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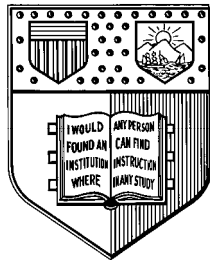
Lawyers as Quasi-Public Actors

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Lawyers as Quasi-Public Actors

W. Bradley Wendel¹

I. Introduction.

I would be willing to bet that if you were to ask an American lawyer what is meant by “access to justice,” he or she would reply that it has something to do with lawyers providing pro bono representation. American lawyers think in this way because of the political reality in the United States, that public financing for anything is looked upon with great suspicion, as a potential socialist camel’s nose under the tent of free-market capitalism. In a political culture in which the President can threaten to veto expansion of a popular program which provides health coverage for children, because it would replace expensive private insurance coverage with public benefits,² the prospects for expanding funding for legal aid must be regarded as exceedingly remote. Voters tend to care more about healthy children than what they perceive to be giving more rights to criminal defendants or more avenues for bringing frivolous lawsuits. As a result, it is a fairly safe assumption that large-scale structural reforms, on the order of establishing a comprehensive legal aid scheme, are unthinkable today in the United States.³ This has the effect

¹ Professor of Law, Cornell University.

² See Christopher Lee, “Bush: No Deal on Children’s Health Plan,” *Washington Post* (July 19, 2007), p. A3. The article reports that that Bush objects on “philosophical grounds” to expanding the program because “when you expand eligibility . . . you’re really beginning to open up an avenue for people to switch from private insurance to the government.” The unstated assumption, that this is a bad thing, is an absolutely central aspect of American political culture.

³ Some publicly funded legal assistance for poor clients does exist in the United States. The federal Legal Services Corporation (LSC) provides funding for local legal aid organizations which in turn fund representation on such matters as social security and other public benefits claims, consumer matters, and housing disputes. State and local offices may also be funded with so-called IOLTA funds, named for the Interest on Lawyers’ Trust Accounts

of punting to individual lawyers some of the moral pressure to ensure access to justice. The Model Rules of Professional Conduct, prepared by the American Bar Association (ABA), state as an unenforceable principle that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”⁴ In countries like the United Kingdom, with robust (if embattled) publicly financed legal aid systems, the access-to-justice debate tends to focus more on controlling the costs of legal services in the context of cutbacks across the board in public expenditures. Pro bono representation is comparatively unimportant and, in fact, professional organizations are careful to emphasize that it should not be seen as a substitute for legal aid.⁵ In the United States, however, responding to the problem of unmet needs for legal services tends to fall upon lawyers as individuals. There is nothing natural or necessary about this — the profession as a whole could respond to the gap between the need for legal representation and its supply in a variety of ways. One possibility would be relaxing the enforcement of restrictions on the unauthorized practice of law, which have often been used by the bar to defend its monopoly against encroachment by accounting and consulting firms (in the case of large law firms serving

program. (For a list of funded services at a typical office — Tompkins, Tioga Neighborhood Legal Services — see their website at <http://www.lawny.org/lawny/content/view/61/92/>.) LSC- and IOLTA-funded services do not come anywhere close to meeting the legal needs of low-income citizens. Per capita funding for legal services is approximately \$2.25 in the United States, compared with \$32 in England and \$12 in Ontario. See Deborah L. Rhode, *Access to Justice* (New York: Oxford University Press 2004), p. 112. Many funding sources impose restrictions on the use to which the money can be put, which seems reasonable enough on the surface, but these funding restrictions often include content- and viewpoint-based limitations on the services that lawyers can provide. For example, federal LSC funds may not be used for the representation of prisoners, to fund class-action lawsuits, or to challenge the constitutionality of restrictions imposed as part of federal benefits programs. These funding restrictions even apply to the non-federally-funded activities of a legal aid office. See David Luban, “Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers,” 91 *California Law Review* 209, 221-222 (2003).

⁴ Model Rules of Professional Conduct (“Model Rules”), Rule 6.1.

⁵ See Andrew Boom and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford: Hart Publishing 1999), Ch. 9.

corporate clients) and by non-lawyer service providers and even self-help books and software (in the case of lawyers serving individual clients).⁶ Since progress in this area seems unlikely, responsibility for improving access to justice will continue to fall on individual lawyers.

This paper is intended to answer a hypothetical lawyer who asks, *why* does every lawyer have a professional responsibility to provide pro bono legal services? I will answer the question in a rather roundabout way, by trying to establish that lawyers are quasi-public officials, with some responsibilities to ensure that the legal system functions as it should. “Quasi-public” may seem like an odd way of putting the point, but it is merely another way of saying that lawyers may have some obligations to assume direct responsibility for the proper functioning of the legal system. That means that they are not primarily either (1) merely hired guns or mouthpieces of clients, who can advise clients and assert legal positions without regard to the justice of their clients’ positions, or (2) ordinary moral agents who can act as moral “filters” by refusing to represent certain categories of clients or refusing to take certain legally permitted actions on behalf of their clients. Rather, lawyers are agents of *both* clients and the legal system. They represent clients within the bounds of the law, but this does not mean that they are entitled to push right up to the boundaries of the law until there is a high likelihood that their client will be subject to legal penalties. Instead, lawyers must be guided by the actual meaning of the law, and while they may be a bit more creative and aggressive in litigated matters (where there is an

⁶ See, e.g., *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, 199 WL 47235 (N.D. Tex. 1999) (enjoining sale in Texas of Quicken Family Lawyer software package); *Florida Bar v. Brumbaugh*, 255 So. 2d 1186 (Fla. 1978) (enjoining the service provided by a former legal secretary who assisted clients in filling out forms to obtain no-fault divorces).

opposing lawyer and an impartial tribunal to correct for excessively zealous arguments), in general lawyers must accept some personal responsibility for getting the law right. This duty does not imply, however, that lawyers should make their own determinations about what *justice* requires. Lawyers provide access to a particular kind of justice — legal justice — which may or may not coincide with the demands of morality in every case.⁷

Broadly speaking, there are two ways to understand the relationship between lawyers and justice. Lawyers can be required to aim directly at either substantive or legal justice, and to accept some non-trivial responsibility for ensuring just outcomes in particular cases, and social justice generally. Or, lawyers can be asked to aim only indirectly at justice, pinning the hope for achieving justice (however defined) on institutions and procedures such as the adversary system.⁸

The indirect strategy presupposes an invisible-hand mechanism, similar in structure to Adam

⁷ I have to make a linguistically awkward distinction here, between substantive and legal justice. By substantive justice I mean something narrower than justice in Rawls' sense of the right arrangement of the basic structure of society, i.e. "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation." John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press 1971), p. 7. Rather, I am using it in a looser, more colloquial sense to indicate what outcome in a litigated dispute, or what assignment of legal entitlements to citizens, would be justified by moral considerations such as rights, fairness and consequences. Cf. Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press 1986), p. 97 ("Justice is a matter of the correct or best theory of moral and political rights . . ."). By legal justice, on the other hand, I mean what rights and duties are recognized as legally binding under a given jurisdiction's laws. See generally Brian H. Bix, "Natural Law: The Modern Tradition," in Jules Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press 2002), pp. 71-73 (distinguishing legal validity from what one has a moral obligation to do).

⁸ William Simon's theory of legal ethics is an interesting hybrid of these two approaches. He requires lawyers to aim directly at justice, at least where there is some sort of institutional malfunction that vitiates the presumption (a fairly weak one) that the adversary system will result in justice being done. See William H. Simon, *The Practice of Justice* (Cambridge, Mass.: Harvard University Press 1998). In places Simon writes as though the "justice" that lawyers should aim at is legal, not substantive justice. See *id.*, p. 138 ("I use 'justice' interchangeably with 'legal merit.'"). Elsewhere, however, he seems to suggest that lawyers should aim at outcomes that would be substantively just. See *id.*, p. 164 ("the lawyer may have to consider disclosure as a form of nullification"). This ambiguity is neither here nor there for the purposes of this discussion, which uses Simon's theory only as an example of a direct strategy for pursuing some kind of justice.

Smith's hope that the self-interested motivations of the butcher and the baker will do a better job of getting food on people's tables than the directives of an altruistic governor. In common-law systems this mechanism is provided by the adversary system of adjudication, in which it is hoped that diligent factual investigation and legal argumentation by both parties will contribute to the informed resolution of disputes by courts. This resolution would represent the legally just outcome, although it would be an open question whether the outcome would be substantively just. Reliance on the adversary system as a means of securing justice is undermined by numerous problems including the frequent disparity in resources between the parties, the manipulability of adversary procedures, institutional malfunctions such as overworked courts or incompetent judges, and the difficulty many litigants have in obtaining representation. In addition, lawyers frequently represent clients in non-litigated matters, making the adversary system at best a proxy for the legal advice given by counsel. As a result of these and other reservations about the adversary system, many legal scholars have urged lawyers to accept greater responsibility for aiming directly at justice.

These proposals are generally received by practicing lawyers with thinly veiled hostility. At least among American lawyers there is widespread conviction that the interests of clients, including the interest in avoiding legal penalties, are the only considerations that lawyers should take into account when deciding how to act. Section II of this paper thus makes a descriptive argument, that the American law governing lawyers has always reflected a rather ungainly hybrid of direct and indirect strategies for ensuring that lawyers do their part in bringing about justice. Regulators, including the organized bar, legislatures, administrative agencies, and courts, have

not opted for a pure indirect strategy, but have in many cases placed responsibility on lawyers to act in the interests of justice. Of course, one may acknowledge this descriptive point but still wonder why lawyers should have any responsibility to act directly in the interests of third parties, courts, or the public interest — that is, in the interests of justice.⁹ Therefore, Section III takes up the justification of these obligations, and attempts to show that it is a conceptual mistake for lawyers to see themselves as purely private actors, like any other participant in the market economy, when in fact they have significant public responsibilities toward the law as a socially valuable institution. The more theoretical part of this paper aims to show that justification of any professional obligation proceeds by analyzing the role in question to determine (1) what are the ends of the system as a whole, to which a particular professional role belongs, (2) the relationship between the role and these overall ends (i.e. is there a direct or an indirect strategy for promoting these ends), and (3) how the responsibilities of occupants of that role should be structured in light of the relationship between the goals of the system and the professional role in question.¹⁰ This looks like a functional argument, in that the normativity inherent in the professional role arises from the relationship of means to ends. However, it can also be understood along Dworkinian lines, as an argument to the best constructive interpretation of an area of law and the associated institutional actors required to operationalize it.

⁹ As Alice Woolley puts it in her contribution to this symposium, “[T]hat lawyers have been stated to have such an obligation [to foster access to justice] does not mean that they *should* have it.” Alice Woolley, “Imperfect Duty: Lawyers’ Obligation to Foster Access to Justice,” manuscript p. 12.

¹⁰ This is similar in structure to Luban’s fourfold root argument. See David Luban, *Lawyers and Justice* (Princeton, N.J.: Princeton University Press 1988), p. 131. Because I take a different view about (1), above — I think the end the lawyer’s role is set up to promote is legal, not substantive justice — I reach different conclusions regarding (2) and (3).

I will argue in this way, that the best way to understand the American law governing lawyers is as the framework for a quasi-public conception of the lawyer's role. This is a challenge to lawyers and legal scholars who understand the law governing lawyers as instantiating a different fundamental normative principle, such as the protection of client autonomy.¹¹ (This is not the only way to argue for more public-regarding responsibilities on the part of lawyers. One might also rely on the sociology of the professions, to distinguish the practice of law from a "mere" business, or make an economic argument along the lines of Alice Woolley's contribution to this symposium.) If the argument succeeds in establishing that lawyers are quasi-public actors, it should follow that lawyers have some personal responsibility to alleviate the problem of lack of access to justice. Lawyers who disclaim any personal responsibility for providing pro bono legal representation are, in effect, contending that they are nothing more than private service providers in a particular market. But if lawyers do have a quasi-public role, they may reasonably be obligated to respond to the problem of unmet need for legal services by providing some pro bono representation.

II. Do Lawyers Have Obligations to Pursue Justice Directly?

A. Professional Rhetoric in Common-Law and Civil-Law Systems.

There are occasional references to the public responsibilities of lawyers in the American

¹¹ See, e.g., Stephen L. Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities," 1986 *American Bar Foundation Research Journal* 613.

professional conduct rules. For example, the preamble to the American Bar Association’s Model Rules of Professional Conduct refers to lawyers as “officers of the court.”¹² However, any responsibility this may entail for directly pursuing justice is immediately qualified away with the vague hope that “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”¹³ Despite the opening rhetorical flourishes, the main body of the binding disciplinary rules adhere to a vision that can be called “client-centered representation.” (More pejoratively, one might call the lawyer a hired gun or a mouthpiece of the client.) The rules provide that a lawyer is required to “abide by a client’s decisions concerning the objectives of representation” and consult with the client about tactical matters.¹⁴ She must render candid advice, even if it is unpleasant and unwelcome,¹⁵ and in no event may the lawyer counsel or assist the client in conduct that the lawyer knows is a crime or fraud.¹⁶ In the end, however, the client has the right to insist that the lawyer assist her with conduct that the lawyer believes is unjust, or which poses a risk of harm (although not harm that is a violation of law) to non-clients.¹⁷ This vision of the lawyer as simply the passive agent of the client’s will — albeit a highly skilled one — is so central to our professional culture that it is often taken for granted. But observers of the legal profession have

¹² Model Rules, Preamble ¶ [1] (referring to lawyers as “officer[s] of the legal system”).

¹³ Model Rules, Preamble ¶ [8].

¹⁴ Model Rule 1.2(a), Rule 1.4(a)(2).

¹⁵ Model Rule 2.1 & cmt. [1].

¹⁶ Model Rule 1.2(d).

¹⁷ Model Rule 1.2, cmt. [2] (“lawyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected”).

frequently noticed how lawyers are trained and socialized to see themselves as implementing the projects and the values of others, not acting as independent sources of evaluation or constraint within the professional relationship.¹⁸

The disciplinary rules do recognize some obligations that run to courts or third parties. These include preventing witnesses from lying in official proceedings and correcting perjury that the lawyer knows to have been committed,¹⁹ not making affirmative misrepresentations to third parties,²⁰ and reporting fraud by a corporate client if the board of directors refuses to take corrective action.²¹ However, when conflicts arise between the interests of justice and the interests of the client, the interests of the client have priority in most cases. For example, a lawyer may be required to disclose confidential information to correct perjury on the record,²² but the lawyer is directed to first advise the client confidentially of the lawyer's obligation to correct perjury, so that the client's confidences will be safeguarded to the greatest extent possible.²³ The

¹⁸ See, e.g., Roger C. Cramton, "The Ordinary Religion of the Law School Classroom," 29 *Journal of Legal Education* 247 (1978). Kate Kruse has recently published a critique of the influential teaching materials on client-centered representation, noting the hopeless confusion in the materials surrounding the ethical value of autonomy. Katherine R. Kruse, "Fortress in the Sand: The Plural Values of Client-Centered Representation," 12 *Clinical Law Review* 369 (2006).

¹⁹ Model Rule 3.3(a).

²⁰ Model Rule 4.1.

²¹ Model Rule 1.13(c). This provision of the disciplinary rules was added only recently, and only after the dismal showing by the legal profession in the Enron, Global Crossing, WorldCom, et al., scandals. See below for more discussion of the bar's resistance to anti-fraud exceptions to the duty of confidentiality.

²² Model Rule 3.3(c).

²³ Model Rule 3.3, cmt. [10]. Even with this concession to the client's interests, the rule requiring disclosure of client perjury has been criticized for betraying the fundamental principle of client-centered representation. The best known criticism is from Monroe Freedman, who objects that imposing a duty on lawyers to rectify perjury will inevitably undercut the duty to provide effective representation, particularly to criminal

duty not to lie to third parties is qualified to a much greater extent by a comment which defines many apparent lies as non-lies. The comment says that “[u]nder generally accepted conventions in negotiation, certain types of statements are ordinarily are not taken as statements of material fact.”²⁴ When a lawyer says, “My client won’t settle for a penny less than \$100,000,” she has not violated this rule even if she knows her client would be willing to settle for \$75,000, because of the convention that defines the lawyer’s statement as one not respecting a material fact. The disciplinary rules thus contemplate an *almost* pure hired-gun model. The lawyer should regard the client’s interests as paramount, and should defer responsibility to the adversary system for ensuring that justice is done, except in the most extreme cases.²⁵

At the level of professional rhetoric, there is an interesting contrast between the public and private commitments of the common law legal profession and those in civil law systems. Official descriptions of the role of civilian lawyers reveal a notable willingness to recognize duties on the part of lawyers to pursue justice directly. In the German system, for example, lawyers are charged with the responsibility of being “independent organs of the judiciary.”²⁶ The

defendants. See Monroe H. Freedman and Abbe Smith, *Understanding Lawyers’ Ethics* (Newark, N.J.: Matthew Bender & Co., 2d ed. 2002), Ch. 6.

²⁴ Model Rule 4.1, cmt. [2].

²⁵ The structure of duties created by the Canadian Bar Association’s Code of Professional Conduct is similar. As Allan Hutchinson observes, “In prioritizing the different duties that lawyers owe, the one to their clients is treated as trumping all others in almost all situations.” Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law 1999), p. 21.

²⁶ See Bundesrechtsanwaltsordnung (BRAO) [Federal Lawyers’ Regulation] § 1 (“Der Rechtsanwalt ist ein unabhängiges Organ der Rechtspflege.”) [“The lawyer is an independent organ of the judiciary.”]. For this overview of the duties of German lawyers, I am grateful to Matthias Lehmann’s manuscript and presentation at the IVR World Congress on Legal Philosophy’s workshop on legal ethics.

term *Organ der Rechtspflege* in the German lawyer code is usually translated as “organ of the judiciary,” but a more evocative translation might be “guardian of the law.” German lawyers are representatives of clients, but not only that; they also have a responsibility to take care of the legal system, to ensure that justice prevails in society. If there is a conflict between the client’s interests and the interests of justice, the trumping relationship is the reverse of the American practice — the interests of justice must prevail. German lawyers are seen as “trustworthy functionaries”²⁷ of the *state*, not of clients — an idea that would strike most American lawyers as outrageous. Similarly, French lawyers do not regard themselves as agents of the client (or mouthpieces or hired guns, as they might pejoratively describe American lawyers). Rather, the French lawyer “is an independent person who lends his eloquence and credibility to someone in whose cause he believes, and who needs his help.”²⁸ French lawyers also see themselves as independent from the state,²⁹ and would presumably be just as horrified as American lawyers to be described as trustworthy functionaries of the state. However, French lawyers do see American lawyers as being excessively deferential to their clients’ interests, as opposed to taking a stance of detached impartiality that allows lawyers to represent clients while being primarily concerned with pursuing justice.³⁰

²⁷ This description is from Ugo Mattei, “The Legal Profession as an Organization: Understanding Changes in Common Law and Civil Law,” in John J. Barceló III and Roger C. Cramton, eds., *Lawyers’ Practice and Ideals: A Comparative View* (The Hague: Kluwer), p. 174. While calling lawyers functionaries of the state may be accurate as a historical matter, it probably understates the importance of independence from the state to the ideology of the bar in modern Germany. See generally Dietrich Rueschemeyer, *Lawyers and Their Society: A Comparative Study of the Legal Profession in Germany and in the United States* (Cambridge, Mass.: Harvard University Press 1973).

²⁸ John Leubsdorf, *Man in His Original Dignity: Legal Ethics in France* (Aldershot: Ashgate 2001), p. 15.

²⁹ *Id.*, pp. 4-11.

³⁰ *Id.*, pp. 23, 55

Although the differences between the ideology of common-law and civil-law lawyers may be less dramatic at the level of actual practice,³¹ the differences in rhetoric do appear to have some impact on the way lawyers conceive of their duties in practical terms. For example, American lawyers are trained and socialized to regard the law as something that can be planned around, neutralized, or evaded. Clever manipulation of the law is celebrated as a professional virtue, not an occasion for condemnation. Lawyers in civil-law systems, on the other hand, tend to view the law more as a given, and less susceptible to nullification by clever lawyering. Apart from these difficult-to-prove generalizations about professional cultures, it would be a mistake to stop the analysis here, however, because the rules promulgated by the organized bar represent the position of only one institutional actor in the overall scheme of regulation to which lawyers are subject. As Susan Koniak has argued, the bar may articulate a normative vision for lawyers, but that vision may not triumph over the normative vision articulated by other institutions, such as courts and administrative agencies.³² It is essential to consider the law governing lawyers as a whole, and not focus myopically on the rules of professional conduct enforced by state bar associations. From that perspective, it is apparent that there are actually traces of both direct and indirect approaches in the regulatory structure of the profession.

In the remainder of this Section I will consider two examples of this hybrid approach, which I am calling the conception of lawyers as quasi-public actors. The first is an instance of

³¹ Geoffrey C. Hazard, Jr. and Angelo Dondi, *Legal Ethics: A Comparative Study* (Stanford, Cal.: Stanford University Press 2004), p. 66.

³² See Susan P. Koniak, "When the Hurlyburly's Done: The Bar's Struggle with the SEC," 103 *Columbia Law Review* 1236 (2003); Susan P. Koniak, "The Law Between the Bar and the State," 70 *North Carolina Law Review* 1389 (1992).

the conflict between duties owed exclusively to the client and duties to the legal system or society as a whole. If lawyers were purely private actors, it would be hard to see why they would have any obligation to disassociate themselves from the wrongdoing of others. However, the law governing lawyers has always provided for this limited sort of “gatekeeper” role. The second example is the debate over whether lawyers should exercise moral discretion in selecting clients. If lawyers were purely private actors, their client-selection decisions would presumptively be subject to moral criticism, just as an individual might be criticized for buying “blood diamonds” or a newspaper might be criticized for accepting advertisements from neo-Nazi organizations. However, there is a long tradition in the legal profession of rejecting this kind of moral criticism as unjustified, because access to justice is a kind of public good. Moral filtering by lawyers (a different kind of professional gatekeeping) is regarded with suspicion because, I contend, lawyers have a kind of quasi-official role in mediating between the interests of individuals and the framework of social ordering established by the law. Although the American and Canadian legal systems do not recognize a binding professional obligation to accept all clients without regard to the lawyer’s moral qualms, lawyers frequently make reference to the duty to represent unpopular clients. This suggests that they do not accept a purely private conception of their professional role.

B. Confidentiality and Anti-Fraud Duties.

The bar’s vision of the lawyer as a faithful agent of the client has its roots in contract and agency law. The lawyer-client relationship arises by mutual consent of the parties — that is, as a

matter of contract.³³ The contract establishes an agency relationship, meaning that the lawyer (the agent) is empowered to do something on behalf of the client (the principal), subject to the client's control and direction, and the lawyer's actions will be binding on the client.³⁴ As part of the agency relationship, all agents have duties to keep confidential any information learned from the principal in the course of the relationship.³⁵ This duty in agency law is not absolute, and "[a]n agent may reveal otherwise privileged information to protect a superior interest of . . . a third party."³⁶ Superior interests include the interest in preventing crimes, and the agent is permitted to reveal confidential information to law enforcement authorities for this purpose, and also to private parties to prevent them from being harmed by the principal's actions.³⁷ In the analogous area of the evidentiary attorney-client privilege, the common law has always recognized that the protection of the privilege is lost if the client consults the lawyer for the purpose of committing a crime or fraud.³⁸ By contrast, for most of its history the organized bar has defended a near-absolute rule of confidentiality for lawyers, which prohibited disclosure of information learned in the representation of a client, except in the most dire circumstances. Despite highly publicized scandals, such as the passivity of lawyers in face of fraud by managers of savings and loan institutions, the bar always managed the remarkable feat of simultaneously

³³ Restatement (Third) of the Law Governing Lawyers § 14 & cmt. b.

³⁴ See generally William A. Gregory, *The Law of Agency and Partnership* §§ 1-2 (St. Paul, Minn.: West Group, 3d ed., 2001).

³⁵ See Restatement (Third) of Agency § 8.05(2).

³⁶ *Id.*, cmt. c.

³⁷ *Id.*

³⁸ Restatement (Third) of the Law Governing Lawyers § 82.

fending off calls for more external regulation and maintaining internal regulations that did not require lawyers to disclose client confidences where social justice required it.³⁹

Historically the position of the organized bar was notably at odds with the stance of other institutional players. Courts and administrative agencies tended to take a view more in line with the general law of agency, that superior interests of third parties could trump the lawyer's duty of confidentiality to the client. In a well known case that shocked the securities bar, the Securities and Exchange Commission (SEC) brought an enforcement action against two law firms who participated in a merger transaction, learned that the deal was about to close on the basis of materially misleading financial information, and refused to take affirmative steps to delay the closing until accurate information could be provided.⁴⁰ The SEC continued to maintain that it had the inherent authority to regulate the activities of lawyers representing publicly held companies, and that its regulatory authority trumped the stringent rule of confidentiality asserted by the organized bar. This conflict was somewhat muted until the accounting scandals in the wake of the dot-com collapse focused public attention on the role of professionals in corporate fraud. Congress responded by providing express statutory authority to the SEC to issue regulations governing the practice of lawyers representing public corporations, in Section 307 of the Sarbanes-Oxley Act.⁴¹ Despite determined opposition by the securities and corporate bar, the SEC issued regulations requiring lawyers to report credible evidence of wrongdoing up the

³⁹ For this history see Thomas D. Morgan, "Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct," 17 *Georgetown Journal of Legal Ethics* 1, 5-6 (2003).

⁴⁰ See *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978).

⁴¹ 15 U.S.C. § 7245.

corporate chain of command, and permitting lawyers to disclose confidential information to regulators if internal reporting would not effectively put a stop to the wrongdoing.⁴² Possibly seeking to forestall further legislation or administrative rulemaking, in 2003 the ABA’s House of Delegates approved several amendments to the Model Rules governing confidentiality.⁴³ The official position of the organized bar is finally aligned with the other legal institutions that have long recognized that the lawyer’s duty of confidentiality cannot subordinate obligations to avoid assisting wrongdoing.⁴⁴

There is a sound economic case that can be made for imposing these responsibilities on lawyers. The crux of this argument is that relying on professional “gatekeepers” is a way to lower transaction costs and benefit all participants in some economic activity.⁴⁵ The costs to

⁴² 17 C.F.R. § 205.3.

⁴³ See Model Rule 1.6(b)(2), (b)(3); Model Rule 1.13(c) (as amended Aug. 2003).

⁴⁴ A few state bar associations continued to assert the superiority of the duty of confidentiality to other professional obligations. The most notorious example was the Washington State Bar Association’s position that the lawyers who comply with Sarbanes-Oxley Act and regulations promulgated by the SEC under the Act may still be subject to professional discipline if they breach the duty of confidentiality. SEC General Counsel Giovanni Prezioso responded with a forceful letter reminding the state bar that the U.S. Supreme Court has consistently held that regulations issued by federal agencies preempt inconsistent state laws, including bar association rules. The conflict was finally resolved when the Supreme Court of Washington adopted amendments to the confidentiality rule permitting disclosure in circumstances covered by the Sarbanes-Oxley regulations.

⁴⁵ See, e.g., John C. Coffee, Jr., “The Attorney as Gatekeeper: An Agenda for the SEC,” 103 *Columbia Law Review* 1293 (2003); John C. Coffee, Jr., “Understanding Enron: ‘It’s About the Gatekeepers, Stupid,’” 57 *Business Lawyer* 1403 (2002). For the original, highly influential articles introducing the gatekeeper concept in the legal literature, see Reinier H. Kraakman, “Corporate Liability Strategies and the Costs of Legal Controls,” 93 *Yale Law Journal* 857 (1984); Reinier H. Kraakman, “Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy,” 2 *Journal of Law Economics and Organizations* 53 (1986). I will confine my use of the term “gatekeeping” to the context of professionals refusing to lend their credibility to financial transactions. Alice Woolley refers to lawyers as gatekeepers any time they refuse to represent a client (e.g. on moral grounds) or simply have priced their services beyond the reach of many consumers. See “Imperfect Duty: Lawyers’ Obligation to Foster Access to Justice,” manuscript p. 10. There is nothing objectionable about this usage, but I would like to preserve the narrower sense of the idea of gatekeeping, to pick up on the arguments of Coffee and others.

businesses of obtaining capital include not only borrowing costs and professional fees, but also some premium that investors demand as compensation for accepting the risk that their loan will not be repaid, or the shares they hold in a company will become worthless. In effect, part of the cost of obtaining financing includes compensating investors for the risk of fraud. Therefore, all participants in the financial markets share an interest in effective anti-fraud enforcement. One way to prevent fraud, of course, is to create a state enforcement agency, such as the SEC, which investigates and prosecutes wrongdoing. As between regulators and participants in financial markets, however, there are enormous information asymmetries. By contrast, lawyers and accountants are familiar with much of the information that any enforcement agency would need to learn, and also have access to corporate decision-makers who may be contemplating wrongdoing. As a result, requiring lawyers to take steps to prevent fraud, such as disassociating themselves from wrongdoing, may be the least expensive practical means of preventing fraud. To make this requirement stick, practically speaking, all that is needed is to impose legal liability on lawyers in certain circumstances, as in cases where lawyers are aware of their client's fraud and either provide substantial assistance (a fairly weak gatekeeping obligation, because it prohibits only actively aiding fraud) or fail to withdraw from the representation (a stronger obligation).

The bar's struggle with the SEC can be understood as a clash of basic normative visions, between the bar's view of lawyers as purely private actors — agents of clients or “scriveners” who merely memorialize the terms of deals negotiated between the parties — and the SEC's vision of lawyers as gatekeepers, which implies that lawyers have an obligation to work in

parallel with the SEC to achieve the agency's goal of protecting investors from fraud. When the Sarbanes-Oxley Act was enacted, the response from the corporate and securities bar was consternation at what they perceived as a fundamental change in the nature of the attorney-client relationship.⁴⁶ But it is telling that one of the largest insurers of large law firms objected to the proposed SEC regulations only to the extent that they went beyond what was already the law in many jurisdictions, which required lawyers to disassociate themselves from their clients' fraud if the lawyer's services had been used by the client in committing the fraud.⁴⁷ Lawyers at this company, who were involved in the defense of lawsuits against large firms all over the country, had long since become accustomed to the hybrid nature of the lawyer's role, which is not purely client-centered, but imposes affirmative obligations on lawyers to act to prevent violations of law.⁴⁸ Despite the hysteria with which the SEC's proposals were received in some quarters, I

⁴⁶ See Susan P. Koniak, "When the Hurlyburly's Done: The Bar's Struggle with the SEC," 103 *Columbia Law Review* 1236 (2003), pp. 1270-71.

⁴⁷ See Comments of Attorneys' Liability Assurance Society (ALAS), on the SEC's Proposed Rule on Lawyer Conduct (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/alasi1.htm> ("The Commission should consider that the legal ethics rules in many states may already require attorney withdrawal and disaffirmance, if the attorney's prior work will be or is being used by the client in perpetrating an ongoing or future crime or fraud. In such a situation, noisy withdrawal may be required in order for the attorney to comply with the mandate in every state's ethics rules that the attorney not knowingly assist a client's crime or fraud. ABA Formal Opinion 92-366.").

⁴⁸ This insurer did object to any obligation to disclose confidential information in addition to refusing to continue representing a client engaging in wrongdoing. Significantly, and perhaps owing to many such negative comments, the SEC never finalized a proposed rule that would have created a duty, as opposed to a permission, to report out confidential information to the extent necessary to prevent, rectify, or mitigate harm from client frauds. As noted above, the controversy over the SEC's reporting-out rules was largely mooted by the ABA's adoption of amendments to the confidentiality rule permitting disclosure in circumstances that would have been covered by the SEC's rule. Although the ABA rule creates a permission, not a duty, to disclose, if it is read in conjunction with federal securities and state tort law, it effectively creates a duty. The reason is that a lawyer might be civilly liable for participating in the client's wrongdoing if the lawyer had some available course of action (i.e. disclosing the fraud) that would have prevented the harm and did not follow that avenue. In addition, the disciplinary rule requiring disclosure to third parties to avoid assisting fraud is qualified only to the extent there is a duty to keep information secret. See Model Rule 4.1(b) ("a lawyer shall not knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."). If the duty of confidentiality has an exception in a given case, the duty in Rule 4.1(b) would mandate

think it is accurate to see the Sarbanes-Oxley rules as being largely redundant with the obligations that lawyers have always had, to avoid assisting their clients' frauds — i.e. to serve as gatekeepers.

C. Morally Motivated Client Selection.

Another issue implicating the access to justice debate, much discussed by legal ethics scholars, is the permissibility of lawyers refusing to represent certain clients, or categories of clients, on moral grounds. As a matter of the positive law governing lawyers in the United States, lawyers do not have a legally enforceable obligation to serve any given client.⁴⁹ The only circumstances under which a lawyer would be required to accept representation is where a court appoints the lawyer,⁵⁰ and in those cases that lawyer has generally agreed to have her name added to a roster of lawyers willing to accept court 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.⁵¹ At least on the surface, the American position seems far removed from the British "cab-rank" rule, which

disclosure.

⁴⁹ Charles W. Wolfram, *Modern Legal Ethics*. (Minneapolis: West Publishing Co. 1986) § 10.2.2, p. 571. The rule is the same in Canada. See Hutchinson, *supra*, p. 73 ("there are no prohibitions on lawyers refusing to represent particular clients or causes"); Woolley, *supra*, p. 1.

⁵⁰ Model Rule 6.2.

⁵¹ Model Rule 6.2(c).

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.⁵² The rule is widely 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.⁵³ But it nevertheless underscores an important normative commitment by the legal profession, to refrain from making moral judgments about clients' ends, and thereby to ensure that access to the law is rationed to all potential clients on a morally neutral basis.

The commitment underlying the cab-rank rule, in turn, makes sense only if lawyers are understood of as having quasi-public responsibilities. It is a central commitment of political liberalism that government officials must make political decisions on grounds that are

⁵² Boon and Levin, *supra*, pp. 27-29. 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.

Quoted in Leubsdorf, *supra*, p. 19. 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* (Wellington, New Zealand: Butterworths 2000) § 6.1, p. 153.

⁵³ Boon and Levin, *supra*, pp. 181-82. John Flood's research describes 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. See John A. Flood, *Barristers' Clerks: The Law's Middlemen*. (Manchester, U.K.: Manchester University Press 1983), pp. 54-59, 65, 69-76. As Flood notes, "this sifting of the solicitors effectively nullifies the impact of the cab-rank rule of the Bar." *Id.*, p. 71.

“independent of any particular conception of the good life, or of what gives value to life.”⁵⁴ This principle is often stated in terms of shared or common reasons:

Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.⁵⁵

But there is no analogue to the principle of liberal neutrality in the purely private domain, a point underscored by the U.S. Supreme Court’s decision in the Boy Scouts case, which held that a private organization could deny leadership positions to gay adults.⁵⁶ The organization’s exclusion of gay scoutmasters was based on ethical beliefs that were not acceptable to all citizens on the basis of their common human reason, yet other aspects of political liberalism — such as liberty of conscience and the importance of autonomy — favored allowing the Boy Scouts to act on the basis of idiosyncratic (or at least not generally accepted) moral beliefs. Like the Boy Scouts, private businesses are generally free to decline service to prospective customers on most grounds, except those characteristics, such as race or sex, that are prohibited by statute as a basis for discrimination. They are also free to price their services beyond the reach of many consumers, if doing so would maximize their profits. However, so-called “common carriers,” like railroads and bus companies, whose activities are “infected with the public interest” are not permitted to turn away paying customers. People have such a compelling need for access to

⁵⁴ Ronald Dworkin, “Liberalism,” in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press 1985), p. 191.

⁵⁵ Samuel Freeman, “Introduction,” in Samuel Freeman, ed., *Cambridge Companion to Rawls* (Cambridge: Cambridge University Press 2003), p. 58.

⁵⁶ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

these services that they have a right to access to them, which may not be denied on the basis of reasons that would otherwise be permissible (as in the Boy Scouts case). Similarly, enterprises whose activities are deemed to be of great importance to the public may have less latitude to demand that customers waive tort liability.⁵⁷ And public utilities are permitted to charge only “reasonable” rates, and may not engage in price discrimination or charge whatever the market will bear.⁵⁸

As noted above, the American law governing lawyers does not impose a binding cab-rank duty on lawyers to accept all clients who are willing to pay. However, a holistic and purposivist reading of the law governing American lawyers reveals that, despite the lack of a black-letter

⁵⁷ See *Tunkl v. Regents of University of California*, 383 P.3d 441 (Cal. 1963).

⁵⁸ In her contribution to this symposium, Alice Woolley criticizes the “public utility” argument for lawyers having a special obligation to provide legal services to those unable to pay for them. She is undoubtedly correct that while the legal profession as a whole may have a monopoly over the provision of legal services, individual lawyers do not. See Woolley, *supra*, p. 5. She goes on to say that lawyers are no different from pharmacists, dentists, and other professionals who have to obtain a license to practice from the state, implying that lawyers should have no greater responsibility than pharmacists or dentists for making their services more widely available. But the attempt to argue by analogy with public utilities may be better understood as a suggestive comparison, focusing not on the ability to extract monopoly rents, but on the importance to consumers of the services provided by lawyers. In torts, the line of cases declining to enforce exculpatory clauses and disclaimers of liability in contracts turns on the importance of the good or service in question to basic life needs such as shelter or health care. See W. Page Keeton, et al., *Prosser and Keeton on Torts* (Minneapolis: West Publishing Co.) (5th ed. 1984), p. 483 (“the validity of a contract against liability for negligence . . . is likely to turn upon the extent to which it is considered that the public interest is involved”). Monopoly power does create an unfair disparity in bargaining power, which is another basis upon which courts sometimes refuse to enforce exculpatory clauses, but the relationship of the defendant’s activities to the “public interest” has independent significance. Unfortunately, courts are not particularly consistent in their decisions on what sorts of activities implicate the public interest. Compare *Kopischke v. First Continental Corp.*, 610 P.2d 688 (Mont. 1980) (refusing to enforce waiver of liability in contract for sale of a used car) with *YMCA of Metropolitan Los Angeles v. Superior Court*, 63 Cal. Rptr. 2d 612 (Ct. App. 1997) (enforcing waiver in connection with participation in a recreational program for senior citizens). Woolley recognizes that when the public utility argument is refined in this way, the distinction between lawyers and other providers of essential services (pharmacists, grocers, etc.) collapses. See Woolley, *supra*, p. 9. From this she draws the conclusion that lawyers ought to be treated like pharmacists and dentists, and not required to provide free or low-cost access to their services, but of course one might invert that argument and claim that society has a legitimate claim on the goods and services of lawyers, pharmacists and grocers, and indeed anyone whose activities serve important human needs.

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 of representation 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."⁵⁹ 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,"⁶⁰ the right to withdraw is qualified by the requirement that the lawyer ensure the client is not harmed by the withdrawal,⁶¹ and the obligation to continue representation in a litigated matter if ordered by a court.⁶² Moreover, 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.⁶³ Finally, there is a curious non-rule, which does not impose an obligation to represent but which nevertheless reminds

⁵⁹ Geoffrey C. Hazard, Jr., and W. William Hodes, *The Law of Lawyering* (Gaithersburg, Md.: Aspen Law and Business 2001) § 51.5, p. 51-7.

⁶⁰ Model Rule 1.16(b)(4).

⁶¹ Model Rule 1.16(d).

⁶² Model Rule 1.16(c).

⁶³ Restatement (Third) of the Law Governing Lawyers § 32, cmt. j ("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.").

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.”⁶⁴ Taking all of this together, one might say that there is a cab-rank *principle* underlying the American scheme of rules, despite the absence of an enforceable rule.⁶⁵ (I think the same thing is true regarding pharmacists, by the way, and think it is a mistake to conclude that pharmacists are permitted to opt out, on religious grounds, of the general obligation to dispense lawful medicine to customers with a doctor’s prescription.)

The rhetorical power of this cab-rank principle was on display after an incident earlier this year, in which a U.S. Defense Department official, Deputy Assistant Secretary for Detainee Affairs Charles “Cully” Stimson criticized lawyers at major law firms for representing detainees in the American detention center at Guantánamo Bay, Cuba. In a radio interview, Stimson tried to persuade clients of these firms to use the threat of withholding lucrative engagements as leverage to persuade the management of these firms to stop representation of detainees:

I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks.⁶⁶

⁶⁴ Model Rule 1.2(b).

⁶⁵ Cf. Norman W. Spaulding, “Reinterpreting Professional Identity,” 74 *Colorado Law Review* 1, 20-21, 25, 30 (2003) (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 causes).

⁶⁶ Editorial, “Unveiled Threats,” *Washington Post* (Jan. 12, 2007), p. A18.

He then proceeded to name the firms publicly, proclaiming it was “shocking” to see these firms doing pro bono work for alleged terrorists.⁶⁷ Stimson’s attempt to enlist corporate clients to threaten their law firms backfired, after an uproar from the legal profession, and he resigned three weeks later. One of the most significant criticisms came in a blistering op-ed piece, also in the *Wall Street Journal*, written by Charles Fried, a law professor who had been Solicitor General in the Reagan Administration. Fried said Stimson “showed ignorance and malice,” referred to the honorable tradition of lawyers representing the dishonorable, and linked that tradition to the rule of law in a free society, in contrast with “today’s China or Putin’s Russia.”⁶⁸ Anticipating that an appeal to self-interest might help persuade the readers of the *Journal*’s famously conservative editorial page, Fried noted the “extravagant rhetoric of [left-wing] ideologues” who regularly criticize large law firms for representing large tobacco and pharmaceutical companies. If representing detainees was tantamount to “helping al Qaeda,” Fried suggested, lawyers for cigarette manufacturers would be accountable morally for helping addict children to a deadly drug, and lawyers for big pharmaceutical companies would be expected to give a moral justification for pushing health care costs beyond the reach of ordinary Americans.

Despite the power of arguments such as Fried’s, it must be conceded that there are reasons to deny the existence of a cab-rank principle in the American law of lawyering. For one

⁶⁷ In all likelihood these comments were not Stimson’s private viewpoint, but represented the position of the Bush Administration. An editorial in the *Wall Street Journal* quoted an unnamed official as saying that “this information [the identity of the law firms] might cause something of a scandal, since so much of the pro bono work being done to tilt the playing field in favor of al Qaeda appears to be subsidized by legal fees from the Fortune 500.” Robert L. Pollock, “The Gitmo High Life,” *Wall Street Journal* (Jan. 12, 2007), p. A12.

⁶⁸ Charles Fried, “Mr. Stimson and the American Way,” *Wall Street Journal* (Jan. 16, 2007), p. A21.

thing, although individual lawyers and the organized bar sometimes make good rhetorical use of the ideal of counsel being bound to act for any client, in pursuit of any cause, it seems that the public is often having none of it. Alan Dershowitz devotes a chapter in his book about the O.J. Simpson criminal trial to rebutting charges that he has gone over to the side of evil, after an honorable career of fighting anti-Semitism. He quotes a person who approached him on the street in New York to dress him down: “I used to love you so much, and now I’m so disappointed in you You used to defend Jews like Scharansky and Pollard. Now you defend Jew-killers like O.J.”⁶⁹ Dershowitz goes on to quote liberally from his hate mail, including a letter that observes — quite rightly — that “[y]ou are not compelled to accept a case.”⁷⁰ This letter seems to reject the bar’s assertion of an implicit cab-rank principle. Perhaps public skepticism is due to the inconsistency of the organized bar’s support for the representation of unpopular clients. Looking at the history of the American legal profession, one cannot help noticing that certain clients and causes, such as African-American civil rights plaintiffs in the South in the 1950’s, suspected Communists during the McCarthy era, and political radicals in the 1960’s had a great deal of difficulty obtaining representation.⁷¹ Certainly when it comes to putting any real lobbying muscle behind the defense of publicly funded legal aid for indigent clients, the bar’s record has been a sorry one.⁷²

⁶⁹ Alan M. Dershowitz *Reasonable Doubts: The Criminal Justice System and the O.J. Simpson Case* (New York: Touchstone 1996), p. 157.

⁷⁰ *Id.*, p. 160.

⁷¹ Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law*. (New Haven: Yale University Press 1978), pp. 92-93.

⁷² See Luban, “Taking Out the Adversary,” *supra*.

Of course, the public (assuming that people who write hate mail to Alan Dershowitz are representative of any population at all) may be misinformed about the normative structure of the legal profession. A more serious objection, therefore, is that lawyers themselves deny the existence of an implicit cab-rank principle, and for good reasons. American lawyers tend not to identify themselves as lawyers-full-stop, but often associate themselves with clients and causes in exactly the way the cab-rank principle instructs them not to.⁷³ Although career tracks are formally more fluid in the United States than in virtually any other country (certainly in comparison with civil-law systems), in reality lawyers begin to specialize fairly soon after graduating from law school.⁷⁴ Specialization occurs by subject matter, so that lawyers start to become most familiar with areas like securities law, criminal law and procedure, or employment discrimination law, and enjoy a comparative advantage in the competition for clients as a result of specialization. Within a given field, lawyers further specialize according to the identity of the clients they represent, for example serving either accident victims or insurance companies, labor unions or management. Part of the explanation for this violation of the cab rank ideal is that specialization implies a certain amount of *de facto* client selection. Poor people do not need lawyers who specialize in asset-backed securities deals, and corporations do not hire divorce lawyers, except possibly as a benefit for their officers. Another reason for specialization by clientele is the avoidance of conflicts of interest.⁷⁵ A law firm whose practice included the

⁷³ It occurs to me as I write this that I generally describe myself as having been a “defense-side product liability litigator,” not simply a “lawyer,” before becoming a law teacher.

⁷⁴ See Richard L. Abel *American Lawyers* (New York: Oxford University Press 1989), pp. 202-05; John P. Heinz and Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Chicago: Northwestern University Press) (rev’d ed. 1982), pp. 26-28.

⁷⁵ Hazard, *supra*, pp. 91-93.

representation of both unions and employers could expect to find itself frequently disqualified from representing one of the parties, because of concurrent or previous representation of the other party. Lawyers also talk about “client-relations” reasons for specializing, which amounts to a concern not to irritate regular clients by representing interests they find distasteful.⁷⁶ Lawyers would like to display their independence and integrity, but not represent causes that are too unpopular with their clients, who might believe that “[a]n independent professional is fine, a maverick something else.”⁷⁷

Apart from these prudential considerations, there may be something normatively attractive in a profession that has discretion to allocate its services according to the political or moral commitments of its members. David Luban argues that it would be a good thing if lawyers acted as an “informal filter” on people pursuing legally permissible but morally dubious projects.⁷⁸ Social ordering relies on informal pressures, such as the disapproval of friends and neighbors, to a much greater extent than it relies on formal legal sanctions. Luban argues that a lawyer’s refusal to assist a client in carrying out a legally permissible but morally wrongful project is no different from “these other instances of social control through *private* non-cooperation.”⁷⁹ He calls this the “Lysistratian prerogative,” after the play by Aristophanes in

⁷⁶ See, e.g., Donald D. Landon, *Country Lawyers: The Impact of Context on Professional Practice* (New York: Praeger 1990), pp. 123-24, 127-31.

⁷⁷ Hazard, *supra*, p. 95.

⁷⁸ David Luban, “The Lysistratian Prerogative: A Reply to Stephen Pepper,” 1986 *American Bar Foundation Research Journal* 637, 641.

⁷⁹ *Id.*, p. 642 (emphasis added).

which the wives of Athenian soldiers conspired to end the Peloponnesian War by withholding sex from their husbands until they agreed to make peace. 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 law governing lawyers permits lawyers to give non-legal advice,⁸⁰ so if there is a legal permission and a moral requirement to try to talk the client out of wrongdoing, it would follow that a lawyer would not be able to escape moral blame for standing by and assisting the client in committing a legally permissible moral wrong. 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. Thus, a lawyer can act as a moral filter by counseling her client not to engage in wrongdoing, withdrawing from the representation if the client refuses to listen, or by refusing to enter into the professional relationship in the first place.

There is a significant difference, however, between informal associations and the lawyer-client relationship. 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. However the distinction between voluntary and involuntary associations does not really capture what is "political" about the lawyer-client relationship. The

⁸⁰ Model Rule 2.1.

lawyer-client relationship is legally voluntary in the sense that the parties are not literally stuck with one another, except in the relatively unusual case of court-appointed counsel, but as a practical matter it can be difficult and costly for a client with a recalcitrant lawyer to locate substitute counsel. The cost of abandoning long-standing social relationships (to say nothing of family relationships) is bound to be greater than the cost of finding a new lawyer. True, these costs do not have market prices attached to them, but surely it is more costly to someone, in the sense of being a significant bad event, to turn his or her back on an old friend who gave inconvenient moral advice. Thus, rather than focusing on the voluntary or involuntary nature of entry into or exit from relationships, it is better to focus on the nature of the reasons that structure the relationship between the parties.

Roughly speaking, a lawyer's attempt to dissuade clients on moral grounds is not analogous to informal social pressures, because the nature and basis for the advice we expect from friends and family members is different from what we expect from legal professionals. While it may be true that "friends help friends become better people,"⁸¹ 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 lawyer's fiduciary duty to the client,⁸² but it would be a mistake to map all of the moral terrain of friendship — i.e. a relationship constituted in part

⁸¹ Robert F. Cochran, Jr., "Introduction: Three Approaches to Moral Issues in Law Office Counseling," 30 *Pepperdine Law Review* 591 (2003), p. 599.

⁸² The friendship metaphor is developed in a well known paper by Charles Fried. See Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation," 85 *Yale Law Journal* 85 1060 (1976).

by ordinary moral considerations — onto an economic transaction between two strangers in the context of a highly legalistic mode of social ordering. 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.⁸³

Simon talks about the “impersonality” of the law, but another way to put it is in terms of the social function of the law in superseding the sorts of moral considerations that ordinarily structure the relationships between individual persons, *outside of politics*. A political process, and therefore a legal system, is necessary because people disagree in good faith about what rights, fairness, and justice requires. As a result, there are limits on the “admissibility” of ordinary moral considerations in political relationships.

For me to think about politics, there must be limits on the “logical space” that my substantive views occupy. To think about politics, I must be willing at least part of the time to view even my own uncompromising convictions about justice as just one set of convictions among others. I must be willing to address, in a relatively impartial way, the question of what is to be done about the fact that people like me disagree with others in the society about justice.⁸⁴

The reason that ordinary moral considerations are not central to the attorney-client relationship is that the political process displaces the “logical space” of ordinary moral reasons. The role of lawyer is structured by the agency relationship between lawyers and clients and the foundational role of the legal entitlements of clients. Lawyers obtain and protect legal entitlements; they are

⁸³ William H. Simon, “Ethical Discretion in Lawyering,” 101 *Harvard Law Review* 1083 (1988), p. 1138.

⁸⁴ Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press 1999), p. 160.

not friends or moral advisors. (A lawyer may be *both* a friend and a legal advisor, and the client may seek moral advice from this lawyer/friend, but the roles are still analytically distinct.) In this way, lawyers are more analogous to public officials than to private actors.

III. How to Argue for a Particular Conception of Legal Ethics.

I have been arguing here that the law governing lawyers is about the inherent tension between duties to the client and duties to others, or the hybrid direct/indirect strategy for pursuing justice. Some legal scholars would say this does not go far enough, and the regulation of the legal profession ought to be understood as imposing obligations on lawyers to act directly in pursuit of justice, when other institutions cannot be relied upon to reliably secure justice.⁸⁵ Others contend that the law governing lawyers is really about something completely different. Monroe Freedman, for example, has long contended that “[a]n essential function of the adversary system . . . is to maintain a free society in which individual human rights are central.”⁸⁶ In a similar vein, Stephen Pepper has argued that “law is intended to be a public good which increases autonomy,”⁸⁷ implying that lawyers ought to pursue their clients’ lawful objectives and not worry about the interests of third parties. Since increasing autonomy is the principal goal of the legal

⁸⁵ See, e.g., Simon, *supra*; Luban, *Lawyers and Justice, supra*. Marvin Frankel makes a somewhat narrower argument that lawyers ought to have obligations to act directly to ensure that adversarial litigation results in the discovery of truth (as opposed to justice), if the lawyer has reason to believe that the process is subverting discovery of the truth. See Marvin Frankel, “The Search for Truth: An Umpireal View,” 123 *University of Pennsylvania Law Review* 1060 (1975).

⁸⁶ Freedman and Smith, *supra*, p. 13.

⁸⁷ Pepper, *supra*, p. 617.

system, lawyers must be concerned not to interfere with their clients' autonomy in the pursuit of justice. In the view of Freedman and Pepper, justice either *is* sticking up for one's client's rights, or justice will emerge from the clash of adversary arguments as long as the opposing lawyers vigorously advocate for their clients' interests. Freedman is so focused on the paradigm of criminal defense representation that he tends to assert that justice is identical with protecting client autonomy and dignity:

Even if it were not the best method for determining the truth, however, the adversary system is an expression of some of our most precious rights. . . . The adversary system thereby gives both form and substance to the humanitarian ideal of the dignity of the individual.⁸⁸

From the standpoint of a lawyer counseling a client, Pepper similarly does not talk much about justice, preferring instead to state the lawyer's duties in terms of "advising about the law and implementing client goals through legally available devices."⁸⁹ Justice is therefore identical with "first class citizenship" — i.e. client autonomy, secured through a framework of legal entitlements.⁹⁰

Although this may appear to be a diversion from the task at hand, I think it is important to get a handle on these arguments that the regulation of the legal profession is really "about" such-and-such (autonomy, rights, justice, human dignity, or whatever). Establishing an obligation on the part of lawyers to promote access to justice, whether by taking cases pro bono or not

⁸⁸ Freedman and Smith, *supra*, p. 49.

⁸⁹ Pepper, *supra*, p. 622.

⁹⁰ *Id.*, pp. 615-17.

declining to represent certain categories of clients, presupposes that lawyers are not simply hired guns or mouthpieces of clients. Conversely, an argument against a more robust obligation to provide pro bono legal representation seems to trade on the assumption that the duties incumbent upon lawyers as professionals are exhausted by promoting the lawful interests of the client. As I have been arguing, however, strands of both conceptions of the lawyer's role — public and private — are discernable in the rhetoric of the bar, the binding disciplinary rules, and the duties imposed on lawyers by courts and legislatures. The law governing lawyers, in short, has elements of the hired gun ethic as well as the notion that lawyers are officers of the court. Although the attempt has been made to reduce one of these ethical conceptions to the other — e.g. by arguing that lawyers serve society best by representing their clients zealously and single-mindedly — there are too many features of the law of lawyering that resist reduction. For example, one cannot subsume the duty to disclose perjury to the court under the notion of zealous advocacy. Nevertheless, it may still be possible to make a valid inference from (1) the content of the law governing lawyers to (2) a theoretical explanation for that area of law, by seeking a constructive interpretation that fits with both the public and private strands of the lawyer's role. That inference would, in turn, underwrite an argument based on (2), that lawyers ought to have a duty to provide free or low-cost legal representation to those who were unable to afford it.

The “constructive interpretation” inferential strategy comes from Ronald Dworkin's theory of law. In brief, Dworkin argues that the task of legal theory writ large, as well as a theory of adjudication, is to provide an account of law that justifies the imposition of duties on

citizens.⁹¹ His approach is to seek out the scheme of principles presupposed, and supported, by the past political decisions of judges and legislators that purport to impose obligations on citizens.⁹² It is essential for Dworkin that this scheme of principles be coherent.⁹³ Legitimacy depends on coherence, because coherence is an expression within law and politics of the fundamental moral value of equality. Dworkin's argument here has a strong contractarian flavor — he suggests (although he doesn't use quite this language) that the reasons supporting a community's political decisions must be general in the sense that all affected citizens can be expected to endorse them on the basis of values they share.⁹⁴ Political obligation is essentially *associative*, and for there to be an enduring political association, individuals must be committed to some unified, coherent underlying scheme of principles.⁹⁵ Otherwise the practice in question would not be a morally worthy object of commitment. Just as there would be no moral value in a process that settled disputes by flipping coins, there would be no reason why citizens should regard the law as legitimate if it were not rooted in the fundamental moral traditions of the political community. In determining the content of the community's moral principles, however, a judge (or legal theorist) should not engage in ordinary moral reasoning, from the ground up, as it were. (Dworkin confusingly refers to judges making all-things-considered moral judgments as

⁹¹ Dworkin, *Law's Empire*, *supra*, p. 191.

⁹² *Id.*, p. 211 (“Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse.”); see also Ronald Dworkin, “Hard Cases,” in *Taking Rights Seriously*, *supra*, pp. 87-88.

⁹³ Dworkin, *Law's Empire*, *supra*, p. 101 (political decisions “will be knit together by some unifying conception of the connection between legal practice and political justification”).

⁹⁴ *Id.*, pp. 189-90, 200.

⁹⁵ *Id.*, p. 205.

pragmatists.⁹⁶⁾ Rather, the judge or theorist is attempting to discover the moral principles contained within actual political decisions. The aim is to come up with an interpretation of an actual practice, namely legal decision-making by judges and other officials, which shows that practice in its best light, morally speaking.⁹⁷ Any given judicial decision would therefore be tested against the standard of “whether it could form part of a coherent theory justifying the network as a whole.”⁹⁸

Although Dworkin’s argument is aimed at establishing a connection between the content of law and its moral legitimacy, a Dworkinian-style argument may also be useful to establish a connection between the duties of a lawyer (“role prescriptions” as they might be called⁹⁹⁾ and the moral reasons why role prescriptions ought to have authority for lawyers. A Dworkinian approach would look at the law of lawyering and try to impose a constructive interpretation on that practice as a whole, trying to show it in its best, most normatively attractive light. There may be bits of the practice that do not fit very well with this constructive interpretation, but they may be regarded as deviant, accidental, or comparatively unimportant. The important thing is that the theoretical account of any practice make sense of the way in which the practice actually works, on the assumption that it is a purposive activity, directed at some worthwhile end. As

⁹⁶ *Id.*, p. 145 (“legal pragmatism[] holds that people are never entitled to anything but the judicial decision that is, all things considered, best for the community as a whole, without regard to any past political decision”).

⁹⁷ *Id.*, pp. 227-39 (developing the analogy of the chain novel, where each successive author adds a new chapter that fits with the story as it has been told by previous authors, and also aims to “make the text the best it can be,” where “best” means “best from the standpoint of political morality, not aesthetics”).

⁹⁸ *Id.*, p. 245.

⁹⁹ See Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton, N.J.: Princeton University Press 1999), p. 52.

critics of Dworkin have frequently pointed out, there is no reason to assume that a practice must have only one justifying purpose. Picking up on Dworkin's metaphor of a chain novel, Stanley Fish and others have pointed out that a novel may plausibly be interpreted as doing more than one thing at once. As Richard Posner notes, "[m]uch great literature . . . achieves an equipoise, rather than a resolution, of opposing forces."¹⁰⁰ Fish imagines three readers reacting to a novel in this way:

[O]ne says to another, "Don't you see that it's ironic, a social satire?," and the second replies, "Not at all, at most it's a comedy of manners," while a third chimes in, "You're both wrong; it's obviously a perfectly straightforward piece of realism."¹⁰¹

In this way we can imagine interpreters of the practice of lawyering arguing about its underlying point or purpose:

Freedman and Pepper say, "It's all about protecting human dignity and autonomy," and Luban replies, "No, it's about substantive moral justice." Then Wendel says, "No, the Germans have got it right — lawyers are custodians of the law."

How are we to resolve this impasse? Notice that all of the disputants are making reference to the actual practice as a starting point for the argument. They are not "pragmatists" in Dworkin's sense, arguing from the ground up to a conclusion about what would be an attractive conception of lawyering. Rather, they take the existing norms and traditions of legal practice as given, and

¹⁰⁰ Richard A. Posner, *Law and Literature* (Cambridge, Mass: Harvard University Press) (rev'd ed. 1998), p. 237.

¹⁰¹ Stanley Fish, "Working on the Chain Gang: Interpretation in Law and Literature," 60 *Texas Law Review* 551 (1982), p. 554. See also Sanford Levinson, "Law as Literature," 60 *Texas Law Review* 373 (1982).

argue for the best constructive interpretation of it.

Dworkin's aversion to ad hoc, unprincipled compromises in the domain of politics¹⁰² pushes him toward an implausibly strong notion of coherence as a necessary condition of legitimacy. It may be possible, however, to find a principled, but pluralistic foundation as the explanation and justification of a practice. 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,"¹⁰³ "lawyer-statesman,"¹⁰⁴ Freedman's notion of the lawyer as champion of the little guy or "lawyer for the damned,"¹⁰⁵ and even Pepper's vision of lawyers as competent technocrats¹⁰⁶ are 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. 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

¹⁰² See Dworkin, *Law's Empire*, *supra*, pp. 345-46 ("A community of principle does not see legislation the way a rulebook community does, as negotiated compromises that carry no more or deeper meaning than the text of the statute declares; it treats legislation as flowing from the community's present commitment to a background scheme of political morality.").

¹⁰³ Austin Sarat and Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press 1998).

¹⁰⁴ Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Harvard University Press 1993), pp. 11-13, and *passim*.

¹⁰⁵ Clarence Darrow, *Attorney for the Damned* (New York: Simon and Schuster 1957).

¹⁰⁶ See Pepper, *supra*.

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. Professional associations of lawyers sometimes reflect these ideals, so that there are management-side and labor-side employment law firms, plaintiffs' personal injury and insurance-defense practices, law-and-order prosecutors and defense lawyers dedicated to resisting the exercise of state power, and the like. Thus, a lawyer who acts on the basis of one of these visions exercises moral discretion to some extent, 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.

Although there is a plurality of visions of professional excellence within the American tradition, the variation is not unlimited. Some conceptions of lawyering must be rejected as incompatible with *any* conceivable normative justification of the practice as it actually exists. One might imagine a legal profession that enforces as a binding obligation the French ideal of lawyers advocating only for causes they believe in. However, that conception would not fit with the practice of many American lawyers of representing clients whose ends they do not share. (Consider the examples previously discussed, of Alan Dershowitz's representation of O.J. Simpson, and the representation by large law firms of accused terrorists.) In addition, even if a conception of lawyering is acceptable in broad terms, there may be specific role prescriptions that are incompatible with specific enforceable legal duties. For example, Monroe Freedman may cogently argue for a conception of the lawyer as a zealous, client-centered advocate, there is no getting around the fact that the law governing lawyers in most jurisdictions unequivocally rejects

his conclusion that a lawyer should “go forward in the ordinary way” if she is unable to dissuade her client from committing perjury at trial.¹⁰⁷ Thus, the constraint of “fit,” as Dworkin calls it, has a role in ruling out what would otherwise be normatively appealing conceptions of legal ethics.¹⁰⁸

At the risk of ending on a wishy-washy note, I will observe that a conception of lawyering that does not include some responsibilities to aim directly at justice must be rejected as incompatible with the law governing lawyers; however, the existence of some such responsibilities does not entail any particular obligations, such as the duty to take cases pro bono. There seems to be no escaping the conclusion that lawyers are quasi-public officials, in the sense that some professional obligations must be understood as contributing directly to the realization of legal justice, and sometimes even substantive justice. But it does not follow that, in the absence of a binding legal duty imposed by courts or legislatures, lawyers ought to be required to contribute directly to justice by providing free or low-cost legal representation. Within the context of the larger political system, it may be that the responsibility for improving access to justice ought to fall on other institutions. In the absence of the political will to use public funds to create a comprehensive legal aid scheme, for example, the best constructive interpretation of the practice of lawyering in the United States does not appear necessarily to include an obligation to contribute one’s services at below-market rates. Just as there is an uneasy tension between

¹⁰⁷ See Freedman and Smith, *supra*, p. 164.

¹⁰⁸ See Dworkin, *Law’s Empire*, *supra*, p. 255 (“Convictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all.”).

duties of confidentiality and anti-fraud principles, and between a tacit cab-rank principle and discretion to reject representation on moral grounds, there is real ambivalence within the law of lawyering with regard to the duty to provide pro bono representation. Some lawyers may be willing to accept this responsibility, others may not, and in a profession characterized by a variety of ethical conceptions, this is as it should be.