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PROFESSIONAL ROLE AND PROFESSIONAL JUDGMENT: THEORY AND PRACTICE IN LEGAL ETHICS

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Theory and practice come together at the heart of legal ethics—in the exercise of professional judgment. Sometimes analogized to Aristotelian practical wisdom,[1] professional judgment is "neither a matter of simply applying general rules to particular cases nor a matter of mere intuition" but a process of bringing coherence to conflicting values within the framework of general rules and with sensitivity to highly contextualized facts and circumstances.[2] The importance of professional judgment has been widely recognized. The ABA Model Rules of Professional Conduct have long called on lawyers to exercise "sensitive professional and moral judgment guided by the basic principles underlying the Rules."[3] More recently, the standards governing the accreditation of American law schools have identified "the exercise of professional judgment consistent with the values of the legal profession and professional duties to society" as a professional skill equal in importance to the skills of legal analysis and reasoning, critical thinking, problem solving, and legal research and writing.[4]

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1. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 41 (1993); Gerald J. Postema, *Moral Responsibility in Legal Ethics*, 55 N.Y.U. L. REV. 63, 68 (1980); W. Bradley Wendel, *Should Law Schools Teach Professional Duties, Professional Virtues, or Something Else? A Critique of the Carnegie Report on Educating Lawyers*, 9 U. ST. THOMAS L.J. 497, 525 (2012).

2. Postema, *supra* note 1, at 68.

3. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 9 (2011).

4. The most recent proposed changes to the ABA Standards for the Accreditation of Law Schools list as mandatory learning outcomes for all law students,

> competency as an entry-level practitioner in . . . the professional skills of: (i) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context; and (ii) the exercise of professional judgment consistent with the values of the legal profession and professional duties to society, including recognizing and resolving ethical and other professional duties.

STANDARDS REVIEW COMM., SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, DRAFT AFTER JULY 2011 MEETING (2011), *available at* http://www.americanbar.org/con

This article explores the relationship between the exercise of professional judgment and academic theories about lawyers' professional role. It argues that the academic project of developing a coherent conception of lawyers' role in the legal system and in society is an important foundational analysis for the ethical practice of law, but the theoretical project does not, by its nature, produce tools that practitioners can utilize directly. In exercising professional judgment, a lawyer draws on an implicit underlying understanding of professional role that strikes a balance between competing professional values, even if the balancing process remains under the surface. A lawyer's exercise of professional judgment thus contains within it an operative theory about the role of lawyers in the legal system and in society. The aspiration of theorists in legal ethics is to bring to the surface these implicit and operative conceptions of professional role and to subject them to analysis and critique.

The academic project in legal ethics raises a tantalizing hope: By examining and critiquing lawyers' implicit and operative theories of professional role, theory can inform lawyers' day-to-day exercise of professional judgment, grounding practice in sound political, jurisprudential, and moral theory. Yet, the dynamic interaction between theory and practice is more complex and paradoxical than this aspiration assumes. Theory undoubtedly matters to practice—by any account, an understanding of professional role plays an integral part in the exercise of professional judgment. Over the past forty years, legal ethics scholars have made significant theoretical advances, mounting both sophisticated critiques of the neutral and partisan "role morality" of lawyers[5] and building constructive accounts that ground legal ethics in theories of democracy, the function of law in society, and the role of lawyers in the legal system.[6] However, although these theories of legal ethics provide frameworks for ethical decision making, the frameworks remain necessarily abstract, making it difficult to directly apply them to a specific ethical question that arises in practice. Moreover, the theoretical project—taken as a whole—produces a multiplicity of competing theories of professional role, creating an additional layer of questions for practitioners who must decide not only how to apply a theoretical framework but which framework to choose.

Although comprehensive theories of professional role are ill equipped to provide direct guidance to practitioners, the theoretical project in legal ethics is not merely an academic exercise. Theory matters in mapping the

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5. *See, e.g.*, DAVID LUBAN, *The Adversary System Excuse*, *in* LEGAL ETHICS AND HUMAN DIGNITY 19, 19–23 (2007); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 669–71 (1978); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1 (1975).

6. *See, e.g.*, WILLIAM H. SIMON, THE PRACTICE OF JUSTICE (1998); W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010).

broad contours within which lawyers exercise professional judgment. The most useful tools for the exercise of professional judgment are a stable of well-specified professional values—loyalty to clients, confidentiality, access to justice, respect for the rule of law, and respect for legal process—and a sense of when it is more or less appropriate to adhere to one value rather than another. Theories of professional ethics provide a broad and simplified view of the relationship among these values, revealing the strengths and weaknesses of prioritizing one value over another, which can illuminate the choices made in the more complex circumstances of practice. Moreover, the rigor of comprehensive theory can help to curb the self-serving tendency of lawyers to interpret their professional duties in ways that benefit themselves rather than either clients or society as a whole.

Part I of this article sets the scene by examining the three-level process of professional judgment contemplated by the ABA Model Rules of Professional Conduct. It traces the pathway of professional judgment from a simple question of legal ethics—involving the ethics of providing financial assistance to a client—through these three levels: (1) analysis of the language of the applicable rule; (2) analysis of the problem in terms of the underlying principles and policies that animate the rule; and (3) examination of how competing conceptions of professional role will provide different guidance in ethical decision making. Part II surveys theories of professional role in legal ethics and the rubrics or frameworks for ethical decision making that these theories propose or suggest. Part III details the challenges of employing the rubrics and frameworks created in theories of professional role directly in the exercise of professional judgment. It argues that, although theory is not directly applicable to practice, robust theoretical debate in the field of legal ethics both deepens understanding and sharpens accountability in the field of legal ethics.

I. The Exercise of Professional Judgment

An examination of the interaction between theory and practice in legal ethics ought to begin at the beginning: with a lawyer facing an ethical question as it might arise in day-to-day practice. The ABA Model Rules of Professional Conduct ("the Rules") rely on lawyer self-governance at the most basic level of voluntary individual compliance[7] not only through minimal avoidance of the disciplinary sanctions but also through the exercise of professional judgment in areas where the Rules leave lawyers with discretion.[8] The Rules encourage lawyers to resolve the "many difficult issues of professional discretion" that arise in practice "through the exercise of sensitive professional and moral judgment guided by the basic principles underlying

7. Model Rules of Prof'l Conduct pmbl. ¶ 16.

8. *Id.*

the Rules"[9] and to interpret the Rules based on an understanding of "the purposes of the legal representation and of the law itself."[10]

"Lawyers play a vital role in the preservation of society," the Preamble to the Rules proclaims, and "[t]he fulfillment of this role requires an understanding by lawyers of their relationship to our legal system."[11] Yet, the role lawyers play in the legal system and in society remains undefined in the Rules. In places, the Preamble claims that the Rules themselves define lawyers' role in society,[12] but the definition provided by the Rules is far from clear. The Preamble states that "the Rules of Professional Conduct *when properly applied*" define the relationship of lawyers to the legal system.[13] But the "proper application" of the rules in light of their underlying principles and with reference to the deeper role of lawyers in society is the question at issue; it cannot also be the answer. According to the Preamble, the principles underlying the Rules include "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law."[14] But this formulation obscures the most basic questions about its application: Which of a client's interests are "legitimate"? How broadly or narrowly ought a lawyer interpret the notoriously elastic "bounds of the law"? In attempting to answer questions such as these, lawyers eventually encounter the more basic questions of professional role that the Rules leave undefined.

A. Professional Judgment in Action

The downward trajectory of professional judgment from questions of interpretation of the Rules to its roots in an understanding of lawyers' role in the legal system can be illustrated by an example drawn from my clinical teaching experience:

> **The Drug Awareness Class: To Pay or Not to Pay?**
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> A student in a juvenile justice clinic represents a 15-year-old client charged with felony burglary. The client was caught cutting the tags off of a hat in a retail clothing store. The student successfully negotiated a consent decree for the client, under which the

9. *Id.* at pmbl. ¶ 9.

10. *Id.* at pmbl. ¶ 14.

11. *Id.* at pmbl. ¶ 13; *see also id.* at pmbl. ¶ 14 (describing the rules as "partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role").

12. *Id.* at pmbl. ¶ 13 ("The Rules of Professional Conduct, when properly applied, serve to define that relationship [of lawyers to our legal system]."); *id.* at pmbl. ¶ 14 (the rules are "partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role"). In other places, however, they retreat from that claim. *See, e.g.*, *id.* at pmbl. ¶ 16 ("The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.").

13. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 13 (emphasis added).

14. *Id.* at pmbl. ¶ 9.

> client must stay out of trouble for six months and attend a drug awareness class. If the client meets these conditions, the charge will be dismissed; if the client fails to meet these conditions, he will end up with a felony delinquency adjudication on his record, which will risk his waiver into adult court if he is arrested for a felony again in the future. When the student contacts the client prior to the six-month follow-up hearing, she discovers that he has not yet attended the drug awareness class. The class, he tells her, costs $30 and his family has not been able to pay for it yet. The student wants to know whether it would be an ethical violation for her (or the clinic) to pay the fee for the client's drug awareness class.

As the following analysis will demonstrate, the process of exercising professional judgment in answering this question proceeds through three levels: (1) identification of the appropriate rule and a determination of where it requires discretion or interpretation; (2) analysis of the principles that underlie the rule, explaining its purpose or intent; and (3) decision making within the constraints of those principles, which draws on deeper understandings of the role lawyers are meant to play in the legal system and in society.

1. Level One: Identification of the Appropriate Rule

The ethical analysis of this question begins with a deceptively simple question about the language of the Rules of Professional Conduct. The operative rule is ABA Model Rule 1.8(e), which states: "A lawyer *shall not provide financial assistance to a client* in connection with pending or contemplated litigation; except that . . . a lawyer representing an indigent client may pay *court costs and expenses of litigation* on behalf of the client."[15] The question in applying the Rule to this situation is whether payment of the fee for a court-ordered drug education program falls within the general prohibition against "financial assistance" to a client or the limited permission to pay "court costs and litigation expenses" on behalf of an indigent client. The Comment that follows this rule provides limited guidance on interpreting what counts as "court costs and litigation expenses," describing as permissible the payment of "the expenses of medical examinations and the costs of obtaining and presenting evidence."[16] It contrasts these allowable costs and expenses with the dangers posed by permitting lawyers to "subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses."[17]

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15. *Id.* at R. 1.8(e) (emphasis added).
16. *Id.* at R. 1.8 cmt. 10.
17. *Id.*

Reading the language of the Rule and Comment, it is difficult to conclude that the payment of the fee for the court-ordered drug education class is either clearly prohibited by Rule 1.8(e) or clearly allowed. The fee is connected directly to the court case, and it is a more focused expense than the more general "living expenses" intended to fall within the rule's prohibition. Yet, paying the fee is not quite equivalent to paying for a medical examination or the presentation of evidence, expenses associated with trial investigation and preparation. The factual investigation in the juvenile case is over, and the fee for the drug awareness class is associated with the client's compliance with the court's judgment. Whether paying the fee ought to fall within the scope of the general prohibition against financial assistance or the exception for indigent clients appears to be a judgment call that requires the lawyer to exercise interpretive discretion.

Once interpretive discretion has been located, the question of how that discretion ought to be exercised comes to the surface. One approach is to view discretion as complete freedom: If nothing is prohibited or required, then anything is allowed.[18] The question posed by the student was: "Would it be an ethical violation to pay the fee?" The answer provided by a technical reading of the applicable rule is: "No." If the student wants to pay the fee on behalf of the client, she is free to do so; nothing in the Rules of Professional Conduct constrains her choice. If discretion is unconstrained freedom, then nothing but the bottom-line disciplinary floor limits a lawyer in either pursuing her self-interest or following her moral compass. However, this idea of "discretion as freedom" is not the sensitive professional judgment contemplated in the Rules, which relies on lawyers to seek guidance from the principles that underlie the rules and an understanding of the lawyer's role in the legal system and in society.

2. *Level Two: Analysis of the Principles That Underlie the Rule*

In exercising the sensitive professional judgment contemplated by the Rules, the lawyer in this case must take into account the purpose that the prohibition against financial assistance is meant to serve and the reason why there is an exception for indigent clients. The Comments to the ABA Rules provide insight into both. The Comment states two underlying policy concerns with providing financial assistance to clients: (1) financial assistance may distort the client's objectives by "encourag[ing] clients to pursue lawsuits that might not otherwise be brought"; and (2) by providing financial assistance, lawyers may acquire "too great a financial stake in the litigation."[19] The specific concern toward which the rule is directed is that lawyers will offer financial assistance to clients as an incentive to litigate a

18. *See* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 8–10 (1999) (calling this the Regulatory Model of legal ethics).

19. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 10.

contingent fee case, both drumming up litigation that the clients might not otherwise be inclined to pursue and giving the lawyer a personal stake in the client's recovery as a way of recouping the expenses that were either loaned or advanced to the client.[20] However, these dangers are outweighed by the policy interest in ensuring access to the courts for indigent clients, which is served by allowing lawyers to pay the court costs and litigation expenses that move a case forward.

Interpreted within the larger framework of the policies that underlie the Rule, the question requires analysis of whether paying the fee for the client's court-ordered drug awareness class will distort the client's objectives or the lawyer's incentives, or whether it will support and extend access to the legal process. However, the identification of this larger policy framework for analyzing the question does not necessarily answer the question. To answer the question of whether paying the fee would distort the client's objectives, impair the lawyer's advocacy, or appropriately extend the legal process, a lawyer must confront deeper questions about the function of the legal system and the lawyer's role within that system—in this case the role of lawyers for children in the juvenile court system.

3. Level Three: The Role of Professional Role Conceptions

Lawyers appointed to represent children in juvenile court play a complex role: They have adversarial duties similar to defense counsel in criminal cases, yet they fulfill these duties in the context of a problem-solving court system designed around the ideals of rehabilitation rather than punishment.[21] It is notoriously difficult for juvenile court lawyers to draw the line between adversary criminal defense advocacy that positions them to hold the system accountable—and, in some cases, frustrate the workings of the system to attain the client's goals[22]—and "best interests" representation of their child clients that aligns their representation more closely with the rehabilitative goals of juvenile court.[23]

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20. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 cmt. c (2000) ("Loans for purposes other than financing litigation expenses are forbidden in most jurisdictions and under this Section. That prohibition precludes attempts to solicit clients by offering living-expenses loans or similar financial assistance.").

21. *See generally In re* Gault, 387 U.S. 1, 15–16 (1967) (discussing that society's duty to a juvenile cannot be confined by the concept of merely justice but that the child should be "treated" and "rehabilitated").

22. *See, e.g.*, Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 182–84 (1983); John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 319–21 (1980); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2419–20 (1996).

23. *See, e.g.*, Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1421–24 (1996); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 288–95 (2003).

Consider this contrast between the reasoning of a lawyer who conceives of her role as "best interests" representation and a lawyer who positions herself in a "zealous advocacy" role in exercising professional judgment about the ethics of paying the client's fee for a court-ordered program:

> *Will paying the fee distort the client's objectives in the way that paying living expenses might distort a client's objectives in bringing a lawsuit?* Maybe the client's inability to attend the court-ordered program isn't wholly financial; maybe it is based in a deeper resistance to drug education. A "best interests" lawyer acting to facilitate the rehabilitative goals of the court might be concerned that paying the fee for the client would cloak the client's underlying resistance to treatment and diminish the client's sense of responsibility for addressing the problems that brought him into the juvenile justice system. A lawyer acting in the more adversarial "zealous advocacy" role would focus on getting the client out from under the court's supervision and might be inclined to pay the fee as the most expedient way of getting the charge dismissed.
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> *Will paying the fee give the lawyer a personal stake in the matter?* Although paying a $30 fee is not a large financial investment, it may still create a personal stake for the lawyer with consequences for the lawyer's advocacy at future hearings, especially if the client fails to attend the program after the lawyer pays the fee. A lawyer who conceives of her role as "zealous advocacy" might be concerned that her level of personal involvement would compromise her advocacy for the client if she pays the fee and the client still fails to attend the program. She may know too much about why the client was unable to attend the program, or she might feel a sense of personal betrayal that would compromise her advocacy. A "best interests" lawyer, who conceived of her role as facilitating the client's rehabilitation, would be more comfortable with transparency and experience less pause about the effect on her advocacy in the future should the court question her about why the client had been unable to complete a rehabilitative program after the lawyer had paid the fee.
>
> *Does paying the fee support and extend access to the courts?* If the client truly cannot afford to pay the fee of the court-ordered program, paying the fee on the client's behalf might be seen as an extension of access to the court. In that case, a "best interests" lawyer might see paying the fee on the client's behalf as facilitating the court's rehabilitative goals. However, a "zealous advocacy" lawyer focused on holding the court accountable in a more systemic way might find it more appropriate to go back to the court and advocate for a waiver of the fee, insisting that if the program is important for the client's rehabilitation and failure to

attend it creates legal consequences for the client, then the program should be provided at no cost.

A lawyer who is making decisions at this level probably does not have a fully-developed comprehensive conception of her role in the legal system. For example, most juvenile defense lawyers find themselves somewhere in between the two models sketched out above, drawing on both traditional models of criminal defense advocacy and some measure of "best interests" representation to reconcile the benefits of each approach to their clients and to the legal system.[24] But, as Barbara Babcock has pointed out, even traditional criminal defense advocacy is not monolithic; criminal defense lawyers justify their role in "defending the guilty" by grounding it in a variety of different reasons, which suggest different relationships between defense lawyers, their clients, and the criminal justice system.[25] Like most criminal defense lawyers, Babcock describes her own reasons for finding criminal defense work rewarding as an "amalgam" of the conceptions she describes.[26] Similarly, as I have explored in more detail elsewhere, what is called "client-centered representation" can be seen as shorthand for a plurality of lawyering approaches, each of which honor the value of client autonomy, and some of which tolerate significantly greater intervention into the client's decision-making process than others.[27]

Even without a fully developed comprehensive theory of role, the questions that a lawyer finds salient in an analysis such as the one sketched out above will suggest a conception of professional role that prioritizes and balances the strains of zealous advocacy and best interests representation in the circumstances at hand. And, this implicit understanding of professional role is likely to characterize that lawyer's approach to juvenile defense practice more generally. As the lawyer makes choices over time, a more or less coherent operative theory of professional role will emerge. Even if the specifics of that role conception remain under the surface, the lawyer will be living out a theory of professional role.

B. Implicit and Operative Theory

The vision of sensitive moral and professional decision making guided by underlying principles and grounded in deeper understandings of the role and function of lawyers in society is not limited to legal ethics. Nor is the idea that in exercising professional judgment a lawyer will be living out a

24. *See* Katherine R. Kruse, *Lawyers Should Be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J.L. & POL'Y 49, 99 (2004).

25. Babcock, *supra* note 22, at 177–78 (explaining the Garbage Collector's Reason, the Legalist's Reason, the Political Activist's Reason, the Social Worker's Reason, and the Egotist's Reason).

26. *Id.* at 178.

27. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 369 (2006).

theory of professional role, which operates implicitly under the surface of the lawyer's choices over time. The vision of professional decision making that the Rules invoke is rooted in familiar theories of jurisprudence and adjudication.

Ronald Dworkin opens his jurisprudential classic, *Law's Empire*, with a description of the majority and dissenting opinions in four well-known appellate cases from England and the United States in which the judges diverge in their legal interpretations of statutes or precedent.[28] In deciding such cases, Dworkin argues, judges develop "working theories about the best interpretation of their responsibilities."[29] One of Dworkin's most well-known examples, *Riggs v. Palmer*,[30] is a nineteenth-century probate case establishing that murderers cannot inherit from their victims.[31] According to Dworkin, a judge whose working theory of adjudication denies courts the authority to look past the plain terms of the statute will decide a case like *Riggs* in favor of the murdering grandson; a judge who believes that adjudication properly includes an analysis of the purposes underlying the statute will rule against the grandson.[32] These working theories of adjudication are grounded in judges' convictions about "the point—the justifying purpose or goal or principle—of legal practice as a whole."[33] Any argument advanced by a judge thus "assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others."[34] Even when a judicial opinion is dominated by citations and facts rather than explicit discussion of jurisprudential theory, Dworkin argues, the opinion contains within it a hidden legal philosophy.[35]

So it is, I argue, with theory and practice in legal ethics. When lawyers engage in the kind of "sensitive moral and professional judgment" contemplated by the ABA Model Rules—looking to the principles underlying the Rules as a guide to ethical decision making—they draw on implicit conceptions of a lawyer's role in the legal system and in society. The example of the juvenile defender trying to decide whether to pay the fee for a court-ordered drug education class illustrates the process within a particular field of law practice.[36] And, the question of how to balance competing conceptions of role arises more generally as well. Lawyers exercising professional judgment draw on conceptions of role in deciding the scope and meaning of their professional duties as they make case-by-case decisions about any number of questions: when and whether to reveal confidential information;

28. RONALD DWORKIN, LAW'S EMPIRE 15–30 (1986).
29. *Id.* at 87.
30. Riggs v. Palmer, 22 N.E. 188 (1889).
31. DWORKIN, *supra* note 28, at 15–20.
32. *Id.* at 87.
33. *Id.* at 87–88.
34. *Id.* at 90.
35. *Id.*
36. *See supra* Part I.A.

whether the representation of different clients will pose a conflict of interest for themselves or for their firm; on which representation decisions to consult their clients; and on what decisions to defer to their clients.

Theories of professional role in legal ethics focus on the lowest level of analysis in the exercise of professional judgment—the level that remains largely implicit in ethical decision making—and seek to develop comprehensive conceptions of the lawyer's role based on the nature of the adversary system of justice or the function of law in a liberal democratic society.[37] Like Dworkin's constructive interpretation of social practice, these theories begin with the common understanding or dominant conceptions of professional duty and professional role that operate implicitly within legal practice and use theory to either critique or reconstruct legal ethics based on the role lawyers play in the legal system and in society.[38]

II. Theories of Professional Role in Legal Ethics

The theoretical project in legal ethics has spawned a variety of critical and constructive accounts of lawyers' role in the legal system and in society. This part lays out the three best-developed theories of professional role in legal ethics: moral activism, contextual justice, and fidelity to law. Each theory proposes and defends a single value—morality, substantive justice, or respect for the rule of law—as the organizing principle that coordinates lawyers' conflicting duties to clients, to the legal system, and to society, grounding professional duties in deeper moral, political, or jurisprudential theory about the role of lawyers. Each theory also offers a rubric or framework for producing answers to tough ethical issues that reflects the proper coordination and priority of the competing moral and professional values that the theory has coordinated. This part provides a thumbnail sketch of each of these competing theories, focusing on the rubrics or frameworks that each offers to practitioners as a guide to ethical decision making. Part III will take up the question of why these rubrics or frameworks fail to provide direct guidance in the exercise of professional judgment.

A. Moral Activism

In the view of the early critics of the lawyer's professional role, the moral justifications for the lawyers' neutral, partisan advocacy were too weak to underwrite zealous pursuit of client objectives that trampled on the

37. *See, e.g.*, Tim Dare, The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role 1–14 (2009); Daniel Markovits, A Modern Legal Ethics: Adversary Advocacy in a Democratic Age 3–5 (2008); Wendel, *supra* note 6, at 17–29.

38. *See, e.g.*, David Luban, Lawyers and Justice: An Ethical Study 104–27 (1986); Simon, *supra* note 6, at 7–25; Wendel, *supra* note 6, at 17–29.

rights of others and caused harm to third parties and to society.[39] The target at which the early critics aimed—often called the "standard conception" of the lawyer's role[40]—was a caricatured version of zealous advocacy in which the lawyer pursues the legal interests of the client by stretching the bounds of the law to fit the client's unbridled pursuit of wealth, freedom, and power.[41] Moral theorists argued that the standard conception captured a lawyer's moral duties in some kinds of legal practice, most notably criminal defense.[42] However, they argued, lawyers unreflectively invoke their adversarial role as an excuse to visit morally unjustifiable harm on innocent third parties outside the contexts in which partisan zeal is justified: in non-litigation settings where no third-party arbiter is present to provide a check on partisan zeal[43] and in civil suits between private parties, where truth seeking takes precedence over the protection of individuals against state power.[44]

In the best-known and most sustained theoretical critique of lawyers' professional role morality, David Luban argued that the lawyer's partisan role must be morally justified by showing that the behavior is required by the advocate's role in the adversary system and that the adversary system is itself morally justified.[45] Luban went on to systematically demolish the familiar arguments justifying the adversary system: that it is the best way to determine truth, the best way to protect legal rights, and the best way to reflect society's commitment to enhancing personal autonomy and protecting human dignity.[46] Luban concluded that none of these arguments are satisfactory moral defenses of the adversary system outside of the criminal defense paradigm, a context he defined to include the representation of relatively powerless clients seeking redress or defending their rights against the state or other economically powerful institutional players.[47] Outside the criminal defense paradigm, Luban argued, the adversary system is justified only by the weak pragmatic argument that it "seems to do as good a job as any at finding truth and protecting legal rights" and "the costs of replacing it outweigh the benefits."[48]

Luban's framework for resolving questions of professional ethics that arise in day-to-day practice depends heavily on the moral justification for the lawyer's zealous advocacy role. Rather than permitting lawyers to justify their behavior with rote appeals to professional role, Luban urged a

39. Postema, *supra* note 1, at 74–81; Schwartz, *supra* note 5, at 671; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 32–33; Wasserstrom, *supra* note 5, at 15–24.

40. Postema, *supra* note 1, at 73; LUBAN, *supra* note 5, at 20.

41. *See, e.g.*, LUBAN, *supra* note 5, at 24–26.

42. *Id.* at 58–62.

43. Schwartz, *supra* note 5, at 671.

44. LUBAN, *supra* note 5, at 58–66.

45. *Id.* at 133–37.

46. *Id.* at 68–92.

47. *Id.* at 58–66.

48. *Id.* at 92.

"fourfold root" analysis, in which lawyers take into account the strength of the moral justification for their role in deciding whether to adhere to or break from role to prevent harm to third parties.[49] In deciding whether to break from role under Luban's rubric, the lawyer must take into account: (1) the moral justification for the adversary system of justice; (2) how essential the role of partisan advocate is to the proper functioning of that system; (3) how essential the obligation of zeal is to the fulfillment of the role; and (4) whether the act is required to fulfill the obligation of zeal.[50] Each of these factors should be viewed, Luban argued, as links in a chain of moral justification for a role-determined action. The moral argument operates as a cumulative weight test that "may be undermined at any of its links."[51] A weak argument at any link within the chain diminishes the weight of the justification at ensuing steps.[52]

Luban's fourfold root structure becomes clear when you contrast its operation in contexts where the adversary system is strongly justified with its operation in other contexts, where partisan advocacy is only weakly justified. In the criminal defense context, Luban argued, zealous partisan advocacy "has weighty justifications" that "can support broad institutional excuses";[53] however, in the civil suit paradigm, "the adversary system doesn't excuse much more than the most minor deviations from common morality."[54] Under Luban's structure, the weight of justification at the first step—the justification for the adversary system itself—is passed along the chain in deciding whether the moral justification for adhering to professional role outweighs the moral reasons to break from professional role. Hence, lawyers representing Robert Garrow in the infamous Lake Pleasant "hidden bodies" case were morally justified in keeping confidential the information they learned from their client about the location of bodies of his previous murder victims despite the anguish it caused to the missing victims' families.[55] In the criminal defense paradigm, according to Luban's rubric, confidentiality is strongly justified by "the positive moral good of overprotecting individual rights against encroachment by the state."[56] But

49. *Id.* at 128–47. Luban clarified his views in David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to* Lawyers and Justice, 49 MD. L. REV. 424 (1990).

50. LUBAN, *supra* note 5, at 132.

51. *Id.*

52. *Id.* at 134.

53. *Id.* at 148.

54. *Id.* at 149.

55. *Id.* at 53–54, 149. In this case, lawyers Frank Armani and Frank Belge represented serial killer Robert Garrow in a murder in upstate New York. Garrow confessed to them that he had committed additional murders and informed them of the location of the bodies of three of his victims. Belge and Armani confirmed the information but did not report the information to the authorities until Garrow agreed to reveal it as part of an insanity defense. The lawyers also failed to respond to direct pleas from the families of the victims for information about their missing relatives. LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 164–75 (2d ed. 2008).

56. LUBAN, *supra* note 5, at 149.

this is not the case with the lawyers defending John Zimmerman in a personal injury lawsuit who failed to reveal to the plaintiff that their defense expert had discovered in his examination that the plaintiff had a life-threatening aortic aneurysm possibly caused by the car accident.[57] Because the *Spaulding* case occurred in the civil suit paradigm, the weak justification for the adversary system was passed on along the chain of the fourfold root analysis and was insufficient to justify the moral harm of maintaining the confidentiality of that potentially life-saving information.[58]

Luban's theory of legal ethics creates a theoretical framework that subsumes role obligation into moral obligation. A lawyer's professional duties become a subset of the lawyer's other moral duties, and his theory provides a common metric of moral analysis for weighing and balancing moral and professional duties in making decisions about adherence to or deviation from professional role in specific circumstances.

B. Contextual Justice

William Simon has developed a political and jurisprudential framework for the exercise of professional judgment that ties lawyers' decision making in particular cases directly to the underlying principles and values of law and legal process.[59] Simon joined the early critics of the standard conception of legal ethics, arguing that all of the available justifications for neutral, partisan legal ethics are incoherent and fail on their own terms.[60] However, he departed from the early critics' focus on improving the moral agency of lawyers and focused instead on constructing "a jurisprudential argument for the improvement of the lawyer's role" that incorporated a broader range of public values into day-to-day lawyering decisions.[61] Rather than seeing the relevant public values as springing from lawyers' personal moral judgments, he saw them as growing out of lawyers' professional roles.[62]

Simon's primary target was the categorical nature of professional ethical judgment under what he called the "dominant view" of legal ethics.[63] The dominant view of legal ethics endorses the idea that "the lawyer

57. John Zimmerman was the driver of a car in an accident that injured his neighbor and coworker, David Spaulding. Zimmerman's lawyers learned in discovery that Spaulding had a life-threatening heart aneurysm that may have been caused by the accident. Although this information was unknown to Spaulding, Zimmerman's lawyers did not reveal it to them. Instead, they went on to settle the case. When Spaulding later learned about his condition, he moved to reopen the settlement. Spaulding v. Zimmerman, 116 N.W.2d 704, 706–07 (Minn. 1962); *see also* Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions:* Spaulding v. Zimmerman *Revisited*, 83 MINN. L. REV. 63, 63–65 (1998).

58. LUBAN, *supra* note 5, at 150.

59. SIMON, *supra* note 6, at 10.

60. *Id.* at 36–37.

61. *Id.* at 17.

62. *Id.*

63. *Id.* at 9.

must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim" without regard to its effect on third parties or the public good.[64] Lawyers who accept the dominant view, Simon argued, adhere categorically to professional norms like loyalty, confidentiality, and partisan zeal even when they lead to injustice in particular cases.[65] The disregard for the public interest in the dominant view is typically defended by the argument that adherence to categorical professional norms serves justice in the long run: Strict rules of confidentiality encourage clients to disclose sensitive information; zealous partisan advocacy is the best way to ferret out the truth.[66] Yet, Simon argued, the behavioral assumptions on which these essentially empirical claims are based have remained untested.[67] According to Simon, the argument that a client has a right to pursue injustice is similarly flawed; it makes sense only against the problematic backdrop of libertarian political theory and formalist jurisprudence.[68]

Simon proposed replacing the various categorical norms in legal ethics with a single imperative that lawyers exercise contextualized judgment to "take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice," or as he interchangeably called it, "legal merit."[69] The equation of "justice" and "legal merit" in Simon's theory of legal ethics rests on both a broad definition of law and a narrow definition of justice. In a jurisprudence influenced heavily by Ronald Dworkin, Simon argued that determinations of legal merit are not limited to the positive law enacted by legislatures and courts but include assessment of the underlying principles and background values that justify the law.[70] Justice, as Simon used the term, is not an extra-legal concept based in moral principles but is the best understanding of the background values, principles, and purposes immanent in the law that make the law coherent and establish its legitimacy.[71] Legal merit and justice come together through the process of examining the law in light of its underlying principles and the background values that align law with justice.

In making judgments about the actions most likely to promote justice, lawyers must also take into account a threshold question of institutional competence, comparing their own capacity to reach reliable determinations

64. *Id.* at 7–8.

65. SIMON, *supra* note 6, at 53.

66. *Id.* at 54–68.

67. *Id.* at 54.

68. *Id.* at 26–27.

69. *Id.* at 9, 138.

70. *Id.* at 38–39; *see also* David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 886–87 (1999) (discussing the influence of Dworkian jurisprudence on Simon's theory of legal ethics).

71. SIMON, *supra* note 6, at 138–39.

of justice with that of other legal officials.[72] The adversary system assigns lawyers the role of client advocates, Simon posited, because judges and other legal officials are usually better positioned than lawyers to reach reliable determinations of justice.[73] In situations where the system is functioning effectively, lawyers can suspend their own assessments of legal merit, pursue partisan objectives, and assume that the judgment of other legal officials about what outcomes best accord with justice.[74] However, when an adversary or an official decision maker "lacks information or resources to initiate, pursue or determine a claim" or where officials are "corrupt, or politically intimidated, or incompetent," lawyers must take direct responsibility for achieving substantive justice—even if that means foregoing legal arguments that the lawyer might otherwise be able to make on the client's behalf.[75]

What at first sounds like a fairly straightforward maxim—that lawyers should "take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice"—turns out to be surprisingly complex in its application.[76] Lawyers' commitment to contextual justice and legal merit may require them to forego possible literal interpretations of law that would benefit their clients.[77] Conversely, it may require lawyers to disregard or nullify laws that are inconsistent with the deeper underlying principles and background values that render the law legitimate.[78] Simon's contextual approach usually requires lawyers to interpret the law according to its intended purposes though lawyers must remain "alert for indications that a purposive approach" will not further the interests of justice.[79] The contextual view does not completely rule out lawyers' use of partisan tactics; but in deciding how far to go, lawyers must consider the balance of advocacy and the institutional competence of officials to reach reliable determinations of justice. What most differentiates the contextual judgment approach is the kind of consideration that takes primacy in lawyers' professional judgment: In all cases, lawyers' primary commitment must be to promoting justice, not to advancing their clients' interests or to following their own moral compasses.

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72. *Id.* at 139–40; *see also* Simon, *The Legal and the Ethical: A Brief Rejoinder to Comments on* The Practice of Justice, 51 STAN. L. REV. 991, 1004 (1999) (clarifying that the analysis of institutional competence is a threshold question).

73. SIMON, *supra* note 6, at 139–40.

74. *Id.* at 138–39.

75. *Id.* at 140.

76. *Id.* at 9, 138.

77. *Id.* at 50–52.

78. *Id.* at 77–108.

79. SIMON, *supra* note 6, at 145.

C. *Fidelity to Law*

Bradley Wendel has provided the most recent comprehensive theory of professional role in his book, *Lawyers and Fidelity to Law*, reinterpreting and defending the traditional principles of partisanship, neutrality, and moral nonaccountability in light of the function of law and lawyers in a liberal democracy.[80] Like Simon, Wendel focused his redefined theory of legal ethics on the lawyer's obligation to "act on the basis of her clients' legal entitlements, not her clients' interests or her own views about what substantive justice requires."[81] However, Wendel rejected Simon's vision of contextual justice, and the Dworkian jurisprudence on which it is based, on the ground that its reliance on background values ends up importing the lawyer's extra-legal normative judgments into the interpretation of legal merit.[82] Fidelity to law, Wendel argued, requires positivist interpretation of law, which is significantly more deferential to the public processes of lawmaking.[83]

Wendel's theory of legal ethics is grounded in a deeper theory about the function and legitimacy of law in a liberal democracy characterized by deep, persistent, and ultimately irreconcilable normative controversy. In a society characterized by reasonable moral pluralism, Wendel argued, citizens will disagree about the normative criteria for measuring justice.[84] Law provides a way to transcend normative controversy and transform contested normative claims into agreed-upon criteria of legality.[85] Law deserves respect even from those who disagree with its content, Wendel argued, because law establishes a stable framework within which citizens can coordinate their activities despite their differences.[86] Fidelity to law is underwritten by the normative attractiveness of democratic lawmaking processes, which "manifest respect for the equality and dignity of all citizens."[87]

In practical terms, Wendel's fidelity-to-law conception of the lawyer's role in society precludes gamesmanship and sharp practices that toy with the ordinary meaning of law as understood within the accepted interpretive practices of lawyers, judges, and other participants in the legal system.[88] To play games with legal interpretation is to disregard the enactments of the political community in favor of one's own interests.[89] It also precludes law-

80. WENDEL, *supra* note 6, at 5–8.
81. *Id.* at 48.
82. *Id.* at 46–48. Luban has raised a similar critique of Simon's theory of legal ethics. Luban, *supra* note 70, at 885–88.
83. W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 382–83 (2004).
84. WENDEL, *supra* note 6, at 88.
85. *Id.* at 91–92.
86. *Id.* at 87–88.
87. *Id.* at 88.
88. *Id.* at 190–94.
89. *See id.* at 196.

yers from nullifying unjust laws covertly or "dress[ing] up moral advice as a judgment about what the law permits."[90] When one holds oneself apart from the intended reach of law, Wendel argues, it exhibits disrespect for the equality and dignity of other citizens[91]—whether one does so to promote a client's interests or out of a personal sense of morality or justice.[92]

However, Wendel conceded that even within his fidelity-to-law conception of legal ethics, some amount of interpretive judgment is required. "If it were possible to read the meaning of law directly from legal texts," Wendel wrote, the lawyer's basic job of ascertaining and protecting a client's legal entitlements would be fairly straightforward.[93] However, because the interpretation of legal requirements is notoriously indeterminate, lawyers must exercise interpretive judgment about the relative plausibility of possible interpretations.[94] Such interpretive judgment does not provide a free-for-all of unbounded discretion, he argued, because interpretation is "fundamentally a community-bound process" that draws on intersubjective criteria for validity.[95] Lawyers, Wendel argued, should approach the law from a Hartian "internal point of view," which acknowledges law as a source of reasons for action and draws on specifically legal materials—statutory texts, cases, legislative history materials, underlying principles, and canons of interpretation—as resources for conforming behavior to the community's resolution of contested normative issues.[96]

Rather than providing a specific rubric for ethical decision making, Wendel argued that legal interpretation is best thought of as a craft defined by internal standards of good practice.[97] Drawing on Aristotelian conceptions of virtue ethics, Wendel argued that the excellence of good lawyering is judged by how well or poorly a practitioner achieves the ends of law practice.[98] Because Wendel views the function of law as the settlement of normative controversy in society, his theory of legal ethics holds lawyers responsible for "preserv[ing] the common framework of law and respect for legal institutions" that promotes law's goal of stability and social coordination.[99]

Each of the foregoing theories in legal ethics provides a coherent and comprehensive conception of professional role that is well justified by its

90. WENDEL, *supra* note 6, at 139.

91. *Id.* at 98–99.

92. *Id.* at 8–11.

93. *Id.* at 176.

94. *Id.* at 185–87.

95. *Id.* at 196.

96. *See generally* W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473, 1492–98 (2006) (discussing how the Hartian "internal point of view" applies to lawyers).

97. WENDEL, *supra* note 6, at 184.

98. *Id.*; *see also* Wendel, *supra* note 1, at 525.

99. Wendel, *supra* note 83, at 366.

proponents on the basis of sound moral, political, or jurisprudential theory. Moral activism subsumes professional obligation into common morality, requiring that the moral justification for a lawyer's professional duties outweigh any moral harm caused by adhering to them.[100] The contextual view prioritizes the duty to promote substantive justice over competing duties to pursue client interests or even to obey the positive law, interpreting those other duties as means toward the end of achieving substantive justice.[101] Fidelity to law underscores respect for the rule of law in a liberal democracy as an organizing principle that limits partisan duties to the protection of a client's legal entitlements, as those entitlements are understood within the accepted interpretive practices of the relevant legal community.[102]

It would seem to follow that theories of professional role could usefully provide direct guidance in the exercise of professional judgment. After all, as Part I demonstrated, the exercise of sensitive professional judgment ultimately turns on implicit operative understandings of the role that lawyers play in the legal system, and theories of professional role bring to the surface and define more clearly the conceptions that operate at the shadowy lower levels of professional judgment. However, as the next part argues, the interaction between theory and practice is not as simple as it seems.

III. Theory and Practice in Legal Ethics

While theory abstracts, simplifies, and unifies, practice remains complex, multivariable, and deeply contextualized. The abstraction of theory from real-life complexity makes theory difficult to access as a direct guide to practical judgment, and the multiplicity of competing theories that result from academic discourse reduces the prospects that any theory will be acceptable as the one true guide to judgment. After exploring these challenges, this part examines the pragmatic use of theory in medical ethics to argue that lawyers in practice may be better served by viewing their conflicting professional obligations as plural sets of professional values—loyalty to clients, confidentiality, access to justice, respect for the rule of law, and respect for legal process—than they are by trying to resolve those conflicting values into a single, simplified theory. However, it would be a mistake to conclude that the theoretical project of creating and critiquing unified and simplified comprehensive theories of professional role has no use to the pragmatic project in legal ethics. This part concludes that theoretical debate sets helpful parameters around the exercise of professional judgment by providing a check against self-interested manipulation of professional values and in shaping our understanding of the situations in which different professional values tend to have priority.

100. *See supra* Part II.A.
101. *See supra* Part II.B.
102. *See supra* Part II.C.

A. *Problems with Utilizing Theories of Professional Role to Guide Professional Judgment*

Theorists in legal ethics have both acknowledged and responded to one kind of criticism about the utility of theory to practice: that the rubrics they lay out for the exercise of professional judgment are too complex for ordinary lawyers to use in practice. However, this criticism does not pose the biggest problem to using theory as a guide to practice. The more fundamental problems are that a good theory necessarily oversimplifies and abstracts from the messiness of real life in ways that make it inaccessible and that, taken as a whole, the theoretical project spawns multiple theories to choose from and no clear way to make the choice among them.

1. What's Not the Problem: Complexity

One possible problem with applying theory directly to practice is the perceived complexity of the rubrics or frameworks that theorists in legal ethics provide. For example, in explaining his theory of legal ethics, David Luban laid out a seven-step process for applying the fourfold root structure he offered for balancing the morality of a professional role against the moral harm associated with deviating from professional role.[103] Luban conceded that "[i]t seems like a lot to ask; it all looks like a veritable night in Gethsemane every time a lawyer wants to take what might be described in some circles as 'a lousy four-bill landlord-tenant case.'"[104] Simon's contextual justice theory of legal ethics has been criticized as requiring Herculean intellectual efforts that are "too strenuous for ordinary decision-making by ordinary lawyers."[105] As critics point out, to determine what justice requires in the relevant circumstances of a particular case under Simon's theory, lawyers must understand what the law formally requires and prohibits; analyze the extent to which the law's formal requirements are justified by the law's underlying purposes, deeper principles, and background values; and assess the lawyer's institutional competence to determine substantive justice compared to other institutional actors.[106] Such complex and professo-

103. His step-by-step process was as follows:

1. Identifying the institution, the role, the role obligation and the role act.
2. Assessing the institution, role and role obligation in the light of the ends they are to serve.
3. Applying the minimum-threshold test: determining whether, at each link, the credits and debits indicate that the entity (institution, role, role obligation, role act) is justified.
4. Applying the cumulative-weight test: determining the total significance of the various policy arguments to the role act.
5. Assessing the relevance of the policy arguments to the case at hand.
6. Resolving the dilemma by weighing the justification of the role act against the moral offense of performing it.
7. Acting.

LUBAN, *supra* note 38, at 140.

104. *Id.*

105. Luban, *supra* note 70, at 896; *see also* WENDEL, *supra* note 6, at 46.

106. Luban, *supra* note 70, at 895.

rial analysis, critics have contended, may be too much to ask of "a harried tax lawyer on April 12."[107]

One response that theorists give to the too-complex-for-ordinary-lawyers criticism is that deliberating about the justifications for one's professional role in a particular case is not as hard as it looks when you try to break down the steps and describe them on paper. In fact, complex reasoning is something we do all the time without knowing it. "If you try to enumerate the mental operations involved in doing your week's grocery shopping," Luban suggested by analogy—enumerating how many people you need to feed, figuring out how many meals there will be, what menus to cook, what ingredients you have, what ingredients you need to buy, etc.—"it seems astonishing that you eat at all."[108]

Moreover, theorists respond, lawyers can fall back on general rules and internalized professional norms to resolve many run-of-the-mill ethical questions that arise repeatedly in day-to-day practice.[109] As Simon noted, practitioners routinely rely on tactical rules of thumb like "never ask a question [on cross-examination to which] you don't know the answer" and deviate from these rules of thumb when the circumstances suggest a different course, reserving "subtle and elaborate analysis of tactical choices" for situations in which "time permits and the stakes are high."[110] Theories of professional role typically suggest variation based on the general context or nature of practice: criminal, civil, litigation, or transactional.[111] Although lawyers must think through the broad parameters of professional obligation in their chosen careers at some point, lawyers need not reinvent the wheel every time they face an ethical dilemma.[112]

The theorists' instinct that lawyers in practice develop an internalized sense of professional role accords with cognitive psychologists' understanding of the way experts solve problems. In the process of developing professional expertise, professionals internalize scripts or schemas for structuring the relevant information.[113] Experts circumvent the limits on the quantity of information that the human brain can process "at least in part because they have organized their knowledge into libraries of patterns" that allow them

107. *Id.* at 894.

108. LUBAN, *supra* note 38, at 141.

109. SIMON, *supra* note 6, at 157.

110. *Id.*

111. *See generally* LUBAN, *supra* note 38, at 58–66 (describing the difference between the criminal and civil law paradigms); SIMON, *supra* note 6, at 197–203 (describing an enforcement regime based on the development of context-specific rules and norms); WENDEL, *supra* note 6, at 187–94 (discussing variation in fidelity to law in criminal litigation and civil counseling and transactional practice).

112. LUBAN, *supra* note 38, at 141.

113. Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Problem Solving*, 11 CLINICAL L. REV. 149, 167 (2004).

to work through a problem more quickly and efficiently.[114] When confronted with a new problem, experts draw on these internalized schemas to hone in on the relevant facts, analyze the problem according to its deep structure, and formulate solutions based on previous experience with structurally similar problems.[115] An expert problem solver will move through the intermediate steps of reasoning so automatically and unconsciously that the process will seem intuitive.[116]

When considered as an aspect of expert problem solving, the complexity of professional judgment seems more apparent than real. When a theorist in legal ethics tries to explain how a lawyer would move through all the intermediate steps of applying his or her theory of professional role to a complex factual situation, the considerations that come into play sound dauntingly complex. However, a reasoning process that looks complex on paper is not necessarily going to be either too time consuming or too intellectually taxing in the hands of a seasoned professional.

2. *The Abstraction of Theory*

A more serious problem with applying theories of professional role directly to the exercise of professional judgment is that the simplicity and abstraction of such theories make them largely inaccessible as guides to practice. Legal ethics is famously characterized by a plurality of professional role conceptions and accompanying professional values: Lawyers are representatives of clients, officers of the legal system, and public citizens having special responsibilities for the quality of justice.[117] Each of the comprehensive theories in legal ethics discussed in Part II resolves the tensions between lawyers' conflicting professional obligations by demonstrating how apparent conflicts can be reconciled as manifestations of a single underlying value: morality, justice, or fidelity to law. The resolution of competing professional values into a comprehensive theory of legal ethics thus provides a single unifying principle for legal ethics and in the process simplifies and abstracts lawyers' competing professional duties.

The simplification and abstraction that characterizes comprehensive theories in legal ethics is endemic in any theoretical project. In the world of theoretical explanation, elegance and simplicity are virtues. In the process of developing a comprehensive explanation that grounds and unifies divergent values, theory must significantly oversimplify and abstract from life. A theory that has too many qualifications and exceptions—that takes too

114. STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 353 (2009).

115. Krieger, *supra* note 113, at 167–68; *see also* Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1, 24–26 (1998) (discussing different protocols between experienced and inexperienced problem solvers).

116. ELLMANN ET AL., *supra* note 114, at 351; Weinstein, *supra* note 115, at 26.

117. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (2011).

many divergent possibilities into account—might be a more accurate description of the complexity of life, but it would not be a very good theory.

Consider an analogy to moral reasoning. When we encounter a challenging moral issue—for example, whether to authorize a hospital to terminate life support for one's beloved relative in an irreversible coma—we may experience the pull of conflicting moral values, like respect for our loved one's autonomy and dignity, respect for human life, the desire to end suffering, and the desire not to impose unnecessary cost on others. We ask ourselves: What would my loved one have wanted me to do? Is it worth the discomfort to her and the expense to others to prolong her life needlessly? Does mitigation of discomfort and expense ever provide a good enough reason to terminate a human life?

Some of the great moral philosophers of all time have proposed basic principles designed to provide answers to these kinds of moral questions. Kant's Categorical Imperative suggests that we consider whether the maxim of our action could be willed as a universal law.[118] Bentham's Utility Principle urges that we apply a hedonic calculus to determine what action would serve the greatest good for the greatest number.[119] Yet, most people do not dust off their copies of these great works to get a direct answer to a difficult moral question. High moral theory just is not that useful. When we try to apply an abstract theoretical framework directly to a real-life situation, we get bogged down in the process of filling in the steps that take us down from the higher levels of abstraction to the messiness and complexity of the world we experience. Someone attempting to apply the Categorical Imperative to a moral question would likely stumble at the first step: trying to formulate the maxim of a proposed course of action.

Theories of professional role are closer to the ground than Bentham or Kant; but because comprehensive theories of professional role have the simplified and abstracted quality of good theory, the problems with applying high moral theory to practice are applicable to theories of professional role as well. Consider, for example, how a lawyer might be guided by existing theories of professional role on the question presented in Part I: whether to pay the fee for a court-ordered drug awareness class that is a condition of the client's consent decree. The moral activist approach would deem the lawyer to be in the criminal defense paradigm, in which there are strong justifications for partisan advocacy. However, it would say little about what either partisan duty or morality would dictate regarding the question of paying the fee for the court-ordered program. The contextual justice approach would advise taking the action that best contributed to justice in the circumstances, as informed by the underlying principles and

118. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSIC OF MORALS 33–37 (Allen W. Wood trans., Yale Univ. Press 2002) (1785).

119. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

background values immanent in the law, but it would not provide a clear answer to the key question: whether paying for the drug treatment class contributes to the underlying principles and goals of the juvenile justice system or detracts from them. The fidelity to law approach would consider what course of action would best reflect the intended purposes of the relevant substantive and procedural law and demonstrate respect for the law and legal system, but it would not really answer the question of whether the lawyer's payment of the fee for the court-ordered program usefully supplemented or circumvented those rules, procedures, and systems.

In each case, the theory of legal ethics would tell the lawyer what underlying considerations should guide professional judgment. However, none provide much additional guidance in applying those considerations to the facts at hand because the values that are assigned the highest priority—morality, justice, or respect for law and legal processes—are insufficiently specified in the theory itself. The devil is in the details, and the details come into focus only as one steps down from the abstraction of theory to its implementation in practice.

3. A Multiplicity of Theories

In addition to the problem of abstraction, the theoretical project in legal ethics, when taken as a whole, has generated a confusing multiplicity of theoretical frameworks.[120] Paradoxically, although each theory strives to simplify and unify a lawyer's professional duties, the generation of multiple theories creates an additional level of choice from the perspective of a lawyer facing an ethical question. The question, "What should I do?" becomes complicated by the metaethical question, "How should I choose which framework to use for determining what I should do?"[121] Theorists disagree—often vigorously—among themselves about the answer to the metaethical question. Going down the rabbit hole of theory for guidance on practical questions is likely to be more frustrating than illuminating, as "[a] few minutes spent glancing through the articles in any of the leading philosophy journals, with their cramped, obsessive epicycles on philosophers' objections to each other" will quickly reveal.[122]

As a philosophy graduate student in the mid-1980s, the problem of a multiplicity of ethical theories was driven home for me when I taught discussion sections in large-enrollment Introduction to Ethics courses populated primarily by undergraduate business majors. I imagine that the school of business intended its requirement that each business major take three credits of ethics to raise the ethical standards of the business world. What I

120. *See* Alice Woolley, *The Legitimate Concerns of Legal Ethics*, 13 LEGAL ETHICS 168, 170–71 (2010).

121. *See* Paul Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 500–02 (1999).

122. Luban, *supra* note 70, at 897.

saw instead was the look of bewilderment on the faces of the future business leaders of America as one theory of ethics after another was paraded before them and found to be inadequate in one way or another. Over the course of the semester, the students seemed to be concluding what one might well conclude after a deep plunge into theory: that there are a lot of different ways of approaching a moral issue and all of them are wrong.[123]

Perhaps the most encouraging thing that can be said about the multiplicity of theoretical frameworks is that for many questions, it does not matter which framework you choose because different theoretical roads often lead to the same destination.[124] This, at least, was the conclusion of Albert Jonsen and Joseph Toulmin based on their experience working with a national commission set up by Congress in 1974 to review regulations relating to human subjects of biomedical and behavioral research.[125] The commission was comprised of eleven members—scientists, philosophers, theologians, and laypersons—representing a variety of different religious and political backgrounds and viewpoints.[126] According to Jonsen and Toulmin, "[a]gain and again the commission's deliberations displayed the same unforeseen feature."[127] When presented with actual case studies, the commissioners were in substantial agreement about the results; it was only when commissioners began to explain the reasons for reaching these results that serious disagreement emerged.[128]

Jonsen and Toulmin are philosophers in the field of bioethics, where the problems of directly applying ethical theory to practical judgment have led theorists to reject a "top-down" deductive approach to ethical questions that arise in the practice of medicine and to develop more pragmatic uses of theory.[129] The next section examines in more detail the pragmatic project in medical ethics, seeking guidance for developing the appropriate relationship between theory and practice in legal ethics.

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123. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 337 (5th ed. 2001) (noting that the unfortunate effect of a "textbook approach to moral theory [that] presents several competing theories and then proceeds to criticize each one" is that "readers become skeptical about the value of ethical theory").

124. Woolley, *supra* note 120, at 173.

125. ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 16, 17 (1988).

126. *Id.* at 17.

127. *Id.*

128. *Id.* at 18; *see also* BEAUCHAMP & CHILDRESS, *supra* note 123, at 377 ("Convergence as well as consensus about principles among a group of persons is common in assessing *cases* and framing *policies*, even when deep theoretical differences divide the group.").

129. John Arras, *Principles and Particularity: The Role of Cases in Bioethics*, 69 IND. L.J. 983, 988–91 (1994).

B. *The Pragmatic Project in Medical Ethics: Principles and Paradigm Case*

In the field of biomedical ethics, theorists have largely rejected what John Arras has called a "Consumer Reports" version of ethical consultation: explaining what, in a given situation, a Kantian would do; what solution a utilitarian would promote; what a natural rights theorist would advocate; etc.[130] As Arras points out, this approach "might not prove enormously helpful to those doctors, nurses, and social workers who have not quite figured out where they stand in the ongoing debate between the partisans of Kant, Mill, and Locke."[131] Professionals in the medical field need to make decisions; they cannot afford the luxury of waiting for moral theorists to develop definitive answers to questions that have been the subject of "more than two thousand years of ethical debate among philosophers with rival views" without the emergence of a clear winner.[132]

In an effort to make theory more accessible and useful to practice, leading biomedical ethicists Tom Beauchamp and James Childress developed a pragmatic approach to professional judgment—called "principlism"—which specifies a limited set of mid-level principles that "function as guidelines for professional ethics."[133] Bioethicists do not purport to determine answers to every ethical question by reference to these principles; indeed, they expect the principles to come into conflict, requiring further specification or balancing in the context of particular cases.[134] However, the principles guide the exercise of professional judgment, keeping "judgments *principled* without removing agent *discretion*."[135] A more radical pragmatic approach—called "casuistry"—eschews reference to principles altogether, in favor of reasoning by analogy from paradigm cases.[136] The revival of casuistry in biomedical ethics embraces moral reasoning as essentially practical rather than theoretical,[137] views the locus of moral certainty in our moral reactions to concrete cases,[138] and uses our moral intuitions in paradigm cases to derive general maxims that give presumptive answers for analogous cases.[139]

Although principlism and casuistry have been considered rival views in the field of biomedical ethics, more refined versions of each have begun

130. *Id.* at 989.
131. *Id.*
132. *Id.*
133. BEAUCHAMP & CHILDRESS, *supra* note 123, at 12.
134. *Id.* at 386–87.
135. Tom L. Beauchamp, *Principles and Other Emerging Paradigms in Bioethics*, 69 IND. L.J. 955, 957 (1994).
136. *See* RICHARD B. MILLER, CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING 4–6 (1996); JONSEN & TOULMIN, *supra* note 125, at 250–57.
137. JONSEN & TOULMIN, *supra* note 125, at 24–36.
138. *See id.* at 18.
139. *Id.* at 306–07.

to converge into a pragmatic approach that utilizes both paradigm cases and principles to guide ethical decision making.[140] Moderate versions of casuistry admit that principles, theories, and cultural norms play a role in locating a situation within the taxonomy of paradigm cases and in deriving the maxims that allow one to move analogously from case to case.[141] And, the leading proponents of principlism have conceded that their set of guiding principles is largely indeterminate and must be further specified through application to the more complex facts of specific cases.[142] Principlists now seek "general coherence and a mutual support among the accepted norms" by a process of "matching, pruning, and developing" the principles through interaction with considered moral judgments in paradigm cases.[143] As Beauchamp and Childress put it, neither general principles nor paradigm cases can do the job alone: "Principles need to be made specific for cases, and case analysis needs illumination from general principles."[144]

Although these schools of thought still differ on several scores, they share a view that pragmatic practical reasoning involves dialectic between generality and particularity, allowing theory to inform practice and practice to specify theory. This dialectic echoes John Rawls's notion of the "reflective equilibrium" reached through the process of bringing our moral judgments and the underlying conceptions of justice that best explain or justify them into satisfactory balance.[145] We begin the process of reflective equilibrium, Rawls posited, with our "considered moral judgments"—the judgments in which we have the most confidence because we make them under conditions that are least likely to be distorted by self-interest, haste, or fear.[146] Theory formulates the general principles that govern these judgments, rationally explaining and justifying them.[147] And, this theoretical exploration provides us the opportunity to revise our considered moral judgments upon reflection. According to Rawls, "the best account of a person's sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium" after he has considered alternative proposed conceptions of justice and "either revised his judgments to accord with one of them or held fast to his initial convictions."[148]

140. *See* Arras, *supra* note 129, at 1003.

141. *Id.* at 1002–03.

142. *Id.* at 994–99; Beauchamp, *supra* note 135, at 959.

143. Beauchamp, *supra* note 135, at 961.

144. BEAUCHAMP & CHILDRESS, *supra* note 123, at 397.

145. JOHN RAWLS, A THEORY OF JUSTICE 46–53 (1971). Beauchamp and Childress make specific reference to Rawls's reflective equilibrium, embracing it as part of the core methodology for their "coherence theory" of bioethical reasoning. BEAUCHAMP & CHILDRESS, *supra* note 123, at 397–98.

146. RAWLS, *supra* note 145, at 47–48.

147. *Id.* at 51.

148. *Id.* at 48.

The use of paradigm cases and mid-level principles that exemplify and explain competing professional values is pragmatically useful because it tracks the kinds of judgment that professionals exercise in other aspects of their professional work. Jonsen and Toulmin, for example, describe the process of medical diagnosis as a form of practical rather than deductive reasoning.[149] And, they analogize practical choices about what moral principles to employ to the strategic choices a lawyer makes in settling on the legal theory of a case.[150] Different ethical considerations, like consequentialist arguments or appeals to patient autonomy, have stronger weight in some cases than in others.[151] Like lawyers choosing between tort theory or agency theory in pursuing a client's injury claim, ethicists must be attuned to the persuasive power of particular moral theories in the specific facts of the case at hand.[152] Experts in applied ethical methodology assess the persuasive and rhetorical pull of different principles or paradigms in the situation,[153] and "the final judgments usually turn on a fine-grained analysis of the particularities of the case."[154]

In a series of law review articles, Paul Tremblay has considered the utility of the bioethical model of casuistry for legal ethics; and though he sides decidedly with casuistry over principlism, his insights apply more generally to both of the pragmatic models.[155] Tremblay noted that the case-based analogical reasoning employed in bioethics describes the kind of ethical reasoning in which lawyers already engage and that a deeper study of bioethics can help the legal profession "examine, critique, and make more explicit our own current practice."[156] Legal ethics, he observed, has already developed a set of "stock stories" and paradigm cases used in professional responsibility textbooks to illustrate the limits of partisan advocacy.[157] Legal ethics contain a limited set of mid-level principles as well, reflected most recently in the ABA's articulation of the core professional values of loyalty, confidentiality, independent professional judgment, avoidance of conflicts of interest, and promotion of access to justice.[158]

149. JONSEN & TOULMIN, *supra* note 125, at 36–46.

150. *Id.* at 297–99.

151. *Id.* at 299.

152. *Id.* at 297–98.

153. *Id.* at 298–99; Tremblay, *supra* note 121, at 521–23.

154. Arras, *supra* note 129, at 1001.

155. *See generally* Paul R. Tremblay, *The Role of Casuistry in Legal Ethics: A Tentative Inquiry*, 1 CLINICAL L. REV. 493 (1994) [hereinafter Tremblay, *Role of Casuistry*]; Tremblay, *supra* note 121; Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659 (2002). Tremblay notes the reformed version of principlism that significantly closes the gap between the two methods. Tremblay, *supra* note 121, at 506–08. And, his description of how to apply a casuistic approach in legal ethics uses principles like autonomy and beneficence as anchors for the maxims that derive from paradigm cases. *Id.* at 534.

156. Tremblay, *Role of Casuistry*, *supra* note 155, at 499.

157. Tremblay, *supra* note 121, at 538–39.

158. The articulation of these "core values" came in response to efforts by the ABA to permit and regulate multidisciplinary practice. Nathan M. Crystal, *Core Values: False and True*, 70

A pragmatic project in legal ethics would focus on the mid-level principles of legal ethics—reflected in the core values of legal professionalism—and use difficult paradigm cases to further specify those principles as well as to explore their interplay in situations where they come into conflict. The goal of a pragmatic project is not to bring conflicting principles into a final harmonious settlement, but to understand each principle better in light of its underlying values and purposes. A fuller understanding of the core values of legal ethics helps identify the situations in which the justifications for a particular value—like confidentiality or loyalty or access to justice—are particularly strong and to differentiate them from situations in which its justifications are weaker. Such understanding more directly supports the exercise of sensitive professional judgment guided by underlying principles that the Rules contemplate.

Analysis of paradigm cases plays an important role in analyzing the scope and meaning of these core values. For example, contrast the values of loyalty and confidentiality in the Robert Garrow "hidden bodies" case discussed above[159]—where a lawyer representing a man charged with murder refused to reveal information about the location of the victims of his client's other murders—with the way loyalty and confidentiality operate in the case of William Macumber.[160] In 1974, Macumber was arrested for a 1962 shooting of an Arizona couple that had remained unsolved for twelve years.[161] Lawyer Thomas O'Toole came forward with information that his former client, Ernie Valenzuela, had confessed to the crime in 1967.[162] O'Toole had not revealed his client's confidence at the time of the confes-

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FORDHAM L. REV. 747, 748–49 (2001). I do not mean to imply that the core values articulated by the ABA are the only principles that ought to count in a pragmatic project in legal ethics. The ABA list, for example, does not include any specific principles relating to lawyers' duties to ensure the proper functioning of law or the legal system, which seems a glaring omission in light of the ABA's recognition in the Preamble of the ABA Model Rules of Professional Conduct that lawyers play an important role as "officer[s] of the legal system." MODEL RULES OF PROF'L CONDUCT pmbl. ¶¶ 1, 5 (2011).

159. *See supra* note 55 and accompanying text.

160. A recent account of this case is available in a three-part series of articles in *The Arizona Republic*. John Faherty, *Arizona Murder Mystery: Guilt of Man in 1962 Killings Thrown into Question*, ARIZ. REPUBLIC, June 5, 2011, http://www.azcentral.com/news/articles/2011/06/03/20110603arizona-murder-william-macumber-part-1.html [hereinafter Faherty, *Guilt of Man in 1962 Killings*]; John Faherty, *Arizona Murder Mystery: A Killer Speaks*, ARIZ. REPUBLIC, June 5, 2011, http://www.azcentral.com/community/scottsdale/articles/2011/06/05/20110605arizona-murder-william-macumber-part-2-scottsdale.html [hereinafter Faherty, *A Killer Speaks*]; John Faherty, *Arizona Murder Mystery: Conspiracy Theory*, ARIZ. REPUBLIC, June 5, 2011, http://www.azcentral.com/news/articles/2011/06/05/20110605arizona-murder-william-macumber-part-3.html.

161. Faherty, *Guilt of Man in 1962 Killings*, *supra* note 160. Macumber was charged when his estranged wife approached the police with information that he confessed the murders to her. *Id.* Although Macumber's confession was corroborated by a palm print found on the victim's car, allegations remain that Macumber's estranged wife—who worked as a secretary in the sheriff's department—planted her ex-husband's print in the evidence box. Faherty, *A Killer Speaks*, *supra* note 160.

162. Faherty, *A Killer Speaks*, *supra* note 160.

sion, but by the time another man was charged with the crimes, his former client Valenzuela had died in a prison knife fight.[163] Each case presents the question of when or in what circumstances a lawyer ought to reveal a client's confession to prior unsolved crimes. Revealing such a confidence works substantially against the interests of the client by exposing the client to additional charges and criminal sanctions, invoking a basic underlying principle of client loyalty: that lawyers should not use confidential information to the detriment of their clients.[164] The core value of confidentiality provides an additional and independent reason for lawyers to remain silent, based on a larger interest in maintaining the integrity of the attorney-client relationship and encouraging clients to reveal potentially harmful information to their lawyers.[165] However, the values of loyalty and confidentiality give way in circumstances where death or serious bodily injury can be avoided only by revelation of a client confidence, suggesting that the values of loyalty and confidentiality are not absolute, but must be balanced against, and can be overridden by, the avoidance of pressing public harm.[166]

Lawyers exercising sensitive professional judgment on the question of whether to reveal the client's confidences in this contrasting pair of cases may come to different conclusions: some may favor revelation in both cases; some in neither case; and some may differentiate between the two cases. In the *Garrow* case, the harm against which the values of client loyalty and confidentiality must be balanced is the public fear and uncertainty caused by an unsolved violent crime and the anguish of family members not knowing the fate of their missing relatives. Many lawyers would not find those public harms sufficient to override their duties to protect their client from additional criminal charges. The *Macumber* case initially looked similar, but by the time Macumber was charged with the crime, O'Toole's need to protect his former client's interests was significantly diminished by his client's subsequent death, and the public harm associated with keeping the confidence had escalated with the possibility that an innocent man would be convicted of a crime he did not commit. However, although the principles

163. *Id.* In that case, the trial court ruled that the attorney's testimony was inadmissible on the ground of attorney-client privilege. State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976).

164. This principle is reflected in the proscription against using confidential information to the disadvantage of a former client. MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(1) (2011); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(a) (2011) ("[T]he lawyer may not use or disclose confidential client information . . . if there is a reasonable prospect that doing so will adversely affect a material interest of the client.").

165. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation . . . . This contributes to the trust that is the hallmark of the client-lawyer relationship."); *see also* Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998) (holding that the attorney-client privilege survives the death of the client).

166. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm."). This exception "recognizes the overriding value of life and physical integrity." *Id.* at R. 1.6 cmt. 6.

underlying client loyalty are significantly different in the two cases and the public harm is significantly greater in the *Macumber* case, the principle that client confidences should be maintained to protect trust and integrity in the lawyer-client relationship remains a constant in both cases. Regardless of the outcome a lawyer reaches, the analysis of these contrasting cases will help to clarify and specify the core values of loyalty and confidentiality in light of their underlying principles.

C. The Role of Theory in the Ethics of Practice

If the basic methodology of legal ethics is more properly located in a pragmatic approach that draws on a plurality of specified mid-level principles and core values, as illuminated by the close analysis of paradigm cases, one might conclude that the theoretical project in legal ethics of constructing, critiquing, and defending comprehensive theories of legal ethics has little or no relevance to practice. This conclusion, however, would be mistaken. Although comprehensive theories of legal ethics are not useful as direct guides to ethical deliberation, the theoretical project plays an important role in developing and honing the more useful tools of mid-level principles, professional values, and maxims. The distance and abstraction of theory can provide a more comprehensive viewpoint from which to map the terrain on which professional judgment is exercised. And, both the distance and rigor of theory provide a helpful corrective against the potential for manipulation and abuse inherent in the development of shared norms within a professional community.

1. Accountability and Self-Dealing

A purely "bottom-up" model of ethical reasoning that depends on moral intuitions and shared professional norms may "lack[ ] critical distance from cultural blindness, rash analogy, and mere popular opinion."[167] One reason that casuistry needs to be "revived" is that, by the seventeenth century, it had famously "degenerated into a form of reasoning characterized by moral permissiveness and disingenuous argument" that permitted deployment of moral arguments in favor of well-born penitents seeking absolution.[168] Similar abuse is possible in professional communities, and law has its own not-so-glorious history of using professional training and professional ethics as cover for protectionism.[169] As Susan Koniak has shown, normative understandings within the legal profession diverge from and compete with the formal law of lawyering, often giving higher priority to

167. BEAUCHAMP & CHILDRESS, *supra* note 123, at 395.

168. MILLER, *supra* note 136, at 4; *see also* JONSEN & TOULMIN, *supra* note 125, at 15.

169. *See generally* RICHARD L. ABEL, AMERICAN LAWYERS (1989) (describing the restrictive practices historically employed by American lawyers to dampen competition among lawyers and with outsiders).

values of client loyalty and confidentiality.[170] Yet, empirical studies of the legal profession reveal systematic patterns of behavior counter to these norms where lawyers' professional or reputational interests fail to align with client loyalty and zealous advocacy.[171] And, in the culture of big-firm corporate lawyering, it can sometimes be difficult to distinguish the zealous pursuit of client interests from more problematic patterns of file churning and billing fraud.[172]

Comprehensive theories of professional role provide a useful corrective to these protectionist and self-dealing tendencies by demanding more rigorous theoretical justification of the received wisdom and tacit norms typically employed to defend professional decision making in practice. Some of the earliest theoretical critiques in legal ethics sought to correct lawyers' lax deployment of client-centered norms to excuse overzealous tactics that had exceeded their proper justification.[173] As David Luban put it, "discussions of the adversary system usually stop where they ought to start, with a chorus of deeply felt but basically unexamined rhetoric."[174] By demanding more rigorous justification for what might otherwise be an "adversary system excuse," theorists in legal ethics have helped to further hone and specify the situations in which zealous advocacy is appropriate and the situations in which it may be a cloak for the pursuit of lawyer self-interest.[175]

2. Theory as Theater

Stemming abuse is not the only function that theories of professional role play in shaping the exercise of professional judgment. As experience in biomedical ethics has shown, successful deployment of practical reasoning depends on internalizing an understanding of the circumstances in which different principles or paradigms have greater or lesser weight or salience. In the theoretical project in legal ethics, theorists propose and justify a single unitary value—morality, justice, and fidelity to law—to coordinate divergent professional duties; and those proposals are in turn critiqued and modified, exposing both the strengths and weaknesses of each various approach. Although the multiplicity of competing theories of professional role

170. *See* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1485–86 (1992).

171. *See* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1544–50 (1984).

172. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 705–09 (1990) (describing the practice of "running the meter" to bill clients for nonessential work). For a review of other dishonest billing practice, see Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999).

173. *See supra* notes 39–41 and accompanying text.

174. LUBAN, *supra* note 5, at 27.

175. *Id.* at 28 ("Getting paid by the client, of course, makes it easier to ignore the difference between courtroom and other activities: $800 an hour has been known to buy a lot of Professionalism.").

has the potential to confuse or dismay a practitioner attempting to choose among them, the theoretical discourse can also reveal important insights if approached with the attitude that each theory teaches an important lesson about some aspect of lawyers' role in the legal system and in society.[176]

Biomedical ethicist Albert Jonsen has used the metaphor of travel by hot air balloon and travel by bicycle to contrast the worlds of theory and practice and to describe the relationship between them.[177] "From the balloon," Jonsen wrote, "one gets a wide view of the landscape and the horizons are far on all sides. From the bicycle, one sees only the bumpy road ahead, the fallen tree limbs, and the dogs in the bushes."[178] Theory, symbolized by the balloon, "is very loosely tethered to the ground and can float quite free . . . [and] sees the details of human life only from a great distance and often not at all."[179] Practical judgment, represented by the bicycle, "encounters many variables, and the path of reasoning cannot be navigated without taking them into account."[180] There is no direct connection between the balloon in the sky and the bicycle on the ground—the balloonist can communicate with the bicyclist only by shouting—but after the balloonist is back on the ground, "he or she can tell the earthbound much about the general topography, informing the bicyclist to look for certain landmarks in the earthly bike trip, warning that over the next hill is an unpassable river, indicating that the bike is moving in a circle and going nowhere."[181] A shout from the balloon can warn a bicyclist that he or she is about to go off a cliff and "can warn that a particular resolution of a problem has implications that the bicyclist would want to avoid."[182] Jonsen's metaphor illustrates the limited role that theory can and should play: The lesson he draws is that "communication between balloon and bicycle may be important, but it need be only occasional and sporadic."[183] I see a more robust role of theoretical discourse in providing indirect guidance to the pragmatic project.

Using a different metaphor, I think of theory as providing a stage on which different stories about the priority and centrality of competing professional values can be performed. In this metaphor, the competing professional values, like morality, justice, client loyalty, and the rule of law, are characters in a play. Different theorists place different characters in the leading heroic role. As the story told by each theorist unfolds, the hero faces challenges and demonstrates how those challenges can be overcome. The

176. *See* BEAUCHAMP & CHILDRESS, *supra* note 123, at 377.

177. Albert R. Jonsen, *Of Balloons and Bicycles, or the Relationship Between Ethical Theory and Practical Judgment*, HASTINGS CENTER REP., Sept.–Oct. 1991, at 14, 14.

178. *Id.* at 14.

179. *Id.*

180. *Id.* at 15.

181. *Id.* at 15–16.

182. *Id.* at 16.

183. *Id.*

protagonist in one theorist's story may be the villain in the story told by another. In the story told by the moral activist approach, for example, clients are the villains, greedily urging their lawyers to push up or past the limits of the law, and lawyers' heroic appeals to moral judgment to constrain their clients' greed rescue society from harm. In the story told by the fidelity-to-law approach, the positive law plays the heroic role of rescuing society from irreconcilable moral conflict through fair and inclusive democratic process, and lawyers' exercise of moral authority to prevent clients from reaching the limits of the law undermines and interferes with law's heroic achievement. In a play, the plots of the stories told on the stage of theory are less detailed, the characters more exaggerated, and the props less elaborate than they are in real life. Unlike life, a play moves tidily through conflict to resolution and ends when the curtain falls. But, the stories we see played out on stage often stay with us as we leave the darkened theater and return to the daylight and hubbub of our untidy, ambiguous, and continually unfolding lives.

There is something grandiose about a comprehensive theory of professional role that seeks to encompass all of lawyers' conflicting professional duties within the boundaries of one unifying principle. It is easy to play off that grandiosity and to point out where a theory of professional role falls short, what it leaves out, and where it goes wrong. But theories of legal ethics can also be instructive. Writing about the usefulness of moral theory to biomedical ethics, Beauchamp and Childress concluded that each attempt at comprehensive moral theory was incomplete in some way, but each also had a lesson to teach: "Where one theory is weak in accounting for some part of the moral life, another is often strong. Although every general theory clashes at some point with our considered moral convictions, each also articulates convictions that we should be reluctant to relinquish."[184]

Though theories of professional role are much too simplified and abstract to provide direct guidance to practical judgment, and though each comes complete with its own set of flaws, the narratives about professional role that are played out on the simplified stage of theory can reveal deeper truths about law and lawyering, especially if one focuses sympathetically on the heroic aspects of each story. Wendel's story about fidelity to law as the central principle of legal ethics reminds lawyers not to take lightly the moral weight of democratic consensus enacted into law and emphasizes the important discipline that deference to authoritative legal sources can bring to the exercise of professional judgment. Simon's focus on contextual justice reminds lawyers not to forget that responsibility for justice may require looking beyond the law and either drawing back from aggressive partisanship or using evasive or manipulative tactics to rebalance the scales of justice when the institutional competence of legal officials or standard

184. BEAUCHAMP & CHILDRESS, *supra* note 123, at 377.

procedures is in question. And, Luban's moral activism insists that lawyers remain ultimately accountable as moral agents, answerable for the choices they make in their professional role, rather than slipping into the banality of role-differentiated evil. Each of these considerations is important to remember in the exercise of professional judgment. If they were presented in a less simplified and exaggerated form—if they were more realistically nuanced and complex—these lessons might be lost.

CONCLUSION

The relationship between theory and practice in legal ethics is both complex and interesting. Theories of professional role emerge inevitably in the exercise of sensitive professional and moral judgment guided by the basic principles underlying rules of professional conduct. Yet the theories of professional role that guide the exercise of professional judgment remain largely implicit in their operation. It would seem at first glance that the comprehensive theories of legal ethics—which make those operative theories of role explicit for purposes of critique and reconstruction—can provide an important missing link between lawyers' day-to-day exercise of professional judgment and the political, jurisprudential, and moral theory that justifies lawyers' role in society. Indeed, the comprehensive theories of legal ethics purport to do just that, providing rubrics or frameworks for applying their insights directly to practice. Yet, the theoretical project in legal ethics falls prey to the problems of all theoretical projects: The simplicity and abstraction that make for an elegant theory create too much distance to be of much practical use. This Article has argued that the more pragmatic project in biomedical ethics, which uses mid-level principles to analyze ethical decision making in paradigm cases, is a more promising model for providing the necessary links between theory and practice. Yet, this does not mean that the more abstract and simplified work in theoretical legal ethics has no pragmatic value. Rather, the generation and critique of comprehensive theories of legal ethics can enhance the pragmatic project by providing a check on the self-dealing tendencies of a self-regulated profession and by playing out the implications of prioritizing one value over another on the simplified stage that theoretical abstraction creates.