizes moral ambiguity, especially in the face of competing moral claims, is not upside down at all.

The lawyer's relative confidence in her decision to be scrupulously disloyal is a factor in determining the methods and goal in implementing that decision. Proportionality is a factor, as well. The lawyer should not grievously harm a client to avert minor harm the client intends to inflict on others. The extent of the

lawyer's efforts to persuade the client to abandon the unacceptable plan is also a consideration. It is hypocritical for the lawyer to speak softly and carry a big stick when dealing with a client. Unless the lawyer has exhausted other possibilities, disloyalty that imposes high costs on the client seems clearly out of the question.

A second cost of disloyalty, in addition to the cost imposed on the individual client, must be considered as well. It is widely believed that clients are willing to trust lawyers only to the extent they believe that their lawyers will be loyal to them.<sup>206</sup> Disloyal acts by lawyers may, therefore, threaten all lawyer-client relationships in that, if such disloyal acts are known, clients will generally be less trusting of their lawyers.

A regime of rules that forbids all disloyalty would presumably go the farthest to insure that clients trust their lawyers. Although client trust is an important concern, it is not the sole concern. This observation explains why some disloyal acts by lawyers have always been legally permitted. Clients should not trust lawyers to lie for them or to commit crimes for them. Moreover, lawyers should not induce a trust that they cannot honor.

The secondary effects of legitimate lawyer disloyalty on other clients is a problem only insofar as other clients misperceive the extent of a lawyer's loyalty obligation. Thus, the secondary cost of legitimate lawyer disloyalty is directly related to the extent to which clients generally understand the limits on a lawyer's loyalty obligation. It is a mistake to discourage properly disloyal conduct on the basis that it will undermine trust in lawyers generally. The problem of secondary costs is better addressed by educating clients than by misplacing moral values.<sup>207</sup>

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206. See, e.g., 1 GEOFFREY C. HAZARD & WILLIAM W. HODES, *THE LAW OF LAWYERING* 128 (1985):

Although there is little empirical evidence of the precise degree to which clients rely on the principle of confidentiality, it is intuitively obvious that lawyers operating under a binding requirement of confidentiality will have at least some greater ability to gain the trust of at least some clients, and hence to serve them competently.

*Id.*; FREEDMAN, *supra* note 22, at 87 (stating: "A client is not likely to give her lawyer facts that might be incriminating or embarrassing, however, unless she is assured that the lawyer will maintain the information in confidence.").

207. A recent study "revealed widespread misunderstanding among clients" as to the extent of the lawyer's loyalty obligation to preserve client confidences. Fred C. Zacharias, *Rethinking Confidentiality*, 74 *IOWA L. REV.* 351, 381 (1989). In addition, the study suggested "that the general sense of trust in attorneys as professionals—rather than

## V. CONCLUSION

This discussion makes clear that several factors appropriately influence a lawyer's decision whether to be disloyal to a client, including the cost to the client, the purpose to be served by acting disloyally, and the methods by which the disloyalty may be acted out. Loyalty dilemmas require complex judgments that cannot be reached wisely unless all relevant moral factors are considered. The Model Rules systematically fail to do this. In some Model Rule provisions, neither the cost to the client nor the purpose to be served by the disloyal conduct is adequately considered.

The tendency in the Model Rules is to attempt bright-line distinctions governing various loyalty dilemmas when an analysis and balancing of factors is needed. Sometimes, the Rules undervalue loyalty concerns; other times, such concerns are overvalued. Sometimes, the Rules give lawyers too much discretion; other times, too little. The problem with the withdrawal and confidentiality rules is that they are based on a fundamental misconception about how loyalty concerns relate to responsible moral conduct. The costs and benefits of (dis)loyal action must always be considered before a lawyer can choose how to act responsibly, and the Model Rules usually undervalue at least one of these concerns.

The complex moral decisionmaking that loyalty dilemmas require is short-circuited by the crude directives of the Model Rules. The ethos of the Rules is troubling in two respects. First, although generally empowering the lawyer to do no harm, the lawyer is sometimes disempowered from doing good. Second, lawyers remain free to do harm in many respects.

Sweeping changes in the positive law regulating lawyers must occur before the law could prescribe the process of reflection in resolving loyalty dilemmas that moral philosophy prescribes. Positive law is rarely more than a crude reflection of the complex moral concerns on which it is often based. The Model Rules contemplate the moral questions posed by loyalty dilemmas, but they resolve those questions far too categorically to be wise solutions.

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particularly strict confidentiality rules—is what fosters client candor." *Id.* at 386. These findings support the contentions that clients need to be educated as to the extent of lawyers' loyalty obligations and that the extent of those obligations does not necessarily control whether a client is likely to trust her lawyer.

In the end, the lawyer's loyalty obligation to clients is given uneven legal protection, as it should be. Loyalty is a powerful moral force for the lawyer, but, at times, more powerful moral forces come into play in the lawyer's work. Loyalty to clients should be legally required to some extent. The problem, of course, is in defining the extent. The law tends to pursue categorical distinctions for resolving loyalty problems. An analysis of factors and a balancing of interests would comport more fully with the nature of the loyalty obligation.