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A Case for Legal Ethics

Little would seem more contrary to common sense than a suggestion that lawyers could have something to teach humanity about ethics. Not unfamiliar are quips that legal ethics is like a square circle; such quips undoubtedly draw on a perception that any group that could engage in such practices as the defense of the guilty, the representation of exploitative businesses, the humiliation of court witnesses, not to mention the deliberate complication for its own pecuniary interests of such simple matters as a house closing, a divorce, or an estate settlement, must quite obviously have few if any concerns with what is ethical.

Nonetheless, it is precisely the thesis of this book that some of the procedural dimensions of legal ethics display very desirable features that provide the contours for general ethics. By attending to these teachings from legal ethics, we are able to derive a general theory of ethics that fundamentally alters how we think about ourselves and our obligations. Also, once made explicit, this general theory rooted in legal ethics in turn allows us to return to legal ethics and enrich and improve that field by bringing legal ethics more in line with its own essence.

Of much concern to moral theorists these days, especially with the proliferation of those who style themselves specialists of legal,

medical, and business ethics, is the question of the domain of general ethics and its relationship to these areas of applied ethics. Do principles of general ethics govern universally, so that legal ethics, say, simply represents an application of the basic rules of morality to the particular setting of the attorney? Might not the principle of lawyer-client confidentiality simply be the result of one's applying general utilitarian guidelines requiring the production of the greatest good for the greatest number to the issue of the status of these conversations?; after all, arguably, everyone in society is better off with such a practice. Consider how the lawyer can better help the client who is encouraged to be forthright within the framework of confidentiality. And consider that all citizens of a society can take solace in the thought that, should legal problems arise, they can turn to attorneys as confidants. Or is there something unique about legal ethics, making it quite other than a mere specialized application of general ethics? Arguably, the confidential communications between lawyer and client have no counterpart in general ethics when we consider that within the purview of such communications may be the protection of one who has caused great harm to others. In any case, it is noteworthy that some theorists identify the relationship between general and professional ethics to be the most important issue for professional morality. Against this backdrop, the thesis of this book, that legal ethics provides a good model for general ethics or that general ethics should be more like legal ethics, is a marked departure from the usual fashion of thinking about this issue, and a full consideration of it will pull us in a variety of directions.

THE DEBATE

First, we will consider how the debate over the relationship between general and legal ethics has been staged, and we will show how the possibility of using legal ethics as a paradigm for the development of ethical theory has been obscured. We consider seriously the case that can be made for legal ethics occupying this role and find that it

hinges on legal ethics being pragmatic in nature. A summary of the debate over whether legal ethics is "unique" as against general morality follows. It should be mentioned that this characterization of the debate is borrowed from one of the commentators[1] and that admittedly some infelicities surround such a description; as will become apparent, many theorists are puzzling over the similarities and differences of these ethics and are not always prepared to conclude that one is unique or both are congruent. With these qualifications, let us turn to a sketch of those arguments purporting to show that legal ethics is "unique":

1. The attorney operates within the adversary system of justice, which permits such actions as withholding information, defending those who have confessed to crimes, and discrediting and humiliating witnesses, all to further the client's cause and all of which is beyond the purview of ordinary morality.[2]

2. The attorney gives special consideration to the affairs of another, the client, and thus departs from the demands of ordinary morality that require equal treatment of others.[3]

3. The large number of extant professional codes—codes for accountants, for medical doctors, for journalists, and so on—suggests that specialized bodies of ethics are required to handle moral problems peculiar to the respective professions, the legal profession included.

4. Further, each professional code, including the lawyer's code, contains directives that simply do not apply to the ordinary person and are not derivable from the standards of ordinary morality. For example, ethical advice to attorneys concerning their obligation to reveal to the court precedent adverse to their clients neither applies to nor has a counterpart for the ordinary person.

5. "legal ethics centers about the problem of how to secure a larger income for lawyers. The announced precepts of legal ethics have little to do with the basic values of life or with the basic problems of the present social order."[4] Because of this divergence, we must recognize the distinctness of legal ethics from general ethics.

6. A distinguishing feature of professionals, and thus of attorneys, is that they have a moral commitment to meet human needs and a special capacity for doing so. People in need come to professionals for assistance; herein lies the ground for the moral commitment, presumably not just some general, moral prescription to help the needy but one that is tied to the "knowledge resources" that professionals alone have at their disposal that allow them peculiarly to meet these needs.[5]

7. Although the attorney and the ordinary person share the same basic values, there are some, like confidentiality, to which the attorney is more committed and by which the attorney is more constrained. Ultimately, attorneys are not as free to complicate their worlds as the ordinary person is. More concretely, ordinary people are free to agree to keep confidential certain communications and in so doing to complicate their moral worlds as they like. But, unless they choose to do so, they are unfettered in this regard and their moral world is not complicated. Attorneys, on the other hand, do not have this latitude in their communications with their clients. Their moral world is one where such communications are already understood to be confidential, and in this way the attorney's moral world is already complicated.[6]

8. Legal ethics has a formal system for detecting violations of standards, for holding hearings on alleged violations, and for administering punishment, all of which ordinary morality is without. For example, in New York, a Grievance Committee of the Bar Association looks into complaints of attorney misconduct. The Grievance Committee determines whether to bring charges against the attorney, and, if it does so, the matter goes to the state's Appellate Division during one of its Special Terms. The court issues its findings and may, on the basis of the findings, prescribe punishment.[7] Ordinary or customary morality has no such mechanism. One's outrage for another's moral transgressions may find expression in words or actions aimed directly at the scoundrel or in attempts to induce others to join in the condemnation. One may go to particular people in the community known to be quick to become morally outraged and

willing to participate in some campaign of ignoring, insulting, or excluding the culprit. But again, this is all done informally, whereas it is quite otherwise with legal ethics. Indeed, in identifying ways in which pleasure and pain may come to people as sanctions, the utilitarian Jeremy Bentham speaks of "moral or popular sanction" as being "at the hands of...*chance* persons in the community, as the party in question may happen in the course of his life to have concerns with, according to each man's spontaneous disposition, and not according to any settled or concerted rule."[8]

9. The ethics of the attorney is the law, while this is not the case with the ethics of the ordinary person.[9] The idea here is that the codes of professional ethics that lawyers are to follow are usually promulgated by the supreme court of the state within which the lawyer practices. As such, these rules have the status of law. While the moral norms of a community (against stealing and murdering, for example) may be articulated in some of the laws, these moral norms are neither congruent with nor simply a subset of the legal norms. The common moral dictate to do good for others, for example, basically resists any backing from the legal realm.

10. Attorneys have responsibilities to persons and entities—their clientele, their profession, the public—which are not commanded by ordinary morality.[10] As regards the clientele, there is a special fiduciary duty to care for the interests of the client given the possibilities for abuse open to the professional. To the profession are owed duties to comply with and enforce the code of ethics and to render services to the poor. And to the public is the special duty to be a leader in the framing of public issues and in the development of public opinion.[11]

11. While ordinary ethics deals with one person's obligations to another, professional ethics deals with groups, like lawyers, and with obligations to those outside the group.[12] Thus, it would seem quite natural to find one saying, "Those of us who are lawyers should make sure that we act thusly when we come in contact with non-lawyers." But on this line of reasoning, it would seem quite odd to find one saying, "Those of us who are humans should make sure that we act thusly when we come in contact with nonhumans."

Let us now turn to arguments on the other side of the debate over the issue of whether legal ethics is unique:

1. Morality basically involves an experimental development of a role and a working out of how one's role governs one's actions. So, although a lawyer's role differs from the roles of others in society and may specify actions different from those specified by the roles of others, the dynamics involved are essentially the same.[13]

2. Despite the variety of regulations in professional codes, one must grant, upon reflection, that the ultimate justification of these are basic, universal principles embracing concepts of justice and utility, such principles being the foundation of any morality.[14] One text on legal ethics begins the chapter "Conflict of Interest" with wisdom from Matthew 6:24: "No man can serve two masters: for either he will hate the one and love the other; or else he will hold to the one, and despise the other: Ye cannot serve God and mammon."[15] No further mention is made of the quotation as the authors go on to detail the ways in which conflicts of interest arise in lawyering and the types of restriction lawyers have placed on themselves. But the inference is an obvious one—there is something we all acknowledge to be wrong with placing ourselves in compromising situations where interests are likely to conflict, and the forbearance of lawyers in this regard is but an instance of what we all try to avoid generally. Put slightly differently, "the different codes of professional groups represent...the deliberate application of a generally accepted social standard to particular spheres of conduct.... What is universal is the good in view, and ethical rules are but the generally approved ways of preserving it."[16] The approach here seems to be one of asserting the pervasiveness of general principles of ethics with the suggestion that the reflective person will either see the truth of this assertion or be hard put to find any counter-evidence to it.

3. Now, if we do not grant what seems obvious in (2) above, ill consequences obtain, and this speaks further for our endorsing (2). More specifically, if professionals conceive of themselves as having a special ethics, they may all too easily begin to think true the faulty

view that "expertise about the technical facts of a given area also gives one expertise in the evaluative factor required for decision-making in that area."[17] And this assumption of evaluative expertise can lead to attorneys excluding their clients from participating in making value judgments. Suppose, for example, your client has been charged with first-degree murder. You have been led to believe by the prosecuting attorney that the state would reduce the charge to negligent homicide in exchange for a guilty plea from your client. An obvious alternative would be for your client to stand trial and strive to be exonerated from any wrongdoing. There is evidently present here a choice that needs to be made, and in part it involves a choice among competing values, one involving the certainty of a lesser sentence and the other involving the possibility of exoneration tied to the risk of a much heftier sentence. There is nothing, in principle, that makes you as an attorney who is particularly skilled in handling legal transactions better able to make this choice among competing values than your client. But you may have been duped into thinking that yours would be the better view in matters of ethics and values that are related to legal transactions from the fact that you, as an attorney, think of yourself as having a special ethics, one different from the ordinary person's. And this claim to a special ethics may have led you to think it perfectly appropriate simply to announce to your client what course of action *must* be undertaken, based on the choice that you would have made. To the extent that excluding clients from decisions important to them is a bad thing, we should endorse as correct the view that precludes such happenings, the view that professional ethics is not a special ethics.

OBSERVATIONS ABOUT THE DEBATE

With this delineation of the contours of the debate, let us make first some general observations and then turn to their significance for resolving the issue. To begin with, we should note that some of the

arguments above deal with empirical matters—how things are—others, with normative matters—how things ought to be. More specifically, legal ethics is sometimes contrasted with ethics generally with an observation simply that this is how the one is, that is how the other is. At other times legal ethics is compared with general ethics in order to show what legal ethics should be. So, just looking at the debate, we can recognize that possibilities for analysis include whether or not legal ethics varies or differs from general ethics and, if it does, whether it should.

But more possibilities for analysis become evident upon our recognizing that there is an ambiguity in the phrase "general ethics" that we have been employing. Sometimes it appears that the phrase refers to customary, ordinary, or unreflective morality. At other times the reference seems to be to reflective or critical morality. This contrast between customary and critical morality, of course, strikes up the difference between moral standards that are considered correct because they are accepted by the community and those that are considered correct (even when they diverge from the morals of the community) because they are the product of rational inquiry. With this distinction in mind, we can characterize further the inquiries mentioned above regarding the descriptive and normative relationships between legal ethics and general ethics, depending on how we read "general ethics."

Recognizing all these possibilities for constructing the inquiry, we can see that the debate has focused on two of the possible questions, asking either "Is legal ethics unique or different in relation to customary or critical morals?" or, "Is legal ethics, or should it be considered, nothing more than a part of customary or critical morals?" Now it may be that some of the paths of inquiry have not even a *prima facie* claim of being worthy of pursuit. But there is one path upon which no light has yet been shed and which does, upon analysis, appear to be quite fruitful. I speak here of the possibility that critical or ordinary morality should be more like legal ethics, or, put in terms of inquiries, the question is here raised of whether critical or ordinary morality should be more like legal ethics.

As we brought out above, the possibility of an affirmative answer is counter-intuitive, and the question itself seems pointless given the extent to which many of the practices of attorneys seem to offend the moral sensibility of the community. But regardless of a prejudice even of this sort, the point, whether considered cogent or not, has probably had little chance to surface because of the almost universal assumption that customary or reflective ethics is the primary mode and legal ethics is a unique (or essentially different) yet restricted ethics. Perhaps the sheer numbers to which general ethics applies have obscured the possibility of seeing legal ethics as in some way a paradigm for general ethics. Whatever the explanation is, it is now time to consider what sort of a case might be made for this claim and the extent to which, if it does have merit, we can glean something of significance for the development of ethical theory.

THE CASE FOR LEGAL ETHICS: ITS EMERGING NATURE

Let us distinguish between substantive legal ethics, the specific rules that guide lawyers, and procedural legal ethics, the development of these rules. It is the latter, the process of legal ethics, which we are exploring as a model for general ethics. Usually, I think it will be clear in what follows whether I am referring to procedural or substantive legal ethics if I speak simply of legal ethics. What we can summarily say of procedural legal ethics that captures its essence and at the same time provides the ground for its being a model for ethics is that *the substantive rules of legal ethics emerge from a critically reflective process of assessing what rules best structure the lawyer's experience and guide in the resolution of recurring problems by attending to both what the distinguishing features of attorneys are and what they should be.*

Let us begin to develop this claim by turning first to the recurring problems of lawyers. Our general sense of what the lawyer's problem areas are is confirmed by what we find basically to be the subject matter of the current *Model Rules of Professional Responsi-*

bility of the American Bar Association, of its predecessors, the *Model Code of Professional Responsibility* and the *Canons of Professional Ethics*, of texts on legal ethics, and of articles on legal ethics in journals and law reviews—concerns over conflicts of interests, zealous advocacy, the search for truth, confidentiality, and how to make services available. As regards the manner of dealing with these matters, we find typically that legal ethics operates with a spirit in which the extant solutions to problems are subject to critical reevaluation and change in an ongoing and visible process that unfolds in lay journals and books, law reviews, opinions of courts, bar journals, and meetings of professional associations, all of which we might think of as the community of discourse within which legal ethics unfolds.

Specific examples of this rethinking of issues are readily available, and I offer here a few for illustrative purposes. Judge Marvin Frankel complains in the *University of Pennsylvania Law Review* that the lawyers' *Code of Professional Responsibility* ranks the pursuit of truth too low as evidenced by the fact that various prohibitions, like that against the knowing use of perjured testimony, come under the general dictate advising zealous representation within the bounds of the law, and others, like that against fraud, fall under a heading, "Duty of the Lawyer to the Adversary System of Justice." He suggests revisions that amount to a new rule requiring the disclosure of material facts.[18] Consider, as another example, how the United States Supreme Court in *Bates* rethought the longstanding restriction on lawyer advertising and decided to permit advertising under certain circumstances.[19]

In 1964 Justice Lewis F. Powell, then the ABA's President, called for a committee to review the *Canons of Professional Ethics*. In his statement is evident a spirit of revising for the better the aspects of the Canons that experience has proved to be inadequate:

> Many aspects of the practice of law have changed drastically since 1908. An American Bar Foundation Study Committee has said that these changes make unreliable many of the assumptions upon which the Canons were originally based. As

> remarkably flexible and useful as the Canons have proved to be, they need to be reexamined as guidelines for the practicing lawyer. They also should be reexamined particularly in view of the increased recognition of the public responsibility of our profession.[20]

In 1969 the rules and revisions suggested by the new committee were adopted by the ABA as its *Code of Professional Responsibility*.

Also noteworthy for establishing our claim about the emerging nature of legal ethics is the sequence of events leading to the American Bar Association's adoption of its current *Model Rules of Professional Conduct* in 1983; a majority of the states have, by the way, adopted this work in some form. The others mostly subscribe to some form of the ABA's *Model Code of Professional Responsibility*. The American Bar Association's Commission on Evaluation of Professional Standards in 1981 issued the product that resulted from the commission's being "charged with undertaking a comprehensive rethinking of the ethical premises and problems of the profession of law."[21] The chair of the committee described the process in this way: "From the outset, our sessions were drafting sessions, not forums for free-floating debates. Ideas and their consequences had to be tested on paper. In the nature of things, many proposals and approaches to the issues failed this test. Many more, after being subjected to repeated reworking, survived—often substantially altered from the original form in which they were proposed. The process of revision was continuous."[22] Possibilities for revisions ranged from placing limitations on an attorney's ability to breach confidentiality regarding a client's intent to commit a crime to requiring *pro bono* work of attorneys.

Watch how, in proposing some changes to the lawyer's charge to advocate with zeal, the committee makes clear that thinking on the issue has been ongoing and that the current language of rule 1.3 of the *Model Rules,* directing that "a lawyer shall act with reasonable diligence and promptness in representing a client," has emerged through this process of critical evaluation and reevaluation. ("EC"

refers to an ethical consideration of the *Model Code*; an ethical consideration sets out advice described as aspirational in nature. "DR" refers to a disciplinary rule of the *Model Code*. The violation of a disciplinary rule by a lawyer could result in disciplinary action; in this sense the advice is considered mandatory.)

> A lawyer's duty to act diligently in a client's behalf is part of a general obligation of loyalty to the client. *See* Greene v. Greene, 47 N.Y. 2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 (1979). *See also* ABA Formal Opinion 132 (1935) (Canon 6 of Canons of Professional Ethics prohibits any representation 'where self-interest tempts [the attorney] to do less than his best for his client.'); *ABA CANONS OF PROFESSIONAL ETHICS*, Canon 6 (undivided fidelity). Under the Code, this duty is expressed as acting with 'zeal.' Canon 7; EC 7–1; DR 7–101. The term first appeared in the profession's formal standards of conduct in the ABA Canons of Professional Ethics, Canon 15, which stated in part: 'The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. Phrasing the duty of loyalty in this way, however, could be construed as requiring a lawyer to invest emotion or personal belief in the client's cause, a meaning clearly not intended. *See, e.g.*, United States v. Landes, 97 F. 2d 378 (2d Cir. 1938); Lucas v. Ludwig, 313 So. 2d 12 (La. Ct. App. 1975); EC7–8; EC7–10; EC7–14; EC7–17; EC7–25; EC7–37–EC739; *ABA CANONS OF PROFESSIONAL ETHICS*, Canons 15, 17 & 18. *See also* Tool Research & Eng'r. Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal Reptr 291 (1975). Furthermore, 'zeal' suggests a frame of mind appropriate in advocacy but not ordinarily appropriate in advising a client.
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> The duty is better conceived as one of commitment to achievement of the client's lawful objective. In this regard the lawyer must act vigorously, not indifferently, in behalf of his client in attempting to secure the client's legitimate objectives. *See, e.g.*, In re McConnell, 370 U.S. (1962).[23]

Another good example of the emerging nature of legal ethics comes from recent thought about the predictable difficulty that can arise from assigning lawyers general obligations to be candid with tribunals and at the same time to be vigilant in preserving the confidences of their clients. Almost a quarter of a century ago, Professor Monroe Freedman offered a resolution to the matter in a fashion that, in the ensuing years, seems especially to have provoked much thought and criticism in the attempt to deal best with the problem. Freedman took an extreme position by reasoning to an affirmative answer to what he sees as "three of the most difficult issues in this general area," including whether it is proper to discredit adverse witnesses that the attorney knows to be truthful, to allow his or her client to take the stand knowing the client will offer perjured testimony, and to give clients legal advice that would tempt the client to commit perjury.[24]

Thought on how lawyers should meet their obligations to be candid with the court and to preserve client confidences has gone in a variety of directions since Freedman's contribution. This thought has led to the following conclusions, each of which further supports our observation about the ongoing assessment that is characteristic of legal ethics: (1) that the lawyer should, in the face of representing a client about to commit perjury, try to withdraw from the case,[25] (2) that the lawyer unsuccessful in withdrawing should allow the client to make a statement but not comment on it to the jury,[26] (3) that lawyers should tell their clients at the outset that a communication about an intent to testify falsely would fall outside the scope of the attorney-client privilege,[27] (4) that lawyers should reveal frauds perpetrated upon people and tribunals unless they are privileged,[28] and (5) that lawyers should not offer evidence known to be false but, if lawyers learn that such has occurred, they should take reasonable steps to correct the record even if the execution of this obligation requires disclosing a confidential communication.[29] Further, in *Nix v. Whiteside* the U.S. Supreme Court held that the Sixth Amendment right of a criminal defendant to the assistance of counsel is not violated if the attorney refuses to assist the defendant in committing

perjury. Making reference to both the Model Code and the Model Rules, the Court brought out that "these standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice."[30] One follow-up to the Court's thinking can be found in a "Formal Opinion" of the ABA, where it was brought out that some states may have constitutional requirements that prohibit the disclosure the U. S. Supreme Court spoke of and that would control the lawyer's conduct.[31]

For further illustration of our claim about the desirable features of legal ethics, let us now turn from the first part of our claim, concerning its developing in a critically reflective fashion, to the second, concerning how rules for conduct are tied to conceptions of attorneys that result from this process. It is worth noting that most of what I cite to support the second part of the claim can also be seen as support for the first, for these varying conceptions of the lawyer's role are the result of the ongoing process of critical assessment and reassessment I have been referring to. So, in effect, more evidence is offered for the first part of the claim as we develop the second.

An example of how both might be illustrated with a single case is Hazard and Rhode's presentation in a recent text of thought about the role of the lawyer as partisan advocate within the criminal defense paradigm, about the way thinking on that role has developed when the paradigm is extended to advocacy in civil contexts, and about ways in which the general role might be reconceived. Considering the role of advocate within the criminal defense paradigm, some say that lawyers must defend clients they know to be guilty lest lawyers take on the role of judge and jury.[32] Considering the role of advocate in civil contexts, some, like Hazard himself, bring out that the obligation shifts: "It is perfectly possible to think

that the lawyer for the criminal accused is not 'responsible' for him, while at the same time thinking that the general counsel for a corporation or agency is, in some sense of the word, 'responsible' for it. The point is made by suggesting that it is one thing to represent a sometime murderer, quite another to be on retainer to the Mafia."[33] And some of the thinking that directs our attention to the advocate's obligation to "adopt as his dominant purpose the furthering of his client's interests"[34] grounds this rule of conduct in a rethought role of the lawyer as being like a friend to the client.

Let us go on to consider further that part of our claim about the desirable qualities of legal ethics—that there seems to be a clear link between the thinking about what attorneys are and how they should be conceived, on the one hand, and the thinking about what rules they should follow, on the other. We find that as the conception changes, so too do the rules of conduct. For example, much criticism of the *Code of Professional Responsibility* centered on its embracing a Victorian conception of the lawyer in which the lawyer encounters a client as a discrete entity. Geoffrey Hazard brought out how, in modern times, an enriched notion of the attorney takes cognizance of the fact that some attorneys may have no clients at all; they may, for example, be employed to draft regulations for a government agency. Or, looked at from another perspective, the question of who the client is may have no obvious answer in modern contexts; does the attorney for a corporation have as his or her client the chair of the board, the stockholders, or the directors?[35] The suggestion was that the extant guidelines let us down because the conception of the attorney was antiquated and that better rules would be forthcoming with a revised conception of the attorney.

Most recently, David Luban attempts to build a notion of the lawyer as a moral activist, a notion that would rule out an attorney's engaging in activity such as freeing a rapist on a technicality, activity that Luban thinks objectionable but allowable when we conceive of the attorney as a zealous advocate.[36] And Elliot D. Cohen does much the same with his analysis of the lawyer as "pure legal advocate" versus the "moral agent concept" of the lawyer. The latter, for exam-

ple, would enable us to rule out activity allowed by the former concept (like advocates saying nothing to the court about their clients having lied to the court).[37]

Further, we find throughout the *Model Rules* and the *Code* a number of phrases characterizing the lawyer as a certain type of person or as having a certain type of role, each carrying with it its own normative advice. We find the lawyer depicted as a guardian of the law,[38] as a fiduciary,[39] as an advocate, as an adviser,[40] as a representative, negotiator, intermediary, evaluator, and public citizen,[41] as well as a couple of roles the lawyer may step into, including that of the legislator or other holder of public office. Thus, we find that it is through the conception of the lawyer qua fiduciary and adviser that we locate the obligation of the attorney to "preserve the secrets and confidences of a client" as prescribed by canon 4 of the *Code* and as adviser and fiduciary that we locate the obligation not to "reveal information relating to the representation of a client" under 1.6 of the *Model Rules*.[42]

Aronson et al., in chapter 7 of their *Professional Responsibility*, present materials for consideration of the lawyer's role as advocate. Included are nineteen opinions of federal and state courts along with the description of, or a quotation from, an additional fifty-five. Here one sees the give and take in the dialogue over how best to conceive of this role and the guidelines tied to it in such matters as when lawyers' claims and defenses are frivolous, when, if at all, lawyers may communicate with adverse parties, jurors, and judges, and when they should disclose adverse facts and legal authority.[43]

The *Lawyering Process: Ethics and Professional Responsibility* presents materials depicting ways of thinking about lawyers as interviewers, investigators, negotiators, presenters of evidence, arguers, and counselors.[44] Each way of thinking informs lawyers about how they should act. The notion of attorneys as interviewers suggests that they are to facilitate communication but to do so in a fashion that does not encourage the fabrication of evidence.[45] The editors reject the standard way of grounding this advice, which portrays attorneys as needing to subordinate their interests to those of their

clients in order to create the trust necessary for the relationship. They say that, because attorneys evidently have other loyalties, they may well promote feelings of mistrust if they claim, in the face of this, to act in this subordinate fashion. The suggestion boils down to tying the normative advice about facilitating communication to a better-conceived notion of the attorney as interviewer, one emphasizing "more mutuality and involvement between lawyer and client" rather than client autonomy and lawyer subordination.[46]

In *The Social Responsibilities of Lawyers*, the authors identify many of the social responsibilities by attending to the following "lawyer roles": lawyers for a political movement, lawyers for ordinary people, lawyers for criminal defendants, lawyers for Wall Street, and lawyers for government. Regarding the role of lawyers for a political movement, the authors quote from the analysis of Gary Bellows. Bellows shows the shortcomings of conceiving of the role on a "service model," by which access of the poor to the legal system is primary, and of conceiving of the role on a "law reform model," by which test cases become a primary mechanism for effecting changes in laws for the benefit of the poor. The conception that is superior, according to Bellows, is one in which legal services are seen as an arm of the community organization; that is, the lawyer is to function as part of a political effort, at times as a lawyer, at times as an organizer, an educator, teacher, and PR man.[47] So conceived, the lawyer for a political movement takes on these duties: "He will spend a great deal more time in political organizing, in working on cases and priorities that reflect the group demands of his clients and in developing cases in a way which reinforces their political integration and cohesion."[48]

Professors Sutton and Dzienkowski consider lawyers in the roles of agent, fiduciary, trustee, advocate, negotiator, lobbyist, adviser/counselor, public leader, and intermediary; in each case an effort is made to suggest how these roles carry with them certain obligations for the attorney. Some of the duties carry through the differing roles, like that of loyalty to the client and the preservation of independent judgment by eschewing the representation of parties with conflicting interests. Others, like that of restraining zeal in

advocacy to prevent perpetrating a fraud upon the finder of fact and law, are more specifically tied to the well-conceived notion of the lawyer as advocate.[49]

One text on legal ethics, *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism*, expresses concern about lawyers' being trained in skills of analysis and advocacy with objectivity being a prominent value and all of this figuring centrally in the lawyer's conception of self. The text is replete with selections and comments by the editors intended to assist lawyers in integrating their professional experience with their own human values.[50] In effect, lawyers and law students are invited constantly to think of themselves as humans in whatever they do, and with these reminders come suggestions for how they should act. One selection, for example, sizes humans up as "positive, constructive, moving toward self-actualization, growing toward maturity, growing toward socialization."[51] The editorial comment suggests that the alternative is to embrace a Hobbesian view of human nature that depicts us as competitive, self-interested, aggressive, and always disposed to engage in combat rather than to seek peaceful resolutions to difficulties. The editors' endorsement of the former view is an obvious attempt to encourage law students and lawyers to see themselves and others more as positive beings, a conception that brings with it the advice for lawyers to temper their views of themselves as analytical advocates battling against the opposing side.[52]

In another selection from that text, one of the authors recounts his feelings of fear and inadequacy when he was first placed in the intimidating environment of a classroom full of first-year law students, all seemingly smarter than he, with a professor bent on demonstrating this inadequacy to each student in the class. The author's response was to withdraw for a month and say nothing in the classroom. In the editorial comment that follows, an effort is made to place this experience in the context of situations that are generally fearful to humans, to help the law student and the lawyer see the experience of inadequacy as something that happens not just to them. The analysis continues to recommend that, when we find

ourselves in such situations, we should overcome the urge to withdraw (or take measures designed merely to help us feel safe in the face of danger) and rather take on a "broad vision" of the matter.[53] In short, the advice of not withdrawing makes sense when lawyers broaden their conception of appropriate responses for lawyers to include general human responses.

This completes our study of how legal ethics ties advice for attorneys' conduct to conceptions of attorneys. We identified this connection as a part of the ongoing and critically reflective process that assesses how best to conceive of attorneys in their various roles. The many examples we considered amply demonstrate that these characteristics belong to legal ethics. Some people may see this approach to ethics as desirable simply from the foregoing account which shows it to be an approach that keeps our inquiry going and that is experimental, flexible, and critical. In the next section, we will build on these grounds for seeing legal ethics as a model as we explore how legal ethics can overcome problems that other basic approaches to ethics encounter.

First, a disclaimer is in order. While the claim here is that legal ethics displays the desirable qualities mentioned above, it is not important to our case to establish that legal ethics uniquely displays them; I don't rule out the possibility that similar features can be factored out of other areas of applied ethics. Indeed, I think that current opinion favors piecemeal analysis of contemporary moral problems as a way to contribute in an ongoing fashion to our understanding of and dealing with them. But the notion of there being a climate of opinion that guides people's theorizing is hard to tie down, and accordingly, anything we could say about it would be far less exact than what we have been able to observe about legal ethics. The gain in exactness in itself is a good reason for looking at these qualities within the context of legal ethics where its process and those employing it seem far more self-conscious and deliberate than in other branches of applied ethics.

Next, returning to the argument that legal ethics has desirable qualities, it is noteworthy that one of these qualities, the emerging

nature of legal ethics, mirrors in many ways the legal process, a process which some already recognize as effective. That legal ethics bears strong resemblance to the legal process should come as no surprise when we consider the considerable similarities between an ethical and a legal system and the extent to which it is likely that lawyers adept in the ways of the law would use the legal process as a reference point for formulating their ethics. It is evident that ethics and law both aim to structure and guide conduct with rules, to promote harmonious and just relations among members of some group or society, and to give some ground for the evaluation of conduct as right or wrong, whether legally or ethically.

Further, lawyers and judges find commonplace in their experience a case law that develops as judges, through the urging of counsel, reshape or create legal rules in an ongoing attempt to effect viable solutions to the legal problems at hand. The well-known history of the development of a single rule in the law of products liability dramatically illustrates the workings of the legal process. Here we see the courts moving from a point where those who did not purchase but were injured by products enjoyed virtually no legal protection, except when the product was probably dangerous, to a point where obligations were placed on the seller and remedies did become available to these persons. According to Edward Levi, we find in *MacPherson v. Buick* that "the exception in favor of liability for negligence where the instrument is probably dangerous has swallowed up the purported rule that 'a manufacturer or supplier is never liable for negligence to a remote vendee.' The exception now seems to have the same certainty the rule once had. The exception is now a general principle of liability...."[54] And Dworkin cites *Riggs v. Palmer* as providing a good illustration of how a court creates a new rule from a preexisting principle and thereby contributes to the emerging character of law. In this case, the question was whether one could inherit from one's grandfather as per the terms of the grandfather's will if one had murdered the grandfather. The court acknowledged that a literal reading of the existing statutes permitted this. But the court drew on a long-standing principle of the common