

## *Essay*

# The Morality of Law Practice

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*This is an inquiry about the morality of lawyers and law practice. Some modern academic critiques hold law practice to be immoral or unjust as compared to the standard of “common morality” or of the sense of “justice” shared in the community. This Essay advances a different standard of reference, one that takes into account the pervasive conflicts within society and the limitations on the government’s ability to get at the truth. These limitations generate a role for lawyers as empowered figures who employ government authority as partisans and confidantes for their clients. That role is comparable to other roles that involve exercise of authority, particularly the roles of government officials and business managers.*

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## INTRODUCTION

This Essay examines the basic elements of law practice, including the basic rules of professional ethics and current critiques of the legal profession, and then sets out a different framework.

## I. THE LIMITATIONS ON EFFECTIVE GOVERNMENT

Bernard Williams, the noted philosopher, observed in *Professional Morality and Its Dispositions*, that the legal profession "exists because of imperfection . . . [and to] serve our needs . . . for a social order."<sup>1</sup>

The "need for social order" implies that we must coordinate conflicting objectives of individuals and institutions in our complex pluralistic society. The basic mechanism for doing so is private contract, ranging from informal exchange at the grocery store to technical documentation in complex financial transactions. Where formal and informal voluntary contracting are not feasible, government regulations often step in. In a constitutional regime, government regulations can be considered a form of public contract in that they are the product of negotiations inherent in the legislative process. Government regulation

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1. Bernard Williams, *Professional Morality and Its Dispositions*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 259, 269 (David Luban ed., 1984) [hereinafter *THE GOOD LAWYER*].

ranges from ordinary police work to complex administrative intervention. It also includes ordinary civil litigation, which is where ordinary law practice comes in.

But there are serious “imperfections” in the process of bringing these controls to bear. The perfectly just imposition of legal controls would require a perfectly accurate determination of facts and a perfectly coherent application of law to the facts. In the real world, however, the legal system must make do with artificially determined facts and approximations of coherent law. Ordinary law practice requires practitioners to function within those limitations.

## II. FACT AND LAW

True justice depends on genuine truth, but real world tribunals have access to truth only as it appears from “evidence.” Most evidence consists of oral accounts about past events that have since disappeared. Concerning those events, the disputants have differing accounts and other witnesses may have still other versions. Documentary evidence can never be completely unambiguous, and documents may conceal as much as they reveal. Furthermore, ethical and evidentiary rules exclude highly relevant information from evidence, notably what the parties have told their respective lawyers behind the shield of attorney-client privilege, what the lawyers have experimented with behind the shield of the work-product rule, and, in criminal cases, the shield of the accused’s privilege against self-incrimination.

The shortcomings of how our modern legal system expresses rules of law contribute further to the problem. “Rules of law” are expressed in general verbal formulations, not in specific mandates addressed to concrete events. But legal disputes involve idiosyncratic, concrete events to which specific judgmental response is required. Accordingly, there is a tension between the generality of the rules and the specificity of the judgments required in resolving concrete disputes. As Justice Oliver Wendell Holmes concisely put it, “General propositions do not decide concrete cases.”<sup>2</sup>

Moreover, the American legal system is unusually complex so that even the governing generalities are often uncertain. In our system, even detailed regulatory specifications are subordinate to the very general constitutional requirements of Due Process and Equal Protection. In any given case, for example, a commercial building development or an environmental control, potentially relevant rules emanate from all levels of government—federal, state, and local.<sup>3</sup>

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2. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

3. *See Kelo v. City of New London*, 545 U.S. 469 (2005); *see also Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93 (1994).

Because trial court rulings are subject to reversal, any court's ruling may be equivocal. All court decisions short of the Supreme Court of the United States have only regional authority, and even Supreme Court decisions lack permanent authority. Thus, as a practical matter, much of the law is a kaleidoscope. Incompletely accurate facts and imprecise law mean that any given adjudication can be, in an important sense, defective.

Justice Robert Jackson observed about the Supreme Court of the United States that: "We are not final because we are infallible, but we are infallible only because we are final."<sup>4</sup> The same can be said of the legal system as a whole.

### III. THE MILIEU OF UNCERTAINTY

When parties have a shared understanding of a situation—their respective personal and property rights, their expectations, and so on—their relationship normally can be harmonized without difficulty. In these circumstances, the parties have no need for legal assistance, or at most, they need only formal documentation of their relationship. But when parties require involvement from lawyers, it is typically because the parties' understandings and aims are in conflict and beset by confusion. It is the lawyer's job to facilitate the resolution of these conflicts, by either negotiating an agreement between the parties or counseling their clients about dealing with the unresolved situation. Lawyers' work, thus, necessarily involves conflict and a measure of confusion.

The kaleidoscopic nature of law practice in the real world, therefore, means that lawyering is usually conducted in a milieu of uncertainty—uncertainty as to the facts of a situation, uncertainty as to the motives and purposes of the parties, and often uncertainty as to the rules of law that might govern. On another level, there can be a fundamental uncertainty about the social standard for truthfulness, candor, and responsibility to others.

It is convenient to suppose that community sentiment is substantially uniform, but American *mores* in fact are heterogeneous. However, as we shall see through a review of various critiques, a supposed "common morality" is typically invoked in appraising lawyers' conduct.

### IV. ANOTHER FRAMEWORK

There is an alternative framework, formulated by Sir Isaiah Berlin, which sustains, and perhaps better explains, American law practice. This alternative begins with the recognition that the lawyer's role involves

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4. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

distinctive authority and obligations. These include the authority to speak in court (the “right of audience” as it is traditionally called); the right to provide realistic legal advice; the right to act as a partisan; and the right and duty to maintain secrecy in handling client affairs.<sup>5</sup> A lawyer’s authority requires her to invoke governmental power on behalf of clients—bringing or resisting a lawsuit. It includes giving frank advice about the imperfections in law—advice that may enable a client to act unlawfully. It grants immunity from retribution for pursuing an outcome that the lawyer personally could consider unjust.

In this alternative framework, lawyers are governed not by a “personal morality” professed in the community at large, but by a morality involved in the “public organization”—the government itself. Whether and how far law practice should be endowed with this distinctive authority is, of course, debatable. Nevertheless, as Professor Angelo Dondi and I have explained in *Legal Ethics: A Comparative Study*, these elements of the lawyer’s role have origins going back centuries and are recognized in all constitutional regimes.<sup>6</sup>

#### V. REALITIES OF LAW PRACTICE

A lawyer’s work can be boiled down to four main functions: giving legal advice, litigation, negotiation, and documentation of agreements. In each of these functions, a lawyer will almost invariably be called to do something that contravenes a traditional sense of common morality. Legal advice, involved in all lawyer tasks, aims foremost at optimizing a client’s position. Litigation can require lawyers to endorse positions that they would not adopt for themselves. Negotiation typically entails a measure of dissimulation. Many lawyer-drafted agreements can be over-reaching.

All these functions have been subjected to intense criticism, some of which is reviewed in this Essay. As we shall see, Professor Markovits has said that lawyers necessarily lie and cheat;<sup>7</sup> Professor Simon has said that traditional legal ethics requires lawyers to pursue unjust objectives; and Professor Luban has said that lawyers act immorally when they pursue for a client an objective they would not pursue for themselves.

These criticisms are at least partly true. It is certainly true that some lawyers tell lies for the purpose of deceiving others. Litigation and negotiation are sometimes protracted for strategic reasons, rather than being centered on the merits. Lawful partisanship and zeal can devolve into unprofessional aggression. Legal advice can be a roadmap to illegal conduct.

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5. *See generally* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* ch. 15 (1986).

6. GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* 93 (2004).

7. DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 4 (2008).

But part of the reason for this supposed immoral conduct is that each of these four functions, coupled with a lawyer's ethical obligations to her client, necessarily requires a measure of pretense and deceit. In particular, lawyers must maintain a high degree of secrecy, not least concerning their consultations with clients. To maintain secrecy is to withhold truth, which requires diplomatic skill and sometimes dissimulation. Dissimulation can amount to deception, and deception is functionally similar to the use of force, in that it can induce an opposite party to undertake action voluntarily that otherwise would be undertaken only under coercion.

Negotiation is central to law practice, whether in addressing settlement of litigation or the resolution of a proposed transaction. Negotiation is a set of exchanges in which the parties can move from unresolved difference to an agreeable midpoint. Skillful negotiation requires lawyers to understand the opposing party's vital interests but remain reserved about the client's interests. A measure of pretense can sound out possibilities with the aim of "getting to yes."<sup>8</sup>

Even lawyers' work in documentation can entail difficult ethical problems. When an opposing party (or its lawyer) is unaware of essential facts, does a lawyer have an obligation to remedy that ignorance? The judicial authority on that issue is in conflict.<sup>9</sup>

Lawyers are also sometimes subject to criticism for exploiting, or at least doing nothing to remedy, asymmetry in legal positions. In so-called "adhesion contracts," for example, the stronger party essentially dictates the contract terms while the weaker party simply adheres to the proposed terms, or foregoes the transaction.<sup>10</sup> Most contracts involving consumers are adhesion contracts—credit cards, car rentals, bank accounts, and so on.

There is further asymmetry in the distribution of legal services, a situation that is commonly a basis of criticism of the legal profession. In crude terms, it is complained that the rich have all the lawyers in their pocket. Indeed, the clients who provide the biggest financial returns to a law practice are typically businesses and other organizations. This common form of law practice, through myriad contracts, enables capitalist entrepreneurship to function.

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8. See generally MELISSA L. NELKEN, *NEGOTIATION: THEORY AND PRACTICE* ch. 8 (2d ed. 2007). Lawyers can use stylized phrases to distinguish pretense from truth. Thus, "I can't recommend that to my client" can be code for "We reject that," while "I represent that this . . ." is code for "This is true". See generally Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1 (1992).

9. Compare, e.g., *Brown v. Cnty. of Genesee*, 872 F.2d 169 (6th Cir. 1989), with *Stare v. Tate*, 98 Cal. Rptr. 264 (Cal. Ct. App. 1971).

10. For example, in *Carnival Cruise Lines, Inc. v. Shute*, a Seattle resident injured on a cruise ship was required by a clause in her ticket to bring her suit for damages in Florida, where the cruise company was headquartered. 499 U.S. 585 (1991).

This asymmetry is essentially a problem of public policy, not individual lawyer ethics or conduct. The Supreme Court has maintained that there is no constitutional right to legal assistance in civil matters, and Congress is allergic to legal aid that could pursue substantial legal change. Compounding the problem, many states and localities are parsimonious regarding legal assistance to people of modest means.<sup>11</sup> Business organizations need lawyers to facilitate “compliance” with the law.<sup>12</sup> But corporate lawyering also can facilitate evasion of the law, as we shall see through Professor Norman Spaulding. In sum, the ideal of equal justice accordingly remains an ideal. The current realities of law practice encourage, or at least do nothing to deter, the pretense and ambivalence toward inequality that are the subject of many critiques of lawyers. Lawyers contribute to the problem by adhering to the principle that legal assistance can be provided only by licensed lawyers.<sup>13</sup>

## VI. CRITIQUES OF LAWYERS’ ETHICS

It is uncomfortable to recognize that coercion, deception, and unequal access to justice are aspects of ordinary law practice. Indeed, there has been criticism of lawyers on these grounds as long as there have been lawyers. In thirteenth-century England, for example, as Professor Jonathan Rose has shown in *The Legal Profession in Medieval England*,<sup>14</sup> there were regulatory efforts by the Crown to control lawyer malfeasance. A prime target was what was called “ambidextrous” conduct, referring to lawyers who worked on both sides of a transaction or controversy—what today we call conflict of interest.<sup>15</sup> Other targets were excessive fees and procrastination, evils that still persist.<sup>16</sup>

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11. See, e.g., *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (no constitutional right to civil legal assistance); DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE* (2005) (legal profession’s modest efforts to provide pro bono legal assistance); David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CALIF. L. REV. 209 (2003) (restrictions on civil legal aid).

12. See *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

13. See MODEL RULES OF PROF’L CONDUCT R. 5.4(b) (2013) (“A lawyer shall not form a partnership with a nonlawyer . . .”); MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (2013) (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession . . . or assist another in doing so.”).

14. Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 41–105 (1998).

15. Jonathan Rose, *Of Ambidexters and Daffidowndillies: Defamation of Lawyers, Legal Ethics, and Professional Reputation*, 8 U. CHI. L. SCH. ROUNDTABLE 423, 447–48 (2001).

16. See, e.g., *Bushman v. State Bar of Cal.*, 522 P.2d 312, 315 (Cal. 1974) (lawyer suspended for a year where “the fee charged . . . was so exorbitant . . . as to shock the conscience”); GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 682 (5th ed. 2010) (“Bar leaders and professional codes speak out against the use of delay as a deliberate harassing tactic, but eminent lawyers often boast shamelessly at professional meetings of their skills in delaying cases.”).

Shakespeare's famous line, "The first thing we do, let's kill all the lawyers,"<sup>17</sup> personifies the historical vilification of lawyers. This attitude has persisted. At the turn into the nineteenth century, Jeremy Bentham launched a wholesale attack on the common law, which he called the "Demon of Chicane," and by extension an attack on the entire practice of law.<sup>18</sup> Near the turn into the twentieth century, Carl Sandburg, in *The Lawyers Know Too Much*, asked: "Why does a hearse horse snicker/[h]auling a lawyer away?"<sup>19</sup> More recently, Dean Robert Post said that "the lawyer is the . . . embodiment of the tension . . . between . . . common community and the urge toward individual independence and self-assertion."<sup>20</sup>

Before proceeding to modern systematic critiques, it is useful first to recount the basic legal obligations that govern a lawyer's relationship with a client. These are the duty of confidentiality, the related rules of attorney-client privilege and work-product immunity, and the duty of loyalty.

#### A. CONFIDENTIALITY

The duty of confidentiality is prescribed in the American Bar Association Model Rules of Professional Conduct ("RPC"), Rule 1.6. That rule or a similar version is in effect in every American jurisdiction, and substantially similar rules are in effect in other constitutional regimes.<sup>21</sup> Rule 1.6 (a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."<sup>22</sup> This obligation applies to information received not only from the client, but also from other sources.<sup>23</sup> The phrase "impliedly authorized" expresses the general legal concept that an agent, such as a lawyer, has authority to use client information to further the purpose of the engagement.<sup>24</sup> A number of exceptions are set forth in Rule 1.6(b), for example allowing disclosure to prevent the client from committing a crime or fraud in which the lawyer's services had been used.<sup>25</sup>

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17. WILLIAM SHAKESPEARE, HENRY VI, PART II 154 (Louis B. Wright & Virginia A. LaMar eds., Washington Square Press 1966) (1591).

18. 19 THE WORKS OF JEREMY BENTHAM 35 (John Bowring ed. 1842).

19. CARL SANDBURG, COMPLETE POEMS 189 (rev. ed. 1970).

20. Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 389 (1987).

21. See HAZARD & DONDI, *supra* note 6, at ch. 6.

22. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2013).

23. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 59-67 (2000).

24. See RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 2.02 (2006).

25. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2013).

It may be noted that there is a similar duty of confidentiality in all “agency” relationships, such as that of employee, and in many professional relationships, such as the practice of medicine and nursing, accounting, and financial advising.

For lawyers there are parallel provisions in the law of evidence—the attorney-client privilege and the attorney work-product immunity. These rules apply in litigation and investigations. The attorney-client privilege provides that a client (and her lawyer) generally may not be required to disclose communications to and from the lawyer. It operates like the privilege against self-incrimination in that it precludes the court, as well as an opposing party, from pursuing disclosure. Further, the privilege is available to business organizations such as corporations.<sup>26</sup>

The attorney work-product immunity provides that a lawyer may invoke secrecy concerning documents and other information prepared or compiled in work done for the client.<sup>27</sup> Like the attorney-client privilege, it is recognized in all American jurisdictions.

## B. LOYALTY

The lawyer’s professional duty of loyalty is formally stated in negative terms. RPC 1.7(a) provides:

[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.<sup>28</sup>

The duty of loyalty is expressed affirmatively in Rule 1.3: “A lawyer shall act with reasonable diligence and promptness in representing a client.”<sup>29</sup> The duty of loyalty is extended to former clients through Rule 1.9, which prohibits representation that is “materially adverse” to a former client in “the same or a substantially related matter.”<sup>30</sup> For example, if client A was provided an assessment of one of its patents, the lawyer could not later bring a suit against client A concerning that patent. Exceptions to the duty of loyalty are provided for, but acting on them generally requires consent by the affected clients.<sup>31</sup>

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26. *See* *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

27. *See* *Hickman v. Taylor*, 329 U.S. 495 (1947); FED. R. CIV. P. 26(b)(3).

28. MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2013).

29. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2013).

30. MODEL RULES OF PROF’L CONDUCT R. 1.9(a) (2013).

31. MODEL RULES OF PROF’L CONDUCT R. 1.9(b) (2013).

The rules of confidentiality and loyalty also generally apply not only to the lawyer personally involved, but also to other lawyers in the same firm. This requirement is imposed by Rule 1.10, which “imputes” to all lawyers in a firm a limitation imposed on any of its lawyers.<sup>32</sup> Thus, when lawyer A receives confidences of a client, lawyer B in the same firm has an obligation to maintain that confidence. In *United States v. O’Hagan*,<sup>33</sup> for example, a lawyer was found to have illegally used information about a corporate client of the firm—not one he was personally involved with—to buy the company’s stock offering.

#### C. CHARLES CURTIS’ *THE ETHICS OF ADVOCACY*

An influential beginning of systematic critiques was a 1951 article in the Stanford Law Review, *The Ethics of Advocacy*, by Charles Curtis, a well-established Boston lawyer.<sup>34</sup> Curtis expanded his discussion in *It’s Your Law*, where he wrote that a lawyer is required to “treat outsiders as if they were barbarians and enemies,”<sup>35</sup> that one of a lawyer’s functions is “to lie for his client,”<sup>36</sup> and that a lawyer is required to “say things which he does not believe in.”<sup>37</sup> These characterizations, although accurate as to some lawyers’ behavior, are hyperbole. There are rules and sanctions against such conduct.<sup>38</sup> More important, as a practical matter, oppression of a witness can antagonize a jury or judge and induce retaliation by opposing counsel.

Two of Curtis’ pronouncements remain key in criticisms of law practice: that a lawyer may lie for his client and that he may make arguments he does not believe in. Among more recent critiques are ones by Daniel Markovits, William Simon, David Luban, and Arthur Applebaum. Norman Spaulding takes a more unusual approach.

#### D. DAVID MARKOVITS

The critique by Professor Daniel Markovits is the most recent and most trenchant. It also seems most clearly wrong.

Professor Markovits leads off by stating that law practice necessarily requires that lawyers “lie” and “cheat.”<sup>39</sup> He argues that this conduct is

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32. MODEL RULES OF PROF’L CONDUCT R. 1.10(a) (2013).

33. 521 U.S. 642 (1997).

34. Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

35. CHARLES P. CURTIS, *IT’S YOUR LAW* 8 (1954).

36. *Id.* at 10.

37. *Id.* at 17.

38. MODEL RULES OF PROF’L CONDUCT Rs. 3.4, 4.4 (2013). See, e.g., *Hawk v. Superior Court*, 116 Cal. Rptr. 713 (Cal. Ct. App. 1974); *In re Reisch*, 474 N.Y.S.2d 741 (N.Y. App. Div. 1984).

39. MARKOVITS, *supra* note 7, at 3–4.

nevertheless virtuous because lawyers thereby lead clients to appreciate the legitimacy of the legal process, the rule of law, and democracy itself.<sup>40</sup>

On its face, this idea is bizarre. One would think a lawyer's lying and cheating could only be appreciated by clients who themselves are liars and cheaters. No doubt there are such clients, and there are lawyers who approximate Markovits' vision. But can it be imagined that a typical client, upon winning a verdict, leaves court enthusiastically proclaiming, "We really cheated them, didn't we!?" As Professor Simon has observed, most ordinary citizens do not associate "arguing false inferences or any other form of 'lying' or 'cheating' with fair procedure or with any kind of legitimacy."<sup>41</sup>

Simon questions the source of Markovits' thesis, which is that lawyers somehow impersonate and "imaginatively identify with" the client.<sup>42</sup> Markovits adapted this thesis from writings of John Keats, a poet in the early nineteenth century. However, the adaptation is worse than questionable.

The term taken from Keats is "negative capability," which Keats used in a letter to his brothers. Discussing theatre, specifically Shakespeare's *Richard III*, Keats said: "[I]t struck me what quality went to form a man of achievement, especially in literature, and which Shakespeare possessed so enormously—I mean *negative capability*, that is, when a man is capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason."<sup>43</sup>

In employing Keats' term "negative capability," Markovits omits the words "capable of being in uncertainties, mysteries, doubts." That phrase would indeed describe what Keats was talking about—Richard III's state of mind in Shakespeare's play.<sup>44</sup> Instead, Markovits conjoins "negative capability" with a passage from a different Keats letter written a year later to someone else. In that letter Keats talks about how a poet—an author—can project his identity onto inanimate things such as the sun and moon.<sup>45</sup> From this, Markovits constructs "negative capability" for a lawyer, who he says "is similarly required, by . . . professional detachment, to efface herself . . . [a]nd through this self-effacement . . . to work continually as a mouthpiece for her client."<sup>46</sup> In simpler language,

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40. *Id.* at 5.

41. William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987, 995 (2010).

42. *Id.* at 996 n.21.

43. Letter from John Keats to George and Thomas Keats (Dec. 22, 1817), in LIFE, LETTERS, AND LITERARY REMAINS, OF JOHN KEATS 70, 71 (Richard Monkton Milnes ed., 1848) (emphasis in original).

44. See WILLIAM SHAKESPEARE, *RICHARD III* act 1, sc. 2.

45. Letter from John Keats to Richard Woodhouse (Oct. 27, 1818), in LIFE, LETTERS, AND LITERARY REMAINS, OF JOHN KEATS, *supra* note 43, at 149, 150.

46. MARKOVITS, *supra* note 7, at 93.

the proposition is that a lawyer, in acting on behalf of a client, must make herself disappear—“efface herself.”

This portrayal of a lawyer is simply wrong. Our legal system requires a lawyer not to “efface” herself but to positively assert a distinct professional identity, for example, “Your honor, my name is Sarah Smith and I represent . . . .” A lawyer can properly speak on behalf of a client only because she has a professional identity and the “right of audience” separate from that of her client. A lawyer cannot properly “personify” a client as a witness, for a lawyer is prohibited from asserting “personal knowledge of facts in issue.”<sup>47</sup> And there is a nest of rules imposing responsibilities on lawyers concerning their forensic conduct.<sup>48</sup> A lawyer also must maintain the professional independence and detachment required in competent practice.

“Effacement” also says nothing about the role of lawyer in giving advice. Advice from a lawyer to a client is intelligible only if client and lawyer are distinct—or is the client advising himself?

#### E. WILLIAM SIMON

Professor William Simon in *The Practice of Justice* develops a quite different critique of the legal profession.

The profession’s official understanding is that a lawyer should loyally further the client’s lawful interests, regardless of whether those interests conform to the lawyer’s conception of justice.<sup>49</sup> Simon concludes that the lawyer’s loyalty should be to a higher ideal of “justice,” according to which the lawyer should autonomously determine the client’s proper interests and then pursue “actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”<sup>50</sup>

Professor Simon illustrates his thesis with a hypothetical in which a young lawyer is representing a university in a dispute with a labor union.<sup>51</sup> There is a lawful but “technical” objection to the union’s eligibility to represent university workers. In this setting, Simon says the lawyer should conclude that justice requires disregarding the legal technicality, thereby allowing the union to proceed with its organizing campaign.

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47. MODEL RULES OF PROF’L CONDUCT R. 3.4(e) (2013).

48. MODEL RULES OF PROF’L CONDUCT R. 3.1–3.4 (2013).

49. MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(4) (2013) (“A lawyer may withdraw . . . [if] the client insists upon taking action that the lawyer considers repugnant . . . .”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(3)(f) (2000). There appear to be no reported decisions in which a lawyer has taken such a step. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 20.9 (3d ed. 2013).

50. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 138 (1988).

51. *Id.* at 151–56.

As Professors Woolley and Wendel observe in a criticism of this thesis: “Simon’s ideal lawyer must inquire into the deep structure of the community’s law to determine what apparent legal entitlements are just (or meritorious, as he sometimes puts it) and which are formally valid but not to be respected by a ‘contextual’ lawyer.”<sup>52</sup>

Professor Simon assumes that a concept of “justice” is clearly discernible and widely shared. Furthermore, as Woolley and Wendel observe, Professor Simon’s lawyer is “emotionally stable, introverted, fearless, calm, cognitively reflective and rarely automatic, free of cognitive biases, and highly intelligent,”<sup>53</sup> quite like Professor Simon. And, one might add, the junior lawyer is free of such burdens as student loan debt and dependents and also has other employment opportunities at the ready.

Professor Simon’s hypothetical lawyer is a junior associate, perhaps because it is difficult to imagine that an experienced lawyer would think it ethical to follow the Simon recipe. Indeed, it is improbable that even junior lawyers would think it proper to do so. As Professor Wasserstrom observed, “[O]nce [a] lawyer has agreed to represent the client . . . it [would be] morally wrong to defeat the client’s expectations about . . . the lawyer’s actions on the client’s behalf.”<sup>54</sup> Moreover, a lawyer’s reluctance to disregard a favorable technicality is not because she cannot imagine a better state of justice. Nor is it because she cannot distinguish between a legal technicality and substantive justice. It is because an experienced lawyer recognizes, as Wasserstrom says, that asserting her autonomous sense of “justice” to override the client’s lawful position would be a rank betrayal of the client. It would also be a breach of a legal duty to the client.<sup>55</sup>

An experienced lawyer is just as likely as a junior one to think that union activity was not necessarily beneficial for the client’s employees; there have been corrupt or exploitive unions. An experienced lawyer would know that legal technicalities are often expeditious means of achieving lawful objectives.

Beyond these considerations, in a regime where such autonomy were permissible, it can only be imagined how prospective employers of legal staff—law firms and corporate law departments—would function. Knowing that clients would be fearful of assigning their matters to impetuous swords of the lord, prospective employers would interrogate employment candidates about their concepts of loyalty and justice. Law

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52. Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 *Geo. J. Legal Ethics* 1065, 1084 (2010) (citation omitted).

53. *Id.* at 1085.

54. Richard Wasserstrom, *Roles and Morality*, in *The Good Lawyer*, *supra* note 1, at 25, 31.

55. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2013) (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).

firms thereby would be constituted of lawyers rigidly conforming to conventional professional responsibility and to ideals of justice that Professor Simon would rightly regard as reactionary.

Nevertheless, Professor Simon demonstrates that lawyers are often called upon to pursue objectives for a client that they would not seek for themselves. The discrepancy between a lawyer's sense of right and the duty to client is the pivot on which ordinary law practice can be said to be immoral. Indeed, it is the lawyer's personal sense of right that would result in that assessment.

Professor Simon is surely right in concluding that lawyers should think not only about legal technicalities, but also about justice in broader moral-political terms. RPC 2.1 permits and encourages such a perspective: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors . . ."<sup>56</sup> Thus, in his hypothetical, the junior's reflection about justice could lead her to suggest that the client-university not resort to legal technicality. Among a typical university's constituents are people who would think that relying on such a technicality was antisocial and dishonorable.

#### F. DAVID LUBAN

Professor David Luban has provided the most extensive discussion on the relation between lawyers' ethics and what is taken to be common morality. His basic thesis is that there is a "genuine tension between common morality and role moralities," particularly the role morality of law practice.<sup>57</sup>

Like most critics, Luban accepts that, whatever might be common morality, the role of defense counsel in criminal cases is morally defensible, even if it involves a lawyer trying to persuade a judge or jury of something the lawyer himself does not believe. The strongest defense of that position has been that by Professor Monroe Freedman in *Professional Responsibility of the Criminal Defense Lawyer*.<sup>58</sup> The justification is that criminal prosecution involves the power of the state pitched against a relatively helpless accused, whose dignity requires stalwart defensive advocacy.

In other writings, Professor Luban has been somewhat ambivalent about the moral legitimacy of criminal defense, saying that "[When] a lawyer defending a guilty [client] . . . succeeds in winning an acquittal, an

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56. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2013).

57. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 125 (1988).

58. MONROE H. FREEDMAN, *Professional Responsibility of the Criminal Defense Lawyer*, 64 MICH. L. REV. 1469 (1966); see MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (4th ed. 2010).

injustice is done.”<sup>59</sup> This criticism, however, involves a serious confusion of categories. The acquittal of an accused in the legal system *is* “justice” according to law. If an acquittal is a *moral* “injustice,” it is because the lawyer “knows” that his client was guilty. But the lawyer “knows” of his client’s guilt through the lawyer’s personal assessment of the client, a source of information that is excluded in administering justice according to law.

In any event, the justification for defending an accused does not extend to civil litigation, or to representation in negotiation and transaction work, which are the typical activities of most lawyers. Concerning these forms of law practice, Professor Luban has said that “Anything . . . that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well.”<sup>60</sup> In accord with Professor Simon, Luban proposes that the rules “be redrafted to allow lawyers to forego immoral tactics or the pursuit of unjust ends.”<sup>61</sup> However, the RPC has already gone a distance in that direction. Rule 1.16(b)(4) permits a lawyer to withdraw if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”<sup>62</sup>

On the other hand, Alan Donagan recognizes the heterogeneity of the community’s *mores*: “Individuals and institutions in [modern industrial] society will not only have various ends their pursuit of which will sometimes bring them into conflict, but will also uphold different views of what is morally permissible and socially desirable.”<sup>63</sup> And yet Professor Luban does not acknowledge that in such a milieu, there is no “common morality” with which to contrast lawyer morality. Nor could the community’s jumble of moral ideas yield a definite idea of “justice,” which is the basis of Professor Simon’s critique.

#### G. NORMAN SPAULDING

Professor Norman Spaulding’s thoughtful analyses of law practice and professional ethics goes in a different direction.<sup>64</sup> He criticizes a widely shared justification for the attorney-client privilege embraced by the Supreme Court—that it facilitates client “compliance” with law.<sup>65</sup>

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59. LUBAN, *supra* note 57, at 145. Luban’s “guilty client” is a client that the attorney “knows” is guilty of the charged crime.

60. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 154 (1988).

61. LUBAN, *supra* note 57, at 159.

62. MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(4) (2013).

63. Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER*, *supra* note 1, at 123, 128.

64. See Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003); Norman W. Spaulding, *The Privilege of Probity*, 26 GEO. J. LEGAL ED. 301 (2013).

65. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981); Norman W. Spaulding, *Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege*, 2013 J. PROF’L LAW. 135.

Professor Spaulding says that this rationale is wrong as a matter of history and policy. He argues that a client is entitled, not only to know how to comply with the law, but to a realistic appraisal of whether the law will actually be enforced. He is surely correct that clients often want to include “legal risk” in considering a proposed course of action. By implication, Spaulding affirms that it is not immoral to give advice that could lead a client to pursue a legally wrongful course of conduct.

Spaulding further suggests that the rules as written do not allow the lawyer to engage in such realism. However, Rule 1.2(d) provides: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client . . . .”<sup>66</sup> A lawyer can properly interpret this rule as allowing a client to be given a realistic appraisal of legal risk. Given what many consider to be our excessive legal regulations, and their very uneven enforcement, providing realistic advice about legal deviance is surely defensible.

#### H. ARTHUR APPLEBAUM

Professor Arthur Applebaum makes the usual criticisms that “good lawyers . . . intentionally attempt to convince judges, jurors, litigants, and contracting parties of the truth of propositions that the lawyer believes to be false,” and that “part of what adversaries in professional life do for a living is violate persons by deceiving and coercing them.”<sup>67</sup> Of special interest, however, is Applebaum’s recognition of similarities between the ethical problems of practicing lawyers and those confronting other professionals, specifically business managers, politicians, and military officers. There are two basic points in the comparisons.

First, in our open and conflict-ridden society, there are many roles and relationships that entail partisanship, deception, and use of coercion. They involve protagonists on behalf of constituents or “clients”—people and institutions favored by the actor. Second, the roles of these protagonists are lawful and serve “our needs for social order,” in Bernard Williams’ phrase.

Thus, business managers are committed to the interests of their company’s shareholders, employees, customers, suppliers, and people near its facilities. Business operations employ the coercion involved in business competition. Business managers can use lawful force to discharge unsatisfactory subordinates and terminate unsatisfactory external engagements. Sometimes they must dissimulate, for example,

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66. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2013).

67. ARTHUR I. APPLEBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 104, 175 (1999).

about a company's trade secrets and its profit prospects. Business managers are regulated directly through the concept of fiduciary duties and indirectly through the network of regulations imposed on the enterprises they manage, for example, accuracy in company financial statements, fairness to employees, environmental compliance, and so on.<sup>68</sup>

Among politicians, those holding elective office are partisans who succeeded in competitive elections. Politicians use propaganda; they affirm propositions they may not personally believe in; they often minimize what their programs will cost. They are regulated by standards such as residence requirements and by legal definitions of their positions, for example, a district attorney cannot vote in the city council. Legislatures, city councils, and other deliberative bodies are governed by procedural rules.<sup>69</sup>

The managers of modern administrative agencies are more or less politicians.<sup>70</sup> Agencies are governed by networks of rules that govern their jurisdiction, procedure, and regulatory powers. Their internal processes are often obscure, so that knowing how an agency actually works is a valuable asset.

The military's very purpose is use of force and military technique inherently includes large-scale deception. As agents for a sovereign principal, military officers carry out missions in which they may not have confidence. Their projects often inflict injury on innocent third parties, "collateral damage" as it is now called. Nevertheless, military operations are governed by law, notably "Lincoln's Code," adopted in the Civil War and emulated by many other countries.<sup>71</sup> The military is also indirectly regulated by international norms such as the Geneva Convention.

In candid moments we recognize that partisanship, dissimulation, and coercion are elements of human existence. The "common morality" professed in the Judeo-Christian tradition demands that we "Do unto others as you would have them do unto you." But we hold friends in greater favor than strangers and usually hold fellow countrymen in greater favor than aliens.<sup>72</sup> Indeed, forms of injustice are pervasive in our own society. As Amartya Sen has said, they reflect "hardy social divisions, linked with divisions of class, gender, rank, location, religion,

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68. These days, many businesses also have internal codes of conduct. See Janet S. Adams, et al., *Codes of Ethics as Signals for Ethical Behavior*, 29 J. BUS. ETHICS 199 (2001).

69. The standard text is *Robert's Rules of Order*. These were derived from the rules of the U.S. House of Representatives, and the modern version runs more than 250 pages. See ROBERT'S RULES OF ORDER: SIMPLIFIED AND APPLIED (2d ed. 2001).

70. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 302 (1989).

71. See generally JOHN F. WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

72. Aristotle noted that "[A] man does not seem to have the same duties to a friend, a stranger, a comrade, and a schoolfellow." ARISTOTLE, NICOMACHEAN ETHICS bk. VIII, at 159 (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (c. 384 B.C.E.).

community and other established barriers.”<sup>73</sup> Professor Michael Walzer has tried to reconcile the facts of discriminatory social practice with the ideal of equal justice, but in unconvincing terms.<sup>74</sup> The “distinct understandings” in a society can call for grossly unequal treatment of some community members, such as the Untouchables in India.<sup>75</sup>

These are among the “imperfections” that generate “social needs,” as Professor Williams said. Sir Isaiah Berlin offers an alternative moral framework that deserves recognition.

#### VII. BERLIN’S *MACHIAVELLI*

A framework distinct from “common morality” is presented by Sir Isaiah Berlin in *The Originality of Machiavelli*.<sup>76</sup> Passages from Machiavelli’s *The Prince* illustrate what Berlin is talking about. Machiavelli says that a ruler must be “a great feigner and dissembler”<sup>77</sup> and exercise “cunning assisted by fortune.”<sup>78</sup> He must appear to be religiously upright, but “a prudent ruler ought not to keep faith when by doing so it would be against his interest.”<sup>79</sup>

Berlin interprets Machiavelli as setting up two competing moralities. According to Machiavelli, different people pursue different ends. “Men need rulers because they require someone to order human groups governed by diverse interests and bring them security, stability, [and] protection against enemies.”<sup>80</sup> These diverse interests lead to two moralities. “One is the morality of the pagan world: its values are courage, vigour, fortitude in adversity, . . . order, discipline, . . . justice, . . . and [the] power needed to secure their satisfaction . . . . Against this moral universe . . . stands . . . [the other morality], Christian morality” — we should say Judeo-Christian morality, with its virtues of “charity, mercy, sacrifice, . . . [and] forgiveness of enemies.”<sup>81</sup> “Society is, normally, a battlefield in which there are conflicts between and within groups. These conflicts can be controlled only by the judicious use of both persuasion and force.”<sup>82</sup>

73. AMARTYA SEN, *THE IDEA OF JUSTICE* 389 (2009).

74. He defines justice as beliefs “rooted in the distinct understandings of . . . a shared way of life,” and states that “[t]o override those understandings is . . . to act unjustly.” MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 314 (1983).

75. Walzer evidently did not notice the social coercion that kept the Untouchables in their place.

76. See ISAIAH BERLIN, *The Originality of Machiavelli*, in *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS* 25, 25 (Henry Hardy ed., 2001).

77. See NICCOLÒ MACHIAVELLI, *THE PRINCE* 70 (Luigi Ricci trans., R&R Ltd. 1901) (1532).

78. *Id.* at 37. “Fortune” refers to *fortuna*, the unpredictability in events.

79. *Id.* at 70.

80. See BERLIN, *supra* note 76, at 40.

81. *Id.* at 45.

82. *Id.* at 41.

According to Berlin, “what are commonly thought of as the central Christian virtues . . . are insuperable obstacles to the building of . . . [a] society that . . . satisfies men’s permanent desires and interests.”<sup>83</sup> Indeed, “men who pursue [Christian] ideals are bound to be defeated and to lead other people to ruin.”<sup>84</sup> He concludes that individuals “are perfectly entitled to lead a morally good life[] [and] be a private citizen . . . [b]ut . . . must not make [themselves] responsible for the lives of others.”<sup>85</sup> “There are two worlds, that of personal morality and that of public organisation.”<sup>86</sup>

Berlin then returns to a proposition that is woven into many of his other writings. He states that “[o]ne of the deepest assumptions of western political thought is . . . that there exists some single principle which not only regulates the course of the sun and the stars, but . . . functions . . . in a single harmonious whole . . .”<sup>87</sup> However, according to Berlin, “there might exist ends . . . which were equally ultimate, but incompatible with one another, that there might exist no single universal overarching standard . . .”<sup>88</sup>

Berlin concludes, “[T]he path is open to empiricism, pluralism, [and] . . . compromise.”<sup>89</sup>

#### A. “PERSONAL MORALITY” AND “PUBLIC ORGANIZATION”

Berlin’s two moral categories, “personal morality” and “public organization,” are useful in thinking about the morality of law practice. The domain of “personal morality” is secularized Judeo-Christianity and roughly corresponds to what David Luban has called “common morality” and, as we have seen, what William Simon refers to as “justice.” This morality is manifested in friendship, empathy, honesty, community, accommodation, and a measure of charity. In our society, most people who become lawyers have been brought up in a Judeo-Christian milieu and its corresponding morality. Their pre-law acculturation survives entry into the practice of law, so that most lawyers accept Judeo-Christianity as their “personal morality” and practice it in relationships with family and friends.

Some forms of law practice can partake of “personal morality.” Such can be said of the professional practice of the classic “elbow lawyer,” that is, a trusted legal counsel sitting at the client’s elbow. Indeed, Professor Charles Fried has argued that all client relationships

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83. *Id.* at 46.

84. *Id.* at 49.

85. *Id.* at 57.

86. *Id.* at 58.

87. *Id.* at 67.

88. *Id.* at 69.

89. *Id.* at 78.

are a kind of friendship.<sup>90</sup> But most client-lawyer relationships are commercial friendships governed by terms of an engagement contract and receding when that contract expires.

The other world, “public organization,” involves affairs of the *polis*, to use the classic Greek term for a social-political community. The *polis*, as Berlin observes, is a “battlefield in which there are conflicts between and within groups.”<sup>91</sup> To the same effect is Donagan’s observation that members of our society “not only have various ends . . . but . . . different views of what is morally permissible and socially desirable.”<sup>92</sup>

The thesis derived from Machiavelli is that these “different views” and “conflicts between and within groups” can be kept under control only with the aid of “rulers.” Machiavelli had in mind the Florentine rulers; their modern counterparts are officials and groups in government with authority to fashion and administer policies for the whole community. To carry out its functions, government employs what Berlin calls “judicious use of both persuasion and force.”<sup>93</sup> Law is the instrument of the technique and the lawyer’s vocation deploys that instrument.

Many lawyers have not squarely confronted these characteristics of their professional calling, including the tension between their personal morality and the *mores* of their vocation. When lawyers speak of “justice” they usually refer to their discourses on behalf of clients and the deliberations of judges—peaceful exercises in rationality—information that is protected by the lawyer’s duty of confidentiality and hence excluded. But force is in the background and the legal order combines reason and fiat.

The key transaction in the lawyer’s calling is admission to the bar. This is often viewed as a mere formality and indeed a nuisance. However, legally, it is a critical transformation of identity. Peaceful adherence to judicial decisions usually prevails, supported by recognition that force may be brought to bear if it does not. The law graduate can adhere to traditional Judeo-Christian morality in personal relationships and some professional ones. In becoming a member of the bar, however, the law graduate becomes *ex officio* an “officer of the legal system.”<sup>94</sup> Becoming *ex officio* an officer of the legal system should include

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90. See CHARLES FRIED, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

91. BERLIN, *supra* note 76, at 41.

92. ALAN DONAGAN, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER*, *supra* note 1, at 123, 128.

93. BERLIN, *supra* note 76, at 41.

94. The Preamble to the ABA Model Rules states: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROF’L CONDUCT pmb1. P1 (2013).

recognition that the governing professional *mores* are distinct from their personal *mores*, quite as the governing *mores* of a military officer are distinct from their personal *mores*. The professional outlook should be sober about the contrariness of human behavior and the possibilities of true justice. Faithful commitment to an imperfect system can make it a “higher calling.”

#### B. PARTICIPATING IN GOVERNMENT

Many lawyers would be startled, indeed offended, at being identified as instruments of the government. This identity would be particularly uncomfortable for lawyers engaged in representing victimized people and radical causes. It probably would be equally galling to lawyers engaged in representing conservative causes. But lawyers across the professional spectrum are engaged in invoking the law and thus bringing to bear the coercive power of government. On the left, they do so, for example, by seeking injunctions against environmental violations or employment discrimination, pursuing habeas corpus for prisoners, lobbying for reform legislation, and so on. On the right there is defense of corporations, finding openings in the tax laws, and so on.

The practice of law can be viewed as a highly decentralized form of the separation of powers. Familiar forms of the separation of powers are, of course, the division of authority between the legislative and the executive, and the division between them and the judiciary. The power exercised in law practice, even by lawyers employed in the government, is derivative from the authority of the judiciary. Lawyers have legal capacity, by virtue of their professional status, to invoke the judicial authority to challenge other elements of the government (suing the police for example), or to interdict some other actor in the private sector (such as suing a landlord).<sup>95</sup>

The client-lawyer relationship is thus political as well as legal. As said by Robert Kutak, head of the committee that drafted the ABA Model Rules: “The basic premise of virtually all our institutions is that open and relatively unrestrained competition among individuals produces the maximum collective good. . . . [T]he adversary system of justice reflects the same deep-seated values we place on competition among economic suppliers, political parties, and moral and political ideas.”<sup>96</sup>

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95. The coercive effect of litigation can operate in cases that do not go to trial. In the pretrial stage, parties have to submit to interrogation in depositions and hand over relevant documents; the resulting disclosures can be embarrassing. Parties often settle to avoid such exposure.

96. Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER*, *supra* note 1, at 172, 173–74.

## CONCLUSION

In political terms the lawyer-client relationship can be understood as a small caucus organized to put pressure on some other element in the *polis*. Visualized in this way, the client-lawyer combination fits into the classic political theory of John Locke. In *The Second Treatise of Government*, Locke says:

[E]very man [who has] entered into civil society, has [thereby] quitted his power to punish . . . which he has given up to the legislative in all cases where he can appeal to the magistrate, he has given a right to the commonwealth to employ his force for the execution of the judgments of the commonwealth . . . they being made by himself or his representative. . . . [T]he legislative and executive power . . . judge . . . how far injuries from without are to be vindicated . . .<sup>97</sup>

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97. JOHN LOCKE, OF CIVIL GOVERNMENT SECOND TREATISE 69–70 (Henry Regnery Co. 1966) (1689).