LAWYER SHAMING

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The Lincoln Project's effort to shame law firms working on behalf of the Trump campaign is only the most recent example of the public criticism, even vilification, directed against lawyers who represent unpopular clients. The legal profession is mostly unified in its response, which appeals to values such as due process, fairness, and the right to counsel. On the other hand, many scholars contend that lawyers should be morally accountable for actions they take as professionals, since everyone remains a moral agent, even when acting in an institutional role. This Article argues that, contrary to the near-unanimous view of lawyers, lawyers are subject to accountability for the clients they represent. In many cases, they have a complete normative defense. The social value of legality is a weighty, but not conclusive justification for providing zealous representation to even the worst clients. However, these role-based considerations do not displace ordinary morality from the field altogether. Ordinary morality persists, and in some cases can produce justified self-evaluations, or ascriptions to others, of regret, guilt, or shame. Building these "moral remainders" into professional ethics can help resist cynicism, amoralism, and alienation of professionals from the resources of morality.

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I. INTRODUCTION

In the weeks following the 2020 presidential election, lawyers retained by the Trump campaign, and some acting on their own, filed a farrago of challenges to state election procedures.[1] Initially, some were within the boundaries set by rules of procedure and professional norms.[2] They were objectively well-grounded in law and fact, and not brought for any improper purpose.[3] Courts resolved the nonfrivolous claims fairly quickly, with no significant impact on the then-apparent electoral victory of Joe Biden.[4] Prosecution of the remaining claims began to appear less like an effort to raise colorable legal issues and more like an effort to sow doubts in the minds of many voters on the legitimacy of Biden's election.[5] Led by formerly respectable but now fringe figures including Rudy Giuliani, Sidney Powell, and Lin Wood, the teams of lawyers asserted claims of widespread fraud which affected the result of the presidential election though, curiously, not the congressional races in which Republican candidates

1. *See, e.g.*, King v. Whitmer, 505 F. Supp. 3d 720 (E.D. Mich. 2020); Bowyer v. Ducey, 506 F. Supp. 3d 699 (D. Ariz. 2020).

2. *Contra Bowyer*, 506 F. Supp. 3d at 724.

3. *Contra id.*

4. *Contra id.*

5. Jeanine Santucci, *The Ways Donald Trump and Republicans Have Tried to Overturn Joe Biden's 2020 Win*, USA TODAY (Dec. 29, 2020, 12:03 AM), https://www.usatoday.com/story/news/politics/2020/12/29/how-trump-and-republicans-have-tried-overturn-2020-election/4064558001/ [https://perma.cc/87C5-UMUZ].

had prevailed.[6] Courts repeatedly dismissed the claims for lack of standing or on the substantive merits, in many cases issuing severely critical opinions.[7]

Even before the conspiratorial, Giuliani and Powell-orchestrated lawsuits, challenges to the results of the election drew intense public criticism of the lawyers representing the Trump campaign. The Lincoln Project, led by several Republican political operatives who had become vehement critics of Trump, named names of the elite law firms still involved in the challenges.[8] It tweeted that "[t]he law firms representing Donald Trump's unwarranted and dangerous attacks on our democracy are @JonesDay & @PorterWright" and suggested that the firms' employees resign in protest.[9] In subsequent tweets, the Lincoln Project clarified that its purpose was not only to direct public criticism and shame at the law firms, but also to seek to persuade their clients, including Walmart, General Motors, and Amazon, to take their legal business elsewhere.[10]

6. Representative Chip Roy, the former chief of staff to Senator Ted Cruz, and no liberal squish, objected to seating Republican representatives from states whose allocation of presidential electors were challenged. *See* Aaron Blake, *The Fix: Tom Cotton and Chip Roy Inject Some Logic into the GOP's Alogical Electoral College Gambit*, WASH. POST (Jan. 4, 2021, 10:41 AM), https://www.washingtonpost.com/politics/2021/01/04/tom-cotton-chip-roy-inject-some-logic-into-gops-alogical-electoral-college-gambit/?utm_source=facebook&utm_medium=social&utm_campaign=wp_politics [https://perma.cc/SX5V-KLFH].

7. *See*, *e.g.*, *Bowyer*, 506 F. Supp. 3d at 724, (D. Ariz. 2020). The district court described the evidence submitted and its deficiencies:

> Advancing several different theories, Plaintiffs allege that Arizona's Secretary of State and Governor conspired with various domestic and international actors to manipulate Arizona's 2020 General Election results allowing Joseph Biden to defeat Donald Trump in the presidential race. . . . Plaintiffs append over three hundred pages of attachments, which are only impressive for their volume. The various affidavits and expert reports are largely based on anonymous witnesses, hearsay, and irrelevant analysis of unrelated elections. . . . Plaintiffs next argue that they have expert witnesses who can attest to widespread voter fraud in Arizona. As an initial matter, none of Plaintiffs' witnesses identify Defendants as committing the alleged fraud, or state what their participation in the alleged fraudulent scheme was. Instead, they allege that, absentee ballots '*could have* been filled out by anyone and then submitted in the name of another voter,' '*could be* filled in by third parties to shift the election to Joe Biden,' or that ballots were destroyed or replaced 'with blank ballots filled out by election workers, Dominion or other third parties.' . . . These innuendoes fail to meet Rule 9(b) standards. But perhaps more concerning to the Court is that the 'expert reports' reach implausible conclusions, often because they are derived from wholly unreliable sources.

Id. at 721–24. A district court in Michigan found that there was no rationally supported claim that any conduct by the defendants resulted in votes being changed from Trump to Biden:

> Plaintiffs' equal protection claim is not supported by any allegation that Defendants' alleged schemes caused votes for President Trump to be changed to votes for Vice President Biden. For example, the closest Plaintiffs get to alleging that physical ballots were altered in such a way is the following statement in an election challenger's sworn affidavit: "I believe some of these workers were changing votes that had been cast for Donald Trump and other Republican candidates." . . . But of course, "[a] belief is not evidence" and falls far short of what is required to obtain any relief, much less the extraordinary relief Plaintiffs request. The closest Plaintiffs get to alleging that election machines and software changed votes for President Trump to Vice President Biden in Wayne County is an amalgamation of theories, conjecture, and speculation that such alterations were possible.

King v. Whitmer, 505 F. Supp. 3d 720, 738 (E.D. Mich. 2020).

8. The Lincoln Project (@ProjectLincoln), TWITTER (Nov. 10, 2020, 10:51 AM), https://twitter.com/ProjectLincoln/status/1326205863153946626 [https://perma.cc/QZE8-V2W8].

9. *Id.*

10. *See, e.g.*, Jeff John Roberts, *Backlash Against Jones Day, the Law Firm Aiding Trump's Election Challenge, Begins to Escalate*, FORTUNE (Nov. 12, 2020, 4:42 PM), https://fortune.com/2020/11/12/jones-day-trump-election-lawsuits-court-pennsylvania-gop/ [https://perma.cc/BSF2-FYR3] (citing subsequent tweets and comments elaborating on the public-relations strategy). One Lincoln Project tweet encouraged firm employees to

In the early days of 2021, following the disclosed recording of Trump's call to the Georgia Secretary of State, Brad Raffensperger, in which Trump begged, wheedled, cajoled, and threatened the state official unless he "found" enough votes to flip the state,[11] *New York Times* journalist Michael Schmidt tweeted that Foley & Lardner partner Cleta Mitchell "was on call and is part of Trump's efforts to overturn the election;" he also stated that Mitchell was a partner at an "upper tier law firm."[12] Schmidt contrasted Mitchell with notorious loose cannons like Giuliani, Powell, and Wood, on the assumption that a prestigious law firm such as Foley & Lardner would have no desire to be associated with an assault on an election which, by this time had conclusively been demonstrated to have been unaffected by widespread fraud.[13] The Lincoln Project piled on, tweeting that Major League Baseball was also a client of Foley & Lardner,[14] apparently seeking to embarrass clients for their association with the firm. Two days after the initial report, Miller resigned from the firm.[15] In an email she sent to clients and friends, she blamed her departure on "a massive pressure campaign in the last several days mounted by leftist groups via social media and other means against me, my law firm and clients of the law firm."[16]

Even before Election Day, legal commentator Dahlia Lithwick preemptively called down public opprobrium on the private law firms she predicted would welcome former Trump Administration lawyers back into the fold of the respectable legal profession.[17] Rather than shun lawyers who had provided assistance in humanitarian disasters such as the separation of migrant children from their families at the border, Lithwick assumed large law firms would "power-wash" the reputational stain by hiring these lawyers as if they had recently exited an ordinary presidential administration.[18] In her view, many lawyers who had worked in the Trump Administration shared the moral blame that was

resign in protest of the firms' work on the Trump campaign's election litigation. *See* Xiumei Dong, *Lincoln Project Lobs Attacks Against Jones Day, Porter Wright*, LAW360 (Nov. 10, 2020, 11:40 PM), https://www.law360.com/articles/1327686/lincoln-project-lobs-attacks-against-jones-day-porter-wright [https://perma.cc/3X5Q-SDCJ].

11. *See* Amy Gardner, *"I Just Want to Find 11,780 Votes": In Extraordinary Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021, 9:59 PM), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html [https://perma.cc/MX2M-NVLY].

12. Michael S. Schmidt (@nytmike), TWITTER (Jan. 3, 2021, 2:32 PM), https://twitter.com/nytmike/status/1345830317832232963 [https://perma.cc/2BVU-26J7].

13. *Id.*

14. *See* Aebra Coe, *Foley & Lardner Faces Ire over Partner's Role on Trump Call*, LAW 360 (Jan. 4, 2021, 11:31 AM), https://www.law360.com/articles/1341137/foley-lardner-faces-ire-over-partner-s-role-on-trump-call [https://perma.cc/8MZ8-EPQ2].

15. *See* Michael Kranish, *Cleta Mitchell, Who Advised Trump on Saturday Phone Call, Resigns from Law Firm*, WASH. POST (Jan. 5, 2020, 6:17 PM), https://www.washingtonpost.com/politics/mitchell-trump-resigns-firm/2021/01/05/ea5364b4-4f9e-11eb-b96e-0e54447b23a1_story.html [https://perma.cc/GC2A-NFZ2].

16. Michael S. Schmidt & Maggie Haberman, *Lawyer on Trump Election Call Quits Firm After Uproar*, N.Y. TIMES (Jan. 5, 2020), https://www.nytimes.com/2021/01/05/us/politics/cleta-mitchell-foley-lardner-trump.html [https://perma.cc/X2AH-Y576].

17. Dahlia Lithwick, *What Will Happen to the Lawyers Who Aided and Abetted Donald Trump?*, SLATE (Nov. 1, 2020, 5:45 AM), https://slate.com/news-and-politics/2020/11/lawyers-trump-big-law-return.html [https://perma.cc/Z6UQ-XHXB].

18. *Id.*

appropriately directed at the policies pursued by the President, including illegal and "needlessly cruel" family separations and stonewalling inquiry into the addition of a citizenship question to the 2020 Census form.[19] Upping the rhetorical stakes considerably, she quoted a *New York Times* opinion columnist's assessment that former Deputy Attorney General Rod Rosenstein is a man of "a rather banal morality"—an unmistakable allusion to Hannah Arendt's memorable description of the banality of evil embodied in Nazi functionary Adolph Eichmann.[20] It remains to be seen whether her prediction will be borne out, but some legal recruiters have predicted that Trump Administration lawyers involved with policies such as separating families at the border will have a difficult time finding employment at elite law firms.[21]

Predictably, the call to shame, shun, and ostracize former Trump Administration lawyers, the law firms employing them, and the firms' clients, was met by strong reaffirmation by prominent lawyers and scholars of the principle that lawyers should not be subject to moral criticism based on the identity or objectives of their clients.[22] It is entirely fair to criticize lawyers in normative terms

19. *Id.*

20. The Eichmann allusion repeated by Lithwick is from a *New York Times* editorial. Jennifer Senior, *Rod Rosenstein Was Just Doing His Job*, N.Y. TIMES (Oct. 20, 2020) https://www.nytimes.com/2020/10/15/opinion/rod-rosenstein-family-separation.html [https://perma.cc/UY8Y-6R5N]; *see also* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253 (1963).

21. *See* Dan Packel, *Will Service in the Trump Administration Be a Scarlet Letter in Big Law?*, AM. LAW. (Jan. 11, 2021, 3:50 PM), https://www.law.com/americanlawyer/2021/01/11/will-service-in-the-trump-administration-be-a-scarlet-letter-in-big-law/ [https://perma.cc/Q6ZS-TNY3]. Leah Litman predicts that networks of elite lawyers will welcome Trump Administration officials back into the respectable profession. *See* Leah Litman, *Lawyers' Democratic Dysfunction*, 68 DRAKE L. REV. 303, 325 (2020). She argues that these professionals are so conflict-averse that they will not impose adverse employment consequences on lawyers who participated in human rights violations, including the separation of families at the U.S.-Mexico border. *See id.* at 305, 307.

22. *See, e.g.*, Stephen L. Carter, *Trump's Lawyers are Just Doing Their Jobs*, BLOOMBERG OP. (Nov. 13, 2020, 10:00 AM) https://www.bloomberg.com/opinion/articles/2020-11-13/election-lawsuits-trump-s-lawyers-are-just-doing-their-jobs [https://perma.cc/B8NH-G9YN]; Dan Packel, *Polarizing Election Work, Discrimination Suits May Dent Jones Day's Appeal to Young Lawyers*, LAW.COM (Dec. 17, 2020, 7:19 AM), https://www.law.com/americanlawyer/2020/12/17/polarizing-election-work-discrimination-suits-may-dent-jones-days-appeal-to-young-lawyers/ [https://perma.cc/T9QZ-EEJX] (quoting an email from Stephen Gillers saying, of Jones Day: "[w]hile some law graduates may now avoid the firm and might have anyway because of its reputation more broadly, I commend the firm for not dropping the client in response to that threat or because it feared client flight. It stuck with its client, who had a more than plausible case. That's what lawyers should do."); Michael Paradis & Wells Dixon, *In Defense of Unpopular Clients—and Liberty*, WALL ST. J. (Nov. 18, 2020, 1:09 PM), https://www.wsj.com/articles/in-defense-of-unpopular-clientsand-liberty-11605722970 [https://perma.cc/6APQ-XV4J]. It should perhaps also be noted that nonlawyer professionals in the Trump Administration have also faced shaming or ostracism. The day after the riot at the Capitol, the chief content officer for *Forbes* warned businesses that it would take note if a company had hired Sean Spicer, Kellyanne Conway, Sarah Huckabee Sanders, Kayleigh McEnany, or other administration spokespersons who had unashamedly lied to the public. "Let it be known to the business world: Hire any of Trump's fellow fabulists above, and Forbes will assume that everything your company or firm talks about is a lie. We're going to scrutinize, double-check, investigate with the same skepticism we'd approach a Trump tweet. Want to ensure the world's biggest business media brand approaches you as a potential funnel of disinformation? Then hire away." Randall Lane, *A Truth Reckoning: Why We're Holding Those Who Lied for Trump Accountable*, FORBES (Jan. 7, 2021, 11:57 AM), https://www.forbes.com/sites/randalllane/2021/01/07/a-truth-reckoning-why-were-holding-those-who-lied-for-trump-accountable/ [https://perma.cc/MK6M-ZYCA]. Other nonlawyer officials in the Trump administration have run into controversy in the course of being considered for academic appointments. *See* Marisa Iati & Lauren

that are internal to the legal professional role.[23] If the lawsuits challenging state election procedures had inadequate factual or legal support, or if false evidence was introduced into an adjudicative proceeding, then the lawyers who engaged in this conduct are subject to warranted disapproval, as well as potential disciplinary sanctions.[24] What is not fair game, however, is to saddle lawyers with moral blame if they provided legal assistance to a client bent on pursuing antisocial projects, and did so without violating any applicable standards of professional conduct. From John Adams's representation of British soldiers charged in connection with the Boston Massacre[25] to the defense by elite law firms of alleged terrorists following the 9/11 attacks,[26] American lawyers have consistently maintained a professional tradition of nonaccountability for their clients' character or objectives.[27] And at least for criminal defendants, there is a constitutional right to the assistance of counsel, which is a starting point for constructing a defense to an effort to shame lawyers for their choice of clients.[28]

The assumption of nonaccountability for lawyers representing unpopular, nasty, or antisocial clients stands in sharp contrast to the background moral principle that we are all mutually accountable to others for failures to live up to community standards regulating the terms of interpersonal relationships.[29] There is no requirement in American law to represent any given client. Moreover, simply citing the Sixth Amendment,[30] *Gideon v. Wainwright*,[31] or other positive law begs the normative question, given the prominent and widely supported view among philosophers, whether there is no prima facie moral obligation to obey

Lumpkin, *Universities Face Pressure to Vet Ex-Trump Officials Before Hiring Them*, WASH. POST (Jan. 23, 2021, 7:00 AM), https://www.washingtonpost.com/education/2021/01/23/trump-appointees-universities/ [https://perma.cc/2EGA-TXBB].

23. *See, e.g.*, Scott Cummings, Nora Freeman Engstrom, David Luban & Deborah L. Rhode, *It's Time to Consider Sanctions for Trump's Legal Team*, SLATE (Nov. 23, 2020, 2:37 PM), https://slate.com/news-and-politics/2020/11/trump-legal-team-rudy-giuliani-state-bar-sanctions.html [https://perma.cc/BA4X-7ZBV].

24. Many lawyers and legal scholars wrote publicly to call for sanctions on lawyers representing the Trump campaign for violating, among other rules, prohibitions on making false statements, introducing false evidence, bringing legal claims without adequate legal and factual support, and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *See, e.g.*, *id.*; Charles R. Work et al., *25 Former D.C. Bar Presidents: Lawyers Should Not Be Complicit in Trump's Attack on Democracy*, WASH. POST (Dec. 1, 2020, 6:24 PM), https://www.washingtonpost.com/opinions/2020/12/01/dc-bar-presidents-lawyers-trump-election/ [https://perma.cc/3DRH-MUW4].

25. *See* DAVID MCCULLOUGH, JOHN ADAMS 6566 (2001).

26. Charles Fried, *Mr. Stimson and the American Way*, WALL ST. J. (Jan. 16, 2007, 12:01 AM), https://www.wsj.com/articles/SB116892102246577373 [https://perma.cc/8UBW-3BDP].

27. *See, e.g.*, Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673 (1978).

28. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1245–59 (1993); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. STATE L. REV. 175, 177 (1983–84).

29. STEPHEN DARWALL, THE SECOND PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 68–70 (2006).

30. *See* U.S. CONST. amend. VI.

31. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

the law.[32] In light of the wide zone of discretion, established by the law of lawyering, to make client-selection decisions, and in any case the gap between legal and moral obligation, it is reasonable to inquire into the grounds for a lawyer's exercise of that discretion to choose a particular client. Some lawyers and legal scholars have therefore conceded that "[i]t is proper . . . to publicly challenge lawyers to justify their representation of particular clients."[33] Calling out, shunning, and shaming offenders would then be arguably nothing more than a tool in the toolkit of morality, employed as a way of enforcing norms of accountability for wrongdoing.[34]

The shaming campaigns against lawyers associated with the Trump Administration are neither new nor distinctive.[35] Similar efforts at public vilification seemingly pop up like dandelions every so often and follow predictable patterns.[36] It is tempting to write off lawyer-shaming campaigns as nothing more than fake outrage, ginned up by people who should know better, for crass

32. *See, e.g.*, A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 192 (1979); KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 20–21 (1987); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 950 (1973) (answering in the negative).

33. Monroe H. Freedman, Response, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 112 (1995).

34. Shame is a complex phenomenon within morality. *See*, *e.g.*, BERNARD WILLIAMS, SHAME AND NECESSITY 83–84 (1993); GABRIELE TAYLOR, PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT 53–84 (1985). It can refer to a moral emotion, arising from a sense of having failed to live up to one's own commitments. It can also be something that one is made to suffer; *shaming* is something done to someone by others. There are also non-moral senses of shame and shaming familiar in popular discourse, such as body-shaming or fat-shaming. Shame in the sense of social stigma has been wrongly directed against people for conduct or identity that would now be regarded as unobjectionable. An obvious example would be the shame aimed at, and felt by, LGBTQ+ people in the relatively recent past. Some cultures are characterized by a preoccupation with social standing, or honor, and individuals are vulnerable to shaming practices calling their standing within the society into question. *See, e.g.*, JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 67 (2001); FRANK HENDERSON STEWART, HONOR 145 (1994); WILLIAM IAN MILLER, HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE 19–20 (1993); BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 5 (1982); J.G. Persistiany, *Introduction*, *in* HONOUR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY 9 (J.G. Peristiany, ed., 1966). Lawyer-shaming campaigns have some of the flavor of traditional social practices by which an offender is made to suffer consequences for deviating from community norms. Significantly, the relevant norms are highly moralized, referring to considerations of right and wrong in belief and action. Shaming is not just a sociological phenomenon but a mechanism for enforcing community morality by threatening sanctions such as ostracism. Thus, I will use the term shaming in preference to a blander term such as criticism, to describe the vilification of lawyers who represent clients regarded by the community as beyond the pale.

35. Contra to the claim of former U.S. Attorney General Eric Holder, who complained of "an increasing and disturbing trend of criticizing lawyers for the clients they represent and for advancing arguments that are well within the bounds of zealous advocacy." *See* Eric H. Holder, Jr., *"Lawyers Know Better": Criticizing Lawyers for Defending Unpopular Clients Is Risky, "Disturbing*,*"* NAT'L L.J. (Dec. 30, 2020, 10:55 AM), https://www.law.com/nationallawjournal/2020/12/29/lawyers-know-better-criticizing-lawyers-for-defending-unpopular-clients-is-risky-disturbing/?slreturn=20210819154952 [https://perma.cc/U9FZ-Y69K]. It may be disturbing to Holder or other lawyers, but few things have been more constant than public criticism of lawyers for the clients they represent or the arguments they advance on their behalf.

36. *See, e.g.*, Sarah Polus, *Larry David, Alan Dershowitz Get into Verbal Altercation at Grocery Store*, HILL (Aug. 19, 2021, 8:50 PM), https://thehill.com/blogs/in-the-know/in-the-know/568699-larry-david-alan-dershowitz-get-into-verbal-altercation-at [https://perma.cc/MHM2-B7MM].

political purposes.[37] Many critics, however, appear sincerely motivated by moral disapproval and the desire for accountability.[38] It is possible that they are simply unaware of the legal profession's tradition of providing representation to unpopular clients, but that is unlikely given the frequency with which these public controversies recur.[39] Instead, I contend that lawyer-shaming efforts reveals a theoretical issue in normative legal ethics on which scholars and the legal profession are profoundly divided. That is how the duties and permissions within professional morality (as opposed to the law) should be understood as separate from or continuous with ordinary morality.[40] The only way to break out of the *Groundhog Day* recurrence of the debates over lawyers' accountability for representing antisocial clients is to understand the subtle and contestable theoretical issues on which they depend.[41]

Perhaps surprisingly, I believe many lawyer-shaming campaigns are ethically defensible, and lawyers may be subject to moral criticism for the clients they choose to represent. It is surprising because I have defended a functional approach to lawyers' professional obligations that emphasizes their role as fiduciaries of clients and sees lawyers' primary ethical responsibility as providing effective representation to secure the legal entitlements of clients.[42] I have also emphasized, however, that these duties may have priority over others in deliberation, but deliberative priority does not necessarily eliminate a retrospective, non-action-guiding evaluation that the lawyer has been involved in moral wrongdoing.[43] What to do about this "moral remainder" is a separate question—one may ignore it, repress it, or seek some kind of psychological distance from actions performed in a professional role. Or, better, moral remainders may help avoid a cynical amoralism about the consequences of actions taken in a

37. Alternatively, lawyer-shaming efforts can be seen as akin to lawyer jokes, which may be a bit unfair, but which often express a genuine core of normative critique. *See generally* MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 208–09 (2006).

38. *See, e.g.*, Lithwick, *supra* note 17.

39. *See, e.g.*, Polus, *supra* note 36.

40. The terms ordinary, personal, private, common, general, universal, or background morality are used promiscuously in the analysis of professional ethics to refer to the moral considerations that apply to everyone *qua* moral agent, regardless of any social or institutional role they may occupy. *See, e.g.*, TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 10–11 (2009) (discussing personal or ordinary morality); DAVID LUBAN, LAWYERS AND JUSTICE 105 (1988) (discussing common morality); Bernard Williams, *Professional Morality and Its Dispositions*, *in* MAKING SENSE OF HUMANITY 192, 193 (1995) (discussing general or everyday morality); Judith Andre, *Role Morality as a Complex Instance of Ordinary Morality*, 28 AM. PHIL. Q. 73, 74 (1991) (discussing ordinary morality); Richard Wasserstrom, *Roles and Morality*, *in* THE GOOD LAWYER 25, 34 (David Luban ed. 1983) (discussing universalistic morality); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 65 (1980) (personal, private, or ordinary morality). *See generally* ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 90 (1980) (distinguishing between personal and professional morality). I have used the term ordinary morality, *see* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 2–6, 20 (2010), and will stick with that term here.

41. *See* GROUNDHOG DAY (Columbia Pictures 1993).

42. *See generally* WENDEL, *supra* note 40, at 168; *see also* W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727, 740 (2012) (responding to reviews of *Lawyers and Fidelity to Law*); W. Bradley Wendel, *The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations*, 30 CAN. J.L. & JURIS. 443, 443 (2017) (defending the position in *Lawyers and Fidelity to Law* against critics).

43. WENDEL, *supra* note 40, at 463.

professional role. Doing something may be the right thing, but that does not mean it should always be an easy decision. Public criticism of lawyers for the clients they represent helps remind lawyers that there are moral costs to what lawyers do, even if on balance, the actions are justified. This conclusion follows from the sometimes-tragic nature of professions, which may require people to do things that, in a non-professional capacity, would be justifiably regarded by observers as wrongful.

The structure of the argument in this Article is as follows: Part II provides an overview of the well-established popular ethics of lawyer shaming, developed through iterated arguments and counterarguments in public discourse, many of which refer to both law and the history and tradition of the profession's commitment to representing unpopular clients. It also briefly considers whether lawyer shaming should be disfavored because it is an aspect of "cancel culture," assuming it is possible to reach some understanding of what that term means.

Part III contains the principal normative analysis in the Article. It considers an issue that remains relatively under-theorized in practical and professional ethics, namely, the relationship between ordinary morality and the norms that arise in connection with professional roles. The dominant approaches to role morality have emphasized a strategy of exclusion or outweighing in either direction.[44] Many moral philosophers prefer to see role obligations as continuous with ordinary morality and grant relatively little weight to rights and duties that arise in connection with an institutional role.[45] That would mean that lawyers remain fully subject to moral accountability, on the same terms as anyone else, for their decision to provide assistance to a client's antisocial projects. On the other side, some philosophers and most practicing lawyers see professional role obligations as displacing ordinary morality from the field altogether.[46] What this strategy achieves, by way of creating a tidy normative landscape, it gives up by failing to account for the phenomenology of professional morality, which includes justified reactive attitudes of regret, guilt, and shame. There may be genuine moral dilemmas, in what are referred to as cases of dirty hands or tragic conflicts, where even if we take the action we have most reason to take, we have still done something wrong. The resulting "moral remainder," left by the reasons on the other side of practical deliberation, is a plausible explanation of the prevalence and persistence of criticism directed at lawyers for something that is widely believed to be professionally appropriate.

Finally, Part IV considers how theoretical legal ethics should handle criticism of lawyers based on the clients they represent. In most cases, lawyers are justified in providing zealous representation, even to terrible people. It is not as simple, however, as pointing to the constitutional right to the assistance of counsel in criminal defense matters. The relationship between the moral agency of any person acting in an institutional or professional role on the one hand, and the moral reasons that would apply in the absence of the role on the other, is not a

44. *See infra* Part III.
45. *See infra* Part III.
46. *See infra* Part III.

straightforward one of separate or exclusionary normative domains. The presence of moral remainders is one way to reinforce the accountability of lawyers for the actions they take within the legal system, which aims to serve the interests of society as a whole. In some cases, moral remainders lead to a sense of reluctance in acting on behalf of unpopular clients, which can help ensure that lawyers stay within permissible limitations in the course of the representation. Or a sense of tragic conflict may demand something by way of explanation or atonement by the lawyers involved, to express some appreciation of the underlying loss. As the following discussion will establish, clean, categorical, tidy answers are not to be found to the questions raised by many lawyer-shaming episodes. And it is a good thing, too, because moral remainders and a sense of tragic conflict help prevent the global displacement of moral responsibility onto institutions and roles that professional ethics must always be vigilant to guard against.

II. A BRIEF SURVEY OF THE FOLK MORALITY OF LAWYER SHAMING, WITH NOTES ON THE LAW AND "CANCEL CULTURE."

A. Some Recent Lawyer-Shaming Episodes.

The Lincoln Project's campaign against Jones Day and Porter Wright is reminiscent of other recent progressive efforts to make large law firm employees and clients uncomfortable with the firm's choice of clients and objectives.[47] Consider, for example, the criticism directed at the law firm of King & Spalding after one of the firm's partners, former Solicitor General Paul D. Clement, took on the Republican-led House of Representatives as a client in a challenge to the constitutionality of the Defense of Marriage Act (DOMA).[48] The campaign was organized by the Human Rights Campaign, an LGBT (at the time that was the preferred acronym) civil rights group.[49] In a press release, the group equated defense of DOMA with bigotry and invidious discrimination: "[t]he firm of King & Spalding has brought a shameful stain on its reputation in arguing for discrimination against loving, married couples . . . . No amount of taxpayer money they rake in will mitigate this blemish on the King & Spalding name."[50] The group also contacted the firm's clients and used social media in its effort to pressure the firm not to accept the representation.[51]

After the firm announced that it would not represent the House after all, Clement left King & Spalding to join a small boutique firm, taking his client with him.[52] King & Spalding may have avoided blowback from clients with a more

47. *See* The Lincoln Project, *supra* note 8.

48. Press Release, Human Rights Campaign, HRC to Law Firm King & Spalding: Defense of Discriminatory DOMA Law is "Shameful" (Apr. 18, 2011), https://www.hrc.org/press-releases/hrc-to-law-firm-king-amp-spalding-defense-of-discriminatory-doma-law-is-quo [https://perma.cc/52Q3-GMXA].

49. *Id.*

50. *Id.*

51. *See King & Spalding and HRC Do a Disservice to American Values*, WASH. POST (Apr. 26, 2011), https://www.washingtonpost.com/opinions/king-and-spalding-and-hrc-do-a-disservice-to-american-values/2011/04/26/AFDLNCtE_story.html [https://perma.cc/GCP7-GZ3M].

52. *Id.*

progressive political orientation, but it lost some conservative clients, including the National Rifle Association, as a result of throwing Clement under the bus.[53] The *Washington Post* editorial board referred to the Human Rights Campaign's criticism of the firm as an attempt at intimidation, "bullying tactics," and a "disservice to American values."[54] For good measure, the editorial observed that it would not have been long ago that law firms would have been subject to shaming campaigns for representing openly gay clients.[55] Dahlia Lithwick, the legal-affairs commentator who preemptively shamed law firms considering hiring former Trump Administration lawyers, criticized the Human Rights Campaign for contacting King & Spalding clients and accusing the law firm of bigotry.[56] Despite referring to the defense of DOMA as "taxpayer financing [for] the GOP's personal hate-fest," she rested her normative defense of the firm on the importance of developing a full factual and legal record establishing the unconstitutionality of the statute.[57]

The imbroglio over King & Spalding reminded many observers of the aftermath of the September 11, 2001 attacks, when many litigators from elite law firms entered pro bono appearances on behalf of detainees held at Guantánamo Bay.[58] Deputy Assistant Secretary of Defense Charles D. "Cully" Stimson gave an interview which, with the names changed, could have been a statement by the Lincoln Project about Trump Administration lawyers and the firms and clients considering hiring them:

> I think, quite honestly, when corporate C.E.O.'s see that those firms are representing the very terrorists who hit their bottom line back in 2001, those C.E.O.'s are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out.[59]

53. *See* John Gibeaut, *Withdrawing from Controversial Case Was Awkward for King & Spalding, But That's About All*, AM. BAR ASS'N J. (July 1, 2011), https://www.abajournal.com/magazine/article/at_unease_withdrawing_from_controversial_case_was_awkward_for_king_spalding [https://perma.cc/BP8N-8M3A].

54. *King & Spalding and HRC Do a Disservice to American Values*, *supra* note 51.

55. *Id.*

56. Dahlia Lithwick, *The Best Offense Is a Good Defense*, SLATE (Apr. 26, 2011, 5:06 PM), https://slate.com/news-and-politics/2011/04/paul-clement-leaves-king-spalding-even-opponents-of-doma-should-want-it-to-get-a-vigorous-defense.html [https://perma.cc/VYG7-4QTA].

57. *Id.*

58. *See, e.g.*, Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES (Jan. 13, 2007), https://www.nytimes.com/2007/01/13/washington/13gitmo.html [https://perma.cc/FJ27-HVDM].

59. *Id.* Stimson has recently denied that there was an orchestrated campaign by the Bush Administration to shame lawyers representing detainees. Following the Lincoln Project's tweets aimed at Trump Administration lawyers, Stimson wrote a letter to the *Wall Street Journal* expressing regret for the words he spoke in the interview and criticizing attacks on lawyers in the Obama Justice Department for having represented detainees. *See* Charles "Cully" Stimson, *We Didn't Intimidate Guantánamo Lawyers*, WALL ST. J. (Nov. 24, 2020, 2:34 PM), https://www.wsj.com/articles/we-didnt-intimidate-guantanamo-lawyers-11606246473 [https://perma.cc/M8AZ-HXCS]. This may be the only known case of successful lawyer-shaming shaming.

Conservative commentators, including Liz Cheney and Bill Kristol, labeled these lawyers the "Guantánamo Nine," a name which insinuated that the lawyers themselves are radical supporters of terrorists.[60]

In response to this lawyer-shaming campaign, former Solicitor General Charles Fried rose to the defense of the firms, writing "not only is the representation of the dishonorable honorable," but "it is the duty of the profession to make sure that every man has that representation."[61] The latter statement is nicely hedged to avoid stating incorrectly that lawyers have a duty to ensure that clients are represented.[62] There is no such duty on individual lawyers as a matter of law,[63] so talking about duties of "the profession" is too vague to be meaningful. But Fried's normative argument was clear: there should be no inference from the identity or objectives of a lawyer's client to the lawyer's own moral character. Not all conservatives took Fried's principled stand to heart. The Murdoch-owned *New York Post* editorial board, for example, asked the Obama Administration, "[w]hose side is the Justice Department on: America's—or the terrorists'?"[64] The editorial fulminated that "[i]t's just insane that a lawyer who defended Osama bin Laden's driver and bodyguard—and who sought constitutional rights for terrorists—could be one of the Obama administration's top legal officials."[65] Notably, criticism from the left of this lawyer-shaming campaign may have been muted somewhat by the still-fresh battles over advice provided by lawyers in the Bush Administration on the legality of "enhanced interrogation techniques."[66]

60. *See* Amy Davidson Sorkin, *Going After the Lawyers*, NEW YORKER (Mar. 8, 2010), https://www.newyorker.com/news/amy-davidson/going-after-the-lawyers [https://perma.cc/6WSF-ED6N]; Michael Kinsley, *Two Times Editorials on Law, Two Conflicting Conclusions*, ATLANTIC (Mar. 9, 2010) https://www.newyorker.com/news/amy-davidson/going-after-the-lawyers [https://perma.cc/4JM9-HLDV]. Interestingly both Cheney and Kristol have been unusual among longtime conservatives in perceiving accurately the authoritarian and very anti-conservative nature of Trumpism. *See, e.g.*, Justine Coleman, *Liz Cheney Blames Trump for Riots: "He Lit the Flame"*, HILL (Jan. 6, 2021, 7:18 PM) https://thehill.com/homenews/house/533024-liz-cheney-blames-trump-for-riots-he-lit-the-flame [https://perma.cc/BRL4-6QSP]; KK Ottesen, *Conservative William Kristol: "We're Really Going to Pay a Price for This Terrible Failure in Leadership*", WASH. POST (May 12, 2020, 1:00 PM), https://webcache.googleusercontent.com/search?q=cache:wHUrzJKXwFkJ:https://www.washingtonpost.com/lifestyle/magazine/conservative-willliam-kristol-were-really-going-to-pay-a-price-for-this-terrible-failure-in-leadership/2020/05/11/16a87c84-7818-11ea-b6ff-597f170df8f8_story.html+&cd=1&hl=en&ct=clnk&gl=us&client=safari [https://perma.cc/HD3C-UEJW].

61. Fried, *supra* note 26. The identity of the writer is important here, because Fried was Solicitor General under Ronald Reagan and remained an outspoken conservative while on the faculty of Harvard Law School. The rebuke to the Bush Administration's lawyer-shaming strategy was stronger coming from an ideological fellow traveler.

62. *See id.*

63. *See id.*

64. *Come Clean, Mr. Holder*, N.Y. POST (Jan. 27, 2010, 5:00 AM) https://nypost.com/2010/01/27/come-clean-mr-holder/ [https://perma.cc/44AJ-6LK8].

65. *Id.*

66. *See, e.g.*, *The Torture Lawyers*, N.Y. TIMES (Feb. 24, 2010), https://www.nytimes.com/2010/02/25/opinion/25thur1.html [https://perma.cc/85WZ-KMYG]; Kinsley, *supra* note 60. Along with many other legal ethics scholars, I criticized John Yoo and Jay Bybee for distorting the prohibitions of domestic and international law governing torture to create a superficially plausible but in fact inadequate justification for the interrogation program. *See* W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickwire Memorial Lecture*, 31 DALHOUSIE L.J. 247, 257 (2008); W. Bradley Wendel, *The Torture Memos and the*

One feature of lawyer-shaming campaigns is that they can arise on the political right and left, with equal intensity.[67] In 2019, students at Harvard University protested law school faculty member Ronald Sullivan's decision to join the defense team representing Harvey Weinstein, who had been credibly accused of a pattern of sexual assaults against women in Hollywood.[68] As a result of the uproar, including a "climate review" conducted by administrators at Harvard, Sullivan was relieved of his position as the faculty dean of an undergraduate house, although he remains on the Harvard faculty.[69] The students' grievances against Sullivan were based on their perception of the incongruity of his defense of an accused sexual predator and his responsibility, as a house dean, to show empathy and support for victims of sexual violence.[70] Sullivan has a long history of advocacy for powerless clients, including the family of Michael Brown in their civil-rights lawsuit against Ferguson, Missouri.[71] Sullivan struggled, however, to explain how his representation of Weinstein—a rich, white, powerful client—was consistent with his commitment to working for marginalized clients and communities. In an interview with Isaac Chotiner in the *New Yorker*, Sullivan referred repeatedly to Weinstein as "unpopular," which he surely is as a result of his actions; Sullivan, however, fell back on platitudes about due process and the rule of law without adequately explaining why Weinstein would be deprived of due process if *Ronald Sullivan* did not represent him.[72] Sullivan volunteered to take on the representation; he was not appointed by a court, and other lawyers were already on Weinstein's defense team.[73] The inference that Sullivan may share Weinstein's attitudes toward women was clearly the motivating factor behind the student complaints about Sullivan's position at Harvard, despite the absence of any other evidence suggesting Sullivan's inability to be empathetic

Demands of Legality, 12 LEGAL ETHICS 107 (2009). The normative argument was not based on the identity of the client, nor of the wrongfulness of the objective of establishing the legality of torturing detainees, which put me at odds with two of the scholars I most respect. *See* DAVID LUBAN, TORTURE, POWER, AND LAW xiv (2014); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1683 (2005). My point was not to slight the moral wrongfulness of torture but to focus attention on a distinctive type of unethical conduct by lawyers acting in their professional role. That wrongdoing, which might be called infidelity to law, consists of bending and stretching the law to mean whatever the client wants it to mean. The same type of *professional* wrongdoing occurs when lawyers bless phony tax shelters or structure transactions to defeat the purpose of regulations. *See* W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. REV. 109, 114–24 (2019). The client's underlying wrongdoing, however, may differ. Torture is a greater violation of human dignity than hiding assets overseas. The discussion in Section III.A will make clearer how this distinction can be recognized in professional ethics.

67. Holder, *supra* note 35.

68. Kate Taylor, *Harvard's First Black Faculty Deans Let Go amid Uproar over Harvey Weinstein Defense*, N.Y. TIMES (May 11, 2019), https://www.nytimes.com/2019/05/11/us/ronald-sullivan-harvard.html [https://perma.cc/UJF4-QGMB].

69. *Id.*; Jeannie Suk Gersen, *Unpopular Speech in a Cold Climate*, NEW YORKER (Mar. 14, 2019), https://www.newyorker.com/news/our-columnists/unpopular-speech-in-a-cold-climate [https://perma.cc/4FED-RMGX].

70. *See* Taylor, *supra* note 68.

71. *Id.*

72. *See* Isaac Chotiner, *A Harvard Law School Professor Defends His Decision to Represent Harvey Weinstein*, NEW YORKER (Mar. 7, 2019), https://www.newyorker.com/news/q-and-a/a-harvard-law-school-professor-defends-his-decision-to-represent-harvey-weinstein [https://perma.cc/K82L-SA43].

73. *Id.*

toward women students.[74] Sullivan, perhaps unwisely, conceded that as a result of his representation of Weinstein, some students may have felt unsafe,[75] undercutting the principle that lawyers should not be subject to criticism for their choice of clients. Nevertheless, some observers have seen Sullivan's loss of his house-dean position as an appropriate recognition of the loss occasioned by his choice of Weinstein as a client.[76]

In some instances, the decision to represent a particular client is bound up with the client's goals for the representation. The law firm of Cravath, Swaine & Moore went through an intense internal debate before agreeing to represent a Swiss bank in litigation and negotiations over the bank's role in laundering gold Nazis looted from Jewish victims of the Holocaust.[77] Partners consulted with lawyers inside and outside the firm active in Jewish affairs and concluded that the representation would be permissible only if the bank intended to act responsibly.[78] A senior partner at Cravath, who was also the President of the American Jewish Committee, explained that the firm's representation was contingent on the bank's objective of making fair restitution to victims' families.[79] "They've made it very clear to us that they are bound and determined to address this matter in an open, complete and absolutely fair manner," he stated.[80]

But not all firm lawyers were in agreement; twelve associates at Cravath wrote an internal memo protesting the client's assumed objective of minimizing its financial liability:

> It is our conviction that one cannot represent Credit Suisse in its role as bankers to those who committed genocide and do the justice we are all obliged to do to the victims and survivors of the slaughter. The two are simply incompatible. It seems implausible that Cravath could both serve Credit Suisse and bring about a fair and honorable resolution for those who suffered at the hands of the Nazis and their collaborators. We suspect, even with the best intentions, Credit Suisse's interest may be too closely

74. *Id.*

75. Ronald S. Sullivan, Jr., *Why Harvard Was Wrong to Make Me Step Down*, N.Y. TIMES (June 24, 2019), https://www.nytimes.com/2019/06/24/opinion/harvard-ronald-sullivan.html [https://perma.cc/X4HF-URZY].

76. In his comments on a lecture based on this paper, given at Cardozo Law School, Ekow Yankah expressed this reaction to the Sullivan case, and as the arguments in Part IV suggest, it may be appropriate for observers to expect some expiatory action by a lawyer who elects to take on a cause or client that provokes widespread loathing. This is the case even though the representation is justified as a matter of professional ethics.

77. *See* Blaine Harden & Saundra Torry, *N.Y. Law Firm to Advise Swiss Bank Accused of Laundering Nazi Loot*, WASH. POST (Feb. 28, 1997), https://www.washingtonpost.com/archive/politics/1997/02/28/ny-law-firm-to-advise-swiss-bank-accused-of-laundering-nazi-loot/bb7552a7-2676-428d-9376-572be8f33c47/ [https://perma.cc/BR4D-2FCS]; Michael J. Bazyler, *Suing Hitler's Willing Business Partners: American Justice and Holocaust Morality*, 16 JEWISH POL. STUD. REV. 171, 189–90 (2014).

78. *See* Harden & Torry, *supra* note 77.

79. *See* Lauren Stein, *Jewish Lawyer Defends Decision of Firm to Represent Swiss Bank*, JEWISH TEL. AGENCY (June 5, 1997), https://www.jta.org/1997/06/05/lifestyle/jewish-lawyer-defends-decision-of-firm-to-represent-swiss-bank [https://perma.cc/E835-JX4T].

80. *Id.*

> connected with containing the financial consequences of scandal for justice to be served by our representation of them.[81]

Some outside observers agreed with the associates that the firm's decision was contrary to the duties of lawyers, particularly Jewish lawyers, to avoid complicity in evil.[82] The associate dean of the Simon Wiesenthal Center, Rabbi Abraham Cooper, conceded that the banks have a right to be represented by counsel, but as to the lawyers' participation in the defense, "I guess that's what you have Yom Kippur for" (ouch).[83] One significant aspect of the debate over the representation of the Swiss banks is the assumption it would be consistent with the lawyers' moral agency only if it was expressly for the purpose of candor, fairness, and restitution; resisting the claims of victims' families would not be permitted by morality and religious duties, even if the claims were legally well founded.[84] It was not the identity of the client alone that exposed the firms to criticism, but the suspicion that the banks would use the legal process to obfuscate facts indicating their culpability in Nazi atrocities.[85]

Finally, many Americans recall the denunciation of Senator Joseph McCarthy at a hearing of his Permanent Subcommittee on Investigations: "[h]ave you no sense of decency, sir, at long last? Have you left no sense of decency?"[86] Those lines were delivered by U.S. Army special counsel Joseph Welch, during a hearing on McCarthy's claims that the Army had been infiltrated by communists; these allegations were a kind of counterclaim to the Army's complaint that McCarthy had sought special treatment for David Schine, a close friend of Roy Cohn who had been drafted into the Army.[87] What is sometimes forgotten, however, is that Welch's famous question about McCarthy's sense of decency came in response to McCarthy's observation that Frederick Fisher, an attorney at Welch's law firm, Hale and Dorr, had been a member of the National Lawyers

81. Quoted in Blaine Harden, *When Client, Justice Are Incompatible*, WASH. POST (Mar. 13, 1997), https://www.washingtonpost.com/archive/politics/1997/03/13/when-client-justice-are-incompatible/c29234b5-920e-4586-af81-cf2a06179293/ [https://perma.cc/GBC5-2DQ2].

82. *See id.*

83. Stein, *supra* note 79.

84. *See id.*

85. *See* Harden & Torry, *supra* note 77.

86. The author of a biography of McCarthy says this statement is "among the most canonized words ever uttered by a lawyer." Larry Tye, *Army Lawyer Let Sen. McCarthy "Hang Himself" Through His Own Words, Says Author of New Bio*, A.B.A. J. (Aug. 11, 2020, 9:55 AM), https://www.abajournal.com/web/article/army-lawyer-let-joe-mccarthy-hang-himself-through-his-own-words-says-author-of-new-bio [https://perma.cc/69YR-Z9E5].

87. *See* DAVID M. OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY 416–34 (1983). Roy Cohn had a career after the downfall of Joe McCarthy as a hardball lawyer and "fixer" in New York City, where he famously served as a mentor to Donald Trump. *See, e.g.*, Marie Brenner, *How Donald Trump and Roy Cohn's Ruthless Symbiosis Changed America*, VANITY FAIR (June 28, 2017), https://www.vanityfair.com/news/2017/06/donald-trump-roy-cohn-relationship [https://perma.cc/D4SU-4VXT]; Jonathan Mahler & Matt Flegenheimer, *What Donald Trump Learned from Joseph McCarthy's Right-Hand Man*, N.Y. TIMES (June 20, 2016), https://www.nytimes.com/2016/06/21/us/politics/donald-trump-roy-cohn.html [https://perma.cc/94VU-Y7GF].

Guild, "which was named . . . years and years ago, as the legal bulwark of the Communist Party."[88]

McCarthy, of course, believed everyone he disagreed with was a communist, but the climate of intimidation created by McCarthy and other red-baiting politicians made it difficult for clients suspected of communist ties to find counsel.[89] Unfortunately, the response of the profession, including the American Bar Association (ABA), was to roll over.[90] In 1950, the ABA adopted a resolution supporting President Truman's executive order requiring executive-branch employees to swear an oath of loyalty to the United States; the ABA sought to extend the requirement to all lawyers to take an anti-Communist oath.[91] The ABA proposal was opposed by the New York City Bar Association and the Massachusetts Bar Association but was otherwise supported, at least by widespread silence, by the organized bar generally.[92] The ABA subsequently created a Special Committee on Individual Rights as Affected by National Security, which affirmed the right of defendants to the assistance of counsel and committed the ABA to defending lawyers attacked in public for their defense of unpopular clients.[93] That committee, however, was counterbalanced by a separate Special Committee on Communist Tactics, which proposed that lawyers who refused to give testimony about alleged subversive activities should be disbarred.[94] The Committee on Individual Rights was eventually taken over by southerners who sought to link the civil rights movement with Communism.[95] The entanglement of the legal profession with McCarthyism illustrates the late scholar Deborah Rhode's observation that lawyer-shaming efforts historically have had the most severe impact on powerless and socially marginal clients.[96]

The history of lawyer shaming reveals nothing like a clear principle that lawyers should not be held accountable for the clients they represent. It may be tempting to dismiss it as the result of uninformed criticism by the public, who have not been schooled and socialized in the values of the legal system. Lawyers themselves, however, have not been consistent in their opposition to organized lawyer-shaming efforts, and may even have amplified some of the public criticism.[97] The Lincoln Project's campaign against Jones Day and Porter Wright, for example, was clearly aimed at lawyers within those firms as well as firm

88. OSHINSKY, *supra* note 87, at 461; *see also* Alfonso A. Narvaez, *Obituary, Frederick G. Fisher, 68; Was a McCarthy Target*, N.Y. TIMES (May 27, 1989), https://www.nytimes.com/1989/05/27/obituaries/frederick-g-fisher-68-was-a-mccarthy-target.html [https://perma.cc/LMB8-VR4Z].

89. Michael Ariens, *The Rise and Fall of Social Trustee Professionalism*, 2016 J. PROF. LAW. 49, 57 (2016).

90. *Id.* at 61.

91. *Id.* at 55.

92. *Id.* at 56.

93. *Id.* at 58–59.

94. *Id.* at 60.

95. *See id.* at 63.

96. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 58–64 (2000); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 630 (1985).

97. *See* Rhode, *Ethical Perspectives on Legal Practice*, *supra* note 96, at 637 (explaining how social pressures within the legal profession may compel attorneys to act against their own morals, and also contrary to publicly accepted standards).

clients.[98] Perhaps the discomfort of firm lawyers would result only from being part of a noisy public controversy, not any moral misgivings they may have about supporting Trump's attacks on the validity of the election or being aligned with Trump more generally. The internal controversy at Cravath over the representation of Swiss banks, however, shows that firm lawyers may be sensitive to the moral dimensions of providing services to clients whose objectives might subject them to warranted moral criticism.[99] As these cases show, the core of the normative critique is that a lawyer's agreement to represent someone, whether Republicans in the House of Representatives, Harvey Weinstein, accused al-Qaeda terrorists, or Swiss banks who obfuscated their relationship with the Nazis, happens for a reason. That reason may be the desire for money or publicity, to work on a challenging case, or belief in the justness of the client's cause. It also may be out of commitment to a value or principle, such as ensuring that the client is treated fairly by the legal system or safeguarding against overreach by state actors.

In any event, some justification is called for. The requirement of providing that justification has not deterred lawyers throughout our history, from John Adams to the "Guantánamo Nine," from representing unpopular clients.[100] Even during the height of the Red Scare, lawyers with the ACLU and other organizations represented suspected Communists.[101] Lawyers should welcome the opportunity provided by public criticism to clarify the values supporting their choice of clients. As the next Section shows, the law is not particularly helpful in this regard. It is not sufficient to simply repeat mantras like "zealous advocacy" or to appeal to the Sixth Amendment. The law creates almost completely open-ended discretion to accept or reject any given client.

B. Getting the Law (and the Clichés) out of the Way.

Responses to lawyer-shaming campaigns often refer to legal values such as due process of law,[102] and the constitutional principle that criminal defendants are entitled to the assistance of counsel.[103] Unfortunately, they are often presented categorically, without sensitivity to the context of a particular controversy. For example, it is undeniably true that the actual or constructive denial of counsel to a criminal defendant is a violation of the Sixth Amendment.[104] But that is a far cry from the claim that a defendant has a constitutional right to retain a specific lawyer, or that a lawyer's refusal to represent a specific client is of

98. The Lincoln Project, *supra* note 8.

99. *See* Harden & Torry, *supra* note 77.

100. MCCULLOUGH, *supra* note 25, at 65–66; *see also* Ryan, *infra* note 132.

101. *ACLU History*, ACLU, https://www.aclu.org/about/aclu-history [https://perma.cc/S32E-GBMN].

102. *See, e.g.*, U.S. CONST. amend. XIV, § 1.

103. U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 340 (1963).

104. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 660 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial."); United States v. Gonzales-Lopez, 548 U.S. 140, 146 (2006) (erroneous denial of defense counsel's application for *pro hac vice* admission deprived defendant of counsel of his choice, in violation of Sixth Amendment).

constitutional significance.[105] Most lawyers, most of the time, have a choice of clients to represent. To clear away any lingering misconceptions about duties imposed by the law governing lawyers, this Section briefly reviews the applicable rules of professional conduct and other law.

1. Lawyers Don't Have a Legal Obligation to Represent Any Given Client.

In contrast with the English "cab-rank" rule, under which barristers are obligated to accept all clients who seek their services,[106] there is no requirement in the rules of professional conduct for lawyers which require them to accept the representation of any particular client.[107] American Bar Association's Model Rule of Professional Responsibility ("ABA Model Rules") 6.2, which provides limited grounds for refusing representation, applies only to lawyers who have been appointed by a tribunal to represent a client.[108] Generally, court appointments occur only in criminal cases, and even then only where lawyers have voluntarily added their name to the roll of lawyers in that jurisdiction who are willing to accept court appointments.[109] Even where a lawyer has been appointed by a court, however, the lawyer may seek to avoid the appointment on the ground that "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."[110] The quoted language makes clear that repugnance alone is not a sufficient reason to seek to avoid the representation.[111] Rather, the lawyer's feelings toward the client must be so strong and deeply rooted that the quality of the representation would be impaired—an unusual situation analogous to a personal-interest conflict.[112]

105. *See* discussion *infra* Section II.B.1.

106. *See* CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES r. 601 (BAR STANDARD BD. 2002) (UK). While Canada and the U.S. did not adopt the English cab-rank rule, other common law jurisdictions, including Malaysia, New Zealand, South Africa, and some Australian states, not only have the cab-rank rule but apply it to out-of-court representation as well as advocacy in litigated matters. *See* W. BRADLEY WENDEL, ETHICS AND LAW: AN INTRODUCTION 132 n.4 (2014); Abbe Smith, *Defending the Unpopular Down-Under*, 30 MELB. U. L. REV. 495, 499–501 (2006). At least in the United Kingdom, the cab-rank rule is widely circumvented in practice. Formally it applies only to barristers, not solicitors, who are the client-facing branch of the legal profession in England and Wales. Barristers accept briefs or instructions (what American lawyers would refer to as client engagements) only from solicitors; they do so through their clerks, who have a variety of stratagems for declining unwanted briefs from solicitors. *See* JOHN A. FLOOD, BARRISTERS' CLERKS: THE LAW'S MIDDLEMEN 54–59, 69–76 (1983). Nevertheless, the cab-rank rule remains a central pillar of the ideology of the English bar, and periodically is the subject of ringing endorsements from eminent jurists, such as this defense offered by Lord Reid:
"If counsel is bound to act for such a person, no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for such a client, and the client might have great difficulty in obtaining proper legal assistance." Rondel v. Worsley [1969] A.C. 191.

107. W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 993 (2006).

108. MODEL RULES OF PRO. CONDUCT r. 6.2 (AM. BAR ASS'N 2019).

109. CAROLINE WOLF HARLOW, BUREAU OF JUST. STATS., DEFENSE COUNSEL IN CRIMINAL CASES 2 (2000).

110. MODEL RULES OF PRO. CONDUCT r. 6.2(c)

111. *Id.*

112. *See* MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2); *see also* MODEL RULE 1.16(b)(4) (permitting a lawyer to withdraw where the client insists upon taking an action that the lawyer considers repugnant).

To emphasize, it is an extremely unusual situation where a lawyer must consider the Rule 6.2 criteria for a permissible request to be relieved of a court appointment. Even public defenders, both individual lawyers and entire offices, do not have a legal duty to accept the representation of any particular client, although they may feel tremendous pressure not to turn clients away given the lack of alternative counsel.[113] Lawyers not working in public defender offices or on the roster of volunteers to accept court appointments will never experience anything other than a felt sense of professional (but nonlegal) duty to represent a client.[114] The ABA Model Rules do include a purely aspirational provision stating that lawyers "should aspire to render at least (50) hours of pro bono publico legal services per year,"[115] but when an early draft of the ABA Model Rules proposed making it mandatory to provide forty hours of pro bono representation yearly, the proposal was withdrawn following "[o]utraged opposition."[116] At most, the law of lawyering acknowledges a professional tradition of not denying legal representation "to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval."[117] Any purported duty to represent is, in virtually all cases, a matter of conscience only, not legal obligation.

Monroe Freedman, who defended the ethic of zealous advocacy as vigorously as anyone, believed that the broad legal discretion to accept or decline a client representation makes it a moral decision, for which lawyers are properly held morally accountable.[118] Freedman criticized prominent litigator Michael Tigar for Tigar's decision to represent John Demjanjuk, accused of being a guard at the Treblinka death camp, in a proceeding to restore his U.S. citizenship which had been revoked on the ground that Demjanjuk had lied on his application for citizenship.[119] As Freedman pointed out, Tigar had previously defended a group of law students for picketing the law firm then known as Wilmer, Cutler & Pickering.[120] The students were criticizing the firm for its representation of General Motors in a pollution case.[121] Freedman had contended that the students' picketing was out of bounds, but Tigar had supported the students for demanding that the law firm not lose sight of an important ethical question:

> Which side are you on? The decision is whether or not you will commit your skills, your talents, your resources to the vindication of the interests

113. *See* John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. U. L. REV. 253, 266 (2017).

114. *See* MODEL RULES OF PRO. CONDUCT r. 6.1.

115. *Id.* The bracketed number is intended to allow states to set a number of hours of aspirational pro bono service. Some states deleted the number entirely; others (such as Florida, Mississippi, Nevada, and New York with twenty, and Hawaii and Massachusetts with twenty-five) substantially reduced the number. *See* A.B.A. CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, RULE 6.1: CONFIDENTIALITY OF INFORMATION, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-6-1.pdf [https://perma.cc/ZE47-BBVV].

116. Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 426 (2003).

117. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 5.

118. Freedman, *supra* note 33, at 117.

119. *Id.* at 113–15.

120. *Id.* at 112.

121. *Id.*

> of the vast majority of Americans or the vindication of the interests of . . . the minority of Americans who own the instruments of pollution and repression.[122]

Unsurprisingly, Freeman later turned this demand for justification against Tigar, asking the question the student picketers had demanded the law firm answer—namely, why he was willing to commit his skills, his talents, and his resources "to help a client who has committed mass murder of other human beings with poisonous gases[?]"[123] Tigar responded with a *moral* justification, including the importance of subjecting the powers of the government to scrutiny and providing to even perpetrators of the Holocaust the benefits of the rule of law.[124] Both participants in the Freedman-Tigar debate thus accepted the premise that the absence of a legal duty to represent any given client legitimately raised the question for the lawyer of whether and on what grounds to commit themselves to that cause.

2. There May Be a Right to Counsel, But That's Only for Criminal Defense, and Anyway Not Correlated with a Duty for Lawyers.

The proposition about moral accountability for representation on which there is the most widespread agreement is this: American political culture and the U.S. Constitution assign great importance to the provision of counsel for the defense of one accused of a crime.[125] Clients would be helpless to provide any sort of defense without the expertise of a trained lawyer, who provides access to the legal entitlements established by the Constitution and rules of criminal procedure. The Sixth Amendment thus guarantees criminal defendants the assistance of counsel for their defense; this right has been interpreted to require state courts to appoint and pay a lawyer for a defendant who cannot afford one.[126] It has been extended to juvenile court proceedings,[127] as well as misdemeanor cases in which the defendant is threatened with actual deprivation of liberty.[128] Despite a lively academic literature arguing for "civil *Gideon*"[129]—a right to counsel in certain categories of civil matters—there remains no constitutional right to the assistance of counsel in even the most serious matters subject to civil

122. *Id.* at 113 (citing a debate with Freedman at George Washington University Law School); *see also* David Margolick, *At the Bar: The Demjanjuk Episode, Two Old Friends and a Debate from Long Ago*, N.Y. TIMES, Oct. 15, 1993, at B18 (recounting the first and second Freedman-Tigar debates).

123. Freedman, *supra* note 33, at 115 (quoting Monroe H. Freedman, *Must You Be the Devil's Advocate?*, LEGAL TIMES (Aug. 23, 1993), at 23).

124. *Id.* (summarizing Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES (Sept. 6, 1993), at 22).

125. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (finding an individual who is charged with a crime's right to counsel fundamental).

126. *See generally id.*; U.S. CONST. amend. VI; Powell v. Alabama, 287 U.S. 45 (1937).

127. *See In re* Gault, 387 U.S. 1, 42 (1967).

128. *See* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

129. *See, e.g.*, Kathryn Grant Madigan, *Advocating for a Civil Right to Counsel in New York State*, 25 TOURO L. REV. 9, 10 (2009); Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 76 (2007); Steven D. Schwinn, *Faces of Open Courts and the Civil Right to Counsel*, 37 U. BALT. L. REV. 21, 26 (2007); Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 318 (2001).

adjudication.[130] The stakes of representation can be just as high in some civil matters. The Guantánamo detainees represented pro bono by elite law firm lawyers were bringing habeas corpus claims, which are civil proceedings, but which raise issues comparable to those in criminal prosecutions.[131] Being held in a military detention facility for sixteen years without being charged[132] is obviously a deprivation of liberty and is more severe than the punishment for all but the worst crimes. Nevertheless, there is no legal right to the assistance of counsel in these proceedings.[133]

In addition, the obligation to provide counsel falls on state governments, not on the legal profession. Keeping in mind Hohfeld's insight that "duty" is a slippery term,[134] it is an important qualification on the right to counsel that it is not correlated with a strict duty falling on any particular lawyer, although a lawyer may feel pressure to help realize the institutional end of providing representation. The legal system as a whole certainly places considerable emphasis on securing representation for criminal defendants, but there is a gap between that value and any obligation on the part of an individual lawyer to represent any particular client.[135] Sixth Amendment values are well and good, but as the Freedman-Tigar debate shows,[136] the constitutional significance of counsel for the defense does not exclude the demand for a moral justification for representing a specific client. Even in criminal cases, no individual lawyer is duty-bound to accept the representation of any given client.[137]

130. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–33 (1981) (refusing to recognize a right to counsel in a proceeding seeking the involuntary termination of parental rights).

131. *See* David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 1988 (2008).

132. *See* Missy Ryan, *"There Have to Be Limits": Guantanamo Attorneys Challenge Lifetime Imprisonment Without Charge*, WASH. POST (July 11, 2018), https://www.washingtonpost.com/world/national-security/there-have-to-be-limits-lawyers-for-guantanamo-inmates-challenge-lifetime-imprisonment-without-charge/2018/07/11/f3933faa-8533-11e8-9e80-403a221946a7_story.html [https://perma.cc/4EAE-6XAZ].

133. INTER-AMERICAN COMM'N ON HUM. RTS., TOWARDS THE CLOSURE OF GUANTANAMO 99 (2015).

134. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 717 (1917).

135. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984) (asserting that the purpose of the Sixth Amendment is that a criminal defendant receives a fair trial, not necessarily improving the quality of legal representation).

136. Freedman, *supra* note 33, at 117.

137. Gross, *supra* note 113, at 254.

3. Rules of Professional Conduct Purport to Tell Nonlawyers Not to Assume That Lawyers Agree with Their Clients.

Model Rule 1.2(b), a version of which has been adopted in most American jurisdictions, states that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."[138] The apparent purpose of Rule 1.2(b) is to remind observers not to assume that a lawyer representing a client agrees with the client's objectives.[139] Ronald Sullivan's decision to represent Harvey Weinstein in a criminal prosecution for rape does not mean that Sullivan is pro-rape or anti-woman.[140] On the face of it, however, this is an exceedingly strange rule. It does not prescribe duties for lawyers or even, like the recommendation to perform pro bono services, state an aspiration or a principle of best practices.[141] Even more oddly, it is not even addressed to lawyers, but to observers (most of whom are not bound by the rules of professional conduct for lawyers) who might assume that lawyers' representation of a client constituted an endorsement of the client's views.[142] At the risk of stating the obvious, for Rule 1.2(b) to make any difference to lawyers' accountability for representing antisocial clients, there must be some reason to think that the rule bears on what observers of the lawyer's conduct have reason to believe about the lawyer. A rule of professional conduct can hardly operate as a reason for nonlawyers to believe anything. At best, the rule has an expressive function, affirming on behalf of the organized legal profession the principle of commitment to representation regardless of the client's views.

In addition to the obvious problem that nonlawyer observers are not bound by rules of professional conduct for lawyers, there is an inferential gap between the existence of a legal rule and all-things-considered moral evaluation of a lawyer's conduct. Despite being sometimes referred to by lawyers as "ethics rules," the rules of professional conduct for lawyers are positive law. They are adopted by state courts, pursuant to their inherent power to regulate the legal profession, and enforced through professional grievance and disciplinary proceedings.[143] To have any bearing on the appropriateness of evaluation by nonlawyers, they would have to purport to regulate the exercise of ethical judgment, which would run

138. MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2019). The rule has been adopted in every state except for Michigan, Nebraska, Ohio, Texas, and Virginia. *See* ABA CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [https://perma.cc/R3QU-YGYM].

139. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 2.

140. Abbe Smith, *Can You Be a Feminist and a Criminal Defense Lawyer?*, 57 AM. CRIM. L. REV. 1569, 1581–82 (2020).

141. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(b).

142. *Id.*

143. *See Alphabetical List of Jurisdictions Adopting Model Rules*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last updated Mar. 28, 2018) [https://perma.cc/DJC8-8YTZ].

into obvious First Amendment problems.[144] The reasonable conclusion is that Rule 1.2(b) is not meant to be taken seriously as a *rule*, but merely an admonition to lawyers reminding them of the importance of representing controversial or unpopular clients.[145]

4. Lawyers Can't Lie or Abuse Legal Proceedings on Behalf of Clients.

Lawyers are subject to professional discipline, judicial sanctions, and potentially even civil or criminal liability for misconduct such as falsifying evidence, introducing witness testimony known by the lawyer to be false, and bringing or maintaining a lawsuit without an objectively sufficient factual and legal basis.[146] The lawyers who brought the actions mentioned in the Introduction, claiming widespread election fraud, could be disciplined by their admitting jurisdiction or the tribunal supervising the litigation for pursuing utterly fanciful legal claims.[147] In what was admittedly a sideshow in the election litigation, a Delaware trial judge revoked the *pro hac vice* admission of attorney Lin Wood, citing his "toxic stew of mendacity, prevarication and surprising incompetence" in proceedings filed by Wood in Georgia and Wisconsin.[148]

Many cases posing what criminal defense lawyers refer to as "The Question"—*i.e.*, "How can you represent such a person?"[149]—are morally troubling not only because of the identity of the client, or even the client's objective of securing an acquittal (which presumably is the objective of every criminal defendant). Moral qualms arise instead from the intersection of the client's identity and the tactics employed by defense counsel. Consider a notorious example. In 1997, a Haitian immigrant named Abner Louima was arrested outside a Brooklyn nightclub.[150] Four white New York Police Department officers beat him savagely in the police car and in the stationhouse.[151] The most notorious detail of Louima's torture was a cop shoving a broken piece of broomstick into Louima's

144. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

145. *See* MODEL RULES OF PRO. CONDUCT 1.2 cmt. 5 ("Legal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval.").

146. *See* MODEL RULES OF PRO. CONDUCT r. 3.1 (bringing proceeding without nonfrivolous basis in law and fact); 3.3(a)(1) (knowingly making false statement of fact or law to tribunal), 3.3(a)(3) (offering evidence known by the lawyer to be false); 3.4(b) (falsifying evidence); 4.1(a) (making false statement of material fact or law to a third party); FED. R. CIV. P. 11(b)(1) (presenting any pleading or other filing for improper purpose or without sufficient factual and legal basis).

147. *See* FED. R. CIV. P. 11(b)(2).

148. Page v. Oath, Inc., C.A. No. S20C-07-030 CAK, 7 (Del. Super. Ct. Jan. 11, 2021).

149. *See generally* HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe H. Freedman, eds., 2013) (collection of essays on "The Question").

150. *See* Joseph P. Fried, *Graphic Details as Trial Opens in Louima Case*, N.Y TIMES (May 5, 1999), https://www.nytimes.com/1999/05/05/nyregion/graphic-details-as-trial-opens-in-louima-case.html [https://perma.cc/4HZC-EMDD].

151. *Id.*

rectum and mouth, causing severe internal injuries.[152] It was an atrocious episode of police brutality, but it became a legal ethics case when the defense lawyer representing one of the cops, Justin Volpe, argued in his opening statement that Louima's internal injuries may have come from consensual homosexual activity.[153] The outrage directed at Volpe's defense lawyer was focused not so much on his decision to represent Volpe—lawyers for the three codefendants did not face similar outrage—but was the result of his tactical choice to employ a defense calculated to inflame homophobic sentiments among jurors.[154]

Criminal defense lawyer and legal ethics scholar Abbe Smith provides a powerful distillation of the normative reasons supporting criminal defense representation: the stakes in the representation were high, with Volpe facing the possibility of a long prison term, which would be particular terrifying for a police officer, given the foreseeable fate of a cop behind bars; public opinion was strongly in favor of a conviction, and "[t]hose in charge clearly needed at least some of the officers involved to go down;" because Volpe was the primary target, the prosecution held all the cards, so a plea bargain was out of the question; restrictive discovery rules favored the prosecution; and the evidence against Volpe, including Louima's likely testimony, would be overwhelming.[155] All of these considerations are significant, but it is important to distinguish between reasons for accepting the representation of Volpe and reasons to employ particular tactics in his defense. These are analytically separable considerations but understandably tend to be run together in normative criticism of lawyers. In the Swiss banks case discussed in the previous Section, for example, the district judge supervising the restitution litigation found that the banks had asserted numerous frivolous and offensive objections and were concerned to deny or minimize their role in hiding assets for the Nazis.[156] The evaluation of the firms' decision to represent the banks is colored by the tactics employed in defense of the claims of Holocaust victims for restitution.[157] Many instances of lawyer shaming have this dynamic, in which it is not so much the identity of the client alone, but the combination of

152. *See id.*; Marie Brenner, *Incident in the 70th Precinct*, VANITY FAIR (Jan. 16, 2007, 12:00 AM), https://www.vanityfair.com/magazine/1997/12/louima199712 [https://perma.cc/6EFH-JQKN]. Abbe Smith begins her influential paper on the ethics of criminal defense by recounting the Louima case. *See* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 925 (2000).

153. Smith, *supra* note 152, at 930.

154. *See id.* at 955.

155. *Id.* at 938–45.

156. *See In re* Holocaust Victim Assets Litigation, 319 F. Supp. 2d 301, 303 (E.D.N.Y. 2004). The judge wrote that the Swiss banks' objections to the settlement report were "based on an egregious mischaracterization of the historical accounts." *Id.* The banks could have refused transfer orders in violation of their fiduciary duties to depositors but chose to comply with them to "avoid friction and unpleasantness" in their relations with the German government. *Id.* at 305–07. After the war, the banks followed a concerted policy of relying on Swiss banking secrecy laws to stonewall the families of victims of the Holocaust. *Id.* at 308–11. The litigation posture of the banks in the restitution litigation, however, was to deny that improper transfers, stonewalling, and document destruction had occurred. *Id.* at 318–20.

157. *See id.* at 311.

the client and the tactics used by the lawyer on the client's behalf, that fuels criticism of the lawyer.[158]

C. An Aside on "Cancel Culture."

In the current cultural moment, the proposal to shun or ostracize lawyers who worked in the Trump Administration or for the Trump campaign may be seen as part of the broader social phenomenon of demanding that wrongdoers, often celebrities or other prominent public figures, be denied employment or public platforms as a sanction for their misconduct. To take one of countless examples, the ABC television network canceled a successful sitcom starring comedian and actor Roseanne Barr after she tweeted a racist comment about Valerie Jarrett, an influential advisor to former President Barack Obama.[159] This was a literal cancelation,[160] but the term "cancel culture" has come to refer to protests, often fueled by social media, seeking to stigmatize people and institutions who employ or associate with those who engage in racist, sexist, or homophobic conduct.[161] The critique often emphasizes the rush to judgment, piling-on effect catalyzed by social media, and disproportionate consequences for the

158. *See, e.g.*, *id.* at 321.

159. *See* John Koblin, *After Racist Tweet, Roseanne Barr's Show Is Canceled by ABC*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/business/media/roseanne-barr-offensive-tweets.html [https://perma.cc/3KGJ-C4WN].

160. Another literal cancelation, of a figure far more significant than Roseanne Barr, was the decision by Twitter to permanently ban Donald Trump from the platform, due to the risk of further incitement of violence. *See, e.g.*, Kate Conger & Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (Jan. 8, 2021), https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html [https://perma.cc/JB5D-MKRJ]. Trump had long made attacks on cancel culture one of the central themes of his culture war, and numerous commentators pointed out the irony inherent in Trump complaining about something of which he was a practitioner. *See, e.g.*, Mehdi Hasan, *Donald Trump is the King of Cancel Culture*, WASH. POST (June 30, 2020), https://www.washingtonpost.com/outlook/2020/06/30/cancel-culture-trump-mcenany/ [https://perma.cc/DJA5-TCSX]; Jeanine Santucci, *Trump Decries "Cancel Culture," But Does He Participate in It? He's Called for Boycotts and Punishment for Critics*, USA TODAY (Sept. 3, 2020, 7:25 PM), https://www.usatoday.com/story/news/politics/2020/09/03/trump-decries-cancel-culture-but-he-has-participated/3451223001/ [https://perma.cc/G426-RHJ5]. He had called for boycotts of corporations such as Macy's, Apple, and Harley-Davidson over various disagreements, and notoriously stoked the conservative backlash against Colin Kaepernick for taking a knee during the national anthem in protest of police brutality. The decision by the PGA of America not to hold the 2022 PGA Championship golf tournament at Trump's Bedminster, New Jersey, golf course was another salvo in Trump's back-and-forth cancelation wars. *See, e.g.*, Jaclyn Diaz, *PGA Cancels Plans to Hold 2022 Championship at Trump's New Jersey Golf Course*, NPR (Jan. 11, 2021, 1:47 AM), https://www.npr.org/2021/01/11/955536518/pga-cancels-plans-to-hold-2022-championship-at-trumps-new-jersey-golf-course [https://perma.cc/E32B-BH7X].

161. The term actually comes out of Black culture, originating in a 1981 song called "Your Love is Cancelled," written by Nile Rodgers, and subsequently popularized by the character played by Wesley Snipes in *New Jack City*. *See* Clyde McGrady, *The Strange Journey of "Cancel," from a Black-Culture Punchline to a White-Grievance Watchword*, WASH. POST (Apr. 2, 2021, 6:00 AM), https://webcache.googleusercontent.com/search?q=cache:xktmN474qrEJ:https://www.washingtonpost.com/lifestyle/cancel-culture-background-black-culture-white-grievance/2021/04/01/2e42e4fe-8b24-11eb-aff6-4f720ca2d479_story.html+&cd=1&hl=en&ct=clnk&gl=us&client=safari [https://perma.cc/6QM6-ATYM]. Frequently-cited examples of "cancelation" include comedians Louis C.K. and Aziz Ansari for inappropriate behavior around female comedians and alleged dating violence, respectively, author J.K. Rowling for transphobic comments, actor Kevin Spacey, filmmaker Woody Allen, and musician R. Kelly for alleged sexual assaults, and rapper and producer Kanye West for stating that slavery was a choice (but probably related more to his very public embrace of Donald Trump).

cancellee, including being fired for offhand comments or attempts at jokes that misfired.[162] Complaints about cancel culture have increased along with right-wing resistance to social justice activism, including movements such as #MeToo and Black Lives Matter.[163] It now is well on its way to becoming a trope among hardline conservatives like Florida Representative Matt Gaetz, who tweeted that "[i]mpeachment is the zenith of cancel culture."[164]

One strand of the social commentary about cancel culture is centered on the fate of standup comics, writers, actors, and musicians, and expresses deep fears about censorship of the artistic expression that should enliven a diverse community and challenge complacent elites.[165] Other critics observe trends in the academy that threaten negative employment, or at least reputational consequences for professors who deviate from progressive orthodoxy.[166] In any case, the political left stands accused of intolerance, and therefore illiberalism.[167] Cancel culture is portrayed as an Orwellian effort to render all thought unacceptable that does not conform to some imagined coastal elite value system, focusing mainly on progressive identity politics. In a much-publicized open letter in *Harper's* magazine, a number of public intellectuals described cancel culture as intolerant, illiberal, ideologically conformist, and dogmatic:

> [I]t is now all too common to hear calls for swift and severe retribution in response to perceived transgressions of speech and thought. More troubling still, institutional leaders, in a spirit of panicked damage control, are delivering hasty and disproportionate punishments instead of considered reforms. Editors are fired for running controversial pieces; books are withdrawn for alleged inauthenticity; journalists are barred from writing on certain topics; professors are investigated for quoting works of literature in class; a researcher is fired for circulating a peer-reviewed academic study; and the heads of organizations are ousted for what are sometimes just clumsy mistakes. Whatever the arguments around each particular incident,

162. *See, e.g.*, Rachel E. Greenspan, *How "Cancel Culture" Quickly Became One of the Buzziest and Most Controversial Ideas on the Internet*, INSIDER (Aug. 6, 2020, 7:30 AM), https://www.insider.com/cancel-culture-meaning-history-origin-phrase-used-negatively-2020-7 [https://perma.cc/U2KG-SFNK].

163. *See* Aja Romano, *The Second Wave of "Cancel Culture,"* VOX (May 5, 2021, 1:00 PM), https://www.vox.com/22384308/cancel-culture-free-speech-accountability-debate [https://perma.cc/5F6Z-9QWH].

164. *See* Matt Gaetz (@RepMattGaetz), TWITTER (Jan. 25, 2021, 12:31 PM), https://twitter.com/RepMattGaetz/status/1353772373049282560 [https://perma.cc/2TM8-FKEC].

165. *See, e.g.*, Shaparak Khorsandi, *Cancel Culture Is Ruining Comedy–It's Time To Stand-Up to It*, INDEP. (May 21, 2021, 4:00 PM), https://www.independent.co.uk/voices/cancel-culture-comedy-chris-rock-shappi-khorsandi-b1851680.html [https://perma.cc/2GNQ-DX65].

166. *See, e.g.*, John McWhorter, *Academics Are Really, Really Worried About Their Freedom*, ATLANTIC (Sept. 1, 2020), https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724/ [https://perma.cc/NGQ7-29DT].

167. While there are serious intellectuals making this argument as well, it was popularized by actor Matthew McConaughy. *See, e.g.*, Christie D'Zurilla, *Matthew McConaughey on the "Illiberal Left": Lose the Arrogance, Win the Audience*, L.A. TIMES (Dec. 7, 2020, 11:05 AM), https://www.latimes.com/entertainment-arts/story/2020-12-07/matthew-mcconaughey-russell-brand-values-politics [https://perma.cc/VL7V-RUSQ]. For a version of the argument by a scholar, although still aimed at a popular audience, see generally MARK LILLA, THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS (2017).

> the result has been to steadily narrow the boundaries of what can be said without the threat of reprisal.[168]

The *Harper's* letter frames cancel culture as concerned mostly with thought crimes or taking positions outside the mainstream. On the other hand, cancel culture can be seen as another way of holding powerful people accountable—a social media-fueled variation on time-tested tactics like boycotts. Much of the energy of the #MeToo movement came from outrage that the wrongdoing of men such as Harvey Weinstein was widely known, and yet no one in a position to do something about it bothered to act.[169]

Other than the online component, there is nothing new about mass action by individually powerless but collectively powerful, aimed at people or institutions who engage in morally wrongful behavior. Concerted or loosely organized group actions can be a means of enforcing accountability. The Montgomery Bus Boycott is rightly seen as a turning point in the civil rights movement, not a recurrence of McCarthyism or the American equivalent of Mao's Cultural Revolution. Moreover, powerful people must accept that they are subject to public criticism. There is considerable constitutional significance to the protection of "uninhibited, robust, and wide-open" debate that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks."[170] Cancel culture may be merely one more on the long list of formerly useful descriptions that have been rendered meaningless by their polemical use. (Other examples include "activist judges," "fake news," "deep state," or "political correctness.")

The heat, without much accompanying light, of the discourse around cancel culture seems to be fueled by doubts about the objectivity of moral judgments. Some episodes which share characteristics with cancelations are clearly instances of well-warranted moral criticism and reactive attitudes. Consider, for example, Trump's notorious observation that there were "fine people on both sides" of the violent demonstrations in Charlottesville, led by neo-Nazi, white supremacist, and other militant "alt-right" groups.[171] The statement led to some corporate executives resigning from White House business advisory panels,[172]

168. *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020), https://harpers.org/a-letter-on-justice-and-open-debate/ [https://perma.cc/926X-KYPS].

169. Ronan Farrow's Pulitzer-Prize winning reporting on Weinstein emphasized the indifference of Hollywood elites to widespread knowledge of Weinstein's predatory behavior. *See* Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/M7XS-JVV3].

170. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see also* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51 (1988) (applying this principle to vulgar political cartoon attacking televangelist Jerry Falwell).

171. *See* Glenn Kessler, *The "Very Fine People" at Charlottesville: Who Were They?*, WASH. POST (May 8, 2020), https://www.washingtonpost.com/politics/2020/05/08/very-fine-people-charlottesville-who-were-they-2/ [https://perma.cc/NF6E-B75D].

172. Bill Chappell & Jim Zarroli, *Trump Disbands 2 Business Advisory Councils After String of Resignations*, NPR (Aug. 16, 2017, 1:24 PM), https://www.npr.org/sections/thetwo-way/2017/08/16/543935570/trump-disbands-2-advisory-councils-after-string-of-resignations [https://perma.cc/Y8PK-CDFM].

and a triathlon held at Trump's golf course near Charlotte was canceled.[173] Even Trump supporters did not criticize these reactions as part of cancel culture. The reason, I suspect, is that there is no disagreement about the wrongfulness of failing to strongly repudiate white supremacists. It is not a "cancelation," in the bad sense, to shun someone who is *indeed* or *in fact* a wrongdoer. But people tend to get quite hung up on those italicized words, doubting that there is anything that can warrant the conclusion that someone is *indeed* a wrongdoer. Rather than being something about which one can be right or wrong, ethics is either a matter of opinion, or merely relative to the beliefs, commitments, or culture of the judging subject. In the view of most philosophers, ethical relativism is false, but it is a remarkably persistent feature of popular thinking about ethics.

Surely it is the case, however, that there is no reasonable disagreement over whether "fine people" would advocate for a violent race war and return to genocidal Nazi policies.[174] If someone contends that white supremacy is just an opinion, that assertion is not a conversation-stopper, but an occasion for a follow-up question: on what is that opinion founded?[175] Is it supported by reasons that are generally taken to be relevant to mutual recognition of others as free and equal? There is no need to defend an implausibly strong metaethical position, believing that ethical judgments must be "necessary," "non-contingent," or valid from the "transcendental standpoint of reason."[176] Instead, we can simply get to work making arguments back and forth about whether failing to repudiate neo-Nazis is a bad thing. We appeal to concepts and values we share with others, such as suffering, fairness, dignity, violence, and peace. These considerations refer to the interpersonal character of ethics, mediated through language and reason-giving, as an alternative to resolving disputes using brute force or coercion. An employer who fires an employee who was chanting white supremacist slogans at the Charlottesville rally, or a political official who condemns Trump's embrace of his supporters on the alt-right, is not furthering cancel culture in the negative sense, but is enforcing accountability for actions that are unacceptable in a moral community.

Of course, we may disagree about how they apply in particular cases, or what should be done if there are conflicts among them. Human ideals and goods are pluralistic and, in many cases, incommensurable, as powerfully described by Isaiah Berlin:

> An artist, in order to create a masterpiece, may lead a life which plunges his family into misery and squalor to which he is indifferent. We may condemn him and declare that the masterpiece should be sacrificed to human

173. *See* David A. Farenthold & Jonathan O'Connell, *Trump Steps out of the White House and into a Company in Crisis*, WASH. POST (Jan. 21, 2021, 7:35 PM), https://www.washingtonpost.com/politics/trump-company-financial-problems/2021/01/21/3899b7e4-5c25-11eb-8bcf-3877871c819d_story.html [https://perma.cc/5TB5-TC7W].

174. *See* Roberta Kaplan & Deborah Lipstadt, *Three Years Later, Charlottesville's Legacy of Neo-Nazi Hate Still Festers*, CNN (Aug. 12, 2020, 9:30 AM), https://www.cnn.com/2020/08/11/opinions/charlottesville-three-years-later-hate-festers-lipstadt-kaplan/index.html [https://perma.cc/9KMV-EMDK] (reporting on calls for a "white America," a race war, gassing Jews, and that people of color should "go back to where they came from").

175. *See* SIMON BLACKBURN, RULING PASSIONS 305 (1998).

176. *Id.* at 271.

> needs, or we may take his side—but both attitudes embody values which for some men or women are ultimate, and which are intelligible to us all if we have any sympathy or imagination or understanding of human beings.[177]

Judgment and practical wisdom are called for when values are in tension. Some of the furor over cancel culture arises in cases in which reasonable people can disagree over whether someone was in fact a wrongdoer, or whether they are being punished too leniently for their offenses.

In response to the observation of pluralism, liberal political communities recognize the importance of toleration as a moral principle. Toleration counsels restraint in the face of what one might sincerely believe to be another's wrongdoing.[178] The virtue of tolerance consists of responding appropriately to the context and withholding criticism in order to sustain constitutive goods.[179] Countless family Thanksgiving dinners go off more or less smoothly because reasonable people hold their tongues when confronted by the proverbial uncle who has had a few too many drinks. More to the point of cancel culture, one end to which universities are committed is the free exchange of ideas; a measure of reticence to criticize ideas or expression that some community members regard as wrongful may be necessary to sustain the functioning of the institution. Liberal legal systems recognize the principle of toleration by disallowing prosecution or civil causes of action for some anti-social conduct such as hate speech.[180] The pluralism of Berlin and other liberal thinkers, however, is always bounded by the "common human horizon"—those basic human interests and characteristics that must be taken into account by any system of morality, but which may be instantiated in various ways by different cultures.[181]

Any intellectually serious consideration of cancel culture—how to define it, whether it is a problem, what can be done about it, and so on—must grapple with something like Berlin's observation of a plurality of authentic human goods and worthwhile forms of life, within a common horizon given by what it means to be recognizably human. Some beliefs, goals, statements, and actions are genuinely beyond the pale. In addition, there will often be disagreement on the extension of a concept, so that reasonable people can disagree about application questions. It is possible, for example, to agree that racism is a serious moral

177. Isaiah Berlin, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY 1, 13 (Henry Hardy ed., 2d ed. 1990).

178. *See, e.g.*, RAINER FORST, TOLERATION IN CONFLICT: PAST AND PRESENT 22 (Ciaran Cronin trans., 2013); Bernard Williams, *Toleration: An Impossible Virtue? in* TOLERATION: AN ELUSIVE VIRTUE, 18, 19 (David Heyd ed., 1996); Frank Lovett, *The Republican Critique of Liberalism*, *in* THE CAMBRIDGE COMPANION TO LIBERALISM 381, 384–85 (Steven Wall ed., 2015).

179. FORST, *supra* note 178, at 502–17.

180. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding unconstitutional state statutes prohibiting burning the American flag); R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (striking down city ordinance prohibiting expressions of racial animus, such as cross-burning); Snyder v. Phelps, 562 U.S. 443, 461 (2011) (action for intentional infliction of emotional distress may not be predicated on an anti-gay public demonstration).

181. Berlin, *supra* note 177, at 12; Isaiah Berlin, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND 191, 228 (Henry Hardy ed., 2d ed. 2000); *see also* Jason Ferrell, *The Alleged Relativism of Isaiah Berlin*, 11 CRITICAL REV. INT'L SOC. & POL. PHIL. 41, 47 (2008).

wrong while disagreeing about whether a particular action comes within the concept of racism.[182] But there is no avoiding the actual work of moral argumentation by either complaining about cancelation or invoking the value of tolerance. Conclusions must be established, not assumed. Lawyer shaming cannot simply be written off as an example of a wider social trend. Instead, it must be analyzed in accordance with both the ends and values of the legal system and the moral agency of individuals acting within a professional role. That is the task of the next two Sections.

III. THE ACCOUNTABILITY OF LAWYERS.

A. Institutional and Ordinary Morality.

The problem that frames much of theoretical legal ethics is the supposed conflict between the demands of impartial morality and those obligations, or at least permissions, that arise from the lawyer's professional role and her relationship with a specific client.[183] How can it be that simply being a professional makes a moral difference in the permissibility of one's actions, when professional obligations arise independently of the moral content of the actions they require?[184] David Luban's answer has dominated the scholarly debate: any action performed within a professional role must be given a moral justification all the way down, showing that the relevant institution, such as the legal system, is justified, and so is the specific role (lawyer) within it, the duty that requires the action, and the action itself.[185] Failure at any stage of this four-step chain of justification leaves the professional without an excuse for having violated impartial moral demands. If that happens, lawyers are vulnerable to the same criticism that

182. For example, law professor gave a final examination in a civil procedure class in which one of the questions was about the discoverability of a statement made by a former employee in an employment discrimination case. The professor quoted the statement, which included a racial epithet and a derogatory term for women but redacted the words. Students reported the professor to the administration for bias. *See* Andrew Koppelman, *Is This Law Professor Really a Homicidal Threat?*, CHRON. HIGHER EDUC. (Feb. 5, 2021), https://www.chronicle.com/article/is-this-law-professor-really-a-homicidal-threat+&cd=1&hl=en&ct=clnk&gl=us [https://perma.cc/9H6V-VE3R]. The subsequent proceedings were complicated by allegations that the professor made a threat in a conversation with students about the exam controversy. However, the initial bias complaint against the professor shows the indeterminacy of the normative concept of racial bias in educational settings.

183. *See* DARE, *supra* note 40, at 10–11; Postema, *supra* note 40, at 66–67. Section II.B on the legal regulation of lawyers showed that there is no duty, as a matter of the positive law governing lawyers, to represent any given client. However, there is a strong professional tradition, and a widely felt non-legal obligation, to assist even the most odious clients. Thus, the theoretical issue of the conflict between professional ethical (even if not legal) obligations and the requirement of impartial morality still arises. I have sometimes argued that even if there is no cab-rank *rule* in the American law of lawyering, there may be a cab-rank principle, in the Dworkinian sense. A deep question is why professional custom, even if reflected in the law as a principle, creates a genuine species of normative reasons. Otherwise, all of the important questions about the relationship between professional and ordinary morality are begged right at the outset. I have given a liberal political answer to this question, which is discussed below. *See* discussion *infra* Section II.B. For the purposes of this discussion, however, it is sufficient to begin with the assumption that professional-ethical norms do create genuine normative reasons for those acting in a professional capacity. I am grateful to Emad Atiq for pressing me to clarify these points.

184. *See, e.g.*, Michael Hardimon, *Role Obligations*, 91 J. PHIL. 333, 338 (1994); Mike W. Martin, *Rights and the Meta-Ethics of Professional Morality*, 91 ETHICS 619, 620 (1981); GOLDMAN, *supra* note 40, at 21–22.

185. LUBAN, *supra* note 40, at 130–33.

would be leveled against nonlawyers for the same action. Admission to practice law does not confer immunity from moral criticism, these scholars contend, because it does not simplify the moral issues that arise when considering whether to lend assistance to another person's malignant undertakings.[186] The concept of a professional role is nothing more than a convenient way of referring to the moral considerations that any moral agent would refer to when deciding how to act in similar circumstances.[187] Institutional obligations are, at best, only weakly pragmatically justified, and if they come up against a countervailing principle of ordinary morality, they are generally outweighed.[188]

Strikingly, however, practicing lawyers tend to hold exactly the opposite view about the moral accountability of lawyers, believing that they are not fully subject to the demands of ordinary morality while acting within a professional role. This divergence is not a "growing disjunction" between legal education and legal practice,[189] but a deep, longstanding, and seemingly permanent contrast between distinct normative worlds.[190] This position taken by the practicing bar, known in legal ethics scholarship as the principle of nonaccountability,[191] relies on the existence of a separate, insulated professional domain in which ordinary moral considerations do not apply. Not surprisingly, most philosophers regard this strong form of role-differentiated ethics as a kind of anti-ethic—an unjustified refusal to acknowledge the persistence of moral agency, even when acting in a professional capacity.[192] While it may be appropriate to acknowledge a division of normative labor between lawyer and client, shifting all of the accountability to clients runs the risk of turning lawyers into amoral tools or instruments of their clients' will.

Scholars in the so-called second wave of philosophical legal ethics have contended that the morality applicable to the lawyer's role is fundamentally political or institutional.[193] That is, the evaluative criteria applicable to actions taken by lawyers acting in a professional capacity, including the decision to represent specific clients, should be derived from reflection on institutions and

186. *Id.*

187. *Id.* at 125 ("[T]he appeal to a role in moral justification is simply a shorthand method of appealing to the moral reasons incorporated in that role."); s*ee also* A. John Simmons, *External Justifications and Institutional Roles*, 93 J. PHIL. 28, 30 (1996) ("Institutions . . . are not normatively independent, and the existence of an institutional 'obligation' is, considered by itself, a morally neutral fact. Institutional obligations acquire moral force only by being required by external moral rules."); Andre, *supra* note 40, at 77.

188. Luban does concede that the institution of the adversary system is justified in the context of criminal defense. *See* LUBAN, *supra* note 40, at 145, 148–52. The importance of the role of criminal defense lawyer in protecting against the abuse of state power provides a sufficient pragmatic justification for much of what lawyers do in that context, including keeping client secrets and vigorously cross-examining truthful witnesses to discredit their testimony.

189. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 73 (1992).

190. *See* Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 60 (1983).

191. *See, e.g.*, DARE, *supra* note 40, at 10–11; Schwartz, *supra* note 27, at 673.

192. *See, e.g.*, ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES 109 (1999) (arguing that "[r]oles cannot filter out morally pertinent preconventional descriptions of acts and actors").

193. *See* David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337, 352–54 (2017) (summarizing second wave arguments and including myself, Tim Dare, Alice Woolley, Kate Kruse, Daniel Markovits, and Norman Spaulding among second wave scholars).

practices that have as their end the governance of a political community.[194] The liberal version of this claim, influenced by political theorists such as Isaiah Berlin,[195] Joseph Raz,[196] Stuart Hampshire,[197] and the later work of John Rawls,[198] with an intellectual history going back to Hobbes,[199] emphasizes the predicament of modern societies seeking a legitimate ground for the exercise of political power under conditions of pluralism and disagreement about matters of right and wrong, the nature of the good life, religion, toleration, and tradition. Notwithstanding deep disagreement about many normative matters, it may be possible for members of a political community to reach agreement on the basic structure of a society.[200] If agreement on constitutional essentials is itself elusive, then it may at least be possible to commit the resolution of recurrent issues of interest and value to a procedure that satisfies some threshold standard of fairness.[201] Raz gives the example of two parties who agree to submit a dispute to an arbitrator, and regard the arbitrator's decision as binding, as creating a new reason for them, which they can use as a basis for ongoing cooperation despite the disagreement that led to the dispute in the first place.[202] The arbitrator's decision functions as an exclusionary reason, preempting the reasons the parties had before submitting their dispute to the arbitrator. If the decision was not exclusionary, the parties would be stuck endlessly relitigating the controversy, and the desire to avoid this outcome was the motivation behind seeking the arbitrator's decision.

Generalizing from this example, the positive law of a political community can be understood as an institutional settlement of conflicts over normative and empirical matters.[203] As Tim Dare nicely puts it, "the key function of law in pluralist communities is to provide answers to questions about what we are to do when we were divided over what, morally, we ought to do."[204] If that is right, then lawyers have a good reason not to make decisions about representing particular clients based on moral qualms about the identity or objectives of the client:

> If lawyers refuse to represent clients because they have moral objections to the clients' ends, they are violating the terms of the institutional settlement. Of course, a lawyer has a right to refuse a client on moral grounds. But refusal should be an exceptional event. Otherwise, lawyers are imposing their own moral views on their clients, and when they do that they are

194. *Id.* at 352.

195. *See supra* notes 181 and accompanying text.

196. *See generally* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

197. *See generally* STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE (1991).

198. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993).

199. *See* Gerald F. Gaus, *Public Reason Liberalism*, *in* THE CAMBRIDGE COMPANION TO LIBERALISM 112 (Steven Wall, ed., 2015).

200. RAWLS, *supra* note 198, at 178–82.

201. DAVID MCCABE, MODUS VIVENDI LIBERALISM: THEORY AND PRACTICE 133–34, 148 (2010).

202. RAZ, *supra* note 196, at 41–42, 47–48.

203. DARE, *supra* note 40, at 57–61; WENDEL, *supra* note 40, at 92–99.

204. DARE, *supra* note 40, at 63.

> dishonoring the pluralism of society-the very same pluralism that democratic legal systems exist to preserve.[205]

The moral nonaccountability of lawyers, which is strongly affirmed by the practicing bar, can be understood in this way, as based on considerations of institutional morality, which inform the duties and permissions of lawyers acting in a professional role.

There is a further ambiguity, however, in the idea of institutional morality. Is it a separate or strongly differentiated normative domain, or continuous with ordinary morality, albeit in a complex way?[206] Taking the former view risks denying the moral agency of individuals acting within social or professional roles. There must be some way of "moralizing" roles, so that they do not create a hermetic separation between role-occupants and "the resources of broader moral experience."[207] Arthur Applbaum has analogized this problem to the well-known distinction in jurisprudence between natural law and positivism.[208] Role naturalism holds that the obligations of anyone acting within a social role "follow from some truths about the kind of creatures we are."[209] The alternative, practice positivism, observes that because social roles, practices, and institutions are conventional, norms internal to those role, practices, or institutions simply are what they are, not what they ought to be.[210]

Applbaum illustrates by contrasting two professionals, a doctor and an imaginary foil called a "schmoctor," who is like a doctor in many ways, including having medical training, but who works for a life insurance company providing physical examinations.[211] Suppose the schmoctoring profession does not recognize an obligation to communicate information to an examinee concerning a life-threatening medical condition discovered in the course of an examination, but could provide this information to the insurance company. Morally speaking, what do we think about schmoctors? Role naturalists would maintain that the norms governing the role of doctor are, for the most part, given by the types of creatures we are, with our characteristic needs and vulnerabilities, as well as the characteristic skills learned by doctors, which contribute to the alleviation of illness. People face the possibility of sickness and death and rely on the medical profession to care for their health. Norms like the "do no harm" principle in the Hippocratic Oath follow from natural facts about humans. It would therefore be a natural norm that a doctor should fully inform a patient about risks to his or her health that are discovered in the course of a medical examination. Role naturalism would therefore call into question the possibility of a profession of schmoctors, who purport to care for the health of patients but act in ways that appear not to reflect the considerations that underlie the normative structure of the role.

205. Luban & Wendel, *supra* note 193, at 353.

206. *See* APPLBAUM, *supra* note 192, at 45 ("[A]re roles merely shorthand for a nexus of obligations, values, and goods that have moral weight without appeal to role as a moral category?").

207. Postema, *supra* note 40, at 64.

208. APPLBAUM, *supra* note 192, at 79.

209. *Id.* at 48.

210. *Id.* at 51.

211. *Id.* at 50–51.

There are middle-ground positions, however, which seek to maintain both the distinctiveness of professional roles and a connection between roles and ordinary morality. Dare, for example, follows Rawls's 1955 paper on the practice of promising to distinguish the justification given for an institution or practice, on the one hand, and that given for an act taken within the institution or practice on the other.[212] The practice of promising can further its morally valuable ends only if promisors are not permitted to weigh up the balance of reasons and decide that in a particular case a promise should not be kept. Similarly, the norms of an institution or profession may be constituted with reference to ordinary morality. Once the institutional role is established, it may preclude resort back to the balance of pre-institutional moral reasons. A variation on the two-level justification structure permits the occupant of a role to do something not permitted by the constitutive norms of the role, if it is necessary to accomplish the purpose of the role.[213] A juror who votes to acquit a defendant on the ground that a conviction would be unjust, notwithstanding the weight of evidence against the defendant, would be acting properly if the role of juror has, as one of its ends, acting as a safeguard against injustice. To deny this kind of opt-out strategy might lead to the irrational result of following the norms of a role simply because they *are*, even at the cost of undermining the function of the institution that created the norms.[214]

Professional role norms can therefore be related to ordinary morality in several ways. On Luban's "shorthand" view and Applbaum's conception of role naturalism, role norms are nothing more than summaries of what is permitted or required by morality. Calling out or shaming lawyers for their association with antisocial clients would invoke the moral considerations that would ordinarily justify one in criticizing and avoiding someone like the lawyer's client. Lawyers could give arguments in response, of course, but they would generally appeal to institutional considerations such as due process of law and the importance of resisting the exercise of state power. These are certainly cognizable moral considerations, and they may even be persuasive in a debate between a lawyer and critics. The downside of this strategy of direct moralization of the role, however, is to give significantly less weight to the policies underlying the institutional role.[215] The Cravath associates who criticized their law firm for representing Swiss banks in the Holocaust reparations litigation saw the institutional reasons for the representation as significantly outweighed by the moral costs of helping banks avoid accountability for their complicity in the Nazi looting of the assets of Jewish victims of genocide.

212. *See* DARE, *supra* note 40, at 44–46 (citing John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955)).

213. *See* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 21–22 (1973) (defending the idea of "recourse roles").

214. *See* Gregory Cooper, *The Role of Roles in the Normative Economy of a Life*, *in* PERSPECTIVES IN ROLE ETHICS: VIRTUES, REASONS, AND OBLIGATION 72, 83 (Tim Dare & Christine Swanton eds., 2019).

215. *See* David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392, 395 (1990); *see also* Postema, *supra* note 40, at 72 ("We design social institutions to perform important tasks and to meet social needs or serve important social values. . . . [C]arefully defined boundaries of concern and responsibility are needed for the efficient and successful achievement of important social goals served by the division of labor.").

Practice positivism, perhaps bulked up with Raz's conception of exclusionary reasons, yields a view of professional morality as a largely distinctive domain, separate from ordinary morality. It is what underlies the admonition in the Model Rules of Professional Conduct, that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."[216] That provision of the Model Rules states an absolute prohibition on considering the client's moral views or activities and, as such, runs contrary to strictures in ordinary morality against associating with, let along actively providing assistance to, people pursuing objectionable ends. The appeal here is to professional *morality*, not the law governing lawyers, so the legal discretion to accept or reject a client representation is not dispositive. What matters is whether there is a conventional practice of lawyers representing disreputable clients. The history of lawyer-shaming efforts shows that there is a fairly robust professional norm of representing even the worst clients. But the insight of critics of practice positivism is that the separation of professional and ordinary moral values is dangerous.[217] It risks inculcating a disposition to be deferential to authorities or the demands of one's social role. One of the central moral lessons of the Twentieth Century, learned at incalculable cost, is that just doing one's job, or just following orders, not only is not an excuse for participating in wrongdoing, but the tendency to defer to others acting within institutional roles is one of the causal factors underlying catastrophic moral failures.[218]

The criticism of Rod Rosenstein's banal morality alludes to exactly this danger.[219] As the Rosenstein case shows, however, the strongest normative criticism of lawyers is based not solely on their choice of clients, but on what the client sought the lawyer's assistance to do. The critique of Rosenstein is not that he merely served in the Department of Justice in the Trump Administration, but that he failed to disassociate himself with the Administration's zero-tolerance policy, even knowing that it was leading to the separation of families.[220] Practice positivism would insulate Rosenstein from criticism for his role in this debacle, which may be a sufficient reason for many scholars to reject it.

Rawls's two-level justification strategy, and the idea of recourse roles, gives more weight to policies underlying professional norms. The occupant of a professional role should not conduct a case-by-case analysis of the moral permissibility of some action. Rather, it is permissible to rely on the norms of the practice, including nonaccountability for one's choice of clients. Unlike the strategy of practice positivism with exclusionary effect on ordinary moral considerations, however, these middle-ground approaches permit more scope for reference back to ordinary morality. This comes at the cost of a certain amount of

216. MODEL RULES OF PRO. CONDUCT r. 1.2(b).

217. *See, e.g.*, Wendel, *The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations*, *supra* note 42, at 444.

218. *See, e.g.*, David Luban, *The Ethics of Wrongful Obedience*, *in* LEGAL ETHICS AND HUMAN DIGNITY 237 (2007).

219. *See supra* note 20 and accompanying text.

220. *See* Senior, *supra* note 20.

indeterminacy and messiness at the margins, but in the majority of cases, role norms will have sufficient weight to carry the burden of justification.

This observation leads to a final possibility. Greg Cooper has argued that both the shorthand view of roles, in which they are just a nexus of ordinary moral obligations, and the Razian idea that roles can create exclusionary reasons, are motivated by a desire for a tidy normative landscape.[221] Either ordinary moral obligations supersede professional role obligations, or vice-versa. This may be a false hope. There may be genuine moral dilemmas, in which even when we take the action we have the most reason to take, we have still done something wrong. Cooper gives the example of Captain Vere in Melville's novella *Billy Budd*, who has reasons both to show leniency to Billy, who did not intend to kill his accuser, Claggart, and to enforce the letter of the law and execute Billy.[222] Following Christopher Gowans, Cooper says there is a "moral remainder" from the unchosen option, even though Vere believed (assume reasonably) that he did what was required.[223] Moral remainders can underwrite moral emotions such as guilt, regret, and shame. Even though there may be moral remainders in some cases, however, one action may have deliberative priority. In cases of conflict between ordinary morality and the obligations of an institutional role, role obligations may have deliberative priority, although there is a moral remainder from the unchosen option.[224] Cooper would go further and abandon deliberative priority:

> Deliberative priority is a very strong claim. It requires that however messy our moral lives become, with conflicting and potentially quite strong moral reasons pulling us in different directions, there is always a principled deliberative route that takes us to the one thing that constitutes the right thing to do in any situation.[225]

One who is already committed to normative pluralism, he argues, should not believe there is a reason to favor one set of normative considerations over another.[226] But there must be something to tip the balance in close cases, and even a skeptic about role obligations like Luban believes there is *some* weight to institutional norms. But the moral remainder of having chosen to represent a brutal cop, a former concentration camp guard, or the political officials carrying out Trump's zero tolerance policy at the border may be a reason to subject these lawyers to shame and other social sanctions.

221. Cooper, *supra* note 214, at 85.

222. *Id.* at 86.

223. *Id.* (citing CHRISTOPHER GOWANS, INNOCENCE LOST: AN EXAMINATION OF INESCAPABLE MORAL WRONGDOING (1994)). I have also argued for the recognition of moral remainders as the best way to account for the moral phenomenology of value conflicts in legal ethics. *See* WENDEL, *supra* note 106, at 171–72 (citing GOWANS, *supra*, at 131; Bernard Williams, *Politics and Moral Character*, *in* MORAL LUCK 61–63 (1981)).

224. Cooper, *supra* note 214, at 88–89.

225. *Id.* at 89.

226. *Id.* at 89–90.

B. Weighty, Not Exclusionary Professional Norms.

An appeal to the function of a social institution can explain and justify the norms created by the institution. Institutions have a distinctive function not reducible to a more general value such as utility, and these distinctive functions generate characteristic roles and role-obligations.[227] Colleges and universities, the military, health care, and the legal system are institutions which create obligations whose normative significance can be understood along functional lines. The constitutive ends of an institution—free inquiry and the discovery and transmission of knowledge, in the case of higher education,[228] or defending the territorial integrity and national interests of a state, in the case of the armed services[229]—are socially valuable. These socially valuable functions must be sustained by individuals who are acting as part of an institutional practice undertaking to comply with norms that are defined with reference to the ends of the institution. Soldiers must obey lawful orders,[230] for example, and university faculty must not allow their personal financial interests to affect their research.[231]

Some of these role-obligations can readily be understood as specifying and strengthening obligations that exist as a matter of ordinary morality. Everyone has an obligation to deal fairly with others, for example, but a college teacher must exercise additional care not to be influenced by friendship with a colleague whose child is a student in the teacher's class. More difficult cases arise when there is a conflict between role-obligations and ordinary morality. Rawls's two-level account of promising shows that a practice may rule out reference to certain considerations in deliberation.[232] Even if greater good could be realized by breaking a promise, the whole point of promising is to exclude that kind of thinking. Raz applies this strategy to the directives of an authority, arguing that recognition of an authority entails regarding the reasons it establishes as exclusionary.[233] Even without the directives of an authority, however, social facts may establish social norms, along the lines of H.L.A. Hart's account of how a social rules can be generated by certain types of social practices.[234] If these social norms are ethically justifiable, they may constitute an obligation for those who act within the purview of a social institution.[235]

227. *See* Christine Swanton, *Expertise and Virtue in Role Ethics*, *in* PERSPECTIVES IN ROLE ETHICS: VIRTUES, REASONS, AND OBLIGATION, *supra* note 214, at 45, 47; Tim Dare, *Roles All the Way Down*, *in* PERSPECTIVES IN ROLE ETHICS: VIRTUES, REASONS, AND OBLIGATION, *supra* note 214, at 31, 39.

228. Jonathan R. Cole, *The Triumph of America's Research University*, ATLANTIC (Sept. 20, 2016), https://www.theatlantic.com/education/archive/2016/09/the-triumph-of-americas-research-university/500798/ [https://perma.cc/D39X-WHLK].

229. *See* François Gresle, *The "Military Society:" Its Future Seen Through Professionalization*, 46 REVUE FRANÇAISE DE SOCIOLOGIE 37, 53 (2005).

230. 10 U.S.C. § 890 art. 90.

231. *See, e.g.*, STAN. UNIV., FACULTY POLICY ON CONFLICT OF COMMITMENT AND INTEREST (2020).

232. *See* Rawls*, supra* note 212, at 16.

233. *See* JOSEPH RAZ, THE AUTHORITY OF LAW 22–27 (1979); Joseph Raz, *Authority, Law, and Morality*, *in* ETHICS IN THE PUBLIC DOMAIN 194–221 (1994); RAZ, *supra* note 196, at 48, 58–61.

234. *See* Dare, *supra* note 227, at 36 (citing H.L.A. HART, THE CONCEPT OF LAW 55–57 (2d ed. 1997)).

235. Swanton, *supra* note 227, at 47.

What if the norms created by an institution are weighty, but not exclusionary? Some role theorists appeal to the faculty of judgment or practical wisdom as necessary for the specification of general principles and balancing in cases in which they come into conflict. In bioethics, for example, the approach of Beauchamp and Childress has been highly influential.[236] They defend four prima facie ethical principles—beneficence, nonmaleficence, respect for autonomy, and justice—which sometimes conflict in practice.[237] When there is a serious conflict, and it is not obvious that one of the principles is weightier than others, a practitioner must rely on insight, discernment, and practical wisdom.[238] These are virtues or excellences that require practice and experience. Not every practitioner is equally competent at making the necessary judgments. In legal ethics, Anthony Kronman has offered a similar aretaic (virtue-based) theory, arguing that excellent lawyers have developed the complementary virtues of sympathy for their clients' values and objectives, on the one hand, and the capacity for detachment from them and consideration of the public interest, on the other.[239] These approaches in practical ethics are rooted in the moral theory of David Ross, who set out several prima facie duties, including fidelity, gratitude, reparation, nonmaleficence, and a duty to promote the greater good.[240] As for what to do all things considered, that depends on which of these duties is the weightiest.[241] For that determination, Ross quotes Aristotle saying it "rests with perception."[242]

Doubts about aretaic approaches to judgment in practical ethics are, I believe, one of the factors that explain the appeal of the strategies on either end of the continuum of the relationship between institutional or role morality and ordinary morality. Certainly, Raz's notion of exclusionary reasons results in a cleaner normative landscape.[243] If an individual is subject to an authority, and that authority issues a directive to do something, that directive excludes resort to considerations that would otherwise be applicable.[244] In legal ethics, there is a tendency for lawyers to seek clear answers in the rules of professional conduct to hard questions involving conflicts of duties. Cross-examining a witness known by the advocate to be telling the truth, for the purpose of discrediting the witness's testimony, involves a conflict among several moral principles, including truthfulness and fidelity to the client whose cause could be advanced by

236. *See* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (3d ed. 2019).

237. *See generally id.*

238. *Id.* at 394.

239. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 66–74 (1993); *see also* Dean Cocking & Justin Oakley, *Professional Interpretation and Judgment, and the Integrity of Lawyers*, *in* PROFESSIONAL ETHICS AND PERSONAL INTEGRITY 68 (Tim Dare & W. Bradley Wendel eds., 2010); Postema, *supra* note 40, at 68 ("In professional contexts there is much need for practical judgment in this Aristotelian sense.").

240. *See* W.D. ROSS, THE RIGHT AND THE GOOD 19–21 (1930).

241. *Id.* at 29–30.

242. *Id.* at 42.

243. *See* discussion *supra* Section III.A.

244. *See* discussion *supra* Section III.A.

discrediting the witness. It is a paradigmatically difficult ethical issue.[245] Lawyers, however, are strongly inclined to address it using only the resources of law. The rules prohibit offering evidence that the lawyer knows to be false,[246] but that does not preclude the lawyer from establishing, truthfully, that the witness normally wears eyeglasses but was not wearing them at the time. The rules prohibit falsifying evidence,[247] but, if anything, the cross-examination is intended to bring out the truth about the witness's perception of the events. Unless doing so would result in a violation of the rules of professional conduct or other law, in which case the lawyer may seek the permission of the court to withdraw from the representation,[248] a lawyer is required to proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client,[249] and to follow the client's instructions.[250]

On the lawyer's way of thinking, the conduct is ethical because it is permitted or required by the applicable law of lawyering. As William Simon famously observed, however, thinking through the problem in this way is "legal ethics without the ethics."[251] The *ethical* question—not the legal question—arises from investing one's talent's, efforts, and agency in accomplishing an objective that is troubling from the moral point of view. As the self-identified feminist and criminal defense lawyer and scholar Abbe Smith writes, "[i]t is one thing to cross a police officer, jailhouse snitch, rival gang member, phony expert, or officious neighbor with a penchant for exaggeration. It is another to cross-examine a truthful rape or child sex abuse complainant in order to suggest she is lying."[252]

There is no ambiguity in the law governing vigorous cross-examination of witnesses to discredit their testimony. Within some limits set by the rules of evidence and rules of professional conduct, it is permitted.[253] There are also many compelling reasons why criminal defense lawyers believe a full-on, zealous defense is warranted for clients accused of even the worst crimes: resisting the carceral state, with its overcriminalization and excessively punitive sentences;[254] the brutal conditions behind bars awaiting anyone sentenced for a serious crime,

245. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 206 (4th ed. 2010) (stating authors' belief that cross-examining to discredit the truthful witness is "the most difficult and painful" of ethical issues confronting criminal defense lawyers); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966).

246. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3).

247. MODEL RULES OF PRO. CONDUCT r. 3.4(b).

248. MODEL RULES OF PRO. CONDUCT r. 1.16(a)(1), (c).

249. Restatement (Third) of the Law Governing Lawyers §§ 16(1), 21(3) (AM. L. INST. 2000).

250. *Id.* § 21(2).

251. Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 L. & CONTEMP. PROBS. 139, 147 (1996) (citing William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 66 (1991)).

252. Abbe Smith, *Representing Rapists: The Cruelty of Cross Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 256 (2016).

253. *See, e.g.*, FED. R. EVID. 607–08.

254. Smith, *supra* note 252, at 257–59.

including shocking indifference to basic human rights of prisoners;[255] understanding and sympathy for the poverty, racism, lack of educational and employment opportunities, and other social factors underlying many crimes;[256] commitment to the ideals of due process and fairness in the treatment of persons accused of crimes and the importance of checking the power of the state;[257] and an appreciation for the inherent dignity of all human beings.[258] And yet, these institutional reasons must somehow be weighed and balanced alongside the very real moral costs to individual lawyers whose own agency is required for the realization of the ends of the institution. Abbe Smith relates a story from her defense practice. The complaining witness was a child, and she and Smith had developed a rapport.[259] The child trusted Smith.[260] During a recess, the child witness ran into Smith in the hall and wanted to talk about softball.[261] Smith reports:

> I liked her, too, and would have been happy to talk about camp, softball, whatever she wanted to talk about. . . . I wanted to tell her I was sorry, so sorry—about what had happened to her, what my client had done, and what I was doing now. I wanted to tell her she was going to be okay, that she would get through this and have a good life, that she was strong and resilient. I would have done all this if only I was not the lawyer on the other side. . . . Defense lawyers do not get to apologize—no matter how much we may want to. To do so would be narcissistic and vain.[262]

In addition to these personal costs, zealous criminal defense has other consequences relevant to the moral analysis, such as perpetuating stereotypes based on race, sex, or sexuality.[263]

C. Moral Remainders

Considering the problem of criminal defense representation as movingly presented by Smith, one can see the appeal of categorical higher-order principles for resolving conflicts among moral values such as avoiding harm, compassion for suffering people, doing justice, and treating others fairly. Smith says there is no easy resolution of the tension between her ethical commitments as a feminist and a criminal defense lawyer: "[t]here is no one answer, and no easy answer. Each case poses its own challenges."[264] Exclusionary reasons offer a superficial solution to this normative conflict, but as Smith's story shows, and as Cooper

255. *See, e.g.*, Ken White, *Thirty-Two Short Stories About Death in Prison*, ATLANTIC (Aug. 13, 2019), https://www.theatlantic.com/ideas/archive/2019/08/thirty-two-stories-jeffrey-epstein-prison-death/596029/ [https://perma.cc/72BQ-3NZY].

256. Smith, *supra* note 252, at 291–92 (quoting Babcock, *supra* note 28, at 178).

257. Ogletree, *supra* note 28, at 1246–58.

258. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, *in* LEGAL ETHICS AND HUMAN DIGNITY 65–95 (2007) (Gerald Postema ed., 2007); Smith, *supra* note 252, at 295–97.

259. Smith, *supra* note 252, at 276–77.

260. *Id.* at 277.

261. *Id.*

262. *Id.*

263. *Id.* at 283–84; *see also* Smith, *supra* note 152, at 949–52.

264. Smith, *supra* note 252, at 309.

argues against the deployment of exclusionary-reason strategies, they fail to capture the phenomenology of our moral lives.[265] There may nevertheless be deliberative priority among competing principles. Smith remains a criminal defense lawyer, and still defends clients accused of rape, despite her feminist commitments and a number of experiences she describes in harrowing detail. She has concluded that the values supporting zealous criminal defense have deliberative priority. However, as Cooper observes, and as Smith's account powerfully illustrates, deliberative priority for professional role-obligations can still leave moral remainders, a powerful sense of wrongdoing having occurred, even though the lawyer's actions were supported by a reasonable balance of the applicable considerations.[266] One result of a moral remainder is to leave the actor with a retrospective sense of personal guilt for having been involved in something that is a cause for regret.

I want to suggest that this can be a good thing, or at least that the alternative is worse.[267] In an article that provoked outrage when it was published in 1951, a distinguished Boston lawyer quoted Montaigne on the ethics of public callings to contend for immunity from moral accountability for actions performed within a professional role:

> The mayor and Montaigne have always been two people, clearly separated. There's no reason why a lawyer or a banker should not recognize the knavery that is part of his vocation. An honest man is not responsible for the vices or the stupidity of his calling, and need not refuse to practise them. They are customs in his country and there is profit in them. A man must live in the world and avail himself of what he finds there.[268]

Notice, however, the way in which Montaigne seeks to displace responsibility onto the role. He disclaims accountability because he was acting within the role of mayor. "Knavery" may be part of the exercise of public office, but it is not *personal* knavery. It belongs to the role itself, not to its occupant. (As the saying goes, "Don't hate the player – hate the game.") Montaigne's attempt at justification ignores the moral agency that persists even when a person is acting in a professional role.[269] But if the requirements of the role have deliberative priority, what is a politician, or a lawyer, to do? One possibility is to recognize that in

265. Cooper, *supra* note 214, at 79, 89.

266. *Id.* at 86–87.

267. The following discussion appeared in W. Bradley Wendel, *Role Morality, Dirty Hands, and the Theology of Vocation*, *in* LUTHERAN THEOLOGY AND SECULAR LAW: THE WORK OF THE MODERN STATE 171 (Marie A. Failinger & Ronald W. Duty eds., 2018). It is reproduced here with few changes on the ground that most readers of legal scholarship are not also consumers of Lutheran public theology.

268. Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 20 (1951) (quoting Michel de Montaigne, *Of Husbanding Your Will*, *in* THE COMPLETE ESSAYS OF MONTAIGNE 766 (Donald M. Frame trans., Stan. Univ. Press 1958)). Postema also frames his influential analysis of role morality around Montaigne's essay. *See* Postema, *supra* note 40, at 63–64.

269. *See* APPLBAUM, *supra* note 192, at 75.

public life it is sometimes necessary to do things that require using means that are questionable in ordinary moral terms.[270]

The key insight of this so-called "dirty hands" literature is that we want public officials and professionals to have qualms about the tragedy that is necessarily part of their public calling. A reluctant politician would have scruples about cutting a corrupt deal with a local ward boss in order to obtain the boss's support for a large-scale project that would further the good of the community.[271] We, the members of the politician's community, want *that* person to exercise power on our behalf, because of her feelings of guilt and—contra Montaigne—acceptance of responsibility for the knavery that is inevitable in this line of work. The honest politician does not attempt to displace the responsibility for wrongdoing onto a professional role but accepts it as personal guilt. Only a politician who is hesitant to incur the personal moral costs of engaging in wrongdoing to further the community's interests, when it is truly necessary to do so, will have any hope of avoiding wrongdoing when it is not necessary, or of not rationalizing self-interested conduct as the inevitable moral costs of exercising public power.[272]

A revealing illustration of the problem of dirty hands and the relevance of the character of political officials comes from an interview with President Barack Obama near the end of his second term. Asked about criticism from the left about his administration's use of drone strikes in Pakistan and other countries, President Obama said he actually welcomed it. Taking this moral criticism seriously ensured that the decision to launch a lethal strike would not be made too readily:

> I'm glad the left pushes me on this. I've said to my staff and I've said to my joint chiefs, I've said in the Situation Room: I don't ever want to get to the point where we're that comfortable with killing . . . . [T]he critique of drones has been important, because it has ensured that you don't have this institutional comfort and inertia with what looks like a pretty antiseptic way of disposing of enemies . . . . I think America will continue to have work to do in finding this balance between not elevating every terrorist attack into a full-blown war but not either leaving ourselves exposed to attacks or, alternatively, pretending as if we can just take shots wherever we want, whenever we want, and not be answerable to anybody.[273]

Machiavelli, Montaigne, and Weber would contend that the use of violence is inevitable in statecraft.[274] Local politicians may not employ violent means but may be required to enter into morally corrupt bargains (though staying on the "legal" side of the line) in order to accomplish worthwhile objectives. Without

270. *See* STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 161–62 (1989); Thomas Nagel, *Ruthlessness in Public Life*, *in* PUBLIC AND PRIVATE MORALITY 75–91 (Stuart Hampshire ed., 1978); *see* Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 179–80 (1973); Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 121, 123 (Hans H. Gerth & C. Wright Mills eds. & trans., 1946).

271. *See* Walzer, *supra* note 270, at 165–66.

272. *See* Williams, *supra* note 223, at 62–63.

273. Jonathan Chait, *Five Days That Shaped a Presidency*, N.Y. MAG. (Oct. 2, 2016), https://nymag.com/intelligencer/2016/10/barack-obama-on-5-days-that-shaped-his-presidency.html [https://perma.cc/ERD4-L8VC].

274. *See, e.g.*, Weber, *supra* note 270, at 121.

suitable dispositions, however, the occasional reluctant resort to trickery or violence in pursuit of the common good may easily degenerate into cynical amoralism about public life. There must be a way to remain good even while acting within a role that occasionally calls upon the actor to do wrong. It may be difficult to select or train politicians and professionals who can inhabit the "space between cynicism and political idiocy,"[275] but one cannot wish the problem away by insisting that public officials apply the same standards of goodness in personal morality to their vocations. What is important in President Obama's statement about drone strikes is that he accepts the legitimacy of the moral critique from the left. His argument is not that critics are wrong, and that strikes should continue, but that the critics are *right*, and strikes should continue. Simultaneously maintaining these seemingly inconsistent beliefs provides a check against complacency and comfort with "antiseptic" killing, while also recognizing that drone strikes may be the best means to accomplish the nation's national-security objectives.

The dirty hands tradition urges professionals to do reluctantly what is required by their calling, but this seems to be a difficult stance to sustain, psychologically speaking. It is more likely that people required by their professional role to violate the ordinary commitments of decent people would begin to identify instead with a stance of detachment from all commitments—a kind of cynical amoralism that may make it more likely that the person would become desensitized to wrongdoing.[276] At the end of the slippery slope from dirty hands to outright immorality is the ready acceptance of "just following orders" as an all-purpose excuse that has been at the heart of large-scale moral horrors.[277] Even if an end appears justified, it is still important to preserve the capacity of professionals to refuse to get their hands dirty in its service. Dirty hands is a paradoxical idea. It is not simply a license to do wrong, but reluctant guidance to pursue the good of one's community, or to carry out the obligations of one's role, with full awareness of the necessity of some wrongdoing as a byproduct.

Many ethical theorists prefer the normative tidiness of exclusionary reasons, or a view of role ethics as continuous with ordinary morality, over the complexity and messiness of the world described by practicing lawyers like Smith.[278] In my view, that preference is driven more by a meta-theoretical desire for neatness than appreciation for the phenomenology of deliberation and action in complex, normatively pluralistic domains. The dirty hands tradition in political ethics provides a better account of moral experience and its long-term effect on the character of professionals. Accepting the idea of moral remainders, however, means significantly complicating the neatness of the usual analysis of lawyers' client-selection decisions.

275. Williams, *supra* note 223, at 66.

276. *See* Postema, *supra* note 40, at 70–72, 85.

277. *See* Alasdair MacIntyre, *Social Structures and Their Threats to Moral Agency*, 74 J. PHIL. 311, 311–12, 316–17 (1999).

278. *See* discussion *supra* Section III.B.

IV. ETHICAL THEORY MEETS LAWYER SHAMING.

No one likes to be called out or criticized.[279] It is even worse when there is a grain of truth in the criticism. Public lawyer-shaming campaigns are like lawyer jokes in this way. Like most satire, lawyer jokes are exaggerated and maybe a bit unfair, but they reflect genuine public anxiety about the unfairness of rich people being able to afford more "justice" than poor people, the uncomfortable situation of clients being in a position of dependency on lawyers, the esoteric knowledge upon which professionals rely to maintain their privileges, and the self-interested nature of high-minded talk about ethics and professionalism.[280] Lawyer-shaming campaigns can be similarly unfair. Former Deputy Attorney General Rod Rosenstein stated that he was unaware at the time it was adopted that the Justice Department's zero-tolerance policy would result in the separation of families.[281] He believed U.S. Attorneys would have identified any humanitarian issues that arose, and he thought the Department of Homeland Security had the capacity to track any children who were separated from their families.[282] Should he be treated as an outcast, and compared to Eichmann in the *New York Times*?[283] After all, he says now that he's sorry.[284] Some of the vitriol may be nothing more than the negative halo effect of being associated with the Trump Administration. As former Republican political strategist Rick Wilson memorably put it, everything Trump touches dies.[285]

While it may not be entirely fair to refer to the banal morality of just doing one's job, like a good lawyer joke, the public shaming of Rosenstein is onto something. As argued in Section II.A, lawyer shaming campaigns have not had a significant impact on the ability of unpopular clients to obtain counsel.[286] Everyone from the brutal cop who raped Abner Louima to Harvey Weinstein to

279. People generally do not take well to being hectored, lectured to, or called out by others, and in the context of political disagreements, there is considerable evidence that when people's political values or affiliations are criticized, they tend to double down on them. The work of social psychologist Michael Hogg, for example, shows how people desire to belong to a group of members who value themselves in the same way and differentiate themselves from others based on characteristics of the group identity. As applied to politics, group identity theory shows how threats to one's identity as a member motivate a strong defense of the group's values as a way of demonstrating that one remains a member of the in-group. *See, e.g.*, MICHAEL A. HOGG, THE SOCIAL PSYCHOLOGY OF GROUP COHESIVENESS 93 (1992); Michael A. Hogg, *Self-Uncertainty, Social Identity, and the Solace of Extremism*, *in* EXTREMISM AND THE PSYCHOLOGY OF UNCERTAINTY 19–30 (Michael A. Hogg & Danielle L. Blaylock eds., 2012); Michael A. Hogg, *Managing Self-Uncertainty Through Group Identification*, 20 PSYCH. INQUIRY 221, 221 (2009).

280. *See* Richard L. Abel, *Marc Galanter, Lowering the Bar: Lawyer Jokes and Legal Culture*, 57 J. LEG. EDUC. 130, 137–38 (2007) (reviewing GALANTER, *supra* note 37, at 245).

281. *See* DEP'T OF JUST., REVIEW OF THE DEPARTMENT OF JUSTICE'S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES 23 n.42, 32–34 (2021) [hereinafter IG Report].

282. *Id.*

283. *See supra* note 20 and accompanying text.

284. *See* Amanda Holpuch & Stephanie Kirchgaessner, *Trump Official Admits Family Separation Policy "Should Never Have Been Implemented"*, GUARDIAN (Jan. 14, 2021, 3:43 PM), https://www.theguardian.com/us-news/2021/jan/14/trump-official-family-separation-policy-rod-rosenstein [https://perma.cc/EX6E-S2JX].

285. *See* RICK WILSON, EVERYTHING TRUMP TOUCHES DIES: A REPUBLICAN STRATEGIST GETS REAL ABOUT THE WORST PRESIDENT EVER 11 (2018).

286. *See* discussion *supra* Section II.A.

suspected Communists during the McCarthy era has managed to secure competent lawyers to represent them. I suppose one might worry that if the volume is turned up on lawyer-shaming campaigns, perhaps assisted by social media, things will be worse for controversial clients. That seems unlikely, but in any case, this Article is about the normative issues faced by lawyers who lend their efforts and talent to defense efforts or advising for clients who at least some members of the moral community regard as untouchable. These issues come up in different ways, taking into account both the identity of the client and the actions performed by the lawyer in the course of the representation.

A. Varieties of Criticisms.

Considering current and historical lawyer-shaming campaigns, the potentially justified normative criticism they embody can take at least two different forms. As suggested by the cases reviewed in Section II.A, the arguments for holding lawyers accountable depend not only on the identity of the client, but what the lawyer did in the course of the representation.[287] Using the normative theory developed in Part III,[288] we can revisit some of these cases.

1. Representing this client, in general, is permissible, but you did things in the course of representing the client that you should be ashamed of.

This is the criticism of Rod Rosenstein. Thousands of lawyers worked for the Trump Administration, most of whom handled routine matters having no particular connection with the actions that have provoked public condemnation, such as Trump's Muslim ban[289] and the zero-tolerance policy. Defending slip-and-fall cases on federal property or negotiating contracts to buy trucks for the U.S. Postal Service has no different normative valence owing to the identity of the President.[290] Some Administration lawyers, however, were senior enough to have some influence on policy decisions. They could have pushed back more forcefully to reduce the harm caused by the policies or, if those efforts failed, resigned from their position. Rosenstein in particular can be faulted for issuing ambiguous guidance about the Administration's zero-tolerance policy. There was considerable pressure from then-Attorney General Jeff Sessions, an immigration hardliner, influenced by his former aide and later principal Trump Administration immigration advisor Stephen Miller, to deter undocumented immigrants from crossing into the United States.[291] "We need to take away children,"

287. *See* discussion *supra* Section II.A.

288. *See* discussion *supra* Part III.

289. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2004–06 (2018).

290. *See* Packel, *supra* note 21 (observing that lawyers with senior roles in agencies overseeing the financial sector have had no difficulty finding jobs at large law firms).

291. *See* Michael D. Shear, Katie Benner & Michael S. Schmidt *"We Need to Take Away Children," No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html [https://perma.cc/N9UT-N9SU].

Sessions urged.[292] United States Attorneys in several districts along the U.S.-Mexico border requested guidance from Rosenstein about a new directive to criminally prosecute adults for crossing the border, even if that meant separating them from children accompanying them.[293] The directive from the Department of Homeland Security was to separate any children over the age of five from their parents; the U.S. Attorneys, however, believed they had discretion to decline prosecution under case-specific circumstances.[294] The written zero-tolerance policy had directed prosecution "to the extent practicable," but at least one U.S. Attorney interpreted Rosenstein's advice as not declining prosecution solely because adult family members would be separated from their children as a result.[295] Rosenstein later said this was a misunderstanding, but another U.S. Attorney on a conference call also understood Rosenstein to have stated that no categorical decisions not to prosecute should be based solely on the age of a child.[296]

Lawyers are legally permitted to advise or assist their clients with any actions that are not criminal or fraudulent.[297] The zero-tolerance policy had been adopted by Attorney General Sessions, and U.S. Attorneys had discretion not to prosecute in particular cases. Nothing in Rosenstein's reported conduct is a violation of his obligations under the positive law governing lawyers. If he is subject to criticism, it is with reference to the moral wrong of separating young children from their families, committing them to a system that was ill-prepared to deal with their care, and which was subsequently unable to track and reunite children with their families.[298] On the other side of the normative balance are the reasons, which may have substantial weight, established by the institutional settlement of law. One of then-candidate Donald Trump's most consistent campaign promises was to build a wall along the southern border (and have Mexico pay for it).[299] He also promised to bar entry by Muslims into the United States.[300] One may regard these policies, and the subsequently issued zero-tolerance policy, as morally abhorrent—I certainly do—but they attracted substantial support from voters.[301] There is value, in political-moral terms, in working within a system that

292. *Id.*; *see also* IG Report, *supra* note 281, at 39.

293. *See* IG Report, *supra* note 281, at 34–36.

294. *Id.* at 36.

295. *Id.* at 40–41.

296. *Id.* at 42.

297. MODEL RULES OF PRO. CONDUCT r. 1.2(d).

298. IG Report, *supra* note 281, at 50–53.

299. Michael D. Shear & Emmarie Huetteman, *Trump Insists Mexico Will Pay for Wall After U.S. Begins the Work*, N.Y. TIMES (Jan. 6, 2017), https://www.nytimes.com/2017/01/06/us/politics/trump-wall-mexico.html [https://perma.cc/NR8Q-WNNG].

300. Abby Phillip & Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: "You Know My Plans"*, WASH. POST (Dec. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/ [https://perma.cc/N6Q8-BRAF].

301. Jessica Taylor, *Trump Calls for "Total and Complete Shutdown" of Muslims Entering U.S.*, NPR (Dec. 7, 2015, 5:49 PM), https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s [https://perma.cc/FR24-7QWA] (describing then-candidate Donald Trump's campaign call for "a total and complete shutdown of Muslims entering the United States"); John Burnett, *How The Trump*

resolves disagreement and provides a framework for social stability and cooperative action. I have taken this position consistently,[302] and must reluctantly subscribe to it again here. The role of lawyers in our society is an appropriately modest one. They provide technical legal advice and assistance and leave questions about the morality of actions to their clients. Jeff Sessions and Stephen Miller, along with Donald Trump, deserve the lion's share of the moral blame for the separation of families at the border.

However, even a weighty reason to provide assistance to the federal government's immigration enforcement polices does not automatically take deliberative priority over moral reasons to refuse to provide assistance, either by pushing back internally or resigning one's position. (Whatever a lawyer does it should be overt and explicit; sabotage and covert resistance are a violation of the lawyer's fiduciary duties to the client.).[303] Judgment and practical wisdom is still required to determine which course of action to take, and one can criticize Rosenstein for making the wrong judgment call. It is not obviously, straightforwardly either right or wrong for Rosenstein to have attempted to provide guidance to U.S. Attorneys' offices which accurately reflected the legal directive of his boss, Attorney General Sessions, reached in consultation with a democratically elected President. The Eichmann comparison is inappropriate, not because the harm to children separated from their families was not great, but because American laws have a claim to respect as a resolution of social disagreement that satisfies a threshold standard of fairness, in contrast with Nazi laws that grossly immoral.[304] Rosenstein's actions were not obviously immoral, unlike Eichmann's, because they were plausibly the product of Rosenstein's fidelity to law and his respect for the chain of command.[305] Much turns on one's attitudes toward the law and

Administration's "Zero Tolerance" Policy Changed The Immigration Debate, NPR (June 20, 2019, 4:21 PM), https://www.npr.org/2019/06/20/734496862/how-the-trump-administrations-zero-tolerance-policy-changed-the-immigration-deba [https://perma.cc/9S5P-YW3D] (describing President Trump's zero-tolerance policy).

302. *See, e.g.*, W. Bradley Wendel, *Legal Ethics is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727, 737–38 (2012); W. Bradley Wendel, *Putting Morality in Its Place*, 15 LEGAL ETHICS 175, 175 (2012).

303. *See* MODEL RULES OF PRO. CONDUCT r. 1.4.

304. Immoral why? Fuller argued it was because they did not respect the form of law as "good order," which contains an implicit morality that must be followed in order to create any law at all, even bad law. Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644–45 (1957). Other legal theorists would contend that legality requires protection of fundamental human rights. *See, e.g.*, TOM BINGHAM, THE RULE OF LAW 48–54, 66–68 (Penguin Books) (2010). Anti-positivists such as Robert Alexy maintain that an unjust law may not qualify as a law at all. *See* ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE: A REPLY TO LEGAL POSITIVISM 40–81 (2002). This is not the place to undertake a thorough jurisprudential exploration of the reason that Nazi laws do not have the same claim to respect as American laws. In any event, a critic of my views who believes the American legal system is sufficiently unjust that it does not create obligations of respect on the part of citizens, and fidelity on the part of lawyers, will be unpersuaded by the argument that it least it is not as bad as Nazi laws. But such a critic will already have gone straight to a morally-based critique of a lawyer like Rosenstein in any event.

305. Rosenstein stated that believe it was important to stay in his lane. *See* IG Report, *supra* note 281, at 46. This is not necessarily an abdication of responsibility. Complex institutional systems do have "lanes," with a division of responsibility among, for example, prosecutors and defense lawyers, or policy-making officials and those involved in the implementation of policy. *See* WENDEL, *supra* note 106, at 164–72 (recounting the story of Daniel Bibb, an attorney in the Manhattan District Attorney's office, who allegedly "took a dive" on a case to ensure the acquittal of a defendant he believed to be innocent).

hierarchical structures of authority. Many lawyers believe they would have made a different call than Rosenstein, but it is easy for any of us to say from the comfort of an armchair (or tenured academic position) that we would have forcefully told the Attorney General of the United States to shove it.

In short, Rosenstein may have gotten it wrong. He is subject to reasoned moral criticism for not having done enough to prevent the traumatizing separation of families. His actions do not indicate, however, that he is a beyond-the-pale figure like Eichmann, who should be shunned by all decent people.[306] There were sufficient, even weighty reasons for him to have stayed in his position as Deputy Attorney General and tried to provide the best guidance he could concerning the policy directives coming from higher-ups.

2. While this client may have an abstract right to counsel, there is something wrong with your representation of this client. You should be ashamed of yourself, although theoretically another lawyer might not be.

This is one aspect of the criticism of Ronald Sullivan for his representation of Harvey Weinstein.[307] Sullivan's role as a house dean at Harvard University enmeshed him in two distinct institutional roles. One was as a law professor and a civil rights lawyer who has frequently defended unpopular clients. The second was in an educational role that involved caring for students who may have been subjected to the kind of harassment for which Weinstein was being prosecuted. *Qua* lawyer and law professor, Sullivan is understandably committed to the value of due process, which extends even to bad people accused of doing bad things.[308] If Sullivan had only been a lawyer, scholar, and teacher, it is unlikely that his representation of Weinstein would have caused such as furor. But the student-services role in which he also served intersected uncomfortably with his role as an advocate. One might respond that the students who complained about Sullivan's actions as defense counsel were hypersensitive or mistaken about the inference that should be drawn from his decision to lend his efforts and talent to the defense of an accused rapist. Sullivan may have been motivated by an opportunity to work on a challenging, high-profile case, make some money, and enhance his reputation as a defense lawyer. That answer passes a threshold of normative acceptability. There are many criminal defendants out there, however, so the students are not unreasonable in asking, "why Weinstein?"

Barbara Babcock, in her influential article on defending the guilty, puts the point nicely when she observes that "The Question"—"how can you defend those

306. Some caution is warranted when drawing conclusions about an individual's character based on their actions. The fundamental attribution error is a well-established psychological tendency to attribute the causes of behavior to a person's character or personality, and to give less weight to situational factors. *See generally* Zachariah Berry, *Explanations and Implications of the Fundamental Attribution Error: A Review and Proposal*, 5 J. INTEGRATED SOC. SCI. 44 (2015); Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCH. 1 (1967).

307. *See supra* notes 69–76 and accompanying text.

308. *See* Jeannie Suk Gersen, *Unpopular Speech in a Cold Climate*, NEW YORKER (Mar. 14, 2019), https://www.newyorker.com/news/our-columnists/unpopular-speech-in-a-cold-climate [https://perma.cc/4FED-RMGX].

people?"—can be stated with the emphasis on different words.[309] Asking, "how can *you* defend those people?" may be a particularized ethical challenge for lawyers whose commitments or affiliations are directly implicated by the representation. David Wilkins told the story of Anthony Griffin, a black lawyer working with the Texas ACLU who represented a Ku Klux Klan leader resisting the state's efforts to discover the Klan's membership list.[310] For any lawyer, representing the Klan would be a morally fraught decision, but for a *black* lawyer it involves representing a client dedicated to the lawyer's own dehumanization. However, Griffin had served as general counsel for the local chapter of the NAACP and believed that the constitutional cases decided in the 1960's that protected the NAACP's membership rolls from discovery by the Klan should also protect a party he loathed.[311] The decision was personal and professional for Griffin. Similarly, a feminist lawyer representing defendants charged with rape,[312] and Jewish lawyers representing Swiss banks in Holocaust reparations litigation,[313] face morally wrenching decisions that are not fully captured by the question of the permissibility of a generically-described lawyer representing the same clients. Considerations of personal integrity require the recognition of discretion to choose clients and causes to represent according to one's own sense of what constitutes a life well lived in the legal profession.[314] This does not mean that a lawyer's personal values take precedence over the values of the legal system and the norms of the professional role. Lawyers can go too far and violate their professional role obligations in pursuit of their personal values.[315] At the client-selection stage, however, where lawyers have broad discretion to decide which clients to represent, it is natural that lawyers would be drawn to certain types of clients given their own underlying values and commitments.

If professional obligations were categorical—if institutional roles created exclusionary reasons—it would be difficult to account for the moral phenomenology of lawyers' reluctance to represent particular clients because of their personal identity, community ties, or political commitments. The idea of "cause lawyering" would lose its positive normative valence.[316] Lawyering would just be lawyering, with no consideration, either positively or negatively, for the identity of one's clients. It seems peculiar to withhold approval from a lawyer who could have made heaps of money in private practice, but who elected instead to represent under-served communities or advocate for the rights of the powerless.

309. Babcock, *supra* note 28, at 177.

310. *See generally* David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995). I discussed this case in WENDEL, *supra* note 40, at 148–55.

311. Wilkins, *supra* note 310, at 1030–31.

312. Smith, *supra* note 252, at 256–57

313. *See supra* notes 77–80 and accompanying text.

314. *See* Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1630 (2002).

315. *See* Bruce A. Green, *The Role of Personal Values in Professional Decisonmaking*, 11 GEO. J. LEGAL ETHICS 19, 38 (1997).

316. *See generally* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuard Scheingold eds., 1998).

Regarding professional role norms as exclusionary would have that result, which is one reason I believe they should be understood as weighty but not exclusionary.

This, however, goes both ways. Along with lawyer praising comes the possibility of lawyer shaming. This is not to say there is anything wrong with opting for a career in private practice. Choosing to be a cause lawyer may be supererogatory, with most legal careers satisfying the threshold of moral permissibility. But even supererogation requires an assessment of a lawyer's career and client choices that is not blocked outright by professional role norms. The better way to understand the relationship between role norms and ordinary morality is to assign substantial positive value to representing any client effectively in an effort to obtain, defend, or support the client's legal entitlements. Weighty, but not conclusive. The reasons in favor of the representation may be considered alongside countervailing reasons. Although Anthony Griffin had a very good reason, related to his commitment to civil rights, to represent the Klan leader in litigation, another lawyer, and particularly another black lawyer may have balanced the relevant considerations differently. Abbe Smith gives a powerful justification for representing defendants in rape cases, but other feminist lawyers may reach the opposite conclusion.[317] Legal ethics would be impoverished if it did not recognize the importance of individual integrity and commitments alongside the duty of fidelity to law.

B. The Relevance of Moral Remainders.

Professional norms are weighty but not conclusive. Judgment may be required in some cases to determine deliberative priority between role obligations and those stemming from ordinary morality. But that may not end the matter. It is also important to appreciate the moral costs of an action, even if, on the balance of reasons, it was the right thing to do. Gerald Postema explains what is meant by moral costs:

> [I]n cases in which obligations to other persons are correctly judged to be overridden by weightier moral duties . . . it is not enough for one to work out the correct course of action and pursue it. It is also important that one appreciate the moral costs of that course of action. That appreciation will be expressed in a genuine reluctance to bring about the injury, and a sense of accompanying loss or sacrifice. It may even call for concrete acts of reparation: explaining and attempting to justify the action to the person injured, or making up the loss or injury to some extent.[318]

Morality is not only a guide to deliberation and action. One might also ask questions pertaining to evaluation and appraisal—expressing moral condemnation or approval. Peter Strawson famously assigned a role in morality to reactive attitudes such as hurt feelings, resentment, offense, indignation, or, on a positive note, gratitude, love, or forgiveness.[319] Strawson's point was that these reactive

317. *See supra* Section II.B.4.

318. Postema, *supra* note 40, at 70.

319. *See generally* P.F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962).

attitudes signify a relationship in which one demands accountability from another, and that consequences, outcomes, or states of the world are not reasons of the right sort to offer in response.[320] Without getting too deep into metaethics, however, we can appreciate Strawson's insight that the reactions of others who are affected by our actions are fundamental to moral justification. Thus, practices such as criticism, remonstration, protesting, and resisting can be understood as outgrowths of the intrinsically interpersonal character of morality. On this approach, moral obligations arise *relationally*. Stephen Darwall calls this the second-person point of view, and also refers to the perspective of the moral community as first-person plural.[321] In other words, morality involves taking up the perspective of others, and seeing oneself as a member of a community of people who regard each other as free, equal, and rational. We express reactive attitudes, such as resentment or offense, toward others, but we can also turn them in on ourselves. Moral emotions such as pride, shame, and guilt can function as guides to action, making reference to other-regarding values. Failing to measure up to the justified demands of others can be an occasion for experiencing the emotions of remorse or guilt, for example. These moral emotions reflect the quintessentially social nature of humans and the role of morality in regulating relationships among members of a community.

Some public criticism of lawyers appears to reflect, albeit in a crude way, the insight of Postema and others, that a lawyer may have worked out the right course of action but should also be expected to express some appreciation of the accompanying loss. A faculty dean at Harvard, for example, understood the tension created by Ronald Sullivan's dual roles as defense counsel and mentor to students:

> There's nobody that would think that every single person doesn't deserve the best possible legal representation in court—of course we believe that . . . . "It's just, you know, to what extent does that commitment to legal representation in a very high-profile case like this collide with the responsibilities of being a community leader at Harvard?"[322]

Perhaps Sullivan should have done more both to explain his decision to represent Harvey Weinstein and to reassure the student community at Harvard that he takes very seriously the importance of fostering a climate free from discrimination and harassment. Perhaps he thought both of these points were self-evident. All clients deserve representation, and he has a history of representing clients who have been the victims of sexual assault.[323] Or perhaps he thought he had done enough to acknowledge the moral remainder from his representation of Weinstein. As he said, "given my long history of social-justice work, it is a very strange position for me to be in, to have people justifying my bona fides, but it is what it is. We are here now. Part of my role is to engage the students rather than talk at

320. DARWALL, *supra* note 29, at 246–47.

321. *Id.* at 9 (citing Gerald Postema, *Morality in the First Person Plural*, 14 L. & PHIL. 35 (1995)).

322. Jan Ransom & Michael Gold, *"Whose Side Are You On?": Harvard Dean Representing Weinstein Is Hit with Graffiti and Protests*, N.Y. TIMES (Mar. 4, 2019) (quoting Diana L. Eck), https://www.nytimes.com/2019/03/04/nyregion/harvard-dean-harvey-weinstein.html [https://perma.cc/94T6-Y9NY].

323. *Id.*

them."[324] The controversy may not have been insoluble, and the Harvard administration still probably overreacted by removing Sullivan from his position as house dean. In any case, however, addressing the issue fully required taking account of the representation.

Moral theorists who contend for recognition of the moral costs of justified actions argue that it is important to role morality that professionals do not lose the sense of uneasiness about doing things that they would not be permitted to do when acting outside of the professional role.[325] As a matter of moral psychology, maintaining too much distance between oneself and one's role–the claim that the mayor and Montaigne are separate people–risks alienation and amoralism. A good example of lawyers keeping their personal and professional selves in close communication is the memo prepared by the Cravath associates objecting to the firm's representation of Swiss banks.[326] At least according to what can be gleaned from reporting on the controversy, the associates' objection prompted the firm to set limitations at the outset of the representation on what the firm would be willing to do for the client banks.[327] The firm refused to engage in any actions that could be seen as foot-dragging or obfuscating the historical record.[328] It would have been legally permissible to conduct a hardball litigation strategy, and other firms were accused of doing just that.[329] But the sensitivity to public criticism, or even internal criticism by its own employees, caused firm leaders to conduct the representation in a way that was sensitive to the interests of victims in receiving reparation, and more general value of respect for the historical record showing the banks' complicity in Nazi atrocities.

Bernard Williams argues that recognizing moral remainders–or, as he puts it, encouraging some qualms and moral unease in professional life–will "provide some antibodies against absorbing a mystifying conception of the dignity of the profession" and will "neutralize some of the mechanisms of self-deception."[330] Suppose Rod Rosenstein felt the appropriate qualms and moral unease. It is possible that, instead of hemming and hawing when he began to receive reports that the Border Patrol was referring adult heads of families for prosecution, thereby leaving their children in the custody of another federal agency,[331] Rosenstein might have resisted the implementation of the zero-tolerance policy. Or, he might

324. *See* Chotiner, *supra* note 72.

325. Williams, *supra* note 40, at 196.

326. *See* Harden & Torry, *supra* note 77 and accompanying text. The criticism may have also forced Sullivan to be honest about whether he was representing Weinstein because of his commitment to due process and civil rights or whether he was only in it for the glory and to make a buck. There would be nothing wrong with taking a high-profile case for money and fame, but it is not a noble motivation either. When weighing and balancing the considerations on both sides of Sullivan's decision, his subjective motivations could make a difference, even though the representation by a generic lawyer satisfies the threshold standard for moral permissibility.

327. *See* John L. Goldman, *Venerable Firm in Spotlight for Holocaust Assets Case Role*, L.A. TIMES (Apr. 3, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-04-03-mn-44919-story.html [https://perma.cc/C5TJ-UP9T].

328. *See* Harden & Torry, *supra* note 77.

329. *See In re* Holocaust Victim Assets Litigation, 319 F. Supp. 2d 301, 309 (E.D.N.Y. 2004).

330. Williams, *supra* note 40, at 199.

331. *See* IG Report, *supra* note 281, at 41–43 (reporting ambiguities in Rosenstein's guidance on declining prosecution of adults).

have been less inclined to stay in his lane, as he put it.[332] Responsibility for caring for and keeping track of children separated from their parents was passed back and forth, like a hot potato, between Customs and Border Protection, Border Patrol, and Health and Human Services.[333] A forceful intervention by the Deputy Attorney General may have resulted at least in better systems being put in place for tracking separated children, even if it may have been too much to ask for Rosenstein to seek to reverse the zero-tolerance policy. Whatever may have happened in this counterfactual case, Williams's point is vital: Only professionals who remain sensitive to the moral costs of their actions, even if they are on balance justified, will retain the dispositions needed to resist serious wrongdoing.[334] The existence of moral remainders shows why it is not incoherent for people outside a profession to disapprove of what professionals do.[335] Understood in this way, lawyer shaming is not irrational or mistaken. As a matter of normative theory, it is not only coherent, but affirmatively valuable.

V. CONCLUSION

Public criticism of lawyers will never go away. Lawyer shaming may sometimes be unfair, overblown, or susceptible to social media pile-ons. It is undoubtedly no fun to be subject to public campaigns of vilification. Lawyers are right to reaffirm the importance of due process, fairness, and the right to counsel. But just repeating these arguments as mantras, while failing to appreciate the moral costs of representing some clients, risks mystification, cynicism, alienation, and amoralism. I believe very strongly in the importance of vigorous representation of clients who are regarded by many others as morally dubious. In fact, I have taken a lot of criticism for that position over the years. But the response is not to assert a strict separation between ordinary and professional morality, nor to advocate for one normative domain having absolute priority over the other. Understanding personal and professional morality as on a par with each other, sometimes presenting difficult issues calling for the exercise of judgment, is intrinsic to legal ethics. Lawyers may have to face up to some vitriolic, and occasionally mistaken, public criticism, but on the whole, lawyer shaming helps keep the profession connected to the resources of ordinary morality. It may be asking too much to welcome it, but we have to learn to live with it.

332. *Id.* at 46.
333. *Id.* at 45.
334. Williams, *supra* note 40, at 199.
335. *Id.* at 200.