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Cover Page Footnote

Acting Professor of Law, University of California, Los Angeles. I am grateful to Rick Abel, Stuart Banner, Devon Carbado, David Dolinko, Jody Freeman, Bob Gordon, Ken Klee, Russell Korobkin, Youngjae Lee, Steve Munzer, Bill Rubenstein, Seana Shiffrin, Kirk Stark, and members of the Southern California Law & Philosophy Group and the UCLA Junior Group for their helpful comments on earlier drafts of this paper. I also thank Paul Foust for his research help, Alicia Pell and Shelley Cobos for their proofreading, and especially Jody Freeman, Deborah Rhode, Seana Shiffrin, David Sklansky, Clyde Spillenger, and Ben Zipursky for their encouragement and support. In this paper, I construct an account of Rhode's view of ethical lawyering that builds on the starting points she offers in her recent book. In filling out and developing the picture as I understand it, I may well have strayed from the position Rhode herself intended to endorse. The account I offer here must therefore be understood to be my own interpretation of her model, and not necessarily that which Rhode understands herself to have presented.

ETHICAL LAWYERING AND THE POSSIBILITY OF INTEGRITY

Sharon Dolovich*

INTRODUCTION

What is involved in being an ethical lawyer? This, to my mind, is the central question for those interested in understanding the professional obligations of lawyers. But how to go about answering it? The obvious first step is to try to explain what it is that ethical lawyers *do*, how they respond to requests for assistance from current or prospective clients, how they understand their obligations and how they fulfill them.

The dominant model of ethical lawyering to emerge from efforts to answer this question has been the traditional view of the lawyer as zealous advocate, or, as William Simon puts it, “neutral partisan:”¹ one who does whatever possible, within the bounds of the law, to serve her client’s interests regardless of what the lawyer herself thinks of the client’s ends. A neutral partisan, on this view, passes no judgments; her zeal on behalf of the client is unmitigated and noncontingent.

More recently, however, legal ethics scholars have begun to challenge the hegemony of this model, advancing a different answer to the question of what ethical lawyers do. For these critics, ethical lawyering involves not the suspension of moral judgment but rather

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In this paper, I construct an account of Rhode’s view of ethical lawyering that builds on the starting points she offers in her recent book. In filling out and developing the picture as I understand it, I may well have strayed from the position Rhode herself intended to endorse. The account I offer here must therefore be understood to be my own interpretation of her model, and not necessarily that which Rhode understands herself to have presented.

1. William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29, quoted in Deborah L. Rhode & David Luban, *Legal Ethics* 89 (3d ed. 2001).

the exercise of it, to determine what justice requires and thus the nature and extent of the efforts the lawyer ought to exert on the client's behalf. On this alternative view, lawyers cannot justify their actions solely on the ground that it was in their clients' interests that they act in this way, but must instead, as Deborah Rhode puts it, come to take "personal moral responsibility for the consequences of their professional acts."² Whereas the conventional view rejects as inappropriate a lawyer's moral assessment of the client's interests and ends, this latter view construes this assessment as central to the work of an ethical lawyer.

Addressing these competing views is the first order of business for anyone interested in figuring out what is involved in being an ethical lawyer. There is, however, a second step in this inquiry, one which, despite receiving considerably less attention from legal ethics scholars,³ also bears examination if we are to have a complete account of ethical lawyering. That is, we must ask: What are ethical lawyers like? What traits of character do ethical lawyers possess that make them able to fulfill their moral responsibilities? In this article, I seek to show that any complete account of ethical lawyering needs a theory of moral character. Moreover, I argue that the likelihood that the traits of character on which ethical lawyering depends will be fostered or undermined among individual lawyers will be determined to a great extent by the shape of the institutional framework of legal practice. It is for this reason, I conclude, that there can be no widespread moral renewal across the profession without widespread structural reform, reform that if it is to be effective must start by addressing the prioritizing of profit that has come to define many institutions of legal practice.

I develop this set of arguments through a focus on the model of ethical lawyering advanced by Deborah Rhode in her recent book, *In the Interests of Justice*. In this book, Rhode situates herself among those legal ethics scholars who have challenged the standard zealous advocacy model in favor of a more contextual approach.⁴ In so doing, she speaks directly to our first question of what ethical lawyers do. Like other scholars who advance such views,⁵ however, Rhode attends

2. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* 17 (2000).

3. The notable exception here is Anthony Kronman. See generally Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993) [hereinafter Kronman, *Lost Lawyer*] (exploring the moral character of the ideal of "lawyer-statesman" and in particular the Aristotelian virtue of practical wisdom which makes possible the achievement of this ideal); see also Anthony T. Kronman, *The Value of Moral Philosophy*, 111 Harv. L. Rev. 1751 (1998) [hereinafter Kronman, *Moral Philosophy*].

4. Rhode's commitment to this approach predates her recent book. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589 (1985). On my use of the term "contextual" to denote Rhode's model, see *infra* note 40.

5. See, e.g., David Luban, *Lawyers and Justice: An Ethical Study* (1988); William

little if at all to the question of what character traits are necessary for ethical lawyering. It is not that Rhode's account of ethical lawyering is without a theory of moral character. To the contrary, as with all accounts of ethical practice that do not directly address the question of moral character, one finds in Rhode's model a tacit reliance on the presence of a certain set of moral qualities in the lawyers to whom she addresses herself, an unarticulated vision of the moral character of the ethical lawyer. But this account remains below the surface, rendering it inaccessible to critics and champions alike.

In what follows, I argue that the kind of person on which Rhode's model implicitly relies for its success is a person who possesses the traits of character that together comprise the moral quality commonly associated with the most morally praiseworthy among us: the quality of integrity. My argument proceeds in several steps. Because any claim as to the character traits of an ethical lawyer will depend on the conception of ethical lawyering being advanced, to make this case it is first necessary to understand what it means to be an ethical lawyer on Rhode's account—a task which in turn requires that we understand the standard zealous advocacy model to which Rhode's model is a reaction. For this reason, I explore in Part I the standard conception of the lawyer's role, before turning to the task of articulating, in somewhat more detail than Rhode herself offers, the alternative framework for ethical lawyering Rhode advocates in its stead. My aim in Part I is two-fold: to develop a critical understanding of each framework, and to convey a sense of what Rhode's model demands of the lawyers who would take it as a guide. In Part II, I provide a brief philosophical exploration into the moral quality of integrity. This excursion is necessary if I am to be able to demonstrate that integrity is the quality on which Rhode's model implicitly depends for its success. Then, armed with an understanding of the nature of integrity itself, I return to Rhode's account to demonstrate the extent to which the possibility of ethical lawyering as Rhode conceives it depends on lawyers possessing the character traits that comprise integrity. Finally, in Part III, I explore some of the implications of this dependence for the structure of the legal profession itself, and in particular consider what it suggests for those who wish to promote among lawyers the practice of ethical lawyering the way Rhode and others⁶ understand it. I argue that although basic moral character is to some extent shaped long before moral actors enter the legal profession, the institutional structures and practices of the profession can nonetheless have a significant influence on whether a lawyer's integrity is fostered or undermined. In closing I identify an incompatibility between ethical lawyering and an undue concern with maximizing profit, and argue

H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* 9-11 (1998).

6. See e.g., Luban, *supra* note 5; Simon, *supra* note 5.

that engaging in this latter pursuit may undermine the very qualities of integrity on which ethical lawyering on the contextual model depends for its success.

I. ZEALOUS ADVOCACY AND RHODE'S ALTERNATIVE

A. *The Standard View*

In her recent book, Rhode reserves some of her harshest criticism for the zealous advocacy model of the lawyer's role. This model, the "standard conception,"⁷ has at its core the view that a lawyer realizes her professional obligations by remaining loyal to clients and exhibiting "extreme partisan zeal" on behalf of their interests, constrained only by the limits of the law.⁸ Notwithstanding that achieving the interests of any given client may have serious negative implications for innocent third parties or for the public at large, on this view the loyalty and partisanship of zealous advocates must nonetheless be unwavering.⁹

It is a curious thing that on this standard view, the lawyer's role is at the same time both amoral and highly ethical. It is amoral in the sense that, however morally questionable the clients' ends and however zealous the lawyer is in their pursuit, the lawyer is thought to bear no moral responsibility for either the content of the ends or their achievement.¹⁰ Although a basic assumption of ordinary morality is that a person who acts knowingly and willingly to achieve an end is

7. Luban, *supra* note 5, at 7.

8. *Id.* at 50; see Rhode, *supra* note 2, at 15 (explaining that on this view, a lawyer's "preeminent obligation is loyalty to client interests" and that "[e]xcept in limited circumstances . . . lawyers are to maintain clients' confidences and to pursue their interests 'zealously within the bounds of the law'").

9. See Rhode, *supra* note 2, at 15. This view was eloquently expounded by Lord Henry Brougham, who in 1820 asserted that:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction, which he may bring upon others.

Rhode & Luban, *supra* note 1, at 186 (quoting 2 Trial of Queen Caroline 8 (J. Nightingale ed. 1820-21)).

10. See Model Rules of Prof'l Conduct R. 1.2(a) (2000) ("A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to [limited exceptions]."); R. 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."); Model Code of Prof'l Responsibility EC 7-7 (2000) ("[Subject to limited exceptions,] the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."); EC 7-8 ("In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.").

morally responsible for both the act and the end, the standard view of the lawyer's role exempts lawyers from this judgment.¹¹ In part, the idea behind this notion is that clients, if they are to achieve permissible legal ends, need lawyers to help them navigate their way through the system.¹² If lawyers were deemed morally responsible for their clients' ends, they might decide to judge the worth of those ends before agreeing to take the representation,¹³ in which case individual lawyers would be in the powerful position of deciding which legal goals were worthy and which not, thus usurping the legislative and judicial functions and denying clients the tools they need to vindicate their legal rights.¹⁴ To avoid this situation and to ensure that clients retain autonomy over their own ends, the standard view relieves lawyers of moral responsibility for actions taken on behalf of their clients, instead conceiving of lawyers as "amoral technician[s], whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established."¹⁵ As such, lawyers are free—and, indeed, required—to express "indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance,"¹⁶ including possible harm to innocent others or to the public at large.

Yet even while, on this standard view, lawyers enjoy a wholesale exemption from moral judgment for actions taken in their professional capacity, they are at the same time credited with a high ethical purpose: that of ensuring, through the performance of their role as "neutral partisans" for their clients,¹⁷ the realization of society's highest ends.¹⁸ We have already seen that the neutral

11. See Luban, *supra* note 5, at 7 (arguing that, in addition to the "principle of partisanship," the standard conception of the lawyer's role also consists of the "principle of nonaccountability": "When acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved" (quoting Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669, 673 (1978))) (omission in original).

12. For a clear articulation of this argument, see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: Defense, a Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613.

13. Or worse, they might decide to judge the worth of the client's ends during the course of the representation, after the client has put their trust in the lawyer's word that she is committed to helping the client get what he wants.

14. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rts. 1 (1975). In the English system, barristers have traditionally subscribed to the cab rank principle, on which clients, assuming they can pay, are assigned on a first-come, first-served basis to the next available barrister who has subject matter competence. This rule, when practiced, arguably avoids the possibility that lawyers will select clients based on their personal perception of the worth of the client's aims. See Richard Abel, *American Lawyers* 33 (1989).

15. Wasserstrom, *supra* note 14, at 6.

16. *Id.* at 5.

17. See Simon, *supra* note 1, at 89.

18. I use this phrasing not to endorse the suggestion that these values are in fact "society's highest ends" but in efforts to capture the flavor of justifications offered for

partisan is thought to secure the public value of individual autonomy. But there are several other values that are, on this view, thought to be secured when lawyers play this role: the presumed products of our adversary system, most central among them the discovery of truth and the preservation of individual rights.¹⁹ The argument tying these values to the amoral role of the zealous advocate, like that offered above with respect to client autonomy, is at base a consequentialist one,²⁰ and it runs as follows. The securing of these values—truth, rights, justice, individual autonomy, etc.—is the central purpose of any justice system. The mechanism through which these values are achieved in the American system is the adversary process, a process in which individual litigants are represented by lawyers who, each playing the part of zealous advocate for their clients' interests, engage in direct adversarial conflict with the other sides' lawyers. Placed between the adversaries is an impartial arbiter who considers the partisan presentation of the evidence offered by each side and is able, after weighing the arguments offered, to discern what is truth and what is sophistry. From this discernment of truth comes a judgment as to the rights of the parties. This is the consequentialist claim upon which the defense of zealous advocacy hinges: that it is only through this clash of adversaries that these ends can be achieved. The role of the lawyer is thus to be both neutral—not to judge the aims or interests of the clients *ex ante*, but merely to present them in their unmediated state—and partisan—to present those unmediated interests as persuasively as possible to the tribunal, in order to let the judge or jury decide what is true, and what is therefore due to whom.²¹

There is thus, on the standard conception, a mutual interdependence between the amorality and ethicality of the lawyer's role. That is, it is only because lawyers in their capacity as neutral partisans are believed to play such a crucial role in the achievement of society's highest ends that they are exempt from being judged negatively on the basis of individual acts taken on behalf of clients.

the standard view of the lawyer's role, which are frequently put in these terms.

19. These, at least, are the values thought to be realized by the adversary system in the civil context. There are a host of additional values attributed to the adversary system in the criminal context, but because I view the criminal context as a special case, I leave these aside for purposes of the present discussion. For further discussion of zealous advocacy in the criminal context, see *infra* note 59.

20. Consequentialism is the moral theory which holds that "the rightness or wrongness of an action always depends on the consequences of the action, on its tendency to lead to intrinsically good or bad states of affairs." Bernard Williams, *Morality: An Introduction to Ethics* 82-83 (2d ed. 1993).

21. This is the argument behind the claim of the American College of Trial Lawyers that "the most effective way to discover truth and preserve rights is through an adversarial process in which attorneys have 'undivided fidelity to each client's interests as the client perceives them.'" Rhode, *supra* note 2, at 15. Rhode describes the passage from which this quote is taken as "aptly" summarizing the conventional view. *Id.*

Indeed, lawyers who undertake the role of neutral partisan to further their clients' interests, reserving judgment even when they themselves find their clients' interests to be problematic or even reprehensible, are on this view not to be condemned for their amorality but rather celebrated as the agents that make possible the achievement of society's highest values. This assessment of the highly ethical character of the lawyer's role extends even to those actions that might seem, to the uninitiated at least, to be morally indefensible under any circumstances, such as a lawyer protecting a client's confidences even where the information, if disclosed, could save the lives of innocent third parties.²² Again, the justification for such an action is the consequentialist one we have seen to be grounded in the needs of the adversary system, in this case the need for a relationship of candor and trust between lawyer and client. Without an expectation of confidentiality, it is argued, clients would not trust their lawyers sufficiently to disclose all the details bearing on the case, thus compromising the lawyer's ability to be an effective advocate for the client.²³

In sum, by occupying the role of zealous advocate assigned to them by the adversary system, lawyers are claimed to be serving the needs and interests of the justice system and thus performing a vital service for society as a whole. Although in particular cases—when, for example, defending a multinational corporation with deep pockets

22. The classic case of such a circumstance is *Spaulding v. Zimmerman*, 116 N.W. 2d 704 (Minn. 1962). In that case, the defendants' lawyers knew the plaintiff, Spaulding, to have an aneurysm, a life-threatening condition of which Spaulding himself was unaware and which could mean instant death unless treated with simple surgery. *Id.* at 707. The lawyers concluded that their duty of confidentiality to their clients required that they keep the fact of the aneurysm confidential, and they did so, a move that only came to light when, two years later, Spaulding had an army physical that disclosed his condition. *Id.* at 708. Spaulding then petitioned to have the original settlement vacated, and although the court granted his motion, it took great pains in so doing to emphasize that "no canon of ethics or legal obligation" required the lawyers to inform Spaulding or his counsel about the aneurysm. *Id.* at 710. These words remain true to this day, although the ABA House of Delegates recently approved modifications to its confidentiality rule in a way that would allow lawyers in their discretion to disclose confidences "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm." Model Rules of Prof'l Conduct R. 1.6(b)(1) (approved amended draft 2001).

23. In the criminal context, this argument takes on a constitutional cast, the idea being that, if a defendant's right to adequate assistance of counsel under the Sixth Amendment is to be meaningful, a lawyer must know all she can about the case and especially all the client knows about the case. The client must therefore be able to trust the lawyer not to reveal his confidences to the prosecution. Or, as criminal defense lawyer Frank Armani colloquially put it: "The question of the Constitution, the question of even a bastard like him having a proper defense, having adequate representation, being able to trust his lawyer as to what he says." Frank Armani, *Ethics on Trial*, WETA-TV video 1987, quoted in Rhode & Luban, *supra* note 1, at 185 (addressing the question as to why he had notoriously refused to reveal where his client, accused serial killer Robert Garrow, buried the bodies of his victims, despite impassioned pleas from the families of the victims for news of their loved ones).

against a child maimed or paralyzed by a faulty product manufactured by his client—a lawyer's actions may seem morally dubious, proponents of this view would argue that this impression is based on a misunderstanding of the lawyer's necessary role in the system as a whole.

At first, there is much that seems compelling about this set of justifications for the zealous advocacy role. However, leaving aside the criminal justice context—the context in which, for many commentators, the justification for the zealous advocacy model seems particularly compelling²⁴—closer scrutiny of these claims suggests strong reasons for skepticism, in two key (and in my view definitive) respects. First, as Rhode among others has argued persuasively, there is strong reason to doubt that the American-style adversary system as currently constituted effectively serves the ends of discovering truth and preserving legal rights in the ways its champions claim.²⁵ Second, and particularly significant for our purposes, it is by no means obvious that the values the adversary system is claimed to serve are the most important among those at stake in any legal contest. Take, for example, the value of autonomy. Even if it is the case that a lawyer's unquestioned zealous advocacy promotes the autonomy of the client,

24. See *infra* note 59.

25. As to truth, this claim in the context of the adversary system presupposes that extreme partisanship, with its self-interested (and often selective) presentation of the facts, is as likely to yield an accurate picture as disinterested presentation by, say, an impartial investigating magistrate. See Rhode, *supra* note 2, at 55; see also Luban, *supra* note 5, at 72. Yet not only is this empirical claim "not self-evident," Rhode, *supra* note 2, at 56, but it is also counter-intuitive, particularly given the procedural mechanisms available to any savvy trial lawyer for the exclusion of relevant evidence. Luban, *supra* note 5, at 69 ("Perhaps science proceeds by advancing conjectures and then trying to refute them; but it does not proceed by advancing conjectures that the scientist knows to be false and then using procedural rules to exclude probative evidence."). And in any case, as Rhode points out, "[m]any disputes never reach the point of formal legal complaint, and of those that do, over ninety percent settle before trial." Rhode, *supra* note 2, at 55. As a consequence, the majority of claims are not actually adjudicated in the adversarial context, and those that are "seldom resemble the bar's idealized model of adversarial processes" which assumes "roughly equal incentives, resources, capabilities, and access to relevant information." *Id.* The skepticism suggested by these arguments as to the effectiveness of the adversary system in getting at the truth applies also to the question of legal rights: the ability of clever advocates in our system to manipulate the rules to achieve victory regardless of the merits of the case gives reason to doubt not only that the truth has been discerned but also that the legal rights of the parties have been vindicated. One may, of course, take the formalist view that no legal rights exist until recognized by a court of law, but this simply begs the question—on this theory we could equally celebrate the preservation of rights whatever legal system we had. And anyway, the fact that, under the current system, parties with valid legal claims are frequently outmatched by adversaries with more resources and thus greater access to more zealous advocacy on their behalf creates reason to doubt that the results of the adversary system as currently constituted are an adequate reflection of the parties' relative rights under the law. For more comprehensive discussions on these points, see Luban, *supra* note 5, at 68-78; Rhode, *supra* note 2, at 55-57.

in the sense of promoting individuals' initiative and responsibility for their own ends, the autonomy of the client is not, as Rhode and David Luban have argued, "the only value" of social importance.²⁶ In fact, depending on the context, this value may be of lesser importance than other values.²⁷ For this reason, one who wants to defend the role of zealous advocate on this ground bears the burden of showing that in a particular case it is client autonomy with which we should be most concerned.²⁸ And this goes not merely for client autonomy, but for all the values the lawyer's role as zealous advocate allegedly serves. For in the course of zealously representing their clients, lawyers may be called upon to act in ways that considerably compromise the health, safety, or financial well-being of innocent third parties, harm the environment, undermine public institutions including our regulatory system, and/or weaken public trust in the fairness and integrity of both the legal system and its guardians.²⁹ The client's goals may well be legal, and the lawyer's advocacy for those aims may be consistent with his or her duty of loyalty to the client, but as Rhode emphasizes, this is not the same as saying that advocacy that risks unjust results is consistent with, much less designed to realize, society's most pressing interests and values.³⁰ Because there are important social values cherished by the public other than those claimed to be promoted by the adversary system, proponents of the standard account cannot simply assume *ex ante* that this latter set of values represents society's only priorities and thus that their vision of the lawyer's role is justified

26. See Rhode & Luban, *supra* note 1, at 152.

27. As might be said, for example, if a client sought to exercise his autonomy to develop a piece of land under his control when doing so might endanger a fragile ecosystem.

28. I use the term "we" here deliberately, to emphasize that the lawyer who adopts the role of the zealous advocate escapes moral judgment for her professional acts only at the behest of society. The role, in other words, is one that society affirms as morally legitimate precisely in order to promote the public values that are considered necessary and desirable in a free and just society.

29. For example, in the name of preserving client confidences—a central component of loyalty to the client—lawyers have been called on to: conceal from the court that the client, a convicted rapist, has through a clerical error escaped sentencing and remains at large in the community; keep secret the fact that the opposing party has a life threatening condition of which he remains unaware because of an oversight by his own inexperienced counsel; conceal from a former client's new counsel the fact of that client's fraud to the tune of almost \$60 million, causing new counsel to assist in negotiating almost \$15 million in new fraudulent loans; and keep confidential the fact that an employer intends to sell as safe a shipment of defective dialysis machines that will potentially put patients at risk. See Rhode, *supra* note 2, at 106-08 (citing Tom Coakley, *N.M. Rapists Free 10 Years in Court Foul-Up*, Denver Post, Mar. 23, 1983, at 12A; Spaulding v. Zimmerman, 116 N.W. 2d 704 (Minn. 1962); *OPM Leasing Services, Inc.*, in *The Social Responsibilities of Lawyers* 184 (Phillip B. Heymann and Lance Liebman eds. 1988); Balla v. Gambro, Inc., 584 N.E. 2d 104 (Ill. 1991)). Such actions may well be consistent with a lawyer's obligation of loyalty to the client, but that is not the same as saying they are consistent with society's most pressing interests and values. See *id.* at 106-07.

30. *Id.*

in all cases. Instead, this claim must be argued for—and may not always be persuasive.³¹

To some, this last suggestion may seem to miss the point. For the way it has commonly been conceived, the zealous advocate is not a role available for a lawyer to freely choose or discard at will depending on the circumstances of the case, but is rather a model for lawyering in all cases, regardless of the particulars. Indeed, it might be thought, were lawyers to decide *sua sponte* whether to conform to the system's demands for neutrality based on the worth of the client's interests and for partisanship on behalf of those interests, the system's mechanisms would be subverted and it would cease to function. Yet if the critique of the standard view offered above has any force, it suggests that society's interests are not actually served by an across-the-board *ex ante* commitment by lawyers to adopting the neutral partisan role. Indeed, such a commitment may well *undermine* societal interests. And if this is so, the presumption in favor of the standard view of lawyering for reasons of promoting such interests cannot be sustained in all cases.

The foregoing discussion suggests a puzzle: If society's interests are not ultimately served by the standard view of the lawyer's role, why does it persist? As Rhode has convincingly shown, there is at least one group that stands to benefit a great deal from the broad acceptance of this view: lawyers themselves.³² Adopting this view provides lawyers, constructed thereby as "amoral technicians," with a highly simplified moral universe which offers easy guideposts for action that allow lawyers to sidestep wrenching ethical dilemmas, and with the luxury of acting on behalf of clients free from the risk of moral censure.³³ It secures for members of the profession the status and satisfaction that comes with occupying a role that is viewed as serving society's highest ends. And, as Rhode demonstrates throughout her book, it provides considerable professional advantage for lawyers, who are able to market their services effectively by pledging to prospective clients their undivided loyalty and zeal. If, however, Rhode is right and the public interest is routinely undermined by lawyers' "reflexive retreat into role,"³⁴ those of us

31. To take this position, it bears noting, is not the same as saying that it is never socially desirable or appropriate for lawyers to adopt the role of zealous advocate. As we will see below in our discussion of Rhode's alternative account, *see infra* Part I.B and accompanying text, there will be contexts and circumstances in which furtherance of public values of the highest order will *require* neutral partisanship on the part of lawyers.

32. *See* Rhode, *supra* note 2, at 58.

33. As Wasserstrom nicely puts it: "For most lawyers, most of the time, pursuing the interests of one's clients is an attractive and satisfying way to live in part just because the moral world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life." Wasserstrom, *supra* note 14, at 9.

34. Rhode, *supra* note 2, at 52.

seeking the basis of ethical lawyering must look elsewhere for a satisfying account of lawyers' professional obligations.

B. Rhode's Contextual Alternative

For Rhode, the most troubling aspect of the standard view is that it exempts lawyers from the obligation to reflect critically on the question of what justice requires. As she sees it, justice is not the inevitable byproduct of zealous advocacy, but requires for its achievement deliberate efforts in that direction. As she puts it, if lawyers want to claim for themselves the status of "officers of justice, they must accept greater obligations to *pursue* justice."³⁵ It is this demand that lawyers view the obligation to pursue justice as a central aspect of their professional responsibility that forms the basis of Rhode's alternative to the standard conception of the lawyer's role.

But what exactly does Rhode mean by the pursuit of justice? Reading her work, the picture that emerges is one of justice as the achievement of a morally defensible balance of the competing interests at stake in any legal struggle.³⁶ If lawyers are to do justice they must be ready to take account in any given case of all the interests at stake³⁷—including the interests of third parties and not merely the interests of the client and the lawyers themselves. As such, before acting on behalf of a client, they must consider all the consequences of the actions they contemplate for all of these interests,³⁸ not just legally but morally as well.³⁹

35. *Id.* at 17.

36. Actually, reading the whole of *In the Interests of Justice* reveals that, for Rhode, justice has a dual aspect. In addition to the conception of justice I describe here, Rhode also views justice in a more basic way as a straightforward product of the legal system, at least in its ideal form. Rhode's well-known concern with the question of how to ensure broad and equitable access to legal services and to the legal system itself for all members of society stems from this second, more basic understanding of justice. As she sees it, if the possibility of justice in a rule-of-law society such as ours requires access to the legal system and legal representation to make that access meaningful, fairness requires that these goods must be made available to all citizens. *See id.* at 117-41; Deborah Rhode, *The Rhetoric of Professional Reform*, 45 Md. L. Rev. 274 (1986); Deborah Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 Geo. J. Legal Ethics 989 (1998).

37. *See* Rhode, *supra* note 2, at 67.

38. This insistence that lawyers must consider the consequences of actions taken on behalf of clients distinguishes Rhode's view significantly from the standard account, which judges lawyers' adversarial advocacy independently of the consequences that advocacy is likely to generate. As Simon has put it, there is a notion underpinning the standard account of the lawyer's role that "there is an inherent value or legitimacy to the judicial proceeding (and to a more qualified extent, the entire legal system) which makes it possible for a lawyer to justify specific actions without reference to the consequences they are likely to promote." Simon, *supra* note 1, at 90.

39. *See* Rhode, *supra* note 2, at 79.

Even this brief account allows us to identify key features of Rhode's alternative model of the lawyer's role. First, her approach is highly *contextual*. That is, Rhode rejects the notion that lawyers should automatically approach every context as a zealous advocate. As she sees it, it is precisely because situations change and contexts vary that it is not possible for lawyers to make a once-and-for-all judgment as to whether their obligation is simply to defend zealously the client's interests. Instead, a lawyer must in each case consider the full range of interests likely to be affected by his advocacy, and make a determination as to what approach to the client's interests justice requires the lawyer to take in the particular context.⁴⁰ Second, the model she offers is *anti-legalistic*. Rhode rejects the assumption of the standard view that lawyers need only concern themselves with the requirements of the law. For Rhode, it is precisely because lawyers are well-positioned to understand the competing interests at stake in any legal conflict that they are obliged to attend to the moral consequences of their professional actions.⁴¹ And, finally, as these other features suggest, unlike the standard account, on which a lawyer "knows but one person in all the world . . . his client,"⁴² Rhode insists that lawyers in the course of their professional actions must recognize and consider all the interests that stand to be affected by those actions.

Rhode recognizes that reasonable people may disagree in any given instance about the meaning and requirements of justice, and thus that "[i]ndividual lawyers may have good faith disagreements about how [particular] conflicts should be resolved."⁴³ In her view, "in a profession as large and diverse as the American bar," it is to be

40. See *id.* at 67. Arguably, the term "contextual" could also be used to describe the zealous advocacy model, in the sense that the particular actions a zealous advocate takes in zealously advocating for the interests of their clients will vary depending on the circumstances. On Rhode's view, in contrast, what varies by context is the determination whether the lawyer should take on the role of zealous advocate and prioritize the interests of the client in this particular instance at the expense of all the other interests at stake. Perhaps a better term to capture this feature of Rhode's view is "particularist," but I stick with the term "contextualist" notwithstanding the possibility of confusion on this score, because this is the term that is commonly used to express this idea by others writing in this area. See, e.g., Simon, *supra* note 5, at 9 (referring to his preferred approach to ethical decisionmaking by lawyers, "in which decisions often turn on 'the underlying merits,'" as "the Contextual View").

41. In this respect, Rhode's model is like Simon's—although, as we will see below, Simon takes the implications of this anti-legalistic perspective farther than Rhode is comfortable doing. See *infra* notes 62-73 and accompanying text.

42. See Rhode & Luban, *supra* note 1, at 186 (quoting Lord Brougham).

43. As Rhode puts it, "any framework that builds on general principles while remaining sensitive to social context will leave room for argument about appropriate results." Rhode, *supra* note 2, at 71. Rhode does, of course, rule out one particular conception of justice: the rule-utilitarian position that justice is maximized overall when lawyers act in all cases according to the zealous advocacy model of ethical lawyering.

expected that “different lawyers will make different judgments about what is in fact just.”⁴⁴ The point is not that all lawyers reason the same way, but rather that all are obliged as moral agents to make a good faith effort in any situation to determine what ought to happen. Rhode is not trying to achieve a consensus on the substantive meaning of justice. She is rather making the more modest claim that even in light of our disagreements about justice it is better if lawyers act in good faith, reflect in a given case on the various interests involved and what is at stake for each, and, applying their own moral principles, reach a judgment as to the most morally defensible course under the circumstances. The idea is thus not uniform substantive outcomes, but moral reflection and deliberative action by responsible agents.⁴⁵

Although Rhode focuses more on urging lawyers to be true to what they perceive is right, rather than suggesting a full substantive account of what is right, she nevertheless does argue that there are certain values to which all lawyers must be assumed to be committed. For example, simply by virtue of their status as moral agents, lawyers are obliged to do what they can to protect innocent third parties from harm. In addition, by virtue of their professional status, Rhode ascribes to lawyers the responsibility of acting in ways that support and reinforce, rather than undermine, the institutions that comprise the legal system.⁴⁶ Thus, in addition to their obligation to “prevent unnecessary harm to third parties,” lawyers are also obliged to show respect for the rule of law,⁴⁷ and to act in ways that “promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends.”⁴⁸

That Rhode thus presumes on the part of all lawyers a commitment to these specific values may at first appear inconsistent with her recognition that individual lawyers will have different views about what justice requires. If her view permits lawyers to implement their own perceived views about justice, must she not also allow the possibility that some individual lawyers will subscribe to moral views

44. Rhode, *supra* note 2, at 79.

45. See *Id.* at 71 (“The advantage of the contextual framework proposed here is not that it promises bright-line answers but, rather, that it promotes ethically reflective analysis and commitments.”).

46. This position has been eloquently defended by Bob Gordon. As he puts it, Think of lawyers as having the job of taking care of a tank of fish. The fish are their clients, in this metaphor. As lawyers, we have to feed the fish. But the fish, as they feed, also pollute the tank. It is not enough to feed the fish. We also have to help change the water.

Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, in *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* 42, 54 (Deborah L. Rhode ed., 2000) [hereinafter *Ethics in Practice*].

47. “In accommodating [their] responsibilities, lawyers should, of course, be guided by relevant legal authority and bar regulatory codes. Respect for law is a fundamental value, particularly among those sworn to uphold it.” *Id.* at 67.

48. *Id.*

that reject the centrality of those values Rhode ascribes by definition to all lawyers? There is, however, a limit to Rhode's endorsement of diverse moral views, one that resolves this apparent inconsistency. While she recognizes the possibility of differing moral views, she nonetheless maintains that a lawyer's conduct in the course of seeking justice must accord with principles consistent with a commitment to the maintenance of a legal system and capable of being universalized.⁴⁹ Although Rhode says little to elaborate this approach, it appears to borrow something from the Kantian notion of the categorical imperative, the celebrated injunction which holds that one should "[a]ct always according to that maxim whose universality as a law you can at the same time will."⁵⁰ The idea behind this imperative, simply put, is that it is unjustifiable to act in any way such that, if your act were "universalized" into a principle of conduct, it could not logically provide a guide to conduct for all moral actors. The classic example is that of telling a lie: If everyone told lies, then eventually no one would believe anything anyone said, and it would no longer be possible to "lie" in the sense of telling an untruth that passes for truth.

At least something of this notion of universalizability seems to explain Rhode's insistence that a lawyer is obliged in the course of her professional actions to promote the values necessary to preserve the integrity of the legal system. For, as Rhode's discussion implies, as with our example of telling lies, if everyone who operated within the institutional framework of the law acted to undermine the system's core values, there would be no more institutional framework, no more legal system as we know it, and no further context in which lawyers could continue to vindicate the legal rights of their clients. Because "act so as to undermine the values on which the legal system depends for its continuing legitimacy" is not a principle that can be coherently universalized among members of the legal profession, actions taken in accord with its dictates will by definition be inconsistent with any reasonable interpretation of what justice requires.

Rhode also prescribes to lawyers an obligation to do what they can in their professional capacity to protect innocent third parties from harm, and this obligation too seems to follow from her insistence that the principles of ethical lawyers be universalizable. For lawyers in the course of their professional lives routinely work to protect their clients from unnecessary and unjustified harm, and in so doing demand that the system treat their clients justly and that all parties involved act toward them and their clients with honesty, fairness, and good faith. If these are demands that lawyers routinely make of the system and the players within it, ethical lawyers must reciprocate in these regards

49. *Id.* ("Lawyers' conduct should be justifiable under consistent, disinterested, and generalizable principles.")

50. See Immanuel Kant, *Grounding for the Metaphysics of Morals* *437.

in the actions they take toward other affected parties as well as to the system itself. To satisfy this universalizability requirement, it cannot be enough that all lawyers “universally” make a commitment merely to help their own clients. For, as Rhode’s discussion makes clear, lawyers are not just professionals but also human beings. And because, like all human beings, lawyers are vulnerable to harm at the hands of others and thus dependent on the respect and fair-dealing of others to protect them from harm, it is not open to them to act, even in their professional capacity, in ways that cause harm to innocent others.

What would the adoption of Rhode’s ethic mean for lawyers in practice? For one thing, Rhode takes for granted that a lawyer is entitled to be selective in his choice of clients, refusing representation to those whose goals and interests are at odds with the lawyer’s personal moral commitments. This approach might well raise legitimate concerns were it to be universally accepted and thus create the possibility that some persons—say, those with politically unpopular views—would be unable to find representation. Yet even if approach were widely adopted, it seems to me reasonable to expect that there would be a sufficient number of lawyers committed to the principle of universal access to justice that the client in question would be able to secure representation on that basis, notwithstanding the general unpopularity of her views.

Rhode would further expect, with Luban,⁵¹ that the ethical lawyer would engage the client in discussion⁵² as to the moral implications of the client’s preferred ends.⁵³ However, if this discussion fails to persuade the client against ends that, if pursued, would require the

51. See *infra* 72-73 and accompanying text.

52. A zealous advocate would not, of course, be precluded from having such a dialogue with clients. But for ethical lawyers on Rhode’s or Luban’s view, this dialogue would necessarily encompass, among other considerations, the broader moral implications of the client’s ends. For zealous advocates, on the other hand, the priority would be on understanding the client’s goals in order to achieve them, with broader moral considerations coming into play only to the extent that the client is interested in considering them.

53. Such discussion is consistent with the rules governing lawyers’ conduct, in particular Rule 2.1, which states: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” Model Rules of Prof’l Conduct R. 2.1 (2000); see also R. 2.1 cmt. (“It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.”); Model Code of Prof’l Responsibility EC 7-8 (1981) (“In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.”). At the same time, however, the drafters of the Rules seem to assume that the relevance of these moral considerations for the client’s position is only that such considerations may “impinge upon most legal questions and may decisively influence how the law will be applied.” See R. 2.1 cmt.

lawyer to act against her own moral sense, on Rhode's view a lawyer must refuse to assist even a client she has already agreed to represent. This position need not, Rhode maintains, deny the client the right to pursue his own interests. To the contrary, in her view, decisions that affect the achievement of clients' aims "should rest with clients," for "[t]hey are, after all, the ones who have to live with the result."⁵⁴ Yet the fact that a client has the right to pursue particular ends does not mean he has the right to the assistance of a particular lawyer to do so, even if that lawyer has already been retained.⁵⁵ For, as we have seen, on Rhode's conception, lawyers too are moral agents, and they therefore "have a right and a responsibility to determine whether their support is ethically justifiable,"⁵⁶ which includes the responsibility to refuse assistance when the lawyer concludes it is morally necessary to do so.⁵⁷

Finally, and perhaps most surprisingly, this model need not necessarily preclude lawyers from playing the role of neutral partisans on behalf of their clients. For, depending on the circumstances, a lawyer carefully reflecting on the situation before him may well conclude, given the moral principles to which he is committed, that adopting the role of zealous advocate on behalf of his client in this particular instance is precisely what justice requires. The difference for Rhode is that zealous advocacy should not be the required stance of the lawyer in all contexts, but a choice, made by the lawyer on a case-by-case basis⁵⁸ after careful reflection on the various interests at

54. Rhode, *supra* note 2, at 72.

55. This idea has support in the ABA Model Rules. See R. 1.16(b)(3) ("[A] lawyer may withdraw from representing a client if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."); R. 1.16(b)(3) ("[A] lawyer may withdraw from representing a client if . . . a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.") (approved amended draft 2001).

56. Rhode, *supra* note 2, at 72.

57. See *id.* at 69. As Rhode puts it, "[c]lient trust and confidentiality are entitled to weight, but they must be balanced against other equally important concerns." *Id.* at 67. In taking this position, Rhode is unmoved by the familiar rejoinder that the client will simply replace lawyers who refuse with "a less 'high minded' successor, who will insulate the client from future conscientious advice." *Id.* at 69 (quoting Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* 145 (1978)). As she puts it, it is "by no means clear how often a moral stand by lawyers will force them to resign and make way for someone worse." *Id.* at 69. Indeed, it is her hope that lawyers who question the moral legitimacy of clients' ends will "raise the stakes for [those] clients, both psychologically and economically," thus "prompt[ing] clients to rethink their objectives rather than replac[ing] their attorney." *Id.*

58. On the standard view, if lawyers are perceived to have choices at all, it is the choice of whether to accept the representation of a particular client who seeks their services. This choice, is, to be sure, acknowledged as a moral one, one for which, as Monroe Freedman has maintained, "the lawyer can properly be held morally accountable." See Monroe Freedman, *The Morality of Lawyering*, *Legal Times*, Sept. 20, 1993, at 22, quoted in Rhode & Luban, *supra* note 1, at 134, 135. But from this perspective, the possibility of moral judgment evaporates as soon as the representation has been accepted, after which the lawyer is believed to have "a duty,

stake in the specific context⁵⁹ and for which the lawyer should be held morally accountable.

The foregoing discussion may lead some readers to conclude that Rhode is more concerned with protecting the lawyer's soul than achieving justice. For while proponents of zealous advocacy recognize that vindicating society's highest values may require lawyers to do things on behalf of their clients that they would otherwise find morally troubling, Rhode seems unwilling to have lawyers do what they believe is morally distasteful, even, it may seem to defenders of the standard view, at the expense of justice. As we have seen, however, Rhode doubts the claim that society's interests are best served by an absolute *ex ante* commitment on the part of lawyers to the role of neutral partisan. Certainly, Rhode's model creates space for a lawyer to follow her conscience and refuse to assist a client, rather than undertaking actions or achieving ends which she cannot morally condone. This is part of its attraction for those who fear that uncritical adoption of the neutral partisanship model will take a toll on lawyers who are, after all, human beings and moral agents as well as professionals. But my sense is that, for Rhode, this appealing feature is secondary to the central belief that a profession whose

to the best of his ability to advocate a position, if his client's interest so requires, which counsel may personally regard as contrary to the public interest." Abe Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?*, 55 Chi. B. Rec. 36 (special centennial supplement 1974). For Rhode, however, lawyers have both moral agency and the capacity for moral reflection, qualities that do not disappear the moment the representation begins. Furthermore, from the perspective of one who, like Rhode, seeks to hold lawyers morally responsible for their choices and actions, views like Freedman's arbitrarily privilege the moment of initial consultation. What if a client is not honest at the outset about her goals? What if she changes her mind later on? If lawyers should have leeway on moral grounds to refuse a request for their services, it is not clear why this moral agency should vanish as soon as the representation begins.

59. Rhode assumes this process of reflection will ordinarily lead to the endorsement of the zealous advocacy approach by lawyers operating in the criminal defense context, where the "potential for governmental abuse" and the threat posed by the system to "individuals' lives, liberty, and reputation" tilt the equities heavily toward the need for nonjudgmental and zealous advocacy. Rhode, *supra* note 2, at 72; see also Luban, *supra* note 5, at 148 ("In the criminal defense paradigm, the appeal to the adversary system by-and-large vindicates the kind of partisan zeal characterized in the standard conception."); Wasserstrom, *supra* note 14, at 12 (endorsing the neutral partisanship model in the criminal justice context while criticizing its application to the civil context); *id.* ("Because a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism of the rightness of punishment even where wrongdoing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused—without regard, so to speak, for the merits."). But see Simon, *supra* note 5, at 170-94 (rejecting the justifications traditionally offered by critics of zealous advocacy for a criminal defense exception). The question, of course, is whether these concerns are dispositive, and for Rhode's model to be consistent she must leave this final determination to individual lawyers themselves.

members assume personal responsibility for serving society's interests and achieving justice will be more likely overall to do so successfully than a profession in which these goals are assumed byproducts of helping clients get what the law allows them.

Leaving it up to an individual to determine the appropriate course to justice in any given instance does, it is true, create a risk that he will get it wrong as others see it—or worse, that he is committed to a moral conception that others would outright condemn. This risk, however—the risk that the moral agents who use their own moral judgment will draw conclusions as to what justice requires on the basis of values that others might well vehemently oppose—is one that any contextual conception must run. Rhode attempts to contain this risk, but to the extent that lawyers could act consistently with her specifications and nonetheless reach results that others might find morally troubling, Rhode's model would be required on its own terms to affirm their engagement in ethical lawyering.

C. Rhode's Individualist Ethic

This, then, is what it means on Rhode's account for lawyers to pursue justice: careful reflection in the particular situation on the interests at stake and the likely consequences of alternative actions, with the choice of what do to on behalf of one's client being made on the basis of a consistent commitment to universalizable values and principles and the acceptance by lawyers of personal responsibility "for the moral consequences of their professional actions."⁶⁰ In the vast majority of cases, of course, lawyers will not be called to account for their choices before any sort of tribunal, or even before the court of public opinion. As Rhode well recognizes, the disciplinary system in place to scrutinize lawyers' actions is woefully inadequate, incapable of addressing even many of the most egregious cases of lawyer misconduct.⁶¹ Thus if lawyers are to assume personal responsibility for their professional conduct in the way Rhode advocates, they must decide to do so, not out of fear of sanction or public recrimination but on the basis of individual choices as to how to conduct their professional lives. Rhode's ethic is thus best understood as an individual ethic, which offers guidance as to the nature of ethical practice and leaves it up to each lawyer individually to decide whether to follow it. Whether an individual lawyer has the capacity or inclination to conform to the demands of this ethic will depend to a great extent on the nature of his or her own moral character.

In this respect, Rhode's approach is in line with other contextual models of lawyering. Simon, for example, has argued that lawyers

60. Rhode, *supra* note 2, at 67.

61. See *id.* at 158-60. Even among those cases of lawyer misconduct assessed before a tribunal, it is the rare one that receives any sort of public attention.

“should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice.”⁶² Fulfilling this obligation, Simon maintains, requires that lawyers recognize a “professional duty of reflective judgment,”⁶³ the exercise of which presumes that lawyers have the qualities of character that will lead them to take this duty seriously, to reflect carefully, and to act on their deliberative judgment as to what justice requires. And Luban, strenuously rejecting what he labels the “nonaccountability principle” of the standard view—the idea that “a lawyer is responsible neither for the means used nor the ends achieved in a legal representation”⁶⁴—conceives the role of ethical lawyer as one of “moral activist” who, among other things,⁶⁵ approaches client representation with the expectation of discussing with clients the moral implications of their projects and ends.⁶⁶ For Luban, “nothing permits a lawyer to discard her discretion or relieves her of the necessity of asking whether a client’s project is worthy of a decent person’s service.”⁶⁷ This notion, too, assumes that lawyers will have the inclination and the capacity to make moral judgments about which projects are worthy of their efforts and to act on those judgments, even when doing so is against the client’s interests, or their own.

There are certainly differences between these various contextual accounts. Most notably perhaps, Simon argues that lawyers ought to apply to the rules governing the lawyer’s role the same sort of “complex, flexible judgment” they routinely bring to the reading of laws in other contexts,⁶⁸ whereas Rhode seems to accord more deference to the “formal rules” necessary for “effective legal processes.”⁶⁹ Rhode also sides with Luban against Simon on the question of the unique character of the criminal defense context. Rhode argues that in the criminal context the standard role of the lawyer as zealous advocate is not only appropriate but necessary to promote society’s interests,⁷⁰ while Simon sees no reason to

62. William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1090 (1988); see also Simon, *supra* note 5, at 9.

63. Simon, *supra* note 62, at 1083; see also Simon, *supra* note 5, at 10 (“[T]he essence of this approach is contextual judgment—a judgment that applies relatively abstract norms to a broad range of the particulars of the case at hand.”).

64. Luban, *supra* note 5, at 160.

65. On Luban’s view, moral activism also involves “law reform—explicitly putting one’s phronesis, one’s savvy, to work for the common weal.” *Id.* at 173 (emphasis omitted).

66. See *id.* (“Client counseling, in turn, means discussing with the client the rightness or wrongness of her projects, and the possible impact of those projects on ‘the people.’”).

67. *Id.* at 174. Like Rhode, Luban contemplates that there will be times when the lawyer’s moral views are sufficiently at odds with the clients’ that representation will be impossible. See *id.*

68. Simon, *supra* note 1, at 186.

69. Rhode, *supra* note 2, at 77.

70. See *supra* note 59.

distinguish the criminal defense context from any other context in which the lawyers' obligation is to exercise discretionary judgment as to what justice requires under the circumstances.⁷¹ Finally, although she does not address this case directly, Rhode seems more likely than either Simon or Luban to shrink from the notion that a lawyer who believes her client to be engaged in a project that is fundamentally immoral or unjust may legitimately act unbeknownst to that client to undermine those projects and thus the client's interests. Although Luban, for example, suggests that if the lawyer's attempts at moral counseling fail and the client too has failed to convince the lawyer of the justice of her projects,⁷² there will likely be at that point "a parting of ways," he also contemplates the possibility that at that point there may be, depending on the circumstances, "a betrayal by the lawyer of a client's projects, if the lawyer persists in the conviction that they are immoral or unjust."⁷³

In the main, however, Luban and Simon share with Rhode the view that ethical lawyering requires the exercise of discretion by individual lawyers, who must judge for themselves in any given situation what justice requires and act accordingly. And, for this reason, the success of their models depends, as does Rhode's, on the inclination and capacity of individual lawyers to act in these ways, and thus on the presence among individual lawyers of the sort of moral character that would render them thus inclined and capable of so doing.

Zealous advocacy, too, presupposes certain traits of character in the lawyers who adhere to its particular conception of ethical lawyering. Yet despite the centrality of individual moral character to the possibility of ethical lawyering however one conceives it, there has been, with the exception of Anthony Kronman's important work in this area,⁷⁴ surprisingly little attention paid in the legal ethics literature to the sort of moral character ethical lawyering requires. Despite this neglect, it seems to me plain that no theory of legal ethics can be

71. See Simon, *supra* note 5, at 170-94.

72. For Luban, the moral activist lawyer must remain open to the possibility that dialogue with the client will lead the lawyer to change his views. Yet if Tanina Rostain is right that forces of professional socialization can lead to a coherence between the views of lawyer and client on issues relating to the representation even where there is a divergence of perspective on broader social, political, and economic questions, there is at least reason to wonder whether such changes on the part of lawyers would come as a result of dialogue or other more subtle forces. Tanina Rostain, *Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment, and The Practice of Justice*, 51 *Stan. L. Rev.* 955, 962-64 (1999) (discussing the results of Robert Nelson's study of corporate lawyers in Chicago); *id.* at 963 ("Under current conditions of practice, lawyers may become so identified with their clients that they are unable to tell when considerations of justice dictate a result at odds with their clients' interests.").

73. Luban, *supra* note 5, at 174.

74. See Kronman, *Lost Lawyer*, *supra* note 3; see also Stephen L. Carter, *Integrity* (1996) (exploring the idea of integrity more generally, although with some legal applications); Kronman, *Moral Philosophy*, *supra* note 3.

complete without a theory of the character traits of the ethical lawyer. In what follows, I offer an account of the traits of character on which, I argue, the success of Rhode's model—as well as Simon's and Luban's—depends. I focus in this account on the moral quality of integrity, which I view as the key to the possibility of ethical lawyering on this model. The portrait of integrity I sketch is necessarily an ideal type; few lawyers, indeed few people, will in their daily lives fully realize the ideal. Yet those of us who aspire to be better people—and better lawyers—would still benefit from an articulated ideal to which we can aspire, and it is in providing such an ideal that a theory of moral character makes its greatest contribution.

II. INTEGRITY

In this part, I support my contention that Rhode's model of ethical lawyering presupposes, and thus depends for its success upon, the presence among individual lawyers of the character traits that are together thought to comprise integrity. To make this case, it is necessary to have at our disposal a more precise understanding of this set of traits. For this reason, in what follows, I draw on the work of moral philosophers of integrity to offer a brief account of the meaning of this concept. I suggest that a person of integrity has four primary character traits: a steadfast commitment to her values and principles, maintained even in the face of negative consequences; deliberative flexibility; a clear sense of her values and principles; and consistency, both in the application of her principles and between word and deed. In addition, I identify four other traits that are arguably associated with the person of integrity: moral trustworthiness, moral maturity, clear self-knowledge, and the concomitant of self-knowledge, an absence of self-deception. Once this account has been sketched, we will be in a position to recognize that integrity among legal practitioners is central to the possibility of ethical lawyering the way Rhode conceives it—and thus that promoting ethical lawyering on Rhode's framework depends in turn on the possibility of fostering lawyers' integrity.

It bears emphasizing that, in focusing on the implications of integrity for Rhode's contextual account, I do not mean to suggest that moral character is irrelevant to the possibility of ethical lawyering on the zealous advocacy model, nor that practicing zealous advocates may lack integrity and still be expected to fulfill their ethical obligations as that model conceives them. To the contrary, as I indicate at various points below, at least some of the qualities I discuss herein are also necessary to the possibility of ethical lawyering on the zealous advocacy model. The ensuing discussion of the virtues of ethical lawyering should therefore be of interest even to those readers who reject the contextual model in favor of the standard view.

A. Integrity

As Lynne McFall has noted, a person of integrity is “undivided; an integrated whole.”⁷⁵ The person of integrity is thus in some sense “the person who keeps his self intact.”⁷⁶ But what is it to keep oneself intact? At a minimum, the person of integrity manifests the trait of consistency or steadfastness.⁷⁷ She is “true to [her] commitments,”⁷⁸ even “in the face of personal or social pressure to do otherwise.”⁷⁹ Maintaining one’s commitments is thus the first key trait of the person of integrity. It is easy to act consistently with one’s values and principles when everyone else holds the same commitments and is encouraging and supportive of them. The real test of steadfastness comes when, by the act of sticking to one’s sense of what is right, one courts “contempt, ostracism, loss of a job, penal sanctions, the breakdown of friendships and familial relations, [or] being labeled ‘confrontational,’ ‘difficult,’ ‘overly sensitive,’ or ‘militant.’”⁸⁰ Consistency in this sense is not, however, exclusive to the person of integrity. Fanatics, too, will act according to strongly held commitments and values despite the risk of social opprobrium or other personal costs. And although fanatics are unrelentingly loyal to their cause and are willing to pay the price of their loyalty when it comes with a cost, this is not the same as saying that they have integrity.

How, then, to distinguish the fanatic from the person of integrity?⁸¹ What makes a person a fanatic is the absence of critical distance from her commitments: A fanatic cleaves to her views and principles no matter what. No evidence, no argument, however powerfully it may refute the central tenets of her belief, will dissuade the fanatic from her commitments or lead her to rethink them.⁸² The quality of

75. Lynne McFall, *Integrity*, 98 *Ethics* 5, 7 (1987) (quoting the Oxford English Dictionary).

76. Gabriele Taylor, *Integrity*, 55 *Proc. Aristotelian Soc’y* 143, 148 (Supp. 1981).

77. See Daniel Putman, *Integrity and Moral Development*, 30 *J. Value Inquiry* 237, 242 (1996) (“Remaining steadfast to deeply held principles is central to what [integrity] is all about.”).

78. Nancy Schaubert, *Integrity, Commitment and the Concept of a Person*, 33 *Am. Phil. Q.* 119, 120 (1996).

79. McFall, *supra* note 75, at 9 (“A person of integrity is willing to bear the consequences of her convictions . . .”); Jody L. Graham, *Does Integrity Require Moral Goodness?*, 14 *Ratio* 234, 234 (2001); see also Putman, *supra* note 77, at 237 (“Having integrity entails acting consistently on principles despite the presence of circumstances which might threaten those principles.”).

80. Cheshire Calhoun, *Standing for Something*, 92 *J. Phil.* 235, 259 (1995).

81. See Graham, *supra* note 79, at 242-44 for a discussion on the distinction between “the man who dogmatically stands for a cause and the man of integrity.”

82. See *id.* at 244 (“Someone who is simply unwilling to expose his views to criticism is vulnerable to serious self-deception or can rightly be accused of a narrow-mindedness, stubbornness or fanaticism.”); see also Mark S. Halfon, *Integrity: A Philosophical Inquiry* 32-34 (1989) (offering the example of a religious fundamentalist, whose claim of intellectual integrity would be compromised by an

integrity, in contrast, implies the capacity for and willingness to engage in critical reflection on one's values and principles, a process that involves at a minimum the careful consideration of alternative viewpoints, a logical assessment of relevant evidence, and an openness to the possibility that one could, in the face of sufficiently persuasive arguments, be convinced to rethink one's preferred approach.⁸³ The engagement in this deliberative process distinguishes the person of integrity not only from the fanatic but also from the person who is merely predictable. We expect the predictable person to act in a particular way, but we do not necessarily credit that person with critical reflection on the path she takes.⁸⁴ The person of integrity, in contrast, is assumed to have chosen his course after due reflection on the situation at hand. We may disagree with his choices, but we have confidence that he does not choose thoughtlessly. Indeed, it is our faith in his "deliberative flexibility,"⁸⁵ a capacity the fanatic lacks, that leads us to respect the choices of a person of integrity, and to credit those choices as the product of this trait.

A person of integrity is thus one who is willing "to expose [her] views to criticism" and "to reassess and revise [her] principles" in light of persuasive arguments and evidence.⁸⁶ This deliberative flexibility, a second key trait of the person of integrity, does not, however, imply inconstancy. To the contrary, when after due deliberation she remains convinced of her perspective, the person of integrity will stick to her guns—notwithstanding, as we have seen, the personal costs of so doing.⁸⁷ From this it follows that a person of integrity has a clear set of values and principles to which she self-consciously subscribes, and in support of which, for what she "takes to be the right reasons,"⁸⁸ she is steadfast.⁸⁹

unwillingness to reassess his beliefs in light of evidence that challenged "the truth of [his] religious beliefs"). The key here is the fanatic's unwillingness to expose her views to critical reflection or to revise them even in the face of evidence demonstrating the falsity of her beliefs. Certainly these categories at some point shade into one another, so that a person of integrity who arrived at his principled commitments through reasoned deliberation may eventually become fanatical about their promotion and no longer open to considering alternative perspectives. Whether such a person may continue to merit the status of a person of integrity because his views were initially arrived at through a carefully deliberative process is a question I leave to one side for purposes of this paper.

83. See Halfon, *supra* note 82, at 133, 336; Graham, *supra* note 79, at 242. Graham labels this process the assumption of "epistemic responsibility." See *id.*

84. See Schaubert, *supra* note 78, at 124 (suggesting that a person may be predictable "through no conscious effort of her own").

85. This quality of deliberative flexibility is the closest analogue of the various traits of integrity I discuss here to the virtue of "practical wisdom" endorsed by Kronman as the key to his conception of ethical lawyering. See Kronman, *Lost Lawyer*, *supra* note 3, at 14-17, 41-43, *passim* (1993).

86. Graham, *supra* note 79, at 244.

87. See *id.*

88. McFall, *supra* note 75, at 9.

89. See Putman, *supra* note 77, at 242 ("Remaining steadfast to deeply held

The possession of a clear sense of values, along with a commitment to their enactment, is the third key trait of the person of integrity. This feature, though, has led philosophers of integrity to wonder whether there are any principled limits, internal to the quality itself, on the substance of the values and principles to which persons of integrity are committed.⁹⁰ Put another way, can consistently evil people have integrity?⁹¹ Considering the question, philosopher Mark Halfon finds “no *a priori* restrictions concerning the object or content of the commitments of those who have integrity.”⁹² Although he identifies several criteria for the ascription of integrity, including “a commitment to investigate the truth of one’s beliefs and the intention to pursue a course of action that one believes is morally right,”⁹³ Halfon nonetheless finds it conceivable that a Nazi, even *qua* Nazi, could have integrity.⁹⁴ For although he concedes that “[n]early all Nazis will be guilty of inconsistency, a failure to acknowledge relevant empirical evidence, or a refusal to take seriously relevant moral considerations,” we could nonetheless, Halfon argues, “imagine a naïve and impressionable young Nazi or perhaps a sophisticated and inquisitive mature Nazi who sincerely believes in the principles of Nazism and will remain committed to those principles in the face of adversity.”⁹⁵

Gabrielle Taylor also concludes, reluctantly, that there is no clear incompatibility between integrity and all forms of immorality.⁹⁶ In

principles is central to what the virtue [of integrity] is all about.”) *But see* Schauber, *supra* note 78, at 120 (“[The] core of integrity, some kind of steadfastness, is not by itself admirable. A steadfast person may be worse than someone more inconstant.”).

90. *See* Schauber, *supra* note 78, at 120.

91. Both Graham and Putman explore versions of this question. *See* Graham, *supra* note 79, at 234 (asking whether “integrity places some constraint on the nature of what is stood for”); Putman, *supra* note 79, at 237 (“Can criminals have integrity?”).

92. Halfon, *supra* note 82, at 136 (saying of the “virtues of integrity that ‘while necessary, they are not sufficient; for their definition allows for almost any content’” (quoting John Rawls, *A Theory of Justice* 519 (1971))).

93. Halfon, *supra* note 82, at 36. From these requirements, Halfon derives further “restriction[s] that] are built into the notion of integrity”—that is, “[p]ersons of integrity should consider all relevant and available empirical evidence that apparently conflicts with the truth of their beliefs. They should also acknowledge and confront all relevant moral considerations insofar as they intend to do what is right.” *Id.* Other restrictions logically follow, including “a commitment to conceptual clarity, logical consistency, and perhaps a moral point of view free from self-deception.” *Id.*

94. Halfon, *supra* note 82, at 134-36. Halfon distinguishes the question of whether a Nazi could have integrity, “*qua* Nazi,” from the question of whether such a person could exhibit integrity in her other roles. *Id.* at 134. In this latter regard he finds it to be “relatively obvious that a Nazi could have integrity in the capacity of a friend, comrade, parent, teacher, and so on.” *Id.* In this sense, he continues, “integrity is like the virtue of courage. That is, it is a virtue that may be exhibited in some contexts but not others.” *Id.*

95. *Id.* at 136.

96. Taylor, *supra* note 76 at 152 (“[M]y view of integrity fits and explains many of our intuitions and the major demands we make on the person of integrity. . . . On the

particular, she finds that some forms of the deceitful manipulation of others may be compatible with integrity.⁹⁷ Taylor defends this position that not all deceit indicates an absence of integrity through the example of Leonora, the heroine of Beethoven's opera *Fidelio*.⁹⁸ After her husband is unjustly imprisoned by political opponents, Leonora disguises herself as a man and seeks access to the prison to attempt a rescue.⁹⁹ She is befriended by Rocco, the jailor, who hires her as his assistant, and by his daughter Marzeline, who (of course) falls in love with the disguised Leonora.¹⁰⁰ Rather than reveal herself and lose her opportunity to save her husband, who is by now at risk of execution, Leonora allows herself to be betrothed to Marzeline,¹⁰¹ thus engaging, as Taylor puts it, "in quite serious deception of people who treat her as a friend."¹⁰² Although Leonora is plainly false to Rocco and Marzeline, Taylor maintains that "we should cite her nonetheless as a case of integrity rather than the lack of it."¹⁰³ Why is this so? Because Leonora is acting for "sufficient reason," not only by her own lights, but also by ours. We view Leonora as someone who "get[s] [her] values right,"¹⁰⁴ who has read the situation, considered the various options, and rightly decided that saving her husband is more important than being honest with her new friends.

Taylor's analysis may seem unsatisfying. For how are we to know in each circumstance whether we—or others—have gotten it right? On this point, Taylor emphasizes the importance, on the part of the actor, of self-knowledge, and of the absence of self-deception. One cannot possibly get one's values right unless one understands clearly one's own mind and motives.¹⁰⁵ Because the self-deceived cannot "get their values right" in their own minds, they cannot be said to act with integrity.¹⁰⁶

other hand, I cannot show that ruthless pursuing of one's own ends is incompatible with integrity. We like to think that the whole or integrated person is also the wholly good person, but to some extent at least this thought remains an assumption.").

97. *Id.* at 158.

98. *Id.* at 152-54. For the full libretto to Beethoven's *Fidelio*, see 2 New Grove Dictionary of Opera 182, 183-84 (Stanley Sadie ed., 1992).

99. 2 New Grove Dictionary of Opera, *supra* note 98, at 183.

100. *Id.*

101. *Id.*

102. Taylor, *supra* note 76, at 152.

103. *Id.*

104. *Id.* at 153.

105. *See id.* at 158 ("As he will be free from confusion [the person of integrity] will get his commitments right, and so he will get right his identity in terms of these commitments. In this sense he can be said to have self-knowledge.").

106. Taylor illustrates this point with reference to a spy, who has betrayed his country out of what Taylor assumes is a misguided loyalty to friends. *See id.* at 153. Her claim is that the spy must be "in a muddle about his values" if he believes that "loyalty to friends is more important than loyalty to one's country." *Id.* In making this claim, Taylor wants to disclaim recourse to an "objective appeal to values," and instead insists that the relevant consideration is that:

the spy is thought to be so wrong in his assessment of loyalties because he

But as we have seen, it is not enough to satisfy one's own mind as to the legitimacy of one's deception: One must also act for reasons that others would find "sufficient." At the same time, it cannot be that one may only, consistent with integrity, deceive others for reasons all would accept as morally laudable or legitimate, for this requirement would arguably smuggle in the very moral values that Taylor and Halfon agree are not given content by the concept of integrity itself. For Taylor, the answer to this puzzle lies in her stipulation—familiar from our discussion of Rhode—that the values held by a person of integrity meet what she calls "the demands of consistency," which require that one act to promote one's values and principles equally whether it is oneself or another who stands to benefit.¹⁰⁷ Thus, for example, a person's commitment to the values of "freedom or scholarship" must be a commitment to the realization of these values wherever possible and not just in cases that will affect whether she herself "is free or becomes a scholar,"¹⁰⁸ for "it is hard to see on what ground [she] could consistently and without ignoring relevant

does not get his values right in the light of the evidence there is. He is thought to refuse to reflect and so to be misguided. . . . If only he had been prepared to sort things out he would have seen the error of his ways.

Id. at 153. The difficulty here is that the conclusion that the spy has "gotten it wrong" must stem from something other than reference to the "accuracy" of his ultimate judgment. More appropriate, it would seem, for an assessment of the integrity of his action would be an examination of his own values and principles, the circumstances under which he undertook the assignment, what was at stake, whom he was betraying, etc. This investigation might well reveal the actions of a man who was very clear on his own commitments, without any self-deception, and able to justify his actions as fully consistent with his values in the way Taylor demands. Yet while I am not entirely convinced by her example of the spy, I nonetheless share Taylor's sense that self-knowledge and an absence of self-deception are central features of integrity. The spy example seems to me simply a failure to consistently apply her own standard, rather than an indication that the standard itself is flawed.

107. *Id.* at 157 (explaining that the demands of consistency "extend over the reasons for action generated by [those values themselves]"); see also Halfon, *supra* note 82, at 36 (including "logical consistency" among the demands of integrity).

108. Taylor, *supra* note 76, at 157 ("[T]he demands of consistency extend over the reasons for action generated by [the actor's] commitments. If he is committed to freedom or scholarship then this provides him with a reason for bringing freedom or scholarship about, and not just with a reason for seeing to it that *he* is free or becomes a scholar."). Or, to take the example of Leonora, if she is truly acting out of a consistent commitment to justice, we should expect that she would be equally committed whether it was her husband or another who was unjustly imprisoned. This example, however, raises a difficult question for theories that, like Taylor's and also like Rhode's, demand as proof of integrity a "consistent, disinterested, generalizable" commitment to particular values. Rhode, *supra* note 2, at 67. For what does this mean when an agent is moved to act in defense of her loved ones? Would integrity really require that Leonora go to such great lengths to rescue the husband of another? Or to put it another way, if she would not be willing to do so, does this vitiate Taylor's claim that she acts with integrity? To answer this question is beyond the scope of this article, but my sense is that this cannot be right, that indeed we tend to think of those who act with courage for the good of their families as candidates for integrity notwithstanding that they act in part out of love—assuming, that is, that they do not privilege the interests of their loved ones to the *exclusion* of all others.

evidence deny that what in [her] view is a good for [her] is also a good for others."¹⁰⁹ Evidence that a moral agent—Leonora, for instance—is motivated to act consistently to vindicate her principles, whether or not she herself stands to benefit, thus goes far to suggest she has “gotten it right” and acted with integrity, notwithstanding her deception of others.¹¹⁰

It is thus that Taylor’s argument serves to limit the class of the “morally wicked” who may be found to have integrity by excluding those who engage in “deceitfully manipulating others” for their own personal benefit,¹¹¹ for such people cannot be shown to have acted according to the demands of consistency as Taylor describes them. Yet, to her distress, Taylor acknowledges that she has still “not ruled out the possibility that all the conditions” she has given for a finding of integrity may be satisfied by others who act in ways “we regard as morally wrong.”¹¹² Indeed, read together, Halfon and Taylor suggest that, although the concept of integrity imposes constraints that serve to narrow the range of people with “morally questionable” characters¹¹³ who may rightly be found to have this quality, possession of integrity does not by itself imply any particular content for one’s values and ends. This conclusion, though, poses a problem for those who want to argue, as I do below in my discussion of Rhode’s stipulation that ethical lawyers will defend at least a limited set of specific values, that people of integrity will, by virtue of this trait, commit themselves to at least some of the values and ends that we commonly associate with moral goodness.

The work of Jody Graham may suggest at least a partial solution to this problem, one that if persuasive poses a significant challenge to the notion that integrity is content-free. Against the position staked out by Halfon, Taylor, and others, Graham makes the plausible point that people of integrity must be “morally trustworthy,” a quality that “a person of morally questionable character” is by definition incapable of exhibiting.¹¹⁴ The morally trustworthy, according to Graham, are “in proper relation to *others*,”¹¹⁵ and have “a genuine regard for the worth

109. Taylor, *supra* note 76, at 157.

110. It is within this framework that self-knowledge and the absence of self-deception become markers of integrity: The presence of these character traits make it possible for the actor to recognize the extent to which her actions are consistent with her stated values and principles; conversely, their absence allows actors to wrongly construe self-interested actions as morally defensible.

111. Taylor, *supra* note 76, at 158.

112. *See id.* (“I have not ruled out the possibility that all the conditions I have given may be fulfilled by someone who ruthlessly and without regard for the well-being of others pursues his own aim, even if in doing so he behaves in ways we regard as morally wrong. Not every immoral action need be a sign of the agent’s corruption.”).

113. Graham, *supra* note 79, at 246.

114. *Id.*

115. *Id.*

of the person."¹¹⁶ Such a person "respects, first and foremost, the humanity in each individual, regardless of the individual's relation to oneself."¹¹⁷

That people of morally questionable character lack the quality of moral trustworthiness as Graham conceives it seems right. But do they thereby lack integrity? I believe that they may. Recall Taylor's notion of "the demands of consistency."¹¹⁸ The idea here is that in a given situation a person of integrity acts consistently with his values and principles, whether it is he himself or some other person who stands to benefit.¹¹⁹ This requirement, which we can also understand as the demand that the values and principles of the person of integrity be universalizable, excludes not only Taylor's deceitful manipulator but also the egoist. As Daniel Putman explains, although the egoist may appear to live by a consistent principle—that on every occasion she ought to act so as to improve her own circumstances—this is not a principle that is capable of being universalized.¹²⁰ To the contrary, this so-called principle would "break down" as soon as its proponent is called upon to "defend [it] on behalf of others."¹²¹ In contrast to the egoist, the morally trustworthy person maintains respect for "the humanity in each individual regardless of the individual's relation to oneself."¹²² Indeed, it is this quality that allows her to recognize and affirm what consistency requires—and thus to act with integrity.

To say that people of integrity must be morally trustworthy in Graham's sense, however, is not the same as saying that they necessarily subscribe to a closed and broad set of specific moral values. Although for the reasons we have just seen, absence of moral trustworthiness may suggest a lack of integrity, to some degree Halfon

116. *Id.* at 247.

117. *Id.* at 246-47. According to Graham, it is not enough that the person of integrity must be morally trustworthy. He must also have what she calls "epistemic trustworthiness." *Id.* at 244. That is, a person of integrity must make judgments in which we can have confidence, must have the "experience and moral know-how concerning when to dig one's heels in" and when to reassess. *Id.* at 244. It is not enough that one strives for "open-mindedness, conceptual clarity and logical consistency. . . . The person of integrity must [also] be good at these things." *Id.*

118. See Taylor, *supra* note 76; see also Halfon, *supra* note 82, at 36 (referring to this constraint of integrity as the demand of "logical consistency").

119. This is not to say that people of integrity cannot have deep commitments to promoting the interests of their loved ones. See *supra* note 108. But commitment to certain values and principles may nonetheless require such people at times to act in ways that fail to promote such interests.

120. See Putman, *supra* note 77, at 239. Putman offers the example of truthfulness, arguing that "[p]ersons dedicated to truthfulness have integrity for exactly the reason that they do *not* need to control the situation for their own benefit. Dedication to truthfulness [instead] exists because truthfulness has a value *in itself*." *Id.*

121. *Id.*

122. Graham, *supra* note 79, at 247 n.23 ("[Moral trustworthiness requires that one] see individuals as having worth because of an equal standing, not to be lessened by sacrificing one individual for the good of others.").

is right: The quality of integrity is consonant with a range—if not an infinite range—of moral commitments. Why, then, do we tend to associate people of integrity with unquestionably laudable moral commitments? The answer, I think, is because those individuals we view as people of integrity *themselves profess such commitments* and demonstrate through their actions that these commitments are real. If we cannot presume to know in advance the full content of the commitments of a person of integrity, we can certainly assess in the moment whether a person's actions match her words. For this reason, it would seem that consistency between word and deed is also indicative—if not dispositive—of an actor's integrity.

The above discussion suggests two final character traits of the person of integrity which bear emphasizing. First, integrity is closely associated with moral maturity. Putman finds the test of moral maturity to lie in a person's willingness to put herself and her interests aside if honoring a professed goal or principle requires that she do so.¹²³ But in fact each of the traits we have identified—the capacity for deliberative flexibility, the possession of a clear sense of values and principles that satisfy the demands of consistency, a commitment to consistency between word and deed,¹²⁴ the willingness to accept the consequences of doing what one believes is right—presupposes an agent who is morally mature.¹²⁵

Second, integrity is incompatible with self-deception. We have already seen that the deception of others is in most cases inconsistent with integrity; because a person of integrity can only deceive others for "sufficient reason," that is, on grounds that can be consistently applied to others as well as oneself,¹²⁶ those who deliberately deceive others for their own benefit by definition lack integrity. But most people are not willfully deceitful in this way. The more typical case is a person who wants to see herself, and to have others see her, as a person who acts in ways that are morally consistent and defensible, while at the same time promoting her own interests. Such a person, if aware of the discrepancy between her desire for a praiseworthy image

123. See Putman, *supra* note 77, at 239. As Putman puts it:

This is a way to test integrity as well as to determine a person's level of moral maturity. Are people willing to concede that the goal or principle they are maintaining is justifiable for others as well as self? Are they willing to put themselves aside if the principle applies more accurately to others? Are they willing to be the object of their own principle?

Id.

124. Allowing, of course, for among others the Leonora-type exception explored above. See *supra* notes 98-110 and accompanying text.

125. See Larry May, *The Socially Responsive Self: Social Theory and Professional Ethics* 26 (1996) ("At any given point in the life of a mature person, retaining integrity will often involve some sacrifices so as to live up to one's principles.")

126. See *supra* notes 107-109 and accompanying text; see also Taylor, *supra* note 76, at 157-58.

and her desire to feather her own nest, may court hypocrisy.¹²⁷ But again, most of us not only want others to see us as people with integrity who do things for the right reasons; we also want to see ourselves in this light.¹²⁸ For this reason we may frequently face what Lynne McFall calls "the temptation to redescription," that is, the temptation to "rewrite . . . in various ways" the values and principles to which we claim to be committed, to change the terms or introduce exceptions in order to render permissible actions that conflict with those values and principles.¹²⁹

This tendency to self-deception may be the single biggest obstacle to integrity. It prevents honest scrutiny of our own motives, requires that certain ideas be permanently excluded from our minds,¹³⁰ and prevents us from fitting comfortably, without tension, into ourselves. The practice of self-deception thus precludes the possibility of becoming an integrated whole, a state of being which is the essence of integrity.¹³¹

127. See Christine McKinnon, *Hypocrisy, with a Note on Integrity*, 28 Am. Phil. Q. 321, 322-26 (1991). McKinnon notes that "the hypocrite is one who desires to be judged more favourably than she deserves to be, according to the prevailing standards" and that "she uses the standards and judgments that comprise our system of morality in order to get for herself some unmerited glory or to escape some deserved reproaches." *Id.* at 323.

128. See Rostain, *supra* note 72, at 964 (noting "people's intense need to think well of themselves—that is to view themselves as decent, reasonable people who care about doing the right thing").

129. McFall, *supra* note 75, at 7. In contrast to McFall, Bela Szabados understands self-deception not as a rewriting of the principles to which we claim to subscribe, but rather a redescription of the evidence with which we are confronted. See Bela Szabados, *Self-Deception*, 4 Can. J. Phil. 51, 66-68 (1974) [hereinafter Szabados, *Self-Deception*]; Bela Szabados, *Wishful Thinking and Self-Deception*, 33 Analysis 201, 204-05 (1973) [hereinafter Szabados, *Wishful Thinking*]. One who is not self-deceived, Szabados explains, "takes the evidence that he has for the proposition as grounds for its truth," whereas the self-deceiver, "prompted by non-truth-centered considerations"—that is, by reasons that lead him to want the truth to be other than what it is—"proceeds to explain away and reinterpret the evidence to satisfy some emotional need." Szabados, *Self-Deception*, *supra*, at 63. The self-deceiver generally fails to recognize that he is motivated by reasons that have nothing to do with the truth, but if this crosses his mind, he explains it away. *Id.* It is for this reason, Szabados argues, that "lies tend to breed lies and self-deception tends to breed self-deception." Szabados, *Wishful Thinking*, *supra*, at 205; see also Daniel Putman, *Virtue and Self-Deception*, 25 S. J. Phil. 549, 554-55 (1987) (arguing that self-deception is inconsistent with integrity because it requires that the self-deceived live "a lie" in a way that precludes the "unity of the life narrative"). It bears emphasizing that the motivation of "non-truth-centered reasons" is not incidental to self-deception but arguably constitutive of it. As Szabados notes, "[o]ne can be self-deceived only about matters in which one has a personal stake. What one can be self-deceived about must link up with one's wants, hopes, fears and emotional needs." Szabados, *Self-Deception*, *supra*, at 67.

130. See Putman, *supra* note 129, at 554-55 (explaining that "[s]elf-deception produces 'gaps' in the continuity of one's self-expression and self-understanding").

131. See Richard C. Prust, *Personal Integrity and Moral Value*, 12 Personalist F. 147, 155-56 (1996) ("If someone could project a single realistic coherent narrative in which everything she is presently doing and intending to do (again, as she presently

B. Integrity and Rhode's Lawyers

In Part I above, I suggested that the possibility of ethical lawyering on Rhode's model requires that lawyers be people of integrity. Having sketched a portrait of integrity, I am now in a position to demonstrate the basis of this claim.

Recall that on Rhode's view, ethical lawyering means that lawyers recognize the contextual nature of justice and commit themselves to determining in each case what justice requires. For Rhode, this process requires lawyers to weigh and consider all the interests at stake in a particular case, including the likely consequences of available actions, and to make a judgment about what justice requires on this basis. As we have seen, Rhode offers no overarching principle to guide these deliberations, for she recognizes that individual lawyers will subscribe to different moral principles and conceptions of justice. All that matters is that lawyers subscribe to *some* moral principles and conception of justice—"consistent, disinterested, and generalizable"¹³²—and that they are willing to act on those principles and conceptions in their professional lives.

Rhode's construction, in short, is a recipe for lawyering with integrity. For if practitioners of this ethic are to be able—and willing—to make the kind of discretionary judgments as to what justice requires that Rhode emphasizes—if they are to assess the situation from the various competing perspectives and determine which course would be the most morally defensible, regardless of whether this course promotes or compromises their own self-interest—they must have a steadfast commitment to achieving justice, whatever the cost to themselves. This steadfastness to moral principle even at the risk of negative consequences to oneself is the first key trait of the person of integrity. At the same time, Rhode's expectation that her lawyers will be flexible and approach each situation with a commitment to evaluating it on its own terms requires that they adopt the method of moral reflection which is characteristic of people of integrity, that is, the deliberative flexibility that allows for the weighing and considering of all interests at stake and all available options against a clear sense of what justice requires, with the recognition that a given situation might challenge one's principled conception of justice and thus that the appropriate course might well be one that the lawyer could not have known in advance.

And there is more. On Rhode's view, recall, these lawyers need not share a common view of what justice requires; it is enough that they

intends realizing it) gets accomplished, that success, let me contend, would amount to her emergence as a person of integrity.”).

132. See Rhode, *supra* note 2, at 67 (“An advocate could not simply retreat into some fixed conception of role that denies personal accountability for public consequences or that unduly privileges clients’ and lawyers’ own interests.”).

themselves have a clear conception of their own as to what is moral and just, a conception that they are committed to vindicating through their own actions even at a personal price. Rhode's lawyers, that is, must have *some* moral conception of their own to employ in these deliberations, some conception sufficiently clearly understood that it may be effectively applied when the circumstances require, but this moral conception need not be the same as that held by others. This expectation, too, as we have seen, is consistent with integrity: The person of integrity possesses a clear sense of his or her own moral values and principles and is willing to vindicate these values and principles even at a cost to himself, yet there is no requirement that this moral sense line up with the prevailing view.

There are, it is true, some restrictions on the moral conception to which a person of integrity—or an ethical lawyer on Rhode's model—is committed. As we saw above, the moral principles to which a person of integrity is committed must satisfy what Taylor called "the demands of consistency,"¹³³ that is, the demand that they be consistently applied whoever the beneficiary.¹³⁴ This requirement, which we suggested may also be understood as the demand that the moral principles to which the person of integrity is committed be universalizable,¹³⁵ is reflected equally on Rhode's model.¹³⁶

In sum: Practitioners of Rhode's ethic of lawyering must maintain a consistent commitment to clear, universalizable values and principles. They must have the capacity for careful deliberation and reflection. They must be open-minded, reasonable in their assessments, and flexible in their judgments. And they must be committed to acting according to their values and principles whatever the consequences of so doing, even if the promotion of their self-interest would dictate otherwise.¹³⁷ What's more, the very possibility of these capacities presupposes a high level of moral maturity and of self-knowledge which, as we saw above, are among the hallmarks of a person of integrity. For one who shares a commitment to Rhode's conception of ethical lawyering, the promotion of integrity among practitioners thus seems to be the key.¹³⁸

133. See *supra* notes 107-08 and accompanying text; Graham, *supra* note 79, at 157.

134. A person of integrity, in other words, will act to realize his values and vindicate his principles whether it is he himself or others who stand to gain from his doing so.

135. See *supra* notes 49-50 and accompanying text.

136. See Rhode, *supra* note 2, at 67.

137. See *id.* (arguing that lawyers' conduct "should be justifiable under consistent, disinterested, and generalizable principles"). This last point, that the lawyer of integrity must be willing to act to vindicate the values to which she is expressly committed even where doing so is against her self-interest, is particularly important in a context, like lawyering for paying clients, where the temptation to act in ways that feather one's own nest at the expense of others is ever-present.

138. These requirements line up precisely with the key character traits of the person of integrity identified in the above discussion. See *supra* Part II.A.

Yet is integrity enough for Rhode? For although at times she claims for her model sufficient flexibility to accommodate a range of moral views, at other times she seems to insist that ethical lawyers subscribe to a particular moral vision, with content specified by Rhode herself.¹³⁹ Given, as we have seen, that integrity itself lacks a specific content and that it is open to people of integrity to act on a broad range of values and principles, Rhode's move to specify in some detail certain of the values to which lawyers must be committed seems to demand of lawyers not merely integrity but integrity *plus*, integrity in the service of values she herself considers worthy. But integrity *plus* is very different than integrity *simpliciter*. While the latter reflects a moral capacity that is open to cultivation by each morally mature individual, the former requires not moral maturity but enforced moral conformity whether or not such conformity reflects one's own views, a state that is neither appealing as an ideal nor promising as a matter of policy.

This concern, however, is misplaced, for Rhode need not smuggle in a particular moral agenda to support the values she specifies as necessarily among the commitments of a lawyer with integrity. To the contrary, she is supported in this respect by several aspects of integrity itself. First, the values and commitments of a person of integrity must meet the demands of consistency—that is, they must be capable of being universalized. This standard requires that lawyers of integrity as a matter of course commit themselves, in the way Rhode advocates, to the support and promotion of “a just and effective legal system,” and the enhancement of “core values such as honesty, fairness, and good faith on which that system depends.”¹⁴⁰ For as we saw above in our discussion of Rhode's own stipulation that the values and principles of the ethical lawyer must be universalizable—a stipulation analogous to the requirement that the moral commitments of a person of integrity must satisfy the “demands of consistency”¹⁴¹—if everyone operating within the legal system's institutional framework acted in ways that undermine the system's core values, the system itself would not survive for long.¹⁴²

Second, although it is possible to conceive of individuals who subscribe to values and principles that others would find objectionable as nonetheless acting with integrity, we have also recognized as a further key hallmark of integrity a consistency between a person's actions and their professed commitments. Thus it is not open to

139. As we have seen, Rhode insists that lawyers “have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends.” Rhode, *supra* note 2, at 67; *see also id.* at 18.

140. *Id.* at 67.

141. *See supra* notes 107-10 and accompanying text.

142. *See supra* notes 49-50 and accompanying text.

members of the legal profession—each of whom takes an oath to uphold the values of a profession that explicitly conceives of each of its members not only as “a representative of clients” but also as “an officer of the legal system and a public citizen having special responsibility for the quality of justice,”¹⁴³ “play[ing] a vital role in the preservation of our society”¹⁴⁴—to hold themselves out as licensed practitioners while at the same time disclaiming the responsibility for or commitment to ensuring a fair and effective justice system. Those lawyers who take an oath are for this reason obliged to act within the system honestly, in good faith, and with due consideration towards those who are vulnerable to harm.

But what of Rhode’s stipulation that lawyers must commit themselves to preventing unnecessary harm to third parties? Could one not argue that lawyers, who by accepting the representation of clients implicitly pledge loyalty to those clients, make no such representations to third parties and thus owe no such duty to them? And if so, on what basis may an advocate of Rhode-style ethical lawyering claim that lawyering with integrity, without more, creates such an obligation? The answer, I suggest, lies in Graham’s insight that people of integrity must be morally trustworthy, in the sense of being “in proper relation to *others*,”¹⁴⁵ of having “a genuine regard for the worth of the person.”¹⁴⁶ As I suggested above, this trait seems a necessary concomitant of any person whose values or principles would satisfy the demands of consistency. For the demands of consistency require of a person of integrity that she act consistently in defense of her own values or principles, whether it is she or someone else who stands to benefit, a requirement that excludes, as we saw, both Taylor’s deceitful manipulator and Putnam’s egoist. These demands thus require of the person of integrity that she act according to principles consistent with moral trustworthiness, which signifies, at the very least, respect for “the humanity in each individual regardless of the individual’s relation to oneself.”¹⁴⁷ Such a disposition at a minimum will reflect a commitment on the part of the person of integrity to protecting innocent third parties from unnecessary harm, which is precisely the value Rhode demands of her ethical lawyers whatever their particular conception of justice.

Inevitably, there will be tension—and even inconsistency—between a lawyer’s multiple obligations to the client, to the system, and to society as a whole.¹⁴⁸ Indeed, a lawyer who takes her responsibilities

143. Model Rules of Prof’l Conduct pmbl. (2000).

144. *Id.* pmbl.

145. Graham, *supra* note 79, at 246.

146. *Id.* at 247 n.23.

147. *Id.*

148. These tensions are explicitly acknowledged in the Preamble to the ABA Model Rules of Professional Conduct, which states that “[v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal

seriously will spend her career trying to effect a fair balance between these multiple obligations.¹⁴⁹ But—and here is the key point—once a lawyer joins the profession and willingly accepts the benefits and obligations of such membership, there are certain values and commitments she can no longer disclaim. For this reason, too, it is unnecessary for Rhode to smuggle in a commitment to the particular substantive values she names and demand that ethical lawyers act consistently with them; lawyers' own representations, performatively implied by assuming the status of lawyer, give rise to this demand. For these reasons, Rhode's ethical lawyers need not practice according to the demands of integrity *plus*. To ensure that lawyers commit themselves to the particular values Rhode highlights, integrity *simpliciter* will suffice.

The inevitability of conflicts among the values and commitments of a lawyer of integrity suggests the nature of the challenge facing such a lawyer: She must do her best to determine how to balance the various interests at stake in any given case, while at the same time representing her clients fairly and remaining true to the range of values and principles to which she is committed.¹⁵⁰ That lawyers will themselves at times pay a price, in terms of lost fees and lost clients, for their refusal to advance certain of their clients' goals, does not, on Rhode's account, constitute sufficient reason for lawyers to act otherwise. For Rhode expects that ethical lawyers, as people of integrity, will willingly pay a price for acting consistently with their stated principles.

There will admittedly be times, on Rhode's view, when the lawyer concludes that no legitimate purpose would be served by withdrawal, and continues the representation.¹⁵¹ There will also be times when the ethical lawyer falls short, allowing the pull of self-interest or the desire to avoid conflict to overcome the recognition that her moral commitments oblige her to act other than she does. Neither of these eventualities, however, destroys integrity, for integrity does not demand action if the situation does not call for it, and if a lawyer

system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." Model Rules pmb1.

149. As Kronman eloquently puts it, "[a] lawyer who is doing his job well dwells in the tension between private interest and public good, and never overcomes it." Anthony T. Kronman, *The Law as a Profession, in Ethics in Practice, supra* note 46, at 29, 32.

150. It is for this reason that the lawyer of integrity must cultivate the quality that Kronman calls "practical wisdom"—the excellence of the person who deliberates well. Kronman, *Lost Lawyer, supra* note 3, at 43. According to Kronman, a lawyer of practical wisdom, which in the ideal form represents Kronman's ideal of the "lawyer-statesman," shows "a certain calmness in his deliberations, together with a balanced sympathy toward the various concerns of which his situation (or the situation of his client) requires that he take account. These are qualities as much of feeling as of thought." *Id.* at 16.

151. *Id.* at 69.

occasionally falls short of her own ethical aspirations, if she lets herself down in this way, self-criticism, self-examination, and perhaps self-reproach are more appropriate responses than abandoning commitments altogether.¹⁵² Certainly, this latter case at least would represent a moral misstep, but such missteps should not be taken to signal the utter failure of integrity. For there is surely a difference between one who occasionally acts contrary to principle and, at such times, acknowledges her own shortcomings, responds with a searching inquiry into why she did what she did, and commits to doing better next time, and one who casually abandons her principles whenever self-interest dictates. This difference is a hopeful one for those whose conception of ethical lawyering depends on the possibility of integrity, for it suggests that the key is not moral perfection, but rather a good-faith commitment to try to do better, and the willingness of individual lawyers to be honest—honest with others, but most crucially with themselves—about their own motives and aims. Some lawyers, it is true, may pretend conformity to the standards of this ethic, perhaps to improve their reputations or in efforts to mask self-interested conduct. But it is precisely the absence of any conceivable enforcement mechanism, or even any effective external check, that makes individual character so important to the possibility of ethical lawyering. Particularly in the absence of institutional change designed to promote ethical lawyering of this sort, there is little to guard against this sort of insincerity, save the integrity of the individual actor and his personal commitment to ethical practice.

C. *Obstacles to Lawyering With Integrity*

Above, I have attempted to show that the possibility of ethical lawyering on Rhode's model depends on the moral character of the lawyers themselves, and specifically that, in order to be successful, this model requires the commitment of lawyers who possess the set of character traits that comprise the moral quality we commonly refer to as integrity. Although my focus here is on the work of Deborah Rhode, my contention is that other contextual conceptions of ethical lawyering—and here I am thinking most centrally of David Luban's moral activism¹⁵³ and William Simon's ethical discretion in

152. See Calhoun, *supra* note 80, at 250 ("Surely, not all weak-willed failures to act on one's own best judgment signal a lack of integrity. Breaking a diet privately embarked upon because one is lazy, or craving sugar, or just plain hungry is weak willed, but not necessarily a cost to integrity, especially if the person reproaches himself for his weakness. Self-reproach is exactly what one expects of the person of integrity who lets himself down."); see also Kronman, *Moral Philosophy*, *supra* note 3, at 1757 ("[A] sound upbringing and a good moral character . . . make one peculiarly liable to feelings of shame. . . . [T]he schism in one's character that shame reveals constitutes a lack of integrity, which those with a good character are likely to find especially disturbing and be particularly anxious to repair.").

153. See Luban, *supra* note 5, at 160-74.

lawyering¹⁵⁴—are equally dependent on the quality of integrity among the practicing lawyers to whom these theories are directed, not only to incline those lawyers to seek an ethical practice, but also to make it possible for them to realize the demands of such a practice in the day-to-day.

Yet if I am right about this, what does it say for the possibility of ethical lawyering on this model that in reality, most of us in the course of our daily lives will never come close to achieving the high standard of conduct that I associate above with persons of integrity? None of us is perfect; none of us is without moral weakness or failing. If it is true that the alternative to the standard zealous advocacy view of the lawyer's role is a model the success of which depends on the possibility of lawyers achieving some unattainable moral standard,¹⁵⁵ should we not just concede that such an alternative will never take, and that we would thus be better off thinking of how to make the practice of zealous advocacy more ethical? Or, put another way, if "ought implies can," are not conceptions of ethical lawyering akin to Rhode's at best misguided and at worst a distraction from the shared end, which is how, realistically, to make lawyers more ethical?

This objection appears to gain even greater force when we consider what this model demands of one who concludes that the ends of his client are contrary to the interests of justice as he understands them: that he withdraw from the representation, or even, in the extreme, that he act contrary to the client's interests. How, exactly, it might be objected, is one who adopts this approach supposed to make a living? to establish a reputation? to build a practice? Clients will not exactly flock to a lawyer who creates obstacles to the achievement of client aims when those aims strike the lawyer as morally objectionable. And why should they? From this perspective, Rhode seems to dismiss too quickly the question raised by former Judge Marvin Frankel: "'Why should the client pay for loyalties divided between himself and [justice]'"?¹⁵⁶ In answer, Rhode maintains that "[c]lients should pay," notwithstanding that the lawyer they pay may ultimately refuse to promote their interests, "because clients as a group ultimately benefit."¹⁵⁷ Specifically, Rhode asserts that "constraints on partisanship" imposed on ethical lawyers by her model will "reinforce

154. See Simon, *supra* note 5, at 138-62; see generally Simon, *supra* note 62.

155. Luban too acknowledges the impossibility of expecting lawyers to conform easily to the high moral standards set by contextual conceptions like his moral activism. Discussing the possibility that an ethical lawyer on his model might be led to withdraw from representation or even to betray a client's projects "if the lawyer persists in the conviction that they are immoral or unjust," Luban argues that, "[u]nlike the standard conception of the lawyer's role, moral activism accepts these possibilities without flinching. Without flinching much, at any rate." Luban, *supra* note 5, at 174.

156. Rhode, *supra* note 2, at 69.

157. *Id.*

[the clients'] better instincts and maintain a well-functioning legal system."¹⁵⁸ From the perspective of a lawyer focused on building her practice, however, this response is likely to be dissatisfying. Clients, in short, do not pay lawyers to help them hone their moral sense, nor to secure the long-term health of the legal system. They pay for help to get things done. And if the lawyer they hire has too much integrity to provide this help, the clients will simply go elsewhere.

There is no getting around the fact that Rhode's model, in its ideal form, demands a high moral standard. And it is also true that the model does expect the ethical lawyer to sacrifice professional self-interest in those cases when being true to her values and principles so demands. Given the undeniable fact that at least some lawyers may be unwilling in practice to act on principle if doing so will compromise their financial self-interest, the question we must therefore confront is whether the demand that a lawyer put her self-interest to one side when justice so requires necessarily negates the value of the model.

This is a fair question. As a definitive challenge to the model of ethical lawyering we have been exploring, however, it falls wide of the mark for one very simple reason: The demand that lawyers at times place their ethical obligations above their financial interests is constitutive not merely of contextual models of ethical lawyering like Rhode's, but of *all* models of ethical lawyering, including the standard zealous advocacy view. To be sure, the zealous advocacy model may in general be more consistently in line with a lawyer's financial interests, because for the most part it dictates that lawyers do precisely what their clients want, notwithstanding that they themselves may have moral qualms about the proposed course—an approach clients may be expected to like and willing to pay for. But this conjunction between a client's aims and a lawyer's self-interest is by no means always present, and the same financial incentives that are likely to lead lawyers away from achieving the standards of ethical lawyering embodied by Rhode's model can also act in practice to compromise the willingness of self-professed "zealous advocates" to live up to their ethical obligations. Zealous advocates, for example, are expected to prioritize their clients' interests over all others, even their own. Yet as Rhode herself documents, the obligations of "zealous advocacy" are in practice frequently used as a justification for "turning litigation into an expensive war of attrition"¹⁵⁹ that increases legal fees—an outcome very much in the interests of lawyers—without necessarily serving the long-term interests of clients.¹⁶⁰ In such cases, a stated commitment to zealous advocacy on

158. *Id.* at 69-70.

159. *Id.* at 84.

160. See also Richard Zitrin & Carol M. Langford, *The Moral Compass of the American Lawyer* 81 (1999) (quoting an unnamed lawyer to the effect that "if billable hours are the engine of the firm, zealous advocacy is the gas pedal").

the client's behalf simply operates as a cover for strategies by which lawyers run up fees at the client's expense; that is, for strategies which compromise the lawyer's ethical obligations to the client in order to serve the lawyer's own self-interest. On the zealous advocacy model, moreover, lawyers are obliged to restrain from assisting clients to the extent that doing so would lead either lawyers or their clients to run afoul of the law. But as the recent Enron scandal nicely illustrates, even lawyers ostensibly committed to the zealous advocacy model will be tempted by the desire to preserve clients' fees to continue assisting their clients even when doing so may run counter to the law.

In short, no defensible theory of professional ethics can guarantee a correlation between ethical action and the financial interests of the actor, and most if not all lawyers face an inevitable "tension between doing good and doing well."¹⁶¹ The fact that practitioners may decline to adopt an ethic that appears most theoretically defensible and most consistent with the stated values of the profession thus cannot be a reason to abandon the search for such an ethic, but must simply be taken as evidence that there is a much greater gap between the professed commitments of the profession and the actual behavior of its members.¹⁶²

161. David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 Harv. L. Rev. 458, 472 (1994) (reviewing Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*). Wilkins notes that young lawyers in particular have grown to expect careers in which "there is no tension between doing good and doing well." *Id.* But as he explains,

This promise . . . has always been illusory. Nineteenth-century lawyers were able to submerge the inevitable tension between public service and private gain by erecting artificial barriers to competition, monopolizing the debate over the goals and operation of legal institutions, exploiting their knowledge about the intricacies of the legal system, and shielding many of their practices from public view. . . . Today's lawyers, however, can no longer rely on these tactics to shield themselves from the conflicting demands inherent in their dual role as "advocates" and "officers of the court." They must face a real tradeoff between the comfortable lifestyles they have grown to expect and the public commitments that confer honor and prestige on their chosen occupation. It is no wonder that many practitioners find this conflict disquieting.

Id. at 472-73.

162. This gap, it bears noting, suggests a level of hypocrisy that may well explain the considerable public hostility toward lawyers that so troubles bar leaders. Hypocrisy, according to Christine McKinnon, is the act of "manipulating others' perceptions of one's motivations" in order to benefit oneself while being judged favorably by the standards that others hold dear. McKinnon, *supra* note 127, at 323. This is precisely what a lawyer does when she pledges to her client the absolute loyalty to his interests embodied in the zealous advocacy model while at the same time taking advantage of the autonomy a lawyer enjoys and the trust (or naïveté) of the client to engage in strategies to, say, increase her billable hours in ways that do not benefit the client or that the client could be expected to veto if he were made aware of them. For descriptions of such strategies, see *infra* note 215; see also Zitrin & Langford, *supra* note 160, at 80-87; Rhode, *supra* note 2, at 169-74.

If it is true that many lawyers in practice prioritize the pursuit of profit and give little or no consideration to the ethical cost of so doing, this fact will of course be relevant to any efforts to *implement* the model of ethical lawyering which after due deliberation appears most defensible.¹⁶³ And it is certainly the case, as I argue below, that the prioritizing of profit maximization by practicing lawyers is at odds with the possibility of integrity. But if there is any value to developing an *ideal* of ethical lawyering, it is important to distinguish reasons for rejecting an ethic on its own terms from potential problems with its implementation. As Graham reminds us, the fact of human fallibility means that very few of us will actually possess integrity in its ideal form.¹⁶⁴ For most of us, the best we can hope for is what Graham calls “integrity in the making.”¹⁶⁵ Viewed in this light, to practice integrity is not to act in conformity with integrity’s demands as a person already possessed of this quality, but literally to “practice,” that is, to repeatedly attempt to act consistently with its requirements in order to improve our general capacity to conform to its demands.

It is in this spirit, I suggest, that we ought to understand the model of ethical lawyering—of lawyering with integrity—found in the work of Rhode, Luban, Simon, and others. For this model to be of use to lawyers who aspire to an ethical standard not reflected in the traditional zealous advocacy conception, it is not necessary that its practitioners never fall short. Instead, ethical practice on this model should be viewed, in the spirit of Graham’s “integrity in the making,” as an effort to develop the character traits that will eventually, it is hoped, lead naturally into greater conformity with the standards of ethical conduct the model represents.¹⁶⁶

In Part III, I explore what it might take to foster the traits of integrity among lawyers in practice and identify some of the common practices of the legal profession that threaten to undermine its possibility. My purpose is to begin to consider the prospects for ethical lawyering as I have understood it here, but to the extent that the true zealous advocate must also be a person of integrity, this discussion should prove as relevant to those who prefer the standard conception as it is to those who reject it.¹⁶⁷

163. See *infra* Part III for further exploration of this issue.

164. Graham, *supra* note 79, at 250-51.

165. *Id.* at 250.

166. As we have seen, Rhode’s model is premised on the consequentialist calculation that those who consistently fall short in these attempts will do better overall than if they made no effort at all in this direction. See *supra* notes 43-45 and accompanying text.

167. This discussion suggests that even lawyers for whom zealous advocacy is the preferred ethical model have need of at least some of the virtues we have here associated with integrity, in particular a commitment to consistency between word and deed and a willingness to stand by one’s stated principles and commitments even when one’s own interests might suffer as a result. Absent these qualities, lawyers who claim the abiding loyalty to the client’s interests that marks a zealous advocate can

III. LEGAL PRACTICE AND THE POSSIBILITY OF INTEGRITY

The conventional story told about integrity, and moral character in general, is that it is fixed in childhood or, at the very least, before the onset of adulthood, and that by the time you're an adult you either have it or you don't.¹⁶⁸ From this, one might well conclude that there is no point in trying to foster the conditions for its cultivation among lawyers, who are invariably past the age of moral development and thus immune to such efforts. But although it may be true that certain of our moral habits and tendencies are formed early on,¹⁶⁹ this is not the same as saying that subsequent social structures and processes play no part in shaping or influencing our ethical capacities and behavior. Nor could such a position be sustained against the considerable evidence that frameworks of social interaction, including those in which professionals practice, determine to a great extent our ethical perceptions and behavior.¹⁷⁰

Lawyers as a group are particularly well-placed to recognize the extent to which ethical identity can be shaped well into adulthood, given that each member of this group will have experienced firsthand the power of an institution to influence one's sense of self. For before one can join the legal profession, one must spend three years in law school, which, in addition to providing an education in legal structure, language, and method, represents a socialization process powerful enough to transform lay people into lawyers.¹⁷¹ I do not here claim

easily slide into hypocrisy. For discussion of the vice of hypocrisy as it relates to the legal profession, see *supra* note 162.

168. Kronman, for example, concludes that "[b]y the time a person reaches the age of twenty or so . . . the habits that define his or her character have already been formed." Kronman, *Moral Philosophy*, *supra* note 3, at 1755-56. This is one argument sometimes offered as to why the teaching of professional ethics is hopeless. See Derek Bok, *Can Higher Education Foster Higher Morals?*, 66 *Bus. & Soc'y Rev.* 4 (1988).

169. See Kronman, *Moral Philosophy*, *supra* note 3, at 1755-56.

170. See, e.g., Robert Jackall, *Moral Mazes: The World of Corporate Managers* (1988) (demonstrating the extent to which the moral perceptions of white collar managers are informed by the shape of the institutional structures in which they operate); Katherine S. Newman, *Falling From Grace: The Experience of Downward Mobility in the American Middle Class* (1988) (demonstrating the extent to which individual perceptions and value judgments related to job loss are a function of the institutional context in which the job loss occurred); Erving Goffman, *On the Characteristics of Total Institutions*, in *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* 1 (1961) (explaining the constitutive effects on individual "values, identities, and practices" of inhabiting a "total institution"); see also Rostain, *supra* note 72, at 970 (calling for "research into the effects of specialization by area, client and task, [and] firm culture and organization" as a way of "understand[ing] the process of value and attitude formation in lawyers").

171. Certainly, law students vary in the extent to which they give themselves up to this process and thus the extent to which they have, by the time of graduation, absorbed the professional identity of the lawyer. On the law school socialization process, see my Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 *Harv. L. Rev.* 2027 (1998); see also Sharon Dolovich, *Leaving the Law Behind*, 20 *Harv. Women's L.J.* 313, 326-30 (1997) (reviewing Patricia Williams' *The*

that the powerful socializing effects of law school necessarily effect permanent changes.¹⁷² Rather, I mention the power of law school to structure the moral perspectives of those who experience it merely as evidence that even as adults our identities are capable of great shifts, and that the engine of these shifts is often to be found in the social structures in which we operate. The danger, of course, is that perspectives may well be shifted in ways that undermine rather than enhance ethical character or behavior, and those concerned with improving the prospects of ethical lawyering may find this possibility particularly disconcerting. On the positive side, the potential for ethical change through the shaping of social structures and practices makes it possible for those committed to ethical lawyering on the contextual model to think about ways to promote among practitioners the character traits on which, I have been arguing, the possibility of such lawyering depends.

Admittedly, to suggest that ethical lawyering may be promoted in this way presupposes that the traits I associate above with integrity are amenable to influence by the structures of legal practice. This, however, I take to be plainly the case.¹⁷³ For although many aspects of one's moral character are obviously shaped long before one enters the practice of law, given that many of the issues and questions that inform the way these traits are manifested in a lawyer's professional life will never have been confronted in one's pre-law life, it stands to reason that the culture and character of the context in which one practices, and in particular the attitudes of senior colleagues who offer a ready model for young lawyers just entering practice, can have a considerable influence on the eventual shape of one's professional identity as well as one's professional habits. Whether, for example, one approaches client representation as if one is an empty shell—what I think of as an “empty suit and a brain”—prepared to be an uncritical conduit for the achievement of the client's interests, or instead as a reflective moral agent who listens with an open mind but also considers the various implications of what the client seeks and comes

Rooster's Egg) (describing the process whereby law schools teach law students to suppress their radical political impulses in favor of a more “rational” approach to legal and political problems); Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (1992). For an account of the powerful forces of socialization and professionalization in medical school, see Howard S. Becker et al., *Boys in White: Student Culture in Medical School* (1961).

172. To the contrary, I share Rostain's sense that when it comes to the construction of a lawyer's “commitments and beliefs, . . . professionalization in legal practice soon eclipses the influence of legal education.” Rostain, *supra* note 72, at 969-70.

173. Even Kronman, who believes that “[b]y the time a person reaches the age of twenty or so . . . the habits that define his or her character have already been formed,” Kronman, *Moral Philosophy*, *supra* note 3, at 1755-56, takes as a given that the social structures of practice—both in the provision of role models and in the demands made on individual lawyers—can have a great influence on the moral character of lawyers. See Kronman, *Lost Lawyer*, *supra* note 3, at 271-314.

to one's own conclusions about what is morally appropriate, is not a trait that can be crystallized in a particular moral agent prior to the commencement of practice. Before entering practice one can (and probably should) consider in the abstract the disposition with which a legal practitioner ought to approach clients' requests for legal services, but it is not until one is faced with actual clients—and, more importantly, sees how the other lawyers on whom one depends for guidance and advice view their own professional obligations—that one can begin to cultivate a particular approach to this endeavor. Certainly the capacity for reflection and deliberation (or lack thereof) will predate legal practice. But what one makes of this capacity in the practice of law will depend to a considerable degree on the example set by role models, and on the extent to which one's practice context is designed to foster—or undermine—one's aptitude in this regard.¹⁷⁴

The same can be said for the substance of the values and principles to which a lawyer is committed. Although it is true that the personal value system to which any particular lawyer subscribes will have been established prior to his or her entry into practice, it is also the case that entry into the legal profession brings with it the need to confront, consider, and make a determination about the obligation of lawyers with respect to a host of values that individual entrants into the profession are not likely to have seriously considered in the past. To what extent are lawyers obliged to effectuate the values ideally realized by a properly functioning adversary system? Must lawyers act in ways that strengthen the legal institutions on which the rule of law depends,¹⁷⁵ or is this task solely the responsibility of the legislature? Are lawyers more than just agents of their clients' desires? What exactly does it mean to be an "officer of the court" or a "public citizen with a special responsibility for the quality of justice?"¹⁷⁶ And what do these roles require? Furthermore, in addition to these questions which new lawyers must answer for themselves, lawyers entering practice will for the first time be confronted with the fact that, in the course of providing professional services, they have the power to conduct themselves in ways that generate considerable consequences for individuals and even entire communities, parties who may have had no direct involvement in the

174. See Kronman's discussion of law firms for a much more detailed exploration than I have here provided of the way law firm practice may foster or undermine one's capacity for what Kronman calls "practical wisdom," a quality with a strong family resemblance to what I have labeled "deliberative flexibility." Kronman, *Lost Lawyer*, *supra* note 3, at 271-314; *see also supra* notes 85, 150.

175. Gordon advances this latter view eloquently in his essay, *Why Lawyers Can't Just Be Hired Guns*. *See* Gordon, *supra* note 46.

176. *See* Model Rules of Prof'l Conduct pmbi. (2000) ("A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.").

legal matter at hand.¹⁷⁷ In particular, a law license offers the prospect of supporting actions and projects undertaken in the service of one's clients with the state-backed coercive force of a court order, and the opportunity to be viewed as the voice of authority in many public fora. Although some practitioners will remain unaffected by the prospect of this power, proceeding to enact through their practices the value system they brought with them to the law, others will be moved to reflect on previously held values in light of the power a law license carries—and for members of this latter group the structures of practice are bound to have considerable influence on the conclusions eventually drawn in this regard.

Let me put these claims in terms of the portrait of integrity developed above: What I am suggesting is that, notwithstanding that the constituents of moral character may be formed well before the bar swearing-in, the structures of legal practice, and in particular one's early experiences of legal practice, stand to influence considerably both the capacity for the exercise of independent judgment and deliberative flexibility and the substance of the values and principles to which one is committed. But what of the remaining traits of integrity? What of the willingness of moral actors to act consistently with their own values and principles even if to do so risks compromising their own interests, or of the tendency of moral actors to be honest with themselves about their own motivations? Here, too, it seems highly probable that professional context matters, particularly early on in a legal career. Do one's colleagues encourage consideration of one's personal integrity when formulating client strategies, even if professional interests might suffer? Is there a recognition that one's integrity has value, not only in terms of professional reputation, but for oneself as a coherent moral agent, and that this is a legitimate concern even for professionals who seek a good living? Do existing structures encourage honesty and fair-dealing, or do they reward manipulative or deceptive practices? Although the individual capacity to act on moral commitments in spite of personal costs and with a minimum of self-deception may be shaped at an early stage of moral development, the answers to these questions will determine to a great extent whether individuals can realize this capacity in their professional lives¹⁷⁸—and thus whether

177. True, such lawyers will invariably have brought to practice a previously developed and deeply ingrained sense of their own moral responsibilities vis-a-vis other people, communities, and the environment in which they live. But being a legal professional means reckoning for the first time with state-conferred powers that, if not necessarily outstripping previous potential to have an impact on the world, are certainly different in kind than the powers at the disposal of a lay person.

178. Rostain's illuminating discussion of the human psychological tendencies to conformism (the taking of "cues about the propriety of [our] conduct from others") and self-justification (our need to "'justify' [ourselves], to find explanations that are consistent with [our] self-conception as a decent person") strongly reinforces this

Rhode's alternative conception of ethical lawyering represents for individual practitioners an unreachable ideal or a live option.

If I am right that the structures and practices of one's professional context can, particularly early on in one's career, have a considerable effect on the development of one's professional character' either toward or away from the possibility of integrity, what follows? For one thing, it becomes incumbent on job-seeking lawyers, particularly early on in their careers, to learn as much as possible about the ethical culture of the employment contexts they are considering joining as well as the ethical character of the lawyers with whom they will be working, particularly those lawyers in supervisory roles. Granted, not all lawyers seeking employment have the luxury of choice, especially during an economic downturn, but to the extent that they do, my arguments here suggest that those individuals who care about the prospects for developing as an ethical lawyer would do well to seek placement where their capacity for lawyering with integrity will be fostered rather than undermined.

Yet personal initiative can only take one so far. If I am right that integrity is the key to ethical lawyering, and that social structure and practices can contribute to the fostering or undermining of one's potential for integrity, those who want to enhance the ethical character of the bar must seek to identify, in order to alter, those structures and practices that make it difficult for most lawyers—and in particular new lawyers, who tend to get their start in organizational settings—to develop ethical traits consistent with the conception of ethical lawyering we have here been exploring.

To which structures and practices ought we to look for this purpose? The obvious place to start is with the rules of professional responsibility,¹⁷⁹ to which legal ethics scholars tend to look when thinking about how best to influence the collective behavior of lawyers. And although, for reasons I will address shortly,¹⁸⁰ changes to the rules cannot alone make the difference, there is nonetheless an argument to be made that the rules should be rethought if the goal is to foster the development and exercise of integrity among lawyers.

Our discussion of integrity is most relevant in the context of the confidentiality rules, which address perhaps the most important and far-reaching of a lawyer's professional obligations. As any observer of the legal profession knows, the rules governing a lawyer's duty of confidentiality have traditionally weighed extremely heavily on the side of protecting client confidences, forbidding disclosure even when keeping the secret could lead to serious harm or even death to

conclusion, reminding us that the possibility of integrity is as much a social and psychological question as it is an ethical one. Rostain, *supra* note 72, at 964-66.

179. See generally Model Rules of Prof'l Conduct (2000); Model Code of Prof'l Responsibility (1981).

180. See *infra* notes 203-21 and accompanying text.

innocent third parties.¹⁸¹ From the perspective of integrity, the confidentiality rules thus present two problems. First, they deny lawyers the possibility of exercising their own judgment and acting consistently with their own moral commitments to decide when disclosure is warranted. Such strictures, that is, force the lawyer to give preference to the interests of clients even in cases where doing so conflicts with the lawyer's most strongly held moral commitments, short-circuiting the process of deliberative judgment by dictating the outcome, whatever the lawyer might conclude on the basis of his own moral sense to be the right course of action. In this way, a lawyer's own moral character and moral judgment become irrelevant, not just in the larger scheme, but to her own actions. She acts on the basis of some other actor's dictates, not her own.¹⁸² Second, and as a consequence, acting according to this scheme trains lawyers over time to suppress the exercise of their own moral judgment and the accompanying traits of the person of integrity: lawyers simply defer to the client. Those who adhere mechanically, without reserving to themselves the obligation of assessing in each case the moral appropriateness of the rule's dictates, can be expected to see their capacity for the traits that comprise integrity to atrophy with disuse.

Is this to say that any rules governing confidentiality will be at odds with the goals of integrity? Not at all.¹⁸³ But it is true that, from the perspective of integrity, the preference in terms of institutional design will be for broader discretion and fewer absolute rules in the confidentiality context,¹⁸⁴ so that a greater space would open up for

181. See, e.g., R. 1.6(b) (providing exceptions to the rule against disclosure only in limited circumstances); Cal. Bus. & Prof. Code § 6068(e) (Deering 2001) (setting forth an absolute prohibition on the disclosure of client confidences); see also Rhode, *supra* note 2, at 106-15 (discussing a range of cases in which lawyers, by keeping clients' confidential information, rendered third parties vulnerable to considerable harm); *supra* note 29 and accompanying text.

182. To voice this concern is not the same as saying that the lawyer should feel free, whenever she feels like it, to disclose her client's confidences. Plainly, a lawyer who is acting in the interests of her client would reveal a confidence only with the greatest reluctance, where there are considerable third-party interests at stake. My objection is thus not to the norm itself but rather to its absolute character, and the unwillingness to accord to lawyers the discretion to judge when justice requires deviation from the norm. If a lawyer is not to be just an empty suit and a brain, but rather to be recognized as a moral being in her own right—one who, as Rhode says, takes "personal responsibility for the moral consequences of [her] professional actions," see Rhode, *supra* note 2, at 66-67—she must be accorded the scope of action consistent with such status. To accord discretion to disclose, in short, is not to insist or expect that it be exercised lightly.

183. See *supra* note 181.

184. See R. 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . ."); Cal. Bus. & Prof. Code § 6068(e) ("It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."). The changes approved by the ABA House of Delegates in August 2001 to the confidentiality provision of the Model Rules of Professional Conduct, allowing

the exercise and development of a lawyer's own moral sense. To this, one might well object that the content of the rules should be no obstacle to the true person of integrity, who will act to promote her principles regardless of the consequences, even where the violation is clear and the penalty certain. Our concern, however, is not with heralding instances of individual heroism, but rather with the structures that promote or undermine the broad possibility of integrity. And where there are absolute rules, rules that direct behavior without encouraging critical evaluation of the circumstances, these rules shape not only actions but also ways of thinking, signaling that deference is the moral disposition most valued in the profession.¹⁸⁵ For this reason, one who is concerned with promoting integrity will prefer rules that encourage lawyers to view themselves as moral agents who must, as Rhode says, "accept personal responsibility for the moral consequences of their professional actions,"¹⁸⁶ and not simply to defer to the wishes of their clients or their colleagues.¹⁸⁷ Certainly, to the extent that the confidentiality rules—or other rules¹⁸⁸—prevent lawyers from acting in ways that are consistent with their own aberrational conceptions of justice, they

the possibility of disclosure "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm," represent a considerable improvement over the prior more restrictive version and open up a broader space within which the lawyer may exercise the qualities we have associated with integrity. See R. 1.6(b)(1) (approved amended draft 2001); see also Jonathan D. Glater, *Lawyers May Reveal Secrets of Clients, Bar Group Rules*, N.Y. Times, Aug. 8, 2001, at A12. In my view, these changes are to be welcomed, but they do not go far enough. Also available for approval by the House of Delegates was a more far-reaching proposal that would have allowed disclosure where the lawyers' services were to be used, or had already been used, to perpetuate financial fraud "reasonably certain to result in substantial injury to the financial interests or property of another." R. 1.6(b) (approved amended draft 2001); see William Glaberson, *Lawyers Consider Easing Restriction on Client Secrecy*, N.Y. Times, July 31, 2001, at A1; Glater, *supra*. In rejecting this broader proposal, the ABA left in place restrictions that prevent lawyers from acting even where clients' fraudulent acts stand to have devastating and far-reaching consequences for the well-being of innocent third parties—and even where the lawyer's own sense of justice would otherwise lead him to disclose despite the personal consequences of so doing. By foreclosing this possibility, the ABA signaled its commitment to the standard view, on which the moral compass of the lawyer is set by the client, not internally by the lawyer herself.

185. Lawyers who decide to disclose client confidences even when allowed to do so under a discretionary rule stand to pay a considerable professional price, but they are at least not liable to bar discipline or vulnerable to a malpractice claim for so doing. Nor must they reckon with the thought that in so disclosing they are violating an accepted professional norm. The advantage of discretionary rules is that such rules would signal to lawyers that the profession respects the judgment of lawyers and that it is up to each lawyer to exercise this discretion responsibly and with integrity.

186. Rhode, *supra* note 2, at 66-67.

187. See, e.g., R. 5.2(b) (2000) (assuring junior lawyers that they will not be held in violation of the Rules of Professional Conduct if despite disagreement as to their professional obligations they defer to a supervisor's "reasonable resolution of an arguable question of professional duty").

188. See, e.g., *id.*

protect clients from renegade lawyers whose moral conceptions put them outside the mainstream. But to the degree that these rules cabin lawyers' discretion and allow for only the most restrictive exceptions, they also prevent the moral deliberation and principled action that are the hallmarks of the person of integrity.

I am not, it bears emphasizing, suggesting that, at each moment of their professional lives, lawyers should be prepared to evaluate the moral implications of any given action. Such an approach to legal practice would be impracticable, not to mention that it would yield a profession of serial civil disobedients whose clients would be unable collectively to trust in their lawyers' professional guarantees.¹⁸⁹ At the same time, however, it seems imperative that lawyers, if they are to retain a moral compass and develop the traits of integrity, retain a critical perspective on the actions they take on behalf of their clients, including the implications of guarding the confidences they are called upon to keep.¹⁹⁰

There is a further respect in which the rules are at odds with the possibility of integrity on the part of lawyers, and that is the extent to which the substance of certain provisions reveals a greater concern with the self-interest of the profession than a meaningful commitment to the values and principles on which they are alleged to be based. Again, consider ABA Model Rule 1.6, governing the duty of confidentiality. Absent client consent, this rule flatly forbids lawyers

189. My point here is not that lawyers should pick and choose the moments when they will be morally reflective, but simply that one can expect there to be in practice many everyday moments that implicate no significant moral consequences and thus with respect to which no such reflection will be necessary. My own sense is that once one is attuned to the possible need for moral deliberation arising from one's professional actions, it will become obvious when instances arise that require this kind of deliberation, leaving the lawyer otherwise free to attend to the day-to-day without the fear of moral violation.

190. When client aims conflict with a lawyers' moral sense, lawyers do have options besides abandoning their clients or unilaterally frustrating their purposes. Most obviously, there is much room on this perspective for engaging the client in discussion about the appropriateness or implications of their actions, a strategy consistent with the understanding of the lawyer as advisor or counselor and which even the ABA Model Rules affirm as fully consistent with the lawyer's role. See e.g., R. 2.1 (recognizing that counseling clients will at times require reference "not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation"). I say "even the ABA Model Rules" because, as commentators have shown, despite the language in the preamble to the effect that a lawyer is an "officer of the legal system and a public citizen having special responsibility for the quality of justice" as well as "a representative of clients," see pmb., the substance of the rules is considerably more heavily weighted to the last of these roles than the first two. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39 (1989); see also Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 Tex. L. Rev. 639 (1981) (arguing that the self-regulatory structure of the bar, which allows those lawyers who are governed by the rules to determine their content, means that the substance of those rules will be invariably weighted toward promoting the professional interests of lawyers as a group).

to disclose client confidences—defined broadly as any “information relating to representation”—unless one of two exceptions is met.¹⁹¹ The first exception grants lawyers the discretion to disclose in cases where doing so would “prevent the client from committing a criminal act the lawyer believes is likely to result in imminent death or substantial bodily harm.”¹⁹² This exception is plainly quite narrow, requiring not merely that the threat prompting disclosure be one that a lawyer “reasonably” believes “likely” to lead to death or serious physical harm, but that the source of the threat be a possible criminal act by one’s client.¹⁹³ Its scope might be presumed to signal the high priority that the profession places on protecting client confidences, and the high moral price, in terms of possible considerable harm to third parties or the public interest, that lawyers are consequently willing to pay in order that these confidences be held inviolate. Yet it is hard to square this reading with the second exception to the lawyer’s general duty of confidentiality articulated in Rule 1.6, which allows a lawyer to disclose client confidences in order “to establish a claim or defense on behalf of the lawyer” when he is accused, whether by others or by the client themselves, of misconduct relating to the representation.¹⁹⁴ Certainly, it is not unreasonable in general that a lawyer should be able to defend himself against “a criminal charge or civil claim . . . based upon conduct in which the client was involved,” if it is reasonably believed that, without the lawyer’s knowledge or consent, the client used the lawyer’s services toward ends that might subject the lawyer to such liability.¹⁹⁵ Nor are the drafters wrong when they insist that a lawyer who has worked for a client in good faith is

191. See R. 1.6 (b).

192. See R. 1.6(b)(1). As noted above, *see supra* note 184, in August of 2001 the ABA House of Delegates approved, but has not yet formally adopted, a new version of this rule which would allow disclosure “to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.” R. 1.6(b)(1) (approved amended draft 2001). This revision is welcome and certainly expands the lawyer’s discretion to reveal client confidences, but this change does not in my view undermine the point I am making here, that the narrow scope of the exceptions to the duty implies a strong commitment to confidentiality whatever the consequences. See R. 1.6(b)(2); R. 1.6(b)(5) (approved amended draft 2001). Because the point is made either way, I rely for ease of reference on the current rule notwithstanding that its revision is imminent.

193. See R. 1.6(b)(1) (2000).

194. R. 1.6(b)(2). Specifically, this provision allows a lawyer to reveal client confidences

to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

Id.

195. See R. 1.6 cmt.

entitled to a fee.¹⁹⁶ But where the rule protects these interests on the part of lawyers while refusing to allow disclosure even where analogous third party interests are at stake—as, for example, in the recent refusal of the ABA House of Delegates to approve a further exception to the rule allowing disclosure where doing so would prevent or mitigate “substantial injury to the financial interests or property of another”¹⁹⁷—it is hard to credit the claim that the parameters of the duty of confidentiality are defined primarily by lawyers’ commitment to ensuring an effective adversary system.¹⁹⁸ Instead, it begins to seem as if lawyers’ own self-interest dictates the shape of this rule, allowing lawyers to justify the loyalty to client interests against almost all moral claims (a loyalty for which clients are willing to pay nicely), while exempting lawyers from this duty when such loyalty would exact a personal cost.¹⁹⁹

196. *See id.* (“A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.”).

197. R. 1.6(b)(2)-(3) (proposed amended draft 2001), available at http://www.abanet.org/cpr/e2k-complete_amend.html. This proposal was voted down at the ABA House of Delegates meeting in August 2001, suggesting that it is only the financial interests of lawyers and not third parties that could justify violating client confidences.

198. The most commonly cited justification for the duty of confidentiality rests on the importance for the success of the adversary system that there be open channels of communication between lawyer and client so that the lawyer be fully informed of all he needs to provide effective representation. The idea is that if it were not for the lawyer’s commitment to keeping a client’s confidences, the client would not trust the lawyer sufficiently to tell him all relevant details of the case, thus hampering the lawyer’s capacity to represent the client’s interests fully. R. 1.6 cmt. (2000) (“The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.”); *see also id.* (“A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”). The force of this justification, however, is open to question, particularly in light of empirical evidence suggesting that many clients do not base their decisions as to what information to confide in their attorneys on knowledge of the lawyer’s duty of confidentiality, *see Rhode & Luban, supra* note 1, at 190 (citing Eric Slater & Anita Sorenson, *Corporate Legal Ethics—An Empirical Study*, 8 J. Corp. L. 601, 622 (1983); Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 382-83 (1989); Note, *Functional Overlap Between the Lawyer and Other Professionals*, 71 Yale L.J. 1226, 1232 (1962)), and testimony by some lawyers that they do their best *not* to know all that their client knows, because such calculated ignorance enables them to provide a more successful defense. *See* Kenneth Mann, *Defending White Collar Crime* 103-23 (1985), *quoted in* Rhode & Luban, *supra* note 1, at 311-18.

199. This apparent disconnect between the stated value motivating the rule and the way the rule operates in practice is seen in other rules governing lawyer’s conduct. Rule 3.3, for example, is intended to reflect a lawyer’s duty of candor to the court arising out of the lawyer’s role as officer of the court, yet it requires lawyers to disclose only that legal authority that directly controls and is “directly adverse to the position of the client,” thus exempting a range of authority that does not fit these

Why is this a problem from the perspective of integrity? As we have seen, the possibility of integrity requires among other things an honesty with self and others as to one's motives and ends, and the willingness to act on one's stated commitments even where doing so runs counter to one's own self-interest. To the extent that the rules governing lawyers' conduct seem in substance to be more about promoting lawyers' self-interest than the values alleged to underpin them, they are inconsistent with these requirements, indicating instead a system-wide hypocrisy as to lawyers' motivations, and priorities designed to improve the profession's image without incurring the expense of actually living up to stated principles.

There is, of course, a danger to granting lawyers greater discretion under the rules to exercise their own judgment as to how to proceed in a given case: They might use this discretion in ways that compromise, rather than further, the interests of justice. The concern here is not that lawyers might reasonably differ as to the principles of justice they embrace and thus that the outcomes that result from the principled exercise of discretion by some may not cohere with conceptions of justice more widely held; that possibility, as we have seen,²⁰⁰ is inherent in any ethic that recognizes, as Rhode's does, the legitimacy of a range of moral views, and is in itself no affront to justice. No, the danger posed by affording lawyers greater discretion under the rules is of a different order, and reflects not good faith disagreement as to what justice requires, but the very real likelihood that some lawyers, given the chance, would use the opening such discretion would create to gain an advantage for themselves or their clients, even at the expense of the system or unprotected third parties. The ethical justification for such an approach, if there is one, would likely be found in what might be called extreme zealous advocacy,²⁰¹ which has

narrow parameters yet may nonetheless be highly relevant and necessary in order that the court have a full picture of the governing precedent. See R. 3.3(a)(3) ("A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."). Indeed, it was only in the recent revisions of the Model Rules that the drafters modified the rule so that any false statement to the court, and not merely that which is "material," would constitute a violation of a lawyer's duty of candor. Compare R. 3.3(a) ("A lawyer shall not knowingly make a false statement of *material* fact or law to a tribunal.") (emphasis added) with R. 3.3(a) (approved amended draft 2001) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal."); see also Gaetke, *supra* note 190 (demonstrating generally the limited extent to which the current version of the Model Rules substantively embodies the notion that a lawyer is an officer of the court); Deborah Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 Tex. L. Rev. 689, 702-06 (1981) (arguing that the prohibitions on advertising and solicitation are more about lawyers protecting their monopoly than about vindicating the values and ends offered to justify them).

200. See *supra* notes 43-45 and accompanying text.

201. This extreme version of the lawyer's role is broadly justified on the ground that it reflects the duty lawyers owe their clients, but my sense is that this proffered

already for many lawyers squeezed out of the accepted view of lawyers' obligations any possible duties as officer of the court or "trustee[] of the public good."²⁰² Given this danger, it might be thought better to have rules of professional conduct that set a clear floor below which a lawyer may not sink and hope that lawyers will at least follow the rules, than to create discretion that will be consistently turned to the client's advantage even at the expense of the interests of justice more broadly.

With the recognition of this danger, we decisively turn—as was inevitable—from the construction of an ideal theory to consideration of the existing prospects for, and obstacles to, its implementation. Above, I defended the value of articulating ethical ideals to which we can aspire and against which we can measure our own behavior, and I remain committed to that endeavor. But it is also true that ethical theory untethered from reality will be ultimately unconvincing and easy to dismiss. So I believe it is not only appropriate but also necessary to identify here the feature of current legal practice that to my mind represents—both in its raw form and to the extent that it informs the practice structures in which many lawyers operate and develop their professional identities—the single greatest obstacle to the possibility of integrity: the prioritizing of profit maximization. Obviously, lawyers need and deserve to make a living, and there is no reason from the perspective of integrity why that living should not be a comfortable one. But where the structures and norms of legal practice are molded around the single-minded pursuit of profit, we can routinely expect that both the development and exercise of the character traits that comprise integrity will become stifled, and eventually—as we saw above, in our discussion of the confidentiality rules—atrophy with disuse.

To see why this is so, consider the likely effects of the prioritizing of profit on the way a lawyer might approach the representation of a paying client, a client the lawyer has an interest—a financial interest—in keeping happy and satisfied. First, in this posture, the lawyer is likely to defer to the client's view as to the goals of the representation, to see herself as the conduit for achieving the client's preferences rather than a moral agent in her own right who might bring to the table her own views as to what the just or appropriate result might be. And this is so even where the client's goals might have morally

justification frequently masks what is more correctly viewed as actions taken to promote the lawyer's own interests—which frequently, although not always, line up on the same side. In this form, zealous advocacy is wholly inconsistent with the exercise of integrity, which as we have seen presupposes among other things honesty with one's self and others as to one's motives and a willingness to act on stated principles even at the expense of self-interest.

202. See Kronman, *supra* note 149, at 32 (“A lawyer who is doing his job well dwells in the tension between private interest and public good, and never overcomes it.”).

questionable effects, or skate close to the legal line, or where their realization would require strategies likely to undermine, rather than enhance, the “core values” of “honesty, fairness, and good faith on which the [justice] system depends.”²⁰³ A lawyer might, for example, in the interests of keeping her client happy and defending against a meritorious claim by a sympathetic plaintiff, take advantage of the vulnerable plaintiff who is temporarily without (or with incompetent) counsel and set the plaintiff’s deposition at a place and time difficult for that party to get to, and, when the witness fails to appear, to have the case dismissed with prejudice for failure to prosecute.²⁰⁴ Or, in the interests of protecting a high-paying corporate client on the verge of bankruptcy, a lawyer might vociferously and zealously defend the client’s financial soundness before the regulatory body responsible for certifying the client for continued federal deposit insurance, even though continued insurance of an insolvent bank would only dramatically drive up the already very large bill the taxpayers would eventually receive for the bail-out when the bank ultimately fails, and despite the fact that the regulatory process as designed explicitly relies on the candor and good faith of the attorneys as well as the clients.²⁰⁵ Or, for similar reasons, a lawyer might continue to certify the legality of dubious accounting or investment practices, and even, when the client is at risk of being investigated for those practices, subtly advise that incriminating documents be destroyed rather than retained and turned over to the investigating authorities when lawfully requested.²⁰⁶ Of course, the actions of a lawyer seeking to keep a client happy and ensure continued fees need not take such a dramatic form as these examples provide. The point is simply that, where the lawyer’s priority is the securing of profit for himself or his firm, he is apt to take actions that further the stated interests of the client even where

203. Rhode *supra* note 2, at 67.

204. See Zitrin & Langford, *supra* note 160, at 1-2 (recounting the story of “Laura Bernardi, a senior associate at a large urban law firm” who, apparently in order to enhance her partnership prospects, got rid of a case in which a smoking gun memo incriminated her client in precisely the way described in the text).

205. See *In the Matter of Kaye, Scholer, Fierman, Hays, and Handler: A Symposium on Government Regulation, Lawyers’ Ethics, and the Rule of Law: Introduction*, 66 S. Cal. L. Rev. 977, 979-83 (1993), *quoted in* Rhode & Luban, *supra* note 1, at 228.

206. As of now, it is not clear whether Enron’s lawyers played roles on this order in the events leading up to the spectacular failure of that corporation, but early evidence offers reason to suspect that they did so. For discussion on this question of the role the lawyers appear at this early stage to have played in the drama of Enron’s collapse, see Robert W. Gordon, *Portrait of a Profession in Paralysis*, 54 Stan. L. Rev. (forthcoming July 2002); see also Mann, *supra* note 198 (describing the “avoidance techniques” adopted by white collar criminal defense attorneys through which they avoid learning of their clients’ circumstances while managing to convey—without saying so explicitly and thus risking subsequent legal exposure themselves—that it might be in their clients’ interests to dispose of any potentially incriminating documents relevant to the impending prosecution).

those interests require actions or yield effects that are counter to the interests of justice, even as the lawyer himself were to conceive them.

This deference to the preferences and perspective of the client compromises the development and exercise of the lawyer's integrity in multiple ways. As we have just seen, it leads the lawyer to take actions that may well be contrary to her own conception of justice. It furthermore discourages the lawyer even from deliberating as to her own view as to what justice might require in a given circumstance—an approach that, as we have already seen, is central to the possibility of lawyering with integrity—to avoid a situation in which her own conclusions are trumped by the contrary conclusions of the client. To keep the client happy, the lawyer will learn to view grants of discretion, whether provided by the rules or by the system more broadly, as providing opportunities for furthering her client's interests, even where this approach, if adopted by all parties operating within the system, would ultimately compromise the legitimacy and long-term health of the system itself. Whether a lawyer could, under these circumstances, maintain over the long-term a clear sense of her own values and commitments is a question that in the universe of deference to the client matters little, and indeed the lawyer herself might have an interest in developing a perspective more consonant with that of her clients, in order to minimize any cognitive dissonance or psychological discomfort that might arise from continually acting contrary to her own principles. In this universe, questions as to the meaning of the lawyer's obligations as "officer of the legal system" or "public citizen having special responsibility for the quality of justice"²⁰⁷ become irrelevant. In short, lawyers whose practices are organized around the priority of profit-maximization seem likely to engage in an ongoing strategy of deference to clients in a way that compromises,²⁰⁸ rather than enhances, the possibilities for the exercise and development of the various traits of character that we have seen to comprise the quality of integrity.²⁰⁹

207. See Model Rules of Prof'l Conduct pmb1. (2000).

208. The lawyer, of course, is not rescued from this conclusion by redescribing her moral commitments as those that prioritize self-interest, for as we have seen self-interest is not a principle that can be applied consistently to all parties, and thus is not one that can consistently form the motivation of a person of integrity. See *supra* notes 118-131 and accompanying text.

209. It may well be, as Rhode argues, that clients whose lawyers have a reputation for integrity will stand to benefit from the greater trust and spirit of cooperation with which opposing counsel and other relevant parties like regulatory agencies will approach dealings with them. See Rhode, *supra* note 2, at 70; see also Steven Bennett, *Talk Tough, But Don't Be a Jerk*, N.Y. L.J., Nov. 24, 2000, at 11 (discussing the relationship between a lawyer's reputation in the legal community and his professional success). But this suggestion seems unpersuasive as a reason why lawyers who have not already sought to develop a reputation for integrity ought to do so. For if it were the case that greater integrity would yield greater profitability for lawyers, it seems reasonable to expect that lawyers would have already begun to practice in this way.

The discussion thus far has assumed that the compromise of the lawyer's development and exercise of integrity in these various ways occurs as a result of the lawyer's own personal decision to show excessive deference to the interests and preferences of the client as a profit-maximizing strategy. But as anyone familiar with the structure of legal practice is well aware, for many lawyers—especially young lawyers new to the profession—the pressure to shape one's approach to practice in ways consistent with the goal of profit maximization is less likely to be generated internally than it is to come from higher-ups in the firm, that is, from firm partners.²¹⁰ For many lawyers, that is, the possibilities for developing a professional identity consistent with integrity in the ways explored above are undermined from the start by the pressure from employers to increase a firm's profitability, a pressure that in today's market generally manifests itself as pressure to prioritize billing hours over all other considerations. At large urban firms in particular, it is currently standard for associates to meet official targets of 2000 hours per year and, privately, associates report pressure to bill 2400 hours or more. The average for those associates on the partner track are even higher than this. Indeed, at some firms, associates report that a junior lawyer billing 3000 hours per year "hardly raises eyebrows."²¹¹

From the perspective of integrity, these numbers raise a number of concerns, most obviously that of overreporting. There are only so many hours in a day and, given widely cited estimates that the average lawyer spends approximately three hours in the office for every two hours billed,²¹² on average a lawyer billing 2400 hours a year must be at work for 3600 hours in a twelve-month period.²¹³ Billing at this

210. Zitrin & Langford, *supra* note 160, at 81 ("Even after accounting for health insurance and other benefits and the cost of support staff, the [associates] of the legal world are major profit centers for their firms.").

211. Ross Guberman, *Running from the Law*, Washingtonian, Oct. 2001, at 52 ("In the 1970s, associates [at the Los Angeles office of Latham & Watkins] billed about 1,400 hours a year; in the 1980s, 1,800 was the target at even the largest firms. But at today's Latham & Watkins, billing 2,300 hours is typical, and 3,000 hardly raises eyebrows."); see also Lisa G. Lerman, *Scenes from a Law Firm*, 50 Rutgers L. Rev. 2153, 2154-55 (1998) (recounting the experiences of law firm associate "Nicholas Farber," who reported that the official target for associates at his firm of about fifty associates and a third as many partners in a "medium-sized town" was 2000 hours a year, but that "[t]hose who got significant bonuses typically billed well over 2000" and that "the highest number of hours a lawyer at the firm billed in a year was 2600"); Cameron Stracher, *Double Billing: A Young Lawyer's Tale of Greed, Sex, Lies and the Pursuit of a Swivel Chair* 58 (1998) (reporting that "plenty of lawyers" at the New York firm where he was a young associate "billed more than two thousand hours [a year]").

212. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 Rutgers L. Rev. 1, 14 (1991); Patrick Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871, 894 n.166 (1999).

213. Cf. Rhode, *supra* note 2, at 171 ("To generate two thousand billable hours, attorneys typically need to work ten hours a day, six days a week.").

level thus requires a lawyer to be in the office—or at some other location for purposes of work—for close to ten hours a day, seven days a week, 365 days a year.²¹⁴ Surveying these numbers, one cannot help wondering whether lawyers billing at these levels are capable of doing so honestly. Is an hour billed really an hour worked? Although there is little available by way of systematic evidence of widespread fraud, anecdotal evidence of overbilling by associates at large firms reported by a number of authors is not encouraging,²¹⁵ particularly from a perspective, like the one we have developed here, that places a premium on lawyers' honesty, fair-dealing, and "moral trustworthiness."²¹⁶ But even apart from the possibility of fraud, and

214. Even a less ambitious associate, seeking only 2100 hours in annual billables, must put in over 8.5 hours a day, every day of every month, to meet this target.

215. Widely cited techniques for increasing the number of hours billed beyond those actually worked include "time-sheet padding" (inflating or inventing the number of hours actually worked), Guberman, *supra* note 211, at 52; *see also* Ross, *supra* note 212, at 15 (discussing Lisa Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659, 705, 709-10 (1990)), in which the author reports an informal study on "deception in billing practices" in which one respondent "described a firm in which it was common to bill twenty hours per day, even if the attorneys had worked only ten hours"; "recycl[ing]" work (billing a client the full length of time taken to perform a task—for example, drafting a memo on a legal question or preparing a contract—that had already been done and fully paid for by a prior client), Rhode, *supra* note 2, at 173; Zitrin & Langford, *supra* note 160, at 83; Ross, *supra* note 212, at 83-88; "double billing" or even "triple billing" (billing two or three clients for a single hour, whether by producing work relevant to each and/or by charging one client for a task (e.g., traveling) that allows one to work simultaneously for a second client), Rhode, *supra* note 2, at 173; Zitrin & Langford, *supra* note 160, at 83-84; Lerman, *supra* note 211, at 2159 (interviewing one former associate who reported being encouraged by partners at his firm to double and triple bill his time by "find[ing] a way to do three things in that hour[,] [t]hen . . . bill three different hours to three different clients"); adjusting upward (compensating "for hours and expenses" that one assumes he has forgotten), *see* Rhode, *supra* note 2, at 171; delaying the recording of hours (because after much time has passed it is easier to exaggerate how much time one spent working and how little time one spent on breaks), Ross, *supra* note 212, at 15 (quoting one California attorney who described "filling out time sheets" as "the most creative professional activity" of many lawyers (citing Kirsch, *How Do I Bill This?*, 5 Cal. Lawyer 15, 17 (Apr. 1985))); and exploiting minimum increments (so that "four two-minute phone calls" in a system with a fifteen-minute minimum increment becomes one hour billed), Schiltz, *supra* note 212, at 919. Certainly, some of these techniques are more ethically troubling than others. Inventing or inflating one's hours so that clients are billed for time not worked, for example, seems to me blatantly fraudulent, while many attorneys (and certainly many law students, if the several classes with which I have discussed this question are any indication) have less difficulty, morally speaking, with double billing, at least where one client is being billed for travel time for which they would have paid anyway. *But see* William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* 81-82 (1996) (arguing that "the only forms of double billing that are even arguably ethical occur when a lawyer travels for one client and bills another client for work performed during the trip or when a lawyer works for one client while being forced to wait on the business of another client" and noting that "[t]here are few other situations in which an attorney can perform two distinct services for two different clients at the same time").

216. Graham, *supra* note 79, at 246; *see also supra* notes 114-122 and accompanying text.

the worries about the quality of work performed by someone who has been working sixteen-hour days for days or weeks on end,²¹⁷ the pressures placed in law firms on associates (and partners) to maintain their billables pose the very real likelihood that the professional identity developed in this context will resemble not so much Rhode's ethical lawyer, who carefully reflects on the interests at stake and the likely consequences of particular actions in light of his own values and principles and ultimately accepts "personal responsibility for the moral consequences of [his] professional actions,"²¹⁸ but rather a lawyer who views the exercise of professional judgment solely through the lens of personal advancement—assuming he has any time available to exercise his professional judgment at all. This result may, of course, be a feature of practice in any large organization in which junior lawyers are removed from the decision-making process, but my sense is that it is particularly likely in contexts where the primary metric of associate performance is the number of hours billed annually. Even when a junior associate is part of the decision-making process, in a firm culture where billable hours are supreme, any decisions she makes will ultimately be directed toward, not what justice would require or what is consistent with her own values and principles, but rather toward what is most likely to increase her billables and enhance her status at the firm.

In such circumstances, where the desire for profit or the pressure to bill is great, even those lawyers who have retained a sense of their own moral commitments are likely to give into what Lynne McFall calls the "temptation to redescription."²¹⁹ Not wanting to miss an opportunity to feather his own nest—or the nest of his employers—the lawyer will redraft his own principles or construct a late-breaking exception to them to accommodate the conclusion he wants to reach in the present case. This move is plainly counter to the spirit of the model of ethical lawyering we have here been exploring, which depends upon a high level of self-knowledge, honesty about motives, and an absence—or at least a minimum—of self-deception. As McFall suggests, one who admits his motives and nonetheless decides the question in a way consistent with his self-interest has certainly shown "weakness of the will," which is "one contrary of integrity."²²⁰ But it is the person "who sells out, then fixes the books" whose loss of integrity is greater,²²¹ and this description seems particularly apt when applied to the person who redrafts his principles to justify actions that privilege profit over ethical consistency.

217. See Rhode, *supra* note 2, at 35 ("Clients do not get efficient services from bleary, burned-out lawyers.").

218. *Id.* at 66-67.

219. McFall, *supra* note 75, at 7.

220. *Id.*

221. *Id.*

I have already suggested that ethical lawyering on the contextual model is necessarily an individual ethic, one that offers guidance as to the nature of ethical practice and leaves it up to each individual lawyer whether she will choose to follow. In addition, I have suggested that whether or not an individual lawyer has the inclination or capacity to make this choice will depend to a great extent not only on her own moral qualities or character but on the nature of the professional context in which she works. It now appears that, to the extent that lawyers develop their professional identity—and thus their commitments—in professional structures that emphasize the pursuit of profit to the exclusion of all other values, such lawyers will be unlikely, and perhaps even unable, to develop or enhance the moral qualities that make it possible to lawyer with integrity.

CONCLUSION

The guiding premise of this article has been that no theory of legal ethics is complete without addressing the question of what traits of character lawyers must possess to enable the ethical fulfillment of their professional obligations. With this premise in mind, I have sought in this article to fill out the model of ethical lawyering put forward by Deborah Rhode in her recent book *In the Interests of Justice*, with the aim not only of developing a richer sense of a lawyer's ethical obligations on this model, but also of generating an understanding of the particular character traits that would make it possible for a lawyer to live up to these obligations as Rhode conceives them. Simply put, my conclusion in this regard has been that Rhode's conception of ethical lawyering amounts to a call for lawyering with integrity.

This conclusion, as the discussion in Part III of this article suggests, offers those committed to enhancing the possibilities for ethical lawyering on Rhode's model both a practical focus and reason for pessimism. Practically speaking, if there is something to my claim that the quality of integrity is central to the possibility of ethical lawyering, it suggests an appropriate course of action for its promotion: the fostering among practicing lawyers of the character traits commonly associated with people of integrity. At the same time, however, there is reason for pessimism as to the likely success of such efforts, particularly given the incompatibility that I have argued exists between the possibility of integrity and the prioritizing by lawyers of the goal of profit maximization.

It bears emphasizing that the tension I identify between ethical behavior and profit maximization is not exclusive to Rhode's model of ethical lawyering. To the contrary, this tension exists even for zealous advocates on the standard conception, who routinely face the temptation to privilege their own financial self-interest at the expense of the client. Rather, what this inevitable tension suggests is

something with which anyone familiar with the temptations and pressures of legal practice is already well aware, which is that *all* practicing lawyers, and not merely those drawn to Rhode's model, must choose between ethical practice and an exclusive commitment to profit maximization.²²² Individual lawyers are, of course, free to choose the latter, but in doing so they must also relinquish their part in the grand vision, of which lawyers are justly proud, of a profession comprised of "high priest[s] at the shrine of justice,"²²³ "trustees . . . of the public good."²²⁴ Just as there is no integrity where one is solely concerned with oneself and one's own interests, there is no valid claim to conform to the profession's highest ideals where one acts solely to increase one's profits or advance one's career.

But even the commitment of individual lawyers to ethical lawyering does not get us all the way there, for as we have seen, the cultivation of integrity also requires institutional support. It is for this reason that, I believe, no amount of exhortation or civility codes or calls for moral renewal issued by the bar will bring about the ethical change that appears to be sorely lacking in the American legal profession.²²⁵ To this end, we need something less easily won: a broad-based collective commitment to meaningful institutional change.

222. Note that a choice of the former does not at all preclude lawyers from earning a profit. It is the pursuit of profit to the exclusion of all other values that would be in this way ruled out.

223. ABA, *Report of the Committee of the Code of Professional Ethics*, 1906 ABA Rep. 600-04, *quoted in* Rhode & Luban, *supra* note 1, at 65.

224. *See* Kronman, *supra* note 149, at 32.

225. *See* Gordon, *supra* note 206.

Notes & Observations