MORAL FREAKS: Lawyers' Ethics in Academic Perspective

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Much recent academic discussion exaggerates the distance between plausible legal ethics and ordinary morality. This essay criticizes three prominent strands of discussion: one drawing on the moral philosophy of personal virtue, one drawing on legal philosophy, and a third drawing on utilitarianism of the law-and-economics variety. The discussion uses as a central reference point the "Mistake-of-Law" scenario in which a lawyer must decide whether to rescue an opposing party from the unjust consequences of his own lawyer's error. I argue that academic efforts to shore up the professional inclination against rescue are not plausible. I conclude by recommending an older jurisprudential tradition in which legal ethics is more convergent with ordinary morality.

Both critics and defenders of the legal profession often assume that a vast gulf separates ordinary morality and lawyers' ethics. Disparaging "lawyer jokes" often turn on an implied distance between lay and lawyer morality.[2] Although they take a different view of the substance of lawyer's ethics, prominent lawyer expositors of professional responsibility also assume that its distance from ordinary morality is necessarily large. A classic article by Stephen Pepper

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[2] For example: "An ancient, nearly blind old woman retained the local lawyer to draft her last will and testament, for which he charged her $200. As she rose to leave, she took the money out of her purse and handed it over, enclosing a third hundred-dollar bill by mistake. Immediately the lawyer realized that he was faced with a crushing ethical question: Should he tell his partner?" Marc Galanter, <u>Lowering the Bar: Lawyer Jokes and Legal Culture</u> 161 (2006).

defends "the lawyer's amoral ethical role". In a recent book, Daniel Markovits defends a "modern legal ethics" that pervasively requires lawyers to "lie" and "cheat". The lawyer in such expositions appears as a moral freak, albeit a benign one.

The divergence idea is largely associated with lawyer devotion to clients at the cost of injustice or harm to third parties and the public. In this essay, I criticize academic versions of the three types of argument most often made to minimize the lawyer's responsibilities to nonclient interests. The first defense draws on the moral philosophy of personal virtue; the second on jurisprudence, and the third on utilitarianism of the law-and-economics variety (though my examples come more from casual conversations than from the publications of any particular theorist).

I suggest that each of these accounts is unsatisfactory as a matter of both morality and law. Their common defect is to exaggerate the necessary distance between ordinary morality and legal ethics. This defect could be viewed as unfair to lawyers in painting their role as less morally attractive than it need be or as overly generous to them in offering an undeserved measure of immunity from lay moral criticism.

I begin with a hypothetical to orient the contrast between ordinary morality and the three defenses of aggressive role morality; then take up the three defenses in turn; and conclude by pointing toward an alternative theoretical tradition that is more plausible jurisprudentially and more attractive ethically.

I. The Mistake-of-Law Problem

Lawyer X represents the defendant, a large corporation, in a personal injury case arising from an accident in which a truck driven by one of its agents injured a pedestrian -- the plaintiff. In the course of extensive negotiation, X realizes that the plaintiff's lawyer is operating under a mistaken assumption about the applicable law. The plaintiff's lawyer thinks that if X proves that his client was contributorily negligent, it will bar the plaintiff's claim entirely. There is high probability that X can establish contributory negligence. However, a recent statute in the relevant jurisdiction replaces contributory with comparative negligence. Plaintiff's counsel is aware of the statute but mistakenly thinks that it does not apply to this case because the relevant events occurred before

its enactment. In fact, the statute applies to all cases filed after its enactment, which would include this case.

Plaintiff's counsel has made an offer to settle the case on terms that X believes are more favorable to his client than a fully informed lawyer would recommend to the plaintiff. That is, the offer is outside the zone of minimally probable trial outcomes (appropriately adjusted for likelihood and litigation expense) on the side that favors the defendant. X is highly experienced and is confident of this judgment.

Should X accept the offer without informing opposing counsel about his mistake? Assume that, if X put the issue to the client, the client would decide not to disclose.

Assume further that X has discretion over this matter in the sense that neither disclosure nor failure to disclose would subject him to discipline or liability. On the other hand, X wants to exercise his discretion in a principled way so that he could explain and justify his decision.[3]

The assumption that doctrine does not explicitly dictate either disclosure or nondisclosure seems basically correct, but we should take note of two rules by way of background.

First, the bar's confidentiality rule in its most widely adopted form requires that the lawyer obtain client consent for disclosure of "all information relating to the representation" with certain specified exceptions not relevant here. (1.6(a)). Although this definition of protected information literally includes information about legal authority, it is invariably interpreted to exclude it. No one doubts, for example, that X would be free to advise someone in an unrelated matter on the comparative negligence statute without this client's permission, which would not be the case with information covered by the confidentiality rule.[4]

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[3]   This is a slightly modified version of a problem that appears in Gary Bellow and Bea Moulton, The Lawyering Process 586-91 (1978). In 1977, I saw Gary Bellow teach it to a class of about 50 at Harvard Law School. The class divided evenly over whether the lawyer should disclose. In 2007, I taught the problem to a class of about 50 at Harvard Law School. Only one student favored disclosure. In classes at Stanford and Columbia over the past 10 years, disclosure has usually drawn a substantial minority, but never close to half.

[4]   The scope of the confidentiality prohibition depends in part on whether the lawyer "discloses" the information, under Rule 1.6, or merely "use[s]" the information

Second, the disciplinary rules require that the lawyer disclose "<u>to the tribunal</u> legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." (3.3a2) Under some circumstances, this rule might oblige the lawyer to disclose the retroactivity provision in the comparative negligence statute to the court. However, the rule does not apply to out-of-court dealings with counsel.

Of course, a variety of rules invoke general standards -- such as competence, loyalty, and client control -- that might be interpreted to entail nondisclosure. Other rules that prohibit "dishonesty" and "conduct prejudicial to the administration of justice" might be interpreted to require disclosure. But any such interpretation would depend on some background understanding about law or the lawyer's role. So the rest of this essay explores the available background understandings.

As a matter or ordinary morality, the case for disclosure is simple and obvious: The lawyer should disclose because only disclosure will prevent serious harm to the plaintiff, and the lawyer can disclose without significant cost to himself or to the legitimate interests of anyone else. The argument supposes two sorts of harm to the plaintiff in the absence of disclosure. From a substantive perspective, harm arises from the denial to the plaintiff of a benefit to which the statute entitles him. Procedurally, harm arises from the unfairness of a process in which the dispute is resolved without the decisionmakers knowing relevant law.

Note that this "ordinary morality" view of the matter is not independent of law. Clearly law figures in ordinary morality. To the extent ordinary morality differs from the legal profession's ethical precepts, the difference turns on the greater priority ordinary morality gives to direct vindication of substantive legality and procedural fairness over client loyalty.

We are dealing here with two views of the relative roles of ordinary morality and differentiated professional morality in lawyering.

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under 1.8(b). Explicit exceptions aside, the disclosure prohibition is ostensibly absolute; the use prohibition applies only where use would be "to the disadvantage" of the client. However, neither prohibition applies where the only relevant information is general legal doctrine. See <u>Restatement of the Law Governing Lawyers</u> sec.   .The New York rule explicitly excludes information about legal authority from the duty of confidentiality. New York Rules of Professional Conduct 1.6(a).

One, which seems to be dominant among nonlawyers, prescribes a relatively small divergence from ordinary morality in legal ethics. The other view, which seems dominant among law students and lawyers, prescribes a relatively large divergence.[5] We can get a sense of the nature of the divergence by turning to the arguments for nondisclosure in the Mistake-of-Law case.

II. Convention and the Adversary System

Many law students and lawyers have a visceral reaction against disclosure before they can give a reason for it. They seem to feel that non-disclosure is virtually constitutive of the lawyering role. They recognize that most lay people are likely to favor disclosure, but they feel that they gave up the perspective that underlies the lay view when they decided to become lawyers, and they experience arguments for disclosure as attacks on their chosen professional role. It is important to acknowledge that there are reasonable arguments against disclosure, but it is equally important to recognize that many of the arguments for disclosure are internal to the lawyer's role. They are not arguments about whether a good person can be a good lawyer; they are arguments about what it takes to be a good lawyer.

A first unreflective reaction to the problem is, "It's not the lawyer's job to help out the other side." Or as Justice Jackson put it, lawyers should not depend on "wits borrowed from their adversary."[6] But this is clearly wrong. Much of what the lawyer does is designed to help the other side, and lawyers are necessarily dependent on the judgment and efforts of their adversaries. Drafting pleadings, producing material in discovery, giving notice of witnesses, restricting argument to matters of record, and refraining from misrepresentation are core practices of lawyering, and they all help the other side. It is true that lawyers are inclined to help the other side in ways that do not benefit

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[5] My assertion about difference between lay and lawyer views is based on casual empiricism. I doubt that it is controversial. Those who feel in need of more rigorous support will find a little in Fred Zacharias, "Rethinking Confidentiality", 74 Iowa Law Review 351, 394-96 (1989) (small survey of attitudes toward confidentiality in which lay respondents assert that substantive justice and social welfare should trump client loyalty more than lawyers).

[6] Hickman v. Taylor, 329 U.S. 495, 516 (1947).

their own client only insofar as they are obliged to, but the question posed by the Mistake-of-Law Problem is precisely whether the lawyer is obliged to offer a certain kind of help.

The most likely second reaction is that nondisclosure is required by the "adversary system." This seems to be an argument from convention. A convention is a practice that is habitually performed and accepted without controversy. The proponent of a convention sometimes benefits from a presumption in favor of its goodness and is thus excused from offering more direct and specific arguments for it.

However, there is no specific conventional response to the Mistake-of-Law problem. The problem rarely arises, and we have virtually no direct evidence about how lawyers respond when it does. Moreover, when lawyers and law students are presented with the hypothetical, it appears to be controversial. In my experience, a majority favors nondisclosure, but a significant minority disagrees.

The argument from convention appears to be that nondisclosure is entailed by other values and practices that constitute the "adversary system". Those who appeal to this conventional view to support non-disclosure think that, if the particular practice of nondisclosure is controversial, that is only because those who resist it fail to recognize the implications of other values and practices to which they habitually acknowledge commitment.

But the only way in which the general idea of the adversary system could entail any particular practice is by further conventional understanding. In fact, there is no conventional definition of the adversary system that entails any answer to the Mistake-of-Law problem or indeed most of the disputed issues of the ethics of advocacy. Any definition of the adversary system that entailed responses to these problems would be just as controversial as those problems are in isolation.

The best conventional definition of the adversary system – the one that most aptly expresses longstanding and widely accepted views – is the comparatist's. It contrasts our adversary system with the most salient example of a non-adversary legal system – the civil law systems of continental Europe. This definition looks to the relative allocation of authority between judges on the one hand and advocates on the other with respect to the raising of issues, the use of evidence, and the conduct

of trials.[7] In an adversary system, parties and their lawyers have pre-eminent control and responsibility for deciding what issues to raise and what evidence to seek and introduce, and they have a relatively independent role in the conduct of the trial, in particular, the examination of witnesses. By contrast, in the civil law system judges have more initiative and control over such matters.

The comparatist's definition does not seem to be what people have in mind when they assert that the adversary system resolves the Mistake-of-Law Problem. The comparatist's definition focuses, not on the responsibilities of the lawyers and parties to each other, but the relation of the judge to the lawyers. The greater autonomy of counsel in this system might just as readily be interpreted to imply greater responsibility for the ultimate fairness of the proceedings as to imply less responsibility (since the judge has less capacity to safeguard fairness). Yet, this greater autonomy of counsel seems to be the only sense in which it is uncontroversial to say that we have an adversary system.

As far as conventional understanding is concerned, a system that required disclosure in the Mistake-of-Law scenario could be just as much an "adversary system" as one that required the opposite. George Sharswood, one of the most eminent legal ethicists of the 19th century asserted in his treatise that "[c]ounsel … are duty bound, to refuse to be concerned for the plaintiff in the pursuit of a demand, which offends his sense of what is just and right."[8] This precept became marginalized within the profession by the end of the century, but neither the lawyers who espoused it nor the ones who rejected it doubted the validity of the "adversary system." Prior to the 1930s, there was very little opportunity for a litigant to force an opposing party to disclose information and evidence in advance of trial. Lawyers resisted the reforms that have made virtually all relevant information and evidence discoverable on the ground that such a practice was incompatible with the adversary system. However, they lost, and broad discovery has become an accepted part of what no one doubts is still an "adversary system."

It is perhaps surprising that, among academics, philosophers have been especially susceptible to the mistake of conflating particular elaborations of the adversary system with its core principles. Moral

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[7] See, e.g., Mirjan Damaska, The Faces of Justice and State Authority (1991).

[8] George Sharswood, An Essay on Professional Ethics 39 (2d ed. 1860).

philosophers appear occupationally prone to take an interest in "role morality." Some appear to find the same excitement in discovering role-based norms that defy ordinary morality that astronomers take in discovering a planet whose movement deviates from the laws of physics. Advocacy norms that license deception or opportunism fit the bill exactly.

Of course, moral philosophers are less likely than lawyers to presume the value of a convention. But they are happy to appeal to convention to define their subject. In a common approach, the philosopher starts by noting that one or more problematical lawyer norms are integral to the "adversary system." She then proceeds to consider whether the "adversary system" can be justified as a social institution, and/or whether, assuming it is justified, acting as a lawyer in accordance with its specialized norms is consistent with some conception of personal virtue.[9]

This tendency recurs in Daniel Markovits's recent A Modern Legal Ethics (2008). The book is a palace of fancy theory built as a garage for a jalopy. The jalopy is the conception of "adversary advocacy" illustrated by the American Bar Association's Model Rules of Professional Conduct. On the basis of this document and some interpretive case law, Markovits's concludes that "adversary advocacy" requires lawyers to "lie" (deceive in various ways) and "cheat" (take advantage of rules in ways not intended by their drafters).

He then defends adversary advocacy as a way of engendering a sense of "democratic legitimacy" by mediating between the law and the client's self-understanding. By formulating the client's view in terms of public norms, the lawyer makes it possible for disputants to engage each

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[9] Alan Donegan, "Justifying Legal Practice in the Adversary System," in The Good Lawyer 123-149 (David Luban ed. 1983); David Luban "The Adversary System Excuse" in id., at 83-122; Charles Fried, "The Lawyer as Friend," 85 Yale Law Journal 1060 (1985); Arthur Appelbaum, Ethics for Adversaries: The Morality of Roles in Public And Professional Life 104-09 (1999). Donegan and Fried defend professional morality against ordinary morality; Luban and Applbaum do the opposite. All of them presuppose a degree of divergence between professional and ordinary norms that I do not think is defensible even within professional morality.

Bernard Williams seems to have anticipated the problem when he suggested that philosophers should "ask how in detail the justifying arguments for the profession as a whole apply to this or that practice." "Professional Morality and Its Dispositions" in The Good Lawyer, cited in this note, at 266 (emphasis added).

other and the judge in terms of a common language. At the same time, by virtue of her own deep engagement with the client's point of view, the lawyer gives the client a sense of participation in the process that leads to acceptance or "ownership" even when the client loses. This effect requires that the client perceive the advocate as a partisan presumptively committed to her interests, rather than someone responsible for judging her interests. The argument is interesting, but it does not say anything about any controversial issue of legal ethics. As Markovits recognizes, any conception of adversary advocacy has to acknowledge some limits on client loyalty, and his political legitimacy argument provides no principled basis for locating those limits.

Yet, Markovits speaks of all the injunctions to "lie" and "cheat" in the current version of the Model Rules as "engender[ed]" by "the principles of lawyer loyalty and client control that … establish the center of adversary advocacy." (88) He applies such terms to two very different sorts of practices without distinguishing them. One is the advocate's duty to make any effective non-frivolous argument to a court for a client's position regardless of whether she is personally convinced of its merit. (53) This norm is not controversial within the profession. It represents a minimal departure from ordinary morality. It is grounded in the belief that, by deferring private judgment, the advocate facilitates a more reliable and accountable resolution by the judge.

However, Markovits also uses his conception of adversary advocacy to support a range of practices that are controversial and cannot be reasonably be seen as facilitating more reliable and accountable decision-making, such as impeaching a witness that the lawyer knows (on the basis of reliable private information) is telling the truth. And Markovits understands the bar's norms to demand nondisclosure in cases like the Mistake-of-Law problem.[10]

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[10]   I so conclude from Markovits's approving description of an opinion by an ABA ethics committee asserting that a lawyer is free to file a claim barred by the statute of limitations in the hope that the opposing lawyer will not be aware of the defense and that the filing lawyer is forbidden by confidentiality to disclose that the claim is time-barred without the client's consent. Markovits, at 56, 275 n.84. ABA F. Op. 94-387 (Sept. 1994). But the opinion's conclusion with respect to non-disclosure is not supported by argument or citations to authority, and both conclusions are disputed in a vigorous dissent.

For further indications that the opinion's view on nondisclosure is controversial, see Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp.

On the other hand, where he reads the Model Rules to restrain aggression, Markovits approves the restraints on the grounds that the practices in question would "subvert", "undermine", or "misuse" the adversary process. (57-58) He never considers how remarkable it is that a trade association, struggling with internal division and external pressure, should come up with a code that converges so seamlessly with the immanent logic of its governing concept. Apparently, the owl of Minerva spreads her wings whenever the House of Delegates votes.

Markovits does not explain why his general account of the virtues of adversary advocacy requires any particular norm of the Model Rules. Why, for example, do the Model Rules (or the ideal of "adversary advocacy" that they incarnate) mandate disclosure to the court of controlling legal authority unknown to opposing counsel and not mandate disclosure of controlling authority to opposing counsel when the case is settled out-of-court? (The effects of nondisclosure would seem to be the same in both situations.) Why does the Code prohibit the knowing offer of perjury but (according to Markovits) mandate that the lawyer engage in cross-examination intended to induce the jury to draw what the lawyer knows is a false inference? (Both practices increase the risk of a wrong result, and prohibiting either requires the lawyer to make a private judgment about truth or falsity.) Why is the Model Rule that prohibits disclosure of a client's fraudulent plans unless the lawyer has been involved in them better than, say, New York's rule, which permits disclosure regardless of the lawyer's involvement, or New Jersey's which mandates disclosure. No doubt there are arguments for each of these choices. I doubt, however, that any of them can be derived from the abstract idea of an adversary system, even as Markovits elaborates it, or that a system adopting the norms imposing more third-party responsibility would be any less an "adversary system" than the one conjured by the ABA.

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507 (E. D. Mich. 1983) (stating that plaintiff's lawyer had a duty to reveal to the defendant that his client had died before concluding a settlement: "Candor and honesty necessarily require the disclosure of such a significant fact…."); Leardi v. Brown, 474 N.E.2d 1094, 1099 (Mass. 1985) (holding that the inclusion of an unenforceable term purporting to negate a tenant right in a residential lease – presumably in the hope that the tenant would not learn of its unenforceability – violates a statutory prohibition against "unfair and deceptive" practices).

After provocatively insisting on the gulf between ordinary and lawyer morality, Markovits gestures toward the possibility of reconciliation by suggesting that, while lay people may frown on adversary advocacy as detached observers, they find it satisfying as disputants. He supports this argument with references to social science literature that suggests that claimants often attach more importance to procedural fairness than substantive correctness in appraising the fairness of their treatment. (188-93)

However, nothing in this literature indicates that the respondents associate cross-examining a truthful witness or arguing false inferences or any other form of "lying" or "cheating" with fair procedure or any kind of legitimacy.[11] Moreover, we should be wary of indulging appeal to any procedural justice that compromises substantive legality. Outside the sphere of lawyering, we generally take as a defining feature of both justice and legitimacy "Congruence Between Official Action and Declared Rule."[12] There may be some valid procedural norms that inhibit this congruence, but to found the core of legal ethics on them would be implausible.

Part of the problem may be a matter of perspective. Lawyers discussing fairness in the judicial process typically invoke the perspective of litigants, and social scientists are interested in the potential of courts to induce disputants to accept their resolutions. But few lay people spend much of their lives in litigation. When they think of the rule of law, they are apt to think less of how they will be treated if they should end up in court and more about whether their rights will be

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[11]   "Procedural issues are not independent of fair outcomes. Fair outcomes are one thing that people expect from a fair procedure…." Tom Tyler, Why People Obey the Law 164 (1990).

In the studies that Markovits cites, e.g., Tyler, legitimacy from a sense of fair process is compared to legitimacy, not from substantive fairness, but from the disputant's getting what she wants. The studies find that process can legitimate an outcome even to litigants who do not get what they want. However, what Markovits's argument requires is evidence that process can legitimate a substantively unfair outcome (as assessed either by the disputant or a disinterested observer). Most of the examples in the studies seem to involve claims for which there is no obvious benchmark of substantive fairness (for example, requests for public assistance in dealing with public disturbances or housing code violations).

[12]   Lon l. Fuller, The Morality of Law 81 (1964). Fuller asserts that "most forms of 'procedural justice'" are "designed to maintain" this congruence.

respected as they go about their lives in civil society. Here the key value is likely to be "congruence" – the expectation that the laws that purport to govern their situation will be applied in some foreseeable and substantively fair manner.[13]

III. Autonomy Within the "Bounds of the Law"

Probably the most common rationale for nondisclosure in the "Mistake of Law" problem emphasizes that no law requires disclosure and argues that, in the absence of such a law, the lawyer owes it to the client not to do anything that would interfere with the client's goals. Most lawyers instinctively leap to this position, and many are content to remain there.

Stephen Pepper has given the best known jurisprudential account of it in "The Lawyer's Amoral Ethical Role"[14]. His argument begins with the claim that law is, fundamentally and paradoxically, about autonomy. It protects autonomy by limiting it so that everyone can have an equal share of it. The only legitimate public constraint on an individual's pursuit of her ends is law. The lawyer, as an agent of the legal system, has a duty to advance the client's autonomy and cannot recognize any limit on that duty other than law. Any other limit would constitute an unjustifiable infringement of the liberty the law is supposed to protect.

David Luban wrote a famous reply to Pepper's article.[15] He argued that there are many important public values other than autonomy;

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[13]   In the studies that Markovits cites, e.g., Tyler, cited in note ; legitimacy from a sense of fair process is compared to legitimacy, not from substantive fairness, but from the disputant's getting what she wants. The studies find that process can legitimate an outcome even to litigants who do not get what they want. However, what Markovits's argument requires is evidence that process can legitimate a substantively unfair outcome (as assessed either by the disputant or a disinterested observer). Most of the examples in the studies seem to involve claims for which there is no obvious benchmark of substantive fairness (for example, requests for public assistance in dealing with public disturbances or housing code violations).

[14]   Stephen L. Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities," 1986 American Bar Foundation Research Journal 633.

[15]   David Luban, "The Lysistratian Perspective: A Response to Stephen Pepper," 1986 American Bar Foundation Research Journal 637.

that some of these values do not take the form of law; and that both social order and fairness permit and even require coercive (though not necessarily public) enforcement of such nonlegal values. "It is illegal to smuggle a bottle of nonduty-free Scotch into the country. It is not illegal to seduce someone through honey-tongued romancing, maliciously intending to break the lover's heart afterwards," he wrote. Even where it is be impractical to regulate such conduct legally, informal social regulation by lawyers as well as lay people is often practical and desirable

Luban's position is closer to Pepper's than appears at first glance. An interesting section of Pepper's article had taken account of "The Problem of Legal Realism." Legal realism insists that "if you want to know the law and nothing else", which is presumably what Pepper's "amoral" lawyer should want, you should look at it as a "bad man" would and attend only to the "material consequences" that the state attaches to relevant courses of action.[16] The Realist and the bad man care about the terms of enacted law only insofar as they help predict the application of sanctions. The "problem" with this perspective for legal ethics is that it drains law of authority. The transition from substantive rules to sanctions leads to a further move from the sanctions prescribed on the books to the sanctions that are actually likely to be applied, given the inclinations, knowledge, and resources of the parties and public officials. And at this point law seems no longer to represent coherent boundaries of liberty so much as "what you can't get away with".

For Luban, the "Problem of Legal Realism" means that a plausible lawyer ethic has to involve more than fidelity to law and an autonomy defined as whatever the law does not effectively prevent. It has to involve at least some measure of nonlegal morality. Pepper had anticipated this view somewhat. His main solution to the "problem of Legal Realism" was to permit a kind of conscientious objection: where the lawyer had moral qualms about a client's lawful course of action, she could excuse herself. The main difference between Pepper and Luban seemed to be about whether non-legal morality can generate professional duty. Pepper thought that non-legal morality could provide a private excuse for refusing to aid the client, but not a professional duty. Luban thought lawyers sometimes had a professional duty to vindicate non-

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[16]   Oliver Wendell Holmes, "The Path of the Law," <u>Harvard Law Review</u>

legal morality. Such a duty would clearly support public criticism. He left open whether it could support material   sanctions.[17]

There is, however, another line of criticism of Pepper's view that Luban does not take up. Pepper's "amoral ethical role" rests on three premises:

1. Lawyers owe fidelity to law.

2. Law is strongly differentiated from morals.

3. Other than her duty to law, the lawyer's only important duty is to the client's autonomy.

Everyone accepts the first point. Luban attacks the third. But the second point is at least as vulnerable.

The principle that law is strongly differentiated from morals is associated with the doctrine of Legal Positivism. Legal Positivism sometimes purports to offer only a descriptive account of law. But the "lawyer's amoral ethical role" that Pepper defends conjoins a norm of fidelity to law to a positivist notion of law as strongly separate from morals.

How does the Positivist separate law and morals? This is an important consideration for the lawyer who asserts a duty not to disclose in the Mistake-of-Law case. For in that case, the values that weigh in favor of disclosure seem at least as much legal as moral. In the relevant jurisdiction, the value that a person has a right to recover from his injurer some measure of the costs of negligently inflicted injury has been enacted into law. Those who urge disclosure do so because they feel that this law requires disclosure. Without disclosure, the law is almost certain to go unvindicated.

So why would Pepper and lawyers who take his view say that no law requires disclosure? They might be relying on some form of Legal Positivism.

The first candidate would be the one Pepper and Luban mention – legal realism as defined by Holmes's "bad man" perspective and earlier by John Austin. This view identifies law with norms enforced by state-imposed material sanctions. In this perspective, we know that the

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[17]   A related difference concerned the "last lawyer in town" proviso. Pepper would permit conscientious objection only where the client could get help elsewhere. Presumably, Luban would not recognize such a condition. Under his view, it is desirable that the lawyer's refusal precludes the client from pursuing her course of action.

negligence norm does not make disclosure in the "Mistake of Law" scenario a legal duty because the state imposes no sanctions for non-disclosure.

However, the "bad man" perspective is an unsatisfactory way of delimiting law. It ignores a key feature of most people's understanding of law: they associate law with obligation. To call something law is to suggest that there is a presumptive reason to respect it independently of whatever sanctions the state imposes for violation. This would be an important failing even if we were only interested in defining law for descriptive purposes. To the extent that we are trying to define law for ethical purposes, it is a still more serious failing.

This brings us to the second candidate – the procedural perspective associated with H.L.A. Hart. Hart says that legal systems separate law and non-law through secondary or institutional rules. For example, Article I, sec. 7 of the U.S. Constitution says that when a bill vetoed by the President is approved by a two-thirds vote of the Senate and the House of Representatives it "shall become a law." A variety of secondary rules of this kind, both explicit and implicit, tell us when a norm counts as law. This view remains Positivist to the extent that it asserts that a norm's character as law – and by implication its capacity to oblige compliance as law – depends on its institutional provenance rather than its intrinsic weight or acceptance.

How does this view account for the intuition that there is no legal duty to disclose in the Mistake-of-Law scenario? The comparative negligence statute surely meets the secondary tests that qualify a norm as law. However, that norm says nothing specifically about a lawyer's duty to disclose. The case for disclosure rests on a judgment that the basic norm can only be vindicated in these circumstances by lawyer disclosure. If this judgment is correct, why should we not understand disclosure in this scenario as among the duties the statute creates? And if the statute creates such a duty, why would we not consider it a legal duty?

I suspect that part of the reluctance to recognize a professional duty to disclose arising from the comparative negligence principle or the general value of just adjudication rests on a further idea sometimes associated with the Positivist notion of legality. For Austin, in addition to being enforced by sanction, law had to take the form of "command". Ronald Dworkin, in his critique of Positivism, suggested that a basic

premise of the doctrine was that law takes the form of a "rule". A command or rule (in the technical sense elaborated by Dworkin) is a relatively explicit and categorical norm. The scope of its application can be exhaustively specified, and it has a binary "all or nothing" quality. Other types of norms – principles, policies, values – lack these qualities. Their range cannot be fully specified in advance of their application, and they have persuasive rather than dispositive force. They can weigh in favor of a conclusion without dictating the conclusion. They provide reasons for doing or not doing something, but reasons that might be outweighed by competing reasons.

Dworkin made an extensive critique of the premise that law must take the form of command or "rule".[18] It is not clear that his argument has any real targets within legal philosophy. H.L.A. Hart denied such a premise, and according to Jules Coleman "no legal positivist has ever actually held that all legal standards are rules."[19] However, many legal ethicists and practitioners seem at least tacitly committed to this proposition.

In the Mistake-of-Law case, the norm that supports disclosure is not a command or "rule". It is an informal value or, in Dworkin's terms, a principle. This norm is implicit in the comparative negligence statute, and it gives a presumptive "all things considered" reason for disclosure rather than a categorical "all or nothing" reason for action. The lawyer who refuses to consider that such a norm might create a legal duty may assume that such duties can only be created by norms that take the form of commands or Dworkinian rules.

In fact, however, any conception of legality or the "bounds of the law" that excludes principles, policies, and informal values is unsatisfactory both as a descriptive account of the legal system and as a basis for an ethic for legal practitioners. As a descriptive matter, this kind of Positivism misrepresents the way people understand legality. As a normative matter, the ethic that results when this understanding of legality is joined with the professional duty of fidelity to law is unconvincingly narrow. Reflective practitioners could not achieve self-respect or social respect on the basis of such an ethic.

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[18]   Taking Rights Seriously 14-45 (1977).
[19]   The Practice of Principle 107 (2001).

Dworkin and some of his predecessors argued these points by explicating judicial decisions like <u>Riggs v. Palmer</u> in which what seems intuitively the correct result is best explained in terms of an informal norm such as "no one should profit from his own wrongdoing." (The plaintiff in that case was the beneficiary under a will, but he had murdered the testator. The literal terms of the statute allowed the plaintiff to recover, but the court held that the statute was qualified by an implicit principle.)

The lawyer's role, of course, is different from the judge's. The judge's decisions are typically dispositive; the lawyer's are typically facilitative. Nevertheless, the Dworkinian critique of the Positivist "model of rules" is applicable. In locating the "bounds of the law" for the purpose of counseling their clients, lawyers instinctively rely on principles, policies, and informal norms. No lawyer would hesitate to tell a client that, while the speed limit is 65, police do not enforce until a driver exceeds 70. On the other hand, most would not consider telling a fugitive client that the police are focusing their search for the fugitive in neighborhood A and have stopped looking in neighborhood B. Often in such cases, no relevant command or rule dictates the lawyer's decision. Rather, the decision rests on the relative weights of background principles and policies.

Some cases are controversial. Should a labor lawyer tell a business manager that the penalties and process delays in connection with unfair labor practices are such that the economically rational course is probably to discharge union organizers in violation of the National Labor Relations Act? People disagree. But as Dworkin emphasizes, disagreement over the application of norms is not an indication that they are not law. In the Mistake-of-Law hypothetical, the argument for disclosure may be mistaken in various ways. Perhaps disclosure is inconsistent with the best interpretation of the comparative negligence statute. The key point remains that determination of the bounds of the law requires us to consider the full range of relevant legal norms, and this includes norms that may not take the form of commands or "rules".

One could respond by acknowledging that there are informal values in these cases that potentially impose duties but insist that these values are moral rather than legal. No doubt some cases are best described in this way. Pepper and Luban discuss a case in which a father asks a lawyer to draw a will disinheriting his son because the father

wishes to punish his son for protesting the U.S. intervention in Nicaragua. If there is a relevant principle that weighs strongly against the client's freedom of disposition in this case, it is probably best described as a moral rather than a legal one.

However, I do not think this is true of the Mistake-of-Law case. No doubt the right to recover for negligently inflicted injury even when the subject is himself negligent does state a moral principle, but it is not an obviously correct or universally held one. What is obviously correct is that comparative negligence is the applicable law. Even if the lawyer is not committed to comparative negligence as a moral matter, she should have some duty to respect the legal principle that the legislature has enacted. If such respect requires disclosure, then consequent duty seems a legal one.

The Mistake-of-Law Problem requires consideration of a further issue. The fact that a legal value weighs in favor of disclosure, even a legal value capable of supporting a duty, does not necessarily mean that the duty applies to a lawyer opposing the party that disclosure would benefit. If the "Problem of Legal Realism" is the tendency to ignore that anyone has a duty to respect the law, what we might call the "Problem of Legal Idealism" arises when we assume that everyone has the same legal duty to bring social life into conformity with enacted substantive law. In fact, substantive law is mediated by a large body of enforcement norms that allocate different duties to different actors. Enforcement norms sometimes allow or require people to act in ways that result in the non-enforcement of substantive law. They may give officials authority to decide that law ought not be enforced (prosecutorial discretion, jury nullification). Or they may create duties that inhibit or preclude enforcement of other duties (for example, duties to respect privacy that block access to relevant evidence).

However, enforcement norms seem to support disclosure in the Mistake-of-Law scenario. It is a core principle of professional responsibility that lawyers are "officers of the legal system… having special responsibility for the quality of justice."[20] The "officer of the court" idea summarizes some specific duties codified in disciplinary rules, but it also connotes residual uncodified duties in situations that the rules may not have anticipated or that may require more nuanced

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[20]   ABA Rules of Professional Conduct, Preamble, par. 1.

judgment than can be effectively articulated as disciplinary norms. Disclosure in the Mistake-of-Law scenario is a plausible elaboration of this residual responsibility. It represents only a small extension of the explicit codified disclosure duties (which already mandate disclosure to the court). It applies only in rare situations in which a conventional assumption about the operation of the adjudicatory process – that each side will discover the law favorable to it – breaks down with potentially severe consequences. And in such situations, the lawyer will often be the only role occupant who is capable of insuring that a basic condition of fair adjudication is met. Moreover, disclosure does not jeopardize any important legal interest of the defendant.[21]

An apt analogy to the kind of duty involved in the Mistake-of-Law scenario is the duty of counsel in connection with client perjury as it was understood in some jurisdictions prior to the adoption of the current rules that explicitly require corrective disclosure to the court. Prior to the current rules, most jurisdictions had no specific norm requiring corrective disclosure. They had rules prohibiting the lawyer from knowingly offering perjury, which arguably supported a duty to rectify when the perjury was discovered after the fact, but they also had strong confidentiality rules, which arguably forbade after-the-fact disclosure. Several courts and commentators encouraged lawyers to make disclosures in this situation, approving their decisions to do so as "responsible" or "appropriate", while implying that they would not have been subject to disciplinary rules had they done otherwise.[22] The lawyers had discretion in the sense that they were not subject to sanction, but not in the sense that they could decide arbitrarily or were immune from public criticism. Those who approved of disclosure spoke as if the lawyers' officer-of-the-court role gave them an uncodified and unenforceable professional duty to disclose. That's the kind of duty that arises in the Mistake-of-Law case.

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[21]   In their treatise, Geoffrey Hazard and William Hodes give two reasons for the Model Rule 3.3 requirement of disclosure of legal authority to the court: First, "there is a risk that [without disclosure] an erroneous decision (that could have been avoided) will result"; and second, "the law does not 'belong' to the client in the same way that factual information does." The Law of Lawyering 29.11 (3d ed. 2007 Supp.). Of course, both reasons are fully applicable to our out-of-court scenario.

[22]   E.g., Nix v. Whiteside, 457 U.S. 157, 169-71 (1985); People v. DePallo, 96 N.Y.S.2d 437, 754 N.E.2d 751 (2001).

Of course, it may often be difficult to identify the conditions in which such a principles-based duty applies. The lawyer may not be able to confidently assess the effects of disclosure or whether these effects involve injustice. Or disclosure may exacerbate his own client's vulnerability because of an independent defect in the process. However, the Mistake-of-Law scenario stipulates that the lawyer is confident that these conditions are not present. It is not implausible that lawyers could make such determinations reliably. These determinations involve the same skills of legal and strategic assessment that they would have to have in order to advise their clients on the clients' own interests even if the lawyers had no responsibility to third parties. We can concede that, in situations of uncertainty, there should be a presumption of client control, which will often mean nondisclosure. But on the assumptions of the scenario, it seems consistent with conventional understandings about enforcement norms to impute such a duty to the lawyer.

Note that the argument here is not that the officer-of-the-court role entails disclosure in the categorical sense that the conventionalist position asserts that the adversary system entails nondisclosure. All the officer-of-the-court role entails is a responsibility to take account of indications that injustice is likely to occur if the lawyer adheres to the presumption of partisanship. The norms of informed decision-making and compensation for negligently-inflicted injury are Dworkinian principles. They don't categorically dictate action; they designate concerns that must be weighed in a comprehensive decision.

If accepted, the critique of Positivism precludes any strong distinction between law and morality, and thus, any strong distinction between legal ethics and ordinary morality. However, it does not preclude weak distinctions. Law draws heavily on ordinary morality, but it does not incorporate it wholesale. It selects and emphasizes elements of ordinary morality. The lawyer is trained in distinctive analytical techniques, and the proper application of these techniques is an element of good practice. The correct professional responsibility answer will converge with ordinary morality more often than Pepper allows, but it will not always do so – the Oppressive Testator may be a counter-example – and even where it does, the lawyer will sometimes may have different, or additional reasons for the conclusion than the lay person.

Recognizing that many of the values in terms of which lawyering is criticized are legal as well as moral has benefits. First, it makes clear

that the professional techniques and sources that lawyers draw on in their professional work are available to structure and ground analysis of ethical problems. Second, it also implies that the decisions lawyers make are properly a subject of peer evaluation, criticism, and sometimes sanction within the profession.

IV. The Instrumental Perspective

Utilitarian perspectives seemed to have gained ground at the expense of fairness perspectives in academic legal discourse with the advent of the law-and-economics movement in the 1970s.[23] This development paralleled or influenced a shift in the bar's professional responsibility rhetoric. The shift is visible in the transition from the ABA Model Code of 1970 and the ABA Model Rules of 1983.

The "zealous advocacy within the bounds of the law" phrase that was so central to the Model Code does not appear in the Model Rules. Instead, we find a heightened emphasis on confidentiality, both as independently important but also as part of the rationale for rules on conflicts of interests and the economic organization of practice. This shift was related to an increasingly instrumental tone. "Zealous advocacy" was portrayed as a good in itself. But the rationale for confidentiality in the Model Rules is instrumental: it asserts that confidentiality is good because it induces more disclosure to lawyers, which is supposed to be good because on balance, it leads to better legal advice and in turn more compliance. [24] Such arguments concede that client loyalty may be unjust in the case at hand but assert that some general practice of loyalty will have beneficial effects overall.

The utilitarian perspective is not inherently biased in favor of client loyalty or, in the Mistake-of-Law case, non-disclosure. In fact, some of the most notable academic analyses of legal ethics problems from a self-consciously utilitarian perspective have been critical of aggressive advocacy norms, and especially the confidentiality rationale for them.[25] Nevertheless, in classroom discussions over many years, I

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[23] George P. Fletcher, "Fairness and Utility in Tort Theory," 85 Harvard Law Review 537 (1972); Louis Kaplow and Steven Shavell, Fairness versus Welfare (2006).

[24] ABA Model Rules of Professional Conduct 1.6, Comment, par.s 3-4.

[25] Louis Kaplow and Stephen Shavell, "Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability," 102 Harvard Law Review 567

have been struck by a strong tendency among the majority of students who favor nondisclosure to frame their decision in instrumental terms.

One might expect that the Mistake-of-Law problem would not lend itself easily to instrumental analysis. The disclosure in question does not involve information provided by the client or in which the client has a proprietary interest. Moreover, my version of the problem strains to eliminate long-term consequences. The situation is idiosyncratic in some respects, and it is unlikely that the lawyer's decision will become widely known.

Nevertheless, my experience is that students viscerally reach for instrumental justifications for non-disclosure. Many of them seem uncomfortable with non-instrumental perspectives, and I speculate that some have been taught elsewhere to think of the instrumental perspective as a hallmark of professional sophistication.[26] They will fight the hypothetical strenuously to conjure up contingencies that suggest the likelihood of various long-term consequences. Or they ignore that the problems calls for a specific response to a particular context and frame their answers in terms of some general and often rigid response to a broad range of situations.

The most common instrumental arguments against disclosure that come up in discussions of the Mistake-of-Law Scenario are these:

Survival of the Fittest. An ethic that encourages competent lawyers to bail out incompetent ones keeps incompetent ones in business longer than they otherwise would survive. It interrupts the pattern of mistake-discovery-complaint-sanction that purges incompetence from the bar.

Laziness. An ethical doctrine that gives lawyers reason to think they will be saved from serious errors by opposing lawyers encourages lawyers to under-prepare.

(1989); Daniel Fischel, "Lawyers and Confidentiality," 65 University of Chicago Law Review 1 (1988); Fred Zacharias, "Rethinking Confidentiality," 74 Iowa Law Review 351 (1989).

[26] See Raymond Fisman, Shachar Kariv, and Daniel Markovits, "Exposure to Ideology and Distributional Preferences" (Unpub. 2009) (study of Yale law students indicating that students' propensity to respond to survey problems in efficiency rather than fairness terms correlates with their first-year exposure to law-and-economics, as measured by the academic background and scholarly orientations of their instructors).

Incapacity for complex judgment. Lawyers' duties to nonclients need to be regulated by bright-line rules that obviate complex judgment. It is too much to expect lawyers to make grounded coherent all-things-considered decisions in stressful and complex situations. Even if we build in a presumption in favor of client interests where the matter is doubtful and even if we limit sanctions to criticism (perhaps even private criticism), it is unfair, oppressive, wasteful, futile, and/or counter-productive to ask the lawyer to confront such difficulties.

Competitive disadvantage. In the absence of an enforceable law mandating disclosure, the lawyer who voluntarily discloses will suffer unfair career disadvantage. Clients will prefer the lawyers who defer most to their interests.

Engaging these arguments specifically risks losing perspective on the more general and basic objections to the instrumental perspective. So I remit specific responses to a footnote,[27] and focus on the general and basic objections.

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[27]   Survival of the Fittest: (1) The plaintiff lawyer's mistake is just as likely to be an isolated lapse as a symptom of deep incompetence. If so, then it is much more socially efficient to correct it by disclosure. (2) Given confidentiality norms, it is most often the case that only the client is in a position to discover mistakes, and since the client is a lay person, the client will often be unable to do so. Where, as in this case, the mistake results in a lower settlement rather than an adverse judicial decision, discovery is especially unlikely.

Laziness: The argument seems to confuse sub-optimal preparation with a lowering of the optimal level of preparation. A procedure that requires more sharing of information is likely to lower the optimal level of preparation. Other things being equal, this is good for clients.

Incapacity for complex judgment: In other contexts – for example, when explaining why lay people shouldn't be allowed to give legal advice or why seven years of higher education should be required for admission to the bar – lawyers point to a capacity for complex judgment as the hallmark of their expertise. The principal norms that govern the lawyer's duties to clients – the duties of care and loyalty – are contextual and presuppose complex judgment. Moreover, judges and public officials make complex judgments, and lawyers would not be able to anticipate or influence their decisions if they were unable to follow and replicate their reasoning.

Competitive disadvantage. (1) The argument seems irrelevant to the scenario, since there is no reason to think that the lawyer's decision in this particular case will become known generally or known even to the present client. (2) To the extent that the scenario describes a frequently occurring situation, the competitive disadvantage consideration would be a good argument for a rule mandating disclosure. To the extent that it occurs infrequently and in many variations, it may make more sense to subsume

First, it seems most likely that the lawyer's decision will have no consequences beyond the immediate case. The decision is unlikely to become generally known, and the case is in many respects idiosyncratic.

One might object that the idiosyncratic nature of the situation deprives it of general interest. However, I think the scenario is representative of an interesting and broad category – the category of cases that are not governed by rules and where the relevant ethical considerations appear intrinsic and immediate rather than indirect and long-term. The instrumental arguments seem to me to be straining to conjure up indirect effects, and I take this as a symptom that some lawyers are uncomfortable with moral decision in non-instrumental terms.

Second, even if we assume that this lawyer's disclosure would become known and would influence future conduct or even if we shift perspective to that of a regulator designing a rule for a class of similar situations, instrumental analysis would be inconclusive and probably unhelpful. Instrumental analysis depends on predictions about the net aggregate effects of patterns of conduct that are, to say the least, debatable. It's not enough to warrant nondisclosure that disclosure is likely to have bad effects of the type the arguments predict. These bad effects would have to outweigh the good effects that are also likely to follow from disclosure. To determine which effects predominate would require extensive observation and collection of data in experimental and natural situations involving different norms and practices. In fact, no one has done any extensive observation or data collection on these issues, and it seems unlikely that any one with the capacity to do it has any intention of doing it.

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it under a general residual duty of fairness. (Arguably, this is what existing doctrine does.) In this latter case, it is not clear that clients would attach great importance to what lawyers do in idiosyncratic situations or that they would acquire enough information about what they do to make judgments. (3) The argument assumes that lawyers compete for clients on the basis of how aggressively they are willing to advance their interests. This is only partly true. Lawyers can present themselves as champions, but they can also market themselves as reputational intermediaries. A reputational intermediary benefits a client, not by asserting his interests aggressively, but by inducing others to trust him. The lawyer cannot play this role without credibly committing herself to the third parties not to pursue the client's interests opportunistically.

Third, the instrumental arguments of nondisclosure in the Mistake-of-Law Problem imply an image of lawyers that is, in important respects, unattractive. It is hardly flattering to emphasize that lawyers have a propensity to incompetence, laziness, and mental flat-footedness. On the other hand, there is some truth in these assertions. The bar often claims that lawyers have exceptional judgment and virtue, but these claims are usually offered in support of exclusionary entry requirements or lax regulation, and as such should prompt skepticism. Perhaps we should welcome the candor of the concessions in the disclosure duty context.

The more fundamental problem is the way the instrumental arguments attenuate the relation between the lawyer's conduct and the values that are supposed to give dignity and worth to her role. A basic criticism of utilitarianism is that it focuses on effects to the exclusion of the moral qualities of agency. If, to take a famous example, Jim could save twenty lives by shooting an innocent person, he should do so according to at least some versions of utilitarianism. Even those who concede that this might be the right answer object to a moral view that fails to appreciate the cost to Jim in shooting the innocent person. To be forced to act in a way that he considers intrinsically immoral, even if redeemed by more remote consequences, is oppressive and degrading. We would not want even a plausible belief that the killing is the right thing to do to make Jim indifferent or insensitive to the local injustice and cruelty of his act.[28]

Jim's situation is portrayed as horrible, but its relatively extreme circumstances encourage us to think of it as a once-in-a-lifetime burden. By contrast, the instrumentalist approach to legal ethics seems to consign lawyers to a lifetime of such burdens. The distinctive ethical feature of the lawyer's role would be the obligation to repeatedly subvert the vindication of law in particular circumstances in the interests of some more remote vindication. From a morally ambitious perspective, the role seems to involve a daily mutilation of Promethean proportions without

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[28]   Bernard Williams, "A Critique of Utilitarianism," in J.J.C. Smart and Bernard Williams, Utiliarianism: For and Against (1973). See also Markovits's extensive critique of the instrumental perspective. Pp. 103-51. Note that although I have frequently characterized one of the courses of action in the Mistake-of-Law story as "nondisclosure", it does involve agency. The nondisclosure option is not simple passivity, but the active negotiation of an unjust settlement.

the compensating satisfaction of visible Promethean achievement. From a mundane point of view, it seems a kind of "get out of jail free card" that permits the lawyer to rationalize irresponsible actions by self-serving and unverifiable appeals to future effects.

Legal ethics does not need to wrestle with the claims of utilitarianism and the agency critiques of it until there is substantial reason to believe that the controversial practices of aggressive advocacy do produce net long-term benefits. In fact, in most cases, the only effects that we can confidently anticipate are the immediate ones. Thus, the only responsible bases for ethical appraisal are the intrinsic qualities of the relevant actions and their immediate effects.

IV. Conclusion: The Interrupted Tradition

All three of the perspectives we've considered represent departures from the dominant twentieth century tradition in professional responsibility. This tradition began with Progressive era and remained strong through the New Deal and much of the postwar eras. Dworkin's jurisprudence is in many ways a continuation of it. Although it was developed most often with respect to judging, some of its most influential exponents, including Louis Brandeis and Henry Hart (a Brandeis clerk) developed its implications for lawyering. This perspective has been called Purposivism. Its most basic premise is that legal rules and institutions should be elaborated and applied to effectuate their purposes.[29]

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[29] I develop the implications of Purposivism for legal ethics in chapters 5 and 6 of The Practice of Justice: A Theory of Lawyers' Ethics 109-69 (1998). An earlier version of chapter 5 appears as "Ethics, Professionalism, and Meaningful Work," 26 Hofstra Law Review 445 (1997).

Some important recent arguments denying a strong distinction between legal and ordinary morality have been inspired by the Republican tradition that was especially influential on the 19th century bar. E.g., Anthony Kronman, The Lost Lawyer (1995); Russell Pearce, "Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role", 8 U. Chicago Roundtable 381 (2001). See also Fred Zacharias, "Integrity Ethics," 22 Georgetown Journal of Legal Ethics 541 (2009) (emphasizing the extent professional ethical doctrine incorporates ordinary morality). For another view that aligns more directly with the Purposivist tradition, see W. Bradley Wendel, "Professionalism as Interpretation," 99 Northwestern University Law Review 1169 (2005). There is substantial overlap between these arguments and mine.

The relevant rules and institutions are procedural as well as substantive, and they take full account of social conflict and value pluralism. A key function of legal institutions is to resolve conflict and make possible cooperation among people with different goals and values. So Purposivism presupposes, not communitarian harmony, but rather an overlapping consensus on fair ground rules of mutual respect and accommodation.

The lawyer ethic implied by Purposivism strives to directly connect the lawyer's service to individual clients to the values that underlie applicable legal norms. It prescribes creativity in the search for mutually advantageous structures of cooperation and a forswearing of opportunism, short-term advantage-taking, and guileful manipulation. In the Purposivist view, law defines a realm of private autonomy, but its limits must be ascertained purposively.

The development of Purposivism paralleled and contributed to the emergence of the modern ideal of professionalism. Brandeis was a major theoretician of both the general theory of professionalism and its legal instantiation. The idea of professionalism proposed a conception of work that united self-assertion with social commitment and service to private interest with respect for public norms. It sought to create roles and institutions that differed from the antinomian market on the one hand and the rule-bound bureaucracy on the other. By proposing a style of legal analysis that connected private ends and public purposes directly, the Purposivists showed how the general aspirations of professionalism could be vindicated in the legal field.

To a surprising extent, recent academic theorizing about professional responsibility fails to engage this tradition and often ignores it completely. Markovits takes a brief look the early 19th century Republican vision and concludes that it is not a model for contemporary lawyers. He then by-passes the entire modern history of professionalism prior to the ABA's 1970 Code. Pepper looks beyond the libertarian doctrine he prefers only to take resigned account of "the Problem of Legal Realism." He takes no note of the solution to the problem of legal realism proposed by Purposivism: if legal norms can be elaborated in terms of intelligible social purposes, those purposes can serve as grounding for both judicial decision and lawyer conduct. And of course, the instrumentalists take no account of history at all.

These recent theorists portray legal ethics as at least superficially bizarre and in need of strenuous rationalization. This view is foreign to the moral vision that most influenced the founders of modern American professionalism. They saw professional role, not as a problem, but as an opportunity, an opportunity to escape from the provincialism and stultification of the narrowly commercial life and to connect with larger networks and purposes. They saw the distinctive character of professional (as opposed especially, to bureaucratic) work as the adaptive vindication of general social norms in particular circumstances.[30] Purposivist jurisprudence perfectly complements this vision.

The Purposivist analysis of the Mistake-of-Law problem would resolve ambiguity about the relevant rules and the lawyer's role by asking what lawyer conduct would best vindicate the relevant substantive norms and would best promote fair adjudication of the dispute. Such an analysis would resemble what I described at the beginning as the perspective of ordinary morality. The Purposivists thought law added to ordinary morality a complex structure of institutions and authority that facilitated the resolution of complex problems for which ordinary morality alone provided insufficient resources. But they emphasized that law was importantly grounded in ordinary morality, and they cultivated a lawyer role that emphasized the lawyer's connection to, rather than separation from, ordinary morality. Their view deserves more consideration than much recent academic professional responsibility discourse has given it.

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[30]   See Robert Wiebe, The Search for Oder: 1877-1920 (1967); William H. Simon, "Babbitt v. Brandeis: The Decline of the Professional Ideal," 37 Stanford Law Review 565 (1985).