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Moral Activism Manqué

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MORAL ACTIVISM MANQUÉ

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I. INTRODUCTION .......................................................................................... 128

II. TWO STORIES FROM A CIVIL CLINIC ................................................ 132
    A. Amy's Story ....................................................................................... 132
    B. Kendra's Story ................................................................................. 134

III. A PRIMER ON THE MORAL ACTIVISM PROJECT ............................ 136
    A. Moral Activism's Scholarly Pedigree .............................................. 137
    B. How Moral Activism Might Influence Practice .............................. 148
    C. Activism and Money; Activism and Criminal Defense ............... 152

IV. MORAL ACTIVISM'S DISAPPOINTING INFLUENCE ON
    PRACTICE .............................................................................................. 155

V. FOUR PLAUSIBLE, BUT UNLIKELY, EXPLANATIONS FOR
    MORAL ACTIVISM'S IMPOTENCE .................................................... 158
    A. Does Moral Activism Need Better Logic? ...................................... 159
    B. Does the "Common Morality" Conception Have Substance? .... 160
    C. Is Moral Reasoning Too Complicated? ......................................... 163
    D. Maybe Moral Activism Fails Because Lawyers and Law
       Students Have No Souls ................................................................. 164

VI. TROUBLESOME PRACTICES AND UNCERTAINTY ABOUT
    THE WORLD ............................................................................................ 167
    A. Bad Acts, Factual Uncertainty, and Cognitive Biases ............... 167
    B. The Experience from a Clinic ......................................................... 175

VII. PRACTICE IMPLICATIONS FOR SYMPATHETIC LAWYERS
    AND TEACHERS .................................................................................. 179

VIII. CONCLUSION ....................................................................................... 182

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financial support.
The moral activism I aim to promote is not simply a kind of philosopher’s pipe-dream; instead, it is a reaffirmation of one of the bar’s own vital traditions. I confess to relief at this thought. Like many who have chosen to write philosophically about issues of public significance, I have often been haunted by the suspicion that what I had to say was simply irrelevant to the world as we find it. I am entirely happy to abandon any claims I might have to novelty and tie moral activism to the self-understanding of a great many lawyers.

I. INTRODUCTION

Since the mid-1980s, legal ethics scholarship has trumpeted a commitment to lawyering for the good, and not just for instrumental gain—what David Luban has called “moral activism” or “morally ambitious lawyering.” Since the mid-1980s, the moral quality of lawyering practice has, by most accounts, degenerated, perhaps significantly. In this article I explore some reasons for this apparent disconnect. Why has the “moral activism project,” as I shall call it, turned out so apparently futile? Why have the law students trained in responsible practice seemingly practiced so irresponsibly as lawyers? I conclude, in the end, that the worry expressed by David Luban in the paragraph quoted above might have had more substance than he realized back in 1990. The sophisticated philosophical lessons from the moral activism project may, sadly, have less influence in the actual world of high pressure and factually complicated practice settings than its adherents have hoped.

One can only guess at the explanations for the apparent ineffectiveness of moral activism, of course, and guessing is the best I can do here. There are a number of plausible explanations, and each of them may have some role to play in the stubborn persistence of


2. LUBAN, LAWYERS AND JUSTICE, supra note 1, at 160 (defining “moral activism” as “a vision of law practice in which the lawyer who disagrees with the morality or justice of a client’s ends does not simply terminate the relationship, but tries to influence the client for the better”).


4. See infra Part IV (discussing moral activism’s disappointing influence, or lack thereof, on lawyering practice).
nasty professional behavior. I suggest, though, one plausible explanation which, if true, augurs not very well for the future of moral activism. That explanation focuses on what lawyers know about the world, rather than what lawyers believe to be right, moral, or ethical.

My thesis develops from anecdotal experiences within my clinical teaching combined with rapidly emerging insights from cognitive psychology regarding how people know what they know and decide what they decide. Most moral activism discussion tends to focus on the normative side of the puzzle, in an effort to understand what professionals value, and to educate those professionals to value the right things, or to perceive moral questions with the appropriate sensibility. That focus understands the challenge as one of moral character or sensitivity. I cannot, and do not, disagree with the important developments from that perspective. But my suspicion is that the challenge of professional nastiness has less to do with what professionals value as good, and more to do with what they understand to be true regarding the tasks on which they work and the ends which they seek to achieve.

Most normative or political conflict represents disagreement about fact, and not about value. People, including lawyers, tend to agree, by and large, about what qualifies as good. They disagree, frequently and at times pointedly, on the empirical questions about whether certain actions, policies, decisions, and the like will achieve the good. There are exceptions to this observation, of course, but those exceptions are rare. Consider any political debate played out in the news and among competing factions: disputes about taxes, environmental policies, homelessness, rent control, corporate governance, accounting rules, and so forth. In each instance, the parties' arguments employ common, shared "goods," but their predictions vary depending on the position staked out. Here is one recent example: the Bush administration defends its loosening of environmental regulations, previously imposed by the Clinton administration, not by asserting that more pollution is normatively good (a moral contention), but by arguing that the relaxed regulations will lead, in the end, to cleaner air and water (a factual contention based upon the shared moral norm that less pollution is good). Comparable examples show up in the morning newspapers each day.

5. See David Arnold, Easing of Air Quality Rules Leaves Suit in Doubt, BOSTON GLOBE, Dec. 1, 2002, at B1 ("The Environmental Protection Agency has triggered protests from coast to coast with the Clean Air Act modifications.").
Similarly, lawyers do not possess differing moral sensibilities, either from one another or from the lay public or the profession’s critics. What lawyers do offer are factual assertions in defense of projects which, to the uninitiated, look pretty bad on the shared moral vision scale. If those lawyers are regularly disingenuous in their claims, then we have a straightforward moral puzzle. If, as I suspect, the lawyers either believe, or do not have enough first hand, reliable evidence to disbelieve, the claims that their clients want presented, then the moral critique is, at best, much more complicated.

I am sympathetic to the latter supposition, in part because I observe this phenomenon regularly in my clinical practice. That concededly un-empirical observation is supported, however, by substantial psychological research about the influence of heuristics and biases on human understanding. Research shows that, through self-serving biases and similar “cognitive illusions,” most people believe what they want to be true. Individuals misperceive, or form beliefs, unconsciously but firmly. Thus, a lawyer faced with an elaborate (if questionably acceptable) scheme proposed or defended by a client will want to believe the factual assertions that justify the scheme. The client will not show up in the lawyer’s office as a “bad man,” and his arguments and plans will rely on claims of justice, fairness, economic growth, and similar shared norms. That the lawyer ends up working for this man evidences not necessarily the moral bankruptcy of the lawyer, but the understandable operation of common, powerful cognitive processes.

This article, and my speculation, will proceed in the following fashion. I will first share two stories, each from my clinical teaching, which illustrate the themes of this article. After presenting the stories, I offer a brief history of the moral activism project, a primer for those readers unfamiliar with what has to be one of the most significant intellectual developments in legal ethics in the twentieth century. I then juxtapose that history with the prevailing accounts of moral corruption—if that is too strong a description, perhaps we would agree to “amorality”—in modern law practice, obviously a

6. Chris Guthrie et al., Inside the Judicial Mind, 86 CORNELL L. REV. 777, 780 (2001); see also JOHN S. HAMMOND ET AL., SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS 198–99 (1999) (noting when people receive conflicting arguments on one issue they tend automatically to accept the argument supporting their initial inclination and dismiss the opposing one).

disappointing phenomenon to those teaching morally ambitious lawyering. I next catalogue some plausible reasons for the disconnect between the theory of activism and the reports from the field—the failure of the moral activism project to “have legs,” if you will. None of the explanations on that list, I argue, withstand scrutiny.

The seemingly exonerated suspects include the following hypotheses. First, could it be that the moral activism project is intellectually weak, and its logical or rhetorical power needs ratcheting up? That explanation, I argue, simply cannot fly. While competing philosophical arguments have emerged regarding the moral worth of instrumental lawyering, the reasoning undergirding the moral activism project is far more sophisticated than that opposing the project. Second, moral activism makes sense only if one accepts an important premise of its arguments, that a common core of morality exists and serves as the essential baseline for ethical assessment of lawyering practices. Perhaps the project flags because no such shared agreement about norms is available? This argument has some initial attraction but, as we shall see, it is quite incompatible with the observations that modern practice has lost its moral compass. Because of the persistence of the latter reports, and for other more basic reasons connected to how people understand what is right, we must reject this essentially relativist explanation. Here is a third possibility: maybe the moral activism project has deep resonance, but its students quickly discover that to lead a good and moral professional life, they need some expertise and sophistication about moral philosophy that they simply do not possess. I dismiss this not implausible concern with a brief discussion of how it is that plain people, including lawyers, make their moral choices, and with some reference to the emerging ideas of casuistry. The fourth and final rejected explanation is seemingly the most obvious, and discouraging one—that is, perhaps lawyers are simply whores, without souls, who care little about the moral quality of their work. If true, this account would explain quite perfectly why the moral activism project has faltered. But, as I develop below, this depiction, however accepted it may be with populist accounts of lawyering, just does not correspond with most of our experiences with law students and lawyers. It is a seductive account for the state of the profession, but it is not a very accurate one.

Because each of the above accounts fails to explain adequately the impotence of moral activism, I turn to the question of what lawyers know and believe, finding there some more promising account of the persistence of troublesome practices. The arguments I present
about a lawyer’s frequent inability to know enough to sustain an activist orientation may remind us of certain strained epistemological claims that surfaced in early arguments about perjury and criminal defense work, questioning whether a lawyer ever “knew” that his client was guilty, or had lied under oath. Similar assertions materialize on occasion in the moral activism literature, usually in defense of a more traditional advocacy stance. The claim here is different, however. I do not argue that lawyers have any trouble knowing what there is to be known in appropriate circumstances, nor do I rely on some postmodern skepticism about empirical understanding. My contention is simpler and more pedestrian: Because the facts of any sophisticated legal dispute tend to be intricate and available only second (or third) hand, lawyers cannot achieve the level of certainty necessary to carry their burden of proof when the question of betrayal arises. I now begin my exploration by recounting two true stories from my clinic experience.

II. TWO STORIES FROM A CIVIL CLINIC

A. Amy’s Story

I work in a civil clinical program at Boston College Law School. Some three or four years ago, in the middle of the day in a normal semester, I walked into the staff conference room with my brown lunch bag in hand. In the room were a clinic student, whom I will call Amy (not her real name), and our staff social worker, Lynn Barenberg (indeed her real name), engaged in a very serious conversation. Amy was troubled and a bit upset. She was sharing with Lynn her angst about a case on which she had been working for a few
MORAL ACTIVISM

weeks. Amy represented a man who was appealing a denial of Supplemental Security Income (SSI) benefits. He claimed he was disabled; the Social Security Administration disagreed. Amy inherited the case on its way to a hearing before an Administrative Law Judge. Amy was not my student in the clinic; she had been assigned in our random fashion to my colleague, Alan Minuskin.

The source of Amy’s discomfort and anguish was her belief that this man was not disabled, and that he was attempting to snooker the agency in order to realize the monthly benefits. She was confiding with Lynn how painful it was for her to advocate for a cause which she believed was unjust. She did not think the client’s case was frivolous—there were plausible arguments on his behalf based on the records. But Amy did not think he was entitled to get the benefits. I listened in on this affecting conversation (with their permission) and then joined it. I said to Amy, “Why are you going forward with the case?” She looked at me, puzzled. “What do you mean?,” she asked. “Well, why don’t you refuse to represent him? You know our philosophy around here—as a first year student you read Wasserstrom and Luban, and we assign Simon for the clinic seminar, so we aim to emphasize moral responsibility and accountability. If we believe that lawyers ought to practice consistent with their moral commitments, why wouldn’t we want to model that conduct in the clinic?” “But,” Amy replied, “you folks assigned me the case. If I somehow drop this client, I worry about my evaluation, and my grade—and this is a nine-credit course, so it affects my GPA a lot.” “Well,” I said, “I can’t speak assuredly for Alan, but if you ask me, I can’t imagine we would criticize or

12. The dialogue that follows represents my best re-creation of the conversation after several years.
13. See Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 HUM. RTS. 1 (1975) (discussing two criticisms of lawyers, which derive from lawyers’ professionalism: that lawyers tend to be amoral and sometimes immoral when dealing with society; and that lawyers often treat clients in an impersonal and paternalistic manner).
15. William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1083 (1988) [hereinafter Simon, Ethical Discretion] (arguing that “[l]awyers should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims,” and that such discretion is “a professional duty of reflective judgment”).
downgrade a student for taking our teaching seriously and practicing the way we preach. I'll talk to Alan, as should you, but I'm quite sure that he will appreciate your thoughtful, responsible approach to hard ethics questions like this.”

I spoke to Alan later that day, and he agreed with my sentiments, not surprisingly. I then did not hear anything about Amy's case until the end of the semester, when I learned that Amy had opted, after all, to remain with her client's case. She wrote the brief for his SSI hearing, conducted the hearing, and won the case.

B. Kendra's Story

Kendra, again not her real name, was a student of mine more recently in a clinical course known as the Homelessness Litigation Clinic. In that course Kendra represented tenants, usually in eviction actions, and she became quite an expert in the law of landlord-tenant relations. After the semester had ended, Kendra's former landlord sued her for back rent after she and a roommate had moved out of an apartment. Kendra believed that she had given all the required notices (the leasehold history was quite convoluted, with roommates coming and going), but her landlord sued her just the same, demanding $2,000, a lot of money to a debt-ridden law student.

Kendra worked hard to defend against this lawsuit. She removed it from a local municipal court to the small claims session of the Housing Court, and she prepared documents and pleadings to establish her theories of the case. I consulted with her on a couple of occasions as she refined her arguments. She headed off to court on a late September afternoon.

I e-mailed Kendra a few days later, curious about how the court hearing had gone. She replied, disappointingly, that she had settled the case at court, and she would love to talk to me about the experience. We met a few days later. Our conversation was in part about the negotiations and the role of the court-assigned mediator, but mostly our conversation was about the landlord's lawyer, whom we will call Joan. Kendra was enraged and disappointed by Joan's conduct throughout the case's history, and especially in court.

As she described it, Joan was arrogant, aggressive, nasty, unkind, and dishonest. Joan berated and belittled Kendra and her roommate, and threatened to report Kendra to the Board of Bar Overseers for Kendra's representation of her roommate without having a license to practice law. (In fact, Kendra was exquisitely careful in her papers and statements to avoid any such implication.) Most infuriatingly to
Kendra, Joan's scorched earth tactics were surprisingly effective. Her aggressiveness unsettled Kendra, and the mediator was seemingly persuaded by the volume and the intensity of the lawyer's presentation. (At the same time, Kendra admitted, the mediator had shared in a private conversation his distaste for Joan's aggressiveness and her sharp tactics.)

Kendra and I discussed what it is that causes lawyers to act like this. We compared ideas of short-term gain versus long-term sacrifices and reputational harm. In the end, though, Kendra had one question for me: "Is this the way I am going to practice law in a few years? If so, I'm not so sure I want into this profession." I assured Kendra, with almost full candor, that I could not envision her resorting to these tactics in the way Joan used them—that she possesses more integrity, character, and sensitivity to these issues than most students, and I expect that she will practice consistent with those qualities. But I report here that I answered with almost full candor, for I am not sufficiently confident about the institutional modeling and incentives, as well as the cognitive biases that I explore below, to bet the farm on my answer.

These two stories evoke themes that I will later connect explicitly to my argument. Each illustrates lawyering complexities which the moral activism project must confront. Amy experienced the tug of moral ambition, but then (perhaps—there is much ambiguity in her tale) opted for the conventional instrumental path when the chips were down. Kendra, soon to be a member of the legal community, expressed her intolerance and revulsion for practices which the profession seems to promote and exhibits all too often. Her opposing lawyer, Joan, gets a good result for her client, and maybe (but maybe not—there is much ambiguity here as well) sleeps well at night having done so. To explain these stories and understand them (and seemingly to alter them) is the responsibility of the moral activism project, to which we now turn.

16. It is an accepted assumption that a primary goal of legal ethics instruction in law school is to create better lawyers who will practice more honorably than they would in the absence of such a course or of such instruction. See, e.g., Heidi Li Feldman, Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?, 69 S. Cal. L. Rev. 885, 948 (1996); Russell G. Pearce, The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. Rev. 1229, 1244 (1995); Michael I. Swygert, Striving to Make Great Lawyers—Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching, 30 B.C. L. Rev. 803, 804 (1990).
III. A PRIMER ON THE MORAL ACTIVISM PROJECT

Imagine, for a moment, that you are a lawyer in private practice. You represent a client who, you realize after he has hired you, wants you to provide some malicious but not illegal legal services. Perhaps this is the story: your client is a landlord who you come to understand is racist. He asks you to bring eviction proceedings against a poor Haitian family, comprising of a mother and her four children. When you do so, the mother files an answer raising important and probably winning defenses (serious claims of mistreatment and terrible conditions in the apartment, with health department reports attached), but she files her papers *pro se* and gets them procedurally wrong—fatally wrong, in fact. You can easily get her answer dismissed, and have her put on the street in January. Your client is just delighted. No law prevents him, or you, from doing this.

Or say your story is this, instead: your client comes to your neighborhood office for a divorce. The more you learn about your client, the less you like and respect him. He is, from all indications, an abusive, controlling, and very angry man, who wants nothing more than to punish and hurt his wife. His wife has no money, but your client has plenty of money. He asks you to do everything lawfully available to make this divorce expensive and demeaning to her, while making him look good and caring before the court. He wants you to get custody of their children by showing his wife to be psychologically unstable, especially compared with him. He does not care about the children. He just wants his wife to suffer, to break, and to beg for mercy. And assume, again, that the law does not forbid you from doing any of the actions that your client has asked for.

17. You will note that both of my fictional miscreants are men. I do not mean to imply either that all male clients are miscreants and sociopathic (I can attest to the contrary), or that no women clients are this unflattering (I can also attest to this having observed some of my clients' opposing parties).

18. Readers familiar with the ABA’s model standards governing lawyering may be quick to point out that purely vindictive lawyering is barred by those standards. See, e.g., *Model Rules of Prof'L Conduct* R. 4.4(a) (2002) (stating that “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person”). The stories I offer are intended to have those substantial purposes, but others as well. Whether I have succeeded in creating such “balanced” stories (that is, lawful but insufferable) may be debatable; that such stories exist all the time in the real practice world is not.
A. Moral Activism's Scholarly Pedigree

From many indications, before 1975 law students encountered a positivistic vision of legal ethics. While the teaching of legal ethics was less prominent, and not part of the core law school curriculum, before the 1972 to 1973 Watergate scandal, its chief lesson in those days was seemingly about the American Bar Association's Code of Professional Responsibility (or, until 1969, the predecessor Canons of Professional Ethics) and its interpretation. There was, in the textbooks and the legal ethics literature, little grappling with the moral implications of the profession's commitment to advocacy and zeal. One of the more prominent scholarly treatments of this topic, Charles Curtis's 1953 article The Ethics of Advocacy, defended the zeal-driven role obligations of lawyers by reference to a sacred duty to one's client above all. His dedication to zeal was so unconditional that he

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19. See, e.g., Kathleen Clark, The Legacy of Watergate for Legal Ethics Instruction, 51 HAST. L.J. 673, 675 (2000) (noting since Watergate, standards require students to receive ethical instruction); Wasserstrom, supra note 13, at 2–3 (discussing how Watergate was an illustration of how lawyers view the world's morality).

20. See, e.g., Walter H. Bennett Jr., Making Moral Lawyers: A Modest Proposal, 36 CATH. U. L. REV. 45, 49 (1986) (observing that traditional teaching methods separated morals from law); James R. Elkins, Moral Discourse and Legalism in Legal Education, 32 J. LEGAL EDUC. 11, 24–31 (1982) (commenting on law students' perceptions and reception of ethics in the classroom). I note here that there is an implicit debate in the literature about whether the positivist, neutral partisan stance was itself a new development, following a core conception of the lawyer as "officer of the court," or whether the positivist, instrumental stance has been the traditional, default orientation until the emergence of the moral activism project. There are several authors who espouse the former view. See, e.g., Rob Atkinson, A Skeptical Answer to Edmundson's Contextualism: What We Know We Lawyers Know, 30 FLA. ST. U. L. REV. 25, 27 n.8 (2002) [hereinafter Atkinson, A Skeptical Answer] (choosing the term "reformers" for the moral activists because the term "implies, almost literally, that neutral partisanship is a departure from an earlier, more desirable position"); Roger C. Cramton, Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable, 70 FORDHAM L. REV. 1599, 1602 (2002) (comparing modern hired-gun ethics to "the older notion that the lawyer is an officer of the court who is concerned with the maintenance and improvement of the sound administration of justice"); Russell G. Pearce, Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role, 8 U. CHI. L. SCH. ROUNDTABLE 381, 381 (2001) (describing 1980s' lawyers as less committed, at least rhetorically, to the public good than 1960s' lawyers).

21. See Charles P. Curtis, The Ethics of Advocacy, 4 STAN. L. REV. 3, 3 (1951) [hereinafter Curtis, Ethics of Advocacy] (suggesting "[t]he lawyer's official duty, required of him indeed by the court... is to devote himself to the client"); see also Charles P. Curtis, Ethics in the Law, 4 STAN. L. REV. 477, 479–80 (1952) (attempting to identify characteristics between law and ethics and their vagueness blurring the distinction). Curtis, a practitioner from Boston, also famously wrote, "[a lawyer] is required to treat outsiders as if they were barbarians and enemies." Curtis, Ethics of Advocacy, supra, at 5; CHARLES P. CURTIS, IT'S YOUR LAW (1954), in JOHN T. NOONAN, JR. & RICHARD W. PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 520 (1997).
developed a defense of lying to help a client win his case.\textsuperscript{22} The now-legendary Joint Conference report, issued by the American Bar Association and the Association of American Law Schools in 1958, stands as a classic defense of the lawyer's zealous advocacy role emanating from the essential needs of an adversary system.\textsuperscript{23} Monroe Freedman's 1966 article, championing the zealous role of lawyers representing criminal defendants, was more controversial, but also emerged from a deeply client-centered, positivist perspective.\textsuperscript{24} From the vantage of 2003, the world before the late 1970s looks quite a bit more one-dimensional in its teaching about the moral quality of lawyering practice. A commitment to clients was paramount, with adherence to the profession's rules and canons operating as an important, but the only real, restraint on that commitment.\textsuperscript{25}

Things then got a lot more interesting beginning in the 1970s and through the 1980s, and the developments emerging then have altered the moral landscape of lawyering in an irrevocable way. Richard Wasserstrom, a philosopher and law professor, likely deserves credit for first raising explicitly the central moral question which Charles Fried later posed: "Can a good lawyer be a good person?"\textsuperscript{26} In 1975 Wasserstrom published what might best be called a meditation—it was not a conclusive analytic inquiry—in which he wondered whether

\begin{footnotesize}
\begin{enumerate}
\item[22.] Curtis, \textit{Ethics of Advocacy}, supra note 21, at 9 ("I don't see why we should not come out roundly and say that one of the functions of the lawyer is to lie for his client."). Curtis was criticized, but largely for his willingness to breach the established canons of ethics. See, e.g., Kenneth Reichstein, \textit{The Criminal Law Practitioner's Dilemma: What Should the Lawyer Do When His Client Intends to Testify Falsely?}, 61 \textit{J. CRIM. L. CRIMINOLOGY \& POLICE SCI.} 1, 1 n.3 (1970) (identifying the contrasting opinions of Curtis and Professor Lloyd P. Stryker).
\item[25.] One important dissenting view at the time was the truth-defending Marvin Frankel, but his dissents coincide with the emergence of the moral activism project. See Marvin E. Frankel, \textit{The Search for Truth: An Umpireal View}, 123 \textit{U. Pa. L. Rev.} 1031, 1035-41 (1975) (recognizing the lawyer's traditional role is to serve the client's interest, not necessarily to seek the truth, and criticizing that role).
\end{enumerate}
\end{footnotesize}
the “role-differentiated behavior” required by the legal profession is not troublesome at some moral level.\textsuperscript{27} For many good reasons, some of which we will address in a moment,\textsuperscript{28} Wasserstrom focused on civil representation only. Lawyers represent tobacco companies and polluters. They represent large companies taking advantage of weaker and less wealthy consumers. They use legal rules and tactics instrumentally to gain advantages which we might otherwise find morally offensive. Many of the actions which lawyers take on behalf of clients are lawful but at the same time morally troublesome. But acting zealously for clients has traditionally been the lawyer’s sacred obligation. Wasserstrom in his 1975 piece simply raises that tension, and notes how worrisome it is.\textsuperscript{29} He implies that he finds the lawyers’ role-differentiated behaviors frequently unjustified, but he does not develop a rigorous defense of that implication.\textsuperscript{30}

One year later Charles Fried, a Harvard Law School philosopher who later worked in the Reagan administration and later still joined the Massachusetts Supreme Judicial Court before returning to Harvard Law School, wrote in the Yale Law Journal a path-breaking article responding to Wasserstrom’s worries.\textsuperscript{31} In the article, entitled \textit{The Lawyer as Friend}, Fried argued that serving the interests of clients is morally praiseworthy, even if sometimes the lawyer does things which she would never do were she not a lawyer acting in that role.\textsuperscript{32} His argument is elaborate, but two important points deserve note here.\textsuperscript{33} The first point analogizes the relationship between a lawyer and her client to one of friendship (hence his title).\textsuperscript{34} Since we all favor our friends over those we do not know (or those we know but

\begin{itemize}
  \item \textsuperscript{27} Wasserstrom, \textit{supra} note 13, at 3.
  \item \textsuperscript{28} See discussion \textit{infra} Part III.C.
  \item \textsuperscript{29} See Wasserstrom, \textit{supra} note 13, at 1.
  \item \textsuperscript{30} Wasserstrom poses questions but does not attempt to answer them, even if his activist leanings are rather transparent. (But not \textit{perfectly} transparent. My colleagues and I assign this work to first-year students and ask about it on the final exam, and about one-fourth of the students misread Wasserstrom’s leanings.) Interestingly, this article has since been treated by critics as a position statement in favor of the moral activism project. \textit{See, e.g.,} FREEDMAN \& SMITH, \textit{supra} note 9, at 53–54. Equally interesting, Wasserstrom in an article after his pioneering 1975 piece offers a guarded defense of role-differentiation, one far more supportive of the traditional view than his first writing projected. \textit{See generally} Richard Wasserstrom, \textit{Roles and Morality, in} \textit{THE GOOD LAWYER, supra} note 14, at 25–37 (discussing how roles affect decisions of morality, using parent-child, attorney-client, and commander-troops examples to explain).
  \item \textsuperscript{31} See Fried, \textit{supra} note 26. Fried does not cite Wasserstrom in his article, but the timing implies some connection.
  \item \textsuperscript{32} \textit{Id.} at 1060.
  \item \textsuperscript{33} \textit{See id.} at 1065, 1080.
  \item \textsuperscript{34} \textit{Id.} at 1065.
do not consider friends), and do not usually have to justify that preference (even if helping strangers and acquaintances would be "better" in some purely utilitarian calculus), so should lawyers be able to show preferences toward their clients without being blamed, or otherwise called to account for doing so.\(^{35}\)

Fried's second point is more germane to our purposes. He argues: (a) because all members of our society have a fundamental right to use and to have access to the law, and (b) because the law is hellishly complicated and arcane and quite inaccessible to laypersons, then (c) a lawyer who assists a client to enforce his legal rights can never be blamed, even if the client is using those rights in some fashion (e.g., foreclosing on widows and orphans) which we might find morally offensive in another context.\(^{36}\) We may blame the client, but not the lawyer, as long as the lawyer is doing lawful things. The "amoral" role of lawyers is admirable and necessary, Fried says, because without it some clients would not have access to what they have a legal right to obtain, and lawyers would then be imposing their own view of moral correctness to prevent clients from asserting legal rights.\(^{37}\) Of course, if what the lawyer is doing is illegal, then the Fried defense has no place, and the lawyer deserves to be criticized.\(^{38}\)

The companion articles by Wasserstrom and Fried established the underpinnings of the debate about the proper moral stance for lawyers representing clients. Wasserstrom suggested that lawyers ought to be accountable for the harm and pain they produce. Fried, while not denying that lawyers generate harm and pain, regards those consequences as unfortunate by-products of an overall good system, and in any event not the responsibility of the lawyer.

David Luban, without question the most successful and influential proponent of moral activism,\(^{39}\) developed the Wasserstrom

35. Id. at 1080–81. Fried's friendship argument resembles that made by Charles Curtis in 1954. See Curtis, Ethics of Advocacy, supra note 21, at 5–6.
36. See Fried, supra note 26, at 1084–85.
37. Id. Fried does recognize some legally permitted harms caused by lawyers as indefensible, because they are not required by the system. Id. He notes humiliating witnesses and lying to an opponent in negotiation, for example. Id.
39. See, e.g., Luban, The Adversary System Excuse, in THE GOOD LAWYER, supra note 14; LUBAN, LAWYERS & JUSTICE, supra note 1; Luban, Partisanship, Betrayal and Autonomy, supra note 1.
critique in a nuanced and sophisticated way, and in doing so substantially undercut Fried's philosophical arguments. Luban's arguments, distilled here, proceeded as follows: For Fried's defense of the traditional conception to succeed, one must place enormous faith in the system that requires the role obligations which would otherwise trouble us. Fried points to the adversary system's goodness, and its assumption of competing advocates each dedicated to her client's cause, to justify the occasional unjust or squeamish result. Luban, following Schwartz, reasons that Fried's logic holds only if the adversary system is itself justified and in a strong way, given the measure of injustice that it must account for. In Luban's analysis, the adversary system is perhaps defensible, but only weakly so. As such, it cannot serve as the moral trump that Fried assigns it. If a lawyer must decide on a given day whether to perform some noxious scheme, the lawyer cannot defend her actions by pointing to the greater good of the system and of her job. If she assists with or conceives the noxious scheme, Luban says, she must defend it directly, or accept moral responsibility for engaging in noxious schemes, but she cannot rely on what Luban calls the "adversary system excuse."


41. See Luban, The Adversary System Excuse, in THE GOOD LAWYER, supra note 14, at 105-08.

42. Id.

43. Schwartz, Professionalism and Accountability, supra note 40.

44. See Luban, The Adversary System Excuse, in THE GOOD LAWYER, supra note 14, at 105-08.

45. LUBAN, LAWYERS AND JUSTICE, supra note 1, at 67-103; Luban, The Adversary System Excuse, in THE GOOD LAWYER, supra note 14, at 111-17.

46. See LUBAN, LAWYERS AND JUSTICE, supra note 1, at 56 ("institutional excuses"); Luban, The Adversary System Excuse, in THE GOOD LAWYER, supra note 14, at 111; see also Cramton, supra note 20, at 1604, 1610-14 (documenting "hyper-adversarialism" and calling for greater lawyer accountability). Luban has tempered his attack on role differentiated behavior in response to some criticism of his 1988 book. See David Luban, Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice, 49 MD. L. REV. 424, 431-32 (1990) [hereinafter Luban, Mid-Course Corrections] (responding to David Wasserman, Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation, 49 MD. L. REV. 392 (1990)). In his "mid-course corrections," Luban agrees that a "default" orientation for lawyers should be role commitment and partisanship. Rejection of the traditional role is still necessary at times, but the burden of proof, so to speak, rests with the lawyer. Id. at 432-33.
Luban's work, as noted a moment ago, has been terrifically influential in its reconception of a lawyer's role. As the editor of an important collection of essays on the role morality question in 1983, and the author of a book-length defense of the moral activism perspective in 1988, Luban has spurred nearly two decades of serious, reflective appraisal of the goodness of lawyering practice. His work has inspired a wealth of writing on the topic, including pioneering contributions from Deborah Rhode, Robert Gordon, Stephen Ellmann, Thomas Shaffer, Ted Schneyer, and Murray Schwartz, among others.

47. See THE GOOD LAWYER, supra note 14.
48. See LUBAN, LAWYERS AND JUSTICE, supra note 1.
51. See, e.g., Ellmann, supra note 1, at 118 (criticizing Luban's analysis of ethics as failing to "convincingly support central aspects of the reformulation of lawyers' ethics").
52. See, e.g., Thomas L. Shaffer, The Practice of Law as Moral Discourse, 55 NOTRE DAME L. REV. 231, 231 (1979) [hereinafter Shaffer, Moral Discourse] (discussing three ethical orientations that govern moral conversations with clients); THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981).
53. Ted Schneyer, Moral Philosophy's Standard Misconception of Legal Ethics, 1984 WISC. L. REV. 1529, 1529 (arguing that instead of disregarding their own values and the welfare of third parties, lawyers may actually overvalue the interests of third parties).
54. Schwartz, Professionalism and Accountability, supra note 40, at 669 (proposing different expectations of professional behavior for the non-advocate lawyer versus the advocate).
55. At the risk of omitting many who have joined in this engaging discussion over the past two decades, I note here other significant contributions. See, e.g., ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 1 (1980) (discussing the disputes relating to the "well-meaning behavior of professionals in pursuit of the fundamental values of their professions"); Rob Atkinson, Beyond the New Role Morality for Lawyers, 51 MD. L. REV. 853, 855 (1992) (attempting to improve upon Luban's and Simon's "fundamentally flawed" role morality theory); Naomi R. Cahn, Inconsistent Stories, 81 GEO. L.J. 2475, 2476 (1993) (presenting an in-depth discussion of the dilemmas presented by "conflicting stories within in the legal system"); Daniel R. Coquillette, Professionalism: The Deep Theory, 72 N.C. L. REV. 1271, 1272-73 (1994) (arguing that the law profession is "in crisis" because lawyers have "lost sight of the 'deep theory' of professionalism"); Leslie Griffin, The Lawyer's Dirty Hands, 8 GEO. J. LEGAL ETHICS 219, 219 (1994) (arguing that a "dirty hands" metaphor for professional ethics, which concerns the violation of moral principles for public purposes, is inadequate); Kenny Hegland, Quibbles, 67 TEX. L. REV. 1491, 1495 (1989) (suggesting that "quibbling" should be banned because it "produces injustice" and "threatens the rule of law"); Jamie G. Heller, Note, Legal Counseling in the Administrative State: How to Let the Client Decide, 103 YALE L.J. 2503, 2504 (1994) (proposing a "full-picture counseling" model, which would allow the client to make the ultimate decision after receiving the full picture from
As the moral activism project has progressed, an important debate has arisen about its underpinnings, prompted by the important work of William Simon. Simon's contribution has initiated a distinction, in the assessment of the responsibility of lawyers for the justice of their work, between morally appropriate acts and legally correct ones. The moral activism project tends to focus on the tension resulting from a clash between a lawyer's legal obligations (or her client's legal entitlements) and the moral obligations that otherwise would apply. Simon, departing from the conventional moral activism account, urges a commitment to legal merit rather than morality.

The problem with the typical moral activism thesis (represented by Luban), Simon argues, is that it constructs its arguments, and its admonitions for the professional, upon a foundation of morality about which people generally, and lawyers in particular, struggle for coherent reasoning. Moral concepts are perceived, whether correctly or not, as subjective, personal, and ungrounded. Legal concepts, by contrast, are understood as having reasoned and commonly-understood substance. Simon asserts that a lawyer possesses an
obligation to respect legal merit, and thereby to achieve justice.\textsuperscript{60} His position is plainly "activist," in its opposition to a lawyer's exploiting circumstances for her client, but it grounds activism in shared legal norms.

How, then, might the Simon critique work in practice? He begins with the proposition that lawyers "should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice."\textsuperscript{61} "Justice" means the resolution most faithful to the underlying purposes of the legal scheme. Included in his developed thesis are these two formulas:

(1) The more reliable the institutions available to resolve disputes, the less responsibility the lawyer must assume to achieve justice, and the more instrumental the lawyer may be—and vice versa.\textsuperscript{62}

(2) The clearer the purposes of the legal scheme, the more responsibility the lawyer must assume to achieve justice, and the more interventionist the lawyer may be—and vice versa.\textsuperscript{63}

A lawyer practicing in Simon's imagined world would represent his clients in a contextual, legal merit-focused fashion. In a context where there exists a very reliable institution (e.g., court or agency) and where the purposes of the legislation or legal principle in question are not clear (probably the result of some political compromise or misunderstanding, or with conflicting common law roots), the lawyer is justified in acting as a purely zealous advocate, because the lawyer herself cannot know any better than the institution what the "right" legal result ought to be. In that case, the lawyer may play all lawyering games, use all available legal tactics, and the like. No one can accuse her of acting unjustly because the reliable institution will decide what is just and what is not. There are many cases that fit this description—but not all cases will.\textsuperscript{64}

If, on the other hand, the institution at hand is plainly unreliable (a very overworked court or agency, or an unprepared opposing lawyer), and the purposes of the legal scheme are quite clear, the lawyer cannot act instrumentally to obtain a result which is inconsistent with the clear purposes of the legal principles involved. The lawyer, Simon contends, should have an ethical obligation to refrain from using lawyer tricks to obtain results which are not "legal"

\textsuperscript{60} Id. at 138–39.
\textsuperscript{61} Id. at 138.
\textsuperscript{62} Id. at 140.
\textsuperscript{63} Id. at 145–46.
\textsuperscript{64} Id. at 138–56.
given what the lawyer knows about the legal scheme. Thus, a lawyer who raises technical defenses to defeat a claim which the law would otherwise plainly allow has acted improperly and unethically.

Simon's arguments, and in particular his grounding activism in conceptions of legal merit and not in conceptions of moral standards, have met with much disagreement. This debate, though, is essentially an intramural one, between the Luban version of moral activism and the competing Simon version. The debate participants do not disagree about the value and necessity of moral activism; they disagree about how the activism ought to be implemented.

As the moral activism project has grown in its sophistication and its acceptance, its critics remain. Steven Pepper has attempted the most focused post-Fried defense of "amoral lawyering"—the antithesis of moral activism. Pepper stakes out a fully moral vision for zealous, legal advocacy. His argument is similar to Fried's second argument, but elaborated and refined. For Pepper the legal system and legal rights represent a public good, to which members of American society are entitled. Access to legal rights, though, is illusory without lawyers, because of the complexity and procedural demands of the legal machinery. Lawyers dedicated to lawful advocacy contribute to the autonomy of citizens exercising civic rights, and that is always a good thing. Far from being a troublesome

65. See id. at 138–39.
66. Id. at 162–69.
68. The fact of such deep and sophisticated intramural disagreement about the best model of moral activism is a very intriguing phenomenon. I do not have the opportunity here to develop this point, but consider the plight of a good faith third-year law student committed to practicing in a morally ambitious fashion. Will it matter to her, as she develops her practice amid this commitment, whether Luban's moral vision is more persuasive than Simon's legal vision? If so, how will it affect her day to day practice decisions? Will some action be acceptable when viewed through Luban's lens but not when viewed by Simon? If so, how does this young lawyer sort that out? Is it not more plausible that this lawyer will act in her morally ambitious way without having resolved this fascinating philosophical quarrel?
69. In addition to the work of Stephen Pepper discussed in the text, the most trenchant criticisms of the activist orientation generally include FREEDMAN & SMITH, supra note 9, at 51–62, 86–87 and Ellmann, supra note 1.
70. Pepper, Amoral Role, supra note 14, at 615–24; see also Stephen L. Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, 104 YALE L.J. 1545, 1546–47 (1993) [hereinafter Pepper, Counseling at the Limits].
71. See supra note 36 and accompanying text.
72. Pepper, Amoral Role, supra note 14, at 617.
practice, or even a neutral practice, zealous commitment to lawful legal ends is, by Pepper's formulation, an important public good. 73

Pepper's defense of amoral lawyering has not persuaded many within the academy, it seems. David Luban has met Pepper's arguments with a cogent response. 74 Pepper, Luban points out, has confused the worthiness of a person's autonomy with the worthiness of his autonomous act. 75 It is morally worthy, all things being equal, to repair a friend's car, for that increases her autonomy. 76 It is not morally worthy, though, to do so knowing of her plans to rob a bank, despite the increase in her autonomy. 77 Contributing to a person's autonomy knowing that the person intends to use that autonomy to harm another person gratuitously is not a morally justifiable action, Luban argues. 78

Pepper's reliance upon the "boundaries of the law" is undermined when understood in the context of legal realism, as Pepper himself concedes. 79 Defenders of traditional zeal rely on a critical distinction between what is permitted under substantive law and what is not. It is good, they tell us, to aid someone to exercise his rights, even if we are uncomfortable with the results of that exercise (i.e., foreclosing on the widows and orphans). It is not good, they tell us, to aid that person to obtain the same ends by relying on unlawful means (forging the foreclosure papers, or lying about supposed missed payments). The distinction between what is legal and what is not legal is necessary to the traditional conception's justification.

But that difference is hardly a tangible, unambiguous one in practice. The influence of the legal realism movement in early twentieth century jurisprudence has altered irrevocably lawyers' understanding of positive law and its operation. 80 If the boundaries of

73. Id. at 616–18. See also Sharon Dolovich, Ethical Lawyering and the Possibility of Integrity, 70 FORDHAM L. REV. 1629, 1632 (2002) (noting the traditionalists' argument that amoral lawyering is a moral endeavor). For an alternative argument to the amoral quality of lawyering ethics, see Sean J. Griffith, Ethical Rules and Collective Action: An Economic Analysis of Legal Ethics, 63 U. PITT. L. REV. 347, 348 (2002), which claims that because "moral theories are often indeterminate, contradictory, and controversial, they may not provide a firm basis for ethical rules"; hence any regulation must be based on amoral considerations.

74. See generally Luban, Lysistratian Prerogative, supra note 14 (responding to Pepper, Amoral Role, supra note 14).
75. Id. at 639.
76. Id.
77. Id.
78. Id.
80. In his description of legal realism, Pepper relies on a notion of "pragmatic
positive law are fuzzy at best, then the professional mandate, represented by the traditional zeal commitment, that a lawyer do everything permitted by law to serve her client's ends leaves that lawyer with very little limit on the use of her services. As long as she is resolving all reasonable doubts in favor of her client, and as long as her client demands all that the law can provide regardless of what harm might befall other persons or institutions, the lawyer's "hired gun" function becomes more and more dangerous. 81

To Luban and other moral activism adherents, this snag in the justification of the amoral role eviscerates the defense of the traditional role obligations. 82 This is especially true given the rarity of judicial or similar authority rulings on contested questions of law. The activists' argument proceeds as follows: we can agree that some actions taken by lawyers cause great and worrisome harm to others, harm which but for the lawyering context would trouble us a great deal. The lawyer's defense of this presumptively unacceptable conduct is to refer to the lawfulness of the conduct, and to the rights of clients, as citizens, to have full access to the law's benefits. But the legal realists show us that lawyers have no \textit{ex ante} definition of what is lawful and what is not. Considering most of the lawyering conduct about which we worry takes place outside the presence of a judge (that is to say, it takes place in negotiations, in strategic pretrial posturing, in counseling clients about what they might get away with within the administrative state, and so forth), it falls upon the lawyer to craft the limits of the available advocacy. With the legal realists' insights, we can further agree that those limits will reach quite far. The constraints on what lawyers will do for clients will therefore be rather few. Lawyers will help more people cause harm. The traditionalists' arguments that lawyers should be permitted to proceed without moral accountability because they are only working within the law's limits becomes far less compelling as the argument plays out. 83

\begin{footnotesize}
\begin{enumerate}
\item See Pepper, \textit{Amoral Role}, supra note 14, at 624 n.42 (citing \textsc{Robert Summers, Instrumentalism and American Legal Theory} (1982)); see also Thomas C. Grey, \textit{Holmes and Legal Pragmatism}, 41 STAN. L. REV. 787, 814 (1989); Thomas C. Grey, \textit{Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory}, 63 S. CAL. L. REV. 1569, 1590 (1990) (suggesting pragmatism, the intellectual companion to realism, "is the implicit working theory of most good lawyers").
\item See, e.g., \textsc{Rhode, In the Interests of Justice}, supra note 49, at 75–80.
\end{enumerate}
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B. How Moral Activism Might Influence Practice

At this point, it is important to understand the implications of the moral activism project. If Luban, Rhode, Simon, and other activists are right, what does that mean in any concrete sense for lawyers and their practices? One immediate, and obvious, point is this: the activism project does not call for more regulation, or stricter professional codes, or stiffer penalties for bad lawyers. Recall that activism's fundamental message is that practices which are lawful can still be wrong. It concedes as a fact of life that not all wrongful acts may be made illegal. So whether more lawyering practices should be regulated or punished is beside the point to the moral activism project. Whatever the substantive law's reach, much which is permitted will still cause gratuitous harm.

Rather than seeking greater regulation, the moral activism project aims for something more subtle, but important nonetheless. First, it insists upon moral accountability, for whatever that is worth. Before the arrival of the moral activism project, a lawyer seen engaging in bad but lawful conduct had a ready and comforting response: "Don't go pointing your finger at me. My job is to help clients obtain their legal rights, and that is what I am doing. If you have a problem, change the law. Maybe you can blame my client (although she is just asking for what she is entitled to). But don't

84. While activism represents an ethical (as opposed to a legal) stance, some writers do imply that the activist commitment might be enforced through rules. See, e.g., Cramton, supra note 20, at 1610-11; RHODE, IN THE INTERESTS OF JUSTICE, supra note 49, at 82; see also Ellmann, supra note 1, at 145 (criticizing Luban's moral activism and expressing a belief that Luban's conception would call for enforcement through rules). For reasons described in the text, the concept of mandatory moral activism is tautological.

William Simon's activism grounded in discretionary justice, by contrast, assumes actual enforcement of, and liability for poor exercise of, the contextual judgment he defends. See SIMON, PRACTICE OF JUSTICE, supra note 56, at 195-203. It is frankly difficult to imagine what Simon means by his tort-based enforcement scheme. Consider one of his paradigmatic cases—that of a lawyer who might, but ought not, assert the statute of limitations. Id. at 31-36. The only conceivable setting for enforcement would be when the lawyer asserts the defense, and wins, causing injustice to the poor plaintiff. (A lawyer who chose not to assert the statute, when doing so was justified, would risk enforcement of penalties, of course, but under the conventional malpractice or disciplinary arrangements.) The injured third party (or perhaps the bar authorities) could then bring enforcement proceedings against the lawyer for exercising her discretion unjustly. The claimant's argument would have to be that while the judge indeed accepted the defense, the lawyer was better situated to know that the judge should not have done so. This seems odd indeed, particularly given that the plaintiff (or the judge himself) could have raised that question in the court case.

85. See LUBAN, LAWYERS AND JUSTICE, supra note 1, at 154-61; RHODE, INTERESTS OF JUSTICE, supra note 49, at 67.
blame me.” After the moral activism project, that response is unacceptable. Now, the confronted lawyer must accept that he is selling his services for wicked ends. He cannot hold his head up high. He cannot walk down the street with the same confidence. He has been accused, and he will feel the justified wrath of other members of his community.

If the preceding part of the story holds true, what then does that imply for lawyers and their practice? It gets a bit speculative as well as substantively tricky at this juncture, but here are the likely implications. First, in cases at the margin, lawyers will probably engage in fewer sharp practices. By “at the margin” I refer to those decision points where a lawyer has considerable discretion about

86. See Luban, Partisanship, Betrayal, and Autonomy, supra note 1, at 1013 (stating lawyers must be able to “walk down the street with your head up” (quoting Austin Sarat, Ideologies of Professionalism: Conflict and Change Among Small Town Lawyers, an article later published in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: PROFESSIONALISM AND THE TRANSFORMATIONS OF THE AMERICAN LEGAL PROFESSION (Robert L. Nelson et al. eds., 1992))).

87. See id.

88. This point deserves a bit of marginal explanation, because it seems to rest on some questionable assumptions. The idea of a post-moral activism project lawyer walking down the street with her head held less high does not seem to work on initial consideration. For one thing, neither the video store clerk, nor the deacon at the Baptist Church, nor the gas meter reader—the folks whom our lawyer will meet as he walks down the street—will have ever read any of the moral activism project writers, so to think that lawyers will live in their community differently after the project’s promulgation seems a bit self-indulgent, if not naïve. And, for another, those clerks, deacons, and meter readers, while they have not read Pepper or Fried either, already think lawyers who do bad but legal things are pretty scummy. See, e.g., Richard L. Abel, Choosing, Nurturing, Training and Placing Public Interest Law Students, 70 FORDHAM L. REV. 1563, 1563 (2002) (arguing “[t]he public has never bought [lawyers’] ‘hired gun’ rationalization for amoral partisanship”). So the moral activism project seems equally irrelevant, as it only defends what common folk already think and have thought since before Luban wrote his first article. So why would the moral activism project matter?

Here is why it might matter and why it has warranted such attention in the academy. Moral activism matters because lawyers need to believe in the goodness of their daily work lives. It may well be true that common folk think that lawyers’ sharp practices are indefensible, but lawyers have had good reason to believe otherwise. Sometimes the lawyers would explain the underlying justifications to the common folks, but it did not really matter, so long as the lawyers understood and believed them. Also, it is important to lawyers that other lawyers, members of the professional “moral community,” respect their practices. If her compatriots sympathized when a lawyer gained an arguably unfair advantage because of the technicalities of civil procedure, or because of the sloppiness of an opponent, that lawyer can practice more comfortably and with her head held higher. It is hard to imagine lawyers going to work day in and day out believing that they are essentially whores. A central part of the argument below rests on that premise. Thus, an intellectually coherent moral activism project, taught in law school and accepted within the profession, changes the workaday mindset of the practicing lawyer by unsettling her sense of doing good work.
whether to snag an advantage or hurt an opponent, and where her
client’s central claim is not in jeopardy. One thinks of discovery
disputes, pretrial skirmishing, personal nastiness meant to reflect the
client’s anger or spite, misleading judges and bureaucrats, and so
forth.

Second, a lawyer committed to morally ambitious practice is apt
to have more frequent, and more pointed, conversations with his
clients about the fairness and the justification of their intended
projects. The traditional nonaccountability principle does not invite
“moral dialogue,” as this activity is sometimes called in the literature. 89
In fact, amoral partisanship operates to discourage this talk, by
confirming that the lawyer has little responsibility for the fairness or
justice of his client’s ends or means. 90 A robust acceptance of the
moral activism project would lead, one comfortably predicts, to more
expression of disagreement and efforts at persuasion by lawyers. One
can only assume that these conversations will have some effect. 91

The third expected manifestation of a wider acceptance of the
moral activism project would be a greater incidence of refusal to
accomplish lawful but unacceptable lawyering ends. That is, lawyers
would more often withdraw and, where withdrawal would not prevent
harm, would resort to civil disobedience. It is central to the moral
activism project that lawyers who accept accountability and who
cannot in good faith participate in malicious tactics will refuse to do
so, even if the conventional professional rules and norms do not
permit such refusal. 92 If the unseemly tactics are not discretionary (as
in the first manifestation above), and if the client is not persuaded by
the “moral dialogue” with the lawyer to forego the legal advantages

89. E.g., THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS,
AND MORAL RESPONSIBILITY 66–67 (1994); Luban, Partisanship, Betrayal and Autonomy,
supra note 1, at 1025–26; Pepper, Amoral Role, supra note 14, at 621–23; Pepper,
Counseling at the Limits, supra note 70, at 1563; see Thomas L. Shaffer, The Legal Ethics of
Radical Individualism, 65 TEX. L. REV. 963, 982–84 (1987). As Sharon Dolovich notes,
under the traditional conception the likelihood of a lawyer’s engaging a client in serious
moral discussion is far less. See Dolovich, supra note 73, at 1643 n.52.

90. It is true that Stephen Pepper’s defense of amoral partisanship explicitly calls for
increased moral conversation, see Pepper, Amoral Role, supra note 14, at 621–23, but his
thesis, if accepted by practicing lawyers, makes it easier for lawyers to sidestep these
less-than-comfortable moments. See Luban, Lysistratian Prerogative, supra note 14, at 643.

91. For a discussion of the importance of such conversations within the lawyer’s
counseling practices, see DAVID BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-
CENTERED APPROACH 347–61 (2d ed. 2003).

92. See LUBAN, LAWYERS AND JUSTICE, supra note 1, at 156; Dolovich, supra note
73, at 1648 (noting that Luban and Simon, but perhaps not Rhode, support such a betrayal
of client interests and wishes in order to prevent injustice).
MORAL ACTIVISM

(as suggested in the second manifestation above), then the lawyer must either proceed forward, or withdraw, or betray her client. (Of course, in many settings the fact of withdrawal would serve a betrayal as well.)

The choice between withdrawal and betrayal deserves a moment's thought, because it represents an important fulcrum point within the moral activism project. Consider either of the two examples with which we began this part—the racist landlord looking for an eviction and the abusive husband looking for a humiliating divorce experience. A morally ambitious lawyer, we can assume, would not wish to participate in either client's chosen strategies. If the lawyer opted to withdraw, as she seemingly could do under prevailing professional standards, she would essentially be telling her client to find another lawyer who will do his dirty work, because she will not. Then, one can assume rather confidently, the client will find another lawyer who will do the dirty work. The lawyer's conscience has been saved much angst, but the family will still be evicted and the wife will still be humiliated and left with little money and loss of custody of her children. In many settings, withdrawal (except for the threat's persuasive potential, which we should not underestimate) will not prevent the injustices which the clients are pursuing.

Betrayal, by contrast, will often have a better chance of preventing the harm. If the lawyer opts not to withdraw, but instead simply takes on more responsibility for the control of the litigation, she can mitigate much of the feared injury to the innocent third parties. So in the eviction case, perhaps the lawyer opts not to inform the landlord of the procedural defects of the tenant's proffered answer and ensures (by failing to object or to file a motion to dismiss) that the answer will get a hearing. In the divorce case, perhaps the lawyer takes whatever steps she can to allow the wife to have a fair hearing, to put available evidence before a judge in a neutral fashion, and to minimize the risk that the wife gets a raw deal through a coerced settlement. In each case the lawyer's client has a substantive right to

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93. See Model Rules of Prof'l Conduct R. 1.16(b)(4) (2002) (stating that the termination of representation is permitted if "the client insists upon taking action . . . with which the lawyer has a fundamental disagreement").

94. Deborah Rhode seems to agree with this strategy, declaring that the ultimate choice "should rest with the clients." Rhode, In the Interests of Justice, supra note 49, at 72.

95. Under conventional negotiation ethics measures, the lawyer could lawfully obtain an unfair and even unconscionable result through an informal, out-of-court agreement with an unrepresented opposing party. See Model Rules of Prof'l Conduct R. 4.3 (2002) (not forbidding negotiation with unrepresented persons and not limiting the terms of any
a different strategy and thus to a different result. The betrayal is the lawyer's choice, as a morally ambitious practitioner, to accept responsibility for the justice of the results she obtains. The lawyer then must accept the risks of any civil disobedience—the possibility of malpractice claims, or of bar discipline, if her betrayal is discovered.  

C. Activism and Money; Activism and Criminal Defense

This summary of the moral activism project is nearly complete, but two further considerations deserve brief mention. The first is the oft-raised concern for the economic viability of a morally activist law practice. The second is the promised topic of criminal defense, and why it may be exempt from the criticisms directed at traditional lawyering conceptions. Let us address each in summary fashion before we move on.

Regarding economic viability, there is an obvious question that the moral activism project defenders must address: if, as is true, moral activism is less client-friendly than traditional zeal, and if, as is also true, moral activism can only be an ethically discretionary posture, rather than an enforced stance, then why would any right-
minded client choose to hire the morally ambitious lawyer when a conventional zealous advocate lawyer's office is right next door?°° Given that lawyers need to eat, pay mortgages, and send children to college, why does not this economic realpolitik show the moral activism project to be a visionary dream of pointy-headed Georgetown and Stanford scholars, and not one that will fly in Malden, to say nothing of Northampton, Massachusetts?

In fact, that economic competition argument is overstated, if not simply wrong, for at least three reasons. First, the moral activism project should only matter in the rare and exceptional cases where a client seeks an unjustifiably evil objective. The day to day life of an ambitious lawyer will look no different from that of the neighbor, except when it really matters. Thus, she will not lose a lot of business volume by refusing the nastiest work. Second, the reputation disadvantage that the argument assumes is questionable. It is questionable because the unhappy client whose lawyer has refused to participate in some extremely unjust campaign cannot easily complain to his neighbors about the indignation of his being barred from doing racist or abusive things. There is very little audience for explicitly mean-spirited ideas.°°° It is also questionable because it assumes that clients prefer lawyers who lack a conscience, and that assumption is not at all a secure one.°°° The third flaw in the economic viability critique is one recently noted by Sharon Dolovich.°°° Dolovich writes that the traditional zealous advocacy models are not always so obviously client-friendly, as they favor the lawyer's interests as well, especially in the fees generated by what Roger Cramton calls "hyper-adversarialism."°°° A morally ambitious lawyer may at times sacrifice her client's unjust ends in favor of the interests of third parties, but a lawyer with that integrity and character is also more likely to remain sensitive to her client's interests as they conflict with her own. For

°°° See, e.g., Dolovich, supra note 73, at 1635-38 (noting, but disagreeing with the objection); SIMON, PRACTICE OF JUSTICE, supra note 56, at 204 (labeling this line of concern as the "Race-to-the-Bottom argument").
°°° See SIMON, THE PRACTICE OF JUSTICE, supra note 56, at 205-08 (outlining the differences between perceived client preferences and the actualities in the world of law practice).
°°° Dolovich, supra note 73, at 1666-67 (criticizing the perceived clash between activism and financial aspiration).
°°° Cramton, supra note 20, at 1604.
most clients, that lawyer will be the one whose reputation is attractive. For these reasons, then, the worry that morally ambitious lawyers will end up on welfare is a hollow one.

That leaves us with the topic of criminal defense work. Many writing within the moral activism project, while marshalling arguments about the moral bankruptcy of exploiting instrumentalities and zealous advocacy to achieve unjust ends, limit their criticism to civil cases. These scholars point out that the Constitution’s guarantee of a zealous defense to those alleged to have committed crimes (while noting the barriers that exist to that end), the vast power of the state against the lone individual, the risks to the individual that accompany conviction, and the absence of any new harm to third persons of an incorrect result, compared to the new injuries created by misuse of civil representation, all suggest that lawyers, even the most morally ambitious lawyers, are justified in acting zealously and instrumentally when defending persons in criminal proceedings. The only notable holdout on this point within the activist working group is William Simon, who remains unpersuaded that the distinctions offered for criminal defense work are justifiable ones.

Simon’s disagreement notwithstanding (and his arguments are, as usual, quite powerful), there are important reasons for the moral activism project to focus exclusively on civil cases, and for us to do so here. There is no doubt that in civil cases, where money, property, children, and reputations are at stake, powerful private parties can exploit advantages in legal resources to cause much harm, injustice, and mischief. The moral activism project has a clear and urgent role in addressing that concern. In criminal cases, where the most serious harm has occurred in the past and where powerful defendants seldom (but not never, of course) exploit legal advantages to obtain unconscionable results, the urgency is far less. That does not suggest an end to the debate about moral activism in the criminal context, as much as it suggests that, for now, and for our purposes here, it is more

105. See Dolovich, supra note 73, at 1665–66.
108. See Luban, Lawyers and Justice, supra note 1, at 62.
109. See id. at 60–61.
110. See id. at 59.
fruitful to limit consideration of the moral activism project to civil cases only.

IV. MORAL ACTIVISM'S DISAPPOINTING INFLUENCE ON PRACTICE

We now have completed a generally comprehensive overview of the moral activism project. Since the mid-1980s, this ethical perspective on lawyering has been a central part of legal ethics scholarship. The project is not an exercise in pure science, of course. The reason for such deep and loving attention to the moral calculus surrounding partisanship and zeal is rather plain—to change the behavior of lawyers. The writers within this project observe lawyers acting badly, with innocent persons suffering unjustified injury and distress. Their advocacy and scholarship on behalf of moral activism are intended to alter the prevailing ethos and thus eliminate some of this harm.

Given this apparent goal, it is fair to conclude that the moral activism project has failed thus far, and perhaps failed dramatically. In drawing that conclusion I rely on two assumptions, which I will concede are not sufficiently empirical. Each seems rather comfortable, however. My first assumption is that the moral activism project, which has so dominated the legal ethics literature for close to three decades now, has also been taught to law students in professional responsibility, simulation, and clinical settings for well over ten years. That seems a fair inference. The conventional textbooks on legal ethics note this developing theme, as do so many clinical textbooks. While some debate exists about whether legal ethics

112. See Mark Neal Aaronson, Thinking Like a Fox: Four Overlapping Domains of Good Lawyering, 9 CLINICAL L. REV. 1, 12-16 (2002) (noting the rich literature).


114. See, e.g., GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 28-29 (1978); CLINICAL
teaching ought to focus primarily on substantive law of lawyering and doctrinal topics or instead address the moral quality of lawyering practice, it is hard to imagine even the most positivist doctrine teacher offering a course in professional responsibility without touching on the moral implications of law practice. Those teachers, in the 1980s and 1990s, would have at their disposal far richer arguments about doing good than their previous compatriots would have had.

So I proceed in my analysis by assuming that the deep interest in moral lawyering has not escaped notice of students. New lawyers, then, have joined the profession since the late 1980s knowing that legal ethicists have serious objections to purely instrumental partisan practice. Those lawyers then begin to practice law. If the moral activism project "had legs," one might expect that since the 1980s observers would note a progressively (if perhaps slowly so) more noble quality to law practice. Students who came to law school wanting to be good persons doing good work, and who in the olden days would have learned in school but one quite partisan and non-accountability vision of lawyering, now graduate with strong support from their teachers for an alternative view, one more consistent with their pre-law school aspirations, one that discouraged engaging in nasty practices and effecting gratuitous harm. Those lawyers, the reasoning goes, would practice somewhat differently with this more caring attitude taught to them. They would be, in short, better, kinder, and gentler lawyers.

From all indications, that transformation of practice has not occurred between the late 1980s and today. Here is where my second assumption kicks in, and again it is a reasonably safe assumption. I infer, without having conducted any of my own original empirical


115. There shows up on occasion the argument that the primary role for professional responsibility courses is to teach substantive law and not to teach morality. See, e.g., Ian Johnstone & Mary Patricia Treuthart, Doing the Right Thing: An Overview of Teaching Professional Responsibility, 41 J. LEGAL EDUC. 75, 76 (1991) ("[I]t seems inappropriate for law schools to promote particular values. To do so would be to assume that values are universal or that those embodied in the professional role are uncontroversial."); Lee Modjeska, On Teaching Morality to Law Students, 41 J. LEGAL EDUC. 71, 71, 73 (1991) (stating that teaching morality "raises the specter of moral pontification" and "[l]aw teaching . . . is not a bully pulpit").

116. See, e.g., Debra Schleef, Empty Ethics and Reasonable Responsibility: Vocabularies of Motive Among Law and Business Students, 22 LAW & SOC. INQUIRY 619, 625–26, 628–31 (1997) (showing empirical evidence that more law students come into law school with a commitment to public service than leave school with that commitment).
work,117 that the quality of lawyering practice has not improved, but perhaps has deteriorated. One observation seems quite true: if we were to roam the stacks of our nearest law school library hunting for books written since 1988 praising the legal profession for its good, caring lawyering and noble contributions, we would find few, if any.118 If we did the same pursuit of books written since 1988 lamenting the state of the profession and its angst, we would have much greater success.119 Most observers agree that lawyers engage in much ignoble practice today, and complaints about that loss of a moral compass seem greater today than they were before the arrival of the moral activism project.

If those two assumptions are valid—that more moral activism has been taught in the past fifteen or twenty years or so than before, and that the quality of practice of law school graduates is declining—then somehow the moral activism project has failed to achieve its objectives. I will proceed in this article by accepting the validity of these baseline ideas.120 The challenge is to figure out what might

117. Why not? Perhaps because I am lazy. Perhaps because I know so little about conducting careful empirical studies. But mostly because this Symposium had short deadlines and I promised to meet them. That said, it would be a very fruitful and interesting study to compare the level of malevolence in modern practice with that in practice before 1988, the date of publication of the most important beginning works of Luban and Simon. See LUBAN, LAWYERS AND JUSTICE, supra note 1; Simon, Ethical Discretion, supra note 15. Cf. Kevin M. Clermont & Theodore Eisenberg, Litigation Realities, 88 CORNELL L. REV. 119, 120 (2002) ("The lawyer who today ignores empirical research risks giving in retrospect the very same impression [that nothing has happened.")

118. One scholar who believes that the critics of current practice overstate their worries is Jonathan Macey. See Jonathan R. Macey, Professor Simon on the Kaye Scholer Affair: Shock at the Gambling at Rick's Place in Casablanca, 23 LAW & SOC. INQUIRY 323, 323-24 (1998).


120. We might consider a more optimistic account for the seeming disconnect, one that credits the moral activism project in an indirect way. The argument proceeds
explain this disconnect. We now move on to that task.

V. FOUR PLAUSIBLE, BUT UNLIKELY, EXPLANATIONS FOR MORAL ACTIVISM’S IMPOTENCE

The remainder of this article consists of my imagining the best explanations for the persistence of nasty lawyering by lawyers who have been exposed to the moral activism project. In this part, I examine four possible hypotheses, and reject all four as unlikely. (In Part VI, I will offer a more plausible explanation.) The four we examine here are: (1) perhaps the moral activism project is intellectually unpersuasive, and needs its logic and reasoning ratcheted up to be persuasive to lawyers entering practice; (2) as a variation of the first, perhaps the moral activism project has faltered because it relies on some assumed notion of “common morality,” and that notion is empty of meaning; (3) instead, perhaps lawyers want to do what is right, and believe they should do what is right (and that there is some content to that idea), but the philosophical challenge to figure out what is right is just too daunting for non-philosophers; and, finally (4) perhaps many lawyers are simply mean-spirited, nasty folks, who simply do not care about doing bad things.

Any one of these theories, if true, would explain why the moral activism teaching has failed to move lawyers to act better in practice. I now attempt to show why each one is inadequate or simply wrong.

something like this: In the olden days, before the moral activism project, when there was just one vision of lawyering and that was a neutral partisan vision, lawyers did the same bad things they do now, but there was little basis on which to criticize them. Fewer lamented the state of the profession then because under that older ideology lawyers were just doing their jobs. Then came Luban, Simon, and Rhode with their new, expanded vision of an accountable and more just practice. It may be, this explanation suggests, precisely because of the moral activism project that lawyers now are subject to such sustained criticism, even as they act no worse than they did in the past. There is no conclusive reason to reject this idea, but it does seem inadequate to explain the recent worries about lawyer's conduct, without conceding the Kronman and Glendon nostalgia for a past Golden Age of professionalism. See KRONMAN, supra note 119, at 4; GLENDON, supra note 119, at 12–14; see also Marc Galanter, Lawyers in the Mist: The Golden Age of Legal Nostalgia, 100 DICK. L. REV. 549, 555 (1996) (pointing out the selective memory of these authors’ nostalgia); Peter Margulies, Progressive Lawyering and Lost Traditions, 73 TEX. L. REV. 1139, 1145–48 (1995) (review essay); David B. Wilkins, Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics, 108 HARV. L. REV. 458, 459 (1994) (book review). I do observe, in the literature and commentary, and in my clinical practice, evidence of declining civility and increasing adversarialism. In any event, the explanations which I offer in Part IV, infra, where I explore the psychological biases that inhibit moral activism, are not inconsistent with this imagined account.
A. Does Moral Activism Need Better Logic?

We might imagine that the moral activism project has remained impotent for a very basic reason—it does not persuade its audience, logically or rhetorically. The remedy then would be to parse out its weak links and seek to ratchet up the reasoning and the arguments. Or, alternatively, admit its incoherence and abandon the project entirely.

There are two ways to show why this supposition is wrong. The strong response is simply that the moral activism project is elegant and powerful in its arguments. Most writers and scholars who delve into this topic sympathize with the activist view (even if a spirited debate ensues about the project's specific implications), and those who attempt to defend the traditional view are, if I may be so bold, rather unpersuasive. Fried's friendship thesis is quite untenable, as many have shown, and Pepper's elegant defense of partisanship has been refuted brilliantly by Luban, and has been undercut significantly, and thoughtfully, by Pepper himself in the second half of his original article. Monroe Freedman and Abbe Smith's defense of zeal and partisanship has significant attraction, but most of their arguments rely upon the special case of criminal defense, or assume a fully functioning adversary system.

Others may, and do, disagree, of course. But whether the activists have "won" this debate (as I believe they have) is not the critical question. The second reason to reject a concern for the persuasiveness of the moral activism project is a weaker version of the first, but an entirely sufficient one. It is quite clear, beyond doubt indeed, that a lawyer who needs intellectual and rhetorical justification for practicing in a morally ambitious fashion has ample store in the moral activism project. Put another way, if a student leaves law school wishing to maintain some connection between his life long moral commitments and his law practice life, he will not be dissuaded from

122. See, e.g., Dauer & Leff, supra note 38, at 574–80; Simon, Ideology of Advocacy, supra note 38, at 171–94.
123. Pepper, Amoral Role, supra note 14, at 635.
127. See, e.g., FREEDMAN & SMITH, supra note 9, at 19–23, 31–33.
128. Id. at 24–26 (touting the benefits of final, public judgments after trial).
doing so because of a professional requirement that he adopt the partisan, non-accountability stance. Perhaps in the olden days, before a coherent moral activism project took hold, this student might lack an intellectual foundation for retaining ordinary moral commitments. With the developed and elegant arguments of the philosophers and ethicists now available, his practice horizons have been broadened. If he opts to act in ways that appear too instrumentalist, then we cannot say he does so for lack of reasons to act differently.

B. Does the “Common Morality” Conception Have Substance?

Here is a second plausible explanation for the weak influence of the moral activism project in fin de siècle American law circles. For the moral activism project to work, in the sense of any pragmatic consideration, it needs an accepted conception of common morality, something to which to compare the lawyering activity. Recall that the central message of the moral activism project is that when asked to perform an act which would otherwise be morally unacceptable, a lawyer may not proceed to do so by relying on his job description as a lawyer, but needs better justification, or else he will have acted immorally. That message, of course, needs some substance for the clause “which would otherwise be morally unacceptable.” If there is no reliable, common shared vision of what is right or wrong, then the moral activism project fails miserably.

So, then, we need to consider that explanation for moral activism’s inefficacy—perhaps lawyers and students do not see any common morality, and so they do not experience moral angst when they begin practice. Without a benchmark comparison within morality, their work will be judged by its legality, and the traditional partisan stance is all they then need.

This argument, described as it is here, is not an adequate explanation for the problem we are exploring. Like the first

129. According to pragmatism, ideas are “correct” only inasmuch as they work within the world. See W. Bradley Wendel, Teaching Ethics in an Atmosphere of Skepticism and Relativism, 36 U.S.F. L. REV. 711, 734 (2002) [hereinafter Wendel, Teaching Ethics] (“Pragmatism begins by asking what difference truth makes .... The answer is that ideas are true insofar as they help us make sense of the relationship between that idea and other aspects of our experience. Ideas are true instrumentally ....” (footnote omitted)); Catharine Pierce Wells, Why Pragmatism Works for Me, 74 S. CAL. L. REV. 347, 356–57 (2000).

130. As we shall see, the explanation which I suspect has the most validity is close to this one but different in a significant way. My later thesis will be that lawyers frequently find it difficult, because of cognitive psychological heuristics and biases as well as the utter complexity of the world, to be certain of the factual underpinnings that would prove that
explanation we just explored, this one fails for a strong and a weak reason. The strong reason is this: it is just not true, by and large, that individuals lack shared, common values. It is true that one hears, from time to time, claims that values are "personal," implying that they are therefore arbitrary and idiosyncratic, and that the prominence of "culture wars" evidences a deep disagreement about fundamental values. Similar sentiments worry about some, particularly those in authority positions like teachers, "imposing" values on others, which necessarily implies that values are something that one person possesses individually, like a preference.

But, as I have described more fully elsewhere, as have others more sophisticated than I, this widespread conversational pattern distorts the nature of norms and values. It is in essence a relativist, or subjectivist, view of moral truth to assert that when clients seek to do bad things lawyers must not interfere because those things may not be so bad according to the client's moral world. This is not to deny—how could one?—that much disagreement exists among good faith persons about moral issues. But that disagreement, it seems, is less about what ought to be valued as good, and more about whether the facts are such to constitute a moral bad. The debate about what is right, we notice if we look at it in this light, is almost always about facts, justifications, predictions, and history—one perspective believes certain facts to be so, and an opposing perspective disagrees about the likelihood of that factual picture. This disagreement about how the world works is indeed a serious one, and forms the basis for my

an action is contrary to their sense of right and wrong. The agnosticism which I reject here resurfaces later, but more on the fact end and less on the value end. See discussion infra Part VI.A.


132. See, e.g., Griffith, supra note 73, at 347-48.

133. See, e.g., Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting). "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn." Id.

134. See, e.g., FREEDMAN & SMITH, supra note 9, at 7-9 (objecting to lawyers "imposing" their values on clients); O'Sullivan, supra note 132, at 147-49.


136. See, e.g., Wendel, Teaching Ethics, supra note 129, at 714-19; Wendel, Ethics for Skeptics, supra note 101, at 167-81.

137. See Tremblay, Shared Norms, supra note 101, at 695-704.
pessimism about the viability of the moral activism project.\textsuperscript{138}

There is, as I noted above, a weaker bit of evidence to refute the claim that moral activism could not hold because there are too many ungrounded disagreements about what is good. That evidence is the very fact that observers and critics of the profession do not operate on the assumption that there is no shared moral core. This observation seems true from two angles. It is clearly true from the perspective of the critics of current practice. Those who write deeply troubled accounts of the malaise of modern law practice\textsuperscript{139} implicitly accept shared conceptions about what is good—and, while we may debate their factual picture from time to time, or the remedies, we seldom disagree about the norms that apply.\textsuperscript{140}

But those who defend the amoral role and non-accountability stance of lawyers, and who object most vividly to lawyers incorporating binding moral judgments in their work with clients because of the resulting imposition of lawyers’ values on clients, do not work in an amoral or relativist world. Their arguments are grounded in a moral vision, and one that they hope will be persuasive in its connection to the moral vision of their readers. There is something tautological in the following argument:

It is a bad thing, morally, for a lawyer to undercut the autonomy of her client when the lawyer believes that the client is hurting another person unjustifiably (albeit lawfully). That interference with the client’s autonomy imposes the lawyer’s view of what is good upon the client, who may believe that he is doing something worthwhile. Because the lawyer’s view of the good may differ from the client’s view of the good, the lawyer has no business acting in a way that privileges her vision over that of her client. To do so would be wrong.\textsuperscript{141}

This argument assumes in one thrust that there are some moral principles which bind us (interfering with another’s autonomy is bad), but that others may or may not bind us (hurting an opponent

\textsuperscript{138} See infra Part V.D–VI.

\textsuperscript{139} See, e.g., sources cited supra note 119.


\textsuperscript{141} This argument is paraphrased from FREEDMAN & SMITH, supra note 9, at 60–62.
gratuitously may seem bad to a lawyer, but perhaps not to a client, so no judgments may be made).

Because the population at large regularly acts as though some basic moral truths are evident and important, the relativist or subjectivist explanation for the failure of moral activism cannot persuade us.

C. Is Moral Reasoning Too Complicated?

The third supposed explanation for moral activism's weak influence might relate to the complexity of moral philosophy's language and concepts. This explanation proceeds something like this: unlike the previous explanation, this one accepts that lawyers committed to acting in right and good ways acknowledge that questions of right and good are not personal and idiosyncratic. But, the argument continues, in order to act in ways that are right and good lawyers need to resolve complicated questions of moral philosophy, and they simply do not have the training or the time to do so. An offeror of this explanation might note the deep divisions within moral philosophy circles about what theories best account for ethical truth, and question lawyers' capacity to join that debate and achieve some resolution where the philosophers clearly fail to do so. The upshot of this worry would likely be a return to the positivist, legal-reasoning approach to conflict, which in some guises is exactly what the traditional partisan stance calls for.

This account, while representing a serious worry within the moral activism project, cannot satisfy us as the explanation for the project's infirmity. I have developed this argument in a couple of places

before,\textsuperscript{145} so I will be brief here. Simply put, while the philosophical debates may bewilder us, we nevertheless continue to live our lives with sensible, pragmatic, and shared moral commitments, even if we do not know if our commitments tend to be more Kantian than utilitarian, or Rawlsian, or Aristotelian. We are, whether we know it or not, casuists.\textsuperscript{146} We practice casuistry—a contextual, case-based reasoning by analogy from paradigm cases which have widely shared consensus.\textsuperscript{147} We do not need to resolve the philosophers' debates in order to attempt to live a good and just life, or to practice as a good and just professional.\textsuperscript{148} Indeed, this explanation falters on the same basis as the previous one did. If the explanation were truly a formidable one, we would seldom encounter grounded moral criticism of the practice of law. The prevalence of that criticism implies a basis for such criticism, and that basis is less from the philosophers and more from the common, shared commitments that resonate within the critics' arguments.\textsuperscript{149}

\textbf{D. Maybe Moral Activism Fails Because Lawyers and Law Students Have No Souls}

The fourth proffered explanation is perhaps the most obvious, the most powerful, and, if accepted, the most damning. If moral activism has not changed the tenor of practice or the ethos of the profession, perhaps its failures can be attributed to the fact that lawyers and law students just do not care very much about doing what is right—that they are, as I have described it elsewhere, felons, whores, and jerks.\textsuperscript{150}

This "sociopath" thesis just does not work, and is perhaps the easiest of the explanations to discard, even if it is the account that explains the troublesome practices of lawyers most comprehensively. We reject this account for a number of reasons, but mostly because it


\textsuperscript{146} See Tremblay, \textit{New Casuistry}, \textit{supra} note 145, at 526.

\textsuperscript{147} See Wendel, \textit{Teaching Ethics}, \textit{supra} note 130, at 713–16; Wendel, \textit{Ethics for Skeptics}, \textit{supra} note 101, at 173–75.


\textsuperscript{149} See, e.g., RHODE, \textit{IN THE INTERESTS OF JUSTICE}, \textit{supra} note 49, at 3–8, 24–28 (discussing the problem from the public's perspective and also the discontent of other legal critics).

\textsuperscript{150} Tremblay, \textit{Shared Norms}, \textit{supra} note 101, at 704–05.
does not comport at all with our experience and our observations. It may be true that some lawyers act and speak as though they simply do not care whether what they do has any justice or moral content, or who they hurt for what reasons, but those lawyers are quite rare. As law students they are rarer still.

Our experience (and I am assuming comfortably that your experience is not wildly different from mine) is that lawyers and law students defend their actions, even actions which are dreadful, with arguments and excuses, whether persuasive or not. Perhaps such defenses are disingenuous, and it is likely that some are. But the need to defend actions which appear dreadful with explanations and excuses, grounded in reasons and arguments which have common currency, says a great deal about the commitment to a vision of goodness. This is not to assert that the lawyers or law students in fact are doing good, or have sound, well-developed reasons for their behaviors. Instead, the point here is that the professionals we observe act as though what they do matters and needs justification in some fashion.

While I know less about this than I wish I knew, it appears that psychological study confirms our anecdotal experiences. While persons differ in their moral development levels, with some persons


152. It does seem to be likely, according to several accounts, that lawyers develop personality traits and behaviors which are less attractive and contribute to perceptions of an absence of care about doing good. See, e.g., Susan Daicoff, Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes, 11 GEO. J. LEGAL ETHICS 547, 584–85 (1998):

Lawyers from a very early age appear to have a low interest in people, interpersonal concerns, and emotions. Further, they are likely to conflict with values, such as [a lawyer's] desire to make money. Altruism, which is not terribly prevalent among law students to begin with, may actually decrease during the law school years and appears to decrease during one's years in practice. Lawyers are competitive and primarily motivated by achievement.

Id. (footnotes omitted); Carrie Menkel-Meadow, Is Altruism Possible in Lawyering? 8 GA. ST. U. L. REV. 385, 401 (1992) (noting "our legal culture promotes self-seeking, selfish, individually maximizing behavior").

153. See generally Elliott M. Abramson, Puncturing the Myth of the Moral Intractability of Law Students: The Suggestiveness of the Work of Psychologist Lawrence Kohlberg for Ethical Training in Legal Education, 7 NOTRE DAME J.L. ETHICS & PUB.
exhibiting more sophisticated and sensitive moral reasoning than others, most normal, functioning individuals employ some moral reference for the way they run their lives. There is also much sociological evidence of broad commitments by ordinary people to generalized notions of what makes sense from a moral standpoint, even if there are many disagreements about what social policies might best satisfy those commitments.

For these reasons, it is too simplistic to attribute the poor behaviors of lawyers to some collective moral bankruptcy. It is true, as many commentators have stressed, that law schools ought to and can attend better to moral development and moral reasoning in their teaching, to diminish (or attempt to forestall) the development of the most dangerous character traits that legal training seems to foster. Those suggestions, however, must confront a separate problem, one that has more to do with perceptions of facts and empirical data than with sensitivity to moral qualities. To that, which is the thesis of this paper, we now turn.


155. See Bennett, supra note 20, at 46-48 (discussing role models and peer influence as moral reference tools).


VI. TROUBLESOME PRACTICES AND UNCERTAINTY ABOUT THE WORLD

A. Bad Acts, Factual Uncertainty, and Cognitive Biases

"I'll see it when I believe it."\textsuperscript{158}

We now arrive at my best effort at an alternative explanation for some, and perhaps much, of the troublesome activity that critics lament in the modern legal profession. This account may not explain why more troublesome conduct seems to have appeared in recent decades,\textsuperscript{159} but it does help to reconcile the competing visions of less-than-honorable professional acts and professional actors who seem to be honorable.

My hypothesis is that lawyers, working within the messy world of competing factual claims and arguments, rarely can be sufficiently confident about empirical facts to justify blunt betrayal of their clients. Moral activism, if it is to change the way that the professional behaviors manifest in public, means, at its core, betrayal of client trust. The moral activism project encourages betrayal of client trust only when the client's demands forfeit that trust. However, before betraying or abandoning a client, a lawyer must be certain that her qualms are soundly justified. Earlier objections to moral activism argued that such justification is difficult because of competing visions of what is good. That argument, as we have seen, is unpersuasive. However, replacing it is a newer version, one that locates the uncertainty, not in the realm of value, but in the realm of fact.

The world of a lawyer is a messy, ambiguous, and complicated place. In the stories that populate moral activism project literature, the good guys and the bad guys are rather clearly defined, and the arguments proceed from those premises (consider the two examples that I used to introduce the moral activism primer, with the racist landlord and the abusive husband\textsuperscript{160}). In the untidy law offices where

\textsuperscript{158} GILOVICH, supra note 7, at 49 (quoting psychologist Thane Pittman in a "[s]lip of the tongue").
\textsuperscript{159} This assumes that there is some real evidence that things are worse. See Pearce, supra note 20, at 381–83 & n.8 (observing a change in rhetoric but not assuming any corresponding change in behavior).
\textsuperscript{160} See supra Part III; see also Luban, Partisanship, Betrayal and Autonomy, supra note 1, at 1018 (offering his own two examples, one involving "custody blackmail" in a divorce case, the other a story of the Conoco hostile takeover, where a corporate lawyer threatened to foment an international, racist incident if he did not get his way). William
real lawyers work, bad guys do not often present themselves as unadulterated scoundrels. They have complaints; they have histories; they have been hurt; they want justice. Many of them are wrong, of course, but they are not unambiguously wrong. We may ask a lawyer to betray and abandon these clients when they are wrong, but in so asking, we demand that the lawyer be quite sure that the complaints and pleadings of the bad guys are unwarranted. That responsibility is a heavy one for the lawyer to accept.  

Indeed, the epistemological challenge confronting lawyers within ethics contexts is, almost by definition, more daunting than that facing lawyers regarding questions of substantive law. Recall that the moral activism project operates as a second-tier function. A good-faith lawyer, confronted with an unseemly undertaking, must first determine whether the questionable action requested by her client is lawful. If not, she most likely will refuse to proceed. If the undertaking is not forbidden, then, and only then, the activism equation kicks in. If the undertaking is lawful, but still unseemly, the lawyer must decide whether the unseemliness is so repugnant that she will refuse to participate in the client’s cause.

Simon, similarly, makes his points through stories where the facts are not in doubt, even if the legal or moral implications might be. See, e.g., SIMON, PRACTICE OF JUSTICE, supra note 56, at 29, 31–36 (introducing the statute of limitations case). Simon’s arguments flow from a premise where a rich man owing a just debt asks to assert the statute of limitations to avoid repayment. Id. at 29. My hypothesis is that, while such cases are no doubt common, in the ambiguous world of a law practice, the rich man will offer arguments and pleas which deny the justice of the debtor’s claim. Those arguments and pleas may be flimsy and deserving of much skepticism, but—and this is my principal point—the lawyer will seldom be certain enough that the arguments and pleas are frivolous or untrue to justify abandoning the client’s cause.

161. The thesis I present here is distinctly different from a similar argument presented by Professor William Edmundson, in which he maintains that criminal defense lawyers ought to do anything possible for their clients because they can never know, epistemologically, what is factually true. William A. Edmundson, Contextualist Answers to Skepticism, and What a Lawyer Cannot Know, 30 FLA. ST. U. L. REV. 1, 1–2 (2002). Edmundson asserts that what lawyers think they know is not adequately provably true. Id. at 2. My claim is in some senses the reverse of his. My suspicion is that lawyers remain genuinely uncertain about complicated historical or second-hand facts and as a result cannot rely on certainty to undercut a client’s chosen end. For a philosophical critique of Edmundson’s position, see Atkinson, A Skeptical Answer, supra note 20, at 25–26.

162. A brief caveat is in order here. It is true that moral activism may, in appropriate circumstances, call for the converse of betrayal—that is, a true activist might act as a civil disobedient affirmatively, and claim some benefit for her client where the law does not permit it, if doing so is the only way to achieve justice. Our discussion thus far has focused on betrayal of the bad client, and not vigilante action for the noble client, but the activism conception seems to encompass both. See RHODE, IN THE INTERESTS OF JUSTICE, supra note 49, at 77.
The first step of this process—determining whether the action is sufficiently "legal"—will at times be quite difficult, but often will be comfortably settled. Imagine an Enron-type setting. Several corporate executives ask our good faith lawyer to participate in a complicated scheme to minimize corporate accounting liabilities and to maximize assets on the books, so that the SEC filings and public reports will look good enough to keep the stock price high.\textsuperscript{163} We can imagine some of the legal analysis where the lawyer could easily, without much doubt at all, conclude that the proposals are unlawful. She may have in front of her an SEC directive listing what issuers must disclose in its filings, and the papers before her may omit important corporate developments.\textsuperscript{164} She looks at the SEC directive, and then she looks at the proposed filings, and she concludes that the requested action is unlawful.

Now imagine the same lawyer confronted with the activist judgment. In order to conclude that she cannot support her client after resolving that the action is otherwise lawful, she must make two determinations. First, she must conclude that the proposed, lawful action is harmful to some third parties. Second, she must also establish that the harm caused by the proposal is far greater than warranted by the history or context of the dispute or the events in question.\textsuperscript{165} Except for the clients who walk in and say to her, "I need your help in orchestrating a scheme which is legal, and which benefits me enormously and unconscionably hurts others who are innocent and do

\textsuperscript{163} I am making this up based on very little direct knowledge of the Enron details. My fictional account should suffice, though, for the purposes I intend. For an entertaining, if a bit superficial on the fraud details, account of the Enron events, see generally BRIAN CRUVER, ANATOMY OF GREED: THE UNSHREDDED TRUTH FROM AN ENRON INSIDER (2002) (telling a first person account of an Enron employee).

\textsuperscript{164} We know that the SEC worries that lawyers encounter this kind of problem, because the SEC, commanded by a new federal statute, has recently issued proposed rules requiring lawyers for issuers to report internally ("up the ladder") evidence of securities law violations, and requiring those lawyers to effect "noisy withdrawal[s]" if the issuers officers and directors refuse to make amends. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,673 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205).

\textsuperscript{165} Nearly every action taken by a lawyer on behalf of a client, especially in a litigation or dispute-based setting, will be "harmful" to a third party, usually the other side to the dispute. Activism calls upon the lawyer to recognize when the harm caused is incommensurate with the merits of the dispute and the previous conduct of the parties. See generally DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY, 161–62 (1988) (contending that within the theory of moral activism, the "doctrine of double effect" explains that a lawyer will find "it is permissible to perform an act likely to have evil indirect consequences... only if its direct effect... is morally acceptable and the intention of the actor aims only at the acceptable effect, the evil effect not being one of her ends").
not deserve the pain that we'll inflict," our lawyer will have to make these factual judgments in a far less confident posture than in at least some of her substantive law judgments. William Simon has long argued that moral questions are more difficult to settle than matters of substantive law, and many have quarreled with that argument. Here we agree with Simon, albeit for different reasons.

Each of the two clinic stories with which I introduced this essay helps exemplify this hypothesis, but before we make those connections there is one further noteworthy angle to the hypothesis that we need to explore. My arguments here rely on the complexity and the contested quality of factual assertions underlying legal claims. But there is something else that we need to acknowledge about how lawyers function in practice. Not only is the world of the lawyer and the client complicated in the way just described, but also at the same time powerful cognitive psychological forces operate to undercut the certainty that a moral activist stance requires. Decision theorists and cognitive scientists have demonstrated the significant influence on perceptions, beliefs, and attitudes of several biases or psychological short-cuts. Researchers report how the self-serving bias, the endowment effect, the belief perseverance phenomenon, the availability heuristic, and the hindsight bias collectively affect in critical ways what a person knows, believes, and values. Each of those forces functions to support and encourage beliefs which a person wants to possess, or which are in her interest to possess.

Consider how these "cognitive illusions" might work with a lawyer encountering a scheme proposed by a client who wants to persuade the lawyer that the scheme is a sound and attractive one, and not merely legal. Let us also assume that the scheme would appear to an objective, neutral, outside observer as morally very troublesome. The lawyer, however, does not "see" the information from that neutral, outsider perspective. First, the lawyer's understanding of the scheme will be influenced by the "self-serving bias"—the tendency of

166. See Simon, Practice of Justice, supra note 56, at 18; Simon, Trouble with Legal Ethics, supra note 143, at 66–67.
168. For an explanation of how beliefs are treated as "possessions," as something that one owns, see Gilovich, supra note 7, at 85–86.
individuals “to conflate what is fair with what benefits oneself.” The self-serving bias accounts for the so-called “Lake Wobegon effect.” The self-serving bias also extends to groups with which one is affiliated.

Experimental research demonstrates how deeply the self-serving bias affects one's view of a contested litigation matter. In one study, experimenters assigned groups of undergraduates randomly to one of two groups, and gave each group identical folders containing information about a personal injury lawsuit pending before a judge. Each group's task was to estimate the amount of damages the judge would award to the plaintiff (liability was conceded, so the only contested issue was the amount of recovery). The testers randomly assigned one group to pretend to be the plaintiff; they randomly assigned the other to identify with the defendant. Based on this purely-by-chance assignment, and with no other investment in the case, the plaintiff group estimated the worth of the case substantially higher than did the defendant group. In a control variation, the experimenters did not tell the two groups that they were to identify with a party until just before the end of the evaluation process. In that control variation, the differences between the groups were not significant.

This experiment, the results of which have been replicated often in related studies, demonstrates not posturing by the respective sides about how best to package a case, but instead honest, sincere beliefs about a predictive, factual judgment. The self-interest of the principal dramatically influenced the belief structures of the agents representing that principal. Put another way, those agents could not

172. GILOVICH, supra note 7, at 77 (referring to Garrison Keillor's fictional community from his Prairie Home Companion radio show, Lake Wobegon, where “the women are strong, the men are good looking, and the children are all above average”).
173. Babcock, Explaining Bargaining Impasse, supra note 171, at 111, 116 (suggesting that the self-serving bias is so powerful “that individuals that have more accurate self-evaluations are either low in self-esteem, moderately depressed, or both”).
174. Id. at 111–12; see Linda Babcock et al., Creating Convergence: Debiasing Biased Litigants, 22 LAW & SOC. INQUIRY 913, 917–18 (1997) [hereinafter Babcock, Creating Convergence] (discussing a similar study that used a different control variation).
175. Linda Babcock et al., Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values, 15 INT'L REV. L. & ECON. 289, 293 (1995) (showing that negotiators reach very different assessments about the value of a case when given identical information).
176. See Babcock, Explaining Bargaining Impasse, supra note 171, at 110–11.
(absent some separate intervention) \(^{177}\) "know" what an objective observer would know upon looking at the same data.

The self-serving bias, not surprisingly, also operates to interpret ambiguous cues or evidence as confirming one's view of the world, creating a "confirming-evidence trap." \(^{178}\) Experiments document what most of us would admit, at least privately, to be quite true: that we tend to discount the persuasiveness of arguments that oppose our preferred positions, and view more favorably the persuasiveness of those that agree with our preferred position. \(^{179}\) One sees evidence of this phenomenon regularly in political arguments in the press and other media.

The self-serving bias thus predisposes the lawyer to accept the explanations offered by her client from the beginning. As the client offers explanations and defenses of a proposal, the lawyer filters that data through her distorting bias. The lawyer's cognitive operations are, of course, ongoing and unconscious ones. \(^{180}\) She then assesses any moral questions that might arise through an "[e]gocentric interpretation[] of fairness." \(^{181}\)

As the lawyer hears the more-rosy-than-a-neutral-observer's version of the client's scheme, other cognitive processes operate at the same time. Psychologists report a phenomenon known as "belief perseverance," by which "people cling to their initial beliefs to a degree that is normatively inappropriate." \(^{182}\) The perseverance effect is connected, some think, to the "endowment effect," which leads

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177. See Babcock, Creating Convergence, supra note 174, at 920 (showing plausible debiasing efforts).
178. See HAMMOND, supra note 6, at 198–99.
179. See, e.g., Charles G. Lord et al., Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979). In the Lord study, two groups, one opposing the death penalty and the other supporting it, were given two careful studies, one concluding that the death penalty is effective, and the other concluding that it was not. Id. After exposure to the two studies, the group members emerged more convinced than before of the correctness of their original positions. Id.
182. Craig A. Anderson, Abstract and Concrete Data in the Perseverance of Social Theories: When Weak Data Lead to Unshakeable Beliefs, 19 J. EXPERIMENTAL SOC. PSYCHOL. 93, 93 (1983).
clients to value what they already have over what they aspire to have. Beliefs are like possessions and seem to be influenced by the endowment effect. The research shows that the persistence of beliefs, even in the face of contrary evidence, is aided by the vividness of the presentation of the initial data (vivid but weak data is more powerful than abstract but logically more cogent information) and by the opportunity to generate explanations for those beliefs. All of these factors apply to our lawyer's experience. The self-interested client defending his scheme provides a vivid, personalized description of its benefits and massages any uncertainties or doubts. The influence of the vividness is an example of the "availability heuristic," a cognitive illusion by which people are more apt to believe something will happen if a similar event has occurred recently.

Now consider the effect of one further bias that wields some influence in this setting. The "hindsight bias" causes "[p]eople [to] overestimate the predictability of past events." An event occurs, and afterwards people assume that what happened could have been foreseen. This bias will operate in claims of negligence, lack of due care, and the like in order to make the plaintiff more confident than perhaps warranted by empirical reality, but whose confidence might be confirmed by the bias's effect on judges and juries. For the defendant-type in those disputes, claims of lack of foreseeability might

183. See Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CAL. L. REV. 1051, 1108 (2000). This effect is sometimes called the "status quo bias," which is a puzzling but well-established phenomenon. Id. Consider the following account about the endowment effect and coffee mugs:

[I]n an oft-cited experiment, Daniel Kahneman, Jack Knetsch, and Richard Thaler explored subjects' willingness to buy or sell a coffee mug. The authors gave one group (the "buyers") the opportunity to "buy" a mug instead of giving them monetary compensation for participating in the experiment. They gave the other group (the "sellers") an initial "endowment" of the mug as a gift at the beginning of the experiment, then gave them the chance to sell their newly acquired property. The authors found that the sellers' valuations were more than double the buyers' valuations, even though the experiment presented the subjects with an identical economic choice.


184. GILOVICH, supra note 7, at 85-86 (quoting a metaphor of psychologist Robert Abelson).

185. Anderson, supra note 182, at 95, 103.

186. Id. at 105.


be true, but unavailing. 189

The "hindsight bias" is persistent in its distortion of historical fact. This is cause for some serious concern in legal doctrine because so very much depends on the accuracy of historical accounts. 190 For our purposes, in assessing the viability of a moral activism stance, the "hindsight bias" plays two distinct roles.

First, "hindsight bias" accompanies the self-serving bias in reinforcing the gripes of the client telling the story to the lawyer. The bias affects both lawyer and client, so claims by the client that someone is responsible for knowingly hurting the client can possess greater credence than an objective view would warrant. While it seems to be true that moral activism has a significant role in settings involving defendants, 191 this bias still plays a part in the explanations offered by the accused for why their actions were justified, given the behaviors of the accusing plaintiffs. 192


190. See Rachlinski, Heuristics, supra note 188, at 69–70. Rachlinski explains how much legal doctrine and procedure in fact has as its purpose, an effort to overcome the distortions of this bias. Id. He includes burden of proof, the separation of judge and jury functions, and some evidentiary rules, such as excluding subsequent repair evidence. See id. at 71–72, 94–94.

191. While one initially might assume that the moral activism project would be directed primarily against aggressor clients who use the sword of the law to harm innocent third parties, in fact the stories that populate the moral activism literature tend to show up more often on the defendant side. In many moral activism stories, the "bad" client employs the lawyer's skill to defeat a just claim. See, e.g., Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962), discussed in Luban, The Adversary System Excuse, in The Good Lawyer, supra note 14, at 115 and Hazard, supra note 113, at 20–21 (an insurance company presumably concealed a life-threatening aneurysm in order to limit damage recovery); Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957) (involving a wealthy man who uses the statute of limitations to avoid payment of a just debt), mentioned in Wolf, Ethics, Legal Ethics and the Ethics of Law, in The Good Lawyer, supra note 14, at 46, 59 n.6; see MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD 194–95 (1985), quoted in GILLERS, supra note 113, at 384–85 (discussing a case where aggressive and insensitive lawyers representing the manufacturer of a flawed and potentially deadly birth control device cross-examined women users of the device about their sexual and bathroom habits); BELLOW, supra note 114, at 586–91 (detailing a hypothetical case where a sloppy, overworked personal injury plaintiffs' lawyer overlooks the favorable changes in negligence law and settles a wrongful death case for a mere fraction of what the case is worth; his opponent was a more polished and well-resourced insurance lawyer who blithely exploited the plaintiffs' lawyer's incompetence).

192. While it makes sense that a plaintiff would benefit from the hindsight bias and a defendant would tend to be its victim, see Rachlinski, supra note 188, at 71, its effect can also be important in the meeting between a defendant and his lawyer. Most defendants will explain and defend their actions to their lawyers; think, for instance, of the Dalkon Shield defendants. See MINTZ, supra note 191, at 194–95. That defense will often shift blame to the plaintiffs, whom the defendants will accuse of acting unreasonably. Once the
There is a second way in which the hindsight bias plays an important role in the moral activism project and the critique of lawyers who engage in troublesome practices. The first hindsight bias role spoke to the review of what the client, or the client’s adversary, had done. This second role speaks to what the lawyer has done, as understood at the time when the critics direct their complaints. The critics, simply put, always observe lawyer behavior with the influences of hindsight. Consider this: David Luban uses the example of prominent attorney Joseph Flom and his threats to incite international, anti-Semitic unrest if he did not succeed in obtaining his client’s takeover of the corporate giant Conoco. Luban, a historian at this point, looks at the tactics and results from the perspective of hindsight—how else could he?—and finds the lawyering behavior morally unacceptable. Perhaps his view of the facts is right, but he is reviewing those facts subject to the hindsight bias. What looks to the critic as unadulterated sleaze might have looked more complicated and nuanced at the time of the actions. (Of course, that behavior might well have been simple sleaze. The hindsight bias does not mean that the behavior was not just awful to begin with.)

B. The Experience from a Clinic

We may now connect the two clinic stories with which I began this article to the points outlined in the last section. Let me begin this discussion with a perhaps-surprising admission: in the eighteen or so years that I have taught some version of moral activism in the clinic, my students have seldom acted in the morally activist fashion that would occasion betrayal of client trust and commitment. Sometimes students have moved to withdraw from cases where the facts lacked merit. On rarer occasions a student may have, for example, aided an inept landlord lawyer whose draft settlement papers left his client unprotected, should our client not perform her part of the bargain.194

conversation reaches that point, the “defendant” is acting more like a “plaintiff,” accusing the other side of doing something bad. The hindsight bias, which filters the historical recreation of what bad things happened in the past, will then operate to help the defendant in justifying why he did what looks like a bad thing.


But very seldom has my clinical program encountered a student who has refused to proceed with a client’s case because the student believed that the client was pursuing a morally unacceptable agenda.

That observation ought to be puzzling, because there is no safer place to practice moral activism than in a law school clinic, for several reasons. To begin with, many students exhibit some cultural biases against the clinic’s clients and their goals (there has been no shortage of that kind of reaction—do not misunderstand my earlier point). Students have Luban and Simon right on their desks, assigned sympathetically by the professors who will provide them feedback and assign their grade. The clinic has no worry, none at all, about unhappy clients who might head over to the competing legal aid office. There is no competitor office, and the long line of clients asking for our free help only accentuates the good fortune of those clients who have made it past the gatekeepers. A student could, then, easily decide in an appropriate case that her client has asked for some lawyering activity which generates some very real harm to blameless third parties, and, while legal, the lawyering activity requested is not morally justified. But none do so.

Maybe it is true that in the past eighteen years no client at the Boston College Legal Assistance Bureau has ever raised morally troublesome role questions for the lawyers and students. Perhaps this is a possibility, but hardly likely. (Indeed, I can vouch personally that some clients have raised such qualms for students and for lawyers.) A more likely explanation is hinted at in Amy’s story.

Amy’s conversation with Lynn Barenberg is a helpful example of the moral activism setting. Acting as a lawyer for the first time, Amy faced a conflict between her legal, zealous advocacy role conception and her moral sensibility about playing lawyering tricks to get benefits for a man who did not deserve the benefits. Amy’s choice, when offered to her explicitly, was to stay with the default orientation, and

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196. I have explored that gatekeeping process at length elsewhere. See Paul R. Tremblay, Acting “A Very Moral Type of God”: Triage Among Poor Clients, 67 FORDHAM L. REV. 2475, 2475 (1999) (aiming “to understand the ethics and the strategy of legal services triage”).

197. See supra Part II.A.

198. See Luban, Mid-Course Corrections, supra note 46, at 435 (agreeing that a presumption ought to exist in favor of the conventional role obligations, as a “default”
to represent the client. I suspect that she did so because it asked too much of her to commit, in a final and rather public way, to the factual assertions that caused her moral discomfort. Amy did not have a moral dilemma; she had a factual dilemma. Morally, the question is rather clear. Applicants who are eligible—who are substantively disabled—ought to get Social Security benefits; those who are not eligible should not get benefits. If the system is ineffective in its screening duties, so that some ineligible persons can get benefits without the use of perjury or fraud, then Amy has used her lawyering powers immorally by assisting a not-disabled man to obtain the disability benefits.

Yet that moral assessment relies on factual claims. Amy felt strongly enough about those facts to worry, to stress, and to look for help and relief from our clinic’s social worker. But, despite the strengths of those factual beliefs, I am guessing that Amy could not be so sure that she was right that she could decide those fact claims for herself. The level of certainty, and of confidence, that one needs in order to act as a moral activist is remarkably high, and it calls for a tremendous dose of confidence (or, of course, revulsion for the client) to take that ultimate, betrayal step. Amy could not act as a moral activist when offered the chance.

I suspect by the time Amy held her hearing before the Administrative Law Judge, she not only resolved the ultimate doubt question in her client’s favor (“Who am I to know for certain? I should let the ALJ decide.”), but she persuaded herself that this client was in fact disabled.199 I do not know this, of course, but given the way cognitive dissonance and the other cognitive biases described above operate, I imagine she did.200 That realization leads to our second orientation).

199. Of course, in Amy’s story her client won his case, so a reader might infer that Amy was wrong all along. That is a plausible inference, of course, but importantly it is not the only inference. Nobody would argue that the Social Security disability evaluation system is foolproof. Advocates who represent claimants know of cases where honestly disabled claimants lost cases at the hearing. It is equally fair to assume that errors occur in the other direction, especially with a skilled advocate presenting a case in essentially a non-adversary proceeding.

200. Here is a brief postscript to Amy’s story, involving a similar plight with a different student. I just returned to my clinic after a semester’s research leave. I met with a departing student and my replacement supervisor to review an SSI case whose hearing has been scheduled before an ALJ. The student argued persuasively that the case had little merit, and perhaps I ought not proceed with the hearing. But, until she left the clinic, this same student had resolved her many doubts in favor of proceeding with the hearing, just as Amy did. I can only speculate, of course, but it seems plausible that the student only had the courage to commit to an activist stance when she was relieved of the responsibility of
story.

Recall Kendra's day in court with her landlord's lawyer.\textsuperscript{201} It is possible, I imagine, that Joan, the landlord's lawyer, knew all along that she represented a heartless, greedy, unfair landlord and that she fully intended to employ attack strategies and misleading arguments to leverage some money from a nice, gentle, and blameless law student. That is indeed possible. But you know and I know that Joan most likely did nothing of the kind. We know, pretty darned surely, that Joan saw Kendra as a manipulative, technicality-exploiting, litigious law student who was trying every second-year law school trick to defeat the claim of a hard-working, sympathetic, and, yes, nice young man trying to keep his apartment business afloat. Maybe Joan was aggressive, but Kendra started it, and sometimes you need to be aggressive when justice is on your side. Indeed, the moral activists say exactly that.\textsuperscript{202} Once aggressive, technicality-exploiting practices are justified for the good guys, the important question then becomes identifying the good guys.

Moral activism is challenging because your side is usually right.\textsuperscript{203} You find yourself representing the good guys more often than you expected before you joined that firm, and more often than the critics seem to think. If only they knew the full story. If your clients are not unambiguously right, there are enough arguments and unresolved fact disputes that prevent you from concluding that your client is the ogre that he might appear to be from a distance. When the stakes are high, one may seem to need fewer of those ambiguities and less strenuous arguments to persuade one that he is in a gray area. In gray areas, who is to say which version is truly right?

\textsuperscript{201} See supra Part II.B.

\textsuperscript{202} See SIMON, PRACTICE OF JUSTICE, supra note 56, at 141–42; Gordon, Radical Conservatism, supra note 97, at 925 ("Simon argues that in some settings the lawyer may indeed legitimately act as an unabashed partisan.").

\textsuperscript{203} See, e.g., RHODE, IN THE INTERESTS OF JUSTICE, supra note 49, at 86 (quoting a prominent lawyer who stated he was "not concerned with whether my client is right or wrong. My client is always right"). At the symposium at South Texas College of Law, where I originally presented this paper, one of the other panelists, Larry Fox, made essentially the same argument.
VII. PRACTICE IMPLICATIONS FOR SYMPATHETIC LAWYERS AND TEACHERS

This article does not aim to defend aggressive and strategic lawyering for the bad guys. Instead, it offers an explanation for behaviors that seem to look like exactly that. The moral activists are right; the moral activism project is a noble endeavor. Lawyers ought not use their skills and energy to hurt others unjustly and then evade responsibility by resorting to shibboleths about systemic needs or autonomy trumps. Lawyers who earn good money by manufacturing injustice deserve the reprobation of the profession and the public, as the moral activism proponents aim to accomplish.

My rather gloomy assessment of the moral activism project rests not on its incoherence or on some weakness in its intellectual foundation. Instead, my fears arise from an appreciation for the plight of most lawyers who encounter morally and factually ambiguous terrain. Those lawyers, I have tried to show, comprehend the world differently from the critics, and from the lay observers. They grasp the world especially differently from their opponents. The viewpoint differences result from powerful, ambient, unconscious cognitive forces which the critics cannot wish away. Those lawyers see arguments, gray areas, and explanations that tell them that their clients are less wrong than one might think—or, it is possible that the clients are less wrong. Where moral activism calls for factual certainty, the lawyers experience at best a nagging doubt—and that only in those cases where they are not persuaded that their clients, scorned by the rest of the world, in fact are right.

If this supposition is right, then the role of the reformers seems to change. Much reform aims to sensitize students about how to respond to ethical conflict and how to recognize it in the first place. Those reforms assume that lawyers might see the world as the reformers would. The task becomes one to train lawyers to resolve ethical questions most appropriately, given the competing needs of clients and the harmed third parties. The reformers would agree, though, that when a lawyer's client is right, or is itself the victim of injustice, the lawyer ought to advocate for that client with "warm zeal" and full dedication. See, e.g., supra note 20 and accompanying text (addressing authors who have written about the use of zeal in advocacy). Good guys deserve their help; bad guys deserve some kind of interference, or abandonment.
Given this ethics orientation, lawyers might actually be surprised that they encounter so few of the expected tragedies when they begin to practice, especially those who opt for large firm life. As Tanina Rostain pointed out in her review of William Simon's book, this ambiguity and identification with client arguments "raises a troubling possibility for Simon's proposal: under current conditions of practice, lawyers may become so identified with their clients that they are unable to tell when considerations of justice dictate a result at odds with their clients' interests." If the cognitive psychologists encountered above are right, this stubborn identification with client world views may be less a function of the bureaucratic and profit-driven firm structures and more a result of ordinary heuristics and biases. The stories from the clinic, which is hardly bureaucratic and profit-driven, would support that conclusion.

There is an important way, though, that Rostain's concern about the structure of practice is right, the operation of heuristics and biases notwithstanding. Fact uncertainty persists more readily in contexts where the lawyer simply cannot know the facts firsthand. Much like arguments about just war theory in 2002, where firsthand access to the "true" facts underlying the dispute is just about impossible, a lawyer's reliable assessment of the effect of a large, complex corporate transaction will be hindered by the absence of any direct knowledge of the facts supporting, or opposing, the transaction. The larger and more bureaucratic the setting, the more the lawyer relies upon reports from others who may distort intentionally for their own self-aggrandizement and who will, of course, be influenced by the self-serving biases.

The profit motive also adds to the lawyer's uncertainty in a further, and rather intriguing, way. Imagine the plight of a good faith, honorable, activist-educated young lawyer encountering a lawful but seemingly unconscionable scheme in her large law firm. Let us further add an important leap and assume that she also believes, with all of her operating cognitive processes, that the facts do not support the justice of this scheme. Now, the activist literature tells her, it is the
time for her to accept responsibility and to act in a "morally ambitious" way.

But as she recalls the activist teachings from law school, while deciding whether and how she will respond to the lawful-but-unjust scheme before her, the lawyer also remembers that several very smart scholars, including some with the pedigree of Charles Fried, would counsel her to proceed with the scheme so long as it is lawful. They tell her that it would be wrong for her to do anything to the contrary. The activists, who are in the majority in this debate, disagree of course, and her sense is their arguments are right. But can she really resolve this intricate, long-standing intellectual debate, especially in her cluttered office with $150 million at stake? Maybe it is better to be safe. There would be no public reprimand for going along, after all, because she has already concluded that the law is on her client's side. Maybe she will reread the Luban and Simon books when she finds some spare time, but for now she will take the path of least resistance.

The existential predicament in which our good faith lawyer finds herself thus has two levels of uncertainty—the factual one, which served as the focus for most of the article, and the intellectual one just described. It is hard for her to overcome either of these obstacles, and to proceed as an activist she must overcome both.

The reformers need to think hard about how their agenda can account for these two barriers to activism. Acknowledging them in clinics and ethics courses is an apparent first step. While heuristics and biases are known to be terrifically persistent, there are reports of efforts to anticipate them and to "debias" decisionmakers. Also, while thoughtful writers have claimed for years that the most effective way to teach professional ethics in "in context," the cognitive

208. Luban, Reason and Passion, supra note 3, at 873.
209. See Daicoff, supra note 162, at 576 (stating that "Pepper is somewhat alone in his support of the amoral role").
210. See, e.g., Daniel Kahneman & Amos Tversky, Choices, Values, and Frames, 39 AM. PSYCHOLOGIST 341, 343 (1984) (reporting experimental evidence that the "framing effect" persists even after it has been identified).
211. See Babcock, Creating Convergence, supra note 174, at 922 (showing some success at debiasing).
psychology insights add a wrinkle to that lesson. Through the operation of heuristics and biases, the context can actually distort ethical reasoning, in particular through the self-serving bias.\textsuperscript{213} A sophisticated use of "context" might allow for the use of role plays with controls, so that students might encounter dramatically the influence of the biases on their understanding of facts and predictions. My purpose here is not to develop any semblance of a pedagogy to account for biases and illusions in ethical training. I leave that to others who are more able than I to develop such ideas.

The insights from the psychologists might affect the moral activism project in one further way. Critics within the project might assume a more humble perspective when they encounter evidently nasty behavior. The hindsight bias works in a powerful and endemic way, and it no doubt distorts some of what critics lament. This is not to suggest that most of the terrible behaviors observed by critics would turn out justified if viewed apart from that bias—I have no way to make such an assertion, and it seems rather unlikely. But, much like the fabled McDonald’s coffee story,\textsuperscript{214} where a good faith, defensible (if not absolutely required by justice) jury result has been rewritten, and then mocked, as the quintessential example of the “trouble with lawyers,”\textsuperscript{215} some of the excesses condemned by the activists might have another side to their stories.

\textbf{VIII. CONCLUSION}

Moral activism is perhaps the most important legal ethics development in the latter part of the twentieth century. Its teaching has genuinely revolutionized the moral stance for lawyers confronted with injustice. But the moral activism project, despite its brilliance, seems to have had very little influence on the lives of practicing

\textsuperscript{213} See Babcock, Explaining Bargaining Impasse, supra note 171, at 110 (explaining that the self-serving bias is the tendency of individuals “to conflate what is fair with what benefits oneself”).

\textsuperscript{214} For a detailed description of the verdict against McDonald’s in favor of an elderly woman burned by the restaurant’s hot coffee, see Deborah L. Rhode, Legal Scholarship, 115 HARV. L. REV. 1327, 1349 (2002).

\textsuperscript{215} For one example of the use of the coffee verdict as evidence of justice run amok, consider the United States Chamber of Commerce’s web site, which trumpeted the banner, “Help the U.S. Chamber Take On The Trial Lawyers,” and mocked the McDonald’s award as frivolous and obscene. See Edmund M. Brady, Jr., The U.S. Chamber’s Attack on Trial Lawyers, 77 MICH. B.J. 380, 380 (1998) (reporting on the web site). For a review of misleading attacks on the tort system and its trial lawyers, see Marc Galanter, The Turn Against Law: The Recoil Against Expanding Accountability, 81 TEX. L. REV. 285, 291–99 (2002).
lawyers. I suggest here that the failure of moral activism is not the fault of the project's sensibility, but instead follows from the way that busy lawyers working in complicated settings understand and come to believe facts about the world. The moral activism project assumes that lawyers confronted with injustice will recognize it as such. If the lawyers do not do so (or do not act as though they do so), the usual complaint is that the lawyers' moral development must somehow be impaired. The argument I present here agrees with the observation but not with its diagnosis. The lawyers who seem so insensitive to the injustices quite possibly see a different version of the world, where the grays are grayer and the lines are fuzzier. They see that world not because they are corrupt, but because they are processing information in the usual distorted and biased way that all of us do.

Moral activism must confront the influence of cognitive biases and informational ambiguity into its important message. Without some acknowledgment of that part of the reality of a lawyer's work life, the project will end up, as David Luban feared in 1990, as "simply irrelevant to the world as we find it."