March 5, 2010

GOOD PERSONS, GOOD LAWYERS, AND GOOD LAWYERING

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ABSTRACT

Should lawyers be morally accountable for the legal assistance they provide clients to achieve lawful but immoral ends? Should lawyers be obligated as a matter of professional duty to counsel clients about the moral implications of achieving lawful objectives? These questions have provoked spirited discussion in the aftermath of the “Torture Memoranda” prepared by the Office of Legal Counsel and the recurrent financial irregularities this country has experienced over the past 25 years beginning with the Savings & Loan failures in the 1980s, the Enron and WorldCom bankruptcies at the beginning of this century, and the financial industry meltdown in the late summer-fall of 2009.

Many legal commentators answer both of the above questions in the affirmative. Lawyers are morally accountable for helping clients realize lawful, but immoral objectives and lawyers must engage in a dialogue with clients over the morality of the lawful objective clients seek to achieve. Failure to do so makes the lawyer complicit in the client’s immorality and encourages and facilitates illegal conduct.

In this Essay, I question whether these arguments are properly applied to lawyers and conclude they are not.
GOOD PERSONS, GOOD LAWYERS, AND GOOD LAWYERING

James M. Fischer*

Good lawyers understand it’s not about them, it’s about their clients.**

I

INTRODUCTION

Richard Wasserstrom famously questioned whether a good lawyer can be a good person?¹ Wasserstrom’s inquiry was directed toward the professional claim that a lawyer did not bear individual moral responsibility for engaging in conduct that was professionally proper, but which enabled a client to achieve an immoral, but legal, end.² The professional claim was that role morality trumped personal morality. Under the usual norms of personal morality, an individual who freely chooses to assist and abet a person’s immoral ends shares in the moral responsibility for immoral conduct. The professional claim distinguished between personal and professional conduct holding that, as to the latter, the lawyer, acting in his or her professional capacity, did not partake of the client’s immoral acts. To this separation of personal and professional responsibility for volitional conduct, Wasserstrom demurred. Since then many others have joined in the demurrer.³ Recent actions prominently involving lawyers, such as the

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** ATUL GAWANDE, BETTER 163 (2007) (paraphrasing a remark on what makes a physician a good doctor).


³ DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (Princeton University Press 1998); Russell G. Pearce, The Legal Profession as a Blue State: Reflections on Public Philosophy,
Torture Memora nda” prepared by lawyers in the Office of Legal Counsel and lawyer facilitation of banking and financial market irregularities, have ramped-up the concern that lawyers are failing their profession and society by a single-minded, clients-centered focus to their legal work. To paraphrase the plaint of a federal judge addressing the earlier Savings & Loan failures: “Why Aren’t Lawyers Preventing This?”


During the Savings & Loan Meltdown in the 1980s, which was a smaller version of the Banking crisis that began last year with the Bear Stern and Lehman Brothers failures, one federal judge famously asked “Where Were the Professionals? Lincoln Sav. & Loan Assn. v. Wall, 743 F. Supp. 901 (D.D.C. 1990):

There are other unanswered questions presented by this case. Keating testified that he was so bent on doing the “right thing” that he surrounded himself with literally scores of accountants and lawyers to make sure all the transactions were legal. The questions that must be asked are:

Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?

Why didn’t any of them speak up or disassociate themselves from the transactions?

Where also were the outside accountants and attorneys when these transactions were effectuated?

What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.

Id., at 919-20 (footnote omitted). The judge was the former Director of Enforcement at the SEC. Keating was the former head of Lincoln Savings & Loan, which collapsed amid allegations of fraud and mismanagement.
The idea that a redesigned professional ethos would avoid objectionable policy decisions by clients or financial disasters is comforting, but specious. It assumes that lawyers have a hidden moral compass that has been squelched by law school indoctrination and practice demands, all of which can be countermanded by a change in professional ethos. Let a lawyer’s hidden morality be summoned forth to thwart immoral client objectives and bad policy and financial irregularity will be significantly reduced, perhaps vanish. I suggest that such dreams are unfounded. I argue that holding lawyers morally accountable for client immorality or requiring lawyers to have moral dialogues with clients would be objectionable in that it would frustrate, if not prevent, clients from accessing and asserting legal rights.

In this essay I revisit Wasserstrom’s critique to explore an argument that Wasserstrom and others have undervalued. The first claim I make is that any assessment of the lawyer’s individual responsibility for professional conduct must account for the lawyer’s exclusive control over the means by which legal rights are asserted and legal claims are vindicated in our culture. Lawyers provide necessary

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9 Kruse, Lawyers & Justice, supra note 4, 90 MINN. L. REV. at 391, 393 (arguing that a lawyer who has a fundamental moral disagreement with a client should handle the issue under a “moral conflict of interest” analysis) (quotation marks in original).
services in American society. Assessing a lawyer’s individual moral responsibility for the lawyer’s role related conduct must account not only for that necessity, but must also consider the consequences if role morality does not preempt individual morality. In this essay I argue that lawyers serve as essential facilitators of legal rights and, as such, must provide those services on a uniform, nondiscriminatory basis. Exposing a lawyer’s discharge of professional duties to individual moral accountability risks encouraging lawyer discriminatory selectivity in the providing of essential legal services. Lawyers are necessary conduits to essential aspects of democratic governance and rights enforcement and, thus, must exhibit neutrality with respect to those whom they serve (clients). Moreover, the lack of agreement over the substance of morally correct behavior may cause lawyers to be overly cautious in representing the interests of clients if lawyers are deemed morally accountable for their clients’ ends. The second claim I make is that professional codes already recognize that a lawyer may allow personal moral values to influence or determine certain aspects of the representation. These allowances are transparent and represent the profession’s position as to how role obligations and personal moral views of role actors should be meshed. Allowing lawyers to use personal moral views outside these allowances authorizes a form of individual lawlessness and disloyalty to the client that is inconsistent with the role lawyers occupy in our society.

See, e.g., ABA MODEL RULES OF PROFESSIONAL CONDUCT (ABA MODEL RULES), Rule 1.6(b) (holding that in certain enumerated circumstances a lawyer “may” disclose client confidential information without the consent of the client or authority implied in the client-lawyer relationship); Model Rule 3.3(a)(3) (holding that a lawyer “may” refuse to offer evidence, other than the defendant’s testimony in a criminal matter, that the lawyer reasonably believes is false).
II

THE PROFESSIONAL ETHOS

The professional claim that Wasserstrom and others critique consists of two-parts. First, a lawyer should be a neutral partisan in advancing the client’s lawful position. The role of the lawyer is to facilitate and enable clients to achieve lawful objectives, not serve as moral arbiters of the correctness of the client’s moral choices. Second, in advancing the client position the lawyer is not morally accountable for the consequences of partisanship. The advancement of the client’s lawful position may be social undesirable, inflict harm on third parties, or be morally reproachable; nevertheless, the lawyer is privileged to help the client achieve his goals without moral accountability for her conduct in doing so. David Luban summarized this view thusly:

A lawyer is not to judge the morality of the client’s cause; it is irrelevant to the morality of the representation. That, I think, is the official view of most lawyers: the lawyer’s morality is distinct from, and not implicated in, the client’s. Murray Schwartz calls this the “Principle of Nonaccountability”:

When acting as an advocate for a client . . . a lawyer is neither legally, professional, nor morally accountable for the means used or the ends achieved.

Add to this the “Principle of Professionalism”:

When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail.
And you get what is usually taken to be the professional morality of lawyers. Gerald Postema calls it the “standard conception of the lawyer’s role,” William Simon says that these principles (which he calls the “Principle of Neutrality” and the “Principle of Partisanship”) define partisan advocacy.¹¹

Wasserstrom contended that the professional claim led to and encouraged amoral behavior on the part of lawyers. A “good”, meaning “technically proficient” lawyer, could not be a good, meaning “morally correct” individual, if the lawyer assisted the client’s immoral conduct.

Perhaps more critical was an issue hinted at by Wasserstrom, but developed to greater extent by that others that lawyer amorality resulting from the standard conception encouraged and incentivized lawyers to facilitate and enable illegal client conduct.¹² This resulted because the line between legal and illegal is often opaque and, even when otherwise, partisanship may blind the lawyer to the subtly and nuance of the situation, causing the lawyer to misjudge or mischaracterize the legality of the client’s proposed action.¹³


Lawyers, like all other people, lie; we intentionally lead people to believe things we now are not true. Indeed, as Hannah Arendt pointed out, there is a sense in which lying comes naturally to all of us because human action itself, like lying, rests on the ability to imagine that things might be different than how they actually are. At least up to a point, lying is both easy and tempting; it never comes into conflict with our reason because things could have been as the liar contends and one may come up with a lie that sounds more plausible than the facts themselves.
Holding lawyers morally accountable for facilitating and enabling lawful but immoral client would, it was argued, serve as a constraint against these bad tendencies. Lawyers would interpose their own moral sensibilities and prevent clients from achieving legal, but unjust, results. The proponents were not always clear whether the lawyer was obliged to inform the client that the lawyer’s actions would be governed by the lawyer’s moral sentiments rather than the client’s instructions. The proponents were, however, seemingly uniform in their belief that lawyer moral sentiments would ordinarily be more justice-oriented and more morally correct than client moral sentiments.

Id. (footnotes omitted).

14 For example, in William Simon’s Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083 (1988) Simon argues that lawyer should have and need the discretion to refuse to implement client objectives that would lead to injustices. Simon is never clear in the paper whether the lawyer’s discretion here must be transparent and disclosed to the client. For example, if the lawyer believes it would be immoral to raise the statute of limitations as a defense, does the lawyer simply decide the issue himself or does he have a discussion of the issue with the client? If the latter, does he follow the client’s directive? Does the lawyer seek to persuade the client to acquiesce to the lawyer’s viewpoint? Does the lawyer threaten to withdraw from the representation if the client does not acquiesce? The dynamics of the relationship are not addressed in the paper.

15 See WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 9 (1998) (urging lawyers to “take such actions, as considering the relevant circumstances of the particular case, seem to promote justice”); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 159 (1998) (arguing that professional codes should “be redrafted to allow lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics to pursue these ends”); DEBORAH RHODE, IN THE INTERESTS OF JUSTICE 66-67 (2000):

[L]awyers [must be prepared to] accept personal responsibility for the moral consequences of their professional actions. Attorneys should make decisions as advocates in the same way that morally reflective individuals make any ethical decision.
III

THE MORAL CRITIQUE OF PROFESSIONAL CONDUCT

The legal profession has long tussled with the question how far a lawyer should identify with and assist a client in achieving the client’s lawful aims and goals. I emphasize lawful because the issue is lawful versus immoral conduct, not lawful versus unlawful conduct. Lawyers may no, any more than anyone else, engage in or assist and abet unlawful conduct.16

The issue whether lawyers are privileged to engage in or assist and abet immoral, but legal, conduct has long produced diverse opinions within the bar as far back as the early Nineteenth Century. One view holds that the lawyer, being duty bound to advance the client’s cause, is immune from the moral consequence of lawyering.17 The contrary viewpoint argued that there was no real separation between


17 2 Trial of Queen Caroline 8 (J, Nightingale ed. (1820-1821):

An advocate, in the discharge of his duty, knows but one person in the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

The strict partisan position has even earlier antecedents. See 1 JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 342 (2d ed. 1888):

Boswell: But what do you think of supporting a cause which you know to be bad?
individual and professional self; consequently, personal moral duty was professional obligation.\textsuperscript{18}

The early Nineteenth Century debate continues today. Modernly, the argument for moral immunity under the standard conception is framed in terms of conflict of interest.\textsuperscript{19} The essential feature of this argument is that were the lawyer to hold back from advancing the client’s cause for reasons of the lawyer’s personal morality, the lawyer would create a conflict of interest that would undermine the duty of loyalty owed to the client. This is not to say that under this view the lawyer cannot discuss the moral implications of the client’s proposed actions with the client;\textsuperscript{20} it is to say, however, that ultimately the client decides whether to act morally or immorally and that decision is not imputed to the lawyer. The lawyer’s duty is to provide neutral professional assistance to achieve the lawful objectives desired by the client, even though the lawful objectives may be perceived by some as immoral.

I would concede that the conflict of interest claim operates as an inadequate justification for lawyer immunity from personal moral responsibility because it is a valid justification if and only if professional immunity from moral accountability is already justified. To say that certain actions by the lawyer would conflict with the interests of the

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| Johnson: | Sir, you do not know it to be good or bad til the Judge determines it. |

\textsuperscript{18} See David Hoffman, Fifty Resolutions in Regard to Professional Deportment, in A COURSE OF LEGAL STUDY 571, 752-75 (2d prtg. 1954), at 338 (Resolution I) (“I will never permit professional zeal to carry me beyond the limits of sobriety and decorum.”); at 340 (Resolution XIV) (“My client’s conscience and my own are distinct entities); id. at 346 (Resolution XXXIII) (“What is morally wrong cannot be professionally right.”).


\textsuperscript{20} Such discussions are permitted, but not required. Model Rule 2.1 (holding that lawyer “shall” render independent, professional judgment and advice and “may” discuss and counsel the client about moral, economic, social and political consideration that may be relevant to the client’s matter).
client defines what is proper role behavior as the professional role is defined; it does not, however, inform us why the professional role itself is justified. Avoiding conflicts of interests between lawyer and client helps the lawyer achieve the legitimate objectives of the professional relationship. What those legitimate objectives are must, however, be independently validated.

The contrary claim that lawyers bear personal moral accountability for their lawful professional conduct, however, also fails to sustain itself. First, proponents of the argument never apply it consistently to all aspects of professional practice. Criminal defense is uniformly excepted. In deconstructing the adversary ethic, proponents of moral responsibility treat criminal proceedings as special or exceptional and, thus, not a justification for moral non-accountability across the span of lawyer activities. Secondly, the argument for moral responsibility is not established positively by demonstrating why the lawyer qua lawyer should be morally accountable; rather, the argument is made by deconstructing the claim that moral immunity is justified by the profession’s adversary ethic. Having discredited, in their opinion, that specific justification, moral accountability for professional conduct becomes, in effect, the default conclusion.

The “special status” of criminal defense is often asserted but not established in a manner that effectively distinguishes it from other aspects of the legal system that have

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21 David Luban, Lawyers and Justice: An Ethical Study, 145 (’988) (“The criminal defense lawyer is one of the clearest cases of a role occupant who will often find that the justifications of the role are so crucial that they override all but the most stringent demands of common morality.”); cf. Gerald L. Shargel, Federal Evidence Rule 608(B): Gateway to the Minefield of Witness Preparation, 76 Fordham L. Rev. 1263 (2007) (“Role morality applies with particular force to criminal defense attorneys. Because the defendant’s liberty and sometimes life are at stake and the government is such a formidable opponent, the criminal defense attorney has exceptionally strong duties of loyalty and zeal”).

22 Wasserstrom, Lawyers As Professionals, supra, note 1, 5 HUM. RTS. at 13; David Luban, The Adversary Systems Excuse, supra note 11, at 113-117.
substantial impacts on individuals. The criminal defense exception may be linked to political documents, particularly older documents, in which criminal proceedings are given particular attention, as evidenced by the Bill of Rights. But that particularized attention does not explain the moral claim of non-accountability for criminal defense. Older documents simply evidence the desire that certain procedures or rights be legally recognized and enforceable, but the priority of personal morality over legal right or duty is the fundamental claim of the proponents of lawyer personal moral accountability. The claim cannot be satisfied by identifying the legal preference given criminal defense protections. That same argument would suggest that lawyer nonaccountability is the preferred status because it is rooted in longstanding professional norms that have legal or quasi legal status. So the argument is further made that criminal cases involve potential loss of liberty, which is so great a deprivation as to justify moral immunity for the advocate.

I don’t question the claim that liberty is a significant value and the loss of liberty is a significant injury, but is that loss a special case justifying exceptional treatment? Opponents of moral nonaccountability, seeking to preserve vigorous criminal representation, assert that it is, but is loss of liberty different in kind or only in degree from loss of other basic rights, such as loss of employment, loss of housing, or loss of disability or welfare benefits? Advocates of accountability argue that the state’s active role, coupled with its resources, in depriving the defendant of his liberty distinguish the criminal from the civil claim. But does a state that actively denies basis human rights,

Wasserstrom, *Lawyers As Professionals*, supra note 1, 5 HUM. RTS. at 12 (“Because a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment, even when wrongdoing has
actively polices and controls personal relationships, or deliberately denies or fails to provide basic human needs, impose a lesser burden on its citizens? Liberty is an important value in our modern constellation of rights, but what is it that makes the liberty interest unique so as to excuse lawyers from moral accountability only when representing defendants in criminal proceedings?  Why aren’t lawyers also immune from moral accountability when involved in economic claims, or civil rights/civil liberties claims, or constitutional rights claims? Modern advocates of lawyer accountability have expanded the exception into areas where a “vulnerable” party may be exploited by a sophisticated adversary, in effect conceding that the focus on personal freedom is too limiting. The problem created by focusing on vulnerability and exploitation is that the terms have no boundaries. Physicians no doubt feel oppressed and burdened by malpractice litigation. Does that give their lawyers the freedom to submerge personal moral views in favor of aggressive, “scorched earth” representation?

occurred, it is easy to accept the view that it makes sense to charge defense counsel with the job of making the best possible case for the accused -- without regard, so to speak, for the merits”).

24 Proponents of moral accountability employ a narrow definition of “Liberty” which essentially conflates that right to free physical movement. The right is much broader and pervasive, and, in this broader and pervasive sense, has roots equally ancient and historic with the prominence of criminal proceedings in older documents.

25 Kruse, LAWYERS & JUSTICE, supra note 4, 90 MINN. L. REV. at 424.

26 ATUL GAWANDE. BETTER 87 (2007) (“Malpractice suits are a feared, often infuriating, and common event in a doctor’s life . . . . This is a system that seems irrational to most physicians”). Gawande goes on to note:

Providing medical care is difficult. It involves the possibility of any of a thousand missteps, and no doctor will escape making some terrible ones. Lawsuits demanding six-figure sums for bad outcomes, therefore, seem malicious to physicians – and even worse when no actual mistake is involved.

Id. at 87-88.
Wasserstrom also claimed that “role differentiated behavior is enticing and reassuring precisely because it does constrain and delimit an otherwise intractable and confusing moral world.” Wasserstrom was concerned that the enticement and reassurance would encourage amoral behavior on the part of lawyers who would identify too closely with their clients. Implicit was the concern that lawyer amorality would encourage client immorality and, perhaps, client illegality. I will concede this is a real risk and a risk that increases as profit maximization becomes the dominant aspirational goal of lawyers.

Wasserstrom’s observation, however, begets another, different conclusion from what he envisioned: role-differentiated behavior is necessary to enable clients to have access to individuals who are essential facilitators when it comes to securing legal rights and the benefits of legal assistance. The enticement and reassurance allows and encourages lawyers to accept clients and provide services society deems necessary for a free citizenry. Holding lawyers morally accountable for their client’s actions, as Wasserstrom and others urge, may give lawyers leverage to prevent clients from acting immorally, but at the cost of preventing clients from achieving lawful client objectives.

The common law long recognized that holders of necessary resources and services owed a general obligation to the community to provide those services on a nondiscriminatory basis. There is general, societal consensus as to the core concept

27 Wasserstrom, Lawyers as Professional, supra note 1, 5 HUM. RTS. at 9.

that essential services should be provided on a non-discriminatory basis; the disagreement is in the application, for example, the claim may be that the service is not essential or that access is not blocked. The concern that providers of essential services may use their control to discriminate and deprive consumers of choice is one that is replicated in many ways in modern society. Even if the analogy to essential services is seen as strained, the legal profession has consistently defined itself as devoted to public service in the sense of providing legal services to members of society. The view of law practice as a business rather than a profession has traditionally been treated as an aspersion, not as an aspiration.

29 Howard A. Shelanki, Unilateral Refusals To Deal in Intellectual and Other Property, 76 ANTITRUST L.J. 369, 370-71 (2009) (stating that “[o]n the policy side, there is a reasonable consensus that, at least in theory, a firm’s refusal to supply its rivals can, under some circumstances, harm both short-run and long-run consumer welfare . . . . [C]onsensus breaks down . . . over views of how successfully courts and antitrust agencies can identify and balance the effects of a monopolist’s refusal to deal”).

30 Brett Frischmann and Spencer Webber Waller, Revitalizing Essential Facilities, 75 ANTITRUST L.J. 1, 7-8 (2008).

31 Even the practice of Jim Crowism was predicated on the pretense that access to essential services, such as public schools, was not blocked. “Separate but Equal” was the representation even if “Separate but Unequal or Non-Existential” was the practice. See Paul Finkelman, The Radicalism of Brown, 66 U. PITTS. L. REV. 35, 47 (2004) (“While all these institutes were in theory “separate but equal,” in practice they were never equal. No matter how bad conditions might be for whites, they were invariably worse for blacks.”); cf. Jeanne M. Powers and Lirio Patton, Between Mendez and Brown: Gonzales v. Sheely (1951) and The Legal Campaign Against Segregation, 33 LAW & SOC. INQUIRY 127, 137 (2008) (“The NAACP initially challenged segregation in graduate and professional schools by focusing on the equal side of “separate but equal” on the theory that the high cost of creating separate and completely equal school systems would ultimately ‘destroy segregation’”) (citation omitted).

32 A current manifestation of this concern is the net neutrality debate. Net neutrality argues that users of the internet should have open access to, without discrimination or control over, any content available on the internet. In effect users should have equal access to congressional debates and pornography. The opposing view holds that network operators should be able to control which internet content gets preferential treatment. In other words, internet providers would get to advance their policy preferences over those of internet users.

33 The lament that law practice is becoming less a profession and more a business is not new. See Champ S. Andrews, The Law – A Business Or A Profession, 17 YALE L.J. 602 (1908); JULIUS COHEN, THE LAW: BUSINESS OR PROFESSION? (rev. ed. 1924). Modernly, however, the question mark is seen as anachronistic. See Russell G. Pearce, Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-As-Business Paradigm, 27 FLA. ST. U. L. REV. 9, 18 (1999); Mary C. Daly, The Ethical
Law is today a highly regulated practice with extensive restrictions on who may provide legal services and the terms and conditions under which legal services are provided to clients. Lawyers’ duties are defined not just by codes of professional responsibility, but by common law and statutory obligations. An increasingly frequent element of this regulation is the requirement that lawyers not discriminate in the providing of professional services.

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34 See Susan D. Hoppock, Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement, 20 GEO. J. LEGAL ETHICS 719, 722 (2007) (stating that all American jurisdictions prohibit the practice of law by individuals not licensed or authorized by the jurisdiction to provide legal advice).

35 RONALD MALLEN & JEFFREY SMITH, LEGAL MALPRACTICE (5th ed. 2009) is a treatise, updated annually, that collects cases holding lawyers civilly liable for breach of duties owed to both clients and non-clients; Fred C. Zacharias & Bruce A. Green, Rationalizing Judicial Regulation of Lawyers, 70 OHIO ST. L.J. (2009) (identifying general common law regulation through actions for malpractice, breach of fiduciary duty, fraud, etc.).


Law in the United States is a heavily regulated industry. Lawyers are licensed in each state. They are governed by professional rules, usually adopted and enforced by state supreme courts. The courts regulate lawyers separately as well, through supervisory decisions in the course of Litigation and by implementing common law civil liability rules that govern legal practice. These include malpractice, breach of fiduciary duty, and other causes of action. Administrative agencies – particularly federal agencies – also establish and implement rules governing lawyers who practice before them. Federal and state legislatures play a further role in regulating the bar, providing statutory regulations and criminal penalties that apply to lawyers.

Id. at 1147-48 (footnotes omitted).

37 Nathanson v. MCAD, 16 Mass. L. Rptr. 761 (Mass. Super. 2003) (finding that the lawyer’s conduct in rejecting a client because of his gender was subject to Massachusetts’ statutory prohibition of discrimination in places of public accommodation. The court rejected the lawyer’s claim that (1) her practice was subject to exclusive regulation by the Supreme Judicial Court and the bar; (2) her office was not a place of public accommodation; (3) her rights of free speech or expressive association were infringed); see Steve Berenson, Politics and Plurality in a Lawyer's Choice of Clients: The Case of Stropnicky v. Nathanson, 35 SAN DIEGO L. REV. 1 (1998); Symposium, Compelled Lawyer
No proponent of lawyer personal moral accountability argues that lawyers should provide professional services on a discriminatory basis. That, however, is the necessary, inevitable result of stripping lawyers of nonaccountability. Lawyers will now determine whether the client’s end is morally just and decide whether to advance the client’s position, recognizing that if they do, they bear moral responsibility for their professional actions. As a consequence, lawyers will then discriminate, perhaps not on the overt basis of race or gender or sexual orientation, but on the explicit basis of the lawyer’s assessment of the moral worth of a client’s lawful end and objective of representation, which may conceal improper implicit biases.

This result is troubling. Moral judgment may conclude that legal judgment is wrong because legal judgment failed to consider relevant factors outside the legal rules, which, for simplicity sake, I will label the moral justness of the legal position. For example, proponents of moral accountable often argue that a lawyer acts immorally if the lawyer invokes the statute of limitations to defeat a just claim, e.g., a debt that was lawfully incurred, that client admits he received the money, didn’t pay it back, could pay it back, but now wants to bar the lender’s claim for repayment on the ground the claim is

38 I do not address in this essay the issue whether the lawyer’s decision must be communicated to the client at a point in time that would enable the client to find another lawyer to advance the client’s position. However, if a lawyer should disclose a dereliction of duty (Benjamin P. Cooper, The Lawyer’s Duty To Inform His Client Of His Own Malpractice, 61 BAYLOR. L. REV. 174 (2009)), it would seem appropriate that the lawyer should disclose his intent to subvert the client’s aims and objectives of the representation.
time-barred.³⁹ Why is the lawyer acting immorally here? If it’s ability to pay, why does that factor trump all the factors that support the time-bar (statute of limitations)? Statutes of limitation serve a number of purposes. They provide peace of mind so people may cleanse their books of potential liabilities that occurred before a certain date.⁴⁰ They prevent the perpetration of fraud by precluding the prosecution of stale claims because “evidence has been lost, memories have faded, and witnesses have disappeared.⁴¹ They enhance commercial intercourse by freeing individuals from the distraction and disruption of litigation.⁴² They test whether claims are meritorious (the assumption is that meritorious claims will be diligently prosecuted); they control dockets; and they discourage courts from reaching dubious, difficult to support decisions based on stale evidence.⁴³ Why do these factors fade into oblivion because the clients admits the debt is owed? If the law says that public policy discharges the debt due to passage of time, why is the client denied that legal right? Although dressed as moral engagement, the dialogue and concerns more closely represent policy disagreements.

³⁹ DAVID LUBAN, LAWYERS AND JUSTICE 9 (1988) (discussing and criticizing counsel’s actions in Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957) in which a wealthy defendant interposed the statute of limitations defense to block the prosecution of a claim (debt) brought by an “old friend, countryman, and former employee.”)


⁴² Wood v. Carpenter, 101 U.S. 135, 139 (1879) (discussing Indiana’s six year statute of limitation for fraud); Development in the Law – Statutes of Limitations, supra note 40, 63 HARV. L. REV. at 1185-88.

If policy disagreements serve as a fulcrum of moral judgments, instructing lawyers that their moral sensibilities are significant in deciding how to represent the client represents a broad realigning of the allocation of power within the lawyer-client relationship. Lawyer policies now trump client policies. That would appear to advance the evil of lawyer dominance that proponents of moral accountability usually disparage.44

Commentators who argue that lawyer personal morality should influence professional judgment tend to see moral issues as settled. As the use of a limitations defense to bar an otherwise valid claim illustrates, the idea of moral certainty may be illusory. Consider another example, the withholding of medical care to a child by the child’s parents based on the parent’s religious convictions. Should a lawyer allow the lawyer’s personal moral views to influence how the lawyer would advocate for the parents regarding their choice?

Allowing a parent to withhold necessary medical care to a child has been said by proponents of moral accountability to be obviously morally wrong;45 however, the issue

44 Wasserstrom, Lawyers As Professionals, supra note 1, 5 HUM. RTS. at 15-17.
45 See Richard K. Greensfein, Against Professionalism, 22 GEO. J. LEG. ETHICS 327 (2009):

An Attorney may represent a client who wishes on religious grounds to prevent his infant from receiving necessary medical treatment, even though a foreseeable consequence of success will be that the child suffers serious disability or death. But acting in a manner that would foreseeably harm an innocent person is ordinarily thought to be immoral.

* * * *

Consider for instance, the earlier example of an attorney who helps the client prevent his infant from receiving necessary medical treatment. Affirmatively acting in a manner that has the foreseeable consequence of harming the child’s health violates a moral duty owed by the lawyer toward the child: in its narrowest form, the duty owed by persons not to harm innocent others.

Id. at 352, 358. Under this approach use of placebos in medical research would also "ordinarily be thought to be immoral" because participants who received placebos might be harmed because they did not receive the treatment the study was testing for efficacy. On the other hand, lying may be socially beneficial:
here is more complex. In the complex case in which lawyers become involved, the parent is withholding care not because of personal whim or caprice, but because of sincerely held, good faith religious belief. Stating that the act of withholding medical care is immoral necessarily asserts that the reason behind the act (religious belief and religious tenet) is immoral. That makes the issue much more difficult and much more dangerous.

Treating certain beliefs, whether held by evangelical Christians, Moslems, or Christian Scientists, or any minority religious group, as immoral risks marginalizing small, distinct religious communities and subjecting them to discriminating treatment because their views are outside the mainstream view of acceptable morality. Moreover, in the resolution of the moral issue there is no transparency as there is with a legal decision. The morally correct lawyer simply subverts the client’s efforts to achieve its lawful objective. Where legal proceedings are open to public inspection, criticism, and review; lawyer moral decision making is closed, secretive, and non-reviewable. This

Placebo treatments, like sugar pills and saline injections, are effective in treating pain and perhaps a host of other conditions. In fact, recent neuro-imaging studies show that the pathways of placebo pain relief in the brain largely overlap the pathways of pain relief from drugs like morphine. Placebos are also cheaper and safer than corresponding active medications. The most effectively use placebos to diagnose and treat patients in clinical practice, however, doctors must deceive patients as to the placebo nature of the intervention.


46 Cf. SISELLA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 92 (1978) (stating that moral justification cannot be exclusive or hidden; it has to be capable of being made public.).
lack of transparency also increases the risk that lawyers may articulate publicly acceptable reasons to mask the true considerations for the decisions.\textsuperscript{47}

Proponents of moral accountability often assume the moral high ground rather than prove the claim. For example, Wasserstrom suggested that a father who wished to disinherit his son because of the son’s opposition to the Vietnam War was acting immorally,\textsuperscript{48} but why is that? Why is the son’s opposition to the war moral, but the father’s support immoral? Would it make any difference if the father was a career military person, had fought in a war, had suffered a war-related injury or loss? Wasserstrom does not develop the point; he simply assumes the point and moves on. The morality of the position however, highly contentious, which goes to the next point.

Proponents of moral accountability downplay the fact that moral positions are contentious. Contentiousness over what is morally correct raises significant concern when it is raised as a counterpoint to professional duties. If lawyers, as professionals, can refuse to raise statute of limitations defenses because the lawyer believes it is immoral to defeat an otherwise enforceable claim, where do we draw the line? May other professionals use their personal moral sentiments to avoid their professional duties? For example, should pharmacists be allowed to refuse to provide contraceptives because they believe the prevention or cessation of life is immoral?\textsuperscript{49} If


\textsuperscript{48} Wasserstrom, \textit{Lawyers as Professionals}, supra, note 1, 5 HUM. RTS. at 7-8.

lawyers, as professionals, can morally provide deficient professional service to clients, can pharmacists, as professionals, morally provide a deficient product to their clients, e.g., a placebo rather than a contraceptive?

Even if was limit the inquiry to lawyers as professions, line drawing becomes exceedingly difficult. Should lawyers refuse to represent life insurance beneficiaries on fraudulently procured policies insurers cannot contest because the legislature has decided, as a matter of public policy, that the policy should be deemed uncontestable?\textsuperscript{50} A benefit that was fraudulently obtained appears to be one that is morally suspect; that the client is legally entitled to the benefit does not appear to alter that fact. Does a lawyer act immorally in helping the client claim the benefit? If it is relevant here that the state has declared that public policy trumps morality, why does that argument not hold in the case of the debt barred by the statute of limitations? Other difficulties can be easily conceived. For example, should lawyers refuse to advise clients that they have a technical legal ground that allows them to avoid an unprofitable contract because it is morally wrong to breach a promise?\textsuperscript{51} The reality is that much of what lawyers do can

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\textsuperscript{50} Public policy sometimes limits an insurer’s right to contest policies on the grounds of fraud to a specific period after the policy is taken out; after that period of time the policy becomes incontestable for fraud. These uncontestable provisions operate much like statutes of limitations even if they permit some fraudulent claims to be asserted against insurers. Robert R. Goodins, \textit{Fraud and the Incontestability Clause: A Modest Proposal For Change}, 2 CONN. INS. L.J. 51 (1996) (noting that “[f]or decades the incontestable clause in life and health insurance contracts has been interpreted to bar insurers’ defenses based upon material misrepresentations in the application – even in circumstances where the insured has committed fraud.”) Is it immoral for a lawyer to represent a client who presents a claim on a fraudulently procured insurance policy that the insurer cannot contest because of the passage of time?

be characterized as advancing legal, but immoral, causes. A morally good lawyer then is a lawyer who is often foreclosed from helping clients achieve lawful ends? This seems particularly injurious to clients who rely on lawyers to help them (clients) navigate through a law-based culture and society.

Proponents of moral accountability might argue that the client is not prejudiced because the client can always find a lawyer who will provide the service. This argument can be applied in two contexts:

A) Both Lawyer and Client agree that the client’s objectives are legal but immoral.

B) Lawyer believes Client’s objectives are legal and immoral, but Client believes they are legal and moral.

Category A necessarily assumes that another lawyer (Lawyer 2) is willing to act immorally and this willingness allows the first lawyer (Lawyer 1) to act morally. This argument for morally correct behavior rests on evasion rather than the inherent morality of the position. In effect, Lawyer 1 may act consistent with the lawyer’s moral sensibilities if, and perhaps only if, the client will not be prejudiced because an immoral Lawyer 2 will represent the client and secure the client’s immoral objectives. This is the moral equivalent of the “hot potato” argument. I doubt proponents of accountability would apply the argument elsewhere. Should innkeepers or lunch counter operators be allowed to discriminate because the excluded patron can find accommodations or food elsewhere? Telling providers of an essential service that they may act upon their moral

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52 This strikes me as a form of “avoision,” which is Leo Katz’s evocative neologism that defines efforts to straddle the line between the legitimate and the illegitimate. See LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW x (Chicago 1996) (arguing that avoision is not morally objectionable).
sensibilities to deny service creates the opportunity to do wrong by professing to be doing right.

Category B simply, allows the lawyer to prefer the lawyer’s personal beliefs over the professional obligations to represent a client loyally, diligently, and with competence. But within a professional role premised on a norm of agency why are the lawyer’s personal moral views entitled to preference over the client’s personal moral views. Lawyers voluntarily enter into a professional role of service to clients, a main characteristic of which is that the lawyer acts as a fiduciary. It is a strange twist on the idea of a fiduciary relationship that the fiduciary is entitled to prefer his or her interests over the beneficiary (client) of the relationship. It is uniformly the other way around and proponents of lawyer moral accountability have not, to my knowledge, made the counter case that a lawyer’s fiduciary duty of loyalty should be subservient to the lawyer’s personal views on morality.

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Lawyers do have some legal flexibility here under the professional codes to refuse on non-discriminatory grounds to represent clients (see, e.g., ABA Rules of Professional Conduct, Rule 1.16(a)-(b)) and it is generally, but not uniformly, accepted that lawyers have no general duty to accept representation offered by prospective clients. The issue addressed here, however, is lawyer conduct within an actual, existing representation of a client.

Restatement (Third) Law Governing Lawyers §16 (2000):

To the extent consistent with the lawyer’s other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:

(1) proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation; . . . .

(3) comply with obligations concerning the client’s confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and . . . .
Proponents of accountability argue that lawyer moral accountability is needed to restrain lawyers from too loyally, too diligently, and too competently representing clients. There is a suggestion of that in the Wasserstrom excerpt quoted earlier and has been offered by leading exponents of the accountability view. Lawyers are seen as too willing to facilitate and enable client conduct that is harmful to society. That harm is not, however, illegal harm. As noted previously, lawyers may not facilitate or enable illegal harm. Proponents of lawyer moral accountability are, of course, aware of the distinction between legal and moral harm, even if the distinction can be elusive. They

55 See supra text and notes 8, 21.
56 RHODE, IN THE INTERESTS OF JUSTICE, supra note 15, at 15.
57 ABA Model Rules, Rule 1.2(d), which provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

See supra text and note 16.
58 Cf. Alice Wooley and Sara L. Bagg, Ethics Teaching in Law School, 1 CAN. LEGAL EDUC. ANN. REV. 85 (2007) (noting that distinguishing between moral and legal deliberation based on criteria that are identified as moral or legal yields no universally acceptable distinction between them). Wooley and Bagg offer a functional basis for distinguishing between the two:

It would appear then that neither a distinction based on the “morality” of ethics relative to law, or based on law as focused on means, with ethics focused on ends, is entirely satisfactory in the attempt to distinguish legal decisions from ethical ones. In our view, the most consistently defensible distinction between ethical and legal decisions is instead that an ethical decision is made by a lawyer with respect to her own conduct, while a legal decision is one made by the lawyer with respect to the conduct of her client. A lawyer necessarily takes personal responsibility for her ethical decision; in essence the questions she must ask herself is – “what should I do?” In contrast, legal decisions involve asking “what course of action can (or should) my client take?” The rendering of such advice to a client absolutely requires that the lawyer take personal responsibility for the advice she gives; this is the ethical aspect of the decision to give that advice, and not the legal aspect of it.
are concerned that lawyer non-accountability may cause lawyers to overly identify with clients and, as a consequence, fail to identify the correct distinction between legal and illegal conduct and, in turn, facilitate the achieving of illegal ends and objectives by the client.  

There is evidence that the failure of lawyers to maintain professional independence can lead to facilitation and enabling of client misconduct. Over-identification with the client and the desire to please the client, whether for personal or profit-seeking motives, can cause lawyers to fail to adhere to professional norms and may cause or contribute to a lawyer aiding and abetting client wrongdoing.

Proponents of moral accountability have not, however, made the case that holding lawyers morally accountable when they properly discharge professional obligations will, in fact, cause an appreciable number of lawyers to change their conduct to promote moral objectives the proponents advance. Lawyers are already permitted to decline or withdraw from representations if they find the client’s objectives repugnant or with which the lawyer fundamentally disagrees. That allowance has not apparently

Id. at ___.

59 Wasserstrom, Lawyers As Professionals, supra note 1, 5 HUM. RTS. at 13 (noting “Lawyers excessive preoccupation with and concern for the client”).


61 ABA Model Rules, Rule 1.16(b)(4).
influenced lawyer behavior in any significant way. It remains to be demonstrated that
holding lawyers morally accountable will have any discernable or desirable effect on
lawyers that proponents of moral accountability would find laudable. I will return to this
point in Part IV of the essay.

Holding lawyers morally accountable would, however, have consequences that
would be socially and morally disadvantageous. As I argued earlier,
moral harm is oftentimes very contentitious and that contentitiousness risks that the
lawyer’s mainstream moral views will dominate the client’s outsider or idiosyncratic
moral views. Because lawyers are necessary to access legal rights and the legal
system, a likely consequence is that some lawyers will use their personal moral
convictions in ways that discriminate against insular and unpopular minorities. There is,
moreover, an inherent tension in this claim that lawyers should be morally accountable
for advancing the client’s ends and aims. Lawyers are presented as both too controlling
of clients (Svengalis) and as too beholden to clients (captives). Holding lawyers morally
accountable for their actions may discourage dependency, but it would seem to
incentivize control. Excessive control over another autonomous, free individual raises
moral issues. While proponents of moral accountability have identified this conflict,
they have not demonstrated how these concerns can be reconciled.

See Joshua E. Perry, et. al., The Ethical Health Lawyer: An Empirical Assessment of Moral
Decision Making (SSRN) at 23 (reporting results of an empirical study of Tennessee lawyers that “[w]hen
facing an ethical dilemma, the greatest motivating influences . . . were a desire to avoid discipline or
sanction . . . and concern over how the client’s interests would be affected. Also likely to influence the
actions of these respondents was the desire to feel good about themselves as a person and as a legal
professional.”) The authors of the study also noted that “those who reported higher rates of religiosity and
religious involvement were much more likely to be influenced by the desire to act consistently with their
religious beliefs.” Id.

Wasserstrom, Lawyers As Professionals, supra note 1, 5 HUM. RTS. at 16 (describing conflict as
paradox).
Some commentators argue that lawyers have a moral duty to discuss the moral aspects of the clients proposed aims and objectives. For example, Vischner argues that while lawyers should not be self-appointed moral arbiters of their clients, lawyers should make clients aware of the moral dimension of the legal representation:

The lawyer is not simply a technician, nor is she a moral arbiter. As legal advisors, lawyers are partners in a dialogue that brims with moral significance, whether or not they choose to acknowledge it.64

Vischner builds on a discretionary allowance in the professional codes for rendering non-legal advice65 and constructs the claim that discussion with the client of the moral aspects of the representation is morally required of the lawyer.66

Modern society is largely constructed on the principle of division of labor. Lawyers serve as legal technicians. They are trained in the intricacies and subtleties of the law. Physicians, therapists, investment advisors, etc., all occupy niches in the division of labor. As society become more complex, the general response within the professions is to specialize. A specialist’s knowledge is deep, but narrow; problems within the area of specialization are known; problems outside the area of specialization are not.


65 ABA Model Rules, 2.1:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation .

are referred to other specialists. Occasionally, problems straddle lines and create
niches within the fields. For example, bio-ethics is a specialty that developed because
medical knowledge alone was seen as insufficient to properly address certain problems
that arose in the context of patient care.

Societal and professional division of labor provide that lawyers have a defined
role as legal advisors. Legal problem may give rise to moral issues. They may also
give rise to economic, financial, emotional, medical, and therapeutic issues. If lawyers
have a duty to discuss moral issues with clients, do lawyers also have a duty to discuss
with the client other non-legal issues implicated by the representation? If not, why are
moral issues preferred?

Lawyers by training and experience develop competence in the area of providing
legal advice, but what prepares lawyers to engage in moral deliberation with the client
or provide moral advice? Having and forming moral impressions and sentiments is not
the same as having the expertise and ability to engage in moral deliberation or to
provide moral counseling and advice.

The claim that lawyers should have moral dialogues with clients regarding the
ends of the legal representation necessarily assumes that clients have little or no say in

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67 See ABA MODEL RULES, Rule 1.1, cmt. 2 (“Competent representation can also be provided
through the association of a lawyer of established competence in the field in question.”). The movement
to legal specialization has been pronounced. See W. Bradley Wendel, Morality, Motivation, and the

In the domain of professional ethics, critics have pointed to several
conditions that discourage ethical conduct: the changing structure of the
legal profession, the rise of multi-state and multi-disciplinary law
practices, the pressure of billable hours, and the specialization of law
practice. Posner and the structural critics make essentially the same
claim” Instruction in matters of ethics is insufficient to motivate a lawyer
to act against her self-interest.

Id. at 558 (footnote omitted); Michael Ariens, Know the Law: A History of Legal Specialization, 45 S.C. L.
Rev. 1003 (1994) (discussing the movement to legal practice specialization).
the matter. Why should lawyers presume that clients have not already considered the moral issues or presume that clients desire to hear the lawyer’s views on the matter? Are lawyers the specialists’ clients turn to for moral advice? Must a client, as part of the legal representation, submit to a moral dialogue with a lawyer? Would we require a physician to have a moral dialogue with a patient over the desirability of having an abortion or require a patient to sit through the dialogue?

Vischner argues that moral deliberation is a skill that can be learned. I have no reason to doubt that is true. Most skills can be learned, at least to some extent. And exposure through education likely imparts a level of understanding that exceeds the average of those who are not exposed to the topic in an educational environment. But there is no reason to think that this teaching modality is limited to morality; one can learn financial planning, counseling, etc., in an educational environment. Why is moral learning for the purpose of moral dialogue preferred over other non-legal skills? On the other hand, if all non-legal skills are necessary, how many individuals would have the competence to function as a legal technician?

Clients form relationships with lawyers because they need and desire legal representation. I do not disagree with the claim that some legal representations raise moral issues. I see, however, no basis to conclude that lawyers have particular skill or ability to provide moral advice or engage in moral deliberation with clients at anything but the most perfunctory and meaningless level, e.g., “What you (client) want to do is legally permitted but unjust.” I see no basis to conclude that clients want moral advice or moral dialogue from lawyers. If they do they can request it or, better yet, seek moral engagement from those who have expertise in the field. Absent evidence that lawyers

68 Vischner, Moral Engagement, supra note 64, ___ J. LEG. PROF. at ___.

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have a competency here to fill an unmet client need, there is no reason to create a duty that is both incapable of being met and undesired by clients.

IV

LAWYERS MORAL DELIBERATION

The argument for lawyer moral accountability springs from the perception that much of what lawyers do on behalf of clients is amoral. Lawyers must be moral actors because clients, if left to their own devices, will not make morally correct decisions; rather, clients will act immorally, relying on the lawyer to keep them from acting illegally. By facilitating client immorality, lawyers themselves act immorally. Complementary to this critique is the necessarily included point that the principle of non-accountability stunts moral growth and prevents lawyers from exercising moral judgment. There is, however, a fundamental oversight in this position. Lawyers may not be moral actors, but it is not because professional rules prevent them from doing so. At many critical points, professional rules permit moral deliberation by lawyers. There is, however, little evidence that lawyers elect to engage in moral deliberation even when professional codes expressly permit it.

Profession rules generally require lawyers to preserve the confidences and secrets of the client. The professional duty of confidentially has largely instrumental roots – the duty encourages client disclosure so that the lawyer may accurately advise the client. The professional duty is not, however, absolute. In some circumstances the lawyer may weigh the benefits promoted by the professional duty. For example, ABA Model Rule 1.6(b) permits disclosure (1) when the lawyer “reasonably believes”

69 ABA MODEL RULES, Rule 1.6(a) (2003).
disclosure of client confidential information is necessary to prevent reasonably certain death or substantial bodily harm.\textsuperscript{71} Another provision sets a similar threshold if the lawyer services were used to further reasonable certain substantial financial injury or property loss.\textsuperscript{72} In this context, once the threshold is met, the lawyer is given discretion to disclose. Because the decision is committed to the lawyer’s discretion, the lawyer is free to apply the lawyer’s personal moral values in deciding whether to disclose. The lawyer’s value structure may emphasize client loyalty over client betrayal or may emphasize protecting individuals from bodily or financial harm over protecting client confidentiality. What is the correct or best moral resolution of the issue is not the point; what is the point that professional rules permit moral deliberation here and at a number of critical points in the representation. This includes:

- Discussing the legal consequences of possibly illegal activity with the client,\textsuperscript{73} which may discourage the client from engaging in the activity or provide the client with a roadmap as to how to engage in the conduct and reduce the likelihood of detection.
- Consulting with third parties whether they should intervene in the affairs of a client with diminished capacity,\textsuperscript{74} which may lead to the prevention of harm to the client or may result in needless intrusion into the client’s personal autonomy.

\textsuperscript{71} ABA MODEL RULES, Rule 1.6(b)(1).
\textsuperscript{72} ABA MODEL RULES, Rule 1.6(b)(2)-(3).
\textsuperscript{73} ABA MODEL RULES, Rule 1.2(d).
\textsuperscript{74} ABA MODEL RULES, Rule 1.14(b).
• Withdrawing from representation of a client who the lawyer reasonably believed is perpetrating a crime or fraud using the lawyer services, which may prevent the lawyer from being able to dissuade the client from engaging in the conduct or may leave the client in peril because the lawyer’s belief, while reasonable, was inaccurate.

Lawyers are provided numerous opportunities within the professional rules to consider the moral consequences of a particular course of conduct. It does not appear, however, that lawyers are disposed to engaging in moral deliberation even when given the opportunity to do so. There are very few reported instances when lawyers have engaged in moral deliberation, with clients or by themselves. In the post-Enron era, lawyers who terminate relationships with clients are more likely to do so because of the legal risk of continued association, rather than moral disagreement, with clients. I believe that this aversion to moral dialogue and deliberation is because lawyers largely agree with the objectives their clients seek. Whether this is due to lawyer self-interest or lawyer cognitive dissonance is immaterial; lawyers are unlikely to have moral qualms with their clients’ activities; if they did one doubts they would continue in the area of practice. If you agree with your client’s objectives, it is unlikely that you will have a dialogue with the client or yourself over the efforts undertaken to achieve the objectives, much less the objectives themselves.

75 ABA MODEL RULES, Rule 1.16(b)(2)-(3).
76 Anthony E. Davis, Legal Ethics and Risk Management, 21 GEO. J. LEGAL ETHICS 95 (2008) (noting importance and prevalence of risk management in legal practice). Risk is defined as “any danger that, if not controlled, may lead to consequences unintended by and harmful to a law firm or lawyer.” Id. 98 (footnote omitted).
Even if the lawyer has moral qualms it is unlikely the lawyer will feel qualified or comfortable confronting the client unless the client signals some receptiveness to a dialogue on the issue. There probably are some clients who would be receptive, but there is no reason to believe that clients in general desire that their lawyers provide moral as well as legal advice. More importantly, neither the legal profession, through its professional codes, nor the political branches, through enacted law, have deemed it advisable or advantageous for lawyer to dispense moral advice as a necessary element of the practice of law. I do not contend that this is costless. But the antidote would prefer the interests of agents (lawyers) to feel morally good over the rights of principals (clients) to have their legal positions protected and advanced. For the reasons stated in this essay, that result would be undesirable.

CONCLUSION

This concern that the standard conception of lawyering (client centeredness and moral non-accountability) facilitates and enables harmful behavior is correct if we define harmful behavior as immoral behavior by the client. It may seem apparent that enabling that behavior is itself immoral, but that characterization ignores the larger social context in which lawyers and clients act. What is morally correct behavior is often contentious and disputable. Conferring a power on lawyers to use their own views of morally correct behavior to trump client views could lead to clients being unable to achieve legally proper goals. Such a result is improper given the unique role lawyers serve as agents of the legal system. It is also improper in that it could facilitate discrimination by lawyers against unpopular, insular groups.
Holding lawyers morally accountable for professionally proper conduct is also pernicious because it exalts the lawyer’s policy preferences over those of the client. It does not help the argument that the lawyer dresses the preferences in the guise of moral analysis or moral obligation. The situations in which lawyers act represent cases in which plausible policy arguments can be made for each side’s position. Moral accountability is simply a mask that allows the lawyer to prefer her harm-benefit policy calculus over that of the client. As a private citizen, the lawyer surely has that prerogative. As a lawyer operating as a necessary and essential intermediary between the client and the legal system, giving lawyers’ incentives to prefer their own moral sentiments over those of their clients will necessary result on a reduction of the client’s legal rights and a possible skewing of that inevitable loss against unpopular minorities.