

The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities

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This essay presents a moral justification for the current generally accepted amoral ethical role of the lawyer. The justification is premised primarily upon the values of individual autonomy, equality, and diversity. Based upon these values, the author argues that the amoral role is the correct moral stance for the lawyer as a professional, is a "good" role. The essay then responds to two of the most frequent criticisms of that moral stance: the first based upon economic inequality and the fact that lawyers' services must be purchased; the second based upon the absence of the "adversary system" context for most lawyer work. The author then elaborates a serious problem created by the conjunction of the amoral role and the dominant legal philosophy of American lawyers, "legal realism." If the limit on a lawyer's conduct under the traditional amoral role is the law, then the realist emphasis on the indeterminacy and manipulability of "law" leave the lawyer in a difficult moral position. Finally, a series of possibilities are presented to deal with this problem, the most promising of which is the "moral dialogue" between lawyer and client as an adjunct to the amoral role.

Eleven years ago Richard Wasserstrom published a provocative paper focusing attention on the moral dimension of the lawyer-client relationship.¹ In the intervening decade the topic has received a great deal of attention both in the profession² and in the academy.³ Much of Wasserstrom's

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1. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts.* 1 (1975).
2. In 1977 the ABA formed the Commission on Evaluation of Professional Standards, charged with "a comprehensive rethinking of the ethical premises and problems of the profession of law" (Proposed Final Draft, *Model Rules of Professional Conduct*, Chairman's Introduction, 1981). The efforts of this group, known as the Kutak Commission, resulted in the ABA's adoption of a new code of ethics, the *Model Rules of Professional Conduct*, and in the Association of Trial Lawyers of America's proposal of an alternative code, the *American Lawyer's Code of Conduct*. This process involved numerous conferences and meetings, voluminous public comment and published commentary, and much revision. In relation to an underlying ethic, the general moral role of the lawyer, there is little difference between the prior ABA Code of Professional Responsibility and the new Model Rules. Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 *U. Miami L. Rev.* 739, 746-750 (1981). References in this paper to the Code will not indicate the comparable portion of the Rules.

exposition concerned the role-differentiated morality of the lawyer-client relationship, what he referred to as the amoral professional role. Wasserstrom was critical, but "undecided," about the value of that role. This essay is a defense of the lawyer's amoral role.

The role of all professionals, observed Wasserstrom, "is to prefer . . . the interests of client or patient" over those of other individuals. "[W]here the attorney-client relationship exists, it is often appropriate and many times even obligatory for the attorney to do things that, all other things being equal, an ordinary person need not, and should not do."⁴ This remains the generally accepted understanding within the profession of a lawyer's proper function. Once a lawyer has entered into the professional relationship with a client, the notion is that conduct by the lawyer in service to the client is judged by a different moral standard than the same conduct by a layperson. Through cross-examination, a lawyer may suggest to a jury that a witness is lying when the lawyer knows the witness is telling the truth. A lawyer may draft contracts or create a corporation for a client to enable the distribution and sale of cigarettes, Saturday Night Specials, or pornography. A lawyer may draft a will for a client disinheriting children should they marry outside the faith. The traditional view is that if such conduct by the lawyer is lawful, then it is morally justifiable, even if the same conduct by a layperson is morally unacceptable and even if the client's goals or means are morally unacceptable. As long as what lawyer and client do is lawful, it is the client who is morally accountable, not the lawyer.

Although this amoral role is the accepted standard within the profession, no generally accepted moral justification for it has been articulated.⁵ This remains true despite heated academic discourse on the subject during the ten years following Wasserstrom's article, discourse symbolized by the question: Can a good person be a good lawyer?⁶ The criticism of the amoral role has been extraordinarily diverse, ranging from economics through jurisprudence to religion.⁷ The most common justification for the

3. E.g., G. Bellow & B. Moulton, *The Lawyering Process—Ethics and Professional Responsibility* (1981); M. Freedman, *Lawyers' Ethics in an Adversary System* (1975); G. Hazard, *Ethics in the Practice of Law* (1978); Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 *Wis. L. Rev.* 1529; Dauer & Leff, *Correspondence, The Lawyer as Friend*, 86 *Yale L.J.* 573 (1977); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060 (1976). See also sources cited *infra* note 7.

4. Wasserstrom, *supra* note 1, at 5.

5. Prominent descriptions and justifications are found in Curtis, *The Ethics of Advocacy*, 4 *Stan. L. Rev.* 3 (1951); Fried, *supra* note 3; and Freedman, *Personal Responsibility in a Professional System*, 27 *Catholic U.L. Rev.* 191 (1978). In some respects, the justification provided here is an elaboration and modification of those presented by Freedman and Fried.

6. The question, phrased slightly differently, is the first line of Charles Fried's article, *supra* note 3, at 1060.

7. See, e.g., Luban, *The Adversary System Excuse*, in D. Luban, ed., *The Good Lawyer* 83 (1984) (moral philosophy); M. Frankel, *Partisan Justice* (1980); T. Shaffer, *On Being a Christian and a Lawyer* (1981) (religion); Abel, *Why Does the ABA Promulgate Ethical Rules?* 59 *Tex. L. Rev.* 639 (1981) (socioeconomic analysis); D'Amato & Eberle, *Three Models of Legal Ethics*, 27 *St. Louis U.L.J.* 761 (1983) (moral philosophy); Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 *Tex. L. Rev.* 689 (1981) (socioeconomic analysis); Schwartz, *The Zeal of the Civil Advocate*,

role is framed in the language of the "adversary system," focusing on the justifiably different roles of the advocate and the judge.⁸ Part I of this essay will suggest a far broader moral justification for the amoral professional role of the lawyer, the "first-class citizenship model." Part II will address two of the most common criticisms of the amoral role. Part III poses the serious difficulty for the model created when the amoral professional role is combined with the dominant legal realist view of the law. Part IV canvasses some possibilities for ameliorating the legal realism difficulty.

I. THE FIRST-CLASS CITIZENSHIP MODEL

As an introduction to the first-class citizenship model, I would like to begin with a brief explanation of the concept of professional obligation. The very idea of a profession connotes the function of service, the notion that to some degree the professional is to subordinate his interests to the interests of those in need of his services.⁹ This orientation is suggested by the following seven characteristics that define the concept of a profession.¹⁰

1. A profession is a means of making a living.
2. A profession is based on specialized knowledge, training, and ability, often requiring intellectual labor and many years of higher education.
3. The services rendered by the professional, based upon this foundation of knowledge and ability, are necessary to individuals at various points in their lives and are frequently of the utmost personal concern (for example, services relating to physical health, liberty, religious salvation, or psychological well-being).
4. Because of the specialized knowledge involved, the quality of the services rendered by the professional is untestable from the perspective of the layman. The individual *needs* the service but is unable to evaluate it, and therefore the individual is *vulnerable* in relation to the professional.
5. The profession holds a monopoly on a service frequently needed by individuals, and as a result wields significant economic power.
6. The profession is largely self-regulated in determining and administering the qualifications for membership and in policing professional activities.
7. Part of the self-regulation usually includes ethical prescriptions that articulate a service orientation.

1983 A.B.F. Res. J. 543 (legal analysis); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 30 (jurisprudence); Wasserstrom, *supra* note 1 (moral philosophy).

8. See, e.g., Freedman, *supra* note 3; Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958); Curtis, *supra* note 5.

9. B. Bledstein, *The Culture of Professionalism* 87 (1976); M. S. Larson, *The Rise of Professionalism* 56-63 (1977); W. E. Moore, *The Professions: Roles and Rules* 13-15 (1970).

10. These characteristics are derived from a similar definition provided by Wasserstrom, *supra* note 1, at 2 n.1. See also Bledstein, *supra* note 9, at 87; Larson, *supra* note 9, at x; Moore, *supra* note 9, at 4-22.

The sixth and seventh characteristics are the *quid pro quo* for the fact that the profession has a monopoly on and is making a living from a service the public needs but cannot evaluate.

The seven characteristics add up to an inherent advantage for the professional over those in need of his services and to a pervasive economic conflict of interest between the professional and those who need (and pay for) his services. As a remedy for this unbalanced conflict, there is a primary underlying professional obligation: When the client's interest and the professional's interest conflict, the professional is to forgo his interest in favor of the client's.¹¹

The legal profession's ethical code reflects the factors and the conflict listed above. Much of the ABA's Model Code of Professional Responsibility (the governing document in over three quarters of the states) appears to be designed to enhance the economic well-being of the profession.¹² But much of it also appears designed to put the client's interest above that of the lawyer, to protect the client from the lawyer's self-interest. It is this second aspect of the legal profession's ethics with which this essay is concerned. Leaving aside the "guild" provisions, the role of the professional is to serve the client ahead of himself or herself. If anything justifies the asymmetrical power and opportunity sketched in the seven definitional elements listed above, it is this underlying ethic of professionalism. This ethic alone suggests that if a moral conflict between lawyer and client develops, the lawyer should honor the client's view. But this is not the argument to be presented here. This view of the theoretical service orientation of the professions only sets the stage.

The premise with which we begin is that law is a public good available to all. Society, through its "lawmakers"—legislatures, courts, administrative agencies, and so forth—has created various mechanisms to ease and enable the private attainment of individual or group goals. The corporate form of enterprise, the contract, the trust, the will, and access to civil court to gain the use of public force for the settlement of private grievance are all vehicles of empowerment for the individual or group; all are "law" created by the collectivity to be generally available for private use. In addition to these structuring mechanisms are vast amounts of law, knowledge of which is intended to be generally available and is empowering: landlord/tenant law, labor law, OSHA, Social Security—the list can be vastly extended. Access to both forms of law increases one's ability to successfully attain goals.¹³

The second premise is a societal commitment to the principle of individual autonomy. This premise is founded on the belief that liberty and autonomy are a moral good, that free choice is better than constraint, that each of

11. Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L. Rev. 702, 705 (1977).

12. *Id.*

13. L. Fuller, *The Principles of Social Order* 230–37 (1981); R. Summers, *Lon L. Fuller* 84–86 (1984).

us wishes, to the extent possible, to make our own choices rather than to have them made for us. This belief is incorporated into our legal system, which accommodates individual autonomy by leaving as much room as possible for liberty and diversity. Leaving regulatory law aside for the moment (and granting that it has grown immensely, contributing to the legalization to be mentioned below), our law is designed (1) to allow the private structuring of affairs (contracts, corporations, wills, trusts, etc.) and (2) to define conduct that is intolerable.¹⁴ The latter sets a floor below which one cannot go, but leaves as much room as possible above that floor for individual decision making. It may be morally wrong to manufacture or distribute cigarettes or alcohol, or to disinherit one's children for marrying outside the faith, but the generality of such decisions are left in the private realm. Diversity and autonomy are preferred over "right" or "good" conduct. The theory of our law is to leave as much room as possible for private, individual decisions concerning what is right and wrong, as opposed to public, collective decisions.

Our first premise is that law is intended to be a public good which increases autonomy. The second premise is that increasing individual autonomy is morally good. The third step is that in a highly legalized society such as ours, autonomy is often dependent upon access to the law.¹⁵ Put simply, first-class citizenship is dependent on access to the law. And while access to law—to the creation and use of a corporation, to knowledge of how much overtime one has to pay or is entitled to receive—is formally available to all, in reality it is available only through a lawyer.¹⁶ Our law is usually not simple, usually not self-executing. For most people most of the time, meaningful access to the law requires the assistance of a lawyer. Thus the resulting conclusion: First-class citizenship is frequently dependent upon the assistance of a lawyer. If the conduct which the lawyer facilitates is above the floor of the intolerable—is not unlawful—then this line of thought suggests that what the lawyer does is a social good. The lawyer is the means to first-class citizenship, to meaningful autonomy, for the client.

For the lawyer to have moral responsibility for each act he or she facilitates, for the lawyer to have a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity. Such a screening submits each to the prior restraint of the judge/facilitator and to rule by an oligarchy of lawyers.¹⁷ (If, in the alternative, the suggestion is that the lawyer's screening

14. H. L. A. Hart, *The Concept of Law* 27–28 (1961).

15. Law, *The Messages of a Legal Education*, in S. Gillers, ed., *Looking at Law School* 92, 104–5 (1984); Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 *U. Colo. L. Rev.* 67, 72–75 (1982); Freedman, *supra* note 5, at 204 (1978); Fried, *supra* note 3, at 1073; Wexler, *Practicing Law for Poor People*, 79 *Yale L.J.* 1049 (1970).

16. Access may be indirect. Thus a lawyer may serve as advisor to the union or the employers' trade organization, which in turn transmits wage and hour legal guidelines to member employees or employers.

17. Freedman, *supra* note 5, at 195; Wasserstrom, *supra* note 1, at 10–11.

should be based not on the lawyer's personal morality, but on the lawyer's assessment of society's moral views or on guidelines spelled out in a professional code of ethics, then one has substituted collective moral decision making for individual moral decision making, contrary to the principle of autonomy. Less room has been left for private decision making through a sub rosa form of lawmaking.) If the conduct is sufficiently "bad," it would seem that it ought to be made explicitly unlawful. If it is not that bad, why subject the citizenry to the happenstance of the moral judgment of the particular lawyer to whom each has access? If making the conduct unlawful is too onerous because the law would be too vague, or it is too difficult to identify the conduct in advance, or there is not sufficient social or political concern, do we intend to delegate to the individual lawyer the authority for case-by-case legislation and policing?

An example may help. Professor Wasserstrom implies that a lawyer ought to refuse to draft a will disinheriting a child because of the child's views concerning the war in Nicaragua.¹⁸ "But," asks Professor Freedman, "is the lawyer's paternalism toward the client preferable—morally or otherwise—to the client's paternalism toward her children?" And, he asks further, is there any reason to substitute the diversity of lawyers' opinions on the issue of disinheritance based on political belief for the diversity of clients' opinions?¹⁹ Ought we to have a law on the issue? If not, why screen use of the legal device of testacy either through the diverse consciences of lawyers or through the collective conscience of the profession? And if the law is clear but contrary to the lawyer's moral beliefs, such as a tax loophole for the rich or impeachment-oriented cross-examination of the truthful witness, why allow (let alone require) that the lawyer legislate for this particular person or situation?

It is apparent that a final significant value supporting the first-class citizenship model is that of equality. If law is a public good, access to which increases autonomy, then equality of access is important. For access to the law to be filtered unequally through the disparate moral views of each individual's lawyer does not appear to be justifiable. Even given the current and perhaps permanent fact of unequal access to the law, it does not make sense to compound that inequality with another. If access to a lawyer is achieved (through private allocation of one's means, public provision, or the lawyer's—or profession's—choice to provide it), should the extent of that access depend upon individual lawyer conscience? The values of autonomy and equality suggest that it should not; the client's conscience should be superior to the lawyer's.²⁰ One of the unpleasant concomitants of the view that a lawyer should be morally responsible for all that she does is the re-

18. Wasserstrom, *supra* note 1, at 7.

19. Freedman, *supra* note 5, at 194-95.

20. This is an echo of the underlying professional ethic presented at the beginning of part I. It also leaves one wondering whether there is any place for the lawyer's moral autonomy. The most commonly expressed focus for the lawyer's exercise of moral autonomy is in his or her choice of clients. This and

sulting inequality: unfiltered access to the law is then available only to those who are legally sophisticated or to those able to educate themselves sufficiently for access to the law, while those less sophisticated—usually those less educated—are left with no access or with access that subjects their use of the law to the moral judgment and veto of the lawyer.

II. THE CRITIQUE AND A RESPONSE

A. *The Economic Inequality Criticism*

The foregoing quickly leads to the observation that law is a public good in theory but not in fact, and that one of the key premises justifying the first-class citizenship model is therefore false. Like almost everything else in our society, access to law is rationed through the market—in this case, the market for lawyers' services. Thus, the rich have disproportionate access over the poor, and this is particularly unacceptable given the public nature of law and its implementing relationship to individual autonomy and first-class citizenship. This is the focus of the first criticism of the amoral role: it would be justified if everyone had access to "first-class citizenship" through a lawyer, but everyone does not. The drastic and fundamental inequality of means in America vitiates the moral justification for an amoral professional ethic for lawyers.²¹

Granting the truth of economic inequality does not, however, mean that the amoral role is a bad role, or that the lawyer currently fulfilling the role cannot be a good person. An analogous criticism might be made of the grocer and the housing contractor. Although food and shelter are (in our system) not public goods, they are more fundamentally enabling to autonomy than is law. Yet there is much less disquiet over the moral role of the grocer, housing contractor, or landlord than that of the lawyer.²² We live in a primarily market system, not a primarily socialist system, and the contemporary problem in defining lawyers' ethics is likely to have to be answered in this market context. Lawyers cannot magically socialize the economy or legal services.

Another way of saying this, perhaps more to the point, is that there are two issues here: the distribution of legal services and the content of what is distributed.²³ The moral content of what is distributed—the ethical nature of the lawyer-client relationship once established—is the subject of this es-

more significant elements of the lawyer's moral autonomy are presented briefly below at secs. IV.D & E and part V.

21. J. Auerbach, *Unequal Justice* (1976); Abel, *supra* note 7, at 685–86 and sources cited at nn.250 & 255; A. Goldman, *The Moral Foundations of Professional Ethics* 124 (1980).

22. This may be explained by the relatively intimate interpersonal nature of the professional relationship and by the way a lawyer's integrity appears to be for sale. See the sixth element of Wasserstrom's definition of the professional and his discussion of the lawyer's hypocrisy, *supra* note 1, at n.1 & p.14.

23. For an interesting approach to the "economic inequality" issue and its nexus to law and legal services, and for an excellent overview which recognizes the distinction in the text, see Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974–75).

say. The distribution of access to the law (legal services) is a different subject. While the effort to make law a more truly public good is under way (or assuming it fails and we are left with the status quo), the other issue remains: what is to be the moral content of the legal services that are available? To suggest that transforming the amoral facilitator role of the lawyer into the judge/facilitator role follows from the insufficient availability of legal services is a non sequitur. Such a transformation would compound inequality upon inequality—first the inequality of access to a lawyer, then the inequality of what law that particular lawyer will allow the client access to.

One can argue that the judge/facilitator role will not compound inequality but, to the contrary, will balance power because the advantage accruing to those with access to the law over those without will be balanced by the restraint of the lawyer's moral screening of access to the law.²⁴ There are at least two reasons to react with skepticism to this argument. First, the inequality of distribution is neither complete nor uniform. At least some of the "outs" have had significant access to the law through lawyers.²⁵ Labor unions,²⁶ criminal defendants,²⁷ and civil rights organizations²⁸ are three prominent examples. Lawyers have played key roles in areas where many perceive gains to have been made in social justice.²⁹ Second, there is little likelihood of a large difference in moral perception between lawyers and their "in" clients.³⁰ Perhaps we need more (historical? empirical?) data: Looking back, would there have been more social justice, equality, or general welfare if lawyers had altered or withheld services on the basis of their own (largely middle- or upper-class) values? How would a moralistic as opposed to an amoral role for lawyers have affected 20th-century American social history? However one is inclined to answer such questions, to the extent that the first-class citizenship argument is otherwise valid, expansion and equalization of access to lawyers is a goal which is both consistent with and suggested by that argument.³¹ Transforming lawyers into moral

24. This seems to be an implicit notion on the part of many. See, e.g., Auerbach, *supra* note 21; Luban, *supra* note 7; Wasserstrom, *supra* note 1.

25. Rabinowitz, *The Radical Tradition in the Law*, in D. Kairys, ed., *The Politics of Law* 310 (1982); A. Ginger, *The Relevant Lawyers* (1972); Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 *Stan. L. Rev.* 509 (1984); Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 3 *N.Y.U. Rev. L. & Soc. Change* 369 (1982-83).

26. See, e.g., Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *Minn. L. Rev.* 265 (1978); Sparer, *supra* note 25.

27. See, e.g., Bachmann, *Lawyers, Law, and Social Change*, 13 *N.Y.U. Rev. L. & Soc. Change* 1, 23-26 (1984-85). See generally Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 *Mich. L. Rev.* 1 (1984).

28. Auerbach, *supra* note 21, at 263-68 (1976).

29. See note 25 *supra*.

30. Auerbach, *supra* note 21, at 14-39 (1976); Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 *Stan. L. Rev.* 503 (1985).

31. Galanter, *supra* note 23, provides observations which appear equivocal on both the "amoral role" and the effect of expansion and equalization of access to lawyers. Compare *id.* at 114-19 with *id.* at 138-44.

screens for client access to the law, to the contrary, is a project quite problematic in its relation to equality of access to law.

Before moving on, one caveat related to the economic inequality criticism should be entered. The first-class citizenship model suggests that lawyers are a necessary item in a highly legalized society and that they should have an amoral role in relation to facilitating clients' wishes. It does not suggest how access to lawyers should be organized. The nature and extent of the legal profession's monopoly—for example, whether paraprofessionals should be allowed to practice independently, or whether unauthorized practice rules should be enforced against bankers, realtors, or accountants—is a separate question from that examined in this paper.³² The term “deprofessionalization” can refer to either (1) the market-limiting nature of professional rules or (2) the amoral professional role.³³ The argument up to this point in this essay is that deprofessionalization in the second sense is a bad idea, but no position has been taken on deprofessionalization in the first sense.

B. The Adversary System Criticism

Much writing on the amoral role of the lawyer has dealt with the layperson's common conception of what lawyers do: criminal defense. The amoral role is justified by the need of the “man in trouble” for a champion familiar with the law to aid him in facing the vast resources of the state bearing down on him, attempting to seize his most basic liberties and put him in jail.³⁴ In this context, however, there is another champion, the prosecutor, with greater resources, opposing and balancing the lawyer's amorality. More important, there are a neutral judge and a jury whose roles are significantly less amoral than the advocate's. Critics of the lawyer's role have had a field day distinguishing this situation from civil litigation and from nonlitigation (what most lawyers are working on most of the time).³⁵ The critics suggest that a role justified by the rather unusual context of the criminal justice system simply is not justified in the far more common lawyer roles. Where there is no judge responsible for applying the law from a neutral stance, where there is no lawyer protecting those who may be victimized or exploited by another person's use of “the law”—in these situations the critics of the amoral role argue that the lawyer must take on the neutral judge's role and screen access to and use of the law. Their point is

32. The literature is vast. See, e.g., Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *Stan. L. Rev.* 1 (1981); Morgan, *supra* note 11; Ehrlich & Schwartz, *Reducing the Costs of Legal Services: Possible Approaches by the Federal Government*, reprinted in A. Kaufman, *Problems in Professional Responsibility* at 582 (1st ed. 1976).

33. For a discussion of the latter sense of “deprofessionalization,” see Simon, *supra* note 7.

34. E.g., M. Freedman, *Lawyers' Ethics in an Adversary System* (1975); D. Mellinkoff, *The Conscience of a Lawyer* (1973).

35. Luban's article, *supra* note 7, is entitled “The Adversary System Excuse.” See also, e.g., Schwartz, *supra* note 7; Schwartz, *The Professionalism and Accountability of Lawyers*, 66 *Calif. L. Rev.* 669 (1978); Wasserstrom, *supra* note 1.

that a role modeled on Perry Mason does not fit the lawyer working for Sears drafting form consumer contracts.

It is therefore significant that the justification for the lawyer's amoral role sketched above has not once mentioned the adversary system, has not been based on any premise involving an opposing lawyer or a neutral judge or jury. In the usual justification of the lawyer's amoral role, the model is adjudication, and there is a difficult stretch adapting and applying this to the lawyer's office. In this essay, the model is the office lawyer advising about the law and implementing client goals through legally available devices, and one need not stretch to apply that model to litigation. Litigation is simply one of the available devices for implementing goals, like a trust or a corporation. When one focuses on a defendant, either civil or criminal, the moral validity of the autonomy and equality arguments is more apparent because the legal mechanism is being imposed on the individual rather than freely chosen, but the moral validity is not dependent on the defendant role. Thus, the arguments for the amoral role premised on the adversary system³⁶ supplement the first-class citizenship model in the litigation setting, and the critique based on the limited scope of the adversary system is largely beside the point under the first-class citizenship model.

Two further observations concerning the relationship between the first-class citizenship model and the adversary system model are apposite. First, as noted above, the criminal defendant is only a special instance of the first-class citizenship model. In the criminal context the moral value of full access to all that the law allows is simply clearer and more dramatic. However, because of what is at stake and the procedural safeguards of the adversary system (an opponent lawyer, neutral decision makers), the law may allow more in the criminal context. For example, the criminal defendant has the right to not incriminate himself and he suffers no legal liability for exercising that right. (The jury is told *not* to base convictions on the exercise of that right.) Outside the context of litigation, however, civil liability may be based on nondisclosure of incriminating facts in certain contexts, such as sales of securities under federal regulatory laws or the sale of a house under the common law tort doctrine of misrepresentation. Similarly, to take an example with which we began, the litigant through her lawyer may mislead the court with a cross-examination that intentionally and incorrectly implies the witness was not telling the truth on direct examination, and there will be no liability under the law for the client or the lawyer. In the nonlitigation context of selling a termite-ridden house, however, utilizing similar implications and half-truths to communicate the absence of termites may generate tort liability on the part of the client for misrepresent-

36. These arguments usually focus on the value of the adversary system in elucidating truth, Fuller & Randall, *supra* note 8, at 1160-61, and on the importance of protecting the dignity of the individual enmeshed in the judicial system, Freedman, *supra* note 3.

tation and an ethical violation on the part of the lawyer if she "assisted" the client in "fraudulent conduct."³⁷

Second, the lines between criminal and civil litigation and between litigation and nonlitigation are not as clear as the critics suggest.³⁸ The criminal system pits "the state," with all its power, against an individual.³⁹ But the very point of civil litigation is to allow the private plaintiff to gain the power of "the state" to enforce her claim against the defendant, thus removing the need for, or utility of, acquiring private police or armies to enforce claims. Civil litigation is a contest over which side is to have the vast power of "the state" on its side in a dispute.

Certainly the distinction between litigation and nonlitigation is clearer, but even that line is not as bright as one might at first assume. When the consumer and Sears differ over the validity of a form contract or the misleading nature of advertising or displays, the disparity in power and means is huge. Moving across the line into litigation does equalize the power in both form and substance. But a good deal of that equalization is due to the presence of a lawyer. "Having a lawyer on your side" is a lot of what litigation implies. (To what extent would the filing of a complaint by a *pro se* consumer plaintiff against Sears change the balance of power?) Thus, the more significant transition—the brighter line—may be between having and not having a lawyer.⁴⁰ For the consumer to have access to the law through a lawyer *prior* to litigation would seem to be a more realistic possibility for equalizing power (or actualizing autonomy) than would an obligation on the part of Sears's in-house lawyer to function as a moral screen and filter for Sears's use of the law. This observation circles us back to both the first-class citizenship justification for the amoral role and to the economic inequality critique.

Before moving on from the adversary system criticism, it is appropriate to note that the adversary system image of the lawyer as the champion against a hostile world—the hired gun—is not the proper image for the general role of the lawyer presented here (although it may be the proper image for the criminal defense lawyer). Rather, the image more concordant with the first-class citizenship model is that of the individual facing and needing to use a very large and very complicated machine (with lots of whirring gears and spinning data tapes) that he can't get to work. This is "the law" that confronts the individual in our society. It is theoretically there for his use, but he can't use it for his purposes without the aid of

37. ABA Model Code of Professional Responsibility, DR 7-102(A)(7).

38. Weckstein, *The Civil Advocate and the Multifaceted Functions of Dispute Settlement—Some Domestic and Cross-cultural Perspectives*, 1983 A.B.F. Res. J. 577 (similarities between civil and criminal litigation and the consequent appropriate role of the lawyer).

39. E.g., Luban, *supra* note 5, at 92, 117; Wasserstrom, *supra* note 1, at 12.

40. Of course, part of the added power of having a lawyer on your side is the recognition that a lawyer brings with her the possibility—or the threat—of moving into litigation (and thereby gaining the power of the state). "Access to a lawyer" and the "potential for litigation" are, in this respect, two sides of one coin.

someone who has the correct wrenches, meters, and more esoteric tools, and knows how and where to use them. Or the image is that of someone who stands frustrated before a photocopier that won't copy (or someone whose car won't go) and needs a technician (or mechanic) to make it go. It is ordinarily not the technician's or mechanic's moral concern whether the content of what is about to be copied is morally good or bad, or for what purpose the customer intends to use the car.

III. THE PROBLEM OF LEGAL REALISM

This paper began with a moral justification for the lawyer's amoral ethical role. It then addressed, and for the most part rejected, two of the most common criticisms of that role. We turn now to a third, rarely articulated problem presented by the first-class citizenship justification for the amoral role. Up to this point in the discussion, access to the law as the primary justification for the amoral professional role has been presented with relatively little focus on what "the law" refers to. Three different facets of law have been recognized: (1) structuring mechanisms (trusts, corporations, civil litigation), (2) definitions of intolerable conduct (criminal law and litigation), and (3) regulatory law. The implication has been that the law is existent and determinable, that there is "something there" for the lawyer to find (or know) and communicate to the client. The "thereness" of the law is also the assumption underlying the commonly understood limit on the amoral role: the lawyer can only assist the client "within the bounds of the law."⁴¹ This accords with the usual understanding of the law from the lay or client point of view, but not from the lawyer's point of view. The dominant view of law inculcated in the law schools, which will be identified here as "legal realism,"⁴² approaches law without conceiving of it as objectively "out there" to be discovered and applied. A relatively little explored problem is the dynamic between the amoral professional role and a skeptical attitude toward law.

By "legal realism" I mean a view of law which stresses its open-textured, vague nature over its precision; its manipulability over its certainty; and its instrumental possibilities over its normative content.⁴³ From "positivism" modern legal education takes the notion of the separation of law and moral-

41. ABA Code of Professional Responsibility, Ethical Considerations 7-1 and 7-19. This approach pervades the Code. See, e.g., Disciplinary Rules 4-101(C)(2) and (3), 7-101(A)(1), 7-102.

42. Although perhaps misleading, the choice of the phrase "legal realism" derives from a perception that it will have the highest recognition level as descriptive of "the dominant view of law inculcated in the law schools." "We are all realists now" is a comment often heard from contemporary law professors. See, e.g., Kaufman, A Commentary on Pepper's "The Lawyer's Amoral Ethical Role," 1986 A.B.F. Res. J. at 654. Unfortunately, "legal realism" connotes rather different things to different persons. Robert Summers's usage, "pragmatic instrumentalism," is probably a better descriptive term. R. Summers, *Instrumentalism and American Legal Theory* (1982). My use of "legal realism" is intended to be more inclusive than Summers's use of "pragmatic instrumentalism," as the following paragraph elaborates.

43. See Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. Legal Educ. 247 (1978); Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 Va. L. Rev. 689 (1968).

ity: in advising the client, the lawyer is concerned with the law as an "is," a fact of power and limitation, more than as an "ought." From "legal realism" it takes the notion of law as a prediction of what human officials will do, more than as an existent, objective, determinable limit or boundary on client behavior. From "process jurisprudence" it takes an emphasis on client goals and private structuring, an instrumental use of law that deemphasizes the determination of law through adjudication or the prediction of the outcome of adjudication.⁴⁴ These three views of "the law" are mutually reinforcing rather than conflicting.⁴⁵ To the extent that legal education inculcates these views, "the law" becomes a rather amorphous thing, dependent upon the client's situation, goals, and risk preferences. What is the interaction between this view of the law and the view of the lawyer as an amoral servant of the client whose assistance is limited only by "the law"?⁴⁶

The apt image is that of Holmes's "bad man." The modern lawyer is taught to look at the law as the "bad man" would, "who cares only for the material consequences."⁴⁷ The lawyer discovers and conveys "the law" to his client from this perspective and then is told to limit his own assistance to the client based upon this same view of "the law." The modern view of contract law, for example, deemphasizes the normative obligation of promises and views breach of contract as a "right" that is subject to the "cost" of damages.⁴⁸ Breach of contract is not criminal and, normally, fulfillment of a contractual obligation is not forced on a party (not "specifically enforced," in contract law terminology). The client who comes in with a more normative view of the obligation of contracts (whether wishing the lawyer to assist in structuring a transaction through a prospective contract or in coping with the unwelcome constraints of a past contract) will be educated by the competent lawyer as to the "breach as cost" view of "the law." Similarly, modern tort law has emphasized allocation of the "costs" of accidents, as opposed to the more normative view of 19th- and early 20th-century negligence law. Thus, negligence law can be characterized as establishing a right to a nonconsensual taking from the injured party on the part of the tort-feasor, subject once again to the "cost" of damages.⁴⁹ An industrial concern assessing and planning conduct which poses risks of personal injury or death to third parties will be guided by a lawyer following this view away from perceiving the imposition of unreasonable risk as a "wrong" and toward perceiving it as a potential cost.

44. See Simon, *supra* note 7, at 61-91; Ursin, *Judicial Creativity and Tort Law*, 49 *Geo. Wash. L. Rev.* 229, 234-37 (1981).

45. But cf. R. Summers, *supra* note 42 (differences between "process jurisprudence" and "legal realism"). The phenomenon I am describing is the (perhaps uneasy) synthesis of these three approaches that has come to characterize American legal education and, to at least a significant extent, the practice of American law.

46. The best discussion is to be found in Simon, *supra* note 7.

47. Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 459 (1897).

48. Simon, *supra* note 7, at 48.

49. Calabresi, *Torts—The Law of the Mixed Society*, in B. Schwartz, ed., *American Law: The Third Century* 103 (1976).

There are, of course, variations in the extent to which legal realism will be encountered in a lawyer's office. One is more likely to find the cost-predictive view presented in relation to a contract problem than a tort problem,⁵⁰ and it is more likely to come from a lawyer advising a large corporate enterprise than one advising an individual.⁵¹ But it is valid as a general suggestive model that most clients, most of the time, (1) will enter the lawyer's office thinking of law as more normative and more certain than does the lawyer, and (2) will go out having been influenced toward thinking of the law in terms of possible or probable costs more than they would have had they not consulted a lawyer.

From the perspective of fully informed access to the law, this modification of the client's view is good because it accords with the generally accepted understanding of the law among those who are closest to its use and administration—lawyers and judges. It is accurate; it is useful to the client. From the perspective of the ethical relationship between lawyer and client, it is far more problematic. First, the lawyer is to be an amoral technician who serves rather than judges the client. The lawyer is not the repository of moral limits on the client's behavior. Second, the law itself, as presented by the lawyer, also is not a source of moral limits. Rather, it is presented from the lawyer's technical, manipulative stance as a potential constraint, as a problem, or as data to be factored into decisions as to future conduct. Finally, in determining how far he or she can go in helping the client, the lawyer is instructed to look to that same uncertain, manipulable source: "the law." "Within the bounds of the law" sounds like an objective, knowable moral guide. Any second-year law student knows that as to any but the most obvious (and therefore uninteresting) questions, there will probably be no clear line, no boundary, but only a series of possibilities. Thus, if one combines the dominant "legal realism" understanding of law with the traditional amoral role of the lawyer, *there is no moral input or constraint in the present model of the lawyer-client relationship.*

Again, from the premises of the first-class citizenship model, this is as it should be. The client's autonomy should be limited by the law, not by the lawyer's morality. And if "the law" is manipulable and without clear limits on client conduct, that aspect of the law should be available to the client. If moral limits are not provided by the law and are not imposed by the lawyer, their source will be where it ought to be: the client. Morality is not to be

50. Viewing law in terms of "cost" entails perceiving enforcement as a part of the law. This is clear with Holmes's "bad man" view, and in his view that a contractual obligation entails only an obligation to pay damages for breach. It becomes more problematic when the lawyer is dealing with a potential criminal violation, rather than with contract or tort. See Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 A.B.F. Res. J. 637, 647. Pepper, *A Rejoinder to Professor Kaufman and Luban*, 1986 A.B.F. Res. J. 657, 669-73. Nonetheless, advice about enforcement has been considered part of the advice about "law" in general, and thus has been an accepted lawyer function. See, e.g., Panel Discussion, 35 U. Miami L. Rev. 639, 659 (1981) (comment of Prof. Geoffrey Hazard, Reporter, ABA Model Rules of Professional Conduct).

51. And it is quite unlikely to surface in reference to violent crime. See Simon, *supra* note 7, at 48.

inserted in the lawyer's office, its source either the lawyer or the law. Morality comes through the door as part of the client.

This shifts our focus from the lawyer and the law to the client. It should come as no surprise that many clients will come through the door without much internal moral guidance. Common sources of moral guidance are on the decline: religion, community, family. In a secularized society such as ours, religion no longer functions as the authoritative moral guide it once was. Geographic mobility and divorce have robbed many of the multigenerational moral guidance that families can provide. Small, supportive, usually continuous and homogenous moral communities are the experience of fewer and fewer people. The rural town, the ethnic neighborhood, the church attended for several generations, the local business or trade community (the chamber of commerce or the grocers' trade association)—all are the experience of a far smaller segment of the population than before.⁵² Even the role of the public school in inculcating values may have declined.⁵³ For many, law has replaced alternative sources of moral guidance.⁵⁴

Our problem now posits: (1) a client seeking access to the law who frequently has only weak internal or external sources of morality; (2) a lawyer whose professional role mandates that he or she not impose moral restraint on the client's access to the law; (3) a lawyer whose understanding of the law deemphasizes its moral content and certainty, and perceives it instead as instrumental and manipulable; and (4) law designed as (a) neutral structuring mechanisms to increase individual power (contracts, the corporate form, civil litigation), (b) a floor delineating minimum tolerable behavior rather than moral guidance, and (c) morally neutral regulation. From this perspective, access to the law through a lawyer appears to systematically screen out or deemphasize moral considerations and moral limits. The client who consults a lawyer will be guided to maximize his autonomy through the tools of the law—tools designed and used to maximize freedom, not to provide a guide to good behavior. If one cannot rely on the client or an alternative social institution to provide that guide, to suggest a moral restraint on that which is legally available, then what the lawyer does may be evil: lawyers in the aggregate may consistently guide clients away from moral conduct and restraint.

Assume client consults lawyer concerning discharge of polluted water from a rural plant. Client wants to know what the law requires, respects "the law," and intends to comply. Removing ammonia from the plant's effluent is very expensive. The EPA limit is .050 grams of ammonia per liter

52. Kaufman, *Doubts About Justice*, in H. E. Kiefer & M. R. Munitz, eds., *Ethics and Social Justice* (1970).

53. Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 *Pep- perdine L. Rev.* 105, 107-14 (1978).

54. See Levinson, *The Specious Morality of the Law*, *Harper's Mag.*, May 1977; Lessard, *Notes and Comment*, 53 *New Yorker*, May 23, 1977, at 27-28.

of effluent, and the EPA has widely publicized this standard to relevant industries. In addition to this information, however, lawyer informs client that inspection in rural areas of the state is rare and that enforcement officials always issue a warning (give a second chance) prior to applying sanctions unless the violation is extreme. Moreover, lawyer also informs client that it is known informally that violations of .075 grams per liter or less are ignored because of a limited enforcement budget. In such a situation, lay ignorance of legal technicalities and the realities of enforcement would seem to lead toward more obedience of "the law" (the .050-gram limit). Access to an amoral, "legal realist" lawyer leads toward violation of "the law." Given the model elaborated above, unless the client comes equipped with strong moral guidance, there will be no pressure to obey the law as written. (Worse, if the client is a corporate manager, she may be bound by her own amoral professional role which perceives shareholder profit as its primary guide.)

IV. POTENTIAL ANSWERS TO THE PROBLEM OF LEGAL REALISM

What follows is a brief canvassing of the major responses that might ameliorate the dilemma sketched above. The first two possibilities are societal responses that do not focus on the ethic of the lawyer-client relation, while the last three explore various approaches to lawyers' ethics.

A. Increased Societal Resources Applied to Law Enforcement

The first alternative is to accept the situation described above as either proper or unavoidable. To the extent that the pure "legal realist" view is the basis for conduct, law without enforcement is rendered meaningless. This in turn suggests the need for vast increases in resources devoted to law enforcement. Such a prospect is rather daunting in an era of insufficient government means. More important, the societal atmosphere likely to accompany such an emphasis on law enforcement is not pleasant to contemplate.

B. Rebuilding (or Creating Anew) Sources of Moral Authority and Guidance Other than Law

From right-wing fundamentalism through "values clarification" in the public schools to the renaissance in academic moral philosophy, the perceived need to revive or create sources of moral authority and guidance has become a pervasive societal concern. Commencing with the Enlightenment, secularization has progressively and thoroughly removed religion as the central source of moral authority in Western thought. Science and rationalism, whether taking the forms of logical positivism, anthropology, psychology, or scientism, are increasingly perceived as unable to answer moral and ethical questions. It is safe to say that the search for values and alternative methodologies to elucidate, compare, and validate values is and will remain one of the predominant intellectual (and perhaps political)

themes of the last third of the 20th century. "Watergate" is often cited as the cause of the current academic interest in lawyers' professional ethics.⁵⁵ Both that scandal and our intellectual endeavors, however, are part of a larger and more important historical process. To the extent that values and sources of moral authority are rebuilt external to the law, the moral vacuum of the "amoral lawyer/legal realism" combination will be ameliorated.

As elaborated above, law itself as it is currently conceived is not a primary source of moral authority or guidance. It is possible that the dominant practical philosophy conveyed in the law schools will change, and lawyers' understanding of and approach to the law will change also. But this seems less likely than does a change in the understanding of the lawyer-client ethic. We therefore turn now to some of the possible changes in lawyers' professional ethics.

C. The Lawyer as Policeman, Judge, and/or Deceiver

The lawyer-client ethic analogous to the first possibility above, that of enhanced resources devoted to law enforcement, would alter the traditional balance of lawyer allegiance away from the client and toward society.⁵⁶ In the 1970s the SEC took such a position toward the securities bar. In essence it asserted that the lawyer in our hypothetical above would have had to report to the government consistent discharges above .050 grams per liter, regardless of the likelihood or nature of enforcement and regardless of whether his knowledge was based upon client confidences.⁵⁷ This is indeed to give policing responsibilities to the lawyer and, depending upon the client's understanding of the confidential nature of communications to a lawyer, perhaps makes the lawyer a deceiver.⁵⁸

If the lawyer does not become a policeman, but instead injects morality by refusing to communicate the legal realism view of law to the client, there is still a significant problem. For the lawyer to communicate to the client a "thereness" and a normative obligation to a written law that is contrary to the lawyer's legal realist view of that particular law is to practice deception, deception in service to obedience of the law. Imagine, for example, a lawyer advising a couple for whom there are significant tax and economic advantages in living together unmarried, in a jurisdiction where fornication remains a crime on the books but is never prosecuted.⁵⁹ Is it not deception to fail to inform them of the benefits, or to inform them, but to add that the

55. See, e.g., T. Morgan & R. Rotunda, *Professional Responsibility—Problems and Materials* 1 (3d ed. 1984); Wasserstrom, *supra* note 1.

56. As Prof. Alschuler has aptly phrased this point, "Once lawyers became as loyal to opposing parties and to the public as they were to their clients, however, their clients would no longer have lawyers. The clients would only have judges—a whole series of them." Alschuler, *supra* note 15, at 72.

57. S. Gillers & N. Dorsen, *Regulation of Lawyers: Problems of Law and Ethics* 551-61 (1985), and sources cited therein.

58. Perhaps the best evocation of this is Freedman, *supra* note 3, ch. 3.

59. Morgan & Rotunda, *supra* note 55, at 179. The situation and the issue are not unreal. See, e.g., *Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1986) (unenforced fornication and cohabitation statutes).

benefits are not available because the conduct would be criminal, but then to say nothing further?

To replace the amoral role with a moral responsibility role also transmutes the lawyer into an enforcement mechanism, although now it is not the written law but the lawyer's ethics which are being enforced on the client. The lawyer has become the judge of the client. This approach does ameliorate the dilemma by an injection of ethical constraint, but it does so at the expense of the moral values that inhere in the premises of the first-class citizenship justification elaborated above. That elaboration suggests that this would be a considerable price to pay because the values of individual autonomy, diversity, and equality are relatively fundamental to the traditional understanding of our society. Perhaps the expense is merited if one perceives the synergism of the lawyer's amoral role and the legal realist view of law as sufficiently destructive.

*D. The Lawyer and Client in Moral Dialogue*⁶⁰

The fourth possibility emphasizes the utility of wide-ranging communication between lawyer and client. Instead of defining the client's goals in narrow material terms and approaching the law solely as means to or constraint on such goals, this view opens the relationship to moral input in two ways.

First, the lawyer's full understanding of the situation, including the lawyer's moral understanding, can be communicated to the client. The professional role remains amoral in that the lawyer is still required to provide full access to the law for the client, but the dilemma sketched above is ameliorated by moral input from the lawyer which supplements access to the law. The autonomy of the client remains in that she is given access to all that the law allows, but the client's decisions are informed by the lawyer's moral judgment.⁶¹ Just as the lawyer/policeman role is the analogue in ethics to the alternative of enhanced resource investment in law enforcement, the dialogue role is one possible source for rebuilding moral authority aside from the law. While the lawyer still may not judge or police the client in the sense of screening access to the law, this view of the professional role does allow the lawyer the moral role of moral educator.

The second way the dialogue model infuses a moral element into the lawyer-client relationship is from the side of the client. The current situation minimizes the client's moral input as well as the lawyer's. The client comes in with a human problem (family, business, corporate, etc.); the lawyer defines it in legal terms, usually including a legal goal and legal means to that goal, all perceived from the amoral legal realist stance. Both goal and means may well be defined by the client's interests as presumed by the law-

60. For a general discussion of the ethical approach discussed in this section, see Shaffer, *supra* note 7. This approach is also reflected in the ABA Model Code of Professional Responsibility. See Ethical Considerations 7-1 through 7-8.

61. ABA Code of Professional Responsibility EC 7-7, 7-8.

yer: usually maximization of wealth or avoidance of incarceration.⁶² More communication drawn from the client by an open lawyer may substantially qualify those presumed goals as well as limit means.⁶³ To the extent that the lawyer makes room in the professional relationship for a moral dialogue, the client's moral and ethical perceptions can affect decisions. Part of the dilemma sketched above was based on the limited extent of moral guidance with which many clients now come equipped; the dialogue model aims to draw out and actualize that which is there.

This paper began with the example of the lawyer cross-examining a witness known to be truthful in such a way as to suggest to the jury that the witness might be lying. Dialogue with the client may educate the lawyer to the fact that the client does not want to win that way, that the lawyer is wrong in assuming that winning by all lawfully available means is the task the client intended for the lawyer. To the contrary, the client may want to have "the facts" judged by "the law" and may have no desire to win if the truth does not lead to that conclusion. Or the client may believe that exposing the truthful witness to the implied accusation of dishonesty is a moral wrong of sufficient import to prevent its use even to gain that to which he believes justice entitles him. The client may simply not want to win by immoral means. Or, looking at the dialogue with the moral input coming from the lawyer, if the lawyer is the one morally troubled by such a cross-examination and the client is not, the lawyer's perception may engage or educate the client, or the client's overall regard for the lawyer may be sufficient for the client to agree that the tactic should not be used.

Two limits on the "moral dialogue" approach must be recognized. First, it is expensive. Such a dialogue requires time, and time is the lawyer's stock in trade. Either the client must be willing and able to pay for the expanded conversation at the lawyer's regular hourly rate, or the lawyer must be willing to accept a lower income. With traditional forms of legal services perceived as too expensive for the middle and lower classes, and a consequent shift occurring toward less expensive, more efficient structures for providing legal services, the dialogue model may be difficult (perhaps impossible) to incorporate as an integral part of the lawyers' professional ethic. It may be more likely to occur at the level of complex corporate practice because more time is devoted to analysis of legal alternatives. But even in this area

62. Simon, *supra* note 7, at 52-60; Freedman, *supra* note 5, at 200-201.

63. Gabel & Harris, *supra* note 25; Lehman, *The Pursuit of a Client's Interest*, 77 Mich. L. Rev. 1078 (1979); Fried, *supra* note 3, at 1088; Wexler, *supra* note 15, at 1062-66; but cf. Panel Discussion, 35 U. Miami L. Rev. 639, 643 (1981) (comment by panelist Chesterfield Smith, a former president of the American Bar Association, that clients pay him to tell them what to do, pay him to make choices, *not* to educate them so they can make the choices). See also Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3, 6 (1951): "The upshot is that a man whose business it is to act for others finds himself, in his dealings on his client's behalf with outsiders, acting on a lower standard than he would if he were acting for himself, and lower, too, than any standard his client himself would be willing to act on, lower, in fact, than anyone on his own." Reprinted in C. Curtis, *It's Your Law*, ch. 1 (1954).

of practice, efforts to limit the costs of legal services have been rapidly expanding.

Second, client receptivity to the approach will vary with the context. The criminal defendant facing years in prison and represented by a public defender will be less open to the dialogue than will the corporate officer dealing with in-house counsel. Lawyers in some contexts may be simply unable to engage in dialogue with their clients; the larger the cultural and economic gap between lawyer and client, the less likely is meaningful moral dialogue.⁶⁴ Thus, both limits suggest there will be a spectrum of the kinds of legal practice for which the moral dialogue ethic is suitable or possible.

E. Conscientious Objection

Part I of this essay suggests a moral justification for the amoral role of the lawyer. That there is such a moral justification does not tell us how that justification will balance with competing moral values which may be present in any given situation. Assuming a lawyer feels bound (either morally or under legally enforced professional ethics) to the amoral ethic, he or she may perceive in a particular situation a higher value that supports conduct contrary to the lawyer role. Conscientious objection always remains an alternative in such a situation: one can recognize the moral and legal validity of the amoral role, but choose not to follow it. This possibility ameliorates the dilemma sketched above by injecting the moral perception of the lawyer into certain cases. In such cases, the lawyer's moral perception will screen the client's access to all that the law allows.

If such conscientious objection is not limited to extreme cases, however, it is little different from the lawyer as policeman, judge, and/or deceiver. To the extent the lawyer allows moral considerations to trump professional obligation, his role is no longer amoral. David Luban appears to have reached this point in his conclusion that the amoral role is supported only by very weak moral values.⁶⁵ He argues that in the absence of any countervailing moral value, the lawyer should follow the role. But if there is any valid moral objection to conduct mandated by the amoral role, he concludes that the role provides no justification. Part I above suggests, to the

64. Simon, *supra* note 7, at 55-60; Wexler, *supra* note 15, at 1052. Simon's article, quite possibly the best recently written on the professional ethics of lawyers, unfortunately tends to defeat itself with overstatement. For example, at n.69: "There are severe limitations on the extent to which a person, particularly a stranger, can understand with any depth the ends of another without actually sharing those ends." There is some truth to this point, but to use it as a basis for arguing for the deprofessionalization of lawyers is extreme. Common experience indicates that humans are better at communication than this suggests, and a properly trained lawyer is usually able to draw more from the client than Simon suggests is possible. Experience with a legal services office, a public defender, or a similar practice might move one toward Simon's position, but generalization from that experience to all of the practice of law is not warranted. One form of this tendency toward overstatement which weakens Simon's article is its perception of "contradiction" generally in lawyers' ethics where there may be only complexity, a flaw characteristic of much critical legal studies work. See R. Dworkin, *Law's Empire* 271-75, 441-43 (1986); Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 *Stan. L. Rev.* 509, 516-19, 524 (1984).

65. Luban, *supra* note 7.

contrary, that the lawyer's amoral professional role has strong justification in several moral values. If this is true, conscientious objection should be rarely exercised by the lawyer.

The well-known "hidden bodies" case provides an example.⁶⁶ A criminal defendant revealed to his lawyers the location of the hidden bodies of two murder victims, and the lawyers visited the location to determine the accuracy of the information. The lawyers did not reveal this information for six months, even when it was personally sought from them by the parents of one of the victims. Normal morality would condemn such callous behavior. The amoral role demanded such behavior, for the lawyers were not legally obligated to disclose the information and they perceived it to be in the client's legal interest to delay divulging the information. Professor Luban's approach implies that normal morality should have been applied by the lawyers. The first-class citizenship model suggests the contrary, particularly in the context of criminal defense. Assume for a moment, however, that upon investigation by the lawyers, one of the victims was observed to be alive. Assume further that there was no legal or professional obligation to assist or reveal the existence and location of the live victim to others who would assist (which is quite possibly an accurate statement of the law). Here one has the kind of extreme case for which conscientious objection to the amoral role seems appropriate. Even if the client will be hurt by the lawyers' revealing the plight of the living victim, normal morality in this instance must outweigh the generally strong moral values underlying the amoral role.⁶⁷

V. CONCLUSION: ON THE MORAL AUTONOMY OF THE LAWYER

This paper began by presenting a moral justification for the lawyer's amoral professional role. It then turned briefly to two of the criticisms aimed at the amoral role: the economic one that focuses on the unequal distribution of legal service, and the "adversary system" one that focuses on the usual absence of a judge and the frequent absence of a second, counterbalancing advocate from the situations in which most lawyers function. The difficulty presented by the combination of the amoral professional role

66. *People v. Belge*, 372 N.Y.S.2d 798 (N.Y. Cty. Ct. 1975); Freedman, *supra* note 3, at 1; Morgan & Rotunda, *supra* note 40, at 192-93.

67. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?* 52 U. Colo. L. Rev. 349, 354-55 (1981). D'Amato & Eberle, *supra* note 7, at 784-85, draw the same line between not revealing the dead body and revealing the live victim, on the basis of a deontological model of legal ethics. They appear to assume that the conscientious objection alternative can be incorporated into lawyers' professional ethics, thereby avoiding the problem of violating the obligation to the client. It is difficult to understand how a legally binding ethics code (the current Code of Professional Responsibility carries legal sanctions) could impose an obligation to violate the law, a possibility implied by D'Amato and Eberle, *id.* at 795 (fugitive slave example). Perhaps they are thinking of a code of that which is not legally binding, *id.* at 793. Only the proposed American Lawyer's Code of Conduct, drafted by Professor Freedman, contains a provision allowing revelation of the live victim in the circumstances of the hypothetical in the text. That provision is included only as an alternative—it was not approved by the Commission. American Lawyer's Code of Conduct, Rule 1.6.

and the lawyer's "legal realism" was then elaborated. Last, some possible remedies for this problem were presented.

Where are we left? I would suggest that the moral values of autonomy and equality are imperative in relation to access to the law. Genuine autonomy is so dependent on access to the law, and inequality of access bears so directly on autonomy, that we are indeed dealing with a question of first- and second-class citizenship. This imperative is sufficient, in my view, to outweigh the problems presented by the amoral professional role.

Given this essay's stress on autonomy, it is fair to ask: Where in the amoral role is there a place for the lawyer's moral autonomy? Lawyers are far more intimately involved with and identified with their clients than grocers or landlords are with their customers and tenants. This causes much of the disquiet with the amoral role both within and without the profession. If the client chooses to be the "bad man," to do that which is lawful but morally wrong, does not the lawyer become a bad person, compelled by the amoral role to assist, yet intimately connected to and identified with the client's wrongdoing?

Part of the answer lies in the principle of professionalism sketched at the beginning of part I. Because of the large advantages over the client built into the lawyer's professional role, and because of the disadvantages and vulnerability built into the client's role, the professional must subordinate his interest to the client's when there is a conflict. That the conflict may be a moral one ought not change this precept. The lawyer is a good person in that he provides access to the law; in providing such access without moral screening, he serves the moral values of individual autonomy and equality. This ought to be enough, for the underlying professional ethic cautions that when there is a conflict between lawyer and client, the professional must remember that the *raison d'être* for his role is service to the client.

The rest of the answer can be found in those limited areas in which the moral autonomy of the lawyer can function compatibly with the amoral professional ethic. Initially, the lawyer has the choice of whether or not to be a lawyer. It should be clear that this choice involves important moral consequences.⁶⁸ Second, the lawyer has the choice of whether or not to accept a person as a client. This choice also involves the exercise of moral autonomy.⁶⁹ In light of the first-class citizenship model, exercise of the choice of client aspect of the moral autonomy of the lawyer is troubling if it leads to foreclosure of a person's access to the law. In that situation, the lawyer's autonomy results in second-class citizenship status for the denied individual.⁷⁰ Third, a large degree of moral autonomy can be exercised

68. Whether or not the choice is an educated one in most cases is unclear. While, as Wasserstrom observes, the amoral role may be "comfortable" for practicing lawyers, *supra* note 1, at 7, many law students I have encountered in Legal Profession courses are quite uncomfortable with the prospect of living such a role.

69. Law, *supra* note 15, at 103-4; Freedman, *supra* note 15, at 198-99, 204-5.

70. See Pepper, A Rejoinder to Professors Kaufman and Luban, 1986 A.B.F. Res. J. 657, 659-60.

through the lawyer-client moral dialogue. While there is a wide range of financial feasibility and client receptivity which will set limits on the extent of such dialogue, all lawyers have some opportunity in this area; and to a significant extent, each lawyer can take part in defining those limits. Fourth, conscientious objection is an ever present option within the realm of the lawyer's moral autonomy. These four areas combined create a meaningful field for the exercise of the lawyer's moral autonomy.

More important, if one adds together (1) the conscientious objection possibility, (2) the wide scope for moral dialogue, and (3) the inherent moral value of facilitating access to the law, the result, I believe is that the good lawyer can be a good person; not comfortable, but good.

