How Do Roles Generate Reasons? A Method of Legal Ethics

Stephen Galoob, University of California - Berkeley

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How do Roles Generate Reasons? A Method of Legal Ethics

by Stephen Galoob*

Abstract: Philosophical discussions of legal ethics should be oriented around the generative problem, which asks two fundamental questions. First, how does the lawyer’s role generate reasons? Second, what kinds of reasons can this role generate?

Every extant theory of legal ethics is based on a solution to the generative problem. On the generative method, theories of legal ethics are evaluated based on the plausibility of these solutions. I apply this method to three prominent theories of legal ethics, finding that none is based on a fully satisfactory solution to the generative problem.

This method has important implication for the study of legal ethics. Philosophically, it moves theoretical debates about legal ethics closer to other debates about the sources of normativity, like those concerning promises. Further, this method identifies a real-world dimension to these theoretical debates. Focusing on the generative problem allows for the empirical verification of hypotheses about legal ethics that have, to date, largely been conjectured.

Keywords: legal ethics; reasons; normativity; roles; promises; generative problem; legal ethics- empirical study of.

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Introduction

Much philosophical work on legal ethics defends a particular substantive theory.1

These theories explain what the lawyer’s professional responsibilities should be and why

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they are justified (or not). However, in defending their theories, legal ethicists risk talking past each other. To avoid this impasse, we need standards for assessing theories of legal ethics that do not presuppose the superiority of any particular theory.

I propose that theories of legal ethics should be evaluated based on the generative problem. Broadly, the generative problem asks whether and how our actions can affect what we have reason to do.\(^2\) Many confront the generative problem in debates about promises. By promising to do something, can you make it that case that you have a reason to do what you have promised? What if the action you have promised to do is otherwise impermissible? If so, then how does your promise generate these permissions or obligations? If not, why not?

Similar questions can be asked about professional roles generally, and the role of lawyer especially.\(^3\) Does your occupying the role of lawyer affect what you have reason to do? How much difference could this role make to what you have reason to do? Could the role permit or require you to act in otherwise impermissible ways? If so, how? If not, why not?

Every extant theory of legal ethics rests on a solution to the generative problem. We should assess these theories based on the plausibility of their implicit solutions to the generative problem. This generative method brings debates about legal ethics closer to debates in other areas of law and broader philosophical debates about normativity. This


\(^3\) In discussing whether the lawyer’s professional role can generate reasons for action, I do not mean to take a stand in debates about what the lawyer’s professional role is, or even whether there is a professional role of lawyer. Rather, the broader puzzle is how any role, however defined, can make a normative difference.
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method also identifies a real-world dimension to otherwise theoretical debates about legal ethics. Every solution to the generative problem depends on verifiable assumptions and posits verifiable hypotheses. Thus, the generative method allows for testing claims about legal ethics that have, to date, largely been conjectured.

This article has two main parts. Part I elaborates the generative method and describes what is a viable solution to the generative problem. Part II applies this method to three prominent theories of legal ethics. I conclude that none is based on a fully satisfactory solution to the generative problem. However, this finding should not be troubling. Rather, it invites a broader and more empirically informed conversation about legal ethics and professional roles.

I. The Generative method

Section (a) describes the generative problem and the form that solutions to it might take. Sections (b) and (c) show how solutions to the generative problem can be evaluated structurally and empirically.

a. Solutions to the Generative Problem: Mechanisms and Effects

In debates about legal ethics, the generative problem is the question of how the lawyer’s role could generate reasons for action. A solution to the generative problem establishes that a specific set of features (F) of a role (R) give the agent who occupies the role (A) reason to act in a certain way (to do X or not to do X). Thus, solutions to the generative problem take the following form:

F of R generates reason for A [not] to do X.

Every solution to the generative problem has two important aspects. The first is its account of the role’s generative mechanism, or the specific features in virtue of which a
role generates reasons for the role-occupant. The concern here is whether F, rather than some other features of R, explain A’s reasons.

The second aspect is a solution’s account of the _generative effect_ of a role. If occupying a role can make a difference to someone’s reasons for action, how much difference can it make? Even if a role can generate some reasons for action, it is an open question whether the role generates reasons to act in any particular way. To verify a statement about the generative effect of a role, we need to establish a tight connection between R and A’s having reason (not) to do X.

Let’s consider these issues more thoroughly in the context of legal ethics. Do lawyers have compelling reasons to act in certain ways? If so, do their roles explain these reasons?4 When you have a compelling reason to do X, your X-ing is justified. Your having reason to do X also affects how others may respond to your X-ing. When you do X for a good reason, it is inappropriate to criticize you in certain ways.5 Further, your reasons affect the reasons of others. Where you have a good reason to do X, others might

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4 In general, a reason is a consideration that bears on a question. See Pamela Hieronymi, ‘The Wrong Kind of Reason’ (2005) 102 _Journal of Philosophy_, 437, 444. To say that reasons are considerations is to deny that they are mental states (e.g., beliefs, desires, or intentions), so much as ‘the propositions, facts, states of affairs, events, or objects that might serve as the content of such mental states, that which beliefs or desires are about.’ Ibid., at 438. Practical reasons are considerations that bear on the question of what to do, rather than theoretical reasons (which bear on the question of what to believe). Ibid., at 444. ‘Normatively compelling’ reasons are considerations that can fully justify and/or guide someone’s action or belief, rather than those that merely explain or figure in the explanation of that action or belief. See Joseph Raz, ‘Reasons: Explanatory and Normative’ in Constantine Sandis (ed), _New Essays on the Explanation of Action_ (Palgrave Macmillan, 2009). I use the terms ‘reasons’ and ‘good reasons’ both to mean normatively compelling (or conclusive) reasons for acting in a certain way. These kinds of reasons can figure third-personally in justifying action, as well as first-personally in an agent’s deliberation. My topic is how roles could generate such reasons. This topic differs from the issue of whether ‘role morality’ is transparent to ‘ordinary morality,’ as many legal ethicists put the question. For example, Arthur Applbaum concedes that roles can generate practical reasons, but focuses his attention on whether roles can generate moral reasons. Applbaum, _Ethics for Adversaries: The Morality of Roles in Public and Professional Life_ (Princeton University Press, 2000), 57. On the method proposed here, Applbaum’s concession is precisely what is at issue.

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have duties to refrain from interfering with (and perhaps to assist or accommodate) your
doing X. The generative problem arises, in part, out of these implications. Reasons are
supposed to constrain your actions, to limit what you are justified in doing. It would be
strange if one could, by exercising her will, affect the reasons that she and others have.
Such an arrangement would invite Hume’s charge of transubstantiation, wherein ‘a
certain form of words, along with a certain intention, changes entirely the nature of an
external object, and even of a human creature.’

Explaining how the lawyer’s role could generate reasons, then, requires
specifying the generative mechanism. Similar issues arise in debates about promising.
How could your promise to do X make it the case that you have a reason to do X?
Philosophers propose a variety of mechanisms to explain how promises generate reasons.
Practice-based views argue that the source of a promise’s normativity is the convention
or practice of promising itself. In making a promise, one implicates a broader social
convention. This convention explains why the promisor has reason to keep her promise.
Practice views differ in their description of how the convention of promising endows
individual promises with normative significance. However, on all such views, promises

7 Joseph Raz, The Morality of Freedom (Oxford University Press, 1986), 84 (‘We cannot create reasons just by intending to do so and expressing that intention in action. Reasons precede the will.’)
10 John Rawls offered a two-tiered view about the normativity of promises: first, the practice of promising itself is just; second, the individual promisor who ‘invokes the rule and accepts the benefits of’ this practice has a duty based on the ‘principle of fairness.’ A Theory of Justice (Rev Sub Harvard University Press 1999), 304-5. Niko Kolodny and R Jay Wallace offer an alternative practice-based account: the reasons to keep one’s promise include moral reasons not to undermine or exploit a valuable social practice (like that of promising). See ‘Promises and Practices Revisited’ (2003) 31 Philosophy & Public Affairs, 119, 148-51.
do not directly create reasons. Rather, the act of promising changes the reasons applicable to the promisor by invoking the convention of promising.

Others dispute that the normative significance of promising is necessarily conventional. One such non-conventionalist position is based on autonomy. In promising, the promisor voluntarily commits her will or invests her agency toward the object of the promise.\textsuperscript{11} This commitment or investment generates a reason for the promisor to act in the way specified by the promise. Others have reason to hold the promisor to her promise as a way of respecting her agency.

Another position, defended by T.M. Scanlon, sees the ‘value of assurance’ as the source of the normativity of promises.\textsuperscript{12} For Scanlon, the promisor’s reason to keep her promise follows from a broader prohibition on disappointing the expectations of others that one has induced.\textsuperscript{13}

David Owens advances still another position: promises have normative significance because they serve our ‘authority interests.’\textsuperscript{14} For Owens, a promise to do X is a grant of authority to another, a way of taking the decision about whether to do X out of the promisor’s hands. By implication, breaking a promise is wrong because it is \textit{ultra vires}. In failing to do X after she has promised to do X, the promisor acts on authority that she lacks.

This brief discussion suggests a parallel to legal ethics. In debates about promises, controversy over the generative mechanism asks how your promising to do X could give


\textsuperscript{12} \textit{What We Owe to Each Other} (Harvard University Press, 1998), 303.

\textsuperscript{13} Scanlon calls this broader moral requirement ‘Principle F.’ Ibid, at 304.

you a reason to do X. The question for legal ethics is how your occupying the role of lawyer (among whose tenets is that role-occupants are permitted or required to do X) could make it the case that you have reason to do X. Each of the positions on how promising generates reasons has an analogue in legal ethics. The analogue to the ‘practice’ position denies that the occupation of the lawyer’s role directly generates reasons. Rather, occupation of the role changes the reasons that apply to the lawyer—in particular, the reasons for valuing the institution in which the role arises. On the counterpart to voluntarism, the lawyer’s investment of agency in her role explains her role-based reasons. To commit to the life of the lawyer is to give oneself reason to act in ways that lawyers act. On the counterpart to Scanlon’s assurance view, the lawyer’s role can generate reasons by inviting certain expectations of others. Thus, the lawyer has reason to do X where her client (or her fellow practitioners) have reason to expect her to do X. Another alternative, analogous to Owens’s authority view, is that occupying a role effects a transfer of authority. When acting as a lawyer, one relinquishes to relevant others (for example, one’s client, one’s fellow professionals, professional regulators) the power to decide what one will do in certain situations. My point here is not to elaborate or defend any of these candidates. Rather, it is to suggest that every potential explanation for how the lawyer’s role generates reasons has a parallel in debates about how promises generate reasons.

Questions about the generative mechanism ask how the lawyer’s role can make a normative difference. Questions about the generative mechanism ask how much normative difference the lawyer’s role could make. Here, too, there is a parallel to debates about promising. Suppose that the deontic status of an action can be classified as
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forbidden, permitted but not required (or ‘merely’ permissible), or required. How much difference can a promise to do X affect the deontic status of doing X? Say that I promise to donate a large sum of money to support the local Musical Society’s orchestra, even though ‘keeping this pledge would entail seriously neglecting my children’s need for food and clothing.’

Normally, donating this sum would be impermissible because it would require me to violate duties to support my children. Can my promise to donate this sum make it so that I am permitted or required to perform this otherwise impermissible action?

A maximalist position holds that promises can change the deontic status of actions, regardless of the background normative status of such actions. A moderate position sees the normative significance of promises as more constrained. The power ‘to create promissory obligations and reasons is circumscribed by other normative requirements, including the moral claims of others.’ For a moderate, whether a promise to do X generates a reason to do X depends on the antecedent deontic status of doing X. If doing X is broadly impermissible, then promising to do X cannot generate a permission or requirement to do X. The moderate might reach this conclusion by denying that promises necessarily create obligations or denying that obligations generate reasons when they conflict with broader normative requirements.

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15 Watson (n 11), at 173.
16 The logic behind a maximalist position might be the following: A valid promise to do X can create an obligation for the promisor to do X, and to have an obligation to do X is (at least sometimes) to have reason to do X. See Margaret Gilbert, ‘Three Dogmas about Promising’ in Hanoch Sheinman (ed), Promises and Agreements: Philosophical Essays (Oxford University Press, 2011), 80.
17 Watson (n 11) at 178.
The maximalist and moderate positions overlap in some cases. Where doing X is ‘merely’ permissible, both positions allow that a promise to do X can generate an obligation to do X. For example, in the Musical Society case, if keeping my pledge was not otherwise impermissible (say, if it did not entail depriving my children), then my promise to donate the sum would have generated an obligation for me to do so.

However, the maximalist and moderate positions differ on other important cases. The maximalist asserts that promissory reasons can cross the permissibility divide. Promises can render permissible actions that are otherwise impermissible. Likewise, promises can render impermissible actions that are otherwise permitted or even required. Thus, in the Musical Society case, the maximalist might conclude that my promise generates a compelling reason for me to donate the sum, even if doing so will preclude me from fulfilling my duty to provide for my children. Alternatively, the maximalist might say that I face a dilemma, since I have both compelling reason to donate (via my promise) and not to donate (based on my obligation to provide for my children).

By contrast, the moderate mostly denies that promissory reasons can cross the permissibility divide. Where doing X is otherwise required, one’s promise not to do X cannot make X-ing optional or forbidden. Further, if doing X is otherwise forbidden, then one’s promising to do X cannot permit (let alone require) one to do X. The moderate position need not hold that illicit promises (or promises to perform otherwise impermissible actions) make no normative difference at all, just that they do not generate a reason to perform the illicit actions promised.20

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20 A moderate could deny that the promise to do X generates a reason to do X, yet acknowledge that this promise affects what one has reason to do. My promise to donate money to the musical society might not give me a reason to donate this sum, but nonetheless give me reason to apologize. See Watson (n 11), at 175-6.
Similarly, there are maximalist and moderate positions about the generative effect of the lawyer’s role.\(^{21}\) On a maximalist position, roles can change the deontic status of certain actions independently of background normative considerations.\(^{22}\) The lawyer’s role can obligate her to act in ways that are otherwise impermissible or merely optional. For instance, professional rules might require a lawyer to maintain confidences in cases where disclosure seems otherwise morally required. Likewise, roles can forbid certain actions that are otherwise permitted or required. For example, it is plausible that there is a general moral requirement to help others when one can easily do so.\(^{23}\) Yet, on the maximalist position, the lawyer’s role could render the provision of important aid optional, or even forbid it altogether. The maximalist contends that role-based reasons (like promissory reasons) can cross the permissibility divide.

By contrast, a moderate position would see the generative effect of roles as more limited, and constrained by broader normative considerations.\(^{24}\) The moderate asserts that ‘[i]nstitutions and the roles they create ordinarily cannot mint moral permissions to do what otherwise would be morally prohibited.’\(^{25}\) Roles can ‘require what is permitted,’ but ‘ordinarily cannot permit what is forbidden.’\(^{26}\)

\(^{21}\) A skeptical position might deny that roles have any generative effect. On such a position, the lawyer’s role cannot even generate obligations to act in otherwise ‘merely’ permissible ways. Although this skeptical position is possible, no legal ethicist advances it. Therefore, I won’t consider this skeptical position further here.


\(^{23}\) T.M. Scanlon, Moral Dimensions: Permissibility, Meaning, Blame (Harvard University Press, 2008), 140.

\(^{24}\) See Applbaum (n 4); Alan Gewirth, ‘Professional Ethics: The Separatist Thesis’ (1986) 96 Ethics, 282. There is some overlap between the moderate and maximalist positions. On both positions, roles can require their occupants to act in ways that are otherwise optional. Further, both positions could see roles as sometimes prohibiting actions that are otherwise optional.

\(^{25}\) Applbaum (n 4), at 3.

\(^{26}\) Ibid, at 258.
A solution to the generative problem consists in an account of the generative mechanism and generative effect of the lawyer’s role. To illustrate how solutions might differ, consider the following example.

**Brutal Cross-Examination**: A lawyer is defending a rapist, who has informed the lawyer that he is guilty, but who insists on offering as defence the falsehood that the victim consented to have sex with him. The client is unrepentant and unshakeable—he has gotten away with the same defence in the past. To make it seem plausible that the victim consented and then turned around and charged rape, the lawyer would have to conduct cross-examination so that the witness “look[s] like a whore.” This technique requires humiliating and browbeating the witness, knowing that if she blows up she will seem less sympathetic, while if she pulls inside herself emotionally she loses credibility as a victim.  

The goal of aggressive cross-examination is to secure the client’s acquittal. The supposition is that humiliating the witness will undermine her credibility, thereby improving the client’s chances of acquittal. May the lawyer aggressively cross-examine the witness?

As a general matter, this conduct seems impermissible. Aggressively interrogating the victim of a crime is a direct harm. It aims to humiliate the witness and might well compound the degradation of the underlying wrong. Harming someone without a good reason invites serious moral criticism. This conduct also raises the prospect of moral complicity. As Christopher Kutz has argued, your complicity in another’s wrong can be based on your endorsing the wrong, even when you neither intend nor cause the wrong. Normally, acting on behalf of a rapist in these ways would be tantamount to endorsing the conduct, or at least failing to repudiate it to the extent morally required. Further, to provide post-crime aid is normally to be an accessory after the fact, which invites an

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28 Here, blameworthiness would be based on ‘reasons of character,’ rather than ‘reasons of causation’ or ‘reasons of consequences.’ *Complicity* (Cambridge University Press, 2000), 42-3.
additional charge of moral complicity. Finally, helping a rapist evade punishment seems sufficient to make one complicit in the rapist’s future assaults. Each of these is a serious charge.

Resolving the Brutal Cross-Examination case, then, turns on whether the lawyer’s role can justify this conduct. Different positions on the generative effect arrive at different conclusions. On a maximalist position, aggressive cross-examination could be justified, even though this conduct would be impermissible if done outside the lawyer’s role. A more moderate position would deny that this conduct could be justified by the lawyer’s role, since roles cannot ‘mint moral permissions.’ Moreover, those who take the maximalist position might offer different explanations of why the lawyer’s role could justify aggressive cross-examination. These differences reflect different conceptions of the generative mechanism. Likewise, those who take the moderate position might differ in explaining why aggressively cross-examining the witness cannot be justified. These differences, too, reflect different accounts of the generative mechanism.

Resolving the Brutal Cross-Examination case, then, requires not only reaching a conclusion about the reasons that the lawyer has, but also offering an explanation of how the lawyer’s role helps explain these reasons. More generally, solving the generative problem requires positing an account of the generative mechanism and taking a position on the generative effect of the role.

b. Structural Evaluations

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30 This criticism could be supported by what Kutz calls reasons of causation, consequence, and character. Kutz (n 28), at ch. 2.

31 Applbaum (n 4), at 3.
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A structurally viable solution to the generative problem should, at a minimum, be congruent and robust.

**Congruence:** A solution to the generative problem is congruent when its account of the generative mechanism meshes with its account of the generative effect. For example, a maximalist position on the generative effect of the lawyer’s role posits that lawyers could be permitted or required to act in otherwise impermissible ways. Everyone has compelling reasons not to act impermissibly. Doing so usually subjects one to powerful criticisms. Thus, the defender of the maximalist position must show that role-based reasons can overrule or outweigh or defeat the ordinarily weighty reasons against such actions. This defence requires a powerful account of the generative mechanism. The graver the wrongs that a role could justify, the more powerful the account of the generative mechanism must be. A solution risks incongruence if its account of how roles generate reasons is not powerful enough to support its conclusions about the normative difference that roles can make.

The Brutal Cross-Examination case illustrates the importance of congruity. Harming the rape victim and being complicit in a rape are serious wrongs. Arguing that aggressively cross-examining the rape witness is permitted or required requires offering a powerful account of the generative mechanism. This account must show that the lawyer’s role implicates highly compelling interests. It must also show why these interests are served by aggressively cross-examining the witness, and (perhaps) that these interests would not be served by actions that did not involve degrading or humiliating the witness. Because everyone has compelling reasons to avoid degrading and humiliating others, the account should also explain why these background reasons do not constrain the lawyer’s
behaviour in this case. If an account of the generative mechanism cannot meet these
challenges, then it does not mesh well with the conclusion that the lawyer’s role could
justify aggressive cross-examination.

Congruence is a structural requirement. A solution is deficient if it needs, but
cannot provide, an account of how the lawyer’s role generates compelling reasons to act
in ways that are otherwise impermissible. Because congruence is a structural
requirement, an incongruous solution can be rejected as an account of how the lawyer’s
role generates reasons, regardless of the plausibility of its conclusions about legal ethics.

Robustness: A solution to the generative problem is robust when its account of
the generative mechanism and generative effect travel. Every solution picks out certain
features of the lawyer’s role that make a normative difference. We can assess a solution’s
robustness by asking whether other roles with the same features generate similar reasons
and justifications for role-occupants. Robustness requires not only that the occupants of
these analogous roles have similar reasons, but also that these role-based reasons are
explained by the common features of the roles.

For example, suppose a theory of legal ethics concludes that the lawyer’s role can
require her to maintain client confidences, even where disclosure would otherwise be
required. Suppose also that this conclusion is attributed to two specific factors: that the
client is vulnerable and that allowing the lawyer to disclose confidences would inhibit
client communication. A solution to the generative problem is implicit in this argument:
specific features of the lawyer’s role (the client’s vulnerability and the inhibitory effects
of allowing disclosure) explain the change the deontic status of disclosing confidences. If
this solution is robust, then other roles that implicate similar considerations should
generate similar obligations to maintain client confidences. If roles with analogous features are not associated with similar duties of confidentiality, then we can question whether the proposed solution is an adequate explanation of the lawyer’s obligations. We might ask whether factors other than vulnerability and inhibition are needed to explain why the lawyer has reason not to disclose client confidences. Alternatively, the lack of robustness might lead us to question not the solution’s logic, but the conclusion that it is taken to support. Perhaps the client’s vulnerability and the potentially inhibiting effects of disclosure are insufficient to relieve role-occupants of their broader duties to help others. Thus, when a solution to the generative problem is not robust, we can doubt that it offers a plausible account of the generative mechanism or the generative effect of the lawyer’s role.

To say that solutions must be robust is not to say that the justifications for the lawyer’s role must generalize within or across societies. Not every theory of legal ethics aspires to generality. Some assign normative importance to features that are unique to the lawyer’s role. The robustness requirement is not meant to rule out these solutions in advance. Rather, it prevents these solutions from avoiding generalization by fiat. If a solution posits that certain kinds of reasons are restricted to the legal domain, then it must explain and justify this domain restriction. Otherwise, it is structurally deficient.

c. Empirical Evaluations

The generative method also opens new avenues for empirical inquiry. This empirical inquiry is not a matter of testing the conclusions that a solution reaches. (As

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32 See W. Bradley Wendel, Wendel, W. Bradley, ‘Razian Authority and Its Implications for Legal Ethics’ (2010) 13 Legal Ethics, 191 (‘To the extent that the lawyer’s role has any normative significance… its significance is bound up with the law’s function of settling moral and empirical conflict.’)
discussed below, some solutions deny that conclusions about legal ethics do or should
conform to ordinary moral judgments about what lawyers should do.) However, every
solution asserts hypotheses about how roles can make a normative difference and how
much difference they can make. By testing these hypotheses, we can assess the viability
of solutions to the generative problem.

There are at least three ways to empirically analyze solutions to the generative
problem. First, we can test a solution’s assumptions. Every solution starts from empirical
presuppositions. If a solution’s presuppositions are not true, then the solution must be
revised or else it is descriptively inaccurate.

Second, we can assess the empirical adequacy solution’s account of the generative
mechanism. Recall that an account of the generative mechanism specifies the features of
a role that make a normative difference. It contends that F, rather than some other
features of R, explain why A has reason to do X. There is a necessary connection
between mechanism and effect. When the features specified by the mechanism are
present, a role should generate reason to do X. When they are absent, a role should not
generate reason to do X. We can test such hypotheses using survey methods developed
by psychologists and experimental philosophers. First, we should isolate features of the
role that are hypothesized to be normatively significant. Then, we should identify real-
world or experimental circumstances where these features are (or are not) present.
Finally, we should examine whether the predicted conclusions about the reasons of role-
occupants are borne out. If not, then we can question the descriptive accuracy of solution.

33Thanks to William Simon for encouraging me to clarify this point.
A descriptively inaccurate solution might offer a valid account of how roles could generate reasons, but it does not explain how roles do generate reasons for us.\textsuperscript{34}

Third, we can assess the empirical adequacy of accounts of the generative effect. As noted above, maximalist positions predict that the lawyer’s role can permit (or require) lawyers to act in ways that are otherwise forbidden. By contrast, moderate positions predict that role-based reasons cannot cross the permissibility divide. We can assess these competing hypotheses by examining whether variations in the description of a role are associated with different verdicts about the permissibility of certain actions. If so, then there would be reason to doubt at least the moderate position that professional roles cannot ordinarily ‘mint moral permissions.’\textsuperscript{35}

There are many other ways to empirically assess theories of legal ethics based on their implicit solutions to the generative problem. The point is that the generative method provides a way to verify many central claims in debates about legal ethics.

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To summarize, on the generative method, theories of legal ethics should be analyzed based on their implicit solutions to the generative problem. First, we should isolate a theory’s solution, or its account of the generative mechanism and the generative effect of the lawyer’s role. Second, we should evaluate the congruence and robustness of this solution. Third, we should empirically evaluate a solution’s assumptions and hypotheses. A theory of legal ethics should be revised or rejected if it is based on a structurally implausible or empirically unsupported solution to the generative problem.

\textsuperscript{34} Such an account would fail to capture what, after John Mikhail, I will call the ‘operative’ principles about the normative significance of roles, or the ones that actually guide ordinary judgments about how roles generate reasons. See his Elements of Moral Cognition (Cambridge University Press, 2011), at § 2.1.5

\textsuperscript{35} Applbaum (n 4), at 3.
II. Evaluating Three Theories of Legal Ethics

In this Part, I apply the generative method to three prominent theories of legal ethics. For each theory, I first describe its main tenets and identify its implicit solution to the generative problem. Table 1 summarizes these solutions. For the sake of comparison, I consider how each solution might resolve the Brutal Cross-Examination case. I then examine the structural plausibility of each solution, finding some difficulties that have not been appreciated by legal ethicists. I also identify each solution’s empirical commitments and outline a research agenda for verifying or disconfirming these.

Table 1: Summary of Solutions to the Generative Problem

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<th>View</th>
<th>Generative Mechanism</th>
<th>Generative Effect</th>
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<td>Hired Gun views</td>
<td>Transmission</td>
<td>Maximal (tracks institutional justification)</td>
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<tr>
<td>Ordinary Morality views</td>
<td>Triggering</td>
<td>Moderate</td>
</tr>
<tr>
<td>Discontinuity views</td>
<td>Authority</td>
<td>Maximal (constrained by legitimacy)</td>
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</table>

The goal of this analysis is not to articulate the best theory of legal ethics, so much as to establish how this debate might be resolved. Two of the theories considered here (the ‘Hired Gun’ and ‘Discontinuity’ views) rest on structurally problematic solutions to the generative problem. Further, the descriptive adequacy of each of these theories is an open question.

a. ‘Hired Gun’ theories

‘Hired Gun’ views predominate among lawyers and practitioners. Lord Brougham’s statement of this position is canonical:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and
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expedients, and at all hazards and costs to other persons… is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.36 Consistent with Lord Brougham’s statement, most versions of the Hired Gun view defend at least the principles of partisanship and non-accountability. The principle of partisanship holds that ‘[w]ithin, but all the way up to, the limits of the law, the lawyer must be committed to the aggressive and single-minded pursuit of the client’s objectives,’ even when doing so conflicts with the interests of others.37 The principle of non-accountability holds that ‘a lawyer is not to be judged by the moral status of their client’s projects, even though without the lawyer’s assistance the client would not have been able to pursue those projects.’38 Arguments for the Hired Gun view are typically teleological: the justification for the principles of partisanship and non-accountability is a function of the justification for the legal institutions in which the lawyer’s role arises.39 As such, most Hired Gun views reflect what some call ‘system utilitarianism.’40 Where the legal system is justified, the principles of partisanship and non-accountability are justified (and the lawyer is immune from criticism for acting on them), even if these principles permit or require actions would be prohibited if performed outside the lawyer’s role. By implication, where the legal system is unjustified, so are these principles (and the lawyer’s role does not provide reason to act in accordance with them).

The Hired Gun solution posits a transmission mechanism: the justification for the lawyer’s role-actions derives from the justification of the institution in which the role

37 Dare (n 1), at 5.
38 Ibid, at 10.
39 Ibid, at 79.
arises. When transmission conditions are met, this broader institutional justification applies to specific institutional roles. In the case of the lawyers, the broader source of justification is the adversarial system, or perhaps the legal system itself. Where (and to the extent that) the legal system is justified, the lawyer’s professional actions in accordance with the principles of partisanship and non-accountability are also justified.

The Hired Gun solution also offers a tracking hypothesis: the justification for the lawyer’s role tracks the broader justification for the institution in which that role arises. On this hypothesis, the more justified the institution, the greater the justification for the occupants of institutional roles to act in ways that depart from otherwise applicable requirements. The less justified the institution, the less justification for role-occupants to perform professional actions that are otherwise impermissible. By implication, if the conditions for transmission are not met, then the institutional role does not generate compelling reasons for action.

Tim Dare defends something like the transmission mechanism as part of an ‘indirect route’ for justifying a lawyer’s professional actions. Yet Dare’s defence raises a puzzle that applies to Hired Gun solutions more broadly. Why the need for an indirect strategy at all? Why not analyze the lawyer’s professional actions by directly applying the relevant moral criteria?

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41 See Richard Wasserstrom, ‘Roles and Morality’ in David Luban (ed), The Good Lawyer, 1983, 25, 36 (‘[N]one of the moral arguments for roles are stronger than the justifiable confidence in the overall justice and utility of the institutions within which the roles are established and in terms of which they are sought to be justified.’).

42 Luban (n 1), at 58 (the ‘weaker the justification of the institution, the weaker the force of [role-based] obligation in overriding other morally relevant factors’).

43 Dare (n 1), at 44. The transmission mechanism has a distinguished philosophical pedigree. See John Rawls, ‘Two Concepts of Rules’ (1955) 64 The Philosophical Review, 3; Benjamin Freedman, ‘A Meta-ethics for Professional Morality’ (1978) 89 Ethics, 1, 17.
Defenders of the Hired Gun view answer these questions in at least two different ways. Some argue that ordinary moral principles (and judgments based on them) misfire when applied to ethical world of lawyers. On this *categorical hypothesis*, ordinary moral principles and judgments take what some moral psychologists call a ‘characteristically deontological’ form. These principles and judgments are not fine-grained enough to account for the complex scenarios or institutional considerations that lawyers face. As such, directly applying ordinary moral principles would either result in indeterminacy or provide systematically incorrect answers to important questions. This malfunction explains the need for an indirect strategy like the transmission mechanism.

Others see the need for indirect justification as arising out of moral pluralism. On this *pluralist hypothesis*, ordinary moral principles are the source of persistent disagreement, which extends to the ethical decisions that lawyers confront. Given this disagreement, ordinary moral principles should be systematically excluded from the lawyer’s professional deliberations, as well as from the rules of legal ethics. Because moral and political disagreements are deep, seeking a direct moral justification for the lawyer’s role is inconsistent with basic requirements of democracy. An indirect justificatory strategy is necessary to prevent arbitrariness and preserve the rule of law.

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45 I assume here that ordinary moral judgments apply (or otherwise reflect) moral principles.


48 Spaulding calls this ‘thin professional identity.’ Ibid, at 6-7.

The Hired Gun solution also takes a maximalist position about the generative effect of the lawyer’s role. When the transmission conditions are met, ‘lawyers owe special duties to their clients which render permissible, or even mandatory, acts that would otherwise count as morally impermissible.’\textsuperscript{50} The lawyer’s role can also forbid her from acting in ways that she would otherwise be permitted to act. This role can permit or require her to take actions that would otherwise be forbidden. These effects can also work in the other direction: where the transmission conditions are met, the lawyer’s role can forbid her from acting in ways that would otherwise be required.

Here is how the Hired Gun solution might resolve the Brutal Cross-Examination case. If the conditions for transmitting institutional justification to the lawyer’s role-actions were met, then the principles of partisanship and non-accountability would give the lawyer reason to aggressively cross-examine the rape witness. Further, if a justified legal system permitted or required lawyers to engage in even more brutalizing tactics in cross-examining witnesses, then the lawyer would be permitted or required to take these more extreme actions as well. However, if the transmission conditions were not met, then the lawyer’s role would not generate such reasons. The institutional justification would not transmit to justify the lawyer’s role-actions.

\textbf{Structural evaluation:} There are two serious structural difficulties with the Hired Gun solution. The first concerns its congruence. The Hired Gun solution takes a maximalist position on the generative effect of roles. In order to be congruent, the transmission mechanism must be capable of generating compelling reasons. Moreover, if the principles of partisanship and non-accountability are true (as the advocate of the

\textsuperscript{50} Dare (n 1), at 2.
Hired Gun asserts), then institutional justifications must routinely transfer to the lawyer’s role-actions. We can doubt both of these claims, and therefore the congruity of the Hired Gun solution.

Under what conditions do institutional justifications transfer to individual role-actions? This is a contested question in debates about legal ethics. Because transmission could significantly change the deontic status of an action, some construe the conditions for transmission stringently. For example, on David Luban’s ‘fourfold root’ argument, institutional justifications can transmit to otherwise impermissible role-actions, but only when an institution is morally good and ‘intrinsically’ justified;\(^{51}\) the role is justified by the structure of the institution; the specific role-obligation is essential to the performance of the role; and that the action is required by the role-obligation.\(^{52}\) Luban denies that these transmission conditions are routinely met for lawyers who act outside the criminal justice context.\(^{53}\) We might also question whether these transmission conditions are routinely met within the criminal justice context. For example, it is difficult to argue that a tactic like brutal cross-examination is *essential* to performing the role of lawyer. It’s at least plausible that a criminal lawyer who does not (or is forbidden to) engage in this tactic still counts as practicing law. The same can be said for almost every other partisan tactic that the advocate of the Hired Gun view takes to be justified by the lawyer’s role.\(^{54}\) Thus, on a

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\(^{51}\) For Luban, an institution is intrinsically justified where its ‘moral standing has a noninstrumental basis.’ Luban (n 1), at 47, and pragmatically justified where it is not demonstrably worse than available alternatives. Pragmatic justification thus ‘does not really endorse an institution,’ so much as ‘advocate[] for enduring it.’ Luban (n 27), at 93.

\(^{52}\) Ibid, at 131-2.

\(^{53}\) For Luban, the lawyer’s role-obligations are largely justified by the adversarial legal system. Yet, in the civil context, the adversarial system is only pragmatically (rather than intrinsically) justified. Luban (n 1), at 62. Therefore, on Luban’s argument, the justification for the legal system does not transmit to the role-actions of lawyers in the civil context.

\(^{54}\) Applbaum (n 4), at 126-7.
stringent interpretation of the transmission conditions, lawyers seem to lack many of the role-based reasons that Hired Gun views assign them.

Recognizing this, most advocates of the Hired Gun position argue for laxer transmission conditions. Tim Dare, for example, argues that successful transmission requires only that legal institutions institutions be morally good (whether they are intrinsically or comparatively justified is irrelevant); and that a role-obligation be part of a role as that role is presently constituted, rather than essential to the performance of the role.55

Determining the conditions under which institutional justifications transmit is crucial to the viability of the Hired Gun solution. If more stringent standards apply, then the lawyer’s role will almost never generate reasons to act in otherwise impermissible ways (and the principles of partisanship and non-accountability look unsupported). The Hired Gun view only works if lax transmission standards apply. Yet no defender of the Hired Gun view has ever made a persuasive case for why lax transmission standards do or should apply.56 Absent such an argument, the Hired Gun solution appears incongruent.

We can also question whether the transmission mechanism is capable of generating compelling reasons at all. This mechanism seems to leave out important elements of the justification of role-actions. The transmission mechanism is an example of justification by subsumption: the justification for role-actions is based on some more

55 Dare (n 1), at 45-6. Also, Dare would probably allow that institutional justifications transmit whenever an institution is justified at all, rather than (as Luban posits) only when the institution is intrinsically justified.

56 Dare in essence resolves this stringency issue by fiat, arguing that a strict interpretation of the transmission mechanism does not preserve an analytic distinction between ‘role morality’ and ‘ordinary morality.’ Ibid, at 46. This defense is inadequate because it presupposes the truth of what Dare aims to prove (and what Luban denies): namely, that ‘role morality’ can be described in a way that does not ultimately reduce to ‘ordinary morality.’
abstract property that these role-actions instantiate. Yet subsumptive methods of justification have difficulty assigning normative importance to moral or practical agency. This diagnosis applies to the transmission mechanism as well. The justification for the lawyer’s role-action depends exclusively on the justification for the legal system, and not at all on the reasons for which the lawyer acts. Many argue that the lawyer’s moral or practical agency is integral to legal ethics. For example, agency seems important in so-called ‘wrong kind of reason’ cases, where some considerations that provide an incentive for the performance of an action are not within the correctness standards for the activity of which the action is a part. In such cases, whether a token action is justified depends both on whether the activity is justified and whether the token action is done for reasons that are within the ‘shared set’ of reasons ‘that [the] activity gives rise to.’ Consider a variation on the Brutal Cross-Examination case in which institutional considerations successfully transmit to the lawyer’s role-actions, yet the lawyer chooses to brutally cross-examine the witness solely out of sadism. In this scenario, aggressive cross-examination might be justified in an abstract sense, but the lawyer’s reasons for action are of the wrong kind. Some legal ethicists (including some who otherwise defend the principles of partisanship and/or non-accountability) would see

61 Ibid, at 43.
aggressive cross-examination as forbidden if done for sadistic reasons. Yet the transmission mechanism cannot explain this conclusion. To the contrary, if acting in a certain way is institutionally justified and this justification transmits to the lawyer’s role-action, then the lawyer who acts in that way is justified, regardless of whether she does so for the wrong kinds of reasons. Because the transmission mechanism neglects the potential importance of agency to the deontic status of the lawyer’s professional actions, it does not seem to fully explain how the lawyer’s role generates compelling reasons. Yet such an explanation is required to support a maximalist position about the generative effect of the lawyer’s role. Therefore, the Hired Gun solution appears incongruent: the transmission mechanism cannot satisfactorily explain how the lawyer’s role might generate permissions or requirements to act in ways that are otherwise forbidden.

A second difficulty with the Hired Gun solution concerns the robustness of the transmission mechanism. The Hired Gun solution posits that lawyers are permitted and required by their roles to perform otherwise impermissible actions because of the institutional justification for the legal system. Yet, if the transmission mechanism generalized, then roles that resembled the lawyer’s role in the relevant respects would be capable of generating similar kinds of reasons. For example, some advocates of the Hired Gun view claim that, because the client’s fundamental interests are at stake in legal representation, lawyers have extensive prerogatives to harm third parties in order to advance the client’s cause. If the transmission mechanism generalized, other roles

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62 For instance, sadistically motivated cross-examination might be what Charles Fried calls a ‘personal wrong’ against the witness, and would therefore be impermissible. ‘The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation’ (1975) 85 *Yale Law Journal*, 1060, 1084-6. Likewise, on Brad Wendel’s account, sadistically motivated cross-examination would arguably be impermissible because it is incompatible with the virtue of fidelity to law that, for Wendel, is the ‘central obligation of lawyers.’ Wendel (n 1) at 7.
implicating similarly fundamental interests should generate similar permissions or requirements.

This prediction rings false. For example, the role of physician seems analogous to the role of lawyer in all the ways that the Hired Gun view deems relevant. The physician-relationship implicates interests that are at least as fundamental as those involved in the lawyer-client relationship. Medical institutions seem at least as justified as legal institutions, however we measure institutional justification. Yet the principles of partisanship and non-accountability are inapplicable to the physician’s role. Consider an analogue to the Brutal Cross-Examination case.\(^{63}\) In the U.S., it is generally accepted that a physician cannot hasten the death of a terminally ill organ donor in order to further the interests of her own patient, even if doing so will dramatically improve the patient’s chances of survival.\(^ {64}\) Given the depth at which this nonmaleficence principle is engrained, this kind of activity would not seem to capable of being rendered permissible or obligatory solely by altering the laws governing physicians and codes of medical ethics. In our society, there is simply no plausible medical analogue to the Brutal Cross-Examination case.

Yet the lack of such an analogue suggests that the Hired Gun solution is either incomplete or not robust. The justification for role-based reasons seems to depend on more than the justification for the institutions in which a role arises. Our social expectations about the institutions or institutional roles also matter to the justification of

\(^{63}\) This scenario is adapted from Jesse Mckinley, ‘Surgeon Accused of Speeding a Death to Get Organs’, The New York Times (New York, February 27, 2008) A1.

\(^{64}\) See Institute of Medicine, Non-Heart-Beating Organ Transplantation: Medical and Ethical Issues in Procurement (National Academies, 1997), 8 (‘Donor patients must not be killed or their death hastened by the taking of organs.’).
role-actions, especially those that depart from moral requirements. The Hired Gun solution attempts to explain the professional reasons of lawyers based entirely on considerations ‘internal to the [lawyer’s] role.’ Yet this exclusive focus is a structural defect. Because the transmission lacks robustness, the Hired Gun solution cannot fully explain how the lawyer’s role generates reasons at all, let alone permissions to act in otherwise impermissible ways.

**Empirical Evaluation:** These structural concerns aside, we can empirically evaluate the Hired Gun solution in at least three ways. First, we can test its presuppositions. Supporters of Hired Gun views have offered two explanations for why moral principles cannot apply directly to questions of legal ethics. On the ‘categorical’ hypothesis, ordinary moral principles and judgments are too categorical. This insensitivity to contexts or consequences makes ordinary moral judgments unable to provide the fine-grained guidance necessary for guiding the professional conduct of lawyers. On the ‘pluralist’ hypothesis, ordinary moral judgments about what lawyers ought to do are unsuitable for legal ethics because they reflect widespread, intractable disagreement.

Both of these hypotheses are verifiable. If the ‘categorical’ hypothesis is true, then lay judgments about the classification of role-actions should be categorical in form. Lay classifications of the deontic status a lawyer’s action should not vary based on the description of the circumstances in which the action arises. Yet survey evidence suggests

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65 Dare (n 1), at 44.
that these lay judgments are highly sensitive to both consequences and institutionally important features.\textsuperscript{66} These results are inconsistent with the ‘categorical’ hypothesis.

On the ‘pluralist’ hypothesis, lay judgments should exhibit dissensus because they are based on deep disagreements. If this hypothesis is true, then we would expect to see significant dissensus among lay classifications of action-types as forbidden, ‘merely’ permitted, or required in particular cases. This dissensus should be patterned, with classifications of the lawyer’s action systematically correlating with first-order beliefs. Finally, if disagreement is intractable, then manipulations of the descriptions of hypothetical scenarios should not be associated with convergence in lay judgments. Each of these hypotheses can be tested empirically.

Second, we can empirically examine some claims internal to the Hired Gun solution. One of these is the tracking hypothesis, which posits that the justification for role-actions tracks the justification for the institution in which the role arises. If this hypothesis is generally correct, then changes in the justification of an institution should correlate with changes in the justification for role-actions. Greater justifications for an institution should be associated with more extensive latitude for role-occupants to act in ways that depart from ordinary morality. If judgments about the justification of role-actions do not generally correlate with changes in the hypothetical justifications of institutions, then the tracking hypothesis is incorrect.

Third, we can examine the conditions under which institutional justifications transmit. The Hired Gun solution presumes that lax transmission standards apply. If (as

\textsuperscript{66} One way to interpret the results Fred Zacharias’s survey of lay judgments about lawyer confidentiality is that disclosing client confidences is more justified when disclosure will prevent serious, imminent harm to identifiable people. ‘Rethinking Confidentiality’ (1988) 74 \textit{Iowa Law Review}, 351, 395, table 5.
Luban argues) strict transmission conditions apply, then the Hired Gun solution would be seriously challenged. We can assess this question experimentally by gauging how variations in the justification for an institution and description of the importance of an action to a role change judgments about whether a particular action is forbidden, permitted, or required. If the conditions for transmission are stringent (after Luban), then these variations should significantly change moral judgments. If they are lax (after Dare), then these variations should not make much difference.

With the exception of the ‘categorical hypothesis,’ each of the main empirical hypotheses of the Hired Gun solution is an open question. Thus, each of these claims awaits further investigation.

b. ‘Ordinary Morality’ theories

On what I will call ‘Ordinary Morality’ views, the point of theorizing about legal ethics is to determine the moral justification for lawyers’ professional actions. Ordinary Morality views may assign some normative significance to the lawyer’s role, but they characteristically deny the non-accountability principle. Lawyers are morally accountable for their professional actions. As Arthur Applbaum argues, the moral descriptions of the lawyer’s role-actions persist. Moreover, any significance of the lawyer’s role is limited. Because the lawyer is not exempt from broader moral requirements, her role cannot justify acting in ways that are clearly impermissible.

Defenders of Ordinary Morality views offer different explanations for the lawyer’s professional responsibilities. David Luban sees dignity considerations as

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67 See Luban (n 1), at 13, n. 20. (lawyer’s role-based reasons provide a ‘baseline presumption, which can be overridden by strong moral reasons to break the role’)

68 Applbaum (n 4), at 91.
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fundamental: the lawyer’s professional responsibilities follow from the broader moral commitment to respect and promote the dignity of others. 69 Through legal representation, a lawyer can uphold her client’s dignity directly (by telling the client’s story) or indirectly (by protecting against unwarranted condemnation of the client). 70 By contrast, William Simon sees the lawyer’s professional responsibilities as a species of justice-based reasons. The lawyer’s commitment to justice means that, in her professional capacity, she ‘should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.’ 71 Lawyers have a special opportunity to promote justice, but their reasons to promote justice are the same as anyone’s. 72

Despite these different elaborations, Ordinary Morality views share a basic structure: each is (to use Jody Kraus’s term) a ‘correspondence account’ 73 of legal ethics. In epistemology, correspondence theories see a statement’s truth as a function of its relation to reality. Kraus notes that some arguments about domains of law have a similar structure. For example, correspondence accounts of contract see the justification for contract law and doctrines as a function of their correspondence with ‘promissory morality.’ 74 A candidate norm or principle of contract law is unjustified if it does not correspond with a principle of promissory morality. Ordinary Morality views apply this

69 Luban (n 1), at 66-7.
70 Ibid, at 69-73.
71 William Simon, The Practice of Justice (Harvard University Press, 1998), 9. Simon’s argument resembles what John Rawls called the ‘natural duty of justice,’ or the moral requirement ‘to support and… comply with just institutions that exist and apply to us.’ See Rawls (n 10), at 99.
72 Other versions of the Ordinary Morality view assign explanatory significance to different moral values. For example, Alan Strudler posits that the lawyer’s professional responsibilities are entailed by broader moral requirements to respect the autonomy of others. See ‘Belief and Betrayal: Confidentiality in Criminal Defense Practice’ (2000) 69 University of Cincinnati Law Review, 245.
74 Ibid, at 1612-1614.
logic to legal ethics. Every justified principle of lawyers’ professional responsibility must correspond to a justified principle in the analogous domain of morality. A candidate principle of professional responsibility is unjustified if it lacks a correspondent in the analogous domain of morality.

Appreciating this correspondence structure helps avoid some mistaken criticisms of Ordinary Morality views. For example, some critics charge that Ordinary Morality views rule out partisanship by the lawyer toward her client.\(^{75}\) This criticism is incorrect. Ordinary Morality views do not criticize partisanship as such, but rather partisanship principles that lack correspondents in ordinary morality. Many philosophers contend that generally applicable moral and political principles contain space for justified partiality. For example, you might have responsibilities of partiality towards another based on the importance of your relationships with her.\(^{76}\) Such partiality could be justified by your shared experiences or history of encounter with your relative.\(^{77}\) However, there are limits to the interests or relationships that can justify partiality, just as there are limits on how justifiable partiality may be manifest.\(^{78}\) Ordinary Morality views hold that role-based partiality is constrained by these broader restrictions on partiality. For example, partiality prerogatives are generally constrained by the rights and interests of others. Partiality in excess of these constraints is usually not justified.\(^{79}\) On this logic, a lawyer’s partiality toward her client should also be sensitive to the rights and interests of third parties. Yet

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\(^{78}\) Ibid, at 53-4.

the principles of partisanship and non-accountability do not acknowledge this sensitivity. On Ordinary Morality views, the lack of sensitivity to the interests and rights of others, rather than the licensing of partiality itself, explains why the principles of partisanship and nonaccountability are defective.

On Ordinary Morality solutions to the generative problem, roles function by changing the generally applicable normative principles that apply to role-occupants. After David Enoch, I call this a \textit{triggering} mechanism: roles make a normative difference by activating existing reasons that their occupants have, rather than by creating new ones.\textsuperscript{80}

To use Enoch’s example, a pedestrian can, by placing his foot on the road, ‘give a driver a reason to stop, but only because the driver had all along, and independently of the pedestrian’s actions, the conditional reason-to-stop-should-a-pedestrian-start-crossing. By placing his foot on the road, the pedestrian thus triggers this pre-existing, conditional reason, thereby giving the driver a reason to stop.’\textsuperscript{81} In other words, on the triggering mechanism, your role can change a reason that there \textit{is} into a reason that you \textit{have}.\textsuperscript{82}

To determine whether the lawyer’s role generates a reason to act in a particular way, we must first identify an abstract, conditional normative principle that could license the action, then show that the lawyer’s role figures into the triggering of this principle. If there is no conditional normative principle under which the action could be justified (for example, if doing X is disqualified from possible justification) or if the role of lawyer does not help trigger the operation of such a principle (for example, if doing X requires


\textsuperscript{81} Ibid, at 4-5

\textsuperscript{82} Mark Schroeder, ‘Having Reasons’ (2008) 139 \textit{Philosophical Studies}, 57.
having specialized medical training), then the lawyer’s role does not generate a reason to act in that way.

Ordinary Morality views advance a moderate position on the generative effect of roles. This position also follows from their correspondence structure. Roles do not create reasons, and any role-based reason must be cognizable on a generally applicable normative principle. Hence, Applbaum’s slogan that roles do not ‘mint moral permissions.’ Your role can generate an obligation to act in ways that (if not for the role) you would be merely permitted to act. However, your role cannot permit or require you to act in a way that is otherwise forbidden by generally applicable normative principles.

The Ordinary Morality solution might resolve the Brutal Cross-Examination case as follows. Aggressively interrogating and humiliating the witness are serious wrongs. On the versions of the Ordinary Morality view considered here, brutal cross-examination could be licensed under some conditional moral principles. Does the lawyer’s role trigger (or helps trigger) any such principles in these circumstances? Probably not. Brutal cross-examination violates dignity (contra Luban’s criterion) and aims to bring about a substantively unjust result (contra Simon’s criterion). Therefore, the lawyer’s role does not generate a reason to brutally cross-examine the witness, although it might generate such a reason if, under the circumstances, brutal cross-examination would advance the fundamental interests (say, in dignity or autonomy or justice) that the lawyer’s role is supposed to advance.

83 Applbaum (n 4), at 3.
Structural Evaluation: Ordinary Morality solutions are structurally unproblematic. For one thing, they do not raise any obvious problems of congruence. Because these solutions take a moderate position on the generative effect of roles, their defenders need not argue that role-based reasons can defeat or override other compelling normative considerations. Rather, one need only show how roles can generate obligations for role-occupants to act in ways that are otherwise permissible. This effect is often taken for granted in debates about professional ethics, and can be explained in a number of ways (for example, on grounds of autonomy, fairness, authority, or the value of the practice of law). Because of this moderate position on the generative effect of roles, Ordinary Morality solutions explain role-based reasons well enough to avoid incongruity. Nor do Ordinary Morality solutions face problems of robustness. The triggering mechanism is robust by definition, since it denies that roles uniquely generate reasons. Indeed, the lawyer’s responsibilities toward her client are a species of broader duties of beneficence and partiality.

Empirical Evaluation: It is perhaps unsurprising that Ordinary Morality solutions have few structural defects. The triggering mechanism is the simplest of any that we will examine. Also, the moderate position on the generative effect of roles requires less extensive defence than the maximalist position. The worry is that Ordinary Morality solutions buy this structural plausibility at the cost of descriptive inadequacy. In particular, Ordinary Morality solutions might undersell the normative difference that roles make. Thus, in testing Ordinary Morality solutions, we should carefully examine whether it leaves out important aspects of how roles generate reasons.
We can empirically evaluate Ordinary Morality solutions in at least three ways. First, we can test the solution’s assumptions. Ordinary Morality views presume that generally applicable moral principles are sensitive enough to operate in the professional circumstances that lawyers face. This assumption contrasts with the ‘categorical’ hypothesis of Hired Gun view. If moral judgments take a characteristically deontological form, then the triggering mechanism would be compromised. Ordinary moral principles and judgments would be too indeterminate or indiscriminate to offer guidance for the circumstances that lawyers face. Also, ordinary moral principles would be incapable of guiding action in particular cases if they reflected pervasive, intractable disagreement. Thus, Ordinary Morality solutions also require the ‘pluralist’ hypothesis to be false. Testing the ‘categorical’ and ‘pluralist’ hypotheses allows us to directly compare the Ordinary Morality and Hired Gun solutions. If either hypothesis were verified, then the Ordinary Morality solution would be seriously challenged.

Second, we can test the empirical support for the triggering mechanism. This mechanism posits that roles can change the reasons that apply to someone, but cannot create new reasons. If so, then we would expect background moral principles, and not applicable professional norms, to explain lay judgments about the deontic status of the lawyer’s professional actions. We can test this hypothesis by examining how variations in the description of professional norms change judgments about the classification of role-actions. In the Brutal Cross-Examination case, for example, Ordinary Morality solutions predict that lay judgments about the classification of brutally interrogating the witness of should not vary much based on the presence or absence of a ‘rape shield’ provision, or a

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professional norm that prohibits cross-examining a rape witness about his or her prior sexual history. If the content of a professional norm significantly changes these classificatory judgments, then the professional norm would seem to make an important difference to the deontic status of the action. This would pose another significant challenge to Ordinary Morality solutions.

Third, we can gauge the empirical support for a moderate position on the generative effect of roles. If roles cannot ‘mint’ moral permissions, then variations in the description of a role should not be associated with changes in judgments about the permissibility of action-types. Holding all other factors constant, the classification of an action-type should not vary based on the description of the role of the actor. For example, abstracting from the content of professional rules, an action (say, disclosing client confidences in order to protect a third-party) should not be morally impermissible for lawyers but permitted or required for some other type of professional (for example, a physician or social worker). Otherwise, the lawyer’s role itself would appear capable of permitting or requiring actions that are otherwise impermissible. By contrast, if the maximalist position is true, then judgments about the permissibility of an action should at least sometimes vary by description of the role.

c. ‘Discontinuity’ theories

W. Bradley Wendel, among others, sees the main task of legal ethics as providing a political justification for the professional responsibilities of lawyers. Although Wendel does not offer a specific term for this approach, I will call it a ‘Discontinuity’

view. In political philosophy, Ronald Dworkin has distinguished ‘continuity’ and ‘discontinuity’ strategies for thinking about justice. On the former, principles of justice are extensions of ethical principles. On the latter, principles of justice do not emanate directly from ethical principles. The approach advanced by Wendel and others resembles Dworkin’s description of the discontinuity strategy. For them, the main question of legal ethics is whether the professional actions of lawyers are politically justified. This question differs from asking whether these actions are justified in ordinary moral terms.

Wendel argues that the lawyer’s professional actions are justified by the need for legal authority. Modern societies are characterized by pervasive disagreements. Legitimate legal systems can authoritatively resolve these disagreements and coordinate collective action. However, to perform these functions, a legal system must grant substantive and procedural entitlements to all citizens. Thus, Wendel argues, the principles of partisanship and non-accountability are justified because they protect the entitlements of the lawyer’s client, thus bolstering the legitimacy of the legal system. The lawyer’s role generates reasons to act in specific ways that would otherwise be morally impermissible. These reasons are explained by need for legal authority and the lawyer’s duty to respect law’s accomplishment. Call this the authority mechanism. Legal materials (including those establishing the lawyer’s professional responsibilities)

87 Wendel (n 1) at 2.
88 Ibid, at 6.
are authoritative pronouncements of what the lawyer ought to do.\textsuperscript{90} For Wendel, such pronouncements mostly take the form of what Joseph Raz calls ‘exclusionary reasons’: they preclude her from considering ordinary moral reasons in deliberating about what to do.\textsuperscript{91}

The Discontinuity solution takes a maximalist position on the generative effect of roles. As Wendel puts it, some roles give rise to ‘specific obligations that are different in kind from, and potentially conflict with, what would otherwise be the moral requirements that would apply to someone differently situated.’\textsuperscript{92} However, there are constraints on the kinds of reasons that professional norms can generate. A professional norm lacks authority if it licenses actions that would undermine the legitimacy of the legal system.\textsuperscript{93} These constraints do not correlate with the legal system’s justification. Unlike the Hired Gun solution, the Discontinuity solution does not advance the tracking hypothesis. Rather, whether the lawyer’s role generates reasons is a binary question. If the conditions of authority are met (in Wendel’s terms, if the legal system is legitimate and the client’s entitlements are at stake), then lawyer’s role can permit or require acting in ways that are otherwise forbidden. If these conditions are not met, then the lawyer’s role does not generate reasons to act in these ways.

\textsuperscript{90} Wendel (n 1), at 23.

\textsuperscript{91} Wendel argues that role-based reasons are for the most part exclusionary, in the sense that they preclude lawyers from considering ordinary moral reasons in deciding what to do. Ibid, at 113; W. Bradley Wendel, ‘Three Concepts of Roles’ (2011) 48 San Diego Law Review, 547, 550. However, although Wendel borrows the notion of exclusionary reasons from Joseph Raz, Wendel’s account of the deliberative impact of exclusionary reasons differs from Raz’s. \textit{Pace} Wendel, Raz denies that exclusionary reasons are ‘reasons to avoid thinking, considering, or attending to certain matters’ and that exclusionary reasons preclude an agent from engaging with excluded first-order considerations. See Joseph Raz, \textit{Practical Reason and Norms} (New Ed. Oxford University Press, 1999), 184.

\textsuperscript{92} Wendel (n 1), at 21.

\textsuperscript{93} Ibid, at 132.
How would the Discontinuity solution resolve the Brutal Cross-Examination case? The answer depends on content of the applicable professional norms governing lawyers. If these norms permit or require aggressive cross-examination, or (alternatively) if the substantive law grants criminal defendants a legal entitlement to confront their accusers even when doing so might humiliate the accuser, then the lawyer’s role would provide reason to brutally cross-examine the witness. If the legal materials did not permit or require brutal cross-examination or the client’s legal entitlements were not at stake, then brutal cross-examination would retain its moral impermissibility. Thus, on the Discontinuity solution, the permissibility of brutal cross-examination is contingent on the content of the applicable legal rules and professional norms.

**Structural Evaluation:** The structure of the Discontinuity solution can be challenged in at least two ways. First, one might question its congruence. The Discontinuity solution attributes a high generative effect to roles. To be congruent, the authority mechanism must be capable of generating compelling reasons. Yet it is doubtful that the authority mechanism can do this.

The difficulty here parallels one facing practice-based accounts of promising, described above. On the latter, the value of the practice of promising explains the normative significance of promises. When a promisor breaks her promise, she (*inter alia*) wrongs her fellow participants in the practice of promising. To make or accept a promise is, by definition, to participate in this practice. However, valid promises typically have normative significance for people besides promisors and promisees. Unlike principals, these third parties are not necessarily participants in the practice of promising. Yet
practice accounts cannot easily explain why promises have normative significance for these non-participating third parties.

The Discontinuity solution offers, in part, a practice-based account of the normativity of roles.94 That the authoritative standards for a valuable practice permit or require role-occupants to do X explains why the role-occupant has reason to do X. Yet, to be compelling, such role-based reasons must be justifiable to everyone, not merely the role-occupants and their relatives.95 The authority mechanism faces difficulties similar to those of practice-based accounts of promising. It must explain why the authoritative standards of a practice (in this case, those governing the practice of law) have normative significance for third parties who do not obviously participate in the practice. This hurdle is especially high where the standards of the practice impose significant costs on these third parties.

To illustrate this problem, consider the Brutal Cross-Examination case. Suppose that the relevant rules of professional conduct permit or require the lawyer’s aggressive cross-examination. Aggressive cross-examination is not integral to legal legitimacy. Many legitimate legal systems forbid these tactics. Nor is it integral to the role of lawyer. Rather, these tactics are justified (if at all) because they are permitted or required by professional authorities. This authorization might well justify these tactics to the lawyer and client. Does it also provide sufficient justification to the witness? The advocate of the Discontinuity solution must offer some explanation why practice-based norms provide

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94 In the terms discussed above, Wendel offers a combination of the authority and practice-based explanations for the normativity of the lawyer’s role.

95 See Scanlon (n 12), at 162. See also GA Cohen’s ‘interpersonal test,’ which defines an argument’s political justification by whether it could ‘serve as a justification of a mooted policy when uttered by any member of society to any other member.’ *Rescuing Justice and Equality* (Harvard University Press, 2008), at 42.
justification to non-participants, or else provide some explanation of the justificatory
force of role-based reasons that does not rely on the authority mechanism. If these
gambits do not succeed, then the discontinuity solution is incongruent. The authority
mechanism would not be able to provide the compelling reasons in favour of professional
actions (as required to cohere with a maximalist position on the generative effect of roles)
because it would not be able to provide a justification to everyone affected by these
actions.

A second concern is whether the Discontinuity solution is robust. Consider how
the authority mechanism works in the Brutal Cross-Examination case. Norms governing
the professional conduct of lawyers render brutal cross-examination permissible as a way
of vindicating the legitimate interests of one’s client. The conduct allowed by these
norms is morally unjustified, but not so unjust as to threaten the overall legitimacy of the
legal system. Because professional norms generate reasons for acting in the way that they
specify, the lawyer’s reasons for acting as her role requires are a species of her reasons to
maintain fidelity to law.

Even if the authority mechanism could explain how the lawyer’s role generates
reasons, it would not easily generalize. For example, this mechanism does not describe
the dynamics of the physician’s role very well, although it should. Take the organ
donation case discussed earlier. What if the medical profession unilaterally propounded a
new professional norm that permitted or required a physician to hasten the death of a
terminally ill organ donor in order to benefit her patient? The conditions for the authority
mechanism seem to be met here. As in the Brutal Cross-Examination case, transplants
involve a fundamental interest that, if not an actual substantive entitlement, arguably
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should be. Furthermore, a rule permitting or requiring physicians to hasten death would probably not undermine the legitimacy of the practice of medicine. The medical system seems ultimately legitimate with or without such a rule. If the authority mechanism were robust, then the medical profession’s introduction of such a norm should be sufficient to generate reasons for the physician to hasten death and to disregard ordinary moral considerations in her deliberations about what to do. Yet this conclusion seems implausible. Few would argue that the medical profession could, by unilaterally changing its norms, generate conclusive reasons for the physician to hasten the death of the organ donor. Even if the medical profession could generate reasons that apply to physicians, these reasons would not obviously provide sufficient justification to non-professionals. Nor would such a pronouncement seem capable of generating exclusionary reasons for role-occupants. If the deliberative process described by the authority mechanism were accurate, then it’s plausible that the physician would not even contemplate the morality of hastening the death of others in order to benefit her patient. Yet, as an intuitive matter, this pattern of deliberation seems morally deficient. Thus, the authority mechanism does not plausibly explain the physician’s reasons in the transplant case, although it must do so in order to be viable on its own terms.

An advocate of the Discontinuity solution might deny that the authority mechanism needs to be robust. Perhaps the authoritativeness of lawyer’s roles rests on considerations that are unique to the legal domain. However, Wendel and other proponents of the Discontinuity view do not defend this domain restriction. Nor does

96 See Wendel (n 32), at 191.
such a defence seem self-evident.\textsuperscript{97} Thus, the Discontinuity solution requires a clearer argument for why the lawyer’s professional norms can generate reasons, even though the norms of analogous professions in similar circumstances do not. Absent such an argument, the authority mechanism is structurally deficient.

**Empirical Evaluation**: We can empirically evaluate the Discontinuity solution in at least three different ways. First, we can evaluate its suppositions. Wendel’s argument offers a strong version of the ‘pluralist’ hypothesis, described above. An implication of Wendel’s position is that moral principles about what lawyers should do in particular cases are subject to systematic, intractable disagreement. This disagreement makes the application of ordinary moral principles to specific cases indeterminate.\textsuperscript{98} This indeterminacy, in turn, explains the need for an authority mechanism. If these assumptions are empirically supported, then lay judgments about the classification of lawyers’ actions in particular situations should reflect systematically high dissensus. In other words, we should be able to identify many cases of lay disagreement about the deontic status of a particular course of action. Moreover, these disagreements should be intractable: they should not converge upon reflection or manipulation of the description of the scenario. If judgments about classification do not exhibit systematic and intractable disagreement, then the ‘pluralist’ hypothesis can be questioned.

We can also test some aspects of the Discontinuity solution directly. One way involves examining the difference that professional norms make. If the authority

\textsuperscript{97} For Wendel, the fact of disagreement explains the need for legal authority, as well as why the norms of the legal profession must be authoritative for lawyers. However, the transplant example suggests that similar conditions apply to a variety of other professional roles. Therefore, \textit{pace} Wendel, it is not obvious that the normative requirements for lawyers are categorically different than those of other professionals.

mechanism is correct, then the content of professional norms should determine the reasons that role-occupants have. We would confirm this hypothesis if variations in the content of the applicable professional norms altered the classification of the role-actions. The authority mechanism also predicts that this correlation is symmetrical. Controlling for other factors, professional norms prohibiting an action-type should strongly correlate with the judgment that the action-type is prohibited. Also, professional norms requiring the performance of an action-type should strongly correlate with the judgment that the action-type is required. We would disconfirm these hypotheses if lay classifications are not determined by the content of professional norms, or if this correlation is asymmetrical (for example, if judgments of prohibition are strongly correlated with the content of professional norms, but judgments of permission or obligation are not).

Another way to test the Discontinuity solution asks whether the lawyer’s role as such substantially explains lay judgments about the reasons that lawyers have. On the Discontinuity solution, the political function of lawyers explains the normative requirements of the lawyer’s role. This contention is, in effect, a hypothesis that the lawyer’s role in particular (rather than the agency or fiduciary role in general) explains the deontic status of the lawyer’s role-actions. We can test this hypothesis through experimental and survey methods. If the hypothesis is true, then lay classifications of the role-actions of lawyers should differ significantly from classifications of analogous role-actions of non-lawyers. The hypothesis would be disconfirmed if there were few significant differences between classifications of the role-actions of lawyers and non-

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99 Wendel (n 1), at 7.
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lawyers, since the fiduciary relationship or professional role in general (rather than the lawyer’s role in particular) would explain the normative requirements.

We can also examine the descriptive adequacy of the authority mechanism. As discussed above, Wendel contends that professional norms provide mostly exclusionary reasons. Role-based reasons not only guide what the lawyer should do, but also exclude moral considerations from the lawyer’s deliberations. It is an open question whether professional norms do or could work in this way. The empirical evidence is mixed. Some studies are consistent with Wendel’s view that lawyers do and should deliberate as if professional norms provide exclusive reasons. 100 Yet, contrary to what the authority mechanism predicts, other studies suggest that lawyers regularly consider first-order moral issues in deciding what to do. 101 These findings are not conclusive, and none of these studies directly tested the relevant question here. However, the defender of the Discontinuity view owes some explanation of these seemingly anomalous results, or else the authority mechanism looks descriptively inaccurate.

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In this part, I have examined three prominent theories of legal ethics. 102 Each offers a different solution to the generative problem. Yet two of these theories (the Hired Gun and Discontinuity views) are based on solutions to the generative problem that seem

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102 I have not tried to describe every theory of legal ethics, or every possible solution to the generative problem. Theories of legal ethics might also be combined with solutions in different ways than I have discussed.
structurally deficient. Also, each solution awaits empirical verification. This Part has established a research agenda for providing such verification.

Perhaps no theory of legal ethics can fully explain and justify the professional actions of lawyers. This prospect should not invite despair. My own hunch is that the best approach to the generative problem involves some combination of the solutions considered above. On such a hybrid approach, different solutions explain different kinds of reasons that the lawyer’s role generates. Hybrid accounts offer powerful explanations for other aspects of our normative world, such as how promises can generate reasons. A hybrid approach would also suggest that normative significance of roles is complex, as some philosophers have noted. Thus, I suspect that many theories of legal ethics are right about something, even if none is right about everything.

Conclusion

Every theory of legal ethics rests on an implicit solution to the generative problem. For such a solution to be viable, it must offer a plausible account of the generative mechanism (or how the role generate reasons) and the generative effect (or the normative difference that the role can make) of the lawyer’s role. These solutions can and should be empirically verified. None of the major theories of legal ethics is based on a fully satisfactory solution to the generative problem. Some of these solutions are structurally deficient. Future philosophical work in legal ethics should aim to address or resolve these structural issues, as well as to verify these empirical hypotheses and assumptions.

The generative method that I have introduced here has at least two important implications. First, this method avoids problems of theoretical disagreement that plague current debates about legal ethics. What is the main point of theorizing about legal ethics? Different theories answer this question differently. Some see the point as offering a moral justification of the lawyer’s role-actions. Others see the point as providing a political justification for these actions. Still others see it is a matter of finding agent-relative justifications for the lawyer’s role-actions, which does not ‘reduce[] to generic moral or political theory.’ Because these answers are both incompatible and outcome-determinative, this disagreement creates an impasse. The generative method allows us to avoid this impasse, providing a way to discuss legal ethics that does not presuppose what the point of legal ethics is (or if there is one). We can reject any theory that is based on an implausible account of how roles generate reasons, regardless of what kinds of reasons (moral, political, or first-personal) should be the currency of debates about legal ethics.

Further, the generative method highlights a fundamental continuity in discussions of ethics. We can use essentially the same tools to analyze questions about the special reasons of lawyers, physicians, managers, soldiers, parents, or citizens. Each of these debates asks how our reasons are related to our roles, as well as how we may discharge conflicting commitments in an imperfect world. The generative method can therefore help distinguish questions that are unique to the lawyer’s situation from those that are more fundamental to the human condition.