UNIVERSITY OF
COLORADO LAW REVIEW
Volume 74, Number 1 *2003*

REINTERPRETING PROFESSIONAL IDENTITY

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INTRODUCTION

It has become quite unfashionable to defend vigorous, client-centered lawyering. Well-known defenses of the past have fallen into desuetude. Perhaps more importantly, for nearly three decades the project of defining and explicating professional ethics has been colonized by a group of scholars fundamentally hostile to the concept of client-centered representation and convinced that it is to blame for professional misconduct and malaise.[1]

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1. Scholarly skepticism about the coherence and defensibility of prescribed social roles spans a wide range of literature in legal ethics, history, the sociology of the professions, moral philosophy, and the philosophy of law. I focus here on criticism relating to the lawyer's role rather than social roles in general. Although there is surely a diversity of views among scholars I call "role critics" below, I use the term to capture what I take to be common themes with the understanding that their work is expansive enough to be treated as a discourse.

Though I am no apologist for the profession or its woes, I strongly believe there is coherent content in a role defined, at least in the first instance, by dedication to the humble task of serving the client's lawful ends. Properly conceived, and bolstered by appropriate institutional sanctions and rewards, client-centered lawyering does not produce the amoral, uncivil, lawless, unhappy lawyers role critics complain about. Quite the opposite. But to make this case, two methodological turns away from ingrained habits in thinking about the profession are necessary.

First, we must be willing to suspend the conviction, so deeply embedded in role criticism and popular discourse (I have in mind the all too familiar lawyer jokes and epithets), that client-centered lawyering is the same as self-centered lawyering—that lawyers who have perverted the service norm for their own interests are ideal typical for any client-centered conception of the role. Suspending this belief will be difficult. After all, these fallen lawyers are usually quite obstinate about how nobly they sought to vindicate their client's interests when the lawlessness and moral bankruptcy of their conduct is exposed. But when the client is financially devastated, reeling from public suspicion and ill will, or worse, in jail or under indictment and buried in civil litigation, these protestations of other-directedness on the part of the lawyer should ring hollow. They should ring especially hollow when it appears the lawyer's pockets were well-lined by the misconduct. Perhaps all roles must be judged by their capacity for perversion, but we cannot mistake, as I think many role critics have, genuine role playing for role perversion. By avoiding this mistake, the contours of *genuinely* client-centered representation can be articulated in light of the rules of professional conduct and the constraints of practice, and self-centered lawyering can be exposed for what it is—namely, impermissible role deviance.

The second methodological turn is to suspend the focus on professional *morality*, which for many good reasons dominates discourse about the lawyering role, in order to address equally important but hitherto unattended questions about professional *identity*. Should lawyers identify with their clients? Should they be identified with their clients by others? Do lawyers have a right to select clients based on whether they identify with the positions their clients seek to advance? The concept of identification, the forms which it may take in practice, the particular orientation of the self toward the lawyering role

it invites, and its relationship to lawyers' autonomy and non-accountability, have not been systematically examined.

Now, perhaps more than ever, a systematic examination is needed. There is a longstanding tension in the bar on the question whether identification with client and cause is essential, permissible and (in any event) unavoidable, or instead a barrier to "active virtue" and effective representation.[2] The question goes not just to competence in the role (under what conditions of identification will the client and the law be properly served), but to distributive concerns (whether identification with clients and causes undercuts or enhances access to legal services), as well as concerns about the lawyer's interest in shaping the role she plays (whether autonomy to identify with clients and causes is and ought to be a protected professional right). The case for "assuming the second self" in American lawyering can be seen at least as early as 1846, when an advocate of the adversary ethic wrote:

> [E]very practitioner is to try his causes upon the law and the evidence, and without suffering his own personal feelings to influence his judgment or point his argument. The English rule, that no barrister may decline a brief . . . we regard as safer than our own practice, by which a counselor may select his own causes,—taking those which will pay the best, or which he considers (upon the slightest possible testimony, that of his own client) the most just. Under the latter course, he is in danger of becoming identified with his client, and of sharing his personal feelings. He may thus

2. On the "essential, permissible and inevitable side," see Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 231 (Austin Sarat & Stuart Scheingold, eds., 1998) [hereinafter CAUSE LAWYERING] ("[I]n the course of representing the client or the 'cause,' a lawyer *always also represents herself* in the sense of asserting her position, identity, and trajectory within the professional universe in which she is embedded.") (emphasis added). "Active virtue" is borrowed from W.B. Yeats:

> There is a relation between discipline and the theatrical sense. If we cannot imagine ourselves as different from what we are and assume the second self, we cannot impose a discipline upon ourselves, though we may accept one from others. Active virtue, as distinct from the passive acceptance of a current code, is the wearing of a mask. It is the condition of an arduous full life.

Ralph Ellison, *Change the Joke and Slip the Yoke*, *in* THE COLLECTED ESSAYS OF RALPH ELLISON 100, 107 (John F. Callhan ed., 1995) (quoting W.B. Yeats).

> become the slave of every artful man, and be kept in constant turmoil and excitement, having no rest to his spirit.[3]

Yet this very argument *against* identification concedes that the conditions promoting affinity between lawyer and client are equally well established in the American context.

Today, controversies over the appropriate degree of identification between lawyer and client abound—though they are rarely confronted and examined as such. Take, for instance, the female lawyer who refused to review a divorce settlement for a man who had "stayed at home serving as homemaker and caregiver" for his wife and kids for much of his eighteen year marriage. In an administrative hearing before the Massachusetts Commission Against Discrimination, she defended her decision on the grounds that identification with clients in this field is essential and permissible, if not unavoidable. She said that "she represented only women in divorce cases [in order] to devote her expertise to eliminating gender bias in the court system," that her female clients "feel comfortable sharing their anxieties and concerns with an advocate whom they trust to be wholeheartedly as well as intellectually committed to their interests," that advancing arguments "only on behalf of women enhanced her credibility with judges . . . in the family law courts," and that, like many contemporary cause lawyers, "she needs to feel a personal commitment to her client's cause in order to function effectively as an advocate."[4]

But for the Commission (which awarded the husband $5,000 for "emotional distress") and subsequent commentators, the case turned on difficult questions about the reach of generally applicable anti-discrimination laws and lawyers' First Amendment rights against compelled speech.[5] The lawyer's

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3. Peleg W. Chandler, *The Practice of the Bar*, 9 MO. L. RPTR. 27, 28 (1846); *see also* 2 DAVID HOFFMAN, *Resolutions on Professional Deportment*, *in* A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 746 (1836) ("In point of interest . . . as well as of feeling, the lawyer is occasionally too intimately connected with his client not to feel the force of those passions which lessen the ardor of virtue.").

4. *See* Stropnicky v. Nathanson, No. 91-BPA-0061, Mass. Comm'n Against Discrimination, Findings of Fact, Conclusions of Law and Order of the Single Commissioner, ¶¶ 3, 10, 13 (Feb. 25, 1997), *affirmed*, 1999 WL 33453078 (MCAD), Decision of the Full Commission (July 26, 1999). *See also id.* at ¶ 14 (lawyer acknowledged that, "in other legal proceedings, not involving controversies between men and women, she has no ethical problem with representing men").

5. For the Commission's analysis, see *id.* For the response of commentators, see Steve Berenson, *Politics and Plurality in a Lawyer's Choice of Clients: The*

autonomy, under current professional regulations and norms, to choose and serve clients on a principle of identification was simply assumed; and the possibility (very real in my view) that professional rules and norms control both the First Amendment and anti-discrimination questions was almost entirely ignored.

The tendency to assume away deeper questions of professional identity and how it is "regulated" can be seen in the often shrill debates over other cases: a black lawyer fired by the NAACP for taking a case for the Ku Klux Klan in his capacity as an assisting attorney with the ACLU; the criticism of black lawyers' conduct in the O.J. Simpson trial; a white supremacist denied admission to practice on grounds that as an avowed racist committed to abolishing basic civil rights he lacks the requisite moral character to practice law; an accused terrorist's decision to fire his court appointed counsel because they "have no understanding of terrorism, Muslims and Mujahedeen," and to represent himself when the court refused his demand for a Muslim lawyer.[6] Indeed, the conviction that part of what a lawyer properly offers her clients *is identification*—the conviction, in other words, that affinity with the person or position of a client is a proper expectation for clients to hold, a proper object for lawyers to seek and an inevitable fact of legal work—

Case of Stropnicky v. Nathanson, 35 SAN DIEGO L. REV. 1 (1998); Debra S. Katz & Richard Koffman, *Ethical Issues in Employment Law Practice: Discrimination in Client Selection—Can Attorneys Lawfully Reject Certain Classes of Clients?*, SD6 ALI-ABA 1017 (July 23, 1998); *Symposium: A Duty to Represent? Critical Reflections on* Stropnicky v. Nathanson, 20 W. NEW ENG. L. REV. 5 (1998); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 57 n.195 (1999).

6. For excellent analysis of the public commentary regarding the lawyer who represented the KKK and the lawyers in the Simpson case see Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straightjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997); David Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995) [hereinafter Wilkins, *Race*]; David Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 MICH L. REV. 795 (1997) [hereinafter Wilkins, *Straightjacketing*]. On the other incidents see GEOFFREY C. HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 875 (1999) (reporting decision of Committee on Character and Fitness for the Third Appellate District of the Supreme Court of Illinois in *In Re Hale* (1998)) [hereinafter HAZARD, THE LAW AND ETHICS]; Tom Jackman, *Moussaoui Allowed to Defend Himself*, WASH. POST, June 14, 2002, at A1; Stephen Lubet, *A Muslim Lawyer for Moussaoui*, N.Y. TIMES, April 25, 2002, at A31; Larry Margasak, *Moussaoui Wants to Fire his Attorneys*, AP ONLINE, April 22, 2002; Brooke A. Masters, *Moussaoui Wants to be his Own Lawyer*, WASH. POST, April 23, 2002, at A1.

appears to be taken for granted.[7] As one commentator on the divorce lawyer's case put it:

> Lawyers bring too much of their own selves to the task of lawyering to be compelled to represent any particular individual. Lawyers are not like taxi drivers who must take all comers because lawyers transport clients with their words, reputations and personal credibility, not with a standard-issue vehicle. . . . [A]ny other result would promote lies by lawyers . . . and probably insurmountable enforcement difficulties.[8]

In this article I argue that the lawyer's role is grounded in a logic of *service*, not identification—that the professional ideal endorsed by the rules of professional conduct envisions a lawyer willing to diligently represent a client irrespective of any personal, moral, or ideological affinity between them. Lawyers working under the service norm not only perform competently for their existing clients irrespective of any personal approval

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7. This is not to say that the subject has been completely ignored, only that we still lack a systematic account of the logic of identification. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 72 (1993) (describing the lawyering role as a form of "suspended identification, less disinterested than the attitude of the observer but more detached than love"); Charles Fried, *The Lawyer as Friend*, 85 YALE L.J. 1060, 1071 (1976) (analogizing the lawyering role to a "special-purpose" friendship "in which the beneficiary, the client, is entitled to all the special consideration within the limits of the relationship which we accord to a friend or loved one. It is not that the claims of the client are less intense or demanding; they are only more limited in scope"); Judge John T. Noonan, Jr., *The Lawyer Who Overidentifies with His Client*, 76 NOTRE DAME L. REV. 827, 829 (2001) (discussing an example of underidentification and an example of overidentification; contending that "[T]he identification which occurs in the love that informs friendships must be present if the lawyer is to do the lawyer's work well") [hereinafter Noonan, *The Lawyer Who Overidentifies*]. For thoughtful treatments of the question of professional identity in the context of a lawyer's membership in a specific socio-cultural group, see Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253 (1998); Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993); Russell Pierce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613 (1993); William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 HASTINGS L.J. 1101 (1997); Russell, *supra* note 6; David Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998) [hereinafter Wilkins, *Identities and Roles*]; David Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993) [hereinafter Wilkins, *Two Paths*]; David Wilkins, *Straightjacketing*, *supra* note 6; Wilkins, *Race*, *supra* note 6.

8. Martha Minow, *Foreward: Of Legal Ethics, Taxis and Doing the Right Thing*, 20 W. NEW. ENG. L. REV. 5, 6 (1998).

of their ends, they are open to taking new clients on the same terms. They thus possess what I call "thin professional identity"—commitment to the principle that effective service and open access to law demand uninhibited orientation of their faculties towards the realization of their clients' lawful objectives. At least in the first instance, then, to serve a client is not to identify with her.

Identification, by contrast, turns the role into an object of self-realization *for the lawyer*. Intense identification between lawyer and client—what I call "thick professional identity"—is typically a self-interested perversion of the service norm, and I hope to show that much in the way of contemporary professional misconduct and malaise (role confusion, lawlessness, maldistribution of legal services, and positional balkanization of the profession) can be attributed to the increasing encroachment of thick identification on the service norm. To reverse the move to thick identity, professional rewards for meeting the service norm through thin identity (and sanctions for deviating from it) must be bolstered.[9]

In order to accurately assess the role of identification, we need to understand the full spectrum of personal and positional identity available to lawyers in practice. Thus Section I opens by offering a framework for examining the manifold ways in which lawyers may identify with their clients and the legal positions they take on their behalf. The concepts of thin and thick professional identity are defined and the important role third parties play in imputing identity between lawyers and their clients or positions is discussed. I then examine the place of thin identity in the law of lawyering. I argue that although the ABA Model Rules do not always require a lawyer to maintain thin identity, the service norm is clearly endorsed and the dangers that thick identification between lawyer and client can produce are often proscribed.

Section II argues that, notwithstanding the Model Rules' endorsement of thin professional identity, a growing array of forces is pushing lawyers toward thick identity. The forces at stake include not only well-recognized market forces such as competition and specialization, but also conflict of interest litigation and the tradition of cause lawyering (which is explicitly predicated on a logic of identification and now includes both politically conservative and liberal factions).

9. For the genesis of my "thin" and "thick" terminology, see *infra*, note 23.

After surveying each of these forces and the consequences for professional identity, Section III sets out and challenges the basic premise of role criticism—that contemporary professional misconduct and malaise are attributable to the client-centered definition of the role embodied in the service norm and thin professional identity rather than to the intrusion of thick identity. I also argue that under conditions of moral pluralism, increasing lawyers' moral accountability as role critics suggest would only magnify the orientation of the role around the lawyer's interests and concerns. Indeed, pluralism is a reason to *demand* thin identity from those who control access to legal services.

The article closes in Section IV by suggesting a variety of ways in which the service norm and thin professional identity can be recovered. I also address concerns about maintaining moral integrity when role acts conflict with a lawyer's moral scruples, the counter-intuitive relationship between cause lawyering and the service norm, and the problem of motivating lawyers to embrace thin identity.

I. A TYPOLOGY OF IDENTIFICATION

To answer the normative question whether lawyers should identify with the clients they represent, we need to know the possible forms such identification might take, the forms it tends to take in practice, and the consequences that follow for the attorney-client relationship. Existing accounts of identification are either inaccurate or conceptually incomplete.

The lawyer's role is commonly said to be both client-centered and role-differentiated. The lawyer places her own interests to one side in order to focus on and maximize her clients' interests within the bounds of the law. The theory does not preclude the possibility that the lawyer's own interests may be realized in the course of playing the role and serving her clients' interests—in most matters, she will receive a fee, sometimes a handsome one, and she may be deeply gratified either by the result she obtains or by the nature and quality of the work she provides, quite apart from the result. But these personal rewards, along with other personal concerns, are treated as secondary, and professional norms strictly proscribe the intrusion of self-interest wherever and whenever it would lead the lawyer to deviate from diligent pursuit of her client's interests. Thus, the lawyer should be capable of performing her role

even if she personally (i.e., morally, emotionally, politically, etc.) disapproves of her client's interests. In this respect, we assume that diligent pursuit of the client's interests turns on suppression of the lawyer's interests.

On this conception of lawyering, call it the standard definition,[10] the *role* is centered on the client but the *person* playing it may or may not be. Between person and role, three possible relationships are typically discussed in role criticism.[11] First, where a person affirmatively identifies with the demands of the role, role and self are proximate. Often called "role-identification" or "role-integration," the person is said to embrace the lawyering role (including the requirement that she place her own interests to one side and focus on the client) not simply as a script to be played, but as a personally valuable and redeeming end in itself.[12] Another possibility arises where a person maintains distance between self and role. She may do so happily, in which case the bifurcation between self and role is benign—a simple separation between client-centered acts required by the role and acts the lawyer regards as expressions of her "true self."[13] This separation will come under pressure, however, if a lawyer begins to feel personally implicated in, and morally horrified by, required role acts. Here, bifurcation turns malignant, a source of alienation leading in extreme cases either back to role-identification (if the self caves to the demands of the role) or to a radical fracturing of the self (schizophrenia).

In each of these possibilities, the lawyering role is conceived as a relatively fixed, exogenous set of demands to which a person in the profession must respond, and primary emphasis in the literature is given to the self as a moral agent. If, however, the lawyering role is instead conceived as a concatenation

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10. We shall have occasion to inquire whether this definition is indeed standard. *See infra* Section III.A.3.

11. *See* Andreas Eshete, *Does A Lawyer's Character Matter?, in* THE GOOD LAWYER 270, 275 (David Luban ed., 1984); *see also infra* Section III.A.3; Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980), *reprinted in* ETHICS AND THE LEGAL PROFESSION (Michael Davis & Frederick A. Elliston eds., 1986) [hereinafter Postema, *Moral Responsibility*]; Gerald Postema, *Self-Image, Integrity, and Professional Responsibility, in* THE GOOD LAWYER 287 [hereinafter Postema, *Professional Responsibility*].

12. Lawyering is not the only role one may personally embrace notwithstanding the fact that it includes a principle of non-identification (differentiation or separation between self and role). Judges, for instance, often personally identify with their role as neutral decision makers.

13. "Benign" from her perspective at least—others may believe that she cannot, in good conscience, regard her role acts as other than her own.

of demands, at least some of which can be (and in fact often are) defined or manipulated by the role player, and if we conceive of the self as more than a moral agent, the relationship between role, self and client becomes far more complex than the integration-bifurcation-alienation account of role identity suggests. Most fundamentally, emphasis shifts from a person's moral identification *with* a given role, to construction or modification *of* the role by the full range of interests and concerns that define the person playing it. Thus, just as in the initial description one may worry about the role alienating or consuming the person (loss of self to role, with its attendant moral costs), in the latter account, one worries whether there is a role at all—whether the person will overwhelm any role constraints deemed inconvenient or inconsistent with the demands of self-interest. We worry, in short, about loss of role to self (with its attendant social costs).

I will return to these worries below. For now, it is important to emphasize that if roles are indeed responsive to the interests of role players, then we do not simply play or break from predetermined social roles—rather, in subtle ways, we also deviate from, adjust, and bend them to our capacities, needs and desires. And the degree of openness of a role to manipulation by its players will turn, significantly, on the means for enforcing, one might say, "regulating," compliance with the demands that define the role. Broad, strong, and consistent regulatory regimes will minimize role deviance. Narrow, weak, interstitial regimes will leave room for dissonance between role demands and role conduct—room for personalization of the role.[14]

With this analysis in mind, a more expansive framework of role identity in lawyering can be articulated. We can begin to account not only for the ways in which the role shapes the role player to meet institutional needs, but for the manifold ways in which the player may shape the role according to her interests. Furthermore, we can use this account to assess the methods by which the profession regulates role identity.

14. There will always be problems of resistance too, perhaps especially in strong regulatory regimes that rely on coercion rather than incentives. The point here is simply to define the potential reach of social and legal rules that work to normalize a role.

A. Personal and Positional Identity

"Identification" designates a very specific phenomenon, namely, the orientation of the self, the person of the lawyer, toward something (here, the client) with a concomitant feeling of affinity or close emotional, intellectual, moral or ideological association. Identification thus indicates a form of sincerity in role acts (in the sense of "congruence between feeling and avowal"[15]) which, as we shall see, may or may not be consistent with the psychological state demanded by the lawyering role. Some social roles cannot be played insincerely. Take parenting, for instance: one is arguably not parenting if one acts without love for one's children—at least if we think loving one's children is an important aspect of the role. I take it to define the role.[16] Other roles, by contrast, may be played (may in fact be designed to be played) irrespective of the player's sincerity—irrespective of any congruence between the required role acts and the actor's personal approval or endorsement of those acts.[17] The central claim of this article is that lawyering is and ought to be such a role.[18]

Lawyers' identification with clients they represent falls into at least two categories which I shall call personal and positional. "Personal identification" designates affinities between lawyer and client that turn on personal attributes of the client. Conceptually, the category is boundless—any physical, cultural or psychological fact about the client may be a source of identi-

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15. LIONEL TRILLING, SINCERITY AND AUTHENTICITY 7 (1971).

16. The example is Meir Dan-Cohen's. *See* Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1224 (1994) (describing parent's expression of gratitude to another for aiding a child as "sincere" because the parenting role is proximate to the self).

17. Dan-Cohen's example here is of a telephone operator saying "Thank you for using AT&T." *Id.* ("[T]he operator's recitation of thanks bears no relation to a personal disposition to politeness [and thus] the operator's role remains at a distance.").

18. As with so many other aspects of lawyering captured in his fine essay, *The Ethics of Advocacy*, Charles P. Curtis candidly stated the place of insincerity:

> A lawyer is required to be disingenuous. He is required to make statements as well as arguments which he does not believe in . . . . And he must never lose the reputation of lacking veracity, because [sic] his freedom from the strict bonds of veracity and of the law are the two chief assets of the profession.

4 STAN. L. REV. 3, 9 (1951). Even where the lawyer must persuade himself to reach "a perfectly astonishing amount of sincerity" in order to be convincing for his client, Curtis adds, it is "self-sown sincerity . . . seldom deep-rooted in lawyers, and it had better not be." *Id.* at 13-14.

fication for the lawyer representing her. The lawyer may identify with the client because she lives in the same neighborhood, goes to the same church, is attractive, holds the same job as a parent of the lawyer, has a great sense of humor, etc. These attributes can be placed along a continuum from the relatively fleeting and trivial (the client's favorite restaurant) to more essential features—often combinations of physical facts, habits and values that are constitutive of the client's sense of self and her place in the world (e.g., her race, ethnicity, parental status, religion, gender). In the abstract (that is, putting to one side the regulation of professional identity and any generalizations about the make-up of the profession) the specific object or objects of identification in any attorney-client relationship may vary as widely as the personalities and identities of lawyers and their clients. And, of course, the objects of identification may shift over time as the professional relationship develops or as the lawyer or client changes.

"Positional identification," by contrast, designates affinities between lawyer and client arising from the substance of the underlying representation. These affinities may, but will not necessarily, overlap with objects of personal identification. The core instance is a lawyer who identifies with the legal position she is taking on behalf of a client in litigation or negotiation. But a range of objects of identification surround this core. A lawyer may identify with the fact situation giving rise to the client's claim or with the legal issues raised by that fact situation. More broadly, she may identify with the field of law in which such issues are regularly presented, or with the constellation of moral, political, economic, and social interests that underlie a client's position and motivate her to seek representation—the client's "cause" as it is often called.

As with personal identification, the object(s) of positional identification may shift over time and may vary according to the individual interests and attributes of lawyer and client. At least part of what explains this variability is the rich psychological complex of motives that may underlie a lawyer's identification with her clients. First, a lawyer may be moved by more or less subconscious forces or by conscious but emotional forces only indirectly related to rational calculation and reflection. This will be especially true with personal identification where affinities often, at least in the first instance, arise unthinkingly. Second, the lawyer's motivation may be altruistic or moralistic in the sense that she tends (or explicitly intends)

to identify with clients whose personal attributes and legal positions correspond to the lawyer's concept of the good. Finally, a range of impulses derive from sheer egoism. Here, the lawyer identifies with personal attributes or legal positions of her clients because it meets an interest of the lawyer to do so.

I have already alluded to one instance of egoistic motivation where, in order to avoid or overcome a malignantly bifurcated relationship between role and self, the lawyer moves toward role-identification. This is a self-protective move—arguably the most basic form of self-interested conduct.[19] Other forms of self-interested identification are possible though. The lawyer may, for instance, seek to vindicate intellectual, pecuniary, or reputational interests by identifying with her clients' personal or positional attributes. Especially under conditions of moral pluralism or dissensus, moralistic motivation to identify with one's clients may be egoistic if the lawyer seeks to realize or impose her own concept of the good in the attorney-client relationship even where that engenders conflict with the client's interests, objectives, and values. Indeed, the moralistic lawyer may go a step further towards self-interest, not only shaping existing client relationships according to her moral vision, but making moral identification a condition of accepting representation in the first place.

We need, of course, to examine the degrees of personal and positional identification possible in the lawyering role. But before doing so, I want to make several clarifying points about our typology and add some complicating elements. The first point is that personal and positional identification are not entirely distinct categories. As I suggested above, personal characteristics of the client may well be relevant to the subject matter of the representation. Overlap between the categories is a reflection of law's imprint on culture—legal representation so often begins either with a threat to the client's interests and values or with a client's hope that the law can be shaped to ratify, protect or expand the social force of her interests and values. In either case, aspects of the client's identity will be deeply relevant to asserted legal positions.

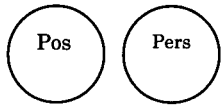
At the same time, however, many positions with which a lawyer may identify do not relate in any substantial way to the

19. "*Role*-identification" may not be the right word here if what the lawyer does is adopt her client's interests as a means of reducing tension between her own values and those she vindicates for her client—it is more the client than the role she embraces in this move.

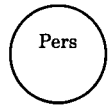
person of the client, and objects of personal identification may bear no relation to the subject matter of the representation. Overlap is likely to be more common where law reaches deepest into culture, which is to say, where law reaches social norms and individual conduct fundamental to the more essential attributes of personhood. In a pluralistic society, however, the norms and practices thought fundamental to personhood will vary across the diverse sectors of society. Personal and positional overlap will track this diversity and different attorney-client relationships will therefore produce different affinities.

The range of overlap between personal and positional attributes of a client is expressed in the following Venn diagrams. In the first, there is no relationship between personal attributes of the client with which the lawyer identifies and the legal positions the lawyer is taking on behalf of the client. Diagram 1.1 indicates a lawyer who nevertheless identifies both with the person of the client and unrelated positions she is taking for her. Diagram 1.2 indicates a lawyer who identifies only with the person of the client. Diagram 1.3, finally, indicates a lawyer who identifies with the legal positions she is taking for her client but not with the person of the client. The next four diagrams all depict overlap between the legal positions the lawyer is taking for her client and personal attributes of the client. In Diagram 2, the lawyer identifies with personal attributes and legal issues that partially overlap but are also unrelated. In Diagram 3, the personal attributes with which the lawyer identifies are entirely related to the legal positions the lawyer is asserting on the client's behalf, but the lawyer also may identify with positional issues unrelated to the client's attributes. In Diagram 4, the legal positions with which the lawyer identifies are entirely related to personal attributes of the client, but the lawyer may also identify with personal attributes of the client unrelated to the legal issues in the representation. In Diagram 5, the overlap is complete—the personal and positional attributes of the client with which the lawyer identifies are completely related to each other. There is no personal attribute with which the lawyer identifies that is unrelated to a positional aspect of the case, and there is no issue arising from the case which does not relate to some personal attribute of the client.

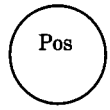
Overlap Between Personal and Positional Attributes of Client

1.1 

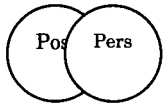
Personal and Positional Identification Without Overlap

1.2 

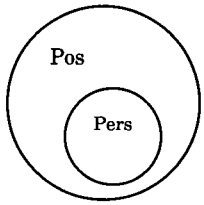
Personal Identification Only

1.3 

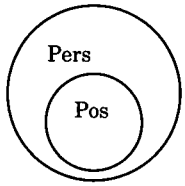
Positional Identification Only

2) 

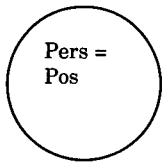
Partial Overlap

3) 

Personal Identification is Completely Related to Positions in Case

4) 

Positional Identification is Completely Related to Personal Attributes

5) 

Complete Personal and Positional Overlap

It also bears repeating that morally motivated identification with one's clients is but one species of identification and that a lawyer's moral faculties account for but one aspect of her personhood. The range of affinities between lawyer and client is thus much broader than moral factors allow for. Although I have framed personal and positional identification as though they turn on attributes of the client's character or legal situation, once the rich motivational structure of identification is exposed, it becomes clear that identification can be driven just as much by the lawyer's needs for (moral, emotional, intellectual, or financial) self-realization in the attorney-client relationship. The logic of identification can thus take a lawyer well past the client-centered stance that is said to define the role.

And just as identification can vary in type over time, it can also vary between clients, raising the possibility that a lawyer may closely identify with one category of her clients, while remaining bifurcated with respect to her role as it applies to all others.[20]

Finally, up to this point, we have addressed identification as a specific act, whether intentional or not, of individual lawyers with regard to their clients. Our description would be incomplete without recognizing two complicating phenomena: (a) that most lawyers work collaboratively in firms,[21] and (b) that, quite independent of any actual identification between lawyer and client, identity can be *imputed* by third parties. On the first point, firms have their own cultures with respect to client identification. So in order to speak meaningfully of a lawyer's relationship with her clients, we must understand her relationship to the norms of her firm as well. In a firm that has strong norms of client identification, a lawyer who displays positional identity with her clients may or may not be sincere—she may simply be playing the role the firm expects her to while privately maintaining a bifurcated stance toward that role and her clients. Conversely, in a firm with strong norms against client identification, a lawyer who identifies with her clients

20. A clear example is the corporate lawyer who is indifferent to her paying clients but actively chooses pro bono and law reform work using personal or positional criteria.

21. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 24 (2000) (reporting that only about a third of the profession is in solo practice) [hereinafter RHODE, IN THE INTERESTS OF JUSTICE]. I intend the broadest connotation of the word "firm" here. It captures both standard private firms as well as the various organizations in which house counsel, government, and public interest lawyers work.

may feel pressure to suppress these sentiments. In either case lawyers may also simply deviate from the governing norms of their firms, but lawyers whose private sentiments match the firm's norms will surely feel more secure, more like their role in the firm is something they can comfortably embrace.[22]

Clients, scholars, judges, other lawyers, and the general public also form opinions about the association between a lawyer and the clients she represents. Thus we can speak of a lawyer *being identified* with the positions she takes for her clients regardless of whether or not the lawyer has actually adopted those positions as her own. Here, factual distance between lawyer and client may be dissolved by imputation; and conversely, factual proximity between lawyer and client may be disregarded. This kind of imputed identity can be normative (believing that that the lawyer should or should not be identified with her client's positions), or positive (believing that the lawyer does or does not so identify), or both. The reasons for imputing identity are complex, but usually track moral or strategic concerns. Some may impute identity between lawyer and client to overcome the non-accountability thesis—the claim that a lawyer is not morally responsible for her role acts because they are vicarious acts for the client. Others may impute identity strategically to ensure zeal in representation, to prevent a lawyer from representing competitors, or to disqualify an opponent in litigation by arguing that the lawyer's loyalties are conflicted.

B. Degrees of Identification

As the chart below depicts, the degree of identification between lawyer and client falls along a continuum from negative, non-existent, or weak association with the person or positions of a client to relatively intense association. A lawyer may affirmatively dislike her client; she may be indifferent to the person or positions of her client; or she may identify with her client in only a weak sense. In any of these circumstances, the lawyer's personal or positional identity may be described as "thin," especially where her actual sentiments correspond to

22. Especially in large firms, it is also possible for practice groups to have norms independent of the rest of the firm. This adds a third layer to the dynamic of identification.

the sentiments imputed to her by others.[23] At the other end of the continuum, call it "thick" personal or positional identity, a lawyer intensely identifies with the person or positions of her client and others believe the lawyer is or should be so identified. Between the extremes, the identity of a lawyer is split—she may feel weak affinity for her clients while others regard her as more closely associated with her clients, or, conversely, she may feel intense affinity for her clients while others view her as weakly associated with them.

	Thin Identity		Thick Identity	
Actual	Weak	Weak	Intense	Intense
Imputed	Weak	Intense	Weak	Intense

Although the continuum is expressed in terms of the identity of an individual lawyer, the identity of firms and practice groups within firms can be located along the same continuum. Moreover, firms and their lawyers may not hold the same place on the continuum. This raises the possibility of intra-firm role dissonance, conflict, and perhaps even competition over the identity of the firm and its practice groups. Competing factions within the firm may use hiring, promotion, conflicts screening, mentoring programs and other aspects of firm management to push the firm closer to thin or thick professional identity.

C. Regulating Professional Identity

In the law of lawyering, the role is firmly centered on the client, but, as I will argue, the attorney-client relationship contemplated by the rules is grounded in a logic of service, not identity. In most circumstances, this means simply that a lawyer's decision to provide legal representation and the quality of that representation should not turn on the degree to which she identifies with the character or positions of those whom she serves. The service norm—a combination of dedication to competent service for existing clients and ensuring that all pro-

23. The terms "thin" and "thick" professional identity are an elaboration of terms in my earlier work on conflicts of interest in pro bono representation. *See* Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts of Interest in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1416 (1998) (citing Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, *in* GEERTZ, THE INTERPRETATION OF CULTURES 3 (1973)) [hereinafter Spaulding, *Pro Bono Publico*] .

spective clients have access to legal services—is thus supported by the principle of thin identity.

1. Client Selection

May a lawyer accept or reject a prospective client for any reason or for no reason at all? The rules do not have much to say about a lawyer's selection of clients. The inference typically drawn from this fact is that a lawyer is free to represent clients of her choosing, to accept or reject requested representation at will.[24] There is, after all, no provision creating an enforceable duty to accept as a client any person who requests a lawyer's services. And although much debated, there is no rule mandating the provision of pro bono representation either.[25] Nevertheless, to the extent that the rules *do* address the manner in which lawyers should respond to the demands of prospective clients, thin professional identity is explicitly endorsed.

First and foremost, the Model Rules of Professional Conduct support the inherent power of the courts to appoint lawyers for needy clients.[26] A lawyer who declines appointment by

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24. The strongest statement is by Monroe H. Freedman:

> Although it is occasionally suggested that the attorney has an obligation to take any client who requests legal services, nothing could be further from the truth or practice. There is no rule, and never has been, that the attorney must serve as a 'hired gun', and cannot elect to serve only selected clients or causes.

MONROE H. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 10 (1975). Others add to the absence of legal obligation an argument that morality requires no more. *See* Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, *in* THE GOOD LAWYER, *supra* note 11, at 214, 216-18; *see also* Fried, *supra* note 7, at 1078 ("Just as the principle of liberty leaves one morally free to choose a profession according to inclination, so within the profession it leaves one free to organize his life according to inclination. The lawyer's liberty—moral liberty—to take up what kind of practice he chooses and to take up or decline what clients he will is an aspect of the moral liberty of self to enter into personal relations freely.").

25. On the debate, see DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 791-92 (2d. ed. 1995) [hereinafter RHODE & LUBAN].

26. *See* MODEL RULE OF PROF'L CONDUCT 6.2 (2001) [hereinafter MODEL RULES]. The Model Rules, drafted and proposed in 1983 by the American Bar Association, have been adopted in whole or substantial part by most states. *See* 1 GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §1.1, 1-3 (2001) [hereinafter HAZARD & HODES]; ABA/BNA LAWYERS MANUAL OF PROFESSIONAL CONDUCT § 01:3 (2002) (listing the forty seven states that have adopted the Model Rules). While this article was being prepared for publication, the ABA adopted amendments to the Model Rules. Because, as the ABA admonishes, "no state currently has adopted the 2002 version . . . and very few authori-

a tribunal without "good cause" is subject to professional discipline.[27] Importantly, mere dislike of the client or disapproval of her legal position is insufficient to avoid appointment. The client or cause must be "so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client."[28] Only in the exceptional case, then, where animosity between lawyer and client is so strong as to undermine the lawyer's effectiveness for the client, will the duty to serve give way. That courts infrequently rely upon their appointment powers in no way undermines the significance of this rule for the lawyering role. Even if a lawyer is never appointed by a tribunal to represent a needy client, one's status as a lawyer, and hence the role itself, is conditioned both by the right of a court to order appointment and the principle that such appointment must be accepted irrespective of the lawyer's opinion of the client.

Other provisions of the Model Rules make clear that a lawyer willing to serve a client without regard to her personal attributes or positions—a lawyer, in short, with thin identity—is the professional ideal. Outside the context of appointment, for instance, lawyers are directed to distinguish the decision to represent a client (and the act of representation itself) from personal approval or adoption of the client's views. Immediately after emphasizing the service-oriented nature of the role—that lawyers must "abide by a client's decisions concerning the objectives of representation"—Model Rule 1.2 states that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[29] Although the rule can be read simply to mean that others should not *impute* identity between a lawyer and client from the fact of representation (and that lawyers are thus free to actually identify with clients if they wish), the Comment makes clear that the provision is intended to shape lawyer's *actual* attitudes toward the clients they may, or already do,

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ties have had a chance to examine or analyze the changed language," I refer throughout the article to the pre-2002 rules. *See* MODEL RULES OF PROF'L CONDUCT, *Preface* (2002). Nevertheless, where my own review discloses changes in the rules material to my analysis, the changes are so noted.

27. MODEL RULES, *supra* note 26, at R. 6.2.

28. *Id.* Other permissible grounds for declining court appointment include "unreasonable financial burden on the lawyer" and any representation "likely to result in violation of the rules of professional conduct or other law." *Id.* at R. 6.2 (a) & (b).

29. *Id.* at R. 1.2(a) & (b).

represent. Under the heading, "Independence from Client's Views or Activities," the Comment states:

> Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.[30]

Lawyers are thus urged to select clients irrespective of any affinity with them, and, indeed, irrespective of any affinity between the person or positions of the client and the general views of society. Access to legal services, in other words, is not to be determined by a lawyer's approval of or identification with prospective clients and their causes.[31]

Even in the context of pro bono representation, where lawyers offer their services for free and thus might legitimately be expected to exercise wide discretion in the choice of beneficiaries, the Rules urge a lawyer to focus not on identification with prospective clients, but on client needs.[32] Lawyers are directed to "provide a substantial majority" of their pro bono work to "persons of limited means or charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means."[33]

One might object that, taking all this into consideration, a lawyer is still at liberty to accept or reject all but unpopular and impecunious clients. She may even turn down unpopular and impecunious clients without fear of professional discipline. But while thick identity (selection of clients based on personal or positional affinity) may be tacitly permitted, it is nowhere endorsed, let alone required by the Rules. If we imagine a continuum of possible support for thin professional identity, it would range from requiring thin identity and prohibiting thick identity on one end (full support) to requiring thick identity

30. *Id.* at R. 1.2 cmt 3.

31. I reject the view that "controversial and unpopular" clients is a narrow category representing social outcasts. Any client who cannot pay is "unpopular" when it comes to obtaining access to legal services.

32. *See id.* at R. 6.1 cmts. 1 & 2.

33. *Id.* at R. 6.1(a). The rule goes on to suggest that any additional services should be directed to civil rights groups, charities or community organizations "where the payment of standard legal fees would significantly deplete the organization's economic resources"; to persons of limited means "at a substantially reduced fee"; or to "law reform." *Id.* at 6.1(b). *See also id.* at R. 6.1 cmts. 1 & 2.

and prohibiting thin identity on the other (no support). The Rules approach full support for thin identity—they either endorse or, as in the case of appointment, require it. That, by implication, thick identity is permitted surely ratifies the claim that lawyers have legal autonomy in their selection of clients, but the professional norm the Rules reflect and attempt to bolster cuts just the other way.

2. Client Service

The principle of thin identity is even stronger in the law of lawyering once a person has been accepted as a client. This is somewhat counter-intuitive. It is perhaps easy to assume that the best representation would be provided by a lawyer who identifies intensely with her clients—a lawyer who feels personally invested in the success or failure of her clients' cases because she has adopted her clients' causes or become emotionally attached to their fates. Surely a lawyer so invested is likely to act with all the diligence, competence and loyalty required by the Rules. One might even imagine that, absent at least some degree of identification, no lawyer could act with the diligence, competence and loyalty required by the Rules.[34] The law of lawyering, however, does not ground the attorney-client relationship in identification. Without denying that competent, diligent and loyal representation may be provided by a lawyer who identifies with her clients, the Rules repeatedly caution against dangers that loom when the person of the lawyer becomes intensely associated with the clients she represents. Four dangers leading to professional misconduct and malaise are especially prominent (role confusion, lawlessness, maldistribution of legal services, and professional balkanization) and the Rules clearly prohibit identification where these dangers would result.

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34. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 138-39 (1994) ("The client, of course, also wants his or her lawyer to be technically competent, but the matters that law addresses often require a trust that goes beyond confidence in professional skill. The client must trust the lawyer's discretion and may even feel a need to have the lawyer sympathize with the client's position."). *See also* KRONMAN, *supra* note 7, at 66 (discussing the importance of sympathy in the lawyering role); Noonan, *The Lawyer Who Overidentifies*, *supra* note 7, at 829 ("The lawyer is . . . to be effective, identifying with the client, with the client's troubles or problems, with the client's expectations and goals.").

i. Role Confusion

First, a lawyer's identification with her clients may lead to role confusion, to a blurring of the clients' interests with the lawyer's, and thus to breaches in the duty of competent client-centered representation. Our typology revealed this possibility in the motivational structure of lawyer-client identification. At its root, identification designates the *orientation of the self*—the person, with all her interests, ambivalences and biases—toward the object of the lawyer's role. When identification is intense, and especially when it is motivated by self-interest, the boundaries between the subject and object of identification can break down and it is all too easy for a lawyer to assume a non-existent congruence of interest. This, after all, is the very logic of identity—to dissolve barriers, close distance, unify interests. At the extreme, the client may actually disappear or become a mere abstraction of the lawyer's interests, an imaginary extension of the lawyer's will. Under these conditions, the role is turned on its head—instead of a means for serving the client's interests, the role becomes a means, whether moral, political, financial, or intellectual, for the self-realization of the lawyer.[35]

Although the Rules do not categorically prohibit identification with one's clients, service—by which I mean steadfast *orientation of the lawyer's faculties or capacities* toward the interests of the client—is the organizing principle behind the core duties of competence, diligence, and loyalty. Model Rule 1.2(a) defines the service orientation of the role by insisting that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."[36] The rule does *not* say that a lawyer shall abide by a client's decisions concerning the objectives of representation insofar as the lawyer identifies with those objectives. As long as they are lawful, the objectives are to be pursued.

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35. For examples drawn from practice, see text accompanying notes 188-221.

36. Model Rule 1.4 adds to this by requiring consistent, open communication with the client so that the she can stay "reasonably informed about the status of [her case]" and "make reasonably informed decisions regarding the representation." The Comment admonishes that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience." *See* MODEL RULES, *supra* note 26, at R. 1.4.

The lawyer may, of course, withdraw from the representation (and she must if the representation would lead to lawlessness), but the Rules provide discretion to withdraw only for good cause or "if withdrawal can be accomplished without material adverse effect on the interests of the client."[37] Good cause includes a client's persistent lawlessness (use of the lawyer's services for crime or fraud), a client's failure to "substantially fulfill an obligation to the lawyer" after warning from the lawyer (the classic example is failure to pay fees), a client who undermines the lawyer's attempts to provide competent representation, a case that becomes "an unreasonable financial burden on the lawyer," and a client who "insists upon pursuing an objective that the lawyer considers repugnant or imprudent."[38]

But where a court so orders, the rule emphasizes that "a lawyer shall continue representation notwithstanding good cause for terminating the representation,"[39] and any withdrawal must be effected in such a way as to reasonably protect the client's interests.[40] The Comment, moreover, begins with the admonition that "[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest *and to completion.*"[41] Withdrawal is thus an exceptional remedy—the rule assumes that once a lawyer accepts a case, she is willing to meet the service demands of the role set forth in Model Rule 1.2(a). Even the provision allowing the lawyer to withdraw if she deems the client's objectives to be imprudent or repugnant states that the client must "insist upon pursuing" such objectives.[42] So the lawyer must remonstrate with the client before abandoning her.

As with the rules on client selection, my point is not that thick identification is everywhere prohibited—under any fair reading of the rule a lawyer may withdraw if intense disapproval of the client renders the representation onerous or repugnant to her. But the endorsement of thin identity (the view that the client is entitled to the lawyer's services regardless of the lawyer's personal opinions) is equally unmistakable in the admonition of the Comment, the provisions of withdrawal for

37. MODEL RULES, *supra* note 26, at R. 1.16(b).
38. *Id.* at R. 1.16(b).
39. *Id.* at R. 1.16(c).
40. *See id.* at R. 1.16(d).
41. *Id.* at R. 1.16 cmt. 1 (emphasis added).
42. *See id.* at R. 1.16(b)(3).

cause, a court's power to order the lawyer to stay on, and the requirement that the lawyer protect the client's interests. The client, by rather sharp contrast, "has a right to discharge a lawyer at any time, with or without cause, subject to the liability for payment for the lawyer's services."[43]

The duties of competence and diligence are also framed in terms that emphasize technically proficient service independent of any identity between lawyer and client. Model Rule 1.1 defines competence as a deployment of technical skill without regard to motive,[44] and, with respect to the duty of diligence, the Comment to Model Rule 1.3 emphasizes that "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer.... A lawyer should act with dedication to the interests of the client and with zeal in advocacy on the client's behalf."[45] Perhaps most importantly, under Model Rule 1.7(b), the duty of loyalty prohibits a lawyer from taking a client "if the representation of that client may be materially limited ... by the lawyer's own interests."[46]

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43. *Id.* at R. 1.16 cmt. 4.

44. *Id.* at R. 1.1. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The Comment adds:

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Id. at cmt 1.

45. The rule itself provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* at R. 1.3.

46. This can be read to suggest that a lawyer should only represent clients with whom she identifies—that whenever personal or positional disagreement between lawyer and client arises, the lawyer must withdraw or decline representation to avoid materially limiting her services for the client. But this reading renders Model Rule 1.2(b) meaningless. Reading Rule 1.2(b) and 1.7(b) together, the lawyer is assumed to be capable of competent performance notwithstanding lack of identification with her clients. Representation should be declined or abandoned only in the extreme case where negative identification is so strong as to make impossible what the role generally demands. *Cf.* FREEDMAN, *supra* note 24, at 10-11.

ii. Lawlessness

The second danger is that thick identity may lead to lawlessness, a temptation to go beyond the boundaries of lawful conduct in order to advance a client's interests. Here, a lawyer's affinity with the person or positions of her client may make her willing to do too much for the client, more than the role and applicable law permit, more perhaps than her client does or should want. Lawyers are supposed to be client-centered, but not exclusively so. The Rules incorporate a number of obligations designed to protect third parties as well as the dignity and fairness of the administration of justice. Most fundamentally, the lawyer must withdraw where "representation will result in violation of the rules of professional conduct or other law."[47] Among these "rules of professional conduct" are provisions requiring the lawyer to assert only non-frivolous positions,[48] to be truthful before tribunals and in dealings with third parties,[49] to be fair to opposing counsel,[50] and to forbear "means that have no substantial purpose other than to embarrass, delay or burden a third person . . . ."[51] A lawyer too invested in her clients may minimize or disregard these important obligations when they conflict with her clients' interests.

Conflict can also extend well beyond the lawyer's obligations to third parties and the legal process. However expedient it appears at the moment of decision for a lawyer deeply invested in her client, lawlessness in the name of zealous representation may in fact disserve the client's interests and violate, thereby, the lawyer's duty of competence. Thick identity deprives a lawyer of the professional independence so essential to perceiving a client's interests dispassionately and to rendering sound, disinterested advice. As with role confusion, the lawyer's self interest may lead her to assume an absent congruence of interest; or the client's interests may simply become a veil through which the lawyer attempts to conceal (from herself as much as others) the force of her own interests.[52]

The Rules thus not only prohibit a lawyer from engaging in representation that would result in a violation of the rules of

47. MODEL RULES, *supra* note 26, at R. 1.16(a)(1).
48. *Id.* at R. 3.1.
49. *Id.* at R. 3.3 & 4.1.
50. *Id.* at R. 3.4.
51. *Id.* at R. 4.4.
52. For examples drawn from practice, see text accompanying notes 188-221.

professional conduct or other law, they require a lawyer assiduously to preserve conditions necessary to the exercise of independent professional judgment. Model Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice."[53] The Comment to Rule 2.1 specifically contemplates that a lawyer's advice may conflict with the client's unmediated perception of her own interests:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable for the client.[54]

The lawyer may even be obliged by her duty of communication under Model Rule 1.4 to offer unsolicited advice if the client contemplates a course of action related to the representation which the lawyer knows "is likely to result in substantial adverse legal consequences to the client."[55]

iii. Professional Balkanization and Maldistribution of Legal Services

Finally, thick identity can divide the profession and undermine the distribution of legal services. There is an important nexus between generality of client base, professional independence, and access to legal services. The more lawyers seek identity and the more they are identified by others with their existing clients, the less willing they will be to take cases opposed to the interests of those clients. Lawyers who intensely identify with non-trivial personal attributes of their clients will

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53. The use of mandatory language renders a violation of the rule sanctionable. *See* MODEL RULES, *supra* note 26, at Scope ¶1 ("Some of the Rules are imperatives, cast in the terms 'shall or 'shall not.' These define proper conduct for purposes of professional discipline. Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has professional discretion.").

54. MODEL RULES, *supra* note 26, at R. 2.1 cmt. 1.

55. *Id.* at cmt. 5. Nothing prevents the lawyer from raising concerns about impacts on third parties or non-legal implications of the client's objectives. Indeed, competent performance may demand it. *See id.* at cmt. 2.

come to prefer representing clients who have those attributes. They will likely feel more comfortable, perhaps most comfortable, representing such clients, and concomitantly less comfortable with, less interested in or excited by the needs of potential clients lacking such attributes. Similarly, lawyers who intensely identify with the positions they take for their clients are more likely to select clients based on positional affinity.

Imputed thick identity will have the same effect. The view of others that representing a client constitutes endorsement of the client's beliefs or conduct, and the view that only a lawyer who identifies with a client can effectively represent her, will function as disincentives (in the form of social pressure) to serve unpopular clients or clients who differ from the lawyer or the characteristics and positions of the lawyer's existing client base. Perhaps most importantly, if clients can freely demand thick identification from their lawyers, normative imputed identity (in the form of client expectations or conflict of interest rules supporting those expectations) can quickly generate intense actual identification. In sum, thick identity significantly narrows the universe of clients the lawyer is open to serve.

The only way in which widespread thick identification would not negatively affect the distribution of legal services is if the diversity among lawyers roughly matched the diversity among all potential clients and the mechanisms for initiating lawyer-client relationships (in most cases, the private market for legal services combined with subsidized/public markets, if any) functioned more or less perfectly.[56] These conditions have never existed, however, and, much as the profession has increased in diversity over the last few decades, it seems unlikely that they can be met. Thus, in the imperfect market we have, we can expect the distribution of legal services increasingly to reflect the still fairly narrow personal and positional preferences of lawyers married to their present clients.[57]

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56. *See* Alan Donagan, *Justifying Legal Practice in the Adversary System, in* THE GOOD LAWYER, *supra* note 11, at 123, 137 ("As long as the legal profession is reasonably representative, it will not be necessary to induce competent lawyers to represent unpopular but decent clients by assuring them of nonaccountability in representing any client whatever.").

57. The history of cause lawyering in 20th century America presents a challenge to this proposition since public interest lawyers, who, on the whole, are strongly motivated by identification with the plight of subordinated groups, have greatly enhanced the distribution of legal services to those groups. Indeed, on its surface, the tradition of public interest lawyering appears to present a strong counter-factual to the critique of thick professional identity. I address this impor-

This reveals the inadequacy of the so-called "last lawyer in town" theory, according to which a lawyer should be free to select clients at will so long as she is willing to accept unpopular clients when no one else will.[58] The last lawyer in town supposedly secures the freedom of all other lawyers to accept or reject clients according to their own standards. However, the theory incorrectly assumes that there are no transaction costs for clients seeking representation and that there are no information costs for lawyers deciding whether they are in fact the last lawyer and whether the client's cause is unpopular. With any significant information and transaction costs, the last lawyer in town theory is just a theory of externality, explaining how each lawyer can refuse impecunious or unpopular clients on the rather fantastic assumption that some other lawyer will surely take them and, if not, that still some other lawyer (perhaps even she) will then happily accept such clients as part of her time-honored professional obligation.

Even if the profession did mirror the various interests and identities of all potential clients and even if there existed a perfectly fluid system for gaining access to counsel, other costs to the profession would remain. The profession would be balkanized according to the personal and positional identities of its

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tant proposition in Section IV. For now, suffice it to say that, relative to the need in subordinated communities and the vast dedication of legal resources to private and corporate interests, the significant contributions of public interest lawyers still lie at the shores of a deep sea of legal need. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1792 (2001) (reporting that American lawyers meet "less than a fifth of the needs" of low income clients) [hereinafter Rhode, *Access to Justice*]; Legal Serv. Corp., *Serving the Civil Needs of Low Income Americans*, A Special Report to Congress (April 30, 2000) (reporting same finding). Moreover, my proposition assumes a universe in which all lawyers have thick professional identity—a universe in which we have all become cause lawyers of sorts. Under these conditions, the dedication of public interest lawyers to subordinated groups will compete against the dedication of lawyers to paying clients and corporate interests. Perhaps the greatest defect in the market for legal services is that it is a market. A fee-for-service regime gives paying clients a great advantage in competing for lawyers' identification. So it is difficult to imagine that an even distribution of legal services would ever result from widespread thick identification.

58. *See, e.g.*, FREEDMAN, *supra* note 24, at 54 (1975) ("A lawyer should be able to refuse a client for any reason, including mere suspicion of dishonesty (*except in the extreme and unlikely circumstance that the client would thereby be left with no attorney available at all*).") (emphasis added). *See also*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 575 (1986) (discussing last lawyer in town theory) [hereinafter WOLFRAM, MODERN LEGAL ETHICS]; Charles Wolfram, *in* THE GOOD LAWYER, *supra* note 24, at 223 (advocating a limited moral duty to represent repugnant clients).

lawyers and the clients they represent. Every lawyer would have a "positional identity" based on some combination of her field of practice, her own identity and her clients' personal and positional attributes. "Professional independence" would be a contradiction in terms since the role would turn on identification between lawyer and client—being professional would mean, in an important sense, being dependent. And with the loss of professional independence, little would remain to stave off the dangers of role confusion and lawlessness that thick identity invites. From a role dedicated to a service ideal, lawyering would take a definitive step toward the wholly self-seeking occupations.[59]

The principle of thin identity underlying Model Rule 1.2(b)'s admonition that representation of a client "does not constitute an endorsement of that client's political, economic, social or moral views," is an attempt to meet these concerns. But the Rules go farther. By defining the scope of a lawyer's duty of loyalty to her clients, the conflict of interest rules regulate professional identity perhaps more directly than any other aspect of the law of lawyering. They are thus worth exploring in some detail.

As I have elsewhere argued, outside of suing a current client, the conflict rules generally endorse thin identity in the sense that, so long as the quality of the services she provides to her existing client is not undermined, a lawyer is generally free to take on clients with conflicting or competing personal attributes or positions.[60] Even in the context of suing a current client, what Model Rule 1.7 refers to as "directly adverse" representation, Thomas D. Morgan has persuasively argued that "the proposition 'a lawyer may never take a position directly adverse to a client' is both not the rule and not what the rule should be."[61]

As it is defined in the conflict rules, loyalty turns on three interrelated elements: the client's legitimate expectations of fidelity, the structure of adversity between lawyer and client, and the impact a representation may have on the effectiveness

59. I mean self-seeking not just in the conventional sense of dedication to financial gain, but, more broadly to capture the paradoxical project of seeking self-realization in a role defined by commitment to the service of others.

60. *See* Spaulding, *Pro Bono Publico*, *supra* note 23, at 1401.

61. Thomas D. Morgan, *Suing a Current Client*, 9 GEO. J. LEG. ETHICS 1157, 1159 (1996). Whether Morgan's position will gain influence with the 2002 amendments to the conflict rules remains to be seen.

of the lawyer.[62] The more indirect or general the adversity and the more diminished the risk of impact on the quality of a lawyer's services, the less legitimate, and hence less legally enforceable, a client's expectations of fidelity become. A hypothetical will help flesh out these points. Assume Clearcut Inc. is a logging company and lumber mill with facilities in Arkansas and Alabama. In contract negotiations with furniture manufacturers to which it supplies wood, Clearcut is represented by the law firm Lloyd & Miller. Lloyd & Miller is also currently representing Clearcut in a lawsuit filed by Home Furnishings, in which Home Furnishings asserts that Clearcut has improperly invoked the "force majeure" clause in a supply contract between them.

Scenario #1: Suing a current client in a related matter. Model Rule 1.7(a) plainly prohibits Lloyd & Miller from representing Home Furnishings in the contract litigation against Clearcut. The reasons are straightforward and compelling: the lawyer could not possibly maintain credibility before judge and jury arguing both sides of the same case; she could not possibly keep separate each client's confidences (every confidence of Clearcut would automatically be "disclosed" to counsel for Home Furnishings); and, however scrupulous she tried to be, she still might be tempted to soft pedal arguments for the less lucrative client or the client whose character or positions she identified with the least. Moreover, Clearcut is surely entitled to think of the firm as its "advocate and champion" in this context.[63] The company has hired a lawyer, after all, not a mediator. For all the same reasons, the rule prohibits the firm from representing any other furniture manufacturer against Clearcut in litigation on its supply contracts. The prohibition amounts to a virtual per se ban because even if Clearcut and the manufacturer consent to simultaneous representation, the adversity is arguably so direct that no lawyer could "reasonably

62. Confidentiality is also central, especially in the context of representation against former clients, but I view the confidentiality concern as part of a lawyer's overall duty of competence—if a client cannot be sure her confidences will not be disclosed or used against her in another case, she will not share information with the lawyer, and in many cases this would undermine the effectiveness of the representation.

63. *See* Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976) ("When Cinerama retained Mr. Fleischman as its attorney in the Western District litigation, it was entitled to feel that at least until that limitation was at an end, it had his undivided loyalty as its advocate and champion . . . .") (quoted in Morgan, *supra* note 61, at 1169).

believe[] the representation [of one client] will not adversely affect the relationship with the other client."[64]

Scenario #2: Suing a current client in an unrelated matter. Once outside the context of suing Clearcut in a related matter, however, the Rules endorse thin positional identity with increasing vigor. Say, for instance, that the firm wished to represent a union composed of mill employees in litigation against Clearcut for breach of its collective bargaining agreement. Because the representation is still directly adverse, the firm would have to obtain the consent of both parties after consultation with each. Once again, the firm must reasonably believe the representation of the union will not adversely affect the relationship with Clearcut.[65] Consent obviously may not be forthcoming from Clearcut,[66] and under certain circumstances, it may be unreasonable for the firm to ask for or accept consent. But the important point is that a lawyer is not so closely associated with her existing clients by the rule as to categorically prohibit suing them. As the Comment states:

> Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as an advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both sides consent after consultation.[67]

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64. MODEL RULES, *supra* note 26, at R. 1.7(a)(1).

65. By referring to the effect on the "relationship" with the other client, rather than the quality of the "representation," see *id.* at R. 1.7(b), the rule arguably incorporates the current client's subjective views about the lawyer taking conflicting work.

66. As Morgan observes, current clients threatened with suit often withhold consent, not because they believe their lawyer has or would betray them, but

> solely out of a desire to make life difficult for the opponent. Indeed, it is widely suspected that clients . . . routinely give small portions of their legal work in a community to each of several law firms, *precisely to be able later to invoke the categorical prohibition on those firms' later filing suit against it.*

See Morgan, *supra* note 61, at 1162 (emphasis added).

67. *A fortiori*, adverse representation short of actually suing a current client would be permissible as well.

Here, the collective bargaining agreement is completely unrelated to the firm's supply contracts work for Clearcut, so confidentiality and credibility concerns are absent. There is still the possibility of soft pedaling and the issue of Clearcut's expectations of fidelity (which the firm must consider in assessing how its "relationship" with Clearcut would be affected), but, on these facts, neither of these concerns precludes the firm from seeking consent. Notice, though, that the danger of soft pedaling is especially high if the firm is thickly identified (actually or by imputation) with one client rather than the other. If the firm believes in Clearcut (say, as a longstanding and committed employer), or if there is deep personal affinity between the firm and Clearcut executives (they are poker buddies and friends), the risk that the firm will act with less vigor for the union dramatically increases. This means that thick identity creates conflicts of interest where none would otherwise be.[68]

The analysis thus far takes Model Rule 1.7(a) at face value. However, it is worth noting, as Morgan argues, that both the per se ban on simultaneous, directly adverse representation in related matters, and the consent requirement for unrelated matters, go well beyond the case law the rule was intended to codify.[69] Early cases held that suing a current client was presumptively improper, but that a lawyer could proceed if she established that there would be no adverse affect on the quality of her work for either client.[70] And Morgan persuasively advo-

68. I do not mean to deny the most plausible ground for identification leading to diminished zeal—that if Clearcut is the more lucrative client, arguments for the union may be soft pedaled. I simply want to stress by the two examples in the text that intense orientation of the self toward the client may produce a range of "self-interested" behavior extending well beyond the commonplace of financial enrichment.

69. *See* Morgan, *supra* note 61, at 1164-83 (describing the doctrinal history of conflict rules prior to the adoption of Model Rule 1.7); *see also id.* at 1179 (examining its drafting history and concluding that Model Rule 1.7(a) was an "unfortunate . . . last-minute, backdoor addition to the Model Rules"); *id.* at 1183 ("Rule 1.7(a) is not only surplusage; it is distracting and misleading."); *id.* at 1187 (noting that "many courts have largely ignored the rule, or at least have wisely disregarded the categorical approach" it endorses); *id.* at 1194.

70. Morgan showcases *Cinema 5*, in which the Second Circuit offered the following framework for simultaneous conflicts: "adverse representation is prima facie improper and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation." Morgan, *supra* note 61, at 1169 (quoting *Cinema 5*, 528 F.2d at 1387). *Cf. id.* at 1170 (conceding that there was no single pattern in the cases between *Cinema 5*, decided in 1976, and the Model Rules in 1983).

cates abandoning the categorical ban of Rule 1.7(a) in favor of "a showing that the proposed suit against a current client would have a 'material' adverse effect on representation of one or both current clients before prohibiting or sanctioning the representation."[71]

Scenario #3: Suing a non-client in a matter relevant to the representation of a client (Positional Conflict I). If Lloyd & Miller wishes to represent a furniture builder in supply contract litigation against another lumber mill, we reach a stage in the structure of adversity where the only concern is whether the firm can be effective for both Clearcut and the furniture builder. In the language of Model Rule 1.7(b), the firm must ask whether the representation of either client "may be materially limited by the lawyer's responsibilities to [the other]."[72] So long as the contract litigation against another mill will not diminish the lawyer's credibility or zeal for Clearcut, and so long as no confidences of Clearcut would be disclosed in support of the builder, her representation of Clearcut is not materially limited and she is free to take the builder's case without seeking consent.[73] As the Comment to Rule 1.7 makes clear: "A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected."[74]

Scenario #4: Suing a non-client in a matter relevant to a client's other legal interests (Positional Conflict II). What if Clearcut objects to the firm taking a case against the federal government for improperly issuing logging permits in Arkansas to logging companies other than Clearcut? The new client here could be a local environmental group or property owners adjacent to the areas targeted by the permits for logging. The analysis is the same as in Scenario #3, except that the prospect

71. Morgan, *supra* note 61, at 1163-64.

72. MODEL RULES, *supra* note 26, at R. 1.7(b).

73. I reject the view that Clearcut's subjective feelings of loyalty are relevant under Model Rule 1.7(b). *See supra* notes 46 & 65.

74. Adverse affect would arise, for instance, if the cases are in the same jurisdiction and the builder wants to invalidate a force majeure clause in its contract identical or similar to the clause in the contracts the firm has drafted and is defending on behalf of Clearcut. Here the firm risks diminished credibility by asserting inconsistent positions before the same court, opportunistically or unintentionally disclosing Clearcut confidences, and laboring under a temptation to favor one client over the other. The firm also risks creating adverse precedent for one client in whichever case is first decided. However, if the cases are in different jurisdictions, or the issues presented dissimilar, these concerns diminish, and with them, the prohibition of the rule.

of material limitation in the firm's work for Clearcut is even more remote. The firm may be fired by Clearcut if it vehemently objects to the firm taking a position adverse to the political and economic views of the logging industry, but nothing whatsoever in Rule 1.7(b) prohibits the firm from taking the case as long as it can competently represent both litigants. As the Comment emphasizes, the firm need not even obtain consent:

> [A] lawyer ordinarily may not act as an advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.[75]

Notice again though that the firm would be most likely to take both cases if it did not view its work for either client as an endorsement of that client's moral, political, social, or economic beliefs or actions—if, in other words, the firm maintained thin positional identity.[76] If instead the firm is thickly identified with Clearcut and therefore sees its work for the company as an expression of its commitment to the logging industry (with all the socio-economic and environmental values that implies), it would likely regard the case against the forest service as repugnant and refuse to take it. Conversely, if it viewed the forest service case as an expression of its true values, the firm would regard its representation of Clearcut as repugnant.[77] As

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75. MODEL RULES, *supra* note 26, at R 1.7 cmt. 3.

76. Conceivably, the firm could embrace thick identity by agreeing to let each lawyer serve her ideal clients. But I think it would be unusual for such an "agreement to disagree" to last long without undermining collegial relations in the firm. Individual lawyers would come to feel their personal values offended by the work of other lawyers in the firm. Lawyers would also likely compete to shape the firm identity around their values and any resulting imbalances in power would leave lawyers in the minority feeling marginalized, under-appreciated, perhaps even at risk of being asked to leave. Another possibility is a bifurcated firm, which is committed to thin identity in its work for paying clients, but embraces thick identity in its pro bono work. Interviews with firm pro bono coordinators show that this is the exception rather than the rule. *See* Spaulding, *Pro Bono Publico*, *supra* note 23, at 1416.

77. And if it did decide to take both cases, the fact of its intense identification with one client would create a risk of diminished zeal for the other. Thus, the firm would have to seek consent after consultation with both clients and conclude that, despite its endorsement of one client's position, its representation of the

we have seen, this is the road to professional balkanization and narrower access to legal services.

Scenario #5: Representing a non-client in a matter relevant to a client's non-legal interests (Personal Conflict). Suppose Clearcut is owned and operated by devout Christian fundamentalists and strongly opposes the firm's decision to take a case supporting the extension of federal benefits to cover non-medically indicated abortions. Structurally, the conflict is at the highest level of adversarial generality—tension between the personal values of an existing and a prospective client on an issue completely unrelated both to the legal interests of the existing client and the specific matters the firm handles for the client.[78] Significantly, the only tangible risk to the effectiveness of the firm's work for either client arises if the firm is thickly identified with the other. If the firm maintains thin identity, it might still be fired by Clearcut if the company felt strongly enough about the issue, but nothing in the Rules bars the firm from taking the abortion case.

A few closing notes on our hypothetical. First, by assuming that Clearcut is no longer a client when an oppositional matter comes to the firm, any of the above scenarios could be altered to create a conflict in successive representation. The Rules in this context are even more solicitous of thin identity than in simultaneous representation. Representation against Clearcut would be prohibited only if the new case is "materially adverse" to Clearcut's interests *and* arises in the same or a substantially related matter as those handled for Clearcut.[79]

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other would not be adversely affected—a dim prospect if the identification is actually intense.

78. The facts could be modified to produce a conflict unrelated to the legal interests of either client. If, for instance, Clearcut was owned and operated by NRA members, and opposed the firm's decision to take a probate case for a person who picketed the local gun shop.

79. *See* MODEL RULES, note 26, at R. 1.9(a) & (c). Courts hold matters substantially related where confidential information obtained in representing the first client is relevant to the subject matter of the new case. *See* Judge Weinfeld's enunciation in T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953). As Hazard and Hodes describe:

> Today, most courts and other authorities hold that the substantial relationship test is not a formalistic inquiry into degrees of closeness, but is largely a judgment as to whether the former client's confidences are at risk of being turned against him . . . . [T]he modern cases focus on the factual contours of both the form and the current transactions or matters and ask whether the affected lawyer *reasonably could have* learned confidential information in the first representation *that would be of significance in the second.*

"The underlying question," the Comment asserts, "is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."[80] Apart from such a direct role reversal, lawyers are free to take cases adverse to their former client's interests where the former client's confidences are not at issue.[81]

Second, the provisions on pro bono representation emphasize the permissibility of working with a legal services organization or participating in law reform even if such activities could negatively affect the lawyer's regular clients. Model Rule 6.3, for instance, provides that "a lawyer may serve [with] a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization has interests adverse to a client of the lawyer."[82] This is a clear endorsement of thin professional identity in support of the distributive element of the service norm.

Finally, as the hypothetical suggests, there is often a substantial gap between the loyalty demanded of lawyers by the conflict rules and the loyalty clients (at least paying clients) may demand in the market for legal services. One could conclude either that the rules do not go far enough to protect clients' market-enforceable expectations of loyalty or that the rules should do more to insulate lawyers from these expectations. I do not wish to enter that debate now.[83] For present

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HAZARD & HODES, *supra* note 26, at § 13.5, 13-12, 13-13 (2001) (emphasis added).

80. MODEL RULES, *supra* note 26, at R. 1.9 cmt. 2. The Comment adds that while:

> a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client . . . a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

Id. In Scenario #3, for example, if the firm were no longer representing Clearcut, it would clearly be free to accept the furniture builder as a client in litigation against another lumber mill over a similar supply contract. *Cf.* HAZARD & HODES, *supra* note 26, at § 13.7, 13-17 (describing courts that have extended the conflict rule to prohibit a lawyer from suing a long-standing former client in matters *unrelated* to the prior representation because the lawyer is said to possess "general tactical information and psychological insights" on the former client; often called the "playbook rationale.").

81. There is a catch-all provision prohibiting the use or disclosure of the former client's confidences. *See* MODEL RULES, *supra*, note 26, at R. 1.9(c).

82. *See id.* at R. 6.3 & 6.4.

83. *See infra* Section IV.A (arguing for the latter approach).

purposes, it suffices to emphasize both that the existing gap reflects an endorsement of thin professional identity by the rules, and that when lawyers cave to their paying clients' market-enforceable expectations, this thickens their identity. On the latter point, even if we could accurately describe a lawyer's initial decision to cave as market rational[84] (and not based on the lawyer's actual sentiments regarding the person or positions of the client), over time the lawyer's sentiments are likely to reformulate around and hence to rationalize her conduct (recall the instability of malignant bifurcation). And even if actual sentiments do not shift toward identification with the client, others may legitimately impute identity between lawyer and client on the theory that actions speak louder than words—that a lawyer's actual conduct, rather than her sentiments, better reflects her true values.[85]

In sum, an examination of the law of lawyering reveals that while thick identity is sometimes tolerated, the dominant professional norm expressed in the Rules is thin identity. Thus to our initial questions, I believe the Rules deliver a negative reply: a lawyer generally should not identify or be identified with the client she represents, and she should not select clients based on the intensity of her identification with their personal attributes or legal positions.

II. MOVING TOWARD THICK IDENTITY

In what follows, I shall argue that, despite the endorsement of thin professional identity in the law of laweyring, a

84. Though note that where it limits one's future client base, the decision may not be rational.

85. My own interviews with lawyers disclose yet another alternative: lawyers offered representation that conflicts with a regular client's interests invoke these interests as a reason to decline the new case. But they often do so without actually consulting the client whose expectations of loyalty they invoke. These lawyers thus impute thick identity to themselves using their client's *imagined* interests as a cipher. *See* Spaulding, *Pro Bono Publico*, *supra* note 23, at 1417-18 (1998) (for firms with thick positional identity, "positional conflicts 'never get to the point of clients exercising veto power because the firm self-edits'") (quoting interview with a private firm pro bono coordinator). The legitimacy of the imputation is belied by the fact that firms with thin positional identity—who work in comparable fields but are willing to call a regular client, explain the conflict, and explain the concept of thin identity as a professional norm—often find that their clients do not enforce the expectation of loyalty their market power confers. *See id.* at 1416-17. All of this is to say that we must be careful not to reify paying client's market-enforceable expectations of loyalty even as we register its unmistakable power to influence professional identity.

broad array of forces is pushing the profession toward thick identity. Some of these forces, such as increased competition, specialization, and conflict of interest litigation, are well-recognized. Others, however, such as the rise of liberal and conservative cause lawyering and the normative claims of role critics, have not been placed alongside the more market-driven forces leading to thick identity. Doing so suggests not only that the dangers of thick identity anticipated in the last section are present in contemporary law practice, but also that increased autonomy for lawyers to choose clients and shape their work according to a principle of moral identification may actually exacerbate professional misconduct and malaise. In this Section, I detail the forces in law practice pushing the profession toward thick identity. I turn to the descriptive and normative claims of role criticism in Section III.

A. Competition

Lawyers in the private market for legal services face intense competition not simply from their peers, but from other professionals, lay providers, and even their own clients. Peer competition is at least partly attributable to the dramatic growth of the legal profession in the second half of the 20th century. The 1995 Lawyer Statistical Report indicates that "[s]ince World War II, the lawyer population has grown from approximately 200,000 to over 850,000 . . . continually outpac[ing] . . . the general population."[86] In 1951, the ratio of lawyers to the general population in the United States was 1 lawyer per 695 persons; by 1995 the ratio fell to 1 per 303.[87]

At the same time, longstanding anti-competitive restrictions on the profession have been lifted. In *Goldfarb v. Virginia State Bar*, the United States Supreme Court held unanimously, and for the first time, that the practice of law is "trade or commerce" within the meaning of Section 1 of the Sherman

86. BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995 1 (1999) [hereinafter CURRAN & CARSON, STATISTICAL REPORT].

87. *Id.* Deborah Rhode suggests that there are also incentives to overproduce lawyers in the academy: "Because legal education is relatively cheap and prestigious to provide, and because students are able to finance high tuitions, law schools have been attractive start-up ventures. Their growth in size and numbers has produced more graduates who cannot find the positions they want . . . ." RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 21, at 29-30.

Act.[88] The decision arose from a challenge to a minimum fee schedule published by the Fairfax County Bar Association, which, in concert with the state's prohibition on unauthorized practice of law, required a home buyer to pay a lawyer at least 1% of the value of the target property for a title examination.[89] Tellingly, the plaintiffs surveyed thirty six local lawyers and none would perform the title examination for less than the fee prescribed in the bar association's schedule. The Court conceded that the "classic basis traditionally advanced to distinguish professions from trades, businesses, and other occupations" is that, for professions, "enhancing profit is not the goal . . . the goal is to provide services necessary to the community."[90] But the Court firmly rejected the profit/service distinction as a reason for exemption from antitrust law:

> In arguing that learned professions are not "trade or commerce" the County Bar seeks a total exclusion from antitrust regulation. . . . We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether section 1 includes professions. . . .
>
> Whatever else it may be, the examination of a land title is a service; the exchange of such service for money is "commerce" in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect.[91]

Clearly off-put by the argument that rent-seeking minimum fee schedules were essential to the culture of an ostensibly service-oriented profession, the Court described the schedule as "a classic illustration of price fixing."[92] It concluded by admonishing that "[i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce."[93]

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88. 421 U.S. 773 (1975).
89. *See id.* at 775-76.
90. *Id.* at 786-87.
91. *Id.* at 787-88.
92. *Id.* at 783.
93. *Id.* at 788. The Court observed that, where state law genuinely compelled restraints on legal services, antitrust exemption under the state action

The decision was a watershed. As Charles Wolfram observed:

> Until 1975 the comforting assumption of the bar was that its regulation was almost exclusively in the hands of bar associations and courts. . . . For almost a century after the federal antitrust laws were first enacted, it was widely assumed that lawyers were exempt from their reach. . . . Anyone adventurous enough to speculate about the matter would probably have been unable to convince many lawyers that the Supreme Court would apply the antitrust laws to them.[94]

Goldfarb not only opened price competition between lawyers, it provoked a sea change in other anticompetitive practices by the bar. Most prominently, the American Bar Association "undertook to repeal several interprofessional treaties on unauthorized practice that had been negotiated over decades with several other professional associations"—treaties that collectively delimited and preserved market boundaries between professional service providers.[95] With the collapse of these boundaries, other professionals (accountants, financial planners, bankers, insurers, and real estate brokers, to name just a few) have increasingly encroached on the market for law-related services.[96] Moreover, the activities of national and local unauthorized practice committees—responsible since the 1930's for aggressively protecting lawyer's turf—have been "severely cut back" in the wake of lower court extensions of *Goldfarb*.[97]

On the heels of a 1976 antitrust suit by the Department of Justice challenging the ABA's advertising and solicitation re-

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doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), might be recognized. *See Goldfarb*, 421 U.S. at 788-92. Here, however, the minimum fee schedule was concocted by the local bar and backed up by state bar sanctions, but nowhere authorized under state law:

> [I]t cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent . . . . [A]lthough the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondent's activities.

Id. at 790. On this reasoning, other restraints on legal services also may lack the requisite nexus to interstate commerce.

94. WOLFRAM, *supra* note 58, at 38-39.

95. *Id.* at 41, 826.

96. *See* RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 21, at 30.

97. *See* WOLFRAM, *supra* note 58, at 827.

strictions,[98] the Supreme Court decided *Bates v. State Bar of Arizona*.[99] Plaintiffs in the case were founders of a legal clinic in Phoenix suspended by the state bar for running an advertisement in the local paper claiming to offer "legal services at very reasonable fees" and listing set fees for routine services.[100] While rejecting the antitrust challenge to the state's advertising rule,[101] the Court followed its decision in *Virginia Pharmacy Board v. Virginia Consumer Counsel*,[102] and held that plaintiffs' ad was non-deceptive commercial speech entitled to protection under the First Amendment. The Court flatly rejected the state bar's parade of horribles argument that lifting advertising restrictions would "irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve"[103]; that, given information asymmetries between lawyer and client and the individualized nature of legal services, attorney advertising is inherently misleading[104]; that advertising by lawyers would "stir[] up litigation"[105]; and that advertising would be difficult to police, lower the quality of legal work and, perhaps most surprisingly, *raise* legal fees.[106]

Foremost in the Court's mind was the concern that the restrictions inhibited access to legal services on the tendentious assumption "that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information."[107] As in *Goldfarb*, the Court poured the cynical

98. The ABA settled the suit after agreeing to change relevant provisions of the ABA Code of Professional Responsibility, and to add the word "Model" to the Code. *See* WOLFRAM, *supra* note 58, at 40.

99. 433 U.S. 350 (1977).

100. *Id.* at 354-56; *see also id.*, Appendix at 385. The relevant disciplinary rule provided: "A lawyer shall not publicize himself . . . as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf." *Id.* at 355 (quoting ARIZ. SUP. CT. R. 29(a)). As in many states, lawyers were restricted to a business card, a Martindale-Hubbel listing, and a discrete listing in the local phone book. *See id.; see also* ABA CANONS OF PROFESSIONAL ETHICS, Canon 27 (1908).

101. The Court found the *Parker* state action exemption applicable since the advertising rule was an "affirmative command of the Arizona Supreme Court." 433 U.S. at 359-60.

102. 425 U.S. 748 (1976).

103. *Bates*, 433 U.S. at 368.

104. *Id.* at 372.

105. *Id.* at 375.

106. *Id.* at 377-79.

107. *Id.* at 374-75; *see also id.* at 370.

acid of market realism on the notion that restrictions having the effect of inflating the price of legal services were linked in any legitimate way to an ethic of disinterested public service. Indeed, in the Court's analysis, the ethic of service figured as a priggish holdover from law practice in England:

> It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow above trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.[108]

Bates has produced a remarkable string of increasingly divided Supreme Court decisions on the proper bounds of lawyer advertising and solicitation—much of the controversy provoked by the question whether the First Amendment permits any room for restrictions designed to preserve the dignity, public image and disinterestedness of the profession.[109] In any event, the Model Rules have been amended to track the Court's expansion of lawyer's commercial speech rights, and fairly ag-

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108. *Id.* at 371-72.

109. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (by a 5 to 4 vote upholding bar prohibition on sending direct mail to solicit personal injury victims within thirty days of the accident); Edenfield v. Kane, 507 U.S. 761 (1993) (striking down ban on in-person solicitation by accountants); Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990) (striking down bar prohibition on attorneys advertising themselves as "certified specialists" by a 5 to 4 vote); Shapero v. Ky. Bar Assn., 486 U.S. 466 (1988) (striking down bar prohibition on direct mail solicitation of home owners facing foreclosure proceedings in a plurality opinion); Zauderer v. Office of Disciplinary Counsel, Ohio, 471 U.S. 626 (1985) (striking down bar prohibition on newspaper advertising containing illustrations and legal advice; upholding disclosure/disclaimer requirements); In re R.M.J., 455 U.S. 191 (1982) (striking down bar restrictions on telephone book ads and new office announcement cards); Ohralik v. Ohio State Bar Assn, 436 U.S. 447 (1978) (holding that state bar may prophylactically prohibit in-person solicitation motivated by pecuniary gain); In re Primus, 436 U.S. 412 (1978) (holding state bar may not prohibit in-person solicitation of lawyer motivated by civil rights objectives) (citing and following NAACP v. Button, 371 U.S. 415 (1963)).

gressive and widespread attorney advertising is now commonplace in most states.[110]

Quite apart from changes in the law of lawyering, corporate clients have changed the dynamic of their relationship to outside counsel by hiring more lawyers and thus moving more legal work in-house (this is especially true in the insurance industry, but the phenomenon is much more widespread), by retaining firms on more limited terms (often just for a single transaction or case), and by forcing firms to bid for their work (in what are colloquially referred to as "beauty contests").[111] Concomitantly, firms have changed their internal policies for promotion to partnership and for sharing profits away from more egalitarian traditions and toward schemes that explicitly favor those who generate clients and fees.[112]

The overall effect of competition on professional identity is clear. First and foremost, however salutary lifting price barriers and lowering information costs has been for consumers of legal services, increased competition directly enhances paying client's market-enforceable expectations of loyalty—their power to demand more intense identification from their lawyers. As Robert Nelson found in his study of large firm social values:

> In the increasingly competitive market for clients, lawyers are less likely than ever to play a mediating role with respect to client demands. They are more likely to press for the maximum advantage of their clients in order to attract future business.[113]

Second, shifting from the demand to the supply side, opening venues for competition in areas like advertising and solicitation not only authorizes but arguably enhances both actual and imputed egoism in the role. The profit motive obviously does not arrive on the scene with attorney advertising, and, of all peo-

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110. A 1994 ABA poll reports that 61% of lawyers are "using some form of advertising and planning to do more of it." *Advertising Wars,* A.B.A J. 72-73 (Feb. 1994). *See also* HAZARD, THE LAW AND ETHICS, *supra* note 6, at 1037-38 (1999) (quoting the ABA poll and describing data on the methods of attorney advertising). *See also* RHODE AND LUBAN, *supra* note 25, at 626-27 (giving contemporary examples).

111. *See* Robert L. Nelson, *Ideology, Practice and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm,* 37 STAN. L. REV. 503, 543-44 (1985).

112. *See* RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 21, at 31-44.

113. *See* Nelson, *supra* note 111, at 544 (also noting firm's loss of "wide-ranging, continuous client relationships"); *see also id.* at 525-28.

ple, surely clients have known this, but expanding the First Amendment to cover lawyer's commercial speech unquestionably enhances the force of self-interest in the role. Lawyers imagine their services as more like other standard commodities whose production is motivated by and for profit, and others, perhaps especially clients, rightly assume that lawyers propose representation primarily for personal gain. The client, literally and figuratively, becomes little more than an opportunity for the realization of the lawyer's financial interests.

At first blush, this may seem positive for thin identity—the profit motive, after all, can clear away other personal or positional motives for client selection and lead the lawyer to accept anyone who can afford the fee.[114] But, as the typology of identification reveals (not to mention the recent corporate accounting scandals), grounding lawyers' selection and service of clients in the profit motive leads to thick professional identity and invites all its dangers.

B. Specialization

For reasons at least partly related to competition and the growth of the administrative state, lawyers also increasingly find themselves working more or less exclusively within specific fields of law, and often on only one side of the plaintiff's/defendant's bar within those fields.[115] Heinz and Laumann's classic study of the Chicago bar describes a profession divided into two hemispheres based on the clients they represent: on one side are "lawyers who represent large organizations (corporations, labor unions, or government)," and on the other, lawyers "who represent individuals."[116] They found

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114. At least in the abstract, moving from "thick," status-based relations to "thin," market-based relations promises salutary distributive consequences and greater individual autonomy. *See generally* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 259 (1979) (quoting and discussing Sir Henry Maine's claim that social progress has been defined by the move from "from status to contract"); E. ALLAN FARNSWORTH, CONTRACTS §1.7, 20-22 (1990) (same).

115. *Cf.* Robert W. Gordon, *The Independence of Laywers*, 68 B.U. L. REV. 1, 54-55 (1988) (arguing that "the American bar began to specialize quite early in its history").

116. The study reports that:

> Lawyers who serve major corporations and other large organizations differ systematically from those who work for individuals and small businesses, whether we look at the social origins of lawyers, the prestige of the law schools they attend, their career histories and mobility, their so-

that task specialization within each hemisphere is also driven by client needs.[117] For this reason, they argued, lawyers in the corporate hemisphere are "likely to work in a narrower range of fields" even if their firm offers a broad array of services.[118] As Robert Gordon argues, "the client base of elite law firms has become even less diverse [in 20th century American law practice]. Tort, antitrust, and securities litigation split into a plaintiff's and a defendant's bar, labor relations between a labor and a management bar."[119]

By orienting lawyers around narrow client bases with specific interests and legal needs, specialization encourages thick positional identification with clients. Corporate lawyers, Heinz and Laumann report,

> seldom perceive any conflict between their interests and those of their clients. In most cases, there probably is none—events that make the client stronger will usually make their lawyers stronger in the long run as well. Corporate lawyers may thus come to regard their own interests as inseparable from those of clients. After lawyers have advocated a client's position for several years—after they have, time and again, been called upon to think of and express all of the strongest arguments for the client—it may well be impossible for them to step out of that role and to consider and assert their own interests apart from those of their clients.[120]

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cial or political values, their networks of friends and professional associates, or several other social variables.

HEINZ & LAUMANN, *supra* note 34, at 127-28. The authors also found that client-based differentiation in lawyers' work produced client-based stratification within the bar. Specifically, professional prestige in the Chicago bar attached to corporate lawyers because of "reflected glory"—the fact that their clients were more socially prestigious than individual clients represented by lawyers in the personal service hemisphere. *Id.* at 135.

117. "Because of client demand for full service, a lawyer often works in a range of fields, encompassing various doctrinal areas, but this demand will be limited by the range of needs of the lawyer's particular clients, and the doctrines dealt with will therefore be confined within client type boundaries." *Id.* at 131.

118. *Id.* Their findings on corporate specialization are supported by Nelson's study. *See* Nelson, *supra* note 111, at 544.

119. Gordon, *supra* note 115, at 55.

120. HEINZ & LAUMANN, *supra* note 34, at 155-56 (citing Robert L. Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 AM. B. FOUND. RES. J. 97, 112-17). *See also id.* at 145; *id.* at 133 ("It may not be necessary for the client to tell [the lawyer to seek favorable changes in the law] if the lawyer has a large enough investment in the client. Changes in the law that make things easier for the client will also often make things easier for the

Heinz and Laumann also found strong evidence of personal identification arising from the common socio-political and religious backgrounds of lawyers and clients in each hemisphere. Shared personal attributes, they suggest, help to thicken positional identity.[121]

C. Conflict of Interest Litigation

Strategic use of the conflict of interest rules in litigation both reflects and exacerbates the effects of increased competition and specialization in the bar. Both federal and state reporters are now replete with decisions on lawyers' efforts to impute identification between the firms or lawyers opposing them and the person or position of their clients.[122] Indeed, firms now aggressively regulate (and thereby typically thicken) their own positional identity as well as the identity of firms with whom they compete. Thus, as a result of litigation over motions to disqualify and clients' market-enforceable expectations of loyalty, conflicts screening has become a Byzantine and exacting process both in hiring lawyers and accepting clients. And as the typology of identification reveals, over time the effect of consistently *imputing* identity is often to produce *actual* affinity, pushing lawyers even further toward thick professional identity.

D. Cause Lawyering

Competition, specialization, and conflicts litigation are all well-documented trends leading to thick identity. What is less often emphasized in the same context is the tradition of "cause lawyering" in the public interest bar—a tradition defined by its rejection of thin identity.[123] As Austin Sarat and Stuart

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lawyer. To the extent that lawyers are specialized by client type, therefore, we may expect them to be organized or politically active, if at all, in areas that are defined by client interests."); *cf.* Gordon, *supra* note 115, at 56-57 (noting and challenging this claim).

121. HEINZ & LAUMANN, *supra* note 34, at 152-53; *see also* Gordon, *supra* note 115, at 55 (arguing that shared attributes played a role in early stratification of bar).

122. *See generally* HAZARD, THE LAW AND ETHICS, *supra* note 6, at 603-04 (discussing judicial frustration "with the frequency of disqualification motions and their use as instruments of delay"); HAZARD & HODES, *supra* note 26, at §14; Morgan, *supra* note 61 *passim*.

123. CAUSE LAWYERING, *supra* note 2, at 3. Carrie Menkel-Meadow defines cause lawyering as "any activity that seeks to use law-related means or seeks to

Scheingold explain, while cause lawyering is committed to the distributive prong of the profession's service ideal, it is predicated on a logic of identification between lawyer and client or cause:

> What distinguishes the morally activist lawyer is that she "shares and aims to share with her client responsibility for the ends she is promoting in her representation." In so doing she elevates the moral posture of the legal profession beyond a crude instrumentalism in which lawyers sell their services without regard to the ends to which those services are put. Cause lawyers thus reconnect law and morality and make tangible the idea that lawyering is a "public profession," one whose contribution to society goes beyond the aggregation, assembling, and deployment of technical skills. In this way lawyers committed to using their professional work as a vehicle to build the good society help legitimate the legal profession as a whole. . . .
>
> But they also threaten the profession by destabilizing the dominant understanding of lawyering as properly wedded to moral neutrality and technical competence.[124]

As Scheingold later writes, "[c]ause lawyers choose cases, clients, and careers according to what they stand for. The essential question is whether there is something at stake in which the cause lawyer believes and is, thus, willing to fight for."[125]

The intensity of identification, its object (personal or positional), and the degree of overlap between objects vary widely

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change laws or regulations to achieve greater social justice—both for particular individuals (drawing on individualistic 'helping' orientations) and for disadvantaged groups." Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, *in* CAUSE LAWYERING, *supra* note 2, at 37. She continues, "Whether the means and strategies are legally based 'rights' strategies or more broadly based 'needs' strategies, the goals and purposes of the legal actor are to 'do good'—to seek a more just world—to do 'lawyering for the good.'" *Id.* *Cf.* John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, *in* CAUSE LAWYERING, *supra* note 2, at 182.

124. Austin Sarat and Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, *in* CAUSE LAWYERING, *supra* note 2, at 3 (quoting DAVID LUBAN, *infra* note 138, *at* xxii); *see also* Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment*, *in* CAUSE LAWYERING, *supra* note 2, at 318-19 [hereinafter Sarat, *Capital Punishment*].

125. Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, *in* CAUSE LAWYERING, *supra* note 2, at 118 [hereinafter Scheingold, *Left-Activist Lawyering*].

among cause lawyers. On the one hand, many cause lawyers intensely identify with a specific legal issue or principle underlying certain fields of practice. These lawyers have thick *positional* identity in relation to their clients even if there is no identification (or even disdain for their clients) on a personal level. Private lawyers who dedicate their pro bono work to a specific field, criminal defense lawyers who view themselves as "defending" the Fourth, Fifth, and Sixth Amendments to the federal Constitution, death penalty abolitionists, and ACLU lawyers who take cases for Nazis and white supremacists, all arguably fall into this category.[126] The emphasis on identification with cause over client is often palpable. John Kilwein quotes an impact litigator whose clients appear secondary, if not an afterthought, to the lawyer's motivation:

> You work hard, very hard, researching, finding witnesses, experts. You prepare your case, then comes the trial. At that point you are basically living and breathing the case. When it comes together and you win, it's a beautiful thing. You really can't beat it. I love it. [Laughing] And you help your clients too.[127]

Other cause lawyers seek *both* personal and positional affinity with clients, and they define their practice accordingly. At least one of the all-women law firms interviewed by Louise Trubek and Elizabeth Kransberger used feminist principles not simply in the selection of clients, but in the firm's hiring:

> I wouldn't say categorically that there would not be a place for a man in this law firm. There is not a place in this law firm for somebody who is not a feminist, in terms of philosophy and working relationships. Somebody who is not a

126. *See* Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Kilwein, *in* CAUSE LAWYERING, *supra* note 123, at 186-90 (describing weaker identification with clients in these groups); Sarat, *Capital Punishment*, *in* CAUSE LAWYERING, *supra* note 124, at 326 (quoting death penalty abolitionist "I do this work because I'm opposed to the death penalty. I'm an abolitionist. I have responsibilities to individual clients, and those obviously override everything. But to me this is an ideological struggle. I do this work as an extension of my beliefs."); Wilkins, *Race*, *supra* note 6.

127. Kilwein, *in* CAUSE LAWYERING, *supra* note 123, at 189.

> feminist is not going to be comfortable here. It's just going to be problems from day one.[128]

And in its most robust form, cause lawyering orients the role almost entirely around the person of the lawyer and the conditions deemed necessary for her self-realization through law—for vindication of her moral, intellectual, cultural or ideological vision of the world. The "left-activist cause lawyers" in Scheingold's study, for example, "do not simply choose sides; they aspire to politicize legal practice. . . . [T]hey are committed to a transformative politics and to a fusion of their political lives with their legal practices."[129]

The field of cause lawyering is also no longer exclusively occupied by liberals. There is now a strong, financially and institutionally secure element of the bar wholly dedicated to building and expanding doctrine on a range of conservative social, economic, religious, and political fronts, as well as to countering left-liberal advancements.[130] As with traditional public interest lawyers, thick identity is the norm. The main difference between the two groups—and it is both morally and professionally significant—is that left-liberal lawyers tend rather systematically to seek out and to serve subordinated groups

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128. Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, *in* CAUSE LAWYERING, *supra* note 2, at 208. *See also id.* at 208 (describing progressive family law practitioners who "do not take, as a general rule—though it is not written—men who come in for divorce who have recently left the house" because in many cases there is violence and "[i]t is almost always being perpetrated on the female"); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, *in* CAUSE LAWYERING, *supra* note 2, at 278 ("The cause lawyer is likely to have a greater personal commitment and connection to clients, to share those clients' systemic social critiques and commitments to long-term change, to be more willing to sustain rather than to settle struggles over moral principles and rights, and to resort more frequently to extra-legal tactics to achieve certain goals."); Bruce Miller, *Lawyer's Identities, Client Selection, and the Anti-Discrimination Principle*, 20 W. NEW ENGL. L. REV. 93 (1998).

129. Scheingold, *Left Activist Lawyering*, *in* CAUSE LAWYERING, *supra* note 125, at 118-19; Shamir & Chinski, *in* CAUSE LAWYERING, *supra* note 2, at 231. *See also* Kilwein, *in* CAUSE LAWYERING, *supra* note 123, at 190 (quoting a lawyer who vigorously asserted his independence from the Legal Services Corporation: "I am a total independent. I can take a case that will offend the powers that be, and I can reject any case I want, for whatever reason I want.").

130. *See* NAN ARON, LIBERTY AND JUSTICE FOR ALL (1989); Oliver A. Houck, *With Charity For All*, 93 YALE L.J. 1415 (1984) (detailing rise of conservative nonprofit law firms established to promote conservative, libertarian and corporate interests; disputing their right to 501(c)(3)) status); Roger K. Newman, *Suits with Agendas*, NAT'L L.J., August 26, 1996, at A1.

that traditionally lack access to legal services in any meaningful sense of the term. Conservative cause lawyers, by contrast, are largely funded by and seek to represent relatively powerful segments of society and individuals or groups who have not, by any stretch of the imagination, confronted significant barriers in obtaining access to law (whether through the courts, the legislature or the administrative machinery of the state). Thus conservative cause lawyers typically do not, by deviation from the principle of thin identity, meaningfully support the distributive element of the service ideal.

III. ROLE CRITICISM

Once cause lawyering is viewed in concert with the forces impacting lawyers in the private market for legal services, a strong, profession-wide move toward thick professional identity becomes strikingly and troublingly clear. It appears equally clear (though the case remains to be made in full) that the orientation of the role around self-centered motives implicit in thick identification has corrupted the service norm and thereby created role confusion, lawlessness, maldistribution of legal services, and balkanization of the profession into positional specialties. In the dominant discourse on legal ethics as it has emerged since the Watergate scandal, however, professional misconduct and malaise are attributed *to the service norm itself* and to what is said to be its underlying ideology—the notion that lawyers are ethically obliged to serve their clients irrespective of the moral worth or social cost of their clients' objectives. This is a very different account of the profession's current plight.

In this section I argue that much of the professional failure complained of in the dominant discourse is in fact attributable to the encroachment of thick professional identity on the service norm—to dangers we located in the logic of identification—and not to the service norm itself. Moreover, I show that role criticism has responded to the move toward thick professional identity, paradoxically I believe, by advocating reforms that would *increase* identification between lawyer and client. I begin, however, by detailing, on its own terms, both the discursive framework of role criticism and its call for professional redemption through morally activist lawyering.

Ever since Richard Wasserstrom's seminal article exposing the tension between the requirements of the lawyer's role and

the requirements of ordinary morality,[131] role critics have scrupulously detailed the working principles of the "ideology of advocacy"[132] and mounted a sustained attack against it. While accounts of the lawyer's role typically work from three sources—the actual practices of lawyers, laws that explicitly regulate lawyers' conduct, and the ideology of lawyering—for role critics, the lawyering role is defined first and foremost by its underlying ideology. The ideology of advocacy not only determines the content of the ethical codes in their view, it both explains and purports to justify lawyers' conduct in practice. As William Simon writes in his pathbreaking article on the subject:

> The purpose of the Ideology of Advocacy is to rationalize the most salient aspect of the lawyer's peculiar ethical orientation: his explicit refusal to be bound by personal and social norms which he considers binding on others. The most elaborate expressions of the Ideology of Advocacy occur in officially promulgated rules of ethics, in doctrinal writings on legal ethics, the attorney-client evidentiary privilege, and the constitutional right to counsel, and in writings on the legal profession.[133]

Simon captures the lawyer's "peculiar ethical orientation" in two "principles of conduct"[134]—principles that have set the terms of the discourse for role critics. The first is the "principle of neutrality," according to which the lawyer is to "remain detached from his client's ends. The lawyer is expected to represent people who seek his help regardless of his opinion of the justice of their ends. . . . [W]henever he takes a case, he is not

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131. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 105 (1975), *reprinted in* ETHICS AND THE LEGAL PROF'N 117 (Michael Davis & Frederick A. Elliston eds., 1986) [hereinafter Wasserstrom, *Moral Issues*]; *see also* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS 14 [hereinafter SIMON, PRACTICE] ("The contemporary prominence of professional responsibility issues dates from the Watergate scandal. Prior to that time little attention was paid to the subject in the law schools or on bar exams, and there was little doctrine or commentary.").

132. William Simon, *The Ideology of Advocacy*, 1978 WISC. L. REV. 29, 30. ("Conventional morality frowns at the ethics of advocacy . . . . The formal, articulate expression of the lawyer's response is the 'Ideology of Advocacy.'") [hereinafter Simon, *Ideology*].

133. *Id.* at 30-31; *see also* Gordon, *supra* note 115, at 20 n.59 (noting that the "Adversary-Advocacy model of lawyering . . . continues to dominate lawyers' public discourse about ethics").

134. Simon, *Ideology*, *supra* note 132, at 36.

considered responsible for his client's purposes. Even if the lawyer happens to share these purposes, he must maintain his distance."[135]

The second is the "principle of partisanship," which "prescribes that the lawyer work aggressively to advance his client's ends. The lawyer will employ means on behalf of his client which he would not consider proper in a non-professional context even to advance his own ends."[136] Role critics claim that, together, the principles of neutrality and partisanship constitute the "Dominant View"[137] or the "Standard Conception"[138] of the role.

Thus, when referring to role criticism, I defer to their term, "neutral partisanship," for the standard conception of the role. I should emphasize at the outset, however, that I use the term with caution. For I believe that, as role critics use it, neutral partisanship imperfectly reflects the service norm and thin professional identity, and, more importantly, that professional failure is largely the result of *deviation* from the ideals of service and thin identity which neutral partisanship imperfectly reflects. If we are to resuscitate the service norm and thin professional identity, we may have to move beyond the terms in which they have been framed by their greatest critics.

A. Structural Flaws

Criticism of the ideology of advocacy is typically embedded in a rhetorical structure built from specific historical, economic and theoretical claims. Role critics often begin their analysis

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135. *Id.*

136. *Id.*

137. SIMON, PRACTICE, *supra* note 131, at 7 ("The core principle of the Dominant View is this: the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim."); *see also* Simon, *Ideology*, *supra* note 132, at 37.

138. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY xx (1988) [hereinafter LUBAN, LAWYERS] (the "standard conception" consists of "(1) a role obligation ('the principle of partisanship') that identifies professionalism with extreme partisan zeal on behalf of the client and (2) the 'principle of nonaccountability,' which insists that the lawyer bears no moral responsibility for the client's goals or the means used to attain them."). *See also id.* at 393 (Appendix 1 arguing that the standard conception is indeed standard). Luban describes neutrality in more narrow terms than Simon, *see infra* III.A.1; *see also* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978) [hereinafter Schwartz, *Professionalism and Accountability*] (taking Luban's position), but the authors seem to agree that they are describing the same phenomenon. *See* SIMON, PRACTICE, *supra* note 131, at 8 n.8.

by asking whether a good lawyer can be a good person (thus shaping discussion of the dominant view around the moral coherence of self and role) or by gesturing to the bar's ever abundant discourse of "professionalism in crisis" and attributing professional failure (both internal and in the eyes of the public) to the inconsistency between the role demands of neutral partisanship and the demands of justice.[139] Attention then turns to structural flaws in neutral partisanship and to a narrative that links these flaws historically and sociologically to the economic conditions from which the modern profession and its distinctive ideology are said to arise.

1. Role Definition

The structural flaws role critics identify map onto three fundamental questions from which it seems nearly all other significant questions derive: (1) what is the lawyer's role, (2) is the role morally, politically and socially justified, and (3) what is the relationship between the role and the self, the person who occupies the role and brings it to life.[140] For role critics, neutral partisanship defines the role narrowly, training the lawyer's attention and energies on her client's interests. Concerns for the substantive justice of results that a lawyer seeks for her client, and means the lawyer uses to obtain them, are for the most part defined out of the role. Thus, for instance, a

139. *See generally* THE GOOD LAWYER, *supra* note 11. *See also* KRONMAN, *supra* note 7, at 1 ("This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul."); LUBAN, LAWYERS, *supra* note 138, at xvii ("The commonest and bitterest complaint against the legal profession is that lawyers do not give a damn about justice, or, when they do, it is despite their profession rather than because of it."); SIMON, PRACTICE, *supra* note 131, at 1-4 (discussing an "anxious profession" and arguing that "the lawyer's anxiety and disappointment are readily explained. The norms of practice require her to take actions that frustrate the values to which she is supposed to be committed . . . . [L]awyers in their conventional practices contribute knowingly to injustice."). For one of the bar's more recent public meditations on the profession in crisis, see American Bar Association Comm'n on Professionalism, *"In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism* (1986).

140. These may not be the three hardest questions, see Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (discussing the "perjury trilemma" for the criminal defense lawyer), or the three most pervasive, see SIMON, PRACTICE, *supra* note 131, at 139 (1998) (arguing that "most legal problems involve all three" of the following tensions: "Substance versus Procedure, Purpose versus Form, and Broad versus Narrow Framing").

lawyer is free (and, on pain of malpractice liability, obliged) to plead the statute of limitations to defeat a claim for repayment of a debt her client would otherwise owe.[141] Also eliminated from the role on this account are obligations to consider all but the most extreme consequences for third parties. So, in most circumstances, a lawyer is obliged to keep a client's confidences even if it means that innocent people will suffer by the lawyer's silence.[142] Although specific rules constrain the lawyer to act (exclusively) in her client's interest, the flaw identified by role critics lies not merely in client-centered rules but in the principle of neutrality itself.

Because the principle of neutrality shapes the content of the law of lawyering, they argue, a lawyer can usually point to specific ethical provisions to deflect criticism onto the positive requirements of the role. She enjoys, as David Luban puts it, "institutionalized immunity from the requirements of conscience."[143] Most importantly though, *neutrality enables partisanship* by freeing the lawyer to use all available (and legal) means to accomplish all available (nonfrivolous) ends regardless of the moral stakes involved and regardless of the lawyer's particular moral scruples.[144]

For role critics, this is a devious combination. The role not only demands that lawyers zealously pursue their clients' ends, it frees lawyers from moral accountability for their role acts, thus removing the most basic check against excessive zeal,

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141. *See* SIMON, PRACTICE, *supra* note 131, at 29, 31-36 (noting and criticizing lawyer's duty under neutral partisanship to plead statute of limitations against a valid debt); *see also* LUBAN, LAWYERS, *supra* note 138, at 9-10 (criticizing the lawyer's duty to her client in the context of *Zabella v. Packel*, 242 F.2d 452 (7th Cir. 1957), in which "a wealthy man attempt[s] to evade a five thousand dollar debt to an 'old friend, countryman and former employee' by pleading the statute of limitations"); Postema, *Moral Responsibility*, *supra* note 11, at 66.

142. *See, e.g.*, LUBAN, LAWYERS, *supra* note 138, at 177-233 (discussing and criticizing examples of lawyers refusing to disclose confidences despite injury to third parties); *see also* MODEL RULES, *supra* note 26, at R. 1.6 (stating that the only grounds for breaking confidence are client consent, a dispute between lawyer and client regarding the representation, and "to prevent the client from committing a *criminal* act that the lawyer believes is likely to result in imminent death or substantial bodily harm") (emphasis added). The 2002 amendments expand the grounds for breaking confidence to cover any situation in which disclosure is necessary to "prevent *reasonably certain* death or substantial bodily harm." *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002) (emphasis added).

143. LUBAN, LAWYERS, *supra* note 138, at xxi; *see also* Donagan, *supra* note 56, at 135 (restating immunity thesis).

144. Simon notes that, in other roles, partisanship and neutrality are not combined and, as a result, partisanship is not unfettered. *See* Simon, *Ideology*, *supra* note 132, at 37.

blind partisanship, and, in the end, lawlessness. The neutral partisan, role critics insist, is perennially tempted to lawlessness. Trained by role demands to "maximize the likelihood that the client will prevail,"[145] the lawyer becomes "a mere instrument of the client's interests"[146]; and in order to maximize those interests she treats the law in instrumental terms. Once ensconced in this "instrumental mentality,"[147] it is a short step to manipulating the law to fit her client's needs,[148] and then an even shorter, if more precarious, step to utter disregard for the law.[149]

Demonstrating the potential lawlessness of the dominant view is a central move in role critics' argument—for law is said to be the only constraint on lawyers' conduct under neutral partisanship.[150] If instead neutral partisanship breeds disrespect for the law and tempts lawyers to lawlessness, the law is a constraint in name alone and the role a recipe for disaster.

2. Role Justification

If neutral partisanship could at least claim a sound justification, the structural flaw in the definition of the role might not be so devastating. Harm caused to third parties and to the administration of justice by lawyers' nearly exclusive devotion to their clients' interests would be outweighed or at least mitigated by other gains from the role. But for role critics, none of the standard justifications for neutral partisanship survive scrutiny. According to David Luban, whose work is exemplary on this issue, the adversary system cannot excuse client-

145. LUBAN, LAWYERS, *supra* note 138, at 11.

146. *Id.* at 13.

147. *Id.* at 15.

148. On the problem of manipulation, see Wayne D. Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice*, 3 J. LEG. PROF. 107, 109 (1978).

149. LUBAN, LAWYERS, *supra* note 138, at 13, 16; *see also id.* at 48-49; John T. Noonan, Jr., *Distinguished Alumni Lecture—Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227, 230 (1981) ("It is easy to overstep the legal bounds, once you embark on the course of saying, 'I'm acting for my client.' . . . 'Vicarious action tempts a man away from himself.'") (quoting CHARLES P. CURTIS, IT'S YOUR LAW (1954)) [hereinafter Noonan, *Lawyer's Conscience*].

150. As Canon 7 of the ABA Model Code of Professional Responsibility admonishes, "A lawyer should represent a client zealously *within the bounds of the law*." (emphasis added). *See also* MODEL RULES, *supra* note 26, at R. 1.16(a)(1) ("a lawyer shall not represent a client, or where representation has commenced, shall withdraw . . . if the representation will result in violation of the rules of professional conduct or other law.").

centered instrumentalism outside adversary settings (i.e., in negotiations and client counseling), and even in litigation, consequentialist and intrinsic justifications fall short.[151]

With respect to consequentialist justifications, Luban cites evidence that adversarial advocacy can as easily hide the truth as reveal it, can as readily undermine important rights as secure them (indeed, "the interests that the lawyer protects may not be legal rights at all"[152]), and can only function properly on its own terms in those rare instances when all other actors are equal to the demands of their respective roles (i.e., opposing counsel is well prepared, equally zealous, and the judge is at least not sleeping or indifferent to the minutia of the case).[153] Role critics are similarly skeptical of intrinsic justifications. Even if enhancing a client's autonomy is morally good in and of itself, that good must be discounted by harm caused to others.[154] And although human dignity is protected by ensuring the right to a lawyer—someone who can help litigants be heard—a bare right to counsel can only justify reasonably diligent lawyering, not the manipulative instrumentalism presupposed by the dominant view.[155] Finally, even if adversarialism is engrained in our culture, part of our social patterns and time-honored traditions, this in no way implies consent to the injuries caused by neutral partisanship, and, critics add, overemphasizing tradition can suppress the malleability of social roles.[156]

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151. *See generally* LUBAN, LAWYERS, *supra* note 138, at ch. 5; *see also* Murray L. Schwartz, *The Zeal of the Civil Advocate, in* THE GOOD LAWYER, *supra* note 11, at 150 (arguing that the dominant view is not justified for civil advocates) [hereinafter Schwartz, *Civil Advocate*]; Schwartz, *Professionalism and Accountability, supra* note 138, at 678 (arguing that the dominant view is not justified outside the adversary system).

152. Eshete, *in* THE GOOD LAWYER, *supra* note 11, at 270, 271.

153. *See* LUBAN, LAWYERS, *supra* note 138, at 68-81. Justice Louis Brandeis appears to have been more optimistic about the adversary process. *See* Louis D. Brandeis, *The Opportunity in Law, in* BUSINESS—A PROFESSION (1914) ("Since the lawyers on the two sides are usually reasonably well matched, the judge or jury may ordinarily be trusted to make a decision as justice demands.").

154. *See* LUBAN, LAWYERS, *supra* note 138, at 81-85; David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. BAR FOUND. RES. J. 637, 639 [hereinafter Luban, *Lysistratian Prerogative*]; Wasserstrom, *Moral Issues, supra* note 131, at 13-14.

155. *See* LUBAN, LAWYERS, *supra* note 138, at 85-87.

156. *Id.* at 87-92; *see also* Richard Wasserstrom, *Roles and Morality, in* THE GOOD LAWYER, *supra* note 11, at 36 ("Just as we can ask whether it is right that a certain role exist at all, so we can also ask whether it is right that the role continue to exist in its present form.").

At best, Luban concludes, the adversary system is weakly justified in that "it seems to do as good a job as any,"[157] and, of course, it's what we have. But this "pragmatic justification . . . does not really endorse an institution—it only advocates enduring it,"[158] and only so long as preferable alternatives remain infeasible. If Luban's assessment is correct, neutral partisanship is weakly justified too, at least to the extent that its legitimacy turns on the moral strength of the adversary system.[159] Any role act on this account can only be contingently justified by the role, and an act will always lack justification when the harm it causes outweighs the fragile foundations of the role.[160]

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157. LUBAN, LAYWERS, *supra* note 138, at 92.

158. *Id.* at 93.

159. And he says as much. *See* LUBAN, LAWYERS, *supra* note 138, at 104 ("[A] social institution, such as adversary advocacy, that can receive only a pragmatic justification is not capable of providing institutional excuses for acts that would otherwise be immoral if they were performed by someone who was not an incumbent of the institution.").

160. *See* LUBAN, LAWYERS, *supra* note 138, at 149 ("[T]he pragmatic justification is about as weak as it could be and still be a justification . . . [T]he adversary system doesn't excuse more than the most minor deviations from common morality. In the civil suit paradigm, there *is* no adversary system excuse to speak of."). Luban finds neutral partisanship justified only in what he calls the "criminal defense paradigm." Only there does the role survive scrutiny under his "fourfold root of sufficient reasoning," which links the morality of individual role acts to the justice of the institution in which the role is played. *Id.* at 60, 129. *See also* Donagan, *supra* note 56, at 134 (same); Postema, *Moral Responsibility, supra* note 11, at 82 (describing "recourse role" which "requires the agent not only to act according to what he perceives to be the explicit duties of the role in a narrow sense, but also to carry out those duties in keeping with the functional objectives of the role"); Schwartz, *Professionalism and Accountability, supra* note 138, at 674 ("the lawyer's nonaccountability might be illusory if it depends upon the morality of the adversary system and if that system is immoral"); Wasserstrom, *in* THE GOOD LAWYER, *supra* note 156, at 36 (same); Wasserstrom, *Moral Issues*, *supra* note 131, at 122 (same).

For other role critics, it is important to note, the role is categorically flawed such that role acts are not even contingently justified by the dominant view. *See, e.g.,* Erwin Chemerinsky, *Protecting Lawyers From Their Profession: Redefining the Lawyer's Role*, 5 J. LEG. PROF. 31, 34 (1980) (arguing that "[t]he consequences of arguing against one's beliefs are so substantial that a lawyer has every obligation to avoid doing so. A lawyer should not argue positions which are at odds with views important to him or herself."); Simon, *Ideology*, *supra* note 132, at 130-44 (defending a concept of "non-professional advocacy"); Wasserstrom, *Moral Issues*, *supra* note 131, at 12 (suggesting deprofessionalization).

3. Personal Integrity

Matters do not improve when role critics turn to the role's impact on the self. Neutrality demands that the lawyer serve her client irrespective of her own moral scruples about the client's goals; and partisanship demands that the lawyer use means which she would forbear in pursuit of her own objectives. As we saw at the outset of the typology of identification in Section I, role critics believe that under these pressures, the role tends to consume the person,[161] the person grows painfully alienated from the role she plays,[162] or the person becomes schizophrenic—completely divorced from her role identity.[163] In each of these responses to tension between role demands and the demands of ordinary morality, the person either disappears into the role or suffers a debilitating fragmentation of self. As Gerald Postema has argued: "as the moral distance between private and professional moralities increases, the temptation to adopt one or the other extreme of identification also increases; one either increasingly identifies with the role or seeks resolutely to detach oneself from it."[164]

Both extremes are costly for role critics. Strong identification with the role impoverishes the lawyer's moral experience by confining it to the boundaries of the role.165 Bifurcating self and role, on the other hand, is an unhappy and inherently unstable solution whenever there is significant tension between role demands and ordinary morality.166 Thus, Postema suggests, "it is not unlikely that the explicit and conscious

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161. *See, e.g.*, Brazil, *supra* note 148, at 116; Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEG. ETHICS 23, 36 (1990); James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 20 CAP. U. L. REV. 735, 749 (1978); Eshete, *in* THE GOOD LAWYER, *supra* note 11, at 274; Edwin H. Greenbaum, *Attorneys' Problems in Making Ethical Decisions*, 52 IND. L.J. 627, 630 (1977); Noonan, *Lawyer's Conscience*, *supra* note 149, at 236; Wasserstrom, *Moral Issues*, *supra* note 131, at 124.

162. *See* SIMON, PRACTICE, *supra* note 131, at 111.

163. *See* WOLFRAM, *supra* note 58, at 584; Postema, *Professional Responsibility, in* THE GOOD LAWYER, *supra* note 11, at 292 (describing "schizophrenic strategy" which "simply dissociates the private personality from the pubic or professional personality, regarding them as separate, independent selves").

164. Postema, *Moral Responsibility, supra* note 11, at 75.

165. *Id.* at 78.

166. *See* Brazil, *supra* note 148, at 115 (describing alienation, "discomfort, dissatisfaction, and unhappiness" from engaging in manipulative role conduct).

adoption of [the bifurcation] strategy involves a substantial element of self-deception."167 And under either strategy,

> one's practical judgment and sense of responsibility are cut off from their sources in ordinary moral experience. . . . [T]he artificial reason of professional morality, which rests on claims of specialized knowledge and specialized analytic technique, and which is removed from the rich resources of moral sentiment and shared moral experience in the community, tempts the professional to distort even the most serious of moral questions.[168]

This distortion goes not just to the lawyer's conscience, it can affect her competence as well. To the degree that law embodies moral principles, "the lawyer who must detach professional judgment from his own moral judgment is deprived of the resources from which arguments regarding his client's legal rights and duties can be fashioned."[169] The lawyer's capacity for practical judgment in the role may also be diminished by "blocking appeal to a more comprehensive point of view from which to weigh the validity of role morality."[170]

In this sense, the lawyer may lose sight of where the role's discrete justifications begin and end (again, the danger of lawlessness surfaces). So too, the lawyer may lose sight of the "client's moral personality," treat her in impersonal, instrumental terms and thereby misunderstand her true ends or undermine the potential depth of the lawyer-client relationship.[171] Finally, and most hauntingly, Postema warns that "when professional action is estranged from ordinary moral experience, the lawyer's sensitivity to the moral costs in both ordinary and extraordinary situations tends to atrophy."[172] Lawyers without sensitivity to moral cost will lack the "habit of reluctance" that, in the face of important moral dilemmas, sparks at least hesi-

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167. Postema, *Moral Responsibility*, *supra* note 11, at 79; *see also* Eshete, *in* THE GOOD LAWYER, *supra* note 11, at 276.

168. Postema, *Moral Responsibility, supra* note 11, at 75-76.

169. *Id.* at 79; *see also* KRONMAN, *supra* note 7, at 140-43.

170. Postema, *Moral Responsibility*, *supra* note 11, at 79; *see also id.* at 73-74 ("[F]ar from encouraging the development and preservation of a mature sense of responsibility, the standard conception tends seriously to undermine it.").

171. *Id.* at 170; *see also* KRONMAN, *supra* note 7, at 127-34; Bell, *supra* note 126, at 512; Greenbaum, *supra* note 161, at 635; Noonan, *The Lawyer Who Overidentifies*, *supra* note 7, at 827, 829.

172. Postema, *Moral Responsibility, supra* note 11, at 79.

tation and reflection, if not outright refusal to participate in what reflection confirms to be an unconscionable act.[173]

Together, these flaws in the definition, justification and habitability of the standard conception of the lawyer's role render it "suspect from the start" for role critics.[174]

B. Redemption Through Role Redefinition

Although role critics' proposals vary in their details, their common normative goal is to replace the principle of neutrality with a principle of accountability akin to a justice-centered vision of the role said to prevail in the early nineteenth century. Thus in arguing for what he calls the "Lysistratian prerogative" (the lawyer's autonomy "to withhold services from those of whose projects he disapproves" on moral grounds[175]), Luban invokes Abraham Lincoln's decision to refuse a case of doubtful justice.[176] Lincoln's decision epitomizes, for Luban, the role of the lawyer operating according to a principle of accountability. And lawyers responsible for the ends their clients pursue, Luban continues, will (quite properly) become "moral activists":

> [L]awyers would necessarily find themselves declining or withdrawing from many more cases than they do now, namely, the unjust ones. That thought is not wrong, but it is also not enough. Rather, it seems to me that lawyering with accountability would respond to a very different vision of the profession from the one contemplated by the standard conception. I shall call this vision "moral activism": a vision of law practice in which the lawyer who disagrees with the morality or justice of a client's ends does not simply terminate the relationship, but tries to influence the client for the better.[177]

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173. *Id.* at 80 (quoting Bernard Williams, *Politics and Moral Character, in* PRIVATE AND PUBLIC MORALITY 64 (S. Hampshire ed., Cambridge University Press 1978)).

174. Eshete, *in* THE GOOD LAWYER, *supra* note 11, at 271.

175. Luban, *Lysistratian Prerogative*, *supra* note 154, at 642.

176. *Id.* at 637.

177. LUBAN, LAWYERS, *supra* note 138, at 160 (emphasis added). *See also id.* at 154 ("Anything except the most trivial peccadillo that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well. The lawyer's role carries no special privileges and immunities."); *id.* at 169 ("I do not see why a lawyer's decision not to assist a client in a scheme the lawyer finds nefarious is any different from . . . other instances of social control through private noncooperation."); *id.* at 174 ("[N]othing permits a lawyer to discard her

Similarly, Simon invokes David Hoffman's 1817 *Resolutions in Regard to Professional Deportment* and George Sharswood's 1854 *Essay on Professional Ethics* to support his argument that "[l]awyers should take those actions that, considering the circumstances of the particular case, seem likely to promote justice."[178] Robert Gordon also explicitly locates his ideal of independence for lawyers—"the notion that . . . [t]he loyalty purchased by the client is *limited*, because a part of the lawyer's professional persona must be set aside for dedication to public purposes"[179]—in "the traditional 'republican' ideal of the lawyer's public role."[180]

Reviving lawyers' public accountability, role critics contend, would remedy the structural flaws in the justification and habitability of the role under neutral partisanship by giving lawyers autonomy to trump client interests when those interests conflict with common morality or the purposes underlying

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discretion or relieves her of the necessity of asking whether a client's project is worthy of a decent person's service."); *id.* at 10 (invoking David Hoffman).

178. SIMON, PRACTICE, *supra* note 131, at 138; *see also id.* at 63 (discussing David Hoffman and George Sharswood's views). For Simon, justice is not necessarily synonymous with ordinary morality:

> Justice here connotes the basic values of the legal system and subsumes many layers of more concrete norms. Decisions about justice are not assertions of personal preferences, nor are they applications of ordinary morality. They are judgments grounded in the methods and sources of authority of the professional culture. I use 'justice' interchangeably with 'legal merit.' The latter has the advantage of reminding us that we are concerned with the materials of conventional legal analysis; the former has the advantage of reminding us these materials include many vaguely specified aspirational norms.

Id. at 138. Indeed, this is one of the key divisions in role critics' normative claims—while most role critics believe the role should be defined around accountability to public morality, Simon contends that the role should be defined around accountability to law conceived in terms of its underlying purposes and commitments to justice and fairness. *See also* Kenny Hegland, *Quibbles*, 67 TEX. L. REV. 1491, 1494-95 (1989) (invoking David Hoffman and agreeing with William Simon's purposivism at least with respect to means a lawyer employs for her clients).

179. Gordon, *supra* note 115, at 13 (emphasis original).

180. *Id.* at 14. *See also*, KRONMAN, *supra* note 7, at 123-47 ("Republican legal ethics refers to legal ethics that came from the two generations of American lawyers who fashioned a common-law jurisprudence for America from colonial legal practice and the communitarian idealism of our revolution . . . . An example of principle in republican legal ethics . . . is the republican lawyer's reluctance to plead, against civil actions, defenses that do not address the merits of the plaintiff's claim—for example, statutes of limitation, the claim of infancy, or the Statute of Frauds."); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 701 n.18 (1988) (citing David Hoffman and Judge George Sharswood).

applicable law.[181] By definition, only role acts consistent with common morality or public justice (law purposively conceived) would be authorized by the role, and tension between role demands, on the one hand, and the demands of morality and justice, on the other, would be mitigated if not eliminated. Perhaps most importantly though, accountability, and the autonomy it entails, holds the promise of restoring respect for the moral authority of law (by replacing the lawyer's nefarious instrumentalism with purposivism) and rescuing the profession from the obsessive client focus demanded by the ideology of advocacy.[182]

C. Relocating Professional Failure

Role critics raise powerful charges against neutral partisanship and they advocate a compelling remedy. However, having examined the typology of identification, the relationship between the service norm and thin professional identity, and the array of forces pushing lawyers toward thick identity, a number of flaws in the framework of role criticism become evident. First, as applied in role criticism, neutral partisanship is an incomplete account of professional rules and ideals. As Ted Schneyer has argued, "in criticizing the hired gun ethic these scholars have ironically helped to *construct* it, creating something of a straw man."[183] Second, even if some version of neutral partisanship is accepted as an approximation of the service norm and thin identity, I believe professional failure is more accurately explained as a form of deviation from the role, so conceived, rather than slavish adherence to it. Finally, insofar

181. In addition to the authors discussed above, see RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 21 at 66-80; Alan H. Goldman, *Legal Reasoning as a Model for Moral Reasoning*, 8 LAW & PHIL. 139, 138-39 (1989); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, EMORY L.J., 909, 969 (1980); Postema, *Moral Responsibility, supra* note 11, at 81-83; Deborah Rhode, *Ethical Perspectives in Legal Practice*, 37 STAN. L. REV. 589, 643-47 (1985); Schwartz, *Civil Advocate*, *in* THE GOOD LAWYER, *supra* note 151, at 162-63; Wasserstrom, *Moral Issues*, *supra* note 131, at 122.

182. On the former point (restoring respect for the moral authority of law) Simon's purposivism converges with Luban's moral activism—both seek to resurrect the normative dimension of law and its claim on lawyers.

183. Ted Schneyer, *Some Sympathy for the Hired Gun*, 40 J. LEGAL EDUC. 11, 23 (1990) (emphasis original) [hereinafter Schneyer, *Sympathy*]; *see also* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WISC. L. REV. 1529, 1569 (arguing that "legal ethics has no paradigm, only some fragmentary conceptions of the lawyer's role vying inconclusively for dominance") [hereinafter Schneyer, *Standard Misconception*].

as it would require lawyers to select and serve clients according to their moral assessment of the law, the underlying facts, and their clients' objectives, role criticism is simply another force pushing toward thick professional identity. Each of these claims is explored below.

1. Questioning the Ideology of Advocacy

As we have seen, role criticism begins from the proposition that neutral partisanship undergirds the law of lawyering and deeply influences lawyers' conduct. Without direct evidence of how lawyers view their role, we cannot be sure whether lawyers are animated by the ideology of neutral partisanship or by some other closely related set of ideas. Nevertheless, there are clear tensions between the picture role critics paint and the service norm as I have elaborated it. Most prominently, the distributive prong of the service norm is largely absent in role critics' concept of neutral partisanship. Partisanship expresses the obligation to focus on and serve the needs of existing clients, but it says nothing about the obligation to hold oneself out to serve others. The principle of non-identification inherent in the concept of neutrality might address this concern insofar as a lawyer with thin identity is open to take all comers she can competently serve, but role critics often suppress the principle of non-identification and proceed as though neutrality entails only non-accountability.[184]

On this construction of the role, there is no obligation to serve needy clients. More importantly, intense identification with a client's ends and interests (to the detriment of others, the administration of justice, and perhaps even the client) appears as a natural and inevitable cost of partisanship and the immunity nonaccountability provides, rather than as a deviation from the neutrality principle resulting from the lawyer's self-interest.[185] *Self*-centered lawyering operates here under

184. The trend dates at least as far back as Murray L. Schwartz's 1978 article. *See* Schwartz, *Professionalism and Accountability*, *supra* note 138, at 671, 673 (1978); *see also* LUBAN, LAWYERS, *supra* note 138, at 7, 11, 56 (though compare *id.* at 16); David Luban, *The Adversary System Excuse, in* THE GOOD LAWYER, *supra* note 11, at 83-84; Shaffer, *supra* note 180, at 697-98.

185. A weaker form of suppression is apparent in other role critics who recognize that nonidentification is a part of neutrality but diminish its significance in the definition of the role. On this construction, non-identification requires only that a lawyer remain indifferent to the moral worth of her clients' ends so that she can focus on the technical details necessary to achieve those ends. Non-

the guise of client-centered lawyering, and the service norm is then blamed for the nefarious moral and social consequences.

Neutral partisanship also maps only incompletely onto any fair construction of the Model Rules. For example, although role critics often point to the duty of confidentiality as it is expressed in Model Rule 1.6 as proof positive of the obsessive emphasis on partisanship in the Rules, they ignore or brush aside the fact that a significant number of states have enacted versions of Rule 1.6 with much broader exceptions.[186] Characterization of the scope of the confidentiality rule is central not just because it enforces a client-centered conception of the role by itself, but because so many other provisions establishing duties to the court and third parties are qualified by the duty of confidentiality. Other Rules bolstering the duty to maintain professional independence are also downplayed by role critics.[187] This is not to say that no support is to be found for neutral partisanship in the Rules, but only that the Rules do not support the strong form of the ideology of advocacy presented by role critics.

2. The Dangers of Thick Identity

But even if we accept role critics' account of the role, it is not at all clear that it adequately explains the professional misconduct and malaise of which they complain. Role critics

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identification is thus responsible for the lawyer as amoral technician—the lawyer willing to do anything technically feasible for her client. *See* Gordon, *supra* note 115, at 57; Postema, *Moral Responsibility, supra* note 11, at 73, 80-81; Wasserstrom, *Moral Issues*, *supra* note 131, at 13. But, as we have seen, thin identity has a broader meaning in the rules as well as in practice. It demands not simply that the lawyer set aside her moral scruples and uncritically pursue her client's interests, but that she maintain sufficient distance from her own motives *and her client's desires* in order to provide her client something she needs but may not always like—independent judgment. *See supra* Section I.C.

186. *See* RHODE & LUBAN, *supra* note 25, at 248-49 (discussing the original version of Rule 1.6 proposed during drafting, which permits a lawyer to break confidence where the client's crime or fraud would result in "substantial injury to the financial interests or property of another," or "to rectify the consequences of a client's criminal or fraudulent act in furtherance of which the lawyer's services had been used"; and emphasizing that "[a] significant number of jurisdictions have enacted versions of Rule 1.6 that are much closer to the unamended version") (citing MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(2) (proposed), Revised Final Draft (June 30, 1982); 2 GEOFFREY HAZARD & WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROF'L CONDUCT app. 1 (1st ed. Supp. 1989)).

187. *See supra* Section I.C (discussing the duty to withdraw, conflict rules and the mandate of professional independence in Rule 2.1).

insist that the role is too client-centered, that neutral partisanship privileges the interests of clients over the interests of justice and the moral rights of third parties. But the typology of identification allows us to be more precise about what it means to say that the role is too client-centered. It also permits us to draw important distinctions between different kinds of ostensibly client-centered behavior in practice. Indeed, an examination of practice indicates that, in many fields, lawyers are not particularly dedicated to their clients in the way either the service norm or role critics imagine.[188] Instead, lawyers appear to have succumbed to the dangers of identification we surveyed above. They are thus client-centered only in a nominal or subjective sense, and their conduct may more accurately be characterized as fundamentally self-centered—the result of seeking thick identity in the role.

Role critics often complain that neutral partisanship produces overzealous lawyers who disregard the moral and legal rights of others—lawyers who are so client-centered, so zealous, that they don't even consult their clients. But their conduct, it turns out, is only superficially client-centered. The familiar chestnut in legal ethics instruction, *Spaulding v. Zimmerman*,[189] illustrates the point. Spaulding, a minor, is severely injured in an accident while riding as a passenger in a car driven by the son of his employer, Zimmerman. None of Spaulding's three doctors discover that he suffered an aortic aneurysm which could immediately cause his death. The defendants' doctor does discover the condition and alerts defense counsel. However, the lawyer decides not to disclose the information to Spaulding and settles the case on the eve of trial for

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188. As Stephen Ellmann has put it:

> Much, if not most of lawyers' behavior is not adequately explained in terms of these two moral propositions [neutrality and partisanship] alone. Many lawyers are not wholeheartedly partisan . . . . A great many lawyers, meanwhile, appear by no means fully committed to the idea that they are morally unaccountable for their work.

Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 124 (1990) (book review of LUBAN, LAWYERS, *supra* note 138). *See also* Schneyer, *Sympathy, supra* note 183, at 23 ("Many (and in my view often the most powerful) of the pressures and temptations that lawyers encounter tend to encourage underrepresentation and indifferent or even disloyal representation, not overzealousness. Against these forces norms of neutrality and partisanship can play a crucial offsetting role.") (citation omitted).

189. 116 N.W.2d 704 (Minn. 1962); *See* Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions:* Spaulding v. Zimmerman *Revisited*, 83 MINN. L. REV. 63 (1998).

$6500. Two years later the aneurysm is revealed when Spaulding gets a physical; he has surgery immediately and petitions to overturn the court-approved settlement. The court agrees, but only after some rather tortured reasoning which concedes that defense counsel had no affirmative obligation, no ethical duty, to disclose the information about Spaulding's perilous medical condition and that, at least prior to seeking court approval, defense counsel acted in good faith.

In the discourse of role criticism, the case is a classic instance of neutral partisanship constraining a lawyer to vindicate his client's interests irrespective of the moral costs for third parties and the substantive merits of the case.[190] However immoral and remorseless it seems, the conduct of Zimmerman's lawyer is nevertheless insulated from criticism by the role—by his duties of confidentiality and zealous representation. As Cramton and Knowles write:

> Under [the] standard conception of total commitment to client within the bounds of the law, the strategic decision not to disclose Spaulding's life-threatening condition to him merely involves an adversary taking advantage of the incompetence or inexperience of Spaulding's lawyer.[191]

But it is not at all obvious that defense counsel acted in accordance with any fair construction of the service norm and thin identity. He did not even tell Zimmerman about the doctor's report showing the aneurysm, let alone ask him whether the information should be disclosed to his employee.[192] Competent representation militates strongly in favor of at least discussing disclosure because Zimmerman may have wanted to reveal the doctor's report (on grounds it would be unconscionable to accept a settlement predicated on deception), and because of the risk

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190. Cramton and Knowles, *supra* note 189, at 72 (noting that in teaching the case, "[p]rincipal emphasis is usually placed on the tension between the obligations of the lawyer's adversary role and the moral obligations of an actor to protect third persons from harm: is a lawyer acting for a client required to maintain a client's confidential information even if doing so will risk the sacrifice of an innocent human life?").

191. *Id.* at 78.

192. Model Rule 1.6 permits disclosure of confidential information whenever the client gives consent and Model Rule 1.4 requires the lawyer to communicate with the client so that she can make appropriate decisions about the objectives of the representation. "Surviving members of the Zimmerman and Ledermann families state that they had no knowledge that David Spaulding was suffering an additional undisclosed injury." Cramton & Knowles, *supra* note 189, at 91-92.

that plaintiff would ask for the report or discover the condition.[193] If plaintiff had asked for a copy of the report prior to settlement, Zimmerman's credibility would have been seriously compromised by his lawyer and his bargaining position in settlement would have been destroyed. If discovered after settlement (as in fact occurred), the risk, however remote, of substantial additional liability—exaggerated by the length of time between defense counsel's discovery and plaintiff's discovery—is surely not something the lawyer could blithely assume Zimmerman was willing to take.

The most probable explanation for defense counsel's failure to disclose the information, even to his own client, is role confusion bred by self-interest. He was being paid not by Zimmerman, but by Zimmerman's insurance company, and he likely hoped to minimize the company's exposure in order to ensure future referrals.[194] This, of course, presents a standard conflict of interest which Zimmerman's lawyer resolved not in favor of his client (as the service norm and the law of lawyering require[195]) but in favor of his own pecuniary interests.[196] *Genuine* commitment to the client under the service norm (indeed, even *genuine* neutral partisanship) would have demanded morally

193. MODEL RULES, *supra* note 26, at R. 1.2 (a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."); *id.* at R. 1.2 cmt. 1 (with regard to the means used, "clients normally defer to the . . . [lawyer] particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected."). The client may have worried more instrumentally about the impact on his business or community reputation. *See id.* at R. 2.1 ("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."); *id.* at R. 2.1 cmt. 2 ("Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate.").

194. *See* Cramton & Knowles, *supra* note 189, at 92 (stating that "insurance defense counsel in the 1950s tended to view the liability insurer as the real party in interest in all accident cases that were likely to settle within the policy limits"); *id.* at 93 (noting that "insurance defense counsel earn their livelihood by getting repeat business from insurers").

195. MODEL RULES, *supra* note 26, at R.1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests"); *see also id.*, *supra* note 26, R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").

196. *See* Cramton & Knowles, *supra* note 189, at 93.

conscious lawyering—far more than Zimmerman's lawyer gave.[197]

Other instances of "paternalism" by lawyers can equally be described as self-centered behavior posing as client-centric role conduct. The interests lawyers typically impute to their clients in the name of client-centered zeal are tellingly consistent with lawyers' pecuniary interests and administrative needs (i.e., not having to spend too much time counseling a client or helping a client seek atypical ends). As Warren Lehman has found, "[t]he values or ends the lawyer chooses are likely to be . . . the readily assumed, the safe, the self-evident: more money, freedom from incarceration or procedural delay," despite the fact that "for many clients, such goods are neither what they want nor what they need."[198]

Even in forms of practice closely allied to role critics' normative vision, there are well documented concerns about whether the interests of clients are genuinely respected. Some lawyers, for instance, reject the nonaccountability prong of the neutrality principle in the way role critics advocate. They hold themselves personally responsible for their role acts, and, typically, this mitigates their zeal—the ends they are willing to pursue and the means they are willing to use. Thus, as Schneyer points out, at least some of the small town lawyers in Donald Landon's study "were . . . reluctant to pursue their clients' initial aims without considering the appropriateness of

197. The moral terror of the case can be sharpened by assuming that, even if asked, Zimmerman would have refused consent to disclose. But it is important to emphasize that this is a leap on the facts as we have them. *See id.* at 88. It nevertheless squarely presents the core of the role critics' charge—that the role requires unconscionable acts. My own view is simply that if the lawyer has properly counseled the client on the full range of consequences and the client persists, it is at that point unmistakably the client's decision and act. The lawyer who has raised the moral concerns and potential adverse consequences with the client is, however, a far cry from the lawyer who simply assumes she knows the client will want to preserve the confidence and then later blames inherently immoral role obligations for her sense of alienation or invokes role obligations to deflect criticism. The latter is a morally hazardous actor, a danger to her client and to society, not a neutral partisan.

198. Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1087 (1979). *See also* Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967); Marvin W. Mindes & Alan C. Cook, *Trickster, Hero and Helper: A Report on Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177 (discussing tendency of lawyers erroneously to conclude that their clients are motivated by self-interest); Simon, *Ideology*, *supra* note 132, at 54 (imputed ends are primarily "maximization of freedom of movement and the accumulation of wealth").

those aims."[199] Recalling Brandeis' vision, Schneyer remarks that "they often approached their cases as mediators."[200] Schneyer also notes that in Robert Nelson's study of the Chicago bar, more lawyers cited moral sensibilities as a reason for *rejecting* offered work than said they had *never* rejected work on grounds of conflict with their moral scruples.[201]

But the zeal of these lawyers may be so mitigated as to fall below the threshold duties of loyalty and competence. The lawyer may think and act more as a judge than as an agent for her client. Judge Noonan gives an example from Brandeis' practice in which his efforts to act as "counsel for the situation"—"looking after the interests of everyone"[202]—rather severely undermined the interests of his putative client.[203] Brandeis took on the role of trustee for a family owned business in debt and at least created the impression in the process that he was representing the family.[204] Instead of protecting their interests, however, he vigorously pursued the interests of the business's creditors (one of whom he had unequivocally taken on as a client) by making an assignment of the business property to his law partner and instituting involuntary bankruptcy proceedings.[205]

Although Judge Noonan presents the case as an example of "underidentification" with one's client,[206] Brandeis and his firm may well have overidentified with their business creditor

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199. Schneyer, *Standard Misconception*, *supra* note 183, at 1546 (citing D. Landon, *Clients, Colleagues and Community: The Shaping of Zealous Advocacy in Country Law Practice* (n.d.) (unpublished manuscript)).

200. *Id.* at 1547 ("Landon's advocates were unwilling to use sharp tactics to gain an advantage over a lawyer they knew and regularly dealt with . . . [because] 'fairness is more important than winning.'").

201. *Id.* at 1549-50 (citing Robert L. Nelson, *Practice and Privilege: The Social Organization of Large Law Firms*, 314-19 (June 1983) (unpublished Ph.D. dissertation). The size of the sample (222 lawyers total; 18 lawyers rejecting the nonaccountability principle; 14 lawyers embracing it) obviously renders generalization across the profession impossible, but the point here is simply that empirical evidence reveals deviance from neutrality.

202. Noonan, *The Lawyer Who Overidentifies*, *supra* note 7, at 832; *see also* John D. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

203. Noonan, *The Lawyer Who Overidentifies*, *supra* note 7, at 829-33.

204. *Id.* at 831 (reporting that both a family member present at the initial meeting in Brandeis' office, and another witness, "inferred that Brandeis had assumed the position of [the family's] counsel"). The conflict of interest was raised in Brandeis' confirmation hearings to the United States Supreme Court.

205. *Id.* at 832; *see id.* at 833.

206. *See id.* at 833 (arguing that "[u]nderidentification with a client is as bad as overidentification").

client, and I view Brandeis' concept of personal accountability in the role—his personal desire to solve a problem rather than just represent a client—as an important element in his failure to serve his putative client. As Noonan recognizes, "[a]t the heart of the situation is the lawyer's desire to abstract himself from the needs and pressures of a particular individual in order to go on and straighten out a mess."[207] This approach to the role privileges the lawyer's need for self-realization in the role (as an arbitrator or judge) over the client's needs. As such it is a species of thick identification leading to role confusion.

Another area of practice close to role critics' normative vision, in which both the cause and self-interest can take precedence over the needs and desires of individual clients, is cause lawyering. Indeed, as Gerald Lopez argues, the "regnant idea of the lawyer for the subordinated" is remarkably self-centered, remarkably insensitive to the complex needs of subordinated peoples and their relation to the often chimerical promise of social change through law.[208] Cause lawyers may also be espe-

207. *Id.* at 833. There are other examples of misconduct by lawyers who fall into a judge's role. *See* Davis v. State Bar, 655 P.2d 1276, 1279 (Cal. 1983) (lawyer's doubts about genuineness of client's symptoms insufficient grounds to neglect case without client consent); Wilder v. Third Distr. Comm., 247 S.E.2d 355, 358 (Va. 1978) (decision whether to obtain judgment against defendant lawyer believes to be judgment-proof is for client); In re Geurts, 620 P.2d 1373, 1376 n.6 (Or. 1980) (neglect of case not excused by lawyer's uncommunicated view that case lacked merit).

208. GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 23 (1992). *See also* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE (1974); WOLFRAM, *supra* note 58, at 155 (noting the view that a lawyer "should control all the important aspects of a representation" is particularly prevalent "in cases in which the client will not pay the fee . . . generally cases in which the economic and social position of the client does not permit much aggressiveness on the client's part"); Menkel-Meadow, *in* CAUSE LAWYERING, *supra* note 123, at 49 (describing "natural cooptation"); William Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in Post-Modern, Post-Reagan Era*, 48 MIAMI L. REV. 1099 (1994). In a famous article, Derrick Bell describes a Boston desegregation case run for the plaintiff class by the NAACP, in which:

> black representatives were ambivalent about the busing plans. They did not wish to back away after years of effort to desegregate Boston's schools, but they wished to place greater emphasis on upgrading the schools' educational quality, to maintain existing assignments at schools which were already integrated, and to minimize busing to the poorest and most violent white districts.

Bell, *supra* note 126, at 482, 515-16. Despite these concerns the NAACP lawyers maintained unilateral commitment to implementing *Brown's* desegregation mandate through busing, arguing that this was all a court would grant, all the right in *Brown* entailed, when in fact courts were willing to grant more. Luban, by contrast, *defends* paternalism in public interest representation:

cially prone to excessive zeal and feel justified in relying on sharp tactics in order to overcome resource disparities with their opponents and to compensate for the persistent failure of substantive law to recognize their clients' positions.

In still other areas of professional failure, the problem with thick identity is not so much paternalism as a collusion of sorts. The client is aware of and supports the lawyer's conduct (because it seems to serve her interests), but the lawyer is arguably driven at least as much, if not more, by self-interest. The result is lawlessness. Judge Noonan gives the example of a partner in the Cravath, Swaine firm, Hoyt Augustus Moore, whose "single-minded devotion to his work" was so strong that he was willing to engage in a criminal conspiracy with a corrupt federal judge to help his primary client (Bethlehem Steel) obtain control of a wire company in receivership.[209] Noonan bills this as a paradigmatic case of "overidentification" with a client and excessive zeal:

> [A]fter Moore's mind got to work on the problem . . . [he] knew that a deal with Judge Johnson could do much more for Bethlehem than merely securing its legal rights; a deal could let Bethlehem steal the wire rope company. . . .

> [P]ublic interest lawyers bent on law reform recruit clients as plaintiffs . . . sometimes manipulate their clients and put the interests of the cause above those of the clients . . . they. . . file class actions, even though a large part of the class invoked, sometimes a majority, opposes them; and . . . there will be times when 'their handling of test cases serves, not the enlightened self-interest of the poor, but the political theories of the lawyers themselves.' *What I do not concede is that there is anything wrong with this.*

LUBAN, LAWYERS, *supra* note 138, at 317-40 (emphasis added); *see also* McCann & Silverstein, *in* CAUSE LAWYERING, *supra* note 128, at 261 (arguing that the "familiar generalizations about cause lawyers are overly broad and inadequately substantiated. . . . [W]e have found that lawyers can, under certain circumstances, contribute important strategic resources and skills to the advancement of movement reform goals").

209. *See* Noonan, *The Lawyer Who Overidentifies*, *supra* note 7, at 834-41. By bribing the judge handling the receivership along with the receivers appointed by the judge (to the tune of $250,000), Moore was able to use a legal claim for $700,000 (the amount the wire company originally owed Bethlehem), to force a foreclosure in which Bethlehem took over the company for a bargain. *Id.* at 838. "The tame receivers did not oppose the bill of foreclosure" (despite the fact that the company had enough cash on hand to pay the debt); "[t]he objections of stockholders were overruled by Judge Johnson" and bidding on the company was structured to ensure the success of Bethlehem's offer. *Id.* at 838. Moore was aided in these efforts by Bethlehem's secretary, a former associate at the Cravath firm. *Id.* at 837; *see also* Noonan, *Lawyer's Conscience*, *supra* note 149, at 229-30.

> He had, I suggest, identified with the client .... For many purposes, Moore was Bethlehem. It became his alter ego.... [H]e wanted to prove to its officers, the men with whom he dealt, that he was the master of the situation, that there was nothing his client wanted that he could not bring off....
>
> His case permits us to see how powerful the impulse to identify is, how subversive the instinct to secure the client's goals may be.[210]

I second Noonan's assessment—Moore's lawlessness strongly suggests that he was too client-centered. As his partner, Robert Swaine, wrote, "No lawyer ever unreservedly gave more of himself to a client than Hoyt Moore has given to Bethlehem."[211] But, it is important to recognize that this is partisanship *without* neutrality, client service without the kind of detachment that would have mitigated Moore's willingness to erect a criminal conspiracy to help Bethlehem acquire the wire rope company at a price well below its market value.

And perhaps it is not even good partisanship. Perhaps it is more accurate to say that Moore was too self-centered—not simply in the sense that he billed, and I assume Bethlehem gladly paid, $125,209 for illegal services ("a very substantial amount of money" in 1937[212]), but in the sense that he staked his professional pride on making himself "indispensable" to Bethlehem, and in such a way that he was ready and willing to place his client in jeopardy of serious civil and criminal liability. Indeed, as Noonan notes, "Years later, when the corruption of Judge Johnson had become public, the wire rope company stockholders were to sue Bethlehem and get a settlement of $6 million."[213] A genuinely *client*-centered lawyer—one not thickly identified with her client—might have anticipated that a judge as corrupt as Judge Johnson would likely be caught (if not for the bribe in question, then for a past or future transac-

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210. Noonan, *The Lawyer Who Overidentifies*, *supra* note 7, at 834, 840-41.

211. *Id.* at 835.

212. As Noonan observes, $125,209 "represented only a portion of the Cravath firm's billings to Bethlehem. Moore could have foregone his share of the fee without discomfort." Thus, Noonan reasons, "[t]he motivation of this driven man was not money—certainly not money only." *Id.* at 840.

213. *Id.* at 838.

tion), and that the financial and reputational risk to the client was not worth the reward.[214]

Orientation of the person and interests of the lawyer toward the client also skews the distribution of legal services. It is no accident that just ten percent of the bar is dedicated to government or other public interest work while eighty five percent of the bar works in private practice, private industry or for private associations.[215] Lawyers strongly identify with clients who pay well. This might not be so significant if lawyers in private practice picked up the distributive slack in pro bono work, but figures on service pro bono publico are equally disappointing.[216] Even among lawyers and firms that do take on pro bono work, the interests of paying clients are often cited as a reason to decline pro bono representation.[217]

And thick identification has aggravated latent positional divisions in the bar. Heinz and Laumann suggest that "one of the consequences of specialization is that the different roles [lawyers play] may come to exist in separate social worlds and that, as they lose contact with one another, the lawyers may also lose their sensitivity to one another's problems, thus diminishing consensus on the profession's goals."[218] They offer the example of "corporate lawyers who dominate the Association of the Bar of the City of New York" and

> advocate 'no-fault' systems of automobile accident compensation. They never touch a personal injury case. And they are vigorously opposed by the personal injury plaintiffs'

214. This assumes, of course, that Bethlehem gained less by acquiring the company than the $6 million it paid in settlement plus any loss to goodwill from the scandal. But, in the absence of more facts on the incident, the assumption is at least plausible, and I suspect that other examples of Moore-like thick identification leading to lawlessness can readily be elaborated from more recent corporate scandals. *See, e.g.*, RHODE & LUBAN, *supra* note 25, at 256-68 (detailing the Kaye, Scholer savings and loan defense and Singer, Hunter's involvement in the O.P.M. fraud).

215. *See* RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 21 at 24. *See also* CURRAN & CARSON, STATISTICAL REPORT, *supra* note 86, at 7.

216. As Deborah Rhode reports, "most practitioners make no significant pro bono contributions. The average for the profession as a whole is under half an hour per week." Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415 (1999); *see also* Rhode, *Access to Justice*, *supra* note 57, at 1810.

217. *See* Abe Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?* 55 CHI. B. REC. 31 (spec. ed. 1974); Griffin Smith Jr., *Empires of Paper*, TEX. MONTHLY, Nov. 1973, at 53, 100-02; Spaulding, *Pro Bono Publico*, *supra* note 23, at 1414-15.

218. HEINZ & LAUMANN, *supra* note 34, at 133.

> lawyers, whose voice is the American Trial Lawyers Association. The personal injury lawyers complain that the corporate lawyers "don't understand our problems."[219]

It is not specialization alone, however, that causes positional divisions, but specialization combined with the thick identification it produces in the absence of countervailing professional norms and incentives. Conflicting client bases create lawyers who disagree at the professional level and the level of law reform only where the lawyers have personally adopted their clients' interests.

As Heinz and Laumann emphasize, balkanization is not simply an abstract concern. Positional conflict between thickly identified lawyers undermines the integrative force of institutions such as law schools, bar associations and the courts.[220] A socially integrated bar is perhaps no end in itself, but there are professional and social costs to division and conflict among lawyers. An integrated bar can rely more on social cohesion to require and reward observance of the service norm and thin identity. In the absence of broad, strong, and consistent enforcement mechanisms and professional rewards, balkanization leaves lawyers exposed to the force of their own interests, and, what may be little better, the particularist claim that they should meet a professional standard tailored to the interests and demands of their positional identity. Perhaps even more important, an integrated bar is connected to rule-of-law values, especially the public perception of legitimacy in legal processes. Heinz and Laumann warn:

> To the extent that the public perceives the separation of lawyers . . . the symbolic unity of the law, and thus its legitimacy, will be weakened. The efficacy of law depends, in very large measure, on voluntary compliance with its requirements, and the disposition to comply depends, in turn, on the existence of consensus that the legal system is legitimate. . . . If lawyers of distinct social types work in distinct realms of law, serve separate sorts of clients, and deal with separate systems of courts and government agencies,

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219. *Id.* at 133, 143 ("[T]he distinct social types of clients served by most lawyers—even those who work in a number of fields—will often have conflicting economic and political interests. To the extent that the interests of lawyers' clients conflict, the interests of the lawyers will also conflict and the social integration of the [bar] will suffer.").

220. *Id.* at 145.

> symbolic unity can be maintained only with mirrors and smoke, and then unreliably.[221]

D. Moral Accountability as Thick Identity

For all of these reasons, I am less inclined to attribute professional misconduct and malaise to the ideology of advocacy, let alone the service norm, than to the increasing force of thick identification in the lawyering role. But if I am right that misconduct and malaise derive in important part from thick identity, the problem with role criticism is not just etiological, but that it proposes a version of the disease as cure. Central to the call for moral accountability and ethical discretion in lawyering is the lawyer's trump—her right to choose clients and define the scope of her service to them based on an assessment of the moral worth or justice of their objectives. From thin professional identity (the idea that a lawyer should choose and serve clients irrespective of her views regarding their personal and positional attributes), lawyers would move to personalization of the role.

Moral identification is prima facie different from identification motivated by self-interest. But it is still a species of identification prone to all its dangers. Moreover, as I argued in Section I, the boundary between moral and egoistic motivation is not always clear. Especially under conditions of moral pluralism, the lawyer's decision to privilege her moral judgment over her client's may carry with it an ugly element of arrogance and, as Sanford Kadish puts it, "moral excess."[222] In what follows, I concentrate on value pluralism, its importance to the service norm, and its suppression in the discourse of role criticism.[223]

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221. *Id.* at 175.

222. *See* Sanford H. Kadish, *Moral Excess in the Law*, 32 MCGEORGE L. REV. 63, 64-68 (2000).

223. I am not the first to try to work out the implications of pluralism for the lawyering role. In an important article, Thomas D. Morgan and Robert W. Tuttle criticize both critics and defenders of the dominant view and contend that if pluralism is taken seriously "[l]egal norms . . . provide the most practical moral boundary for the lawyer-client relationship." Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 G. WASH. L. REV. 984, 989 (1995). While the following analysis seconds their claims regarding pluralism, their attempt to replace instrumentalism with purposivism in the lawyering role takes their approach closer to role critics' normative vision than they suggest (especially that of William Simon), and closer than I think a serious confrontation with the problem of pluralism permits. *See id.* at 1018 (agreeing with Gordon

John Rawls has succinctly stated the relationship between the history of modern liberal democratic regimes, rights securing personal freedom and the inevitability of value pluralism:

> The social and historical conditions of modern democratic regimes have their origins in the Wars of Religion following the Reformation and the subsequent development of the principle of toleration, and in the growth of constitutional government and of large industrial market economies. These conditions profoundly affect the requirements of a workable conception of justice: among other things, such a conception must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed, incommensurable, conceptions of the meaning, value and purpose of human life (or what I shall call for short "conceptions of the good") affirmed by the citizens of democratic societies. . . .
>
> This diversity of doctrines—*the fact of pluralism*—is not a mere historical condition that will soon pass away; it is, I believe, a permanent fixture of the public culture of modern democracies. *Under the political and social conditions secured by the basic rights and liberties historically associated with these regimes, the diversity of views will persist and may increase.*[224]

Rawls takes pluralism as a permanent condition of liberal democratic society precisely because the standard litany of rights and structural commitments of such societies (freedom of ex-

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that "lawyers have an obligation to respect the legal framework, and 'at the very least to refrain from acting so as to subvert and nullify the purposes of rules.'"); *id.* at 1023 (arguing that breach of contract "is clearly a wrongful act that—prima facie—the morally sensitive lawyer may not encourage and may not thereafter assist"). Rob Atkinson also acknowledges the problem of value skepticism for role critics' normative vision, but his remedy is to abandon any pretense of grounding lawyers' moral discretion in a public (let alone objective) standard. *See* Rob Atkinson, *Beyond the New Role Morality For Lawyers*, 51 MD. L. REV. 853, 947 (1992) (advocating a "[f]ideist [l]awyer's [e]thic"). Closer to my defense of the role is Alan Donagan's thoughtful essay, *supra* note 56, at 123. Though, on more narrow terms than Morgan and Tuttle, he too would permit lawyers to select clients according to the moral defensibility of their objectives.

224. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL. STUD. 1, 4 (1987) (emphasis added) [hereinafter Rawls, *Overlapping Consensus*]; *see also* Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES 83-84 (1987) (protection of value pluralism in liberal democracies derives more from "substantive opposition to the particular assertions of prior hierarchies" than any deep epistemological commitment to value skepticism); John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989).

pression and religious exercise, freedom from state establishment of religion, equal protection of the laws, due process, limited government through enumerated powers, judicial review of state action, etc.) protect a degree of personal autonomy that ensures the maintenance of different "general and comprehensive doctrines"—different and often radically conflicting moral, cultural and religious conceptions of the good.[225] Rawls concludes that conformity to a single conception of the good—"[a] public and workable agreement on a single general and comprehensive conception[—]could be maintained only by the oppressive use of state power."[226]

In American law, the fact of pluralism is both respected and resisted. It is respected in the constitutional provisions that secure freedoms allowing different comprehensive doctrines to flower and in all the subordinate forms of law created and construed in deference to those provisions. It is resisted in the continuous stream of litigation and legislation that seeks to canonize certain constructions of the same provisions (and to craft new laws) from the perspective of competing comprehensive doctrines. These are attempts to capture state power in the name of a single conception of the good or, more narrowly, in the name of a specific set of interests. Law thus both limits and expresses the possibility of social change, both expresses and alters the balance between cultural consensus and pluralism. And this dualism operates everywhere law touches culture—in economic, familial, social, religious and political relations.

Thin positional identity in the service norm accommodates this tension between law as pre-established order and law as legitimation in a way that protects autonomy and respects the fact of pluralism. The lawyer is at once bound by law and obliged to press for recognition of her client's interests and values in the law. She may press to the very limit of law—short of frivolity—to win legal vindication for her client. At the same

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225. Rawls, *Overlapping Consensus*, *supra* note 224, at 4. Of general and comprehensive doctrines, Rawls writes

> I think of a moral conception as general when it applies to a wide range of subjects of appraisal . . . and as comprehensive when it includes conceptions of what is of value in human life, ideals of personal virtue and character, and the like, that are to inform much of our conduct (in the limit of our life as a whole). Many religious and philosophical doctrines tend to be general and fully comprehensive.

Id. at 3 n.4.

226. *Id.* at 4.

time, the possibility of erroneous, premature or tendentious moral judgment on the part of the lawyer is avoided by giving the client ultimate say concerning the ends of representation.[227]

The fact of pluralism thus creates a strong presumption in favor of autonomy (more than a mere "thumb on the scale" as Stephen Pepper suggests in his well-known defense of the standard conception of the role[228]), and thin professional identity operationalizes this presumption in the social arena by ensuring access to law on open terms, radically decentralizing authority to decide who shall have representation and what social interests and comprehensive doctrines shall be cast in the legitimating language of the law. In short, if we take pluralism seriously, thin identity has a powerful justification in the very structure of liberal democratic social and political organization.[229]

Luban's contrary claim that a lawyer's moral judgment should *limit* her client's autonomy presupposes that the moral costs of facilitating autonomy can be accurately and decisively weighed—that a lawyer who screens clients will make choices we can agree are "right" and "good."[230] He presupposes, in other words, a degree of moral consensus which the fact of pluralism denies. Whether working from Kantian metaphysical

227. *See* Donagan, *supra* note 56, at 130. *See also* M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics*? 9 LAW & PHILOSOPHY 67, 80-81 (1990) ("[T]here is the practical difficulty that it is often very hard to know whether a cause is just . . . the moral world which lawyers inhabit is extraordinarily rich and complex."); David Wasserman, *Should a Good Lawyer Do the Right Thing*?, 49 MD L. REV. 392, 401 (1990) (reviewing LUBAN, LAWYERS, *supra* note 138) (noting that per se rules protect against the fallibility of individual discretionary choices). Concern for individual fallibility—the possibility of erroneous or biased judgment—is a ubiquitous feature of our legal system. At the most basic level, laws once made can be changed or repealed (even the constitution can be amended), representatives are publicly accountable, and judicial review helps check arbitrary state action. Even the structure of judicial review operates on a premise of fallibility—the decisions of individual trial court judges at both the state and federal level are subject to layers of review by appellate judges who vote to decide the outcome of cases.

228. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RES. J. 613, 614-17 [hereinafter, Pepper, *Amoral*]; Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. BAR FOUND. RES. J. 657, 664 [hereinafter Pepper, *Rejoinder*]. For other autonomy-based defenses of the role, see Donagan, *supra* note 56; Freedman, *supra* note 24; Fried, *supra* note 7.

229. *Cf.* Stephen Gillers, *Can a Good Lawyer be a Good Person*, 84 MICH. L. REV. 1011, 1025 (1986) (reviewing THE GOOD LAWYER, *supra* note 11) (defending non-accountability on related terms in litigation where lawyers are "appurtenant to the rights-adjudicating apparatus we've adopted in civil disputes").

230. *See* Luban, *Lysistratian Prerogative*, *supra* note 154, at 639.

premises or a pragmatic faith in reason and consensus, he (like many role critics) treats the ethical dilemmas he considers as though morally correct answers could have been reached by the lawyers involved if they had properly considered the relevant moral factors. I happen to agree with the way Luban resolves many of the issues he addresses, but I also recognize that others operating from more libertarian, or more wealth-maximizing, perspectives (to name just two) might well come to different conclusions.[231] And I think most of the hard cases in legal ethics center around social, moral, political, and legal issues as to which reasonable disagreement abounds and consensus is wanting.[232] I therefore do not share Luban's confidence

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231. For instance, Luban argues that lawyers for Ford Motor Company should have disclosed the defect in the Pinto gas tanks. LUBAN, LAWYERS, *supra* note 138, at 210 ("[T]he attorney should have alerted the public to the menace of the Pinto."); *id.* at 214 ("[N]o lawyer should have the moral discretionary power to allow an innocent party to die."). However, Gary Schwartz's careful study shows that while there was an increased risk of rear-end fire related fatality in the Pinto, the proportion of total fatal fire accidents in Pintos did not exceed the Pinto's share of the automobile population. *See* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1032-33 (1991). On this and other evidence, Schwartz concludes that the Pinto's overall safety record was "respectabl[e]." *Id.* On the same evidence, a lawyer might with good reason hesitate to whistleblow.

In arguing that a defense lawyer should forbear conducting a hard cross on a truthful rape victim, Luban claims that while the defendant

> is confronted by the state . . . the victim is confronted by the millennia-long cultural tradition of patriarchy, which makes the cliché that the victim is on trial true. From the point of view of classical liberalism, according to which the significant enemy is the state, this cannot matter. But from the point of view of the progressive correction of classical liberalism, any powerful social institution is a threat, including diffuse yet tangible institutions such as patriarchy.

LUBAN, LAWYERS, *supra* note 138, at 151 (emphasis omitted). Applying the "progressive correction," Luban concludes that "the moral boundaries of zealous criminal defense should be drawn short of allowing cross examination that makes the victim look like a whore." *Id.* With the progressive correction in place, most of Luban's solutions to ethical dilemmas reflect left liberal values. A person reasoning from classical liberal premises would likely arrive at quite different answers.

Luban does concede in the rape victim cross example that "readers are likely to have strong and contrary opinions about the relative threats posed to the defendant by the state and to women posed by . . . the male sex. The question is a very close call . . . ." *Id.* at 152. But he does not seem to think this undermines the value of conferring discretion on lawyers to shape representation based on their moral scruples.

232. *See, e.g.*, Ellmann, *supra* note 188, at 129 (voicing doubt that "there is *any* moral common denominator") (emphasis original). Luban might reply that there is a core of moral consensus even if hard cases reflect a penumbral area of uncertainty, and that lawyers are entitled to trump their client's autonomy in

"that in almost every case of significant client immorality the good of helping the client realize his autonomy will be outweighed by the bad of the immoral action the client proposes."[233] In many cases, we will not know or will not agree on the ultimate moral costs and benefits.[234] If value pluralism is taken seriously, we need to know what justifies the intrusion of the lawyer's moral judgment—what entitles the lawyer to privilege her perspective over the judgment of her client, the judge, the jury or public opinion—and we need to know what ensures the accuracy of the lawyer's judgment.

Role critics generally offer two responses—one pointing to common morality, the other to lawyers' special relationship to law. Taking the common morality route, Luban presents the lawyer's trump as just another instance of the kind of altruistic, private noncooperation that "we take for granted in day-to-day life [and without which] society could not exist . . . ."[235] As Pepper makes clear, the trouble with the private noncooperation route is that

> [t]he lawyer, unlike the spouse or friend, is part of the *formal* system of law *imposed* by the community (through its government), and therefore has different obligations from those of the spouse or friend . . . . To see lawyers as being on the informal side of the line—like spouses or friends, free to assist or not assist on the basis of their total personalities, their idiosyncratic personal convictions and their

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that core area. *Cf.* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1023-24 (1990) (insisting that "the softness of morality is greatly exaggerated" and that most disputes are over "'the facts'"). Perhaps this is so. My concern here, however, is that to the degree that we enjoy consensus, it is strongest at the level of abstract moral propositions and weakest at the level of concrete rule application.

233. Luban, *Lysistratian Prerogative*, *supra* note 154, at 642. Luban goes further, suggesting that as long as one's life is generally free—"by and large autonomous"—the imposition of moral limits in one's "mostly occasional" interaction with lawyers is unproblematic. *Id.* at 643. *Compare* David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to* LAWYERS AND JUSTICE, 49 MD L. REV. 424, 435 (1990) (offering a much more circumspect account of the lawyer's trump, suggesting that "role obligations should be regarded as defeasible presumptions").

234. *See* Bernard Williams, *Conflicts of Values*, *in* WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980 71, 80-81 (1981) ("the enterprise of trying to reduce our conflicts, and to legislate to remove moral uncertainty, by constructing a philosophical *ethical theory* (in the sense of systematising moral belief) is a misguided one") (emphasis original).

235. Luban, *Lysistratian Prerogative*, *supra* note 154, at 642.

> whims—is to put law itself on that same side of the line, and to determine access to law on the same unequal, highly contingent, often whimsical basis.[236]

Law, I would add, is one of the most important remedies for oppressive forms of private coercion. Only one convinced that common morality is indeed common (and correct) could be comfortable with private noncooperation as a ground for the lawyer's trump.[237] One cognizant of value pluralism, on the other hand, would worry, as I do, that by conferring moral autonomy on lawyers "the distribution of legal services will come to reflect the [moral and] political preferences of individual lawyers still operating under the constraints of market competition."[238] This is the potentially ruinous consequence of endorsing the lawyer's trump. While the principle of thin professional identity cuts against distribution of legal services based on lawyers' personal beliefs by separating those beliefs from the role, moral accountability (and the autonomy it implies for lawyers) provides no tangible check against the subjective distribution of legal services according to lawyers' various interests and whims.[239]

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236. Pepper, *Rejoinder, supra* note 228, at 665-66 (emphasis original). Curiously, when arguing for a universal right to legal services Luban insists that lawyers *are* part of the formal regime of social organization. He claims that:

> 1. Access to minimal legal services is necessary for access to the legal system.
> 2. Access to the legal system is necessary for equality of legal rights—equality before the law.
> 3. Equality of legal rights is necessary to the legitimacy of our form of government.
> 4. Whatever is necessary to the legitimacy of a form of government it must grant as a matter of right.
> Therefore,
> 5. Access to legal services is a right under our form of government.

LUBAN, LAWYERS, *supra* note 138, at 264.

237. Public consensus is wanting even as to the moral probity of the lawyer's role. We revile the zealous advocate right up to the moment we need a lawyer for our own ends. *See* Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 380 (1987) ("[L]awyers are applauded for following their clients' wishes and bending the rules to satisfy those wishes; and they are at the . . . same time condemned for using the legal system to satisfy their clients' desires . . . [P]opular attitudes toward lawyers are profoundly contradictory.").

238. Spaulding, *Pro Bono Publico*, *supra* note 23, at 1428; *see also* Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 319-21 (same).

239. I worry especially about how a profession that still lacks racial, gender and class diversity in leadership positions will exercise the lawyer's trump in a

Recognizing the force of this charge, William Simon constructs lawyers' public accountability around law itself rather than the vagaries of common morality. The lawyer's trump, he claims, is justified by her special access to and responsibility for the purposes underlying law. Simon's ideal lawyer is not a moral activist, but rather a purposivist in the tradition of the Legal Process School.[240] Relative to the service norm, she is more likely to privilege substance over procedure (by increasing her sense of accountability for vindicating the substantive merits of a case when the applicable procedural guarantees are weak or malfunctioning[241]), purpose over form (by adhering to the purposes of rules when they are clear even if the letter of the rules permits a broader range of conduct[242]), and broad over narrow framing of ethical issues (where she is in a position to know and judge broader factors competently and where broader considerations speak persuasively to the relevant substantive law and can impact the outcome[243]). The lawyer's dis-

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pluralistic society such as ours. At one point, Luban concedes that the oppressed and unpopular would be most affected by conferring "moral discretionary power" on lawyers, LUBAN, LAWYERS, *supra* note 138, at 119, but, in the end, this does not deter him from endorsing morally activist lawyering.

240. Hart and Sacks claim that "[l]aw is the doing of something, *a purposive activity*, a continuous striving to solve the basic problems of social living." HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 102 (William N. Eskridge Jr. et al. eds., 1994) (emphasis added). Official discretion is cabined by the doctrine of "reasoned elaboration." *Id.* at 146. In applying "general directive arrangements" the official must "elaborate the arrangement in a way which is consistent with the other established applications of it [and] must do so in a way which best serves the principles and policies it expresses." *Id.* at 147. The main difference, and it is significant, between Simon's normative vision and the Process School is that he rejects their emphasis on procedure. *See* WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF POLICY 397 (3d ed. 2001) (noting emphasis on procedure).

241. SIMON, PRACTICE, *supra* note 131, at 142 ("[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she needs to assume for substantive justice.").

242. *Id.* at 145-46 ("[T]he clearer and more fundamental the relevant purposes, the more the lawyer should consider herself bound by them; the less clear and more problematic the relevant purposes, the more justified the lawyer is in treating the relevant norms formally.").

243. As Simon elaborates:

> [T]he Contextual View gives lawyers substantial responsibility for determining whether broad or narrow framing is appropriate in a particular case. It suggests that lawyers should frame ethical issues in accordance with three general standards of relevance. First, a consideration is relevant if it fits the most plausible interpretation of the applicable

cretion to resolve each of these tensions in the interests of justice is tethered to her special expertise in the "materials of conventional legal analysis" and "the methods and sources of authority of the professional culture."[244]

Simon says that "[t]he essence of this approach is contextual judgment—a judgment that applies relatively abstract norms to a broad range of particulars of the case at hand."[245] Indeed, he contends that the resilience of the dominant view (with its reliance on categorical norms that cabin lawyers' discretion) is due in large part to the profession's failure to heed developments in legal theory, especially the well-established critique of formalism and categorical reasoning in adjudication: "The preference for categorical norms and decisions in the lawyering context reflects nothing more than a failure to carry through to the lawyering role the critique of formalism, mechanical jurisprudence, and categorical reasoning that has long been applied to the judicial role."[246] But while Simon concedes that contextual judgment "has been challenged,"[247] he ignores the most fundamental challenge and its deep roots in the very jurisprudential tradition that initiated the critique of formalism and categorical reasoning he invokes.

The claim that "general propositions do not decide concrete cases"[248]—first articulated by Holmes and later developed by Progressive and Realist scholars—became a centerpiece in the attack on formalism and mechanical jurisprudence. Simon is quite right that, in the wake of this attack, Legal Process scholars (and, as we will see, Progressives) labored to produce defensible conceptual frameworks for adjudication predicated on contextual judgment rather than categorical reasoning.[249]

> substantive law. . . . Second, a consideration is relevant if it is likely to have a substantial practical influence on the resolution. . . . Third, framing should take account of the lawyer's knowledge and institutional competence.

Id. at 150-51.

244. *Id.* at 138.

245. *Id.* at 10.

246. *Id.*

247. *Id.*

248. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

249. *See* 2 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 254 (1992) (The legal process school's "most important concession to Realism was in its recognition that doctrinal formalism was incapable of eliminating discretion in the law. . . . *The task was instead to harness and channel that discretion through institutional arrangements.*") (emphasis added); Thomas C. Grey, *Modern American Legal*

But another more radical strain of the critique of formalism questioned the institutional competence of judges unconstrained by categorical rules and free to introduce bias through contextual judgment. Progressives, for instance, decried tendentious *Lochner*-era judicial decisions and worked to establish the authority of publicly accountable branches of government.[250] The Progressive critique of the judiciary's institutional competence culminated in the dramatic expansion of the role of the executive and legislative branches of the federal government under the New Deal. In fact, Progressivism became "[t]he working legal theory of most of the lawyers who marched from under Felix Frankfurter's wing to draft the statutes and staff the agencies of the New Deal . . . ."[251]

However, Progressives were not thoroughgoing skeptics of the judicial role. Indeed, as Thomas Grey argues, they initiated the move toward contextual judgment in adjudication by insisting that courts abandon the pretense of categorical reasoning and focus on vindicating the underlying social policies and legislative purposes of law.[252] Legal Realists, by contrast, offered a severely "diminished portrait of the judiciary [characterizing it] as a dispute resolution bureaucracy whose rhetoric had little to do with its actual decisions."[253] By emphasizing the indeterminacy inherent in deductive, analogical and policy-oriented reasoning, Realists made a direct assault on the competence of the courts—specifically, on the core rule of law premise that judicial decision is the result of law rather than custom, personality and politics. In this sense, Grey reasons, the Realists "turned against the project of legal architecture itself":

Thought, 106 YALE L.J. 493, 503 (1996) (reviewing, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)) (Process scholars, "[l]ike the Progressives . . . saw law as a mix of principles and policies, rules and standards, and they believed that adjudication required trained judgment, not simply logical acumen.").

250. Grey, *supra* note 249, at 498-99.

251. *Id.* at 502.

252. *Id.* at 499 (Progressives claimed that "[c]ourts should defer to legislatures in constitutional cases, should ascertain and promote legislative purpose in interpreting statutes, and should draw on the policies reflected in statute law to sublegislate the fields left by legislatures to common law development.").

253. *Id.* at 502; *see also id.* at 503 (describing the "Realist view" of adjudication as "intuitive dispute resolution in the light of unconsciously absorbed custom"). This too "provide[d] ideological ammunition to the New Deal . . . [b]y . . . undermining the prestige of the courts . . . ." *Id.* at 502.

> Not only did the Realists find the general and distinctively legal concepts and principles found in treatises and Restatements hollow and indeterminate, rhetorical rather than operative in their significance, but they also made the same criticism of the equally general "policies" and "interests" relied on in Progressive legal theory. They believed that the important influences on judicial decisions were the procedures under which they were reached and judges' often unconscious sense of how disputes fit into the web of habitual and customary practice.[254]

In contemporary legal theory, the Critical Legal Studies Movement has extended the Realists' critique regarding indeterminacy and abuse of discretion in adjudication.[255] Thus, skepticism regarding the possibility of cabining discretion through a standard of contextual judgment is just as funda-

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254. *Id.* at 500-01. Morton Horwitz summarizes the importance of analogical reasoning to the formalist's project:

> The capacious claims by Classical legal thinkers for the power of analogical reasoning were perhaps more important than any other in legitimizing the old order. Analogical reasoning—the ability to say that one case was like another—was central to all theories that distinguished legal reasoning from political reasoning or sought to show that judging was a function of reason, not will.

HORWITZ, *supra* note 249, at 202. And, just as deductive reasoning "suppressed the inevitable moral and political choice among possible inferences," *id.*, analogical reasoning was inescapably political. *See id.* at 202-06.

255. To the Realists' claims regarding the "inherent ambiguity of language, and the correlate incapacity to restrain discretion through language," CLS adds that while

> [i]t *is* possible to establish legal rules, increasingly detailed in covering available cases, that can become mechanically applicable to the vast bulk of actual controversies . . . *practice* may well become settled only at the cost of *principled doctrine* becoming chaotic. . . . The larger problem may be that practice becomes settled only at the risk that it becomes openly arbitrary, that all rules become rules maintained simply for rules' sake. The Realist hope that vague language will be rescued by recourse to settled purpose is turned on its head in the CLS critique: language remains relatively clear, but a knowledge of purpose makes the clarity appear arbitrary.

Kelman, *supra* note 224, at 45-47 (emphasis original). To the Realists' claim that "*competing* rules exist side-by-side," and that "the *choice* of the governing rule was so unconstrained that each rule was in fact radically undercut by the presence of its fratricidal twin," CLS adds (1) that the conflicting rule may exist, but only in a "separate domain" of law, and (2) that ostensibly perspicacious rules turn for their application on inevitably vague standards. *Id.* at 48-49 (emphasis original). In this context, CLS also emphasizes the problem of enforcement—that clear rules are often not the governing norm for the fact situations they purport to cover. Instead "[t]he 'real' governing norm may be some incredibly open-textured set of standards." *Id.* at 50. Kelman describes this as a "breakdown of rules." *Id.*

mental to the jurisprudential tradition Simon invokes as the turn to contextual judgment on which he relies.

If "carrying through the critique of formalism, mechanical jurisprudence and categorical reasoning" leads to an uncritical embrace of contextual judgment, I worry that Simon has not carried through the entire critique—that he has ignored the very real possibility (especially under conditions of value pluralism) that contextual judgment can slide into tendentious judgment without the rhetorical subterfuge of formalism. At times Simon seems unaware of the dangers of contextual judgment in lawyering. For example, he points to the prosecutorial role as at least "one pertinent context in which lawyers have been relatively willing to accept the possibility of meaningful discretionary judgment"; and he claims that his "formulation of the basic maxim of the Discretionary model has been partly inspired by the maxim the Code prescribes for the prosecutor: 'The responsibility of a public prosecutor . . . is to seek justice, not merely to convict.'"[256] But studies of bias in the exercise of prosecutorial discretion surely undermine its force as an affirmative case for wider discretion in lawyering.[257]

At other times Simon is clearly aware of the limitations of contextual judgment, but he remains unconvinced that these limitations impair its promise for the lawyering role. Against the claim that contextual norms exacerbate uncertainty, Simon insists that contextual standards in law "are often quite determinate when they correspond to well-developed, though tacit, social understandings."[258] He gives the ostensibly uncontrover-

256. SIMON, PRACTICE, *supra* note 131, at 10.

257. Courts are generally reluctant to review and reverse prosecutors' charging decisions, and even when misconduct is found, the harmless error standard insulates convictions from reversal. *See* Darden v. Wainwright, 477 U.S. 168 (1986); United States v. Young, 470 U.S. 1, 15-16 (1985); United States v. Nixon, 418 U.S. 683 (1974); Paul Marcotte, *Few Reversible Errors*, A.B.A.J., Sept. 30, 1990; Walter W. Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 S.W.L.J. 965, 976 (1984). Moreover, disciplinary proceedings against prosecutors are rare because most parties with relevant information do not have incentives to rile a prosecutor. *See* WOLFRAM, *supra* note 58, at 761 (1986). And despite the lofty language of their charge, the evidence shows that prosecutors are most heavily motivated by the desire to secure convictions. *See* RHODE & LUBAN, *supra* note 25, at 323-24 nn.4-10 (citing research and quoting prosecutors regarding their motivation). On abuse of prosecutorial discretion see Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); James Vorenberg, *Decent Restraint or Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

258. SIMON, PRACTICE, *supra* note 131, at 71.

sial example of context-sensitive norms in the Uniform Commercial Code:

> In a variety of businesses you can find consensus across a broad range of options as to whether a buyer's disposition of properly rejected goods was "commercially reasonable" within the meaning of the Uniform Commercial Code. This contextual standard is supported by a tacit social gloss of shared understanding and practice.[259]

Under conditions of value pluralism, however, the reference point for shared understanding (the group(s) among whom consensus prevails) may be underinclusive such that the context sensitive norm is disproportionately sensitive to (and therefore privileges) the shared understandings and practices of an already dominant sector of society.

The Uniform Commercial Code is a perfect example. Realists who turned to positivist social science to address the problem of indeterminacy and avoid the conflicts presented by value pluralism helped draft the UCC on just the premise Simon describes. But as Horwitz observes:

> It has now become a familiar criticism of Llewellyn that in drafting the Uniform Commercial Code to reflect mercantile custom, he endowed economically dominant commercial practices with undeserved normativity. So, for example, he chose to represent the custom of bankers, not of consumers, as representative of commercial custom.[260]

Horwitz goes further, noting the inevitable temptation to "find" false homogeneity—to suppress pluralism and value conflict—when trying to ground rules in social practice and shared norms.[261] Indeed, he identifies this temptation as a "reactionary principle" latent in realism.[262]

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259. *Id.*

260. HORWITZ, *supra* note 249, at 211; *cf.* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms,* 144 U. PA. L. REV. 1765 (1996) (challenging this view of the Uniform Commercial Code).

261. HORWITZ, *supra* note 249, at 212. He adds:

> If the motive for turning to society in the first place is to evade a paralytic choice among subjective values, then how can one choose between conflicting customs when that choice simply renews the question of value. To appreciate this dilemma is to see why the Realist turn to society carried with it a strong tendency to wish to portray the social—or

So too, one may expect a similar temptation to find false objectivity among lawyers implementing Simon's standard for contextual judgment. Even if lawyers are to hold themselves responsible for vindicating substantive justice only under conditions of procedural failure, it is implausible to think different lawyers will come to the same conclusion as to the presence and severity of procedural failure in any but the most egregious cases.263 The same may be said with respect to Simon's prescription for the purpose/form tension and broad versus narrow framing: clarity of purpose in applicable law and opinions about broad contextual factors are likely to vary widely among lawyers. Moreover, as the UCC example suggests, even where lawyers do agree, their consensus may be predicated on the exclusion of important interests and concerns.

My point is not that lawyers are "inept at complex judgment,"264 but rather that, if the fact of pluralism is acknowledged, contextual judgment by those appointed to provide access to law could have adverse consequences for the quality and distribution of legal services. Simon concedes that increasing lawyers' discretion will impact the distribution of legal services, but his confidence in the possibility of objectively determining legal merit leads him to deny that maldistribution would result:

> [W]hether one should be concerned about a client's unpopularity depends on what the source of unpopularity is. If the unpopularity reflects a valid assessment of the legal merits of the client's claims and goals, there should be no concern at all. Of course, the lawyer ought not to accept passively popular judgments of legal merit, but when her own judgment agrees with the public's, the client's unpopularity is no reason to assist him.[265]

The "reactionary principle" in role criticism is its disregard for the problem of pluralism. In a time characterized by radical disagreement about the nature of law and adjudication, when the economic rationality of law has supplanted theories of its

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commercial—world as homogeneous. Only a society without fundamental conflict could avoid choice among values.

Id.

262. *Id.*

263. *See generally*, Bundy & Elhauge, *supra* note 238 .

264. SIMON, PRACTICE, *supra* note 131, at 74.

265. *Id.* at 162.

moral content, and when the profession still lacks racial and gender diversity in positions of power,[266] it is optimistic, at best, to think the distribution of legal services and what remains of professional cohesion would not be adversely impacted by role critics' proposals to confer greater autonomy on lawyers.

Even if the existing distribution did not change at all, the profession would become functionally immune from the criticism that lawyers are over-identifying with clients, causes, or profits and failing to serve the most needy. Each lawyer could simply respond that she is pursuing her moral vision of law practice and link her claim to any one of the readily available moral or legal theories fitting her interests. She could still be criticized for doing so, and if there were wide enough consensus on the point, she might conform to the pressure. But otherwise she will feel entitled (*morally* entitled) to persist. Gone would be the claim, grounded in the service norm and thin identity, that the profession is defined by and privileges open access to legal services and client-centered lawyering over any lawyer's personal quest for self-realization in the role.

IV. RECOVERING THIN IDENTITY

Whatever the force of the service norm, role critics are surely right (and my account of the move toward thick identity presupposes) that lawyers have only rarely lived up to the norm in practice. So a number of questions remain even if one agrees that skepticism of moral activism and contextualism is warranted. To begin with: how can the service norm be bolstered to encourage thin professional identity without radically undermining professional autonomy? If thin identity is to be bolstered in support of the service norm, will the role be habitable—can role critics' concerns about moral integrity in the role

266. *See* CURRAN & CARSON, STATISTICAL REPORT, *supra* note 86, at 13-15 (citing gender diversity statistics); HAZARD, THE LAW AND ETHICS *supra* note 6, at 891-92 (reporting that "[a]s of 1991 about 22% of American lawyers were women, and by 1998 the percentage had risen to about 27"; percentage of women partners in nation's 250 largest firms was 16% in 1998; "[n]ationwide women lawyers made 70 cents for every $1 a male lawyer made in 1998"); *id.* at 901-02 (African Americans comprised 2.2% of the American lawyer population in 1980; in the nation's 250 largest firms in 1998, African Americans were 4% of the associates and 1.2% of the equity partners; reporting comparably low percentages for Asians and Hispanics). *See also* Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005 (1997); David Wilkins & Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 502 (1996).

be met? Should cause lawyering be prohibited? And if service is to replace identification as the professional norm, in virtue of what will lawyers be willing to embrace it—what will motivate lawyers to play a role predicated on thin identity? In closing I want to suggest some preliminary responses to these important queries.

A. Enabling the Service Norm

I think it safe to assume that the market forces pushing lawyers toward thick professional identity are unlikely to diminish and may well continue to increase. This means that attempts to bolster thin identity will normally work against the economic constraints of law practice. But this is nothing new—law practice in America has always been subject to the demands of the market—and in some respects the market forces are salutary. While they undoubtedly entail professional costs, price competition and lower information costs increase the distribution of legal services. The key is to identify a mix of professional rewards and, where necessary, sanctions, that can effectively buttress the service norm and encourage thin professional identity. That the rules already support thin identity does not mean they support it enough.

An important condition of breaking the positional divisions that specialization, competition, conflicts litigation, and moral activism have created in the bar is more active engagement by the bench. The delegation regime, according to which judges pass the task of professional regulation onto mandatory bar associations, is a failure. Professional misconduct goes unsanctioned in all but the most egregious and repeated cases, and the bar has all too often deployed its resources in rent-seeking, monopolistic areas of professional regulation, rather than those concerning the service norm. Even if the delegation regime is not capable of wholesale replacement by direct exercise of judges' inherent power to regulate the profession, judges, not the bar, bear ultimate responsibility for the course of professional regulation. They are the shepherds of the legal profession, and much would be gained for the service norm by even a few discrete interventions on their part.

First, judges should be much more aggressive with their appointment powers. Where voluntary pro bono fails, judges should always ensure that unpopular and impecunious liti-

gants before their courts are properly represented.[267] More expansive judicial appointment would have two effects—first, it would re-enforce the distributive prong of the service norm; second, it would help counter the market forces leading to positional balkanization by requiring lawyers to represent people outside their standard client base.[268]

Second, although the conflict rules are a dual regulatory regime (professional and judicial), the dominant mode of enforcement is through judicial rulings on motions to disqualify. Judges therefore have a central role in defining the scope and intensity of imputed identity between lawyer and client. Narrow construction of the conflict rules, consistent of course with the demands of effective client service (confidentiality, competence, etc.) will directly bolster thin professional identity.[269] Especially in the private market for legal services, the profit motive leads lawyers to seek new clients where the duty of loyalty permits. So narrow construction of the rules would turn market incentives toward thin identity. At a minimum, it would add some legally endorsed, market-based weight to lawyers overwhelmed by their clients' market-enforceable expectations of loyalty.

Third, in addition to regulating the lawyer-client relationship directly, judges are exceptionally well-situated (but too often under-motivated) to limit overzealous advocacy resulting

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267. Although more radical, it may even be appropriate for judges to make appointments in transactional matters.

268. I might be more circumspect about the need for more appointments if state-subsidized legal services and other programs were more broadly available. However, *judicial* construction of the due process clause and fee-shifting statutes has narrowed both the constitutional mandate and legislative incentives for providing legal services to low income clients. *See, e.g.*, Evans v. Jeff D., 475 U.S. 717, 742-43 (1986) (permitting offer of settlement in civil rights case expressly conditioned on waiver of statutory attorney's fees); Marek v. Chesny, 473 U.S. 1, 11-12 (1983) (holding under FED. R. CIV. P. 68 that prevailing party attorney fees under 42 U.S.C. §1988 are unavailable to a civil rights plaintiff who wins less at trial than offered in settlement); Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 25, 33 (1981) ("The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."; declining to extend the right to counsel to child custody proceedings).

269. I have in mind (1) Morgan's argument that in the context of suing a current client we should return to a rebuttable presumption of conflict, (2) the argument to allow ethical screens in the context of imputed disqualification, and (3) my own argument for clarification and expansion of the rules' assurance that positional conflicts of interest (particularly pro bono positional conflicts) are permissible so long as the lawyer's effectiveness for either client is not at risk.

from thick identification between lawyers and their clients. Decades of fraudulent assertion of the attorney-client privilege by tobacco lawyers would have been for naught without judges who, time after time, upheld the claims. And malicious discovery tactics, long the weapon of choice for over-zealous lawyers,[270] can quickly be subdued if judges take even a moderately more engaged approach to their supervisory role than the self-executing rationale originally anticipated by the Federal Rules of Civil Procedure assumed.[271]

On a smaller scale, I think the "imprudence" of a client's objectives should be stricken as a ground for discretionary withdrawal in Model Rule 1.16(b). Instead, the rule should be amended to cohere with the standard for exemption from judicial appointment which refers exclusively to "repugnance"—repugnance so strong as to "impair the client-lawyer relationship or the lawyer's ability to represent the client."[272] As the rule stands now, thick identity is given more room than it should have.[273]

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270. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 388 (1999) (noting that recent discovery reforms "were in response to criticism within and outside the legal community that attorneys were abusing discovery by harassing opposing parties and that the existing system was costly and inefficient") (citing critics). As the 1983 Advisory Committee notes admonish:

> The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. . . . Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons . . . . Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. As a result, it has been said that the rules have not infrequently been exploited to the disadvantage of justice.

See FED. R. CIV. P. 26, 1983 advisory committee notes (quotation marks and citations omitted).

271. As originally promulgated, and until 1983, FED. R. CIV. P. 26 provided that "the frequency of use" of discovery tools was not to be limited. *See* FED. R. CIV. P. 26, 1983 advisory committee's notes (1983); FRIEDENTHAL, *supra* note 270, at 429 n.1 ("Federal Rule 26(b)(1) was amended in 1983 to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The Federal Rule now provides that the court, on its own initiative [may limit cumulative, burdensome, expensive or needless discovery]."). The 1983 amendments also included provisions for sanctions, and the 2000 amendments now impose substantial mandatory initial disclosure requirements (though the parties and the court can waive them). *See* FED. R. CIV. P. 26(a).

272. MODEL RULES, *supra* note 26, at R. 6.2.

273. The 2002 amendments support the view I advocate. "Imprudence" is no longer a ground for discretionary withdrawal—only "repugnance" or "fundamental

Finally, and quite apart from the courts and the bar, law teachers can support the service norm by balancing realism about lawyers' deviation from the norm with due regard for its place in the law of lawyering and the problems of thick identification. It makes a difference in the socialization of young lawyers whether law is taught as an object of identification or as a field of service. This is not to suggest a return to the bromides of the Legal Process School on the civilizing hand of the law and the importance of neutral principles. We can teach law as politics all the way down, on the one hand, while insisting on the other that a lawyer's politics are still less important than her client's, that the danger of confusing the two is ever-present, and that, precisely because law is politics all the way down, *all* clients must be served.[274]

B. Living with the Role

Role critics' concerns about the habitability of the role under the dominant view sort roughly into two categories. The first is internal—concern that the role jeopardizes the lawyer's moral integrity by dominating, alienating or bifurcating her conscience. The second is external—concern that the role harms others (either clients or innocent third parties) by diminishing lawyers' moral faculties. In this category, it is claimed that lawyers operating under the principle of thin professional identity may not be effective in representing clients where the relevant law implicates moral concerns or demands a mix of moral and legal reasoning. At the same time, lawyers may lose sensitivity to the moral costs to third parties of their role acts (and with it their "habit of reluctance").[275]

With respect to the internal concerns, it is important to distinguish harm caused by distance between role and self from harm caused by role confusion. An ever-increasing concern among lawyers with wealth generation, and the concomitant displacement of traditional professional recognition symbols such as craft mastery, transition to public service (especially the bench), distinction in advocacy, and representation of unpopular clients has perhaps more to do with professional ano-

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disagreement" with a client's proposed course of action justify withdrawal. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2002).

274. That is, at least all clients with non-frivolous claims.

275. *See supra* Section III.A.3.

mie than any requirement of thin identity ever could.[276] Professional discontent, Deborah Rhode reports, "is greatest among well-paid large firm associates and least pronounced among relatively low-earning academics, public interest, and public sector employees."[277] Much in the way of alienation, bifurcation and role domination may be explained by this obsession with profit—for starters, increased competition, longer hours, longer, narrower tracks to partnership, more tenuous client relations, less time for public service and recreation, and narrower fields of work.[278] But to say this is to state a claim for thin identity—for more distance between base self interest and the role—and for professional recognition of lawyers who commit to it.

The service norm and thin identity may indeed challenge a person's moral integrity, but the depth and severity of this challenge will turn significantly on whether professional rewards are structured to bolster the role choice. As Bernard Williams argues, if a professional role is justified "then there can be only superficial divergences—the everyday morality will contain the professional morality as an application of itself to special circumstances."[279] Renewing traditional professional recognition symbols can help tend to these superficial divergences and help sustain personal integrity.[280] Giving the lawyer discretion to break from role to preserve moral integrity, on the other hand, simply obviates the role in favor of common morality and it presents all the concerns about abuse of discretion discussed above.

On a deeper level, there is reason to question whether role critics have essentialized a concept of "the self" in their argument that moral integrity requires coherence between role demands and the demands of common morality. First, as the typology of identification shows, problems of alienation, bifurcation and role dominance can arise *whenever* there is tension between role demands and one's personal beliefs. These beliefs

276. On craft mastery at least, see Curtis, *supra* note 18, at 22.

277. *See* RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 21, at 33.

278. *See id.* at 32-35.

279. Bernard Williams, *Professional Morality and Its Dispositions*, *in* MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS, 1982-1993, at 193 (1995). If the role is not justified on the terms of common morality, Williams contends, "then it is not a professional morality but a different one," *id.*, and disaffection would be an entirely natural response to playing the role.

280. *See* Talcott Parsons, *The Professions and Social Structure*, *in* PARSONS, ESSAYS IN SOCIOLOGICAL THEORY 44 (1954).

may be purely egoistic, or other-directed but inconsistent with the dictates of common morality. Thus maintaining personal integrity in the role, if that is the goal, is not just a question of maintaining coherence with common morality. The self is more than moral consciousness—i.e., more than its identity with common morality—in short, more than role critics assume. In this sense the problem of integrity is much larger than role critics suggest.

At the same time, the problem of moral integrity as role critics have framed it rests on a concept of the self that seems remote from modern experience. As Robert Post has written, "We owe especially to the sociologist Erving Goffman the insight that the self in modern society can be understood not as something of substance that actually exists, but rather as a series of performances. The character attributed by others to an individual is the result of these performances."[281] But, Post adds, the insight provokes resistance: "It is of immense importance for us as a society . . . to deny this insight. We get queasy when we view the personality of others to be constituted merely by a series of staged performances."[282] Moral philosophers, especially, get queasy. Their idea that the immorality of roles can alienate or overwhelm a person presupposes not only an authentic self behind the social roles a person plays (a supposition, Post suggests, society at large seems to share with philosophers), but also that this authentic self is the authentic source of common morality.[283]

If an authentic self does not exist, but is rather a melange of roles (or if the self exists but is constituted not so much by commitment to moral deliberation as by egoism and desire), the link between moral integrity and "being oneself" in one's roles

281. Post, *supra* note 237, at 387.

282. *Id.*

283. As David Luban concisely describes:

> [T]o one important tradition of moral theory, the "original actual self" is not a mere construct. This tradition, tracing back to Kant, holds that we have a common morality because we are free and equal moral agents. Now obviously, insofar as we are identified with our social roles we are neither equal nor free; the Kantian conception of moral agency therefore identifies the person, the moral agent, with a self that is distinct from its roles . . . [it] adds that common morality exists because, as moral selves, we really are persons *simpliciter*.

LUBAN, LAWYERS, *supra* note 138, at 112.

becomes tenuous.[284] Among other observers of American culture, Ralph Ellison artfully suggests that authentic selfhood does not exist—that "masking" is constitutive of American identity and its peculiar commitment to autonomy and pluralism:

> Americans began their revolt from the English fatherland when they dumped the tea into Boston Harbor masked as Indians, and the mobility of the society created in this limitless space has encouraged the use of the mask for good and evil ever since. As the advertising industry, which is dedicated to the creation of masks, makes clear, that which cannot gain authority from tradition may borrow it with a mask. Masking is a play upon possibility and ours is a society in which possibilities are many. When American life is most American it is apt to be the most theatrical.[285]

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284. Luban (unique among role critics in this respect) concedes the problem of assuming a self independent of social roles to mark the tension between common morality and role demands:

> Common morality cannot be described without incorporating social roles: if it is, the result is empty and barren. . . . [Nor can] one . . . live outside social roles: to pretend to do so is merely the romantic posturing of one particular sort of social role—one so laden with self-deception that it is scarcely admirable.

Id. at 115. He thus abandons the attempt to ground the argument against nonaccountability in the threat to lawyers' moral integrity and instead turns to the moral personhood of those affected by lawyers operating under neutral partisanship. "Our independence from roles derives from the claim of the moral *patient*, the person affected by our actions, and not the agent. It is for the sake of you as 'poor old ultimate actuality,' and not for the sake of me, that I must be able to break loose from the duties of my station." *Id.* at 126 (emphasis original). The "morality of acknowledgment," as he calls it, requires that:

> [W]e reserve our autonomy from our stations and their duties so that we have freedom to respond to persons *qua* persons. . . . The situation is curiously asymmetrical . . . . It is a delusion to think of *myself* as just a person *qua* person, a 'me' outside of my social station; but when the chips are down, it is immoral to think of you as anything less.

Id. at 127.

All I can say in response to Luban's thoughtful modification of role critics' integrity thesis is that the "morality of acknowledgement" seems remarkably consistent with the service norm as I have defended it. The only difference is that the service norm assumes a narrower field of acknowledgement (acknowledging and serving the personhood of existing and potential clients within the bounds of the law). This may be all the difference in the world to Luban, but if both the competence and distributive prongs of the service norm are actually met, I think the difference in most cases will be insignificant. In short, what Luban views as a moral problem, I view as primarily distributive.

285. Ellison, *supra* note 2, at 108

Behind the mask, for Ellison at least, lies not authentic selfhood, but "the joke that always lies between appearance and reality, between the discontinuity of social tradition and that sense of the past which clings to the mind."[286] "For the excolonials," he adds, "the declaration of an American identity meant the assumption of a mask, and it imposed . . . the discipline of national self-consciousness . . . ."[287] Under conditions of pluralism, this discipline puts all of us in the position of masking, but it renders the lawyering role especially prone to the kind of ambivalence that produces alienation, bifurcation and role domination. As Robert Post argues:

> Lawyers . . . bestride the following cultural contradiction: we both want and in some respects have a universal, common culture, and we simultaneously want that culture to be malleable and responsive to the particular and often incompatible interests of individual groups and citizens. We expect lawyers to fulfill both desires, and so they are a constant irritating reminder that we are neither a peaceable kingdom of harmony and order, nor a land of undiluted individual autonomy, but somewhere disorientingly in between. Lawyers, in the very exercise of their profession, are the necessary bearers of that bleak winter's tale, and we

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286. *Id.*

287. *Id.* Trilling was onto the same "joke":

> The democratic style doesn't signify an absence of sincerity; it does, however, indicate that the personal self to which the American would wish to be true is not the private, solid, intractable self of the Englishman. And in this respect the American self can be taken to be a microcosm of American Society, which has notably lacked the solidity and intractability of English society; it is little likely to be felt by its members as being palpably there. The testimony on this score is one of the classic elements of nineteenth-century American cultural history. James Fenimore Cooper, Hawthorne, Henry James, all in one way or another said that American society was, in James' phrase, 'thinly composed,' lacking the thick, coarse actuality which the novelist, as he existed in their day, needed for the practice of his craft.

TRILLING, *supra* note 15, at 113. *See also* Richard Rorty, *The Priority of Democracy to Philosophy*, *in* 1 RORTY, PHILISOPHICAL PAPERS: OBJECTIVITY, RELATIVISM, AND TRUTH 176 (1991) ("In our century [the] rationalist justification of the Enlightenment [project] has been discredited . . . . The result is to erase the picture of the self common to Greek metaphysics, Christian theology, and Enlightenment rationalism: the picture of an ahistorical natural center, the locus of human dignity, surrounded by an adventitious and inessential periphery.").

> hate them for it. . . . We hate them, that is, because they are our own dark reflection.[288]

Post is writing of the popular conception of lawyers, but we might say with equal force that lawyers hate themselves—that alienation, bifurcation and role domination are conditions of the cultural contradiction lawyers bestride. And even if each of these responses to the role is, in its extreme form, something to resist (through proper structuring of professional recognition and rewards, if nothing else), perhaps no one can or should be entirely comfortable in the role. "[I]t is worth asking," Bernard Williams insists,

> [W]hether it may not be worthwhile encouraging some qualms rather than devoting all efforts to making the qualms go away. . . . What is needed is . . . a general structure or tone that makes it clear that the imperfections of the world in which the professionals operate include the fact that they cannot reconcile what they need to do with what they would like only to have to do. *Such a formation seems all the more appropriate to lawyers, whose profession, more than most, exists because of imperfection.*[289]

This is not just realism about the lawyering role. It provides the beginnings of a reply to the second category of concerns regarding the habitability of the role. Williams' argument for accepting discomfort in the role is consistent with the principle of thin identity insofar as it militates against any simple unification of "self" and role. Public accountability for lawyers, on the other hand, is designed to close the gap between "self," role and society.

Once morality is disentangled from the concept of an authentic self, it is also possible to see how lawyers operating under the service norm may nevertheless effectively spot and rea-

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288. Post, *supra* note 237, at 386. Bernard Williams notes that the public's poor regard for the profession

> is the product of our needing things done that cannot be done, or cannot be well done in present circumstances, without the help of activities which in virtue of some more general ethical dispositions we regard poorly. One is under no necessity to bring it about that one's ethical dispositions should be made exclusively responsive to approval and disapproval, in the sense of what one thinks ought or ought not to obtain. That, once more, would involve the reduction of disposition to casuistry.

Williams, *supra* note 279, at 200.

289. Williams, *supra* note 279, at 198-99 (emphasis added).

son through moral questions embedded in legal issues. They may in fact do better than lawyers seeking to vindicate their own moral vision in the role. Against Postema's claim that "cutting off professional deliberation and action from their sources in ordinary moral experience . . . [renders] the lawyer's practical judgment . . . ineffective and unreliable,"[290] must be placed the proposition (with apologies to Oscar Wilde) that bad lawyering springs from genuine feeling.[291] The lawyering role is quintessentially histrionic. The notion that sound judgment and persuasive legal reasoning demand anything more than the *appearance* of sincerity wars with this basic fact of the role.[292] Moreover, Postema's claim exaggerates the amorality of the service norm. Under the principle of thin identity, a lawyer must remain detached in order to dispassionately assess the law, and she is not accountable for the moral worth of her client's ends. But, as we saw this in the context of *Spaulding v. Zimmerman*, the duties of competence and loyalty still demand that a lawyer effectively consider the moral contours of legal doctrine when moral claims are relevant to sound advice and adjudication. The lawyer who loses the capacity to see the moral dimensions of law and the moral concerns of judge, jury and client is deviating from the service norm, not adhering to it.

And as for a habit of reluctance, I frankly see greater prospects in the professional independence thin identity promises than in the morass of role confusion thick identity invites.

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290. Postema, *Moral Responsibility, supra* note 11, at 79. *See also* KRONMAN, *supra* note 7, at 141-43 (arguing that for lawyers to be effective, they must become "connoisseurs of the law" by sharing judges' unique commitment to "the good of the legal order as a whole, the good of the community that the laws establish and affirm").

291. As Lionel Trilling describes, Wilde's claim was:

> not . . . merely that most genuine feeling is dull feeling, nor even that genuine feeling needs the mediation of artifice if it is to be made into good poetry [but rather] that the direct conscious confrontation of experience and the direct public expression of it do not necessarily yield the truth and indeed that they are likely to pervert it. "Man is least himself," Wilde said, "when he talks in his own person. Give him a mask and he will tell you the truth."

TRILLING, *supra* note 15, at 119.

292. *See* Curtis, *supra* note 18, at 9.

C. Cause Lawyers

How can thin identity be squared with cause lawyering? Perhaps it cannot. Cause lawyering powerfully suggests that thick identity can support the service norm, not just undermine it—that lawyers motivated by intense identification with the plight of marginalized groups not only meet the distributive prong of the service norm more fully than lawyers in private practice ever do, but they also often meet the highest standards of competence and diligence in representation. And in many cases they do both despite unimaginable resource constraints, social antipathy and recalcitrant courts. So, at least until the profession as a whole rises to the demands of equal access to legal services,[293] it is appropriate to permit, perhaps even to cultivate, identification between willing lawyers and needy clients.

But notice the framework of this proposition. As I have just described it, the central premise of cause lawyering is identification with *needy* clients and their cause(s)—the most needy being those who are not only impecunious but socially and politically marginalized or subordinated. If this is cause lawyering in ideal typical form, and I believe it is, it strikes me as the highest order manifestation of service through thin identity—being willing to serve where the most dire need exists quite irrespective of whether one identifies with the personal attributes or positions of the clients one serves and quite irrespective of the prospects for material reward or social approval. Both prongs of the service norm are maximized and the real object of identification is a criterion of need, not any specific client or any other attribute by which prospective clients could be grouped. Moreover, in order to serve the needy effectively, identification on other grounds would often have to be irrelevant to the lawyer's motivation.

Obviously, cause lawyering does not always, perhaps does not often, take this ideal typical shape.[294] Many lawyers choose

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293. The public could do better too. The Legal Services Corporation is drastically underfunded because of ugly political disputes about whether and to what extent the state should subsidize access to legal services for the poor. *See* Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 U.C.L.A. L. REV. 474, 532 n.365 (1985). Here Congress has done little better than the Supreme Court.

294. *See* text accompanying note 208. *Cf.* Kilwein, *in* CAUSE LAWYERING, *supra* note 123, at 187, 193 (1998) (describing cause lawyers who "shared a belief that a major problem with the justice system is the level of unmet legal need

a public interest field based on personal or positional affinity with the underlying client base, or at a slightly greater remove, with the legal or political issues presented in that field.[295] And so the professional identity of cause lawyers is normally thicker than the ideal type suggests. But nothing in what I advocate would preclude outright a role for identity in this kind of choice. My only claim is that the farther a cause lawyer finds herself from the ideal type (the farthest remove being a role wholly centered around vindication of the lawyer's moral or ideological vision of the world), the weaker her claim to a "cause lawyering exemption" from the principle of thin identity and the more vigilant she must be against the dangers of thick identity.

Lawyers ideologically motivated to serve well-funded, socially dominant or secure interest groups are very far afield from the ideal type. So too are lawyers serving subordinated groups who have placed their own interests and ideals ahead of the communities they purport to represent. Clients surely do not always come to lawyers with well-formed legal objectives, so there is an inevitable process of translation in which the lawyer's personal views may infect her advice to clients. But I reject the notion that it therefore makes no difference whether the professional norm endorses paternalism or nevertheless insists that the lawyer assiduously work to expose, explicate and defer to the client's objectives.

D. Role as Calling

This still leaves the problem of how to motivate all lawyers to embrace the service vision of the role without grounding it in a logic of identification. The service norm requires, in the first instance, orientation of the lawyer's faculties toward the needs

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among the disadvantaged and that something had to be done about it . . . there was agreement that they, as lawyers, had both the ability and the responsibility to work to ameliorate this supply problem.").

295. See, for instance, Aaron Porter's description of Charles Hamilton Houston's vision of law as "a tool for social engineering" for blacks. Aaron Porter, *Norris Schmidt, Green, Harris, Higginbotham & Associates: The Sociological Import of Philadelphia Cause Lawyers, in* CAUSE LAWYERING, *supra* note 2, at 158; *see also id.* at 166 (describing Austin Norris' insistence that "the role of African American lawyers was to secure civil rights and to help build and advance the community in light of difficult circumstances"). See also David Wilkin's fine definition and discussion of the "obligation thesis" for black lawyers in Wilkins, *Two Paths, supra* note 7 at 1985-2013.

and interests of her clients. The role is thus not oriented around the person of the lawyer and the requirements for her self-realization. But this is not to say that thin identity precludes the possibility of self-realization and personal enrichment. Service is not without its rewards. The substance of lawyering can surely be mind-numbing at times, but the craft mastery required, the awesome responsibility of having a client's fate in one's hands, and the satisfaction of meeting another's needs are all permissible objects of identification within a framework of vigilant thin identity.

Demanding *thin* professional identity is thus different from demanding *complete non-identitfication*—a total and inelastic bifurcation of role and self. As my discussion of professional reforms suggest, I do not advocate a stoic regime in which the lawyering role is viewed with utter disinterest by those who play it,[296] or a bureaucratic regime so committed to the concept of service that lawyers are permitted no discretion in their choice of fields and their decisions to accept or reject representation. In all but the most coercive social structures (and probably there too), either regime would undermine the very conditions for realization of the service norm. Bureaucratization, in particular, would rightly provoke resistance from the bar. As the Preamble to the Model Rules contends, "[a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."[297]

What I do believe is that the service vision is fundamentally a more humble concept of lawyering than either the strong version of neutral partisanship role critics decry, or the civic republican vision of moral activism they advocate. But

296. *See* Curtis, *supra* note 18, at 19-20. For the same reason, thin identity and the service norm are distinct from what Sanford Levinson and David Wilkins have called "bleached out professionalism." *See* Levinson, *supra* note 7, at 1578; Wilkins, *Identities and Roles, supra* note 7, at 1504. This is not the place to explore the distinction in detail, but just as our reconsideration of *Spaulding v. Zimmerman* revealed that a genuinely client-centered approach to the role will often demand morally conscious lawyering, so too, a genuinely client-centered and service-oriented approach to the role will often demand racially conscious lawyering—sensitivity to both the law and politics of race as it relates to one's case. See Wilkins, *Identities and Roles, supra* note 7, at 1571, 1580-90 (carefully arguing both that group-based moral commitments are not necessarily inconsistent with the demands of the role and that the role often demands group-conscious action of lawyers).

297. MODEL RULES, *supra* note 26, pmbl.

humble callings defined by a principle of thin identity can nevertheless provoke intense dedication. Most of the humbler and less financially enriching forms of public service take this shape. Teaching, policing, and nursing all come to mind.

More mundanely, enhancing positional diversity would pull lawyers out of the drudgery of routinization that increasingly specialized work has created in many fields. And for lawyers in private practice, pro bono work or work by judicial appointment is not only likely to bring positional diversity, but the direct rewards of meeting the distributive prong of the service norm through representation of the most needy. For these reasons, positional diversity is an end in itself—part of the intellectual attraction of law that, combined with its deep social significance, brought so many of us to the field in the first place.

I am painfully aware of role critics' complaint that neutral partisanship (to return to their term) has been used ideologically by the profession to provide a consoling public theory of professional responsibility that masks rent-seeking, amoral behavior. But as Gramsci says, "a concept may arise as an instrument for a practical and occasional end and nonetheless be intrinsically true."[298] Whatever its historical integument,[299] I think the truth in the service norm better serves the underlying interests of clients (and role critics) than would a return to republican ethics. I also see greater potential for success—less balkanization of the profession for one thing, and stronger grounds for expanding access to legal services for another—in calling the profession to account *on its own terms* rather than in terms of an absent concept of justice or morality.

298. Antonio Gramsci, *Hegemony, Relations of Force, Historical Bloc, in* THE GRAMSCI READER: SELECTED WRITINGS 1916-1935, at 198 (ed. David Forgasc 2000).

299. *See* Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. _ (forthcoming 2003).