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in Legal Ethics: The Problem of Client  
Selection

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# CORNELL LAW SCHOOL

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### **Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection**

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Cornell Law School research paper No. 06-006

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# Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection

W. Bradley Wendel\*

## I. Introduction: Two-Level Justification in Ethics.

In the second round of the famous Freedman-Tigar debate, Monroe Freedman writes that “[i]t is proper . . . to publicly challenge lawyers to justify their representation of particular clients.”<sup>1</sup> Note the word “particular” — the challenge here is on a case-by-case basis, and is not aimed at the macro-level decision to become a lawyer.<sup>2</sup> Once a lawyer has opted to represent a client, however, the lawyer cannot be criticized in moral terms for employing unsavory tactics in furtherance of the client’s lawful ends.<sup>3</sup> The reason for exempting a lawyer from moral criticism

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\* Associate Professor of Law, Cornell University. Thanks to Roy Simon for the invitation to participate in this conference, and to many conference participants for excellent questions. I also appreciate the forceful urging of Donald Nicolson to face up to the client-selection problem as an aspect of my general theory of legal ethics. Of course, the primary debt of gratitude that should be acknowledged here is to Monroe Freedman, whose work has done so much to enhance the rigor and excitement of the field of legal ethics.

<sup>1</sup> Monroe H. Freeman, *The Lawyer’s Moral Obligation of Justification*, 74 TEX. L. REV. 111, 112 (1995). See also MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 4.02, at 82 (2d ed. 2002); Monroe H. Freedman, *Ethical Ends and Ethical Means*, 41 J. Leg. Educ. 55, 56 (1991) (“I do not consider the lawyer’s decision to represent a client or cause to be morally neutral. Rather, a lawyer’s choice of client or cause is a moral decision that should be weighed as such by the lawyer and that the lawyer should be prepared to justify to others.”). The second round of the debate concerned Michael Tigar’s decision to represent John Demjanjuk, accused of being the concentration camp guard known as “Ivan the Terrible,” in a deportation proceeding. See Monroe H. Freedman, *Must You Be the Devil’s Advocate?*, LEGAL TIMES (Aug. 23, 1993), at 19; Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES (Sept. 6, 1993), at 22. Both articles are reprinted in FREEDMAN & SMITH, *supra*, at 397-402. The first round of the debate concerned protests led by Ralph Nader, directed at Wilmer, Cutler & Pickering for its decision to represent General Motors in environmental litigation. See MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 10-13 (1975).

<sup>2</sup> Cf. Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM B. FOUND. RES. J. 613, 634 (“Initially, the lawyer has the choice of whether or not to be a lawyer. It should be clear that this choice involves important moral consequences.”).

<sup>3</sup> FREEDMAN & SMITH, *supra* note \_\_\_\_, at 87 (“[Murray] Schwartz is correct in concluding that a lawyer can be held morally accountable for accepting an immoral cause. He is wrong, however, in suggesting that the advocate’s zeal on behalf of a client should be constricted by moral standards that have not been enacted into law.”)

for actions taken while representing a client are familiar systemic reasons: Lawyers need space to engage in creative advocacy, which may open up possibilities for legal change,<sup>4</sup> the American constitutional adversary system helps preserve a free society in which individual rights and dignity are respected,<sup>5</sup> lawyers must have independence from the state if they are to protect individual dignity,<sup>6</sup> adversarial litigation is an effective method of ascertaining the truth,<sup>7</sup> and a vulnerable client should not have to worry that the lawyer might rat him out to the authorities.<sup>8</sup>

Freedman argument for withholding moral criticism of lawyers acting in a representative capacity relies on reasons that are “systemic” in the sense of deriving their force from the moral values underlying the legal system. They are not values belonging to ordinary morality as such — the moral values that would ordinarily make a rapist, the Klan, or a tobacco company “repugnant” to another person. Rather, they are values derived from the goals and standards of the law and ancillary institutions and practices making up the legal system, such as adversarial litigation and the legal profession with its characteristic norms. The legal system permits people who disagree profoundly about moral issues to cooperate toward mutually beneficial ends, and to provisionally settle moral disputes in order to establish a common basis for peaceful coexistence. Because the system possesses certain virtues like fairness and generality to at least a satisfactory

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<sup>4</sup> *Id.* at 95.

<sup>5</sup> *Id.* at 13, 165.

<sup>6</sup> *Id.* at 16, 121-22.

<sup>7</sup> *Id.* at 37-39.

<sup>8</sup> *Id.* at 137, 221.

degree, we have systemic, or practice-dependent moral reasons to value the system as a whole, and to accord at least prima facie moral legitimacy to actions taken by lawyers in their professional capacity.<sup>9</sup> It is curious, therefore, that Freedman permits observers to criticize lawyers based on ordinary, non-systemic moral values for the clients they choose to represent.

Freedman's view of the scope of warranted moral criticism of lawyers reveals an deep conceptual distinction in ethical theory, which is often blurred, between justifying a practice (in this case, the legal system) and justifying an action falling within the practice (representing a particular client, or employing certain tactics).<sup>10</sup> A practice as a whole must be justified on the basis of moral concepts, such as consequences, rights, and other values.<sup>11</sup> Once a practice exists, however, particular "moves" within the practice are justified on the basis of the constitutive rules which make up the practice, not on the basis of underlying moral concepts. The whole point of a practice, such as Rawls's example of promising, may be to preempt the actor from taking into

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<sup>9</sup> I argue for this conclusion at some length elsewhere. See W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004) [hereinafter, "Wendel, *Obedience*"].

<sup>10</sup> See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955). I use the term "practice" throughout this article in the sense, developed by MacIntyre, of "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity." See ALASDAIR MACINTYRE, *AFTER VIRTUE* 176 (2d ed. 1984).

<sup>11</sup> The argument offered by Rawls is located squarely within the utilitarian tradition, and is one of the classic cites for the distinction between act-utilitarianism and rule-utilitarianism. David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 438 n.39 (1990) [hereinafter, "Luban, *Freedom and Constraint*"]. In this article, I am not relying on the specifically utilitarian arguments offered by Rawls, but on the two-level pattern of justification, which can make use of deontological as well as utilitarian considerations at the policy or institution level. Cf. Thomas Nagel, *Ruthlessness in Public Life*, in MORTAL QUESTIONS 75, 86 (1979) [hereinafter, "Nagel, *Ruthlessness*"] (arguing that non-utilitarian moral theories also have different implications when viewed from the standpoint of either individual action or institutions through which action occurs).

account reasons that would otherwise count in an all-things-considered deliberation.<sup>12</sup> The institution of promising may be justified on utilitarian grounds — there is great value in having a means to create and enforce expectations of future conduct by other people — but in an individual case the balance of utilities may appear to favor breaking the promise. As Rawls points out, we cannot account for the stringency of the obligation to keep promises solely on utilitarian grounds, because there very well might be cases in which the best thing, as a whole, would be for the promisor to break her promise. The explanation for keeping promises is instead that many practices, including promising, are constituted by rules, which are not simply guides, summaries, or rules of thumb which simplify the all-things-considered moral evaluation of what should be done, but are conclusive demands that are binding as long as one is acting within that practice.<sup>13</sup> As an analogy with a social institution with a set of tacit rules, like promising, consider institutions with a set of explicit rules, such as games and sports. If a baseball player argued that he should be given a fourth strike, he would be regarded as making a joke, or arguing that the game as a whole would be more interesting if all batters were given four strikes, but it is simply incoherent to argue that the game of baseball should proceed as usual, only with one batter being given an extra strike.<sup>14</sup> The baseball analogy shows that if an observer is to criticize someone in moral terms for making a move within a practice, the target of the criticism can only be the entire practice as a whole, not the actor for taking a particular action whose possibility is

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<sup>12</sup> Rawls, *supra* note \_\_\_\_, at 14-17; *see also* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 27 (1973) (distinguishing between reasons the a person may recognize as bearing on her actions *qua* person, and those which can be taken into account in deciding how to act within a professional role).

<sup>13</sup> Rawls, *supra* note \_\_\_\_, at 24-25.

<sup>14</sup> *Id.* at 26.

defined by the practice.<sup>15</sup>

Arguments pitched at the level of the justification of policies or institutions, like the one offered by Rawls for the obligation to keep promises, have been used to support what has come to be known as “role-differentiated morality” for lawyers.<sup>16</sup> In response, critics of role-differentiated morality have doubted whether any set of institutions and practices can justifiably exclude the full range of moral considerations from an agent’s deliberations.<sup>17</sup> The arguments back and forth in a typical case would go something like this: An observer criticizes a lawyer for representing a repugnant client — the American Nazi Party seeking a parade permit in Skokie, for example.<sup>18</sup> The lawyer responds that he loathes Nazis, and would like nothing more than to see them vanish from the earth, but that his responsibilities are defined by an institution and a role within that institution, and these responsibilities include providing representation to unpopular clients. An action may be defended or criticized only on the basis of standards internal to the practice. The critic then replies that institutions are transparent to moral

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<sup>15</sup> See ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* 84 (1999).

<sup>16</sup> As David Luban characterizes it, an argument from role-differentiated morality, such as Freedman’s, seeks to establish “an institutional excuse from the requirements of common morality.” Luban, *Freedom and Constraint*, *supra* note \_\_\_, at 426. See also Daniel Markovits, *Legal Ethics from the Lawyer’s Point of View*, 15 *YALE J. L. & HUMAN.* 209, 212 (2003) (“adversary lawyers commonly do . . . things in their professional capacities, which, if done by ordinary people in ordinary circumstances, would be straightforwardly immoral”); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1060 (1976) (“The lawyer is conventionally seen as . . . authorized, if not in fact required, to do some things for that client . . . which he would not do for himself.”).

<sup>17</sup> See, e.g., Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 *NYU L. REV.* 63, 71-72 (1980); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1 (1975).

<sup>18</sup> See ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1979).

evaluation, and that the lawyer should be criticized *as a person*, and not receive a free pass from moral criticism as merely a cog in the institutional machinery. What sort of monstrous system is it, asks the critic, which purports to generate moral permissions for acts that would be wrong if committed outside the framework of the system? The lawyer's response is to appeal to the social values justifying the system — goods such as the rule of law, an orderly procedure for resolving normative conflict, and the protection of individual liberty — and to deny that those goods could be realized if lawyers were subject to case-by-case moral evaluation for their decisions to represent particular clients.

The normative position I will defend here is that although the constitutive rules of the practice of lawyering permits the exercise of some limited amount of moral discretion in client selection (and in other aspects of the professional relationship), this discretion ought to be circumscribed to a degree that would be intolerable in ordinary moral life. Becoming a lawyer means accepting constraints on the range of moral considerations that may be taken into account in practical reasoning. It means participating in activities “that honourable and scrupulous people might, *prima facie* at least, be disinclined to do.”<sup>19</sup> As the late moral philosopher Bernard Williams observes, refusing on moral grounds to participate in these sorts of acts would mean that a person could not seriously pursue the morally justified ends of politics,<sup>20</sup> which can be understood to encompass the actions of lawyers. A broad permission to opt out of particular representations on moral grounds would be inconsistent with the rules of the game of lawyering,

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<sup>19</sup> Bernard Williams, *Politics and Moral Character*, in *MORAL LUCK* 54, 57 (1981)

<sup>20</sup> *Id.* at 60.

which are set up to achieve the social function of law, which is the procedural settlement of moral conflict. The institutional justification for the legal system generally assumes that actors must adopt a stance of moral neutrality toward clients and their ends,<sup>21</sup> so that the system can perform its service of resolving disputes and facilitating peaceful coexistence. At the same time, it is important not to structure the norms governing the practice of lawyering in such a way that the game attracts only morally insensitive people, whose dispositions are likely to cause them to commit other sorts of harmful acts.<sup>22</sup> For this reason it is essential to build some limited capacity for the exercise of moral discretion into the normative framework of the legal profession, as a safety valve to prevent catastrophic moral breakdowns in the system. One way to do this is to recognize plural visions of professional excellence within the role of lawyer, so that people can opt into different sub-roles, as it were, which express different sorts of moral virtues.

The amount of moral discretion included, and the occasions for its exercise, are questions I will explore in this paper. In addition to considering these questions in the context of the client-selection debate, I wish to argue, as a matter of methodology or meta-theory, that professional ethics should proceed at one level of abstraction or another, but not equivocate back and forth between them. One can give systemic (or, more technically, second-order) reasons why a lawyer ought to act on rules of a practice, and not on the basis of an all-things-considered moral

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<sup>21</sup> See Postema, *supra* note \_\_\_\_, at 73 (defining the principle of neutrality as the requirement that “the lawyer must represent the client, or pursue the client’s objectives, regardless of the lawyer’s opinion of the client’s character and reputation, and the moral merits of the client’s objectives”).

<sup>22</sup> Williams, *supra* note \_\_\_\_, at 66 (considering the central question, “what features of the political system are likely to select for those dispositions in politicians [and lawyers, a case Williams considers by analogy] which are at once morally welcome and compatible with their being effective politicians [or lawyers]?”).

evaluation of what she ought to do in the situation.<sup>23</sup> Once committed to this style of reasoning, however, consistency demands that the frame of reference for the argument not suddenly be shifted to first-order moral considerations. On the other hand, one might believe that clarity or some other consideration demands addressing questions of professional ethics exclusively in terms of first-order moral values. If one adopts that stance, however, it is impermissible to appeal to blanket permissions on the basis of the rules of the game. Every action must be justified on an all-things-considered basis. Subtle shifting between the two levels of justification creates unnecessary confusion, and may account for the occasionally frustrating nature of debates in legal ethics, where the participants seem to be talking past each other. Moreover, it is part of the general pattern of ethical justification in the public domain — including political and legal ethics — that the primary focus of evaluation is the institutional structure through which action occurs. This evaluative perspective, which is one rough distinction between political and moral philosophy, excludes from deliberation the full range of reasons that would ordinarily be relevant in practical reasoning. The client-selection debate, like any controversy within legal ethics, should therefore be resolved not as a matter of straightforwardly applying ordinary moral values, but in the way suggested by Rawls, with due attention given to the institutional setting of the action.

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<sup>23</sup> For the terminology of first- and second-order reasons, see JOSEPH RAZ, *THE AUTHORITY OF LAW* 16-18 (1979). Briefly, first-order reasons are considerations counting in favor of taking some action or another, while second-order reasons are grounds for not acting on reasons. Using Rawls's baseball example, a first-order reason for not allowing four strikes to a batter is that it would make the game less interesting by shifting the balance of power in favor of the offense. A second-order reason would be that the rules of the game do not allow four strikes. The force of the second-order reason in this case is that players should not consider whether four strikes would make the game more interesting (perhaps by correcting imbalances that tend to favor the defense); those reasons are excluded from deliberation by the second-order reason that the rules of the game only provide for three strikes.

This main body of this Article begins in Section II, with a brief overview of the reasons given for the English “cab-rank” rule limiting the exercise of moral discretion by barristers in client selection. The argument proceeds by considering two broad categories of reasons that have been offered to explain why lawyers ought to have moral discretion in client selection. The first, the subject of Section III, is that restricting lawyers’ discretion would have the effect of interfering with the moral agency of lawyers. I conclude that the Rawlsian two-level justification is compatible with moral agency, because one may rationally endorse the ends of the system at a high level of generality. In any event, whatever one may say about moral agency in client selection is equally applicable to actions taken in a representative capacity. The second category of arguments for giving lawyers moral discretion, considered in Section IV, are broadly consequentialist, and make reference to the actual or potential effect of moral discretion on the effective functioning of the legal system. The theme of the arguments in this Section is that lawyers must act on the basis of legal reasons, not their own moral beliefs, in order to avoid interfering with the moral agency of clients.

## *II. Professional Norms Governing Moral Discretion in Client Selection.*

To the extent there is a debate over the exercise of moral discretion in client selection, it exists only as a normative question about how much discretion ought to be permitted, and how that discretion ought to be exercised by individual lawyers. As a descriptive matter, it is well settled that lawyers do not have a legally enforceable obligation to serve any particular client.<sup>24</sup>

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<sup>24</sup> See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2.2, at 571 (1986).

The only circumstances under which a lawyer would be required to accept representation is where a court appoints the lawyer,<sup>25</sup> and in those cases the lawyer has generally opted in, by agreeing to have her name added to the court-maintained list of lawyers willing to accept appointments. Moreover, the lawyer disciplinary rules contemplate a substantial role for moral discretion in the selection of clients. Even the rule on accepting court appointments permits the lawyer to opt out of a particular representation on the basis of the lawyer's belief that the client's goals are morally repugnant.<sup>26</sup> Once a lawyer-client relationship has been formed, a lawyer may withdraw from representing the client, even where there may be a material adverse effect on the client's interests, if "the client insists upon taking action that the lawyer considers repugnant."<sup>27</sup>

The American position seems far removed from the British "cab-rank" rule, which requires barristers (but not solicitors) to accept the representation of clients in the order they come through the door, like taxicabs waiting in a queue for passengers.<sup>28</sup> The rule is widely

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<sup>25</sup> See MODEL RULES OF PROF'L CONDUCT, R. 6.2 (2002) [hereinafter "MODEL RULES"].

<sup>26</sup> *Id.*, R. 6.2(c).

<sup>27</sup> *Id.*, R. 1.16(b)(4).

<sup>28</sup> See ANDREW BOON & JENNIFER LEVIN, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 27-29 (1999); CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES ¶¶ 203-04. The classic statement of the rule and its rationale is from Thomas Erskine, who defended Tom Paine against charges of seditious libel:

I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar; without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say, that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practice, from that moment the liberties of England are at an end.

2 THE SPEECHES OF THE HON. THOMAS ERSKINE 90-91 (James Ridgeway ed. 1813) (quoted in JOHN LEUBSDORF, MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE 19 (2001)). The cab-rank rule is followed in other common-law jurisdictions such as New Zealand, in which it extends to all lawyers, not just in-court advocates. See DUNCAN WEBB, ETHICS, PROFESSIONAL RESPONSIBILITY AND THE LAWYER § 6.1, at 153 (2000).

thought to be honored mostly in the breach, because barristers are permitted to refuse representation on a variety of grounds, including incompetence, conflicts of interest, the client's inability to pay, or simply being too busy to take on new cases.<sup>29</sup> Whether followed scrupulously or not, the cab-rank rule is aimed at blocking a particular evaluative inference that may be drawn by third party observers — from the client's vicious moral character or actions to the lawyer's moral culpability for assisting the client in dealing with the legal system, even in *rightful* ways. (Lawyers are independently prohibited from using wrongful means to advance the client's ends, repugnant or otherwise.<sup>30</sup>) If lawyers had discretion to choose clients on the basis of endorsement or agreement with the clients' moral views, then lawyers could conceivably share some of the blame and public opprobrium that is directed toward the clients. As a result, lawyers might avoid certain types of clients. They might seek a kind of professional conscientious objector status and refuse to participate in the wrongdoing of accused rapists, child molesters, terrorists, Communists, or whatever class of miscreants most attracts the fear and loathing of the public. As a result, these unpopular clients would be left to face the power of the hostile state on their own, without the assistance of a lawyer — the proverbial champion of the friendless.<sup>31</sup>

The inference resisted by the cab-rank rule presupposes a strong conception of moral

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<sup>29</sup> BOON & LEVIN, *supra* note \_\_\_\_, at 181-82. See also JOHN A. FLOOD, BARRISTERS' CLERKS: THE LAW'S MIDDLEMEN 54-59, 65, 69-76 (1983) (describing how clerks, who serve as intermediaries between solicitors and barristers, steer cases toward particular barristers for career-development reasons, and how solicitors and clerks negotiate to find the "right" solicitor for a given case, without respecting the cab-rank principle). As Flood notes, "this sifting of the solicitors effectively nullifies the impact of the cab-rank rule of the Bar." *Id.* at 71.

<sup>30</sup> See MODEL RULES, *supra* note \_\_\_\_, R. 1.2(d).

<sup>31</sup> See WOLFRAM, *supra* note \_\_\_\_, § 10.2.3, at 576; Michael Tigar, *Defending*, 74 TEX. L. REV. 101, 101 (1995) ("If people who get arrested did not have lawyers, then anybody the police suspect would be railroaded off to jail. It would be a police state.") (quoting the guy who fixes his boots).

accountability for assisting others. It assumes that observers of lawyers' client-selection decisions will impute the wrongfulness of the client's ends to the lawyer, and burden the lawyer with a negative moral evaluation:

If counsel is bound to act for such a person, no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for such a client, and the client might have great difficulty in obtaining proper legal assistance.<sup>32</sup>

One might question whether the reputation of a lawyer might actually be affected by the identity and moral character of her clients. Survey data tend to show that public complaints about lawyers cluster around themes of greed, aggression, dishonesty, and pursuing frivolous lawsuits which hurt the economy.<sup>33</sup> A fairly constant theme of criticism of lawyers throughout American history is that they are greedy, exploit technicalities, prey on the misfortunes of their fellow citizens, serve the rich at the expense of everyone else, and form an undemocratic elite.<sup>34</sup> Other than the charge of favoring the rich, none of these criticisms relate to client selection, and none of the familiar anti-lawyer themes appear to reflect a process of stigmatizing of lawyers with the moral taint of their clients. Thus, this justification for the cab-rank rule is undercut by the lack of evidence showing it is required to insulate lawyers from the moral criticism directed at their

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<sup>32</sup> *Rondel v. Worsley*, [1969] 1 AC 191. I am grateful to Duncan Webb for this reference. *See also* BOON & LEVIN, *supra* note \_\_\_\_, at 29 (quoting a barrister who argued that the rule should be extended to solicitors, to prevent the public from reaching "the damaging conclusion that lawyers were allowed to make moral judgements about potential clients").

<sup>33</sup> *See, e.g.*, Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEG. PROF. 51 (1999); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998).

<sup>34</sup> *See* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 303-04 (1985).

clients.

More to the point, arguments for the cab-rank rule trade on an additional tacit empirical premise, that the morally motivated refusals of lawyers to represent clients will coincide sufficiently that certain classes of clients will be harmed. If conscientious objection to representing clients was an exceptional case, and when it occurred it was not substantially more likely to affect any given client, it would not have an adverse effect on the ability of clients to obtain representation.<sup>35</sup> There is some, admittedly anecdotal evidence that in the aggregate, the exercise of lawyers' moral discretion would not disproportionately disadvantage any particular class of clients. When discussing discretion in client selection, lawyers and academics vary considerably in their choice of which prospective clients will characterize the "repugnant" position. A public defender writes that she "would not develop a law practice around representing police officers."<sup>36</sup> A committed Roman Catholic would not represent a minor seeking a judicial bypass order to obtain an abortion.<sup>37</sup> In countless discussions with students, I have heard disavowals of interest in representing tobacco companies, "polluters" (presumably clients in the chemical, energy, or forest-products industries), companies who engage in union-busting and workplace discrimination, and "big corporations" (everyone else); needless to say,

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<sup>35</sup> Cf. Pepper, *supra* note \_\_\_\_, at 632 ("If such conscientious objection is not limited to extreme cases, however, it is little different from the lawyer as policeman, judge, and/or deceiver."). Pepper's concern is that morally motivated refusal to represent certain clients might result in rule by an "oligarchy of lawyers," *id.* at 617, who act as gatekeepers between citizens and the law, rationing access to the public good of law on the basis of non-public moral reasons.

<sup>36</sup> See Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 937 (2000).

<sup>37</sup> See Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339 (1998).

these clients tend to have no difficulty securing representation by elite law firms. Even prospective clients who are exceedingly repugnant (and deservedly unpopular) as individuals, such as the defendants in the Oklahoma City bombing case, the Grand Dragon of the Texas Ku Klux Klan, the police officer accused of forcibly raping Abner Louima with a broomstick, the man accused of being concentration camp guard “Ivan the Terrible,” and “American Taliban” soldier John Walker Lindh, have all found highly competent lawyers to represent them.<sup>38</sup>

This is not to say there are no instances in which unpopular clients have failed to secure legal representation. White southern lawyers, almost without exception, refused to represent plaintiffs in civil rights cases during the 1950's and 60's.<sup>39</sup> Although the problem subsequently abated, in the recent aftermath of the 9/11 attacks, most lawyers were leery of pressing civil liberties issues or representing clients with any conceivable connection to terrorism. There are also a handful of reported cases authorizing increased attorneys' fees awards, on the ground that it was difficult for a client challenging restrictions on abortion services to find representation in

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<sup>38</sup> See Tigar, *supra* note \_\_\_\_ (justifying representation of one of the alleged Oklahoma City co-conspirators); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 Geo. Wash. L. Rev. 1030 (1995) (title is pretty self-explanatory); Smith, *supra* note \_\_\_\_ (considering defense of Justin Volpe, the defendant in the Louima rape case); Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES (Sept. 6, 1993), at 22, *reprinted in* FREEDMAN & SMITH, *supra* note \_\_\_\_, at C-399 (offering justifications for representing alleged Treblinka guard); William Glaberson, *Defending, and Recasting, an Unloved Client*, N.Y. Times (Dec. 19, 2001) (discussing San Francisco defense lawyer James Brosnahan's representation of Lindh).

<sup>39</sup> See WOLFRAM, *supra* note \_\_\_\_, § 10.2.3, at 576 (citing NAACP v. Virginia ex rel. Button, 371 U.S. 415, 443 (1963)); Richard L. Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 69, 96 (Austin Sarat & Stuart Scheingold eds. 1998).

certain communities.<sup>40</sup> In general, however, there does not appear to be a pervasive problem of potential clients being turned away on account of their morally disagreeable qualities, as opposed to their inability to pay.<sup>41</sup> (The real scandal of differential access to lawyers is that wealth, not the morality of the prospective client's projects, determines whether a lawyer will be willing to accept the representation.<sup>42</sup>) As a result, many lawyers believe their decision to reject a representation on moral grounds is harmless, or at least a marginal contribution to what turns out to be a fairly insubstantial problem.<sup>43</sup>

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<sup>40</sup> See *Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691 (9th Cir. 1996); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 640 (1st Cir. 1990). I owe these references to Teresa Stanton Collett, *The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?*, 40 S. TEX. L. REV. 137 (1999).

<sup>41</sup> It is always difficult to prove a negative, of course, but it is noteworthy that American commentators who favor a norm analogous to the British cab-rank rule seem to be unable to cite data, as opposed to scattered anecdotes, showing that morally motivated refusals to represent have created a pervasive problem of lack of access to counsel.

<sup>42</sup> See DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 207-09* (2000).

<sup>43</sup> With respect to the case of defending unpopular criminal defendants, lawyers might reasonably reject any given client, concluding that “the impact of *this* decision on the ‘institutional task’ of adversary criminal defense most likely would be negligible.” David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392, 399 (1990). This rationalization for rejecting clients assumes, however, that the cab-rank rule and the requirement of moral neutrality in the client-selection process is ultimately justified on consequentialist grounds — that is, on the basis of the beneficial effects that flow from morally neutral client selection. It is probably true that the legal system will go off the rails if lawyers exercise moral discretion in client selection, but this observation is beside the point if the authority of law and the role of lawyers are justified on non-consequentialist (or non-instrumental) grounds. In addition, because the system-level, or institutional justification of legal system is not consequentialist in nature, it does not matter whether any given lawyer is the “last lawyer in town.” See Schwartz, *Civil Advocate*, *supra* note \_\_\_, at 562-63 (discussing the last-lawyer-in-town problem); see also Steven Lubet, [paper or talk citation] (rejecting “instant client” solution to the dilemma created by the need of repeat-player lawyers to maintain good working relationships with adversaries). Advocates of wider moral discretion for lawyers recognize that a client may be deprived of the opportunity to assert or protect a legal entitlement if all available lawyers refuse to provide representation on the basis of moral disagreement, and that this deprivation would be unfair from the point of view of the system-level, institutional justification. To mitigate this problem, those who advocate for a wider scope of moral discretion in client selection often would require a lawyer to represent a prospective client where the practical upshot of refusal would be that the prospective client would go unrepresented. See, e.g., RHODE, *supra* note \_\_\_, at 57; Fried, *supra* note \_\_\_, at 1079; Thomas D. Morgan, *Creating a Life as a Lawyer*, 38 VAL. L. REV. 37, 50 (2003); Roger C. Cramton, *Lawyer Conduct in the “Tobacco Wars”*, 51 DEPAUL L. REV. 435, 441 (2001).

The rule requiring representation by the last lawyer in town is unobjectionable as an aspect of professional

There is no similarly stringent express requirement in American law under which “counsel is *bound to act*” for a client. However, a holistic and purposivist reading of the law governing American lawyers reveals that, despite the lack of a black-letter requirement to represent a client regardless of the lawyer’s moral disagreement with the client’s position, a moral decision not to represent a client should be a relatively rare event. For example, comments to the rule on accepting court appointments set a high bar for opting out on the basis of repugnance. The repugnance exception “applies only when the lawyer’s feeling of repugnance is of such intensity that the quality of the representation is threatened.”<sup>44</sup> In other words, in many cases the lawyer is required to hold her nose and proceed with the representation, as long as she is capable of providing competent legal services to the client. Similarly, the rule governing termination of the attorney-client relationship permits withdrawal in cases where “the client insists on taking action that the lawyer considers repugnant, or with which the lawyer has a fundamental disagreement,”<sup>45</sup> the right to withdraw is qualified by the requirement that the

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regulation, which is aimed at producing good consequences, but whether one is the last, the second-to-last, or the first lawyer in town is irrelevant to a non-instrumental ethical justification for accepting or rejecting the client. See Wendel *Obedience*, *supra* note \_\_\_, at 386-88; Hodes, *supra* note \_\_\_, at 985. Similarly, it is irrelevant whether the distinction between the last- and nth-to-last lawyer ignores the transaction costs incurred by a client who must seek different counsel. See Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 29 (2003) (making the transaction costs argument). In my view, the most plausible system-level justification of the legal system is that it supplies reasons for action that replace the ordinary first-order moral reasons that a lawyer would otherwise rely upon in deciding how to act; it does this in order to enable citizens to rely on a provisional social settlement of disputed normative issues. See Wendel *Obedience*, *supra* note \_\_\_, at 387 n.98. Refusing to represent a client is not morally wrong for the consequentialist reason that the client would go unrepresented. Rather, it is wrong because it manifests an attitude of disrespect for the legal, which lawyers are duty-bound to support. This reason is generalizable to all lawyers in town, so the client-selection problem is general as well. In addition, the exercise of moral discretion must be informed by consideration of the intrinsic value of the institution of law and the legal system, and by the lawyer’s natural duty to support just legal institutions. These reasons are equally applicable to all lawyers in town — first, last, or otherwise.

<sup>44</sup> 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 51.5, at 51-7 (3d ed. 2001 & Supp. 2004).

<sup>45</sup> MODEL RULES, *supra* note \_\_\_, R. 1.16(b)(4).

lawyer ensure the client is not harmed by the withdrawal,<sup>46</sup> and the obligation to continue representation in a litigated matter if ordered by a court.<sup>47</sup> The permission to withdraw does not extend to cases in which the lawyer and client merely disagree; it is limited instead to cases of such profound and irremediable inability to work together that no reasonable lawyer could continue the representation.<sup>48</sup> Finally, there is a curious non-rule, which does not impose an obligation to represent but which nevertheless reminds lawyers that “[a] lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”<sup>49</sup>

Thus, one might say that there is a cab-rank *principle* underlying the American scheme of rules.<sup>50</sup> As a legal principle, is it not binding in the same way that a rule (such as the cab-rank rule) would be. But a principle is not a nullity — it strongly influences the interpretation of rules, figures prominently in legal arguments seeking to justify a result, and constitutes part of the moral foundation of a regime of rules.<sup>51</sup> The ethical implication of this principle is that lawyers

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<sup>46</sup> *Id.*, R. 1.16(d).

<sup>47</sup> *Id.*, R. 1.16(c).

<sup>48</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32 cmt. j. (2000)[hereinafter, “RESTATEMENT”]. (“An action is imprudent . . . only if it is likely to be so detrimental to the client that a reasonable lawyer could not in good conscience assist it . . . . A client’s intended action is not imprudent simply because the lawyer disagrees with it.”).

<sup>49</sup> MODEL RULES, *supra* note \_\_\_\_, R. 1.2(b).

<sup>50</sup> Murray Schwartz has argued that the “principle of nonaccountability” is an important aspect of the ideology of American lawyers, even if there is no explicit cab-rank rule. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978).

<sup>51</sup> For the distinction between rules and principles, see Ronald Dworkin, *The Model of Rules I*, in TAKING RIGHTS SERIOUSLY 14 (1977).

should conceive of themselves as sharing a common, but fairly thin professional identity, which is not influenced by the clients they represent.<sup>52</sup> It also seems to follow that to the extent an American lawyer accepts the cab-rank principle, she should be insulated from moral criticism based on her choice of any particular client to represent. This argument seems to fit nicely with the Rawlsian two-level justification strategy. One of the institutional justifications for the legal system is that it safeguards the value of human dignity, even for repugnant people, by requiring fair treatment according to impartial procedures of adjudication.<sup>53</sup> This is a moral justification, pitched at the level of institutional or second-order values, which has the effect of precluding criticism in first-order terms. Nevertheless, professional ethicists have resisted this pattern of argument, and have attempted to build in space for the exercise of moral discretion on the basis of first-order values. The next section considers the problem of how the lawyer's moral agency is affected by the preclusion of moral discretion at the client-selection stage.

### *III. Moral Agency and the Two-Level Justification.*

#### *A. Personal Identity and Integrity.*

Depending on how the role-obligations of a lawyer are defined, and specifically how the opt-out provisions are conceived, the professional role may exert a corrosive effect on the lawyer's personal integrity. Because a lawyer acts as an agent of the client — a “hired gun” is a

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<sup>52</sup> See Spaulding, *supra* note \_\_\_\_, at 20.

<sup>53</sup> See, e.g. Fried, *supra* note \_\_\_\_, at 1073-75.

common metaphor — she will feel some psychological pressure to distance herself from the moral costs of actions taken on behalf of the client.<sup>54</sup> Furthermore, since this distancing strategy involves creating an artificial separation between moral considerations that would normally apply and the moral considerations that are relevant in the professional universe, the lawyer seems to have nothing left with which to identify. As a result, the lawyer “is increasingly tempted to identify with this stance of detachment”<sup>55</sup> — that is, to regard her moral personality as the lack of any moral personality. The result is a pervasive attitude of skepticism or indifference to moral concerns, even “a kind of moral prostitution.”<sup>56</sup> This identity-defining nature of one’s attitude of professional detachment is enhanced by ordinary psychological processes, such as the recursive character of the interaction between acting, rationalizing one’s actions, publicly expressing commitments, and taking further action in line with one’s publicly stated commitments.<sup>57</sup> A lawyer who is concerned not to create a personal identity as a moral prostitute may justifiably believe that she can escape this trap by exercising moral discretion in client selection.

A person acting in a professional role is not literally a tool or an automaton. She still acts for reasons, which is a hallmark of being a rational human agent. Acting for reasons presupposes reflective self-consciousness — that is, the “capacity to turn our attention on to our own mental

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<sup>54</sup> See Postema, *supra* note \_\_\_\_, at 77-79.

<sup>55</sup> *Id.* at 77.

<sup>56</sup> *Id.* at 79.

<sup>57</sup> See David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 301 (2003).

activities” and also to “distance ourselves from them, and to call them into question.”<sup>58</sup> The standpoint of reflective self-consciousness, in turn, forces us to have a conception of ourselves, a practical, personal identity under which we value ourselves and under which we find our lives worth living.<sup>59</sup> In Christine Korsgaard’s neo-Kantian moral theory, the practical identity of persons is a crucial resource for ethics, because it provides the source of normativity. Why should a person not do something wrongful? Because to do so would be a violation of that person’s integrity, in that it would no longer be possible for her to think of herself under the description under which she values herself.<sup>60</sup> This sounds somewhat abstract, but it simply states more generally the process of moral education and socialization that parents attempt when they tell their children, for example, “If you tell a lie, you will be a liar.” No one wants to be a liar, or to have “liar” as part of the practical description under which they value themselves, so the identity-defining nature of choice becomes the link between value, motivation, and action.<sup>61</sup>

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<sup>58</sup> Christine Korsgaard, *The Authority of Reflection*, in, CHRISTINE M. KORSGAARD, ET AL., *THE SOURCES OF NORMATIVITY* 90, 93 (Onora O’Neill ed. 1996).

<sup>59</sup> *Id.* at 100-01. See also Markovits, *supra* note \_\_\_\_, at 220 (“morality aims to direct a person’s efforts at formulating and then living up to appropriate ideals and ambitions for herself, at constructing a life that is a success from the inside and that she can (and should want to) endorse as her own”).

<sup>60</sup> Korsgaard, *supra* note \_\_\_\_, at 102. Kant, of course, believed that normativity arose from the structure of the free will. Korsgaard’s refinement of Kantian ethics (what earns the label “neo-Kantian”) is to put the agent’s endorsement of reasons to act in terms of personal identity, instead of formal features of reasons for action. See Raymond Geuss, *Morality and Identity*, in KORSGAARD, *supra* note \_\_\_\_, at 189-91. Korsgaard argues that one’s practical identity must be particularized somewhat, and cannot be general, as in the Kantian concept of a citizen of the Kingdom of Ends, or a member of the party of humanity. Korsgaard, *supra* note \_\_\_\_, at 119-21. Naturally, Korsgaard cannot approve of every potential practical identity (such as assassin or Nazi) as a source of normativity, so she hedges a bit by requiring that valuing ourselves requires also valuing others in the same way; this universal requirement may constrain practical identity to such an extent that rationality, not contingent aspects of identity, remain central to ethics. “Not every form of practical identity is contingent or relative after all: moral identity is necessary.” *Id.* at 122. Thus, although the neo-Kantian approach favored by Korsgaard seems to involve a plurality of permissible identities, Korsgaard’s theory may be less “neo” and more Kantian after all.

<sup>61</sup> See Markovits, *supra* note \_\_\_\_, at 224 (“each person continues to need to identify specifically with his own actions, to see them as contributing to his peculiar ethical ambitions in light of the fact that he occupies a special position of intimacy and concern — of *authorship* — with respect to his own actions and life plan”).

In the context of legal ethics, the process of reflective self-consciousness seems threatened by a requirement that lawyers forego the exercise of moral discretion in choosing the clients they are willing to represent. While moral reasoning requires stepping back from our reasoning process and deciding whether we are willing to endorse our reasons from the standpoint of a description under which we value ourselves, a rule requiring lawyers to accept the representation of all clients regardless of the wrongfulness of their projects short-circuits this process and compels a lawyer to live with a choice made on the basis of reasons she might not have been willing to endorse. This is another way in which limiting moral discretion threatens the moral agency of lawyers and turns them into “moral prostitutes.” Lawyers are involuntarily turned into liars, aggressors, friends of rapists and murderers, and all sorts of other practical identities under which no one would choose to value herself. Reflective self-consciousness, which is essential to making moral choices, is seemingly eliminated from the decision-making process.

The trouble with this argument is it proves too much, if the point of making it is to establish moral discretion only when deciding which clients to represent. The rules of the practice of lawyering do not restrict moral discretion only in the client-selection process. Rather, acting as a lawyer means accepting a radical transformation from the ordinary process of moral decision-making in which an ordinary moral agent would engage. The “liar” example above can be extended, because many actions that are required by the role of lawyer would be tantamount to a lie (or at least a serious act of dissembling) in ordinary moral life. Consider a well known fact pattern from a state bar ethics opinion in which the defendant is charged with armed robbery, and

has admitted the crime to his lawyer. At the preliminary hearing the victim testified that the crime took place at midnight, when the defendant was (truthfully) playing poker with three friends, all of whom have a good reputation in the community and will probably be believed by the jury.<sup>62</sup> Unfortunately, the victim was mixed up on the time, probably because the defendant had hit him on the head in the course of the robbery, and the crime actually occurred at 2:00 a.m. The defendant is not going to take the stand. May the lawyer call the friends to testify about the poker game? The ethics opinion says yes, because all of the facts introduced by the lawyer into evidence are true, even though the story made up of those facts is not faithful to the underlying truth of the proposition for which the story is offered as support — namely, that the defendant did not commit the crime.

In many situations in ordinary moral life, however, telling a misleading story that is “made up of truth” would be considered wrongful.<sup>63</sup> Deception is condemned in ordinary moral

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<sup>62</sup> See Michigan Bar Association Ethics Op. CI-1164 (1987), available at <[http://www.michbar.org/opinions/ethics/numbered\\_opinions/ci-1164.html](http://www.michbar.org/opinions/ethics/numbered_opinions/ci-1164.html)> (last visited 9/30/05). Monroe Freedman (with his co-author Abbe Smith) discusses the related issue of cross-examining the truthful witness in FREEDMAN & SMITH, *supra* note \_\_\_\_, at 213-26. Not surprisingly, he concludes that it is permissible to do so, even though the lawyer participates in misleading the trier of fact, and even though it will have the effect of freeing a guilty defendant. See *id.* at 216. Somewhat more surprisingly, however, Freedman (though not Smith) decided to opt out of accepting the representation of defendants accused of rape, because he did not want to be in the position of seeking to discredit the testimony of the victim. See *id.* at 218.

<sup>63</sup> I once asked my students in a legal ethics seminar to give me examples of deceptive stories that were nevertheless made up of truth, and they responded with some illustrations from their own lives:

(1) Student A lived just outside the city limits while attending high school in town. His teacher asked him why his paper was not finished on time and he replied, “I was out of town.” He was home the whole time, but his home was “out of town.”

(2) Student B’s mother asked him whether he took out the trash. He responded, “The trash is outside.” Student B had threatened to beat up his younger brother if he didn’t take out the trash.

In neither of these cases would the person to whom the story was directed be placated by the argument that the story

life, even if a misleading story happens to be composed entirely of factual truths. Deception is morally wrong for the same reasons that lying is morally wrong — if we could not trust representations made by others, we would be unable to act on them without undertaking burdensome steps to verify the statements. As a result, beneficial social cooperation would become difficult or impossible. Yet lawyers almost without exception approve of the strategy of putting on the friends to testify in the poker game case. The reason is not hard to see — there is a complex apparatus for proving the guilt of criminal defendants, in which the defendant enjoys a number of procedural rights, which are intended to check the power of the state and protect individual liberty.<sup>64</sup> These rights would be meaningless, however, if there were no way to assert them effectively in the context of a jury trial. It would not be much help for a client if his defense lawyer simply stood up in closing and said, “Ladies and gentlemen, thank you for your attention to this case. Remember, the prosecution must prove each element beyond a reasonable doubt. Thank you.”<sup>65</sup> Instead, the advocate representing a guilty client must present a story inconsistent with factual guilt, as a way of forcing the state to carry its burden. Criminal defense lawyers may do this by using true facts to suggest misleading inferences favorable to their clients.

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was “made up of truth.” The teacher in case #1 obviously understood the excuse to mean that the student was on some sort of out-of-town trip, not sitting at home watching TV. Similarly, the artful shift to passive voice in case #2 is effective as a deception only because the speaker expects that his mother will understand him to be affirming that *he* took out the trash, which was one of his chores for the night. Thanks to Patrick Bryant and Matthew Smith-Kennedy for these illustrations. See STEPHEN GILLERS, REGULATION OF LAWYERS 457-62 (6th ed. 2001) and Peter Meijes Tiersma, *The Language of Perjury: “Literal Truth,” Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 392 (1990), for examples in a similar vein.

<sup>64</sup> Once again, many of the most powerful arguments in support of this position have been advanced by Monroe Freedman. See FREEDMAN, *supra* note \_\_\_, at 43-49; Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

<sup>65</sup> See John Mitchell, *Reasonable Doubts are Where You Find Them*, 1 GEO. J. LEGAL ETHICS 339, 352-53 (1987)

For this reason, misleading is *justified* in this context, even though the lawyer's use of the friends' testimony is clearly intended to be misleading. The contextual shift from ordinary moral life to the legal system does not describe away the misleading nature of the friends' testimony. That description persists even though there is now a second potentially apt description, in practice-dependent terms, of the act — "putting the state to its proof."<sup>66</sup> But the second description of putting the state to its proof is the one that best captures the normatively inflected evaluation of justified deception in pursuit of the client's procedural due process rights.

There are two ways to reconcile the evaluation of justified deception in the poker case with the process of reflective self-consciousness that is constitutive of moral agency. The lawyer in this case can either (1) build into her practical identity some conception of herself as a lawyer, which can be reflectively endorsed on the basis of the values underpinning the legal system,<sup>67</sup> or (2) particularize the analysis of action, *qua* rational agent, to include reasons why, in the context of the legal system, this act of deception is consistent with ordinary moral values. The difference between (1) and (2) lies in the level of generality at which moral values are thought to influence one's reasons for action. In (1), the lawyer treats the relevant moral values as having been incorporated into the metaphorical rulebook governing the practice of lawyering; if a move in the game is permitted, then there are no further moral questions to raise. By contrast, in (2) the

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<sup>66</sup> See APPLBAUM, *supra* note \_\_\_\_, at 91-92.

<sup>67</sup> One's practical identity may be particularized to some extent, so that a person values herself, in part, as being a member of a certain family or community, a profession or craft, a movement, a religious community, or a similar characteristic that is more specific than simply being a rational agent. See KORSGAARD, *supra* note \_\_\_\_, at 120. See also Markovits, *supra* note \_\_\_\_, at 271 (considering the possibility of "replac[ing] the first-personal ideals and ambitions that good people ordinarily have . . . with new first-personal ideals and ambitions supported by their role").

lawyer treats the rulebook as morally neutral, and proceeds to reason “from the ground up,” as it were, to a conclusion that the action in question is morally permitted or not. In both models of reasoning, the relevant values are the same. In the poker game example they are the liberty and due process values which generate an obligation on the part of the state to prove guilt beyond a reasonable doubt, and the corresponding permission on the part of the defense lawyer to exploit weaknesses in the state’s case in order to construct a plausible narrative inconsistent with guilt.<sup>68</sup>

Thus, the difference between the two models lies only in how coarse- or fine-grained the moral analysis should be. In this way, the difference is analogous to the familiar distinction in jurisprudence between decisions made on the basis of rules and those made on the basis of standards.<sup>69</sup> Expressing a norm as a rule has certain benefits, such as making it easier to apply the norm, reducing errors in its application, constraining the discretion (and thus the power) of the decision-maker, and making the application of the norm more predictable and certain. On the other hand, expressing a norm as a standard yields advantages such as a tighter fit between the outcome of the legal decision and the background justification of the norm, which may produce a more just result as between the parties. Neither model represents the abdication of decision-making authority — they merely represents different ways of making decisions, which have

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<sup>68</sup> Monroe Freedman vigorously argues that the deontological considerations that justify zealous adversary representation in a case like this are embodied in the U.S. constitution. FREEDMAN & SMITH, *supra* note \_\_\_\_, at 13-31; Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57 (1998).

<sup>69</sup> See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* 135-66 (1991); Lawrence B. Solum, *Equity and the Rule of Law*, in *NOMOS XXXVI: THE RULE OF LAW* 120 (Ian Shapiro ed. 1994); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

competing advantages. The moral question is resolved either at a high level of generality, at the system-design or rulebook-writing level, or at a low level of generality, when lawyers reason through their moral obligations in particular cases. Although deciding cases on the basis of a general rule instead of an all-things-considered, standards-based analysis seems like an abdication of discretion, it merely reflects the location of judgment at a different level of the analysis.<sup>70</sup>

I suspect that in a great many cases, the result would be the same, whether the lawyer reasoned on the basis of the rules governing the practice or an all-things-considered moral evaluation. (Similarly, in legal reasoning the result dictated by reasoning from rules and standards overlaps to a great extent.) Moral agency is consistent with reasoning using only the rules of a practice, and not resorting to ordinary, non-practice-dependent moral reasons. Relying on practice-bound norms and not ordinary moral reasons reflects the recognition of certain benefits associated with this style of reasoning, such as the reduction of the costs of erroneous decisions and the increased reliability of decisions not committed to the ad hoc discretion of individual practitioners. Moreover, requiring professionals to engage in a style of analysis that is too fine-grained may have the unintended consequence of undermining professional integrity, in the sense of the ability to perceive oneself as engaging in a unified practice with its associated moral values.<sup>71</sup> If the lawyer in the poker game hypothetical worried about whether deception

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<sup>70</sup> *Cf.* *Metro-North Commuter RR Co. v. Buckley*, 521 U.S. 424 (1997) (noting that the common law permitting recovery for negligent infliction of emotional distress does not engage in a case-by-case analysis of the genuineness of emotional distress, but “has developed recovery-permitting categories the contours of which more distantly reflect this, and other, abstract general policy concerns”).

<sup>71</sup> *See* Luban, *Freedom and Constraint*, *supra* note \_\_\_\_, at 448-49.

was justified *in this case*, she might conclude that the marginal benefit to the client of the deceptive defense was outweighed by the detriment to her own moral agency, which seemingly requires her not to participate in deception.<sup>72</sup> In addition, engaging in this kind of case-by-case analysis runs the risk of undermining the stability of the practice of criminal defense, which creates expectations on the part of prosecutors, judges, and clients. The stable expectations of participants in the practice is one of the preconditions for the ability of the practice to accomplish the ends for which it is constituted — in this case, checking the power of the state and ensuring that criminal defendants are treated with dignity.

As against this style of reasoning it may be observed that a side-effect of ensuring the effective functioning of a social institution may be a certain amount of alienation felt by the practitioner. Although a practice may be justified in some impartial, third-person sense, from the point of view of the individual practitioner it is experienced as a direct relationship of connection with, or authorship of wrongdoing.<sup>73</sup> This is an important objection, but I have a hard time imagining how a system that is designed to handle moral conflict can function without the participation of officials and quasi-officials who in some sense participate in acts that may be experienced as wrongdoing from a first-person point of view. As the deception example shows, these acts are not wrong from the point of view of broader, third-personal systemic values such

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<sup>72</sup> *Id.* at 445 (“when common morality clashes with role morality the marginal benefit of violating one’s role obligation may be quite large, whereas the marginal damage to the role itself is almost always slight”).

<sup>73</sup> *See* Markovits, *supra* note \_\_\_\_, at 226-28 (developing in the context of legal ethics Bernard Williams’s critique of utilitarianism as ignoring the special relationship that an agent has with her own actions). *See also id.* at 261-62 (arguing that, even if the adversary system is justified as a means to impartially determine and protect the legal rights of citizens, lawyers still have to ask whether they are justified in first-personal terms in committing what would ordinarily be described as moral vices, such as lying and subverting justice).

as vindicating the inherent dignity of people accused of crimes. From this standpoint the acts are justified, but there is a different standpoint from which the acts are not justified, namely, the perspective of authorship of the acts.<sup>74</sup> The upshot of this critique is that a justified act may nevertheless be associated with a justified feeling on the part of the agent of having participated in moral wrongdoing.

This possibility of an act being justified from an impartial point of view while creating sentiments of guilt or complicity on the part of the agent is known in political philosophy as the problem of dirty hands.<sup>75</sup> The problem of dirty hands arises when we take as the primary task of public ethics the assessment of the overall moral character of institutions through which action occurs.<sup>76</sup> The “dirtiness” of the agent’s hands is a function of being able to evaluate an act from an impartial (agent-neutral) as well as a personal (agent-relative) perspective. It is important to recognize, however, that an agent with dirty hands may have done the right thing, in some sense, while nevertheless believing herself to have participated in wrongdoing. Eliminating all connection with what the lawyer believes would be wrongdoing in ordinary moral life — that is, seeking some kind of hyper-purity within an institutional role — is possible only at the expense

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<sup>74</sup> See Thomas Nagel, *The Fragmentation of Value*, in *MORTAL QUESTIONS* 128, 134 (1979) (observing that the human capacity to view the world from a diversity of perspectives gives rise to a multiplicity of moral claims).

<sup>75</sup> See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 1 *PHIL. & PUB. AFF.* 160, 161 (1973) (“a particular act of government . . . may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong”); see also Williams, *supra* note \_\_\_\_, at 61 (“In some cases the claims of the political reasons are proximate enough, and enough of the moral kind, to enable one to say that there is a moral justification for that particular political act, a justification which has outweighed the moral reasons against it. Even so, that can still leave the moral remainder, the uncanceled moral disagreeableness I have referred to.”).

<sup>76</sup> See Nagel, *Ruthlessness*, *supra* note \_\_\_\_, at 82-83.

of undermining the capacity of the institution to realize the goods for which it is constituted. Paradoxically, then, a lawyer who seeks to have no authorship relationship whatsoever with wrongdoing also commits moral wrongdoing, only this time in respect of the second-order reasons for respecting a valuable social institution. In the deception example, a lawyer who refused to participate in presenting the deceptive testimony of the friends, in order to create the misleading inference that the client had an alibi, would commit a wrong not only in terms of the client's reasonable expectations, but also in terms of the rules which constitute and regulate the practice of criminal defense. This is a moral argument, offered to justify what would otherwise be the morally wrongful act of deception.

To bring the analogy home to the case of client-selection, we must ask whether there would be any detriment to the social practice of representing clients if lawyers engaged in case-by-case reasoning, taking into account the lawyer's moral assessment of the client's character and ends. Perhaps the client-selection aspect of the lawyer's role can tolerate the exercise of more fine-grained moral discretion than other aspects. On the other hand, too much latitude for the exercise of moral discretion may undermine certain professional commitments, such as the principle of neutrality, which requires the lawyer to refrain from exercising judgment concerning the moral merits of the client's character or objectives.<sup>77</sup> These professional commitments may create a situation in which the lawyer's hands are dirtied, in the sense of involving the lawyer in what she would ordinarily regard as an immoral project, or on behalf of a client whose moral character she despises. The mere fact of having one's hands dirty is not a reason to reject the

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<sup>77</sup> Postema, *supra* note \_\_\_\_, at 73 (defining the principle of neutrality).

institution and role obligations which create this problem, however, because the institution and its related obligations may be preferred by all affected citizens to a system in which the primary motivation of practitioners is keeping their hands clean. For this reason, a practitioner may “opt in” to the system, by endorsing from a first-personal point of view the commitment to work within the structure of the institution to carry out its ends. For this reason, the concept of moral agency alone is not a sufficient reason to permit lawyers to exercise moral discretion in client selection on a case-by-case basis, if the structure of the institution requires lawyers to forego this discretion. It may be the case, however, that the role of lawyer, not the concept of moral agency, requires that we build into the role some capacity for moral discretion in client selection.

*B. Specialization, Cause Lawyering, and Personal-Interest Conflicts.*

Many students do not enter law school simply with the goal of becoming a “lawyer,” but instead perceive themselves as would-be civil rights, criminal defense, environmental, mergers-and-acquisitions, or personal injury lawyers. Specialization is a fact of life in the legal profession, and in the way lawyers think about their careers.<sup>78</sup> Moreover, specialization by field of law obviously implies a certain amount of specialization by client identity.<sup>79</sup> Poor people do

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<sup>78</sup> See RICHARD L. ABEL, *AMERICAN LAWYERS* 202-05 (1989); JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 26-28 (rev'd ed. 1982). Andy Perlman builds on this observation and argues that legal ethics theories should be supplemented by appropriate recognition of the effect of specialization and diverse practice settings on a lawyer's capacity to exercise discretion in client selection, to counsel clients in a morally sensitive way, and to opt out of specific matters and refrain from using tactics if doing so would avoid assisting wrongdoing by clients. See Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 *SETON HALL L. REV.* 829 (2001).

<sup>79</sup> See Spaulding, *supra* note \_\_\_\_, at 46 (“By orienting lawyers around narrow client bases with specific interests and legal needs, specialization encourages thick positional identification with clients.”).

not need lawyers who specialize in asset-backed securities deals, and corporations do not hire divorce lawyers (except maybe as a benefit for their officers). A certain amount of discretion in client selection therefore exists as a byproduct of the differentiation of the legal profession into practice specialities. Some lawyers may be weakly committed to their practice speciality, perhaps (as I did) having fallen into some field more or less by chance. For others, however, serving moral or political ends is an inextricable part of the motivation to become a lawyer. A union-side labor lawyer might be able to envision herself as working instead as a labor organizer, but not as a management-side labor lawyer.<sup>80</sup> More broadly, “cause lawyers” are motivated by the desire to bring about social transformation, serve underprivileged clients, or pursue some other political agenda.<sup>81</sup> For cause lawyers, the commitment to an underlying political cause is logical prior to, and stronger than the commitment to being a lawyer. Moreover, if any lawyer is strongly committed to a professional sub-community, whether progressive or otherwise, it may be difficult for her to generate much enthusiasm for doing different kinds of legal work.

Lack of enthusiasm alone is not a sufficient reason to believe that a lawyer should not be

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<sup>80</sup> Howard Erichson reports that plaintiffs’ class-action lawyers tend to avow strong beliefs in the righteousness of their cause, describing themselves as “crusaders” with an “awesome and holy responsibility to change the world.” See Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2098-2100 (2004). It is easy to dismiss this rhetoric as the self-serving rationalizations of people who are making a gazillion dollars doing work that strikes many observers of the legal system as wasteful or corrupt. As Erichson points out, however, there is evidence that at least some lawyers are sincere in their commitments. For example, the plaintiffs’ lawyers in the Minnesota tobacco product liability litigation made strategic decisions, such as refusing a confidentiality agreement in a settlement offer, which resulted in a high probability of making less money, but possibly doing some real good for the public. *Id.* at 2097.

<sup>81</sup> See Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31 (Austin Sarat & Stuart Scheingold eds. 1998).

ethically obligated to provide competent and diligent representation for a client.<sup>82</sup> All jobs involve some drudgery, and it is unrealistic to expect professionals to sustain a high level of passion and engagement with all aspects of their work. It may be more fun to work for clients with whom a lawyer has a certain degree of sympathy, but lack of enthusiasm is not an excuse for failing to perform a job competently. Thus, the argument from specialization and competence must trade on an additional premise, that certain particularly severe mismatches between the lawyer's commitments and the client's goals are fatal to the lawyer's ability to be an effective agent of the client. This premise is that certain representations create so much friction and dissension between the lawyer and client that they amount to an outright impediment to acting competently, rather than merely tedium or lack of engagement. The conflict must be so serious that it goes beyond a mere diminution of the lawyer's enthusiasm to an inability to impartially consider alternatives and assist the client in complying with the law.<sup>83</sup> In other words, the analysis is not focused on affective or emotional consequences of the representation, but on the lawyer's ability to overcome whatever those might be and carry out her obligations as a professional.

For a lawyer's personal moral beliefs to create a conflict of interest, requiring the lawyer

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<sup>82</sup> See RESTATEMENT, *supra* note \_\_\_ § 16.

<sup>83</sup> Charles Wolfram argues that it is an idiosyncrasy of the American legal profession that lawyers believe themselves to need some kind of strong emotional identification with the client in order to be effective representatives. See Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, in *THE GOOD LAWYER* 214, 224 (David Luban ed. 1983). Many other professional traditions appear not to value psychological virtues like "zeal" on behalf of clients; indeed, the traditions of the French profession demand that *avocats* exercise independence from their clients, which demands a psychological state of detachment and disinterestedness, the diametric opposite of zeal. See LEUBSDORF, *supra* note \_\_\_, at 19.

to withdraw from representing the client, they must “materially interfere with the lawyer’s independent professional judgment.”<sup>84</sup> Exercising independent professional judgment is a fundamental obligation of American lawyers, even if they do not recognize the strong conception of independence demanded of French *avocats*.<sup>85</sup> However, it does not follow from this fundamental status that any normative disagreement between lawyers and clients should disqualify the lawyer from representing the client. Indeed, the fundamental nature of the obligation of professional independence should cut against permitting lawyers to opt out of representing clients in most cases of morality-based disagreement. Like keeping confidences, communicating regularly and promptly with clients, and complying with the rigorous trust-account rules pertaining to client funds, it may not always be easy to exercise independent professional judgment. We expect lawyers to expend effort to comply with the law governing lawyers, and not to beg off their duties just because compliance may occasionally be demanding.<sup>86</sup> As discussed above,<sup>87</sup> the right to exercise moral discretion in the commencement

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<sup>84</sup> MODEL RULES, *supra* note \_\_\_\_, R. 1.7, cmt. [8]. The leading treatise on the law governing lawyers states that a potential negative repercussion on a personal interest of the lawyer’s might “cool the lawyer’s zeal” in representing a client effectively. See 1 HAZARD & HODES, *supra* note \_\_\_\_, § 11.18, at 11-55. The example given, of a lawyer working on a matter that might have a serious negative impact on a personal friend or family member, seems to implicate independence rather than zeal, because the lawyer’s loyalty to her friend or family member would preclude recommending the course of action that would be the most advantageous for the client. The relevant Model Rules provision does not mention zeal, and indeed does not consider the lawyer’s mental state at all. MODEL RULES, *supra*, R. 1.7, cmt. [8] (“Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”). Thus, the better framework for analysis seems to be the lawyer’s ability to recommend the appropriate course of action for the client, not the lawyer’s enthusiasm or lack of it.

<sup>85</sup> *Id.*, R. 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment”); *id.*, R. 1.7, cmt. [1] (“Loyalty and independent judgment are essential elements in the lawyer’s relationship with the client”). For the French norm, see LEUBSDORF, *supra* note \_\_\_\_.

<sup>86</sup> See Spaulding, *supra* note \_\_\_\_, at 20-21, 25, 30 (arguing that the lawyer disciplinary rules, interpreted in light of their underlying structure and purpose, are intended to shape the lawyer’s attitudes toward prospective clients and current clients, and that lawyers are urged to work toward an attitude of detachment from their clients and their

and termination of the attorney-client relationship is highly qualified, and therefore should not be relied upon as an easy escape from the duty to exercise independent professional judgment.

Understood in this way, morally grounded negative evaluations of a potential client — as opposed to the belief that a lawyer is not competent to handle a specialized matter — should seldom be a basis for refusing to accept the representation. It might not be very satisfying to be a lawyer at Covington & Burling working on behalf of South African Airways, which at the time was owned by the apartheid government; the firm could undoubtedly find other clients whose activities contributed directly to social justice, and therefore would provide greater psychic satisfaction for lawyers in the firm.<sup>88</sup> However, neither a direct connection with social justice nor psychic satisfaction is required to justify representing a client. It seems likely that Covington had other clients whose representation was no more attenuated from considerations of social justice than that of South African Airways. Perhaps they were not “implicated in the South African system of racial subordination in a variety of ways,”<sup>89</sup> but they were probably implicated in other moral wrongs, such as reinforcing the American system of racial subordination, discriminating on the basis of sex or sexual orientation, attempting to undermine labor unions, or causing

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causes).

<sup>87</sup> See *supra* notes \_\_\_ - \_\_\_, and accompanying text.

<sup>88</sup> This example is from William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1094-96 (1988).

<sup>89</sup> *Id.* at 1095.

damage to the environment.<sup>90</sup> Large law firms tend to represent disagreeable clients. In part this is due to the market for legal services — the clients of large firms tend to be large entities with wide-ranging operations, which in the natural course of events come into conflict with a variety of constituencies with claims of being treated unjustly by the large entity. Patterns of normative conflict that are prevalent in society are therefore replicated in the interactions between the entity clients and employees, transactional partners, federal and state regulatory agencies, and others who act on the basis of values with which a large firm lawyer might have a certain degree of sympathy. However, the resolution of these conflicts is not entrusted to the conscience of individuals. The whole social apparatus of the law — legislatures, administrative agencies, courts, and lawyers — is designed to provide a relative stable framework for mutually beneficial cooperation, notwithstanding these disagreements. For that reason, first-order moral conflict is not an appropriate basis for a lawyer’s decision not to represent a client.

In an exceptional case, a lawyer’s practical identity (to use Korsgaard’s term<sup>91</sup>) or her ground projects (to use a concept deployed by Bernard Williams<sup>92</sup>) may be so strongly bound up with a particular political stance that it would be literally impossible for that person to function as

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<sup>90</sup> If all of these “moral wrongs” sound suspiciously like they come from the platform of the Democratic Party, it is because I deliberately loaded up the list to show that the social justice and moral values that Simon believes should inform the lawyer’s discretionary decision-making are highly contestable in a pluralistic democracy. Reasonable ethical pluralism, along with institutional-structure arguments about how moral disagreement should be resolved, are the foundation of the institutional arguments I develop for the authority of law and the role of lawyers within the legal system.

<sup>91</sup> See *supra* notes \_\_\_ - \_\_\_, and accompanying text.

<sup>92</sup> See Bernard Williams, *Persons, Character and Morality*, in *MORAL LUCK* 1, 12-14 (1981). A ground project is something that significantly gives meaning to one’s life; it is so important that it is essentially a condition for having any interest in existing.

anything other than a cause lawyer without suffering some kind of radical moral alienation. Consider, for example, a lawyer who chooses to represent only women in matrimonial litigation, because of her political and moral beliefs that women are often discriminated against in the judicial system, and could benefit from her zealous representation.<sup>93</sup> Setting aside questions posed by the application of antidiscrimination statutes (such as whether a lawyer should be treated as a “public accommodation”), the case of the feminist divorce lawyer poses sharply the clash between system-level demands, such as the impartial treatment of all potential clients, and the demands of moral agency that may lead a lawyer to refuse to see herself solely in terms of highly abstract, system-level values. Requiring a lawyer such as this to represent all prospective clients is in effect to require her to build into her practical identity a conception of herself as a fungible service-providing unit. In this highly commodified world, there would appear to be very little room for engaging in the process of reflective self-consciousness, beyond the initial opt-in point at which a person chooses to become a lawyer.

Although this extreme limitation on the exercise of moral discretion is imaginable in principle, it is not a particularly attractive candidate for inclusion in a hypothetical rulebook constituting the role of lawyer.<sup>94</sup> The content of the rulebook is influenced by considerations of

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<sup>93</sup> This example is from the proceedings of a state antidiscrimination agency, which concluded that a woman lawyer’s restriction of her practice to exclude representing men in divorce proceedings was a violation of a state statute prohibiting discrimination in places of public accommodation. *See Stropnick v. Nathanson*, 19 MD.L.R. 39 (M.C.A.D. Feb. 25, 1997); Steve Berenson, *Politics and Plurality in a Lawyer’s Choice of Clients: The Case of Stropnick v. Nathanson*, 35 SAN DIEGO L. REV. 1 (1998); Bruce K. Miller, *Lawyers’ Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctioning of Judith Nathanson*, 20 W. NEW ENG. L. REV. 93 (1998).

<sup>94</sup> *See* Fried, *supra* note \_\_\_\_, at 1078 (arguing that forcing a lawyer to conceive of herself as a scarce resource, and make an allocation decision to maximize the social value of her legal talent, violates the lawyer’s right to reserve a portion of concern for herself and her own projects).

what kind of legal profession a society would want to have.<sup>95</sup> Considerable limitations on the exercise of moral discretion may be necessary to avoid undermining the institutional settlement of normative conflict which is the central achievement of the law. At the same time, however, one might expect a degree of social recognition of the dangers of taking this too far. After all, would-be lawyers are ordinary citizens and moral agents first, and they may be concerned about the effect on themselves, the legal profession, and society as a whole resulting from an extreme form of “bleached-out professionalism,”<sup>96</sup> in which no one was permitted to develop a niche as a morally and politically specialized cause lawyer. Normatively speaking, a morally decent rulebook — one which could be “sold” to society at large — may need to contain some provision permitting specialization and cause lawyering.<sup>97</sup>

It is important to emphasize that the argument for or against building moral discretion into the rulebook of the profession is *not* the familiar consequentialist one, claiming that morally motivated non-representation decisions by lawyers will leave certain potential clients high and

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<sup>95</sup> See APPLBAUM, *supra* note \_\_\_\_, at 99-101 (arguing for “practice positivism” — i.e. that there are no moral constraints on the content of a practice provided by the very concept of a practice); W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 GEO. L.J. 667 (2001) [hereinafter, “Wendel, *Professional Roles*”] (responding to Applbaum’s practice positivism by noting that even if the concept of a practice does not constrain the rules of a practice, any morally plausible practice will be sensitive to the demands of others in society that the rules not permit serious immorality).

<sup>96</sup> See David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998); Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578 (1993).

<sup>97</sup> Even Norman Spaulding, a strong proponent of “thin” professional identity — that is, a rulebook provision denying lawyers the right to exercise moral discretion in client selection — admits that cause lawyering is socially valuable. See Spaulding, *supra* note \_\_\_\_, at 101-02. He argues, in response, that cause lawyering can be justified on the basis of thin professional identity, because willingness to serve any client, even one who is impecunious and socially marginalized, is the hallmark of neutral partisanship. *Id.* at 101.

dry, without anyone to provide access to the complex machinery of law, by which the would-be clients could obtain access to its legal rights.<sup>98</sup> After being dumped by Covington, South African Airways presumably had little difficulty finding another law firm willing to take its legal work. As a practical matter, very few clients will find themselves truly foreclosed from obtaining access to their legal entitlements because of morally motivated refusals by lawyers to represent them.<sup>99</sup> That observation would undercut an argument that limiting moral discretion in client selection is instrumentally justified, to the extent it maximizes the social good of “access to law.” But if individual autonomy and the good of access to law is not at the root of the institutional argument for the authority of law, then appeals to consequences are irrelevant to the justification of the acceptance or limitation of moral discretion in client selection. And if practical identity underlies the normative force of ethics for persons generally, then forcing lawyers to represent clients without regard to moral qualms gives rise to a kind of non-consequentialist wrong. The wrong in that case would be interfering with the autonomy of individuals to engage in reflective self-consciousness, constructing a description under which they value themselves. Deontological considerations are at the forefront of the theory of legal authority and legal ethics under consideration here, and therefore it is unnecessary to resort to speculation about whether the system would collapse as a result of widespread morally-based opting-out by lawyers (a consequence that I consider highly unlikely).

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<sup>98</sup> This is a theme of Stephen Pepper’s defense of the standard conception of legal ethics. *See* Pepper, *supra* note \_\_\_\_, at 623-24, 632-33. It is particularly clear in this passage: “[E]xercise of the choice of client aspect of the moral autonomy of the lawyer is troubling if it leads to foreclosure of a person’s access to the law.” *Id.* at 634.

<sup>99</sup> *See infra* notes \_\_\_\_ - \_\_\_\_, for examples of repugnant clients who succeeded in obtaining effective legal representation.

It now appears that we have circled back around to the argument from moral agency — that is, to the idea that the legal system should not coerce people into adopting a particular narrow kind of self-conception as professionals, but should leave lawyers free to define themselves in terms of practice specialties and subcommunities of clients. As I argued above, the concept of moral agency itself does not require that any practice build in the capacity for practitioners to engage in fine-grained moral discretion.<sup>100</sup> In certain cases, lawyers may appreciate that the success of the practice to which they have committed themselves depends on refraining from conducting a fine-grained moral analysis of the permissibility of a particular act (as in the example of deception). In other cases, however, a lawyer might believe that the practice is not threatened by exercising some case-by-case moral discretion. Again, this is not an empirical argument about the likelihood of bad consequences, such as unpopular clients going unrepresented.<sup>101</sup> Instead, it is a teleological or interpretative account of the purpose which gives meaning and intelligibility to a social practice. If there is a point to a social practice, there is a point to being a practitioner, an answer to the question “what does it mean to be a lawyer?”<sup>102</sup>

C. *Are Professional Roles Placeholders for First-Order Moral Arguments or Exclusionary Reasons for Action?*

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<sup>100</sup> See *supra* notes \_\_\_ - \_\_\_, and accompanying text.

<sup>101</sup> For this argument, which would cut against permitting case-by-case moral discretion in client selection, see *infra* notes \_\_\_ - \_\_\_, and accompanying text.

<sup>102</sup> See Markovits, *supra* note \_\_\_, at 220 (arguing that lawyers “need to construct a first-personal account of these practices that casts them as part of a life they can endorse, generating a self-understanding they can live with”).

The answer to this question turns out to be a highly contingent, and contested matter. Whatever it means to be a good lawyer, however, it must include some component of being a good *person* as well. Otherwise professional ethics risks becoming hermetically sealed from the sources of value that underlie ethics generally, with the effect that the internal discourse of professional ethics becomes fatally impoverished.<sup>103</sup> At the same time, the interest in developing a practical identity that is at odds with one's effective functioning as a professional cannot be of overriding significance in all cases. If someone has a ground project that is of such importance that it would be impossible to serve clients regardless of her moral disagreement with them, then the person may wish to rethink her decision to become a lawyer. On the other hand, one may argue that the role of lawyer should be fully moralized, in the sense that the lawyer's actions are informed primarily by first-order moral considerations. In that case, there would be no separation at all between one's practical identity as a person and one's actions as a professional — the latter follows straightforwardly from the former. There may also be a middle ground here, in which the professional role establishes some limitation on the extent of moral discretion that would be permissible in ordinary life, but which also provides some breathing space for plural conceptions of professional identity to be developed.

These three positions can be summarized in terms of the scope of permissible moral discretion (i.e. the lawyer's first-personal perspective) and the appropriateness of ascribing moral praise or blame to the lawyer's representation decisions (i.e. the third-personal point of view of observers). In each case, we can ask what implications the Rawlsian two-level justification

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<sup>103</sup> See Postema, *supra* note \_\_\_\_, at 75-78.

strategy has for our reactions, as third party observers, to a lawyer's decision to represent a morally disagreeable client.

1. *Full Moralization.*

If a role is fully moralized, the obligations of an occupant of that role are given by first-order moral considerations. If deception is prohibited in ordinary life, by ordinary moral values, then it is prohibited in one's professional role as well. Similarly, to the extent one's ground projects and values are morally repugnant, they can be criticized in the same kind of ordinary moral terms that people would use to criticize someone acting outside of a professional role. There may be something minimally praiseworthy about working in a professional capacity to vindicate the legal system's ends, but a lawyer's career may lack the additionally praiseworthy feature of being dedicated to substantive ideals of justice not captured by the thin procedural virtues of the legal system. Moral discretion and moral criticism thus carry through from ordinary moral life to the decision whether to work on behalf of a particular client.<sup>104</sup> If there is something morally objectionable about associating with people who make a great deal of money selling harmful products while deceiving customers about the dangers they pose, then a lawyer cannot expect to be insulated from moral criticism for working on behalf of Big Tobacco. Conversely, if a client or a cause morally deserves vigorous representation, we can regard the

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<sup>104</sup> See W. William Hodes, *Accepting and Rejecting Clients – The Moral Autonomy of the Second-to-Last Lawyer in Town*, 48 U. KAN. L. REV. 977, 982 (2000) (“because [American] lawyers do have an almost unlimited discretion which clients and causes to accept or reject . . . it is perfectly proper for other lawyers or social critics to either condemn or praise lawyers on moral grounds for the choices they make”).

lawyer for that client or cause as a hero. The possibility of describing an action in terms of the institutional apparatus of the legal system does not somehow destroy the possibility of describing the same action in pre-institutional terms, making use of empirical facts and moral values that do not depend on the institutional setting for their intelligibility.<sup>105</sup>

## 2. *Second-Order Exclusionary Reasons.*

Pointing out the persistence of pre-institutional descriptions and values has always struck me as too pat, however, because professional roles themselves have moral qualities, which change the evaluation of the actor as we move from the ordinary moral context to the professional role. There is no simple one-to-one correspondence between evaluations in these two settings, because the settings themselves change the moral character of the acts. Recall the deception example from Section III. Telling an evasive or misleading story may be condemned in ordinary life, but it may be the right thing to do in a professional context, because of the institutional setting. If an actor is charged with responsibility for vindicating another person's right to be treated with dignity by the state, and the only way that can be done is to construct a deceptive narrative that forces the state to work harder in order to prove its case, then the deception is justified in the professional setting. The moral issue that arises in a professional context is qualitatively different from the issue as it may arise in ordinary life.<sup>106</sup> It is possible to analyze professional role obligations in moral terms, of course, but the analysis must focus on the

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<sup>105</sup> APPLBAUM, *supra* note \_\_\_\_, at 91-93.

<sup>106</sup> See Wendel, *Professional Roles*, *supra* note \_\_\_\_, at 672.

institutional context in which a person acts, and not rely on superficial analogies with noninstitutional ethics.

One response to this problem would be to see professional role obligations as summary rules, or a shorthand for a nexus of obligations and rights, all of which are grounded in ordinary morality but adapted to the professional setting through contextual application. That is, the conclusion, “deception by a criminal defense lawyer is morally permissible,” conceals a lengthy argument which takes into account the moral justification for a particular institutional mechanism for adjudicating guilt or innocence, with procedural entitlements enjoyed by the defendant and associated duties incumbent upon the defense lawyer to vindicate those procedural rights.<sup>107</sup> Referring to professional roles, role obligations, and role permissions is simply a placeholder, or a compressed way of making these sorts of moral arguments. This is the summary conception of rules attacked by Rawls in his 1955 paper.<sup>108</sup> Rawls argues that rules are logically prior to decisions in particular cases, and are not merely guides, rules of thumb, or convenient summaries of lengthy, “ground-up” moral analysis. In his practice conception of rules, the rules which constitute a social practice are *exclusionary*, in the sense that they do not just summarize first-order moral analysis, they replace it.<sup>109</sup>

One of the deepest philosophical problems in legal ethics is whether to regard role

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<sup>107</sup> See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 130-39 (1988).

<sup>108</sup> See Rawls, *supra* note \_\_\_\_, at 22-23.

<sup>109</sup> *Id.* at 24-28.

obligations as merely placeholders for first-order moral reasons, or whether they have an independent, and exclusionary status.<sup>110</sup> David Luban argues that role obligations should not be viewed as exclusionary, because this would involve an abdication of moral agency and would result in unacceptably high psychological costs to those who act in institutional contexts.<sup>111</sup> For Luban, “the appeal to a role in moral justification is simply a shorthand method of appealing to the moral reasons incorporated in that role.”<sup>112</sup> Thus, the norms of a practice are transparent in moral analysis, and it is always possible for a deliberating agent or a third person observer to make reference to the underlying first-order moral reasons. In response, I have argued that the moral analysis of professional roles ought to be cashed out on the wholesale, rather than retail level.<sup>113</sup> The norms of a practice are opaque in moral analysis, and in all but the most exceptional cases, it is not possible to make reference to first-order moral reasons that would otherwise be applicable.

It is not possible to rehash all of the details of this debate in this article, but the crux of my argument is that regarding institutional reasons as exclusionary is a necessary implication

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<sup>110</sup> This issue in legal ethics is simply an instantiation of the problem in moral philosophy generally of how to deal with the possibility of second-order reasons. In short, some philosophers, most prominently Joseph Raz, believe conflicts between second-order and first-order reasons are resolved by trumping or exclusion. Criticizing this model, Michael Moore argues that what appear to be second-order reasons should be regarded as a species of newly created first-order reasons, albeit with very substantial weight, but that they should not exclude consideration of first-order reasons. See Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 849-59 (1989).

<sup>111</sup> See LUBAN, *supra* note \_\_\_\_, at 116-25 (criticizing the “policies over acts” approach).

<sup>112</sup> *Id.* at 125; see also Luban, *Freedom and Constraint*, *supra* note \_\_\_\_, at 434 (standing by this sentence while modifying other aspects of his theory).

<sup>113</sup> See Wendel, *Obedience*, *supra* note \_\_\_\_, at 403-04, 412-17.

from the conditions for something being a legitimate authority. The social function of the legal system is to provide an orderly framework for cooperation despite fundamental and persistent moral disagreement among citizens. In order to achieve this end, the legal system must provide all affected persons — judges, lawyers, and affected citizens — with reasons for action that do not make reference to the first-order moral values that generated the need for a social settlement of normative conflict in the first place.<sup>114</sup> These reasons are not exclusionary merely in a motivational or epistemological sense<sup>115</sup>; rather, they alter the landscape of practical reasoning for affected citizens and lawyers. The moral qualities of actions and the moral evaluation that would ordinarily apply to clients are excluded from deliberation, because of the law’s social function of enabling coordinated activity among people who would otherwise be unable to move beyond moral conflict and agree on a common course of action. Although the legal system could probably accomplish this goal if it recognized limited opt-out rights or conscientious objection provisions for lawyers, basing client-selection decisions on first-order moral values is nevertheless conceptually at odds with the non-instrumental reason to respect the law.

As I argued above in connection with the deception example, if a lawyer is precluded from basing actions on first-order moral values when acting in a representative capacity, it seems incoherent to permit reference to first-order moral considerations at the client selection stage. A lawyer who represents a client may not refuse to pursue the client’s legal entitlements because

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<sup>114</sup> See Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 210, 212 (1994) (“What distinguishes authoritative directives is their special preemptory status.”).

<sup>115</sup> See Moore, *supra* note \_\_\_\_, at 855-56 (identifying this ambiguity in Raz’s use of exclusionary reasons).

the lawyer believes them to be morally problematic. The significance of something's being a *legal* entitlement is precisely that we have settled provisionally, as a society, on a resolution of a particular moral issue, and the lawyer is therefore not entitled to "unsettle the settlement" by refusing to assist the client. But the second-order reasons that a lawyer has for considering only legal reasons do not arise upon commencement of the attorney-client relationship. They are created by the lawyer's professional role, and her (metaphorical) trusteeship relationship with the law. Thus, client-selection decisions are subject to the same constraints on first-order moral reasoning as actions taken in a representative capacity.

### 3. *Role-Relative Moral Pluralism.*<sup>116</sup>

Having argued that values associated with the legal system create exclusionary reasons for action, it is important not to exaggerate the effect of this preclusion on the development of one's practical professional identity. Various visions of what it means to be a good lawyer are compatible with the minimal standards of professional excellence that are entailed by the legal and political systems that we have adopted in our society. Different ideals like "cause lawyer,"<sup>117</sup> "lawyer-statesman,"<sup>118</sup> "lawyer for the damned,"<sup>119</sup> and even "competent technocrat"<sup>120</sup> are

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<sup>116</sup> I am grateful to Greg Cooper for this useful term.

<sup>117</sup> See SARAT & SCHEINGOLD, *supra* note \_\_\_\_.

<sup>118</sup> See KRONMAN, *supra* note \_\_\_\_, at 11-13, and *passim* (defending a conception of lawyering in which the lawyer's primary virtue is "practical wisdom" acquired during a long career of distinguished public service and elite private legal practice).

<sup>119</sup> See CLARENCE DARROW, *ATTORNEY FOR THE DAMNED* (1957).

<sup>120</sup> See Pepper, *supra* note \_\_\_\_.

consistent with the minimal requirements of the professional role. As a result, a would-be lawyer is free to choose among them, on the basis of moral values and the person's practical identity or ground projects. The Razian conception of reasons underlying the authority of law requires that lawyers act on what I have called "internal legal reasons."<sup>121</sup> A lawyer may opt to pursue a specific vision of what it means to be a good lawyer, as long as professional norms and traditions recognize this vision as an authentic way to realize one's ground projects within the broader social and institutional framework of the legal system. The American profession does recognize plural visions of professional virtue, from being a blue-chip lawyer for establishment clients to being a revolutionary lawyer seeking to shake the establishment to its foundations.<sup>122</sup> A lawyer who acts on the basis of one of these visions does exercise moral discretion, but the crucial point is that it is discretion created by, and exercised within a framework of plural values that are internal to the legal system. It is not a matter of straightforwardly acting on first-order moral reasons.

These alternative conceptions of ethical lawyering are all available, but from the standpoint of the second-order values underlying the legal system, they are all on a moral par.<sup>123</sup>

We cannot coherently praise a cause lawyer as a hero and condemn a lawyer for Big Tobacco, if

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<sup>121</sup> See W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1169, 1197 (2005) [hereinafter, "Wendel, *Interpretation*"] (defining internal legal reasons as "those grounds (texts, principles that are fairly deemed to underlie and justify legal rules, interpretive practices, hermeneutic methods, and so on) that are properly regarded in a professional community as appropriate reasons to offer in justification of a result").

<sup>122</sup> I have consistently maintained that anti-establishment, and even revolutionary lawyers are valued within our professional tradition. See Wendel, *Obedience*, *supra* note \_\_\_\_, at 419; W. Bradley Wendel, *Motivation, Morality, and the Professionalism Movement*, 52 S.C.L. REV. 557, 573 (2001) (defending the defense lawyers in the Chicago Seven trial from charges of unprofessional behavior).

<sup>123</sup> Thanks to Sarah Cravens for pressing me to make this point clear.

both visions of ethical lawyering are constituted by the standards of the practice of being a lawyer in the United States. The Razian model of exclusionary not only preempts resort to ordinary moral reasons from the first-personal standpoint of the deliberating agent, but also from the third-personal point of view of a critical observer. From either perspective, the norms of a practice are, or ought to be, relatively non-transparent. Naturally, observers do not always respect this constraint, and may direct opprobrium at lawyers who represent unpopular clients. This blame is merely a social fact, not a justification, unless the observer can explain the relevance of ordinary moral reasons to professional decision-making. If the Rawlsian two-level approach is the right one, moral blame for client selection will be misplaced unless it is grounded in systemic reasons.

*IV. Non-Agency-Based Arguments for Moral Discretion in Client Selection.*

*A. Moral Counseling and Informal Ordering.*

If a wrongdoer intends to do something that will cause harm to others, but needs the assistance of an expert to carry out the plan, the expert can thwart the harmful design by refusing to cooperate. This is obvious in cases of violent aggression such as terrorist bombings, which require some expertise in electronics and explosives to carry out. Analogously, the kinds of financial harms inflicted by the Enrons and Parmalats of the world also require expert assistance. In cases of complex frauds, the assistance of a lawyer is a necessary condition of success of the client's plan.<sup>124</sup> Lawyers prepare opinion letters, without which crooked deals would not close,

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<sup>124</sup> See Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J. L. & PUB. POL'Y 195 (2003).

and provide legal advice that clients may use in structuring fraudulent transactions. These are cases of harm through lawyer malfeasance, but lawyers may contribute to their clients' harm through nonfeasance, by failing to counsel a client not to engage in legal or moral wrongdoing. Even in cases in which professional assistance is not necessary to accomplish the goal, a lawyer may be well positioned to dissuade the client from wrongdoing. In the traditional conception of the lawyer-client relationship, the lawyer is a trusted advisor who knows the client's business intimately, who understands the client's interests and values, and whose opinion accordingly is likely to be taken quite seriously by the client.<sup>125</sup> This aspect of the lawyer's role is aptly summarized in the comment of corporate lawyer Elihu Root, "half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop."<sup>126</sup>

It should be obvious that it is consistent with the lawyer's role as legal advisor to counsel the client not to engage in *legal* wrongdoing. In this sense, a lawyer is performing a gatekeeping function by attempting to dissuade clients from doing something they are not legally entitled to do. Some gatekeeping responsibilities have always been a part of the law governing lawyers.<sup>127</sup> Rule 11 of the federal rules of civil procedure, regulatory requirements imposed on lawyers in specialized practice areas like tax and securities regulation, and the general civil and criminal law of assisting fraud impose legal liability on lawyers who fail to disassociate themselves from

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<sup>125</sup> See Robert A. Kagan & Robert L. Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 409-10 (1985).

<sup>126</sup> See 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938).

<sup>127</sup> See Fred C. Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387 (2004) [hereinafter, "Zacharias, *Gatekeepers*"].

crimes or frauds committed by clients, for which a lawyer's services were employed. Controversies remain about what steps a lawyer ought to be able to take to interdict legal wrongdoing by clients, the most difficult issue being whether the duty of confidentiality should be weakened to permit lawyers to disclose information where necessary to prevent financial harms to third parties.<sup>128</sup> But the general scope of the lawyer's duty is clear in this case — a lawyer may not counsel or assist the client to engage in criminal or fraudulent conduct,<sup>129</sup> and the lawyer is required to withdraw if the representation will result in a violation of law,<sup>130</sup> so *a fortiori* she is permitted to attempt to talk the client out of legal wrongdoing. Gatekeeping on the basis of a lack of legal entitlement is sometimes associated with the ideal of the lawyer as a morally virtuous and prudent counselor.<sup>131</sup> This conception of the lawyer-client relationship may be somewhat anachronistic when clients are more likely to hire lawyers only on an episodic basis, instead of maintaining longstanding engagements with outside counsel. But there is no necessary relationship between the exercise of legal gatekeeping responsibilities and a broader conception of the lawyer's counseling role — even in a one-off representation a lawyer is permitted, expected, and even in some cases legally required to attempt to dissuade a client from violating the law.

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<sup>128</sup> See, e.g., Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution in the Effort to Improve Corporate Lawyers' Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1 (2003); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

<sup>129</sup> MODEL RULES, *supra* note \_\_\_\_, R. 1.2(d).

<sup>130</sup> *Id.*, R. 1.16(a)(1)

<sup>131</sup> See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 122-34 (1993) (setting out and criticizing the “narrow view” of legal counseling, in which “a lawyer is merely a specialized tool for effecting his client's desires”).

This is all beside the point when talking about *morally* motivated client selection, however, because the client selection problem assumes the client has a legal entitlement to engaged in the proposed course of action. As the lawyer reasons through the issue, the American Nazi party may have a constitutional right (as it turns out, the Seventh Circuit held that the Nazis do have this right<sup>132</sup>) to march in the streets of Skokie; the question is whether for moral reasons the lawyer should refuse to lend her support to the client's pursuit of that legal entitlement. Within an existing lawyer-client relationship, Monroe Freedman and others have argued that clients often look to lawyers for non-legal advice, including the impact of morality on the client's decisions.<sup>133</sup> Building on the permission in the law governing lawyers to offer non-legal advice,<sup>134</sup> David Luban has suggested that attempts by lawyers to dissuade their clients from committing legal but immoral acts is an important aspect of informal social ordering.<sup>135</sup> As Luban points out, social pressures such as criticism, shunning, and shaming by friends and family members are mechanisms by which moral norms are enforced against would-be wrongdoers. In

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<sup>132</sup> See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

<sup>133</sup> See Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 200 (1977); FREEDMAN & SMITH, *supra* note \_\_\_, at 70 (“the 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”). In addition to Monroe Freedman, significant legal ethics scholars who have emphasized the moral counseling dimension of the lawyer-client relationship include Tom Shaffer, Bob Cochran, and Steve Pepper. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS AND MORAL RESPONSIBILITY* 66-67 (1994); Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393 (1990/91); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987); Robert C. Cochran, Jr., *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 598-99 (2003); Pepper, *supra* note \_\_\_, at 630-32; Stephen L. Pepper, *Lawyers’ Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 190 (1999).

<sup>134</sup> MODEL RULES, *supra* note \_\_\_, R. 2.1 (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation”).

<sup>135</sup> See David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 641-42 [hereinafter, “Luban, *Lysistratian*”].

the context of lawyering, one way to dissuade the client from committing a wrongful act is to refuse to cooperate by declining to represent the client in the first place. Luban thus argues by analogy with informal means of social control: “I do not see why a lawyer’s decision not to assist a client in a scheme that the lawyer finds nefarious is any different from these other instances of social control through private non-cooperation.”<sup>136</sup> This is the “Lysistratian prerogative,” named for the play by Aristophanes in which the wives of Athenian soldiers conspired to end the Peloponnesian War by withholding sex from their husbands until they agreed to make peace.<sup>137</sup> In that play, the public good of peace was secured not by a political decision, but by private acts of non-cooperation by the soldiers’ wives.

The lawyer’s decision is different, however, because of the social setting in which the non-cooperation occurs. The advice we expect from friends and family members is different from what we expect from legal professions. While it may be true that “friends help friends

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<sup>136</sup> *Id.* at 642. Murray Schwartz similarly analogizes from a private decision to the permissibility of non-cooperation by lawyers. See Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 559 [hereinafter, “Schwartz, *Civil Advocate*”]. In his example, an expert machinist might justifiably refuse to work for the manufacturer of cheap, inaccurate “Saturday Night Special” handguns, on the grounds that these weapons are primarily used to commit violent crimes. In his view, a lawyer would have a similar right to opt out of representing the manufacturer, either in transactional matters or in civil litigation. Schwartz does admit that there may be a systemic value — corresponding to the justification of a practice in the Rawlsian schema — associated with ensuring that every citizen, including corporations, is furnished with representation to enable it to deal with the rules by which society handles normative conflict. *Id.* at 559. Schwartz’s response to this “troubling argument” is to deny that systemic values must override the moral agency of individual actors in every case: He suggests a balancing test which takes into account the value of the legal entitlement that the client seeks to protect by hiring a lawyer. See *id.* at 559-60. In this way, his response parallels Simon’s contextual model of discretionary decision-making by lawyers. My response to Schwartz is the same as to Simon — in brief, the existence, weight, and priority of the client’s legal entitlement is exactly what the legal system is set up to determine. These decisions are properly committed to the procedures of the system as a whole, not to the discretion of lawyers, although lawyers may have coordinate responsibilities to ensure the effective functioning of the system.

<sup>137</sup> See Aristophanes, *Lysistrata*, in TEN GREEK PLAYS 365 (L.R. Lind ed. 1957).

become better people,”<sup>138</sup> it would be an unusual lawyer-client relationship in which the client is expecting to become a better person as a result of collaboration with the lawyer. Calling the lawyer a “special purpose friend” of the client may be an attractive metaphorical way to refer to the principle of partisanship that characterizes the lawyer’s fiduciary duty to the client,<sup>139</sup> but it would be a mistake to map all of the moral terrain of friendship onto an economic transaction between two strangers. As William Simon puts it:

Law is the least personal mode of social order. People resort to law to the extent more personal modes of order fail or when they fear these modes will fail. With few exceptions, the law requires that personal relations yield to its purposes.<sup>140</sup>

Specifically with respect to the morally motivated refusal to deal with another person, there is no social disvalue associated with a refusal to be someone’s friend, but there is some loss, in terms access to the social good of the law, associated with turning away a prospective client. The notion of a duty to be someone’s friend would sound at best like a joke in ordinary morality, and at worse like some kind of Platonic-Orwellian dystopia. In professional ethics, however, we are untroubled by some duty to treat patients, represent clients, and serve customers, notwithstanding moral objections one may have to the agent’s projects. This duty is not absolute — few duties are — but even a weak prima facie duty to enter into a relationship with another person would be unheard of in ordinary morality.

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<sup>138</sup> Cochran, *supra* note \_\_\_\_, at 599.

<sup>139</sup> The friendship metaphor was memorably developed by Charles Fried. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

<sup>140</sup> Simon, *supra* note \_\_\_\_, at 1138. See also Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 665-66 (distinguishing lawyers from a spouse or friend, as being on a different side of the public-private line).

The reason for this distinction in legal ethics is that legal ordering differs from informal social ordering in the former's requirement of generality and justification on the basis of reasons that all affected persons may reasonably accept.<sup>141</sup> In the domain of the political, we require that principles establishing the basis for cooperation be justified on the basis of reasons that may be endorsed by citizens who otherwise subscribe to a diversity of reasonable comprehensive moral doctrines.<sup>142</sup> There is no similar constraint on the basis for informal social ordering, because these relationships are by and large voluntary; the autonomy of persons is not violated by permitting the parties to these relationships to act on the basis of reasons that are not shared by all citizens in a pluralist democracy. If one friend refuses to assist another in a nefarious project, the refusal is likely on the basis of a reason shared by the other friend, but in any event the friends are free to part ways and find other cooperative partners who are more agreeable. In a political relationship, by contrast, one party would unfairly coerce the other if she made decisions respecting the other's public, political rights on the basis of reasons not shared by the subject of these decisions, where there is no viable exit option.<sup>143</sup> The lawyer-client relationship is voluntary in the sense that the parties are not literally stuck with one another, except in the

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<sup>141</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* 16 (1993).

<sup>142</sup> *Id.* at 38.

<sup>143</sup> Imagine a version of the *Lysistrata* in which the rulers of Athens decreed that it would be illegal for women to sleep with men who opposed the Peloponnesian war. This "non-cooperation" would be different in kind from the sex strike in Aristophanes's play, not only because of its mandatory nature, but also because directives of political rulers, made in the name of society as a whole, must be made on the basis of reasons that all members of the society can share. In a pluralist democracy, these shared reasons are procedural — citizens agree to resolve their substantive differences (e.g. over whether to wage war with Sparta) by entrusting the resolution of disputes to certain procedures that treat the views of all citizens with at least some minimum level of respect. There is no similar requirement of formal procedural justice in private relationships like friendship, again not only because these relationships are voluntarily entered into, but also because friends or family members are likely to share a thicker set of substantive values, and are therefore less likely to need to rely on procedural mechanisms to reach agreement.

relatively unusual case of court-appointed counsel. But they are more analogous to involuntary political associations, because the object of the lawyer-client relationship is to secure for the client a legal entitlement — something which is part of the scheme of political ordering, as opposed to informal social ordering. Thus, the analogy with friendly non-cooperation breaks down, and the “Lysistratian prerogative” does not extend to lawyers.

*B. Distributive Justice and Public Reasons.*

Lawyers’ client-selection decisions have distributive significance. This observation can be used as the basis for an argument against permitting lawyers to exercise moral discretion in client selection.

Since legal representation is at least sometimes necessary to secure legal rights, the lawyer or the community of lawyers could render the person’s claim to their lawful rights worthless by refusing to represent them at all . . .<sup>144</sup>

On the other hand, one could make a distributive argument *in favor of* the lawyer’s permission or duty to exercise moral discretion.<sup>145</sup> For example, Simon’s discretionary model of legal ethics requires lawyers to make a comparative assessment at the client-selection stage. The lawyer should evaluate the “relative merits of the client’s goals and claims and the goals and claims of

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<sup>144</sup> Tim Dare, *Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers*, 7 LEGAL ETHICS 24, 28 (2004). See also Pepper, *supra* note \_\_\_\_, at 616-19.

<sup>145</sup> See, e.g., Fried, *supra* note \_\_\_\_, at 1062 (relating, but not endorsing, the argument that “it is wasteful and immoral that some of the finest talent in the legal profession is devoted to the intricacies of, say, corporate finance or elaborate estate plans, while important public and private needs for legal services go unmet”); *id.* at 1076-77.

others whom the lawyer might serve.”<sup>146</sup> The client-selection decision has an distributive dimension, because “most people are unable to enforce most of their rights most of the time.”<sup>147</sup> The lack of social resources means that rights are not generally enforced, and this in turn means that lawyers have the de facto power to determine which rights are enforced. Lawyers should make this determination on grounds related to the justice of the prospective clients’ claims, because all actions by lawyers must be justified in terms of justice, which is after all the central animating value of the legal system.

There are two responses to Simon’s argument — one jurisprudential and one political. The jurisprudential response is that the law is too indeterminate to enable lawyers to make reliable *ex ante* determinations of the legal merits of prospective clients’ goals. Ironically, this line of criticism reads Simon somewhat against himself, because he admits to being influenced by both Critical Legal Studies and the legal theory of Ronald Dworkin.<sup>148</sup> The only way to square this particular circle would appear to be to emphasize the Dworkinian side of this dual influence in the development of a theory of lawyering; otherwise it would be impossible to entrust lawyers with making decisions about the legal merits of their clients’ ends without subjecting clients to the illegitimate domination of their own agents — the “rule by oligarchy of

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<sup>146</sup> Simon, *supra* note \_\_\_\_, at 1091. *See also* WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 9-10, 138 (1998) (noting that justice is equivalent to the legal merits of a matter); *id.* at 162 (arguing that lawyers should feel no obligation to represent unpopular clients if the source of their unpopularity is the lack of legal merit of the clients’ goals).

<sup>147</sup> *Id.* at 1092.

<sup>148</sup> *See id.* at 247.

lawyers” that Pepper worries about.<sup>149</sup> Simon prudently sides with Dworkin here, and argues repeatedly that lawyers are able to reason among competing *legal* values and arrive at a conclusion regarding the legal merits of a client’s proposed course of action.<sup>150</sup> Thus, lawyers enable access by clients to legitimate legal entitlements, not simply what the law can be made to yield up, through manipulation and trickery.<sup>151</sup>

It would require a lengthy digression to deal with the issues posed by the jurisprudential response to Simon. For here it is sufficient to observe that one’s confidence in lawyers allocating access to law according to citizens’ actual legal entitlements depends on one’s belief in a certain degree of legal objectivity. Objectivity in this sense need not mean that which would be equivalent to objectivity in the domains of logic or the natural sciences.<sup>152</sup> Rather, there is sufficient legal objectivity if there are methods of legal interpretation that deliver answers to questions about law that a citizen who was denied representation because of the legal

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<sup>149</sup> See Pepper, *supra* note \_\_\_\_, at 617.

<sup>150</sup> See SIMON, *supra* note \_\_\_\_, at 18 (“If the problem involves the reconciliation of competing legal values, lawyers know how to address it.”), 32 (“Since legal norms don’t apply themselves, a legal outcome can be true to a governing norm if some role players make plausible judgments about how the norm applies in the particular circumstances of the case.”), 51 (“A lawyer who conditions her service to clients on respect for [principles of legal merit and justice] does not impose her own values except to the extent these values coincide with these principles.”).

<sup>151</sup> Compare David Luban’s distinction between Low Realism (whatever a citizen do and avoid being sanctioned by the relevant officials is legal) and High Realism (law is a prediction of what officials trying in good faith will do, in their effort to ascertain and enforce authoritative rules). See Luban, *Lysistratian*, *supra* note \_\_\_\_, at 646-47. Tim Dare similarly distinguishes between mere zeal (the lawyer’s effort to vindicate the lawyer’s rights or legal interests) and hyper-zeal (the pursuit of any advantage obtainable for the client through legal procedures). See Dare, *supra* note \_\_\_\_, at 30. It is significant that Luban, Dare, and Simon disagree in important particulars, but they all agree on the jurisprudential point that there is a difference between legal entitlements and something like “what the law can be forced to cough up.”

<sup>152</sup> See Gerald J. Postema, *Objectivity Fit for Law*, in OBJECTIVITY IN LAW AND MORALS 99 (Brian Leiter ed. 2001); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

meritlessness of her position could not reasonably reject the explanation that her position lacked legal merit. The proviso, “could not *reasonably* reject,” would beg the question unless it were possible to unpack the term “reasonableness,” using methods of legal interpretation, in a way that satisfied competent members of the relevant interpretive community that a legal position in fact had no merit. I believe there are interpretive methods that will yield at least partial, negative agreement — that is, numerous spurious interpretations of law can be ruled out.<sup>153</sup> In many cases, however, a zone of reasonable disagreement will remain, in which lawyers and judges reasoning in good faith will reach different answers to the question of a citizen’s legal entitlements. Within that zone, a morally motivated decision by a lawyer not to represent a client will potentially deprive the client of access to a legal entitlement.

It is not necessary to fall back on the implausible possibility of radical legal indeterminacy to argue that non-representation decisions by lawyers might unreasonably block access to the law; even a relatively narrow range of good faith disagreement among legal interpreters creates the possibility that a lawyer might differ from the client with respect to reasonable beliefs about the client’s legal rights. A modest version of Simon’s distributive argument for client selection would permit the lawyer to reject prospective clients on the ground that their goals are clearly prohibited by the law. In this way, the lawyer would be acting as a gatekeeper, weeding out spurious claims in litigation and refusing to lend assistance to fraudulent transactions.<sup>154</sup> It is important to emphasize, however, that this is not an instance of *morally*

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<sup>153</sup> See Wendel, *Interpretation*, *supra* note \_\_\_\_.

<sup>154</sup> See Zacharias, *Gatekeepers*, *supra* note \_\_\_\_.

motivated decision to reject a client. The lawyer here would be acting entirely as an interpreter of the law and, moreover, as a custodian of the law, safeguarding it from abuse at the hands of overly aggressive clients. In order to apply Simon's distributive argument in favor of morally grounded client-selection decisions, many further premises would need to be specified. For example, it would be necessary to show that political goods, represented as legal rights, can legitimately be distributed on the basis of the private moral decisions of quasi-political actors such as lawyers. This premise is diametrically opposed to the standard assumption of liberal political theory, that decisions respecting the allocation of basic rights must be made on the basis of reasons that no affected citizen may reasonably reject.<sup>155</sup> Political liberalism assumes, as I do, that there exists among citizens a diversity of conflicting, irreconcilable, and reasonable comprehensive religious, philosophical, and moral doctrines.<sup>156</sup> Thus, the basis for a legitimate political decision must somehow transcend these diverse comprehensive doctrines. Rawls's solution is to appeal to "public reason" — that is, "ideals and principles expressed by society's conception of political justice."<sup>157</sup> Alternatively one may ground political decisions in procedural norms, such as the constitution of fair processes for making laws to regulate social cooperation.<sup>158</sup> In any case, the basis for making decisions that limit another free and equal citizen's access to public goods must be something other than an idiosyncratic, non-shared moral

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<sup>155</sup> RAWLS, *supra* note \_\_\_\_, at 38, 137.

<sup>156</sup> *Id.* at 36.

<sup>157</sup> *Id.* at 213.

<sup>158</sup> I defend this basis for legitimate political action in Wendel, *Obedience*, *supra* note \_\_\_\_, at 405-11.

reason endorsed by only one party to the relationship.<sup>159</sup>

A related, political response to Simon is that entrusting moral discretion to lawyers is not the most reliable institutional mechanism for making resource-allocation decisions. Consider the analogous problem in bioethics of allocating scarce health-care resources, such as donor organs or kidney dialysis machines. These decisions often build on classic post-disaster triage principles, in which patients with the most serious injuries who can still be saved have priority on claims to scarce resources.<sup>160</sup> Recognizing the implicit cost-benefit analysis underlying triage, some sophisticated methodologies have been developed, such as the Oregon state health system's attempt to maximize gains in Quality-Adjusted Life Years (QALY) as a result of medical treatment.<sup>161</sup> Naturally there are objections that can be raised to any criterion for distributing scarce resources; for example, using QALY as the measure tends to disadvantage elderly or disabled patients, because younger patients tend to see more of a potential upside from expensive treatments.<sup>162</sup> But the point of any system for making allocation decisions is to specify criteria

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<sup>159</sup> Norman Spaulding argues that “thin professional identity,” or what I have been calling reliance on a system-level justification of the morality of representation, apart from the moral worth of particular clients’ projects, is entailed by political liberalism. By removing the “filter” of a lawyer’s moral discretion, requiring lawyers to adopt thin professional identity “radically decentraliz[es] authority to decide who shall have representation and what social interests and comprehensive doctrines shall be cast in the legitimating language of the law.” *See* Spaulding, *supra* note \_\_\_\_, at 79.

<sup>160</sup> *See, e.g.*, TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 364-66 (4th ed. 1994).

<sup>161</sup> *See id.* at 367-68.

<sup>162</sup> *Id.* at 369. The British national health care system uses age as a rough proxy for the benefits of treatment in some contexts, such as allocating dialysis machines to treat end-stage renal disease; the result is that the system saves a tremendous amount of money, but at the expense of otherwise healthy older people who are denied access to the machines. *See id.* at 370.

that relate to the underlying function of the social institution. In the case of health care resources, the underlying value is medical utility, whether measured by QALY or some other yardstick. A system that used some standard unrelated to medical utility would be regarded as corrupt.<sup>163</sup>

Simon's distributive argument does specify a basis for allocation — namely, legal merit — which is related to the underlying function of the legal system. However, in addition to specifying the appropriate criteria, a system for making allocation decisions must also specify the appropriate decision-making mechanism, including the identity of the officials who will make these decisions. In the case of health care resources, treating physicians may not have all the information they would need in order to determine which investments of scarce resources will produce the most gain, in terms of QALY or whatever measure is deemed relevant. Thus, the ad hoc discretion of individual service providers may be less reliable than decisions made on the basis of systemwide policies governing access to resources. In addition, case-by-case discretionary decision-making may have the effect of undermining macro-allocation decisions made by a legislature or administrative agency. For example, administrators of a state health system faced with a budgetary shortfall might realize the state can pay for either prenatal care or heart transplants, but not both, and decide that there is a greater payoff from prenatal care, in terms of the aggregate increase in the quality of people's lives.<sup>164</sup> Respecting this macro-

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<sup>163</sup> Indeed, critics have raised this concern about the practices of some American transplantation centers, which have given priority to “wealthy or politically influential citizens of foreign nations.” *See id.* at 374 (citing ARTHUR CAPLAN, *IF I WERE A RICH MAN COULD I BUY A PANCREAS?: AND OTHER ESSAYS ON THE ETHICS OF HEALTH CARE* (1992)).

<sup>164</sup> Beauchamp and Childress take this example from the Oregon system. *See* BEAUCHAMP & CHILDRESS, *supra* note \_\_\_\_, at 372.

allocation decision requires individual doctors and hospitals to forego state-funded heart transplants, even in cases in which the balance of utilities seems to favor the transplant patient. In a sense, physicians and the health care system may be working at cross purposes. Individual physicians may reasonably wish to do anything possible to improve the health of a particular patient, while the system as a whole is concerned with *aggregate* improvements in health, across a diverse population of patients, and within the constraint of scarce resources.

Applying this analogy to lawyers' moral discretion in client selection, an individual lawyer may be concerned to avoid complicity in the client's wrongdoing, or to vindicate what she takes to be the legal merits of a representation. At the same time, however, the legal system is working toward the competing goal of reconciling diverse conceptions of moral wrongdoing, which may not line up with the lawyer's moral beliefs in every case. For this reason, lawyers may not be as well positioned as other institutional actors to make reliable decisions which have distributive significance. These sorts of reasons offered in justification of the legal system, and supporting the lawyer's decision to participate in making it work, are weighty, and not easily overridden.<sup>165</sup> Indeed, they may even be exclusionary, in the sense that they replace the reasons for action that the agent would have taken into account, outside the institutional context.<sup>166</sup> The example of allocating health-care resources shows that institutional reasons must be at least substantially weightier than individual reasons, even if not strictly exclusionary, in order to realize the goals of institutions. It would be impossible for policymakers to set up a stable

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<sup>165</sup> See RAWLS, *supra* note \_\_\_\_, at 139, 218.

<sup>166</sup> See Wendel, *Obedience*, *supra* note \_\_\_\_, at 379-80.

system for allocating scarce treatment resources if individual decision-makers, such as physicians and hospital administrators, did not treat these policy-level decisions as preclusive to some extent. Thus, a lawyer who respects the system-level justification of the legal system, which is to channel normative conflict into fair procedures for resolution, may be stuck with a client whom the lawyer believes is morally repugnant. The lawyer may therefore be required, or at least strongly inclined by system-level moral reasons to accept the representation, despite what would otherwise be moral reasons to decline it.

*V. Conclusion.*

Underlying all of the specific arguments about the extent of permissible moral discretion in client selection is an important theoretical question about the level of generality at which moral justification must occur in professional ethics. I have argued that moral agency is consistent with professional role morality, as long as it is possible for a person to reflectively endorse a conception of herself as a professional, on the basis of the ends and values that give intelligibility to the practice. Moreover, describing activities in practice-dependent terms reflects the transformation of the moral quality of an action as one moves from the context of ordinary life into the specialized domain of professional action. The Rawlsian practice conception of rules, which treats rules not as summaries or guidelines, but as exclusionary reasons for action, captures the nature of moral reasoning within professional roles better than the attempt to treat roles as fully moralized in ordinary first-order moral terms. The implication for the client-selection debate is twofold. First, client selection should not be hived off as a question separate

from the morality of acting in a representative capacity. First-order moral values play the same role in client selection as they do in an ongoing relationship, which is to say very little.

Secondly, it is important to keep in mind the internal pluralism of the constitutive ethical values of the legal profession. There is no single right way to be a good lawyer, and there is similarly no reason why a person should not be able to recognize her own distinctive moral personality, perhaps to a limited extent, by acting as a lawyer within the norms and traditions of the profession.