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Moral Disengagement and Lawyers: Codes, Ethics, Conscience, and Some Great Movies

Marianne M. Jennings*

"The prosecution is not going to get him because I am. My client is guilty and he deserves to go to jail."1

The quote is from the opening statement of lawyer Arthur Kirkland, an ethically troubled soul, in the film *And Justice for All*. Kirkland/Pacino was not ethically troubled in the sense of disciplinary rule ("DR") violations;2 he was having trouble with the notion of moral disengagement.3 Pacino had fairly solid evidence that the defendant he was representing in the case was indeed guilty.4 But Pacino was pressured5 into representing a guilty and

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2. Although part of the plot of the film does involve a state bar investigation of Kirkland (with the State Bar represented by Christine Lahti, who switched drama careers from lawyering to doctoring in the 90s in *Chicago Hope*). "Ethically troubled" is used here in the moral sense, not the state bar sense. As well all know, the model rules and code of Professional Responsibility (DRs) have absolutely nothing to do with ethics. See, Marianne M. Jennings, *The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing To Do With Ethics: The Wally Cleaver Proposition as an Alternative* 1996 Wis. L. Rev. 1223 (1996).

3. Moral disengagement is defined *infra* note 12. It's a philosophical and intellectual term that could perhaps lead a reader to believe he/she has encountered an intellectual author. The author felt it best to allow the illusion to remain for at least eight footnotes.

4. "Solid evidence" is defined here to be his client confessing to him that he did rape and beat the victim and, in fact, as the client explained to attorney Kirkland, would like to do it again. Nothing like an honest, albeit brutal, client.

5. It seems that Pacino/Kirkland had disclosed another client's desire to commit another crime, hence Christine Lahti and pressure from the State Bar to have Crackerjack Kirkland represent the very bad judge. The film is loosey goosey with DRs but, in Hollywood, Larry Flynt looks like Woody Harelson, too. Reality is, in many films, a victim. *See, e.g.*, Sally Field in *NORMA RAE* (Twentieth Century Fox 1979), where she played a poor Southern textile worker who unionized most of the South. The story is true, it's just that it was hard to see Gidget and the flying nun in the struggle of the human condition. Also, recalling her role with Burt Reynolds in *Smokey and the Bandit* (Universal Pictures 1977) did not lend credibility.
dangerous man. During the course of the film, Pacino witnesses lawyers representing the guilty a bit too zealously, lawyers missing hearings, lawyers being entirely cavalier, and judges imprisoning the innocent. Finally, realizing he is unable to defend a guilty judge in good conscience, Pacino snaps and tells the jury his client is guilty.

What is perhaps most revealing about this opening statement/Pacino scene in which a lawyer turns on a client is what happens when the scene is shown to a room full of lawyers. There is laughter, cheering, and a palpable sense of relief. In an odd moment of cinematic catharsis, it is as if Hollywood captured the secret desire of every lawyer's heart.

6. Who also happens to be a judge, who, supra note 4, confessed to a crime and the desire to do it again. The cognitive dissonance for this guy must have buried the needle on the moral disengagement meter. The meaning of this sentence will unfold, but a simple translation: how does an actively pummeling judge remain on the bench sentencing other pummelers?

7. Largely because of cavalier lawyers.

8. The film is worth a Blockbuster Tuesday $1.50 rental. Jack Warden is a gun-toting trial judge who can't quite take that final step for suicide, although he tries just before going into court each day. John Forsythe, who, for you 70s' television trivia buffs was the voice of Charlie in Charlie's Angels, is the perverse and guilty judge. And Craig T. Nelson is the district attorney who uses terrific sports analogies in his opening statements, thus foreshadowing his Coach role. The film also offers a unique courtroom occurrence of applause for Nelson's opening statement. The author has no authority to cite indicating applause for prosecutorial opening statements is unique, but, she did survey a couple of lawyers whose uniform response was along the lines of, "Never going to happen in my lifetime."

9. Actually, the scene was shown to a two rooms full of lawyers in June 1997 as part of the Lincoln Center series, "Law, Ethics and Cinema," June 3, 10, 17 and 24, 1997, in Phoenix and Tempe, Arizona.

10. Which is, apparently, to state publicly what they truly believe about their clients and/or case. But, we are trained to the hilt on client privilege. Only Alan Dershowitz is allowed to criticize clients, lawyers, Jerry Falwell, and, really, anyone he likes because, well, he is Alan Dershowitz, defender of the truly guilty. Remember, Mr. Dershowitz is the author of books such as CHUTZPAH (1979); THE BEST DEFENSE (1982), (which is described on the cover as "The Courtroom Confrontations of America's Most Outspoken Lawyer of Last Resort"); REASONABLE DOUBTS: THE CRIMINAL JUSTICE SYSTEM AND THE O.J. SIMPSON CASE (1997); and SEXUAL MCCARTHYISM: CLINTON, STARR, AND THE EMERGING CONSTITUTIONAL CRISIS (1998) (hereinafter SEXUAL MCCARTHYISM).

Mr. Dershowitz offered this insight on his standards for screening clients, "Once I decide to take a case, I have only one agenda; I want to win. I will try, every fair and legal means, to get my client off—without regard to the consequences." ALAN DERSHOWITZ, BEST DEFENSE, XIV-XV (1982).

Also, Mr. Dershowitz on truth and trials:
A criminal trial is anything but a pure search for truth. When defense attorneys represent guilty clients—as most do, most of the time — their responsibility is to try, by all fair and ethical means, to prevent the truth about their client's guilt from emerging. Failure to do so . . . is malpractice.
While lawyers have been trained with the notion of justice for all, that notion mandates representation not just of the guilty but, occasionally, of the repugnant. In theory, that representation is indeed noble and necessary for our system of justice to work. In practice, such carte blanche representation requires a lawyer to participate in moral disengagement. Divorcing one’s personal convictions from the act of representation, which may involve offense to those personal convictions, is a tall order. The ease with which that order is assigned to advocates presupposes that moral disengagement is possible and that it can be contained or easily turned off and on, thus keeping it within the parameters of representation, or lawyering.

Arthur Kirkland’s snap and lawyers’ reaction to it are hardly commonplace. But moral disengagement still creates an ethical


11. Actual numbers may vary depending upon the lawyer’s career track, clients, partners, said lawyer’s own partnership status or desire for such, and work with Alan Dershowitz.

12. “Moral disengagement” is a hifalutin psychological term for the process through which individuals detach the moral standards of lawyering and the legal system from their internalized moral control mechanisms when those moral standards are contradicted. See ALBERT BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY (1986); Albert Bandura et al., Mechanisms of Moral Disengagement in the Exercise of Moral Agency, 71 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 364 (1996). Translation: what I do at work has absolutely nothing to do with my personal life. Please note, the author did begin work on this piece prior to Clinton, Lewinsky and popular theories on compartmentalization. Moral disengagement is also the explanation for more criticism of lawyers’ role. Richard Wasserstrom explains it as follows:

I examine two moral criticisms of lawyers which, if well-founded, are fundamental... The first criticism centers around the lawyer's stance toward the world at large. The accusation is that the lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind. The second criticism focuses upon the relationship between the lawyer and the client. Here the charge is that it is the lawyer-client relationship which is morally objectionable because it is a relationship in which the lawyer dominates and in which the lawyer typically, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion.


13. This is also hifalutin language that translated says: It is especially hard to not have your lawyer thinking cross over into your personal life. You won't necessarily file a brief before deciding who takes out the garbage in your house, but you will find yourself behaving like Jim Carey in Liar Liar (Universal Pictures 1997), in which Fletcher (Jim Carey) lies to his son, his wife, his secretary, judges, receptionists, senior partners, and his own mother because lying is his stock-in-trade for getting results from clients and slowly consumes all aspects of his life.
pressure cooker from which there is no release.\textsuperscript{14} Yet, moral disengagement is largely ignored in the literature on legal ethics when it may well be the root cause of what the public perceives as the decline of lawyer ethics, effective advocacy, and general lawyer trustworthiness.\textsuperscript{15} Moral disengagement, or its modern label of compartmentalization, requires suppressing one's moral conviction in the interest of preserving justice.\textsuperscript{16} Such distinction is a noble activity in the name of justice but still requires some form of rationalization.\textsuperscript{17} The activity of rationalization is treacherous territory in business, professional, and personal lives, but it is peculiarly dangerous for lawyers.\textsuperscript{18} Rationalization in ethical

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\item At least no release like Arthur Kirkland if one expects to continue in criminal defense work. Telling juries your client is guilty has been shown, via marketing studies, not to be an effective promotional tool for recruiting criminal defendant clients.
\item Lawyers were ranked dead last (with the word “dead” carrying literal meaning) by the public for honesty and integrity. JAMES PATTERSON AND PETER KIM, THE DAY AMERICA TOLD THE TRUTH (1991). The public in Arizona alone has been treated to some fascinating glimpses of lawyer charm. Last year, the State Bar permitted a convicted murderer to sit for the bar exam. He did not pass, but he was then hired to teach at Arizona State University. Those who can do, those who can’t teach and those who murder can go on to law school and perhaps a tenure-track teaching position. One can only imagine the lectures, “Now, class, when I committed my murder, \textit{Miranda} was the last thing on my mind. . . .” Then you have the lovely Carmen Fischer, a criminal defense lawyer who truly believed her client’s story and even went so far as to use consultation time periods with her client to really delve into her client’s soul. Don Bivens, \textit{State Bar Expects Lawyers to Act Ethically, Professionally}, ARIZ. REP., MAR. 22, 1999, B4. “\textit{Delving into the soul}” is a hifalutin term for \textit{conjugal visit}.\textit{ Conjugal visit} is a hifalutin term for \textit{jail house rock}. \textit{Jail House Rock} is an Elvis song, but the author digresses. Carmen Fischer’s visits lasted some 4.5 hours with sheriff’s deputies standing around asking, “What can she possibly see in a convicted murderer?” And the sharp retort was, “He could get tenure someday.”
\item Although, the notion is not all that modern. The A.B.A. Canons of 1908, which remained in effect until the 1970s, provided, “The client cannot be made the keeper of the attorney’s conscience.” Code of Ethics Adopted by Alabama State Bar Association, 118 ALA. REP. xxiii, xxix (1899) as adopted by the A.B.A., Walter P. Armstrong, Jr., A Century of Legal Ethics, 64 A.B.A. J. 1063 (1978).
\item Rationalization is how all great scams, frauds, Ponzi schemes, and third-rate burglaries are committed. The language of rationalization can be, “if they’re this dumb, they deserve to lose the money.” “Everybody does this.” “No one is really hurt.” “They can afford the [outright fraud] [burglary] because they’re wealthy.” While some burglars/perpetrators are philosophical Marxists committed to redistribution of wealth, most are committed only to expanding the chain of wealth distribution to themselves; i.e., the buck stops here, although not of its own volition, is also part of their motto.
\item Under the professional rules, lawyers are to make decisions that are based on their impact on their client, not society. It’s consequences for the client, not consequences for society. See e.g., Stephen Eilman, \textit{Empathy and Approval}, 43 HASTINGS L.J. 991 (1992) and DAVID A. BINDER, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991). Just the nature of our rules opens the door for rationalization not available to the public at large, e.g. we may know who did it but we get to withhold that information. So, it is not a terrific moral leap to conclude, when deciding what to disclose in contract negotiations, that withholding material information is no different from protecting a client’s interest. And the path
dilemmas is the beginning of ongoing moral lapses and ethical breaches. At the heart of ethics for lawyers is the issue of moral disengagement and its potential impact on other aspects of an advocate's personal and professional life. Once the decision to disengage morally from one's professional life is made, the lapses in conduct, as measured by any standard, follow easily. At the

continues from there to fraud. For more examples of the slope, see DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE (1974). In fact, some lawyers decide to join forces with their clients. For example, a lawyer could assure a nervous client in negotiations for a major deal, "This is the way the game is played; you take as much as you can get." Then the lawyer pauses and says to the client, "In fact, could I have a piece of the action?" So long as you're helping, you might as well join in, percentage-wise or in some tax advantageous way.

Thomas L. Shaffer and Robert E. Cochran, Jr., phrase it this way:

Hired gun lawyers, like godfather lawyers, play a role, a role that controls their moral choices. Lawyers who are controlled by morality other than their own are at moral risk. Morality is a skill like other skills; it is something that we learn by doing. As we address problems morally, we develop the capacity to deal morally with other problems. If moral sensitivity has no place in lawyers' daily lives, they run the risk that their moral sensitivity will atrophy. The ethic of vicarious conscience, of role, is morally schizoid; at best, it divides people up, and at worst it gives them excuses for immoral behavior. "Either the moral personality is entirely fragmented or compartmentalized, or it is shrink to fit the moral universe defined by the role."

LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 29 (1994), citing Roger C. Crantion, The Ordinary Religion of the Law School Classroom, 29 J. LEGAL EDUC. 247, 259-60 (1978). There you have it, DRs induce schizophrenia. The author knew this from law school and the bar exam but is relieved to know that the philosophers/psychiatrists have validated the bizarre and unforgiving impact of the DRs.

19. Consider the following path of moral devolution as outlined by George Lefcoe, a former member of the Los Angeles Planning Commission who left politics to enter the honorable profession of murderers, teaching at a university, i.e., law school:

I really missed the cards from engineers I never met, the wine and cheese from development companies I never heard of, and, especially, the honeybaked ham from of all places, Forest Lawn (Cemetery), even though the company was never an applicant before the commission when I was there.

But because I missed them I think it was a good idea that I resigned. I do not think it is wise to stay in public office too long a time.

My first Christmas as commissioner—when I received the ham—I tried to return it at once, though for the record, I did not, since no one at Forest Lawn seemed authorized to accept hams, apparently not even for burial. My guess is that not one of the many public servants who received the ham ever had tried to return it.

When I received another ham the next Christmas, I gave it to a worthy charity. The next year, some worthy friends were having a party so I gave it to them. The next year I had a party and we enjoyed the ham.

In the fifth year, about the tenth of December, I began wondering, where is my ham?


20. It's like Sam Malone (of Cheers fame) said when he got stuck driving a Plymouth Volare instead of his Corvette, "It's amazing how fast you can go and how many laws you can break when you don't care." Once you drive a Volare, you don't care (words to live by). Or, it's like a convicted robber once said about his 127 speeding tickets, "If you're going to rob a 7-11 store, what difference does it make if you get a speeding ticket on the way out?"
very center of the legal profession’s code of ethics, the focus on zealous representation and the duty to the client, is the key to the enigma of moral lapses by so many of its members.

If there is one popular cinematic question posed repeatedly about lawyers it is, “How can you represent the guilty masses yearning to be free?” Oddly, the public has the same question and it is not often the public wants the same questions answered cinematically that Hollywood chooses to answer. At the heart of the public’s concern about lawyers’ ethics is the inevitable moral disengagement lawyers face in honoring their profession’s code of ethics. The drama in moral disengagement is compelling, but resolutions for lawyers troubled by the separation of personal virtue from professional standards have been missing in discussions and lacking in both candor and efficacy.

I. WHAT THE RULES OBLIGATE US TO DO

Professor Geoffrey Hazard gives three core values for the profession that have dominated the many iterations of our code for centuries: loyalty, confidentiality, and candor. Loyalty and confidentiality have produced the rules on keeping clients’ secrets and acting as a fiduciary in the best interests of one’s client.

21. How else could we explain the success of Titanic (Twentieth Century Pictures, Lightstorm Entertainment, Paramount Pictures 1997)? We all knew the boat sunk, but Hollywood insisted on an epic film, which, we should note, ran longer than the actual time it took the real Titanic to sink.

22. For the most part, a lawyer who queries, “But what about moral disengagement?” has pretty much received a pat answer for which CLE credit is available, “Deal with it.” Janice Orens, a lawyer, phrased it this way, “It’s like being forced into a sex relationship you didn’t anticipate. It feels horrible to do something that you wouldn’t do normally.”

Diana Cartwright, another lawyer, said of her role as a lawyer, “I have to contradict myself depending on what role I’m taking . . . it’s sort of a professional prostitution.”

These upbeat thoughts came from RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS, 112 (1989). It’s always lovely to think of one’s profession in terms of white slavery and prostitution. For this I learned the Rule Against Perpetuities?

23. Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE LJ. 1239 (1991). It did not escape the author that the primo expert on ethics in our field is named Hazard. No wonder, see supra note 22.


Legal ethics . . . is concerned with ‘the goodness of someone else.’ I would say that legal ethics is concerned with the limits on how far I can go as a lawyer in helping that person and, therefore, with the limits of that person’s rights. That is, when we write and enforce rules of lawyers’ ethics, we define clients’ rights in fundamental ways.

Candor is the value that produced the rules on honesty with courts; i.e., candor toward the tribunal. The problem with the three core values for the profession is that they have several inherent and conflicting moral dilemmas in and of themselves: Does being loyal and preserving confidentiality mean being less than candid with the court? And what if preserving confidences means that someone will be hurt? And what if being loyal to one’s client means representing someone the lawyer believes to be lower than a rattlesnake in a wagon rut?

The core values of the profession are all well and good but they remain a professional code created and enforced in isolation from personal ethics or even the traditional schools of thought on ethics. The lawyer’s code of ethics is divorced from general notions about ethics such as honesty, not giving false impressions, fairness, and justice. The rules presuppose the ease with which the value of confidentiality can supercede an individual’s moral code of being truthful. 

Translation: we have to look at the client’s rights when we’re lawyers, not the fact that they done scammed three-fourths of Gallup, New Mexico’s population on a uranium mine theme restaurant investment.

25. Candor Toward the Tribunal is Rule 3.3 and is “Thou shalt not lie to the court.” Actually, it’s more like, “Thou shalt not lie in a material way to the court.” Actually, it’s more like, “Thou shalt not lie in a material way to the court, and who are we to define materiality?”

26. That’s less than materially candid.

27. That’s materially hurt, not your run-of-the-mill heart break, Sherman Act violation, or eminent domain. Tobacco, silicone—now you’re talking material.

28. Or, as in the case of Arthur Kirkland, actually knows the client has reached wagon rut levels. To be able to represent such a person, one must morally disengage. Either that or receive a really big retainer. Western jargon always serves to lighten up discussions in legal ethics. Because, start tossing around phrases such as “material candor,” and, well, them’s fightin’ words.

29. Traditional schools of thought on ethics include Aristotle, Kant, and Sister Mary Katherine of St. Agnes grammar school who all believed and taught your hair caught on fire if you lied, cheated or made faces behind someone’s back. (The last is limited to sister Mary Katherine. Kant never, at least the author could not locate it in the index to Kant, addressed it.) Professor Thomas L. Shaffer has noted:

When we make ethical judgment about persons we generally use terms like good and bad in the sense of virtuous or vicious. When speaking of acts or behavior, we generally use terms like right or wrong in the sense of praiseworthy or blameworthy. . . . The great classical writers considered that character was fundamental. Consequently they stressed the importance of developing virtues, or dispositions of character, such as courage, wisdom, temperance and the like. For them rules about particular kinds of conduct were secondary and derivative. By contrast, a legalistic approach to ethics begins with rules about particular kinds of conduct and makes virtue secondary.


30. The author would cite a bunch of ERs, DRs, ECs and AM/FMs here, but, really,
easily reconciled with individual values and lawyers are not permitted, once involved in representation, to voice personal values as a reason for being released from representation.\textsuperscript{31}

II. WHAT DILEMMAS THE RULES AND VALUES OF THE PROFESSION HAND US

Just undertaking representation requires some rationalization on the part of the advocate, whether the client is Timothy McVeigh or Phillip Morris.\textsuperscript{32} The theme of representing the guilty returns as the lawyer takes on a client who is unabashedly in a lot of trouble.\textsuperscript{33} According to the work of Thomas Shaffer and Monroe Freedman, the reconciliation of personal values with code-imposed duties leaves the lawyer with three approaches:\textsuperscript{34}

\begin{center}
\begin{tikzpicture}
\node[align=center,draw,rounded corners] (m) at (0,0) {
\begin{tabular}{c|c|c}
\hline
 & Moral Neutrality & Moral Right of Representation \\
\hline
The guilty and/or repugnant client & Moral Judgment & \\
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\end{tabular}
};
\end{tikzpicture}
\end{center}

A. The Role of Moral Judgment

Those who engage in the middle approach of moral judgment as a means for resolving moral disengagement will not represent one whose work, life, or conduct run contrary to their own individual

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\item once we got through the bar exam and legal ethics class we all pretty much reduced our ethics to loyalty, confidentiality and candor, or in a nutshell/Gilbert's version, "Client wins."
\item The release from representation would have to be based on logistical or technical issues such as an uncooperative client or a conflict of interest or, as Mr. Pacino/Kirkland teaches us, the lawyer could just withdraw by announcing the client's guilt during his opening statement, in full view of the prosecutor, jury and an artist busily rendering. The downside of this method of being released from the obligation of representation is disbarment.
\item Representing tobacco companies was demonized during 1998 because independent counsel Kenneth Starr was found by James Carville to have argued appellate cases on behalf of tobacco firms, a fact which Mr. Carville said established conclusively that Judge Starr was Satan in wingtips. \textit{Demonizing Starr}, \textit{Wall St. J.}, Nov. 19, 1998, A12.
\item I.e., guilty, or perhaps at rattlesnake rut level, see \textit{supra} note 28.
\item The model is adapted from the writings of Monroe Freedman. See \textit{MONROE H. FREEDMAN UNDERSTANDING LAWYERS' ETHICS} (1990) and \textit{THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER} (1981).
\end{itemize}

The example of representation of the guilty is used here because (1) more movies have defense lawyer themes, and (2) it's just easier. But, even the probate lawyer can have a morally repugnant client—one who disinherits mercilessly. A real estate lawyer could have a slum lord client who refuses to supply hot water, dismissing it as a luxury. An employment lawyer could have a union buster client. A presidential lawyer could have Mr. Clinton.
values. Lawyers in this middle category reflect the thoughts of Gene Hackman when he played prosecutor Robert Caufield in the film *Narrow Margin*. Mr. Caufield, when offered a bribe to turn over a witness to some mob goons, explains that he remains a prosecutor because, “I like my side of the courtroom. The pay is not so good but the air’s a lot cleaner. If I wanted to make money, I’d have to represent you and I’d feel like I needed to shower.”

35. *Narrow Margin* (1990) is a classic in-over-your head film in which Hackman plays an assistant district attorney who has been relentless in his pursuit of organized crime figure, Leo Watts. Ann Archer plays a woman who, unbeknownst to Leo, witnesses Watts killing her lawyer blind date. Now that is a bad blind date. It is also probably the worst possible first date if you liked the victim because, well, future dates now fall under the rare common law defense of impossibility. On the other hand, there is always a bright side, even to murder on a first date. If things were not going well, murder does eliminate that awkward refusal for a second date. Following the murder, Archer flees to Canada, Hackman follows and the two, on a train, must try to elude mob figures who have been assigned not to date them but to kill them. Dating is not ruled out, however, under mob rules of engagement, if it provides a murder opportunity.

36. Criminal defense lawyers take great offense at this line. But the lay audience viewing the film breaks into laughter. Professor Freedman addresses the ethical issues in presumed guilt as follows:

> The first question is, “Who is the client?” That is, how do I view my client with respect to my role as a lawyer? The second question is, “What is the concern of lawyers’ ethics?” Shaffer’s answer to the first question is that the client is “this other person, over whom I have power.” His answer to the second question is that legal ethics is “concern[ed] with the goodness of someone else,” that is, the client. He adds that the subject of legal ethics begins and ends with Socrates’ question to the law professors of Athens: “Pray, will you concern yourself with anything else than how we citizens can be made as good as possible?” Even if one disagrees, as I do, with Shaffer’s answers, the process of finding one’s own answers to his questions provides considerable insight into one’s perspective on legal ethics and how it affects one’s answers to particular issues.

> My own answers to Shaffer’s questions are surely affected by my having come to legal ethics from litigation involving civil rights, civil liberties, and the representation of indigent criminal defendants. Accordingly, although I agree that the concerns Shaffer expresses are important to lawyers’ ethics, my attitude toward my client has a different emphasis. I identify the client not as “this other person, over whom I have power” but as “this other person whom I have the power to help.” Thus, my central concern is not so much how I can make my client a better person but rather how far I can ethically go—or how far I should be required to go—to achieve for my client full and equal rights under law. Shaffer thinks of lawyers’ ethics as rooted in moral philosophy, while I think of lawyers’ ethics as rooted in the Bill of Rights as expressed in our constitutionalized adversary system. My view of lawyers’ ethics is, therefore, client-centered, emphasizing the lawyer’s role in enhancing the client’s autonomy as a free person in a free society.

> I also believe that the lawyer’s autonomy must be respected. Except in the unusual circumstances of a court appointment, the lawyer is unconstrained by ethical rules in her choice of areas of practice, causes, and clients. I impress on my students, therefore, that clients lie, cheat, and even kill out of pure greed. If you are not able to deal with that fact of professional life, I caution them, you should not go into the practice of corporate law. Contrary to Charles Fried and other commentators,
In the reconciliation of personal values with professional responsibility, the lawyer who uses the standard of moral judgment must be comfortable with the client and the client's conduct before undertaking representation.37

B. The Moral Right of Representation

A second group of lawyers reconciles personal values with differing client goals, values or levels of guilt by approaching representation as a moral value in and of itself. These lawyers view the right of representation as a fundamental human right. Their view of themselves, as described by Richard Wasserstrom,38 is that of amoral technician whose skills or knowledge are made available to clients. Abe Fortas described this protector-of-rights role of lawyers as follows:

Lawyers are agents ... and they should neither criticize nor tolerate criticism based upon the character of the client whom

however, I do not consider the lawyer's decision to represent a client or cause to be morally neutral. Rather, a lawyer's choice of client or cause is a moral decision that should be weighted as such by the lawyer and that the lawyer should be prepared to justify to others.

Only after the lawyer has freely chosen to represent the client is the lawyer under an ethical obligation to provide zealous representation of the client's interests as the client sees them. Even then, the lawyer has limited but significant scope to avoid involvement in conduct that he or she finds morally offensive. The lawyer should be permitted to withdraw on moral grounds in three circumstances: (1) if the client consents; or (2) if withdrawal can be accomplished without significant harm to the client's interests; or (3) in a matter other than criminal litigation, if the lawyer discovers that the client has knowingly induced the lawyer to take the case or to take action on the client's behalf by material misrepresentations about the facts of the case, and if withdrawal can be accomplished without direct divulgence of the client's confidences.

Grounded in the fundamental values of the Bill of Rights, my analysis of lawyers' ethics gives individual dignity a central place. I expressly reject moral neutrality and nonaccountability; indeed, I believe that moral discourse between lawyer and client is an essential aspect of the lawyer's role. I am therefore nonplussed to find my views cited as a paradigm of moral neutrality, and to find myself accused of favoring zeal and confidentiality as ends in themselves, of being cynical, and of ignoring the concerns of justice.


37. Thus, we had the withdrawal of Timothy McVeigh's original attorney, Stephen Jones, because he realized the bombing of the federal building in Oklahoma City had affected too many friends for him to be involved in the defense in the case. Initially, he thought he could disengage, but the impact, so to speak, was too personal. His defense lasted 31.5 days. Also, his client called him a liar, always a signal the relationship has deteriorated. Criticizing Client, McVeigh Lawyer Asks to Withdraw, WASHINGTON POST, August 21, 1997, A9.

they represent or the cause that they prosecute or defend. They cannot and should not accept responsibility for the client's practices. Rapists, murderers, child abusers, General Motors, cigarette manufacturers and stream polluters—are entitled to a lawyer.\footnote{Abe Fortas, \textit{Thurman Arnold and the Theater of the Law}, 79 \textit{Yale L. J.} 988, 1002 (1970). Mr. Fortas makes an equal justice-for-all argument. However eloquent in reason, lawyers have not uniformly embraced the universal right-to-a-defense. See e.g., Independent Counsel Kenneth Starr, \textit{supra} note 32. It did not escape the author that GM is ranked right up there with rapists, murderers and child abusers. I could understand putting Kia in that category, but GM?}

Under this view, lawyers are agents, not judges, and they protect the system, not clients.\footnote{There are two difficulties with this rationalization for moral disengagement. The first is that this need for representation crosses all economic boundaries. If the representation itself is truly a moral obligation, with no moral judgment on conduct, then such representation should be available to all. In other words, if the right to representation regardless of repugnancy (RRRR or R 4) is a moral act, then all those seeking representation should be afforded representation. However, lawyers' need for compensation means that clients enjoy the representation needed to preserve the system only to the extent that they can pay. If representation is a role of amoral technician, then all deserve that assistance, regardless of ability to pay. Perhaps the new mandatory pro bono rules are a testament to a rededication to the amoral technician concept. Then again, maybe they're just salve for the guilty conscience. Then again, they could be more rules for state bar staff to monitor, enforce, audit and sally forth into higher budgets and more staff. It's a little known principal of physics and biology the state bar staffs grow as a cubed function of new lawyer rules. One new rule equals three new staff members plus another page in the bar journal. Moral disengagement is not unique to lawyers or law. Business has it too. Andrew Carnegie poured a ton of money into libraries and museums after busting a union. Michael Novak notes, Carnegie's widely propounded principle had always been not to act hastily, never to hire other workers (scabs) to replace strikers, to wait, to listen to them, to reason with them, to reach an acceptable accommodation no matter how long it took. His public view was that well-trained and motivated workers are difficult to replace; it is easier to satisfy a skilled workforce through reasoned negotiation. All this he violated at Homestead. He lived in denial about what he had done, only later confessing how much he regretted it and how much it haunted him. He created an inner cover story to hide his guilt from himself; the pathos is expressed in his \textit{Autobiography}. In Pittsburgh, Carnegie was widely blamed for his moral cowardice—fleeing to his beloved Scotland before the event took place and, once there, publicly affecting to have been incommunicado. But, of course, he learned of events sometimes within hours, certainly the next day or so. Carnegie went to Scotland for months every year, so this charge hardly bothered him. But he often said that he wished in retrospect that he had stayed home and handled matters according to his stated principles. He deceived himself into thinking that he would have done differently in person than his subordinates did, conveniently masking (even from himself, perhaps) the orders he had given them. He was certainly a moral coward in never owning up to his personal responsibility, not even in private. He did express bitter regrets. Months afterward, Carnegie went back to Pittsburgh, spoke before the townspeople of Homestead, and in later writings magnified out of all proportion the support a few
equated this view to the Aristotelian View.\(^4\)

**C. The Morally Neutral**

The third group of lawyers engage in a form of rationalization with an Adam Smith, invisible hand ring to it.\(^4\) The decision maker in any particular case will work through the advocates, the good, the bad,\(^4\) those with character, those without character, and those who show up pursuant to being awarded a contract pursuant to a public defender bid. Under this view the lawyer not only makes no judgments about the client's behavior,\(^4\) the lawyer justifies workers expressed for him personally. He tried to make up in philanthropy for Homestead for the wrong done, building a huge complex that housed a library, auditorium, swimming pool, and gymnasium, and later leaving an endowment to support additional pensions for his workers and for other families in need. Unlike most of his other philanthropies, however, his gifts to Homestead, grand as they were, carried the attic odor of atonement come too late. Still, it was atonement and to that extent a veiled admission of guilt.

**MICHAEL NOVAK, BUSINESS AS A CALLING** (1996), at 61.

Lawyers represent public housing tenants after representing John Gotti. It's penance. Or David Kendall represents William Jefferson Clinton after representing The National Enquirer. The author realized the analogy has broken down: for during much of 1998, Clinton was The National Enquirer.

41. For you non-philosophers, the Aristotelian View is a hifalutin term bandied about in moral circles. Translated for those who know trees falling in woods make sounds: Virtue. (Same as what Sister Mary Katherine taught. See supra note 29.) Aristotle was a guy who felt there was right and wrong; i.e., not a moral relativist and definitely not amoral. **ARISTOTLE, MAGNA MORALIA** (George Stock trans., 1915). Aristotle was a demanding guy.

42. Adam Smith, for you non-economists out there, said that competition serves as an invisible hand which regulates the market place. His theories and book, **AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS** (1776), were developed through his observations at a pin factory. Just an aside on economics in case the reader is ever on Jeopardy. "I'll take the history of economic theory for $100, Alex."

43. The cinematic flavor of this piece tempts the author to add "ugly" here, but discretion is the greater part of footnoting and valor. See **THE GOOD, THE BAD AND THE UGLY** (Produzioni Europee Associati (Italy) 1966) (a Clint Eastwood spaghetti western that launched Dirty Harry, a Clint Eastwood cop who called criminals punks—definitely not an amoral technician guy).

44. The author wishes to raise the flag once again on moral disengagement:

Those who refuse to pass judgment on a client generally seem to assume that such neutrality is value-free. But individuals cannot market their loyalty, avert their eyes to the consequences, and pretend they have not made a normative decision. To decline to take a moral stance is in itself a moral stance and requires justification as such. Thus the critical question is not by what right do lawyers impose their views, but by what right do they evade the responsibility of all individuals to evaluate the normative implications of their acts? Alternatively, by what right do clients circumscribe counsels' ethical duty?


Moral schizophrenia comes to mind or minds, so to speak. "Either the moral personality is entirely fragmented or compartmentalized, or it is shrunk to fit the moral universe defined by the role." Gerald J. Postema, **Moral Responsibility in Professional Ethics**, 55 N.Y.U.L. REV.
eloquence, deftness of motion, and other trial strategies as appropriate advocacy because of the inherent wisdom within the system and its ability to consider the needs of the community and make a just determination. The lawyer, therefore, need not be concerned with right or wrong because a higher power, like an invisible hand, metes justice.

There is some support in the professional rules for the position of moral neutrality. For example, lawyers cannot vouch during the course of a trial and the rules reflect nearly two centuries of

63, 79 (1980).

45. Both in the paper motion, as in motion to dismiss as well, as in the courtroom sashay. The western theme, supra note 28 continues.

46. This form of rationalization allows Johnnie Cochran (to paraphrase comedian Dana Carvey) to stand before a jury, while facing a mountain of DNA evidence that shows that only O.J. and a guy in Borneo, who has the alibi of coconut tree activities in a different hemisphere at the time of the murder, could have committed the Goldman/Brown double homicide and thunder with indignation, "Why are we even having a trial here?" (See Dana Carvey's Comedy Central Special).

Mr. Cochran also successfully argued the case that Detective Mark Fuhrman stood on the lawn of Mr. Simpson's home at 5:30 A.M. on the day following the murder and said to each passing uniformed officer and suit-clad detective, "We're framing O.J.—are you in?"

Mr. Cochran then went on to bring into his conspiracy theory frame-up the LA county labs, the FBI labs, forensic scientists, dispatchers, Kato, Marcia Clark, and the guy in Borneo who halted his coconut-tree activities when his local sheriff stood at the bottom of his tree and shouted, "They're framing O.J. in Brentwood, are you in?"

This form of rationalization also permitted one William Ginsburg, Monica Lewinsky's blowhard and starstruck, albeit temporary, attorney, to offer this explanation, with a straight face, as to why President Clinton spent so much time alone with an intern, "They were colleagues." So, like, girlfriend, is that Saddam bogus or what? As if! If we were to sum up the morally neutral lawyer, the philosophy is, "Ours is not to question B.S., ours is to create it and let others sift through it." For additional B.S., see Andrew Morton, Monica's Story (1999), in which William Ginsburg is referred to as "A sober W.C. Fields," at 227. Also, Ginsburg may not only have morally disengaged, he went on to defeat his own morality. His claim of kissing Monica's "pulkes" when she was six days old ("Pulkes" for you Yiddish novices are inner thighs. Please, this is a family-hour journal) was problematic because Ginsburg did not meet Monica until she was twenty-one. Six days, twenty-one years, pick, pick, pick. Besides, not meeting her until after she graduated from college was immaterial in the "pulkes" story.

47. And judging from the previous examples (see supra note 45), the invisible hand preferably lacks critical thinking skills.

48. For example, Rule 1.2(b) of the ABA Model Rules of Professional Conduct (1995) provides the following separation of lawyer views, lawyer representation, and client views, "(b) 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." Rule 1.2(b) thus protects David Kendall's representation of the National Enquirer and Alan Dershowitz's representation of the guilty who measure 12 on the Richter scale. Interestingly, Judge Kenneth Starr's representation of tobacco interests caused all manner of moral outcry. The difficulty with the espousing the noble cause theory is that the noble cause is apparently in the eye of the beholder.

49. There is no vouching in court (no spitting either, except maybe in Wyoming). Rule
distinction between the lawyer as an advocate and the lawyer as moral agent. Atticus Finch, in *To Kill a Mockingbird*, did not say, “I believe Tom Robinson;” rather he said, “In the name of God,

3.4(e) of the *ABA Model Rules of Professional Conduct* (1995) governs vouching and provides that a lawyer may not “assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.”

It does not escape notice that if there is an invisible hand that sorts through advocacy (i.e., B.S., see supra note 46 (although it has occurred to the author that several other footnotes in this piece could be cited for general B.S. Footnote 46 is referenced here for a specific form of B.S.), then why shouldn’t an advocate vouch? Perhaps because the thought of advocates vouching is too much to require when representation regardless of the client’s guilt is mandated. The nobility of representation itself, repulsive or not, must cut across all strata. Lawyers attribute greater nobility to representing leukemia-ridden children and their families as against W.R. Grace than in representing W.R. Grace. (See, e.g., JONATHAN HARR, *A Civil Action* (1996) or see John Travolta in the film *A Civil Action* (Touchstone Pictures 1999) as the lawyer for the children and families and Robert Duval as the lawyer for W.R. Grace). Nobility is never associated with an Inc. Also, after either reading the book or seeing the film, you will not drink water again. The author disclaims all liability for dehydration.

50. In fact, here’s a quote from two centuries ago that establishes the distinction between the lawyer as advocate and the lawyer as moral agent by describing a lawyer as advocate as one who

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

2 Thal of Queen Caroline (Shackell and Arrowsmith, 1821). Loose translation: The protests be damned, defend the turnip head.

However, there is a contra view:

Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided . . . It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion. George Sharswood, *An Essay on Professional Ethics*, 32 REP. A.B.A. 183 (1884). And so, you have a true disagreement: the lawyer's character matters in the latter, is irrelevant in the former.

51. (Universal International Pictures, Pakula-Mulligan, Brentwood Productions 1962). Based on Harper Lee's book, the film is the story of Atticus Finch, a Southern lawyer, who represents Tom Robinson, a black man accused of raping a white woman. In the tension-charged town and trial, Gregory Peck as Atticus offers a masterful performance as a lawyer with a case but an unwilling jury (the novel was pre-O.J. Simpson-type juries, Dershowitz sleight-of-hand, and smoke and mirror defenses). Also, Robert Duval plays the odd but helpful village idiot, Boo Radley, who ensures that Scout (daughter of Atticus) escapes death. Scout is a name chosen for one of the three daughters of Bruce Willis and Demi Moore (I'll take Famous Novel Celebrity Children Names for $100, Alex). Interestingly, Gregory Peck (Atticus) then tells a lie to protect Duval from the flood of attention (pies, cakes) that would be showered upon such a hero (one who rescues children with goofy names from attack). Scout was wearing a ham costume at the time of said attack. Truly, there are some odd moments in this story. But Robert Duval went on to represent W.R. Grace (see supra note 49).
do your duty.”52 Vouching occurs in the first case, which sends a message of personal conviction.53 In the second case, only the Divine engages in vouching and Gregory Peck is not even an agent of apparent authority in that case.

All three morality views provide lawyers with a process for disengagement. It is only under the moral judgment approach that the disengagement is physical.54 Under moral neutrality and moral representation, the lawyer disengages mentally.

Because lawyers wrote up a code of ethics and called it legal ethics, they created tenets of lawyer behavior that permit, and often mandate, mental moral disengagement without accompanying physical disengagement. Then, they took the rules on moral disengagement and called them ethics so that moral disengagement became ethical. For those still following along syllogistically55 lawyers created a code of ethics that makes it acceptable to dismiss personal ethics for purpose of work. The implication in a code of ethics is that there is some discussion of values, whether religious, universal, or simply based on standards of fairness and honesty.56 Within the rules themselves are several tips of the hats to the importance of values other than honesty.57 The notion of ethics

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52. The phrase does appear in the book as well. HARPER LEE, TO KILL A MOCKINGBIRD, at 205, (1960). Interestingly, Jem (Scout's older brother and an observer at the Tom Robinson trial) believes Atticus said, "In the name, of God, believe him." Id. at 206. Jem didn't understand vouching. Horton Foote won an Oscar for that sort of dialogue in his screenplay (once again, offered just in case the reader is ever on Jeopardy): "I'll take screenplay writers for $200, Alex."

53. The rule against vouching exists not necessarily to protect the lawyer who is morally disengaged from a client's cause but also to eliminate the bright line in a lawyer's defense of a client he really likes and believes in, and one he's not crazy about but is court-appointed to handle and one for whom he is unwilling to do more than file a motion to suppress or two. Such disparate treatment would surely catch attention of juries: "He's not vouching for his client this time. His client must really be guilty." Hence, no vouching at all so as to not make the distinction too obvious for juries. One can imagine the prosecutorial field day, "Well, ladies and gentleman of the jury, if Mr. Justice System over there is so convinced his client is innocent how come he's not doing his usual, 'From the bottom of my heart, it was a man in Borneo who did this and not my DNA-matching client!?'" (See supra note 46, and Dana Carvey for insight on the Borneo issue).

54. Physical disengagement is best described as follows: Lawyer to potential client, "There is no way on God's green earth I'd ever represent you, even if there are movie rights involved."

55. If A means B and B means C, then A mean C unless A has a really good defense lawyer and a man in Borneo on stand-by.

56. Or maybe just a reference or two to the importance of the proper use of recycling bins or even just a tip of the hat to moral values.

57. For example, under Rule 1.6(a) "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1995). Thus the lawyer may have relevant and
to lawyers thus becomes compliance with a set of rules based on
the justice system's efficient functioning as opposed to notions of
fair play, balance, or utilitarianism.

The result is that in those cases in which physical disengagement
is not an option, the lawyer never may face directly the question of
the consequences of his representation of a guilty client to the
good of the whole. The ethics rules of the profession mandate
representation over conscience. "And therein lies the rub"—
dismissing one's conscience is a dangerous activity.

material information that cannot be disclosed. There are exceptions to this "lips are sealed"
rule, such as if a client reveals he intends to blow up a federal building or the client is a
Kennedy headed to Florida for spring break. Criminal conduct surely lies ahead and Rule
1.6(b) allows the lawyer to contact the FBI in the first instance and Florida officials in the
second so that they can post border notices and signs around college campuses: "Caution:
Kennedy in State."

Actually, the use of the phrase "efficient functioning of the justice system" is itself
a rationalization and form of moral disengagement. The rules of ethics provide the
parameters for a lawyer's behavior when a client has decided not to admit, plead, settle, or
generally throw himself or herself on the mercy of the court. The most efficient functioning
of the justice system would occur if those who are guilty or liable just 'fessed up. Hence,
even the rules themselves are salve for the morally disengaged in that the noble cause of
justice is served even in Kirkland/Pacino circumstances. See supra notes 1-2.

Utilitarianism is yet another hifalutin term that focuses ethical choices on good of
the whole. What's best for society or all involved in a given situation? When a client
confesses to a lawyer, it would be best and cheapest all around for society if the lawyer or
the client communicated that guilt and appropriate punishment, damages, and outcry
followed immediately. Judge Judy functions this way, along with doses of humiliation. But,
the lawyer's code of ethics holds the communication rights inviolate and allows the
confession concealed even if it means that the guilty go free, thus leaving the lawyer with
the knowledge of guilt, which can become unbearable particularly if the guilty, free-to-roam
client strikes again. The value of honest communication between lawyer and client is
deemed a higher value than truth for the burden of proof lies with the opposing side not
one's client. Logistically, it's not a bad system. But, it does require moral disengagement for
the system to work. Lawyers' rules represent a unique ethical standard: check your personal
ethics and start your representation engines. Imagine an architect being forced to conceal a
client's use of substandard materials. Imagine a doctor concealing eboli virus in the interest
of a patient's demand for privacy. The client/patient's interests are subordinated to the
interest of non-collapsing buildings and plague prevention. However, the legal system
mandates lawyers' mollycoddling of murderers (and some lawyers take their mollycoddling
very seriously—see Carmen Fischer's conjugal visits with her client supra note 15).

Hamlet said this in HAMLET, ACT III, SCENE 1.. It's an archaic, Shakespearean phrase
for, "Here's the deal right here."

In the movie The Godfather (Paramount Pictures 1972), this dismissal of
conscience reaches a fever pitch. Johnny Fontaine (Vic Damon) desires a Hollywood career
even as he is a two-bit singer. Don Corleone, his godfather (who happens to be Marlon
Brando), learns that a director has denied Fontaine a part. Corleone/Brando assures him it
can be handled. Don Corleone sends Tom Hagen (Robert Duval/Boo Radley, see supra note
52) to negotiate with the now-famous "offer he can't refuse," which turns out to be the head
of his horse in bed with him one morning. Needless to say, Fontaine gets the part. The
author searched in vain for a horse head-in-the-bed DR, but found nothing. Rule 3.5 on
In most other ethical maxims and models, the impact of one's conduct is either the motivation or rationalization for behavior, but for lawyers, the impact and motivation are irrelevant because the code is beholden to a system, not a set of values. Moreover, morality is further distanced when lawyers realize that representing a guilty party because you need the money is thus no different from representing a guilty party because you believe the law to be unjust. You get money for representing both the just and unjust. The profession's or system's ethics make you noble in both circumstances, but in the former your representation is for dollars earned at what is personally perceived or analyzed to be at expense of the whole. The code of ethics thus becomes a justification or rationalization for conduct a lawyer might find personally morally offensive. The only question a lawyer is

decorum is limited to court.

David Laban phrases the moral slope problem as follows:

If you think winning is the most important thing, you will eventually think winning is the only thing. Take the normative content out of the lawyer's role and the lawyer will feel impelled to take the normative content out of law as well and define it... as victor's spoils pure and simple. David Laban, The Lysistratian Prerogative: A Response to Stephen Pepper, 1986 AM. BAR FOUND. RESEARCH J. 637, 648 (1986). Translation: Take the rules of morals out of lawyering and lawyers will take them out of life. The author disclaims all liability should readers try to say aloud the word "Lysistratian."

62. It's a great deal like being a teenager. You do certain things because the system values and sanctions it, not because you really believe what you are doing to be a good thing. How else can the backward baseball caps be explained? The visor intended to shield one's eyes is placed conveniently over the spinal cord and the entire look brings the names Goober and Gomer to mind, but the system has sanctioned the activity. So it is with lawyers. The futility of justifying conduct sanctioned under the code of ethics is akin to explaining a backwards baseball cap. Richard Wasserstrom notes that if a lawyer does not believe a client, he is simply playing a role as in a play, however, the audience (i.e., judge and jury) don't know that he is playacting. Wasserstrom, supra note 38, at 5.

63. Lawyers represent folks at all levels of Kohlbergian development: preconventional (shoplifters go to jail); conventional (most folks don't care for shoplifters); and postconventional (you'll be arrested at a sit-in if you protest shoplifting laws and their discriminatory impact). The most money is made in representing the preconventional for the altruistic anti-shoplifters rarely have resources, unless, of course, they engage in shoplifting—a vicious circle of reasoning is emerging. LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT 30-31 (1981).

64. "The lawyer as professional comes to inhabit a simplified universe which is strikingly amoral—which regards as morally irrelevant any number of factors which nonprofessional citizens might take to be important, if not decisive, in their everyday lives." Wasserstrom, supra note 39 at 8.

65. Even lawyers themselves have not bought into the system completely. One can represent Richard Speck, Ted Kaczynski, and Jack Kevorkian and feel really good about it, but take on the defense of GM and you've crossed into the vast moral wasteland. In 1970, Professor Monroe H. Freedman and Professor Michael Tigar (no relation to Pooh bear) had what was apparently a nasty exchange (the author concludes so because in Monroe H. Freedman, The Lawyer's Moral Obligation of Justification, 74 TEX. L. REV. 111 (1995),
required to evaluate under moral neutrality or moral right of representation is whether an individual needs representation. Questions that need not be examined, but are impossible to ignore from a moral, as opposed to a code, perspective include: What is this client's reputation for veracity? What is this client's purpose? What is my purpose in representation? Are other non-clients denied their rights if this client's case proceeds? The personal values, demons, and goals of the client may be ignored while the lawyer also disregards societal interests and/or the rights of others involved. How long can lawyers engage in limited moral

Professor Freedman apologizes for angering Professor Tigar, at 115) over the propriety of Wilmer, Cutler & Pickering agreeing to defend General Motors in an air pollution case. Law students, led by Ralph Nader (a lawyer himself, and, certainly no friend of GM's (see, e.g., RALPH NADER, UNSAFE AT ANY SPEED (1970), which is Nader's indictment of the Corvair, not for its design that made it look like a bee in mating season, but for its explosive tendencies) picketed outside of Wilmer, Cutler & Pickering's offices in Washington, D.C. Tigar agreed with the picketers and Nader,

I am not criticizing [Wilmer, Cutler & Pickering] for [going all out on behalf of their clients]. I am criticizing them for their choice of their clients that they choose to go all out on behalf of. And that, you see, is an important difference. . . you have to make a decision the decision is whether or not you will commit your skills, your talents, your resources to the vindication of the interests of the vast majority of Americans or the vindication of the interests of . . . the minority of Americans who own the instruments of pollution and repression. 74 TEX. L. REV. at 112-113.

If GM is a defendant, does not the law entitle them to a defense? Does not the system mandate representation? If you cut them, do they not bleed? Okay, only brake lines in vehicles bleed, but, doggone it, GM is entitled to a lawyer. See supra note 63.

So also are tobacco companies, but Judge Kenneth Starr enjoyed the disdain of the bar for his representation of a client that happened to be a tobacco firm. See, e.g. ALAN M. DERSHOWITZ, SEXUAL MCCARTHYISM, at 95 (1998).

66. A view Professor Freedman held from 1970 until 1995, when he apologized to Professor Tigar (see supra note 65) because he found a defendant he wouldn't represent: John Demjanjuk, a Nazi concentration camp guard who came to the United States and became a naturalized citizen. When his background was discovered, he was extradited to Israel, acquitted, and then returned to the United States. Professor Freedman then learned that Demjanjuk was represented by Professor Tigar, to which Professor Freedman said Mike Tigar, is John Demjanjuk the kind of client to whom you want to dedicate your training, your knowledge, and your extraordinary skills as a lawyer? Did you go to law school to help a client who has committed mass murder of other human beings with poisonous gases? Of course, someone should, and will, represent him. But, why you, old friend? 74 TEX. L. REV. at 115.

67. In short, the great Tigar/Freedman match-up (which sounds oddly like something Don King would promote) raises a whole host of issues that Freedman refused to address until his own ox was gored and his own gall meter went off. In fact, these legal ethics types when they do fall, tend to do so in a big way. Professor Freedman not only questioned Tigar's representation of Demjanjuk, he actually called Demjanjuk a "son of a bitch" in a law review article. The worst offense was that he had no footnote source for the name calling, such as, see e.g., Lenny Bruce, Howard Stern, or George Carlin. Bluebook violation trumps bad language. For the actual SOB reference, see id. at 114.

68. And so, we see, moral disengagement. What I said 56 footnotes ago. Even a moral
evaluation? Only until their ox is gored.69 In short, lawyers snap. For example, in the film The Star Chamber,70 a defense lawyer represents two producers of kiddie porn films who stand accused of the murder of a nine-year-old boy. The child's bloody tennis shoe was in their van when police officers stopped the van because it looked suspicious and there was an outstanding ticket that showed up when the officers ran a check. During the stop, the men offered proof the fine was paid but the officers,71 pretending to smell marijuana, searched the van and found the shoe.72 The search of the van represents a classic Fourth Amendment issue.73 The role of the amoral agent is to see that police officers comply with the constitutional limitations on search and seizure. Fourth Amendment rights and the search-and-seizure issues are part of the judicial system, and the role of the advocate or a moral technician is to keep that system inviolate. That there is a noble system, cause, and issue does not dismiss the personal moral issues that remain: (1) Does the exclusion of this evidence free two murderers? (2) How are the boys' parents affected? (3) What impact will the exclusion have on future searches and rights? (4) How do the rights of the boy compare to the rights of privacy protected under the Fourth Amendment?74 

69. See supra note 52. Idioms aside, we don't engage morally except when we see the issue and client from the victim's side. A restaurant with a uranium mine theme (see supra note 24) sounds perfectly defensible until the lawyer learns his Uncle Milt was taken by the scheme. Prior to Uncle Milt's involvement, the lawyer would go to the mat for the uranium restauranteurs/entrepreneurs. Following disclosure of the gigantic restaurant fraud, the lawyer seeks the death penalty for securities fraud.

70. THE STAR CHAMBER (Twentieth Century Fox Pictures 1983).

71. Clearly, these officers have not watched enough Cops (Fox Television).

72. In classic Hollywood style, the police officers are depicted as boorish, jack-booted imbeciles who harass the polite child molesters/killers. It is a well-known fact that child molesters/killers are more polite and brighter than LAPD's finest. (The author speaks in sarcasms... there is no cite here).

73. In The Star Chamber, Michael Douglas plays a judge who snaps. Snapping lawyers and judges is a common theme in lawyer movies. Once again, Hollywood, in its own innocent (?) way is indicting moral disengagement. The author does not claim Hollywood calls it that or understands moral disengagement, but it certainly understands that snapping lawyers and judges mean big box office. Douglas joins a secret judicial society that metes out its own punishments to those the judicial system sets free. It is arguable after viewing this film that enough moral neutrality and moral right of representation rationalizations can cause impairment of judgment or judges.

74. Under traditional ethical analysis, all of these issues would be examined and the balancing of individual rights versus societal harm would probably produce the result that the child killers' trial should include the van/tennis shoe evidence. Michael Douglas excluded the evidence, the killers went free, and Douglas snapped. He became a member of The Star Chamber; a group that bumped off the truly guilty who slipped through Fourth Amendment
The defense lawyer who participated in the omnibus hearing for this murder case preserved client confidentiality and represented his clients zealously within the bounds of the law, all while honoring the standards of his profession. Yet, the result of the lawyer's work is that two murderers are returned to society. While defendants generally appreciate this result and end and the lawyer's practice grows from such victories, the justice and fairness of the results are troubling.\textsuperscript{75}

For those who prefer the invisible hand theory as opposed to the amoral technician theory, there are times when justice is so blind that facts are lost. In other words, the invisible hand malfunctions.\textsuperscript{76} In \textit{Witness for the Prosecution},\textsuperscript{77} a barrister discovers \textit{after} he has won an acquittal that his client is indeed guilty. Sir Wilford, the barrister with the guilty client, violated no rules, but the witness\textsuperscript{78} who won his client an acquittal lied on her loopholes. Alan Dershowitz was not in the film.

\textsuperscript{75} Indeed, Michael Douglas is forced to look at pictures of the young boy shown by the boy's father. The boy's father, a physician, can no longer work because he is consumed with grief and is forced to sell the family house and move because the boy's mother can't bear to see her son's room and constantly heard him crying. Hollywood does do a darn good job of making moral disengagement darn hard to do. This from a city that brought us Sharon Stone and \textit{Striptease} (Castle Rock Entertainment, Lobell/Bergman Productions 1996).

\textsuperscript{76} Which cuts way back on the charm and comfort of the invisible hand theory of justice. That it doesn't always work that way deprives lawyers of yet another source of comfort in moral disengagement.

\textsuperscript{77} \textit{Witness FOR THE PROSECUTION} (United Artists 1957). You can't go wrong with Marlene Dietrich and Tyrone Power in a 1957 Billy Wilder film version of an Agatha Christie play just chock full of barristers and solicitors. Charles Laughton plays Sir Wilford, the defense lawyer, who is also a convalescing heart patient described by his nurse as "not discharged, but expelled from the hospital for conduct unbecoming a cardiac patient." As Sir Wilford, Laughton is depressed after his discharge because of being sentenced to a "diet of bland civil suits" until Tyrone Power enters as a defendant charged with murder. This was Tyrone power's last movie before a fatal heart attack at age 45. The shot of one of Marlene Dietrich's famous legs cost $90,000 in extras and stunt men. The Royal Family was given a sneak preview of the film but was required to take a pledge to not reveal its ending. Sir Wilford describes his client as a "drowning man clutching a razor blade," and "a man with one foot on the gallows and another on a banana peel." Sir Wilford's blood pressure was 240/130 on the day of the trial. But he did take his Thermos of "cocoa" into trial.

\textsuperscript{78} The witness is the defendant's wife. This movie has more twists and turns than Disney's Space Mountain. It's a must-see for any lawyer ever duped by a witness. Indeed, House Manager Ed Bryant said he felt like Charles Laughton after he deposed Monica Lewinsky. Nicole Seligmann, one of the President's lawyers (although not one of the president's men), said Mr. Bryant was more like Javert, the irrepressible officer in \textit{Les Miserables}. "Laughton might be the more fitting reference. It is that of the dogged, tireless, obsessed Inspector Javert once played by Mr. Laughton in the 1935 movie version of \textit{Les Miserables}.") 145 CONG. REc. § 1290, at 1310 (Feb. 6 1999). Defense lawyers always resort to Javert when they are losing. If all else fails, call it relentless prosecution. Victor Hugo was a defense lawyer at heart.
own without Sir Wilford’s knowledge. Sir Wilford is troubled by what the system, in which he was complicit as an agent, has done. He is then left with the possibility of breaching a client confidence in an after-the-acquittal ethical dilemma.\footnote{79}

More important, perhaps, he is left with the knowledge that his efforts produced, at best, a miscarriage of justice.\footnote{80}

The questions presented in these two films are (1) whether one gives greater deference to the Bill of Rights or to one’s personal convictions; and (2) whether one must suppress the truth for a client. The lawyer’s code provides that the Bill of Rights and client confidences are higher sources of law to which the lawyer must defer, which may contradict the lawyer’s personal code of ethics and induce the fear of another child murdered as a murderer goes free.\footnote{81} To avoid discipline and/or malpractice the lawyer must defer to the rules of the profession as the higher law. Such deference, which means suppression of the obvious but unaddressed moral issues beyond professional responsibility, means that the personal moral codes of ethics decline or disappear. There are consequences when deference is exercised and personal values ignored. Suppressed personal values are never a pretty sight.\footnote{82}

\footnote{79} It is one thing to knowingly defend a guilty party and quite another to defend a client one believes to be innocent but who turns out to be guilty, not only of murder, but murder for money. Tyrone Power, the client, killed an elderly woman after ingratiating himself to her enough to be named in the will.

Furthermore, Sir Wilford is left with the knowledge that he unwittingly perpetrated a fraud on the court because he produced and had admitted the falsified evidence. Now there Sir Wilford has a problem. Comment 11 to Rule 3.3, ominously titled, “Remedial Measures” provides as follows:

if perjured testimony or false evidence has been offered, the advocate’s proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} Rule 3.3 cmt. (1995)

\footnote{80} Sir Wilford takes no pleasure in an acquittal for a guilty client, especially when the acquittal is based on false evidence. Sir Wilford permits the true ethical issues to surface for he prides himself on being a technician who can outwit with facts and law, but not an amoral one. Indeed, he tells his client upon discovering the fraud, “My dear, couldn’t you have worked with me truthfully and honorably? We could have won.” \textit{WITNESS FOR THE PROSECUTION} (United Artists 1957).

\footnote{81} To which lawyers often find themselves saying, “Who decided this? I don’t remember voting.”

\footnote{82} Philosopher Mary Midgley notes that psychological difficulties spring from client-centered values for such an approach:

is understandable as a piece of crisis-management for particular cases—for abnormal dependence, abnormal submissiveness and conformity. Or again, it can be seen as a half-truth of value for all of us. Self-respect, self-understanding, and indeed self-love, are necessary parts of serious living, they are not guilty excesses; we vitally need them . . . . But
III. THE CONSEQUENCES OF DEFERENCE TO RULES

The consequences of deference to legal and rights-based ethics as opposed to a moral philosophy foundation are numerous because of the notion of moral hazard. As difficult as it is to say, lawyers acting in their professional capacity and abiding by professional rules truly are a moral hazard, meaning that they maximize their own benefits while not having to bear the societal consequences of such maximization. Because the code of professional responsibility permits disregard for the consequences, the lawyer can disengage from personal moral standards. Once a lawyer has made the decision to disengage, conduct is controlled exclusively by the standards of the profession because personal values are by necessity divorced from professional evaluation. In addition, once personal values are divorced, there are consequences summarized in the following categories: (1) truth becomes a victim of the profession rather than the goal of the justice system; (2) both individual and professional credibility suffer; (3) there is an inability to draw moral lines, for so much conduct is rationalized under the rules that the process of rationalization continues; and (4) injustices results.

A. Truth As a Victim of the Profession's Rules

Lawyers are true postmodernist zealots. Once they buy into zealous representation, all manner of skullduggery occurs because

it is surely alarming to preach this gospel as normal and comprehensive advice for most people. MARY MIDDLEY, CAN'T WE MAKE MORAL JUDGEMENTS? 121 (1991).

83. Larry Flynt and Charlie Sheen sound like moral hazards, but the term actually has its origins in economics.

84. Moral hazard is formally defined as follows:

Moral hazard may be defined as actions of economic agents in maximizing their own utility to the detriment of others in situations where they do not bear the full consequences, or equivalently, do not enjoy the full benefits of their actions due to uncertainty and incomplete or restricted contracts which prevent the assignment of full damages (benefits) to the agent responsible. JOHN EATWELL, MURRAY MILGATE, AND PETER NEWAN, THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS (1987).

In short, lawyers can use their knowledge to benefit themselves and their clients without regard to the consequences to society, which, many have noted, doesn't sound too much different from Exxon. Perhaps, therein lies the rub: the commercialization of the profession.

85. It's not Old Testament destruction, but it can be a mess.

86. When the author explained this theory of the article, i.e., lawyers as postmodernist zealots, one colleague said, "I didn't know you could get certified in that." Yes, the new post-modernist zealots section of the American Bar Association, you can pay dues if moved to do so.

87. Canon 7 of the ABA Mode Code of Professional Responsibility provides: "A lawyer should represent a client zealously with the bounds of the law." Rule 1.3 of the ABA Model
professional skullduggery is distinguishable from generic skullduggery, largely owing to the fact that lawyering rules authorize skullduggery in the name of noble virtues, such as client privilege, the preservation of the adversary system, and John Grisham novels and flicks.88

In true moral hazard fashion, skullduggery occurs in the use of procedure to suppress the truth or keep the truth from emerging. For example, consider the client who has run a red light and received a ticket. The client confesses that indeed she did run a red light. Her lawyer tells her to take the ticket to a hearing anyway because there's a good chance the police officer will not show up for the hearing.89 When the officer does not show up for the hearing, the client is relieved of all responsibility, the case is dismissed, and the lawyer is hailed a hero.90

Another procedural tool that can divert or postpone truth is dilatory tactics. For example, suppose that you knew your client, the president of the United States, had a history of sexual affairs91 and a young woman has brought a sexual harassment suit against the president. It's fairly clear that your client did harass the young woman92 but your client has another election pending and needs time. You take a motion to dismiss all the way to the United States

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Rules of Professional Conduct provides that "A lawyer shall act with reasonable diligence and promptness in representing a client." Canons, ECS and DRS are part of the Model Code and Rules and comments are part of the Model Rules. The states are all over the map, so to speak, on what they have adopted. New York, Ohio, and California have even developed their own systems of rules.

88. Truly, were it not for skullduggery we wouldn't have A Time to Kill (Warner Brothers, Regency Enterprises 1996), The Firm (Paramount Pictures 1993), The Client (Warner Brothers, Alcor Films, Regency Enterprises 1994), or The Rainmaker (Constellation Films, Douglas Reuther Productions, American Zoetrope 1997). There's Tom Cruise in a Memphis firm that does off-shore tax planning for the mob. There's no Rainmaker without skullduggery on the part of insurance defense lawyers, and The Client is just not suspenseful without Romey, the lawyer, for the mob, and the mob is, by judicial notice and common knowledge, skullduggery writ large.

89. For the advice, the lawyer is paid. There is no available defense, there is only a procedural hope.

90. Punishment avoided, guilt irrelevant, and more new red lights clients than the lawyer can handle. Is this a great ethics system or what?

91. At this point in the nation's history, the author is unclear on the definitions of "affair," "relationship," "sexual relations," and "is" but would like to clarify that she refers to whatever it is called when two folks have conduct while at least one of them is partially unclothed, although not necessarily aroused. See, e.g., Judge Susan Webber Wright's definition list in Jones v. Clinton reprinted in Alan Dershowitz, Sexual McCarthyism, at 18-19.

92. Even American Lawyer has come out and said Mrs. Jones' case was strong. Stuart Taylor, Her Case Against Clinton, Amer. Lawyer, Nov. 1996, 57. For Supreme Court ruling and background, see Clinton v. Jones, 520 U.S. 681 (1997).
Supreme Court where the justices slam dunk you nine-to-zero on a privilege for the president. You knew that the justices would rule that way, you know your client is guilty, but you went to the Supreme Court for a delay. Under the rules, you’re fine.\(^93\) In your soul, you’ve delayed, cost the plaintiff a lot of money, and obfuscated.\(^94\)

In yet another situation where the lawyer knows the truth, the rules justify silence on the part of counsel in the face of false testimony.

An evidentiary example debated by legal ethics experts follows:

A lawyer represents a plaintiff in a negligence action involving a man who was killed when he used a defective elevator. A crucial issue is whether the defendant was on notice of the defective condition. The most important witness on that issue is the defendant’s former janitor, now retired.

\(^93\) In the comments to Rule 1.3 there is the notion that a proceeding is not frivolous “even though the lawyer believes that the client’s position ultimately will not prevail.” Thus, you could not only try presidential privilege but, Secret Service privilege, separation of powers privilege and Socks-the-Cat privilege.

\(^94\) But, hey, that’s good lawyering. Also, the author confesses a fondness for obfuscation. Interestingly, the system of justice needs protection only when the Fourth Amendment right to privacy is at issue or when the prosecution fails to make a case. The justice system apparently can survive dilatory tactics. However, in fairness to the profession it should be noted that Professor Dershowitz feels Robert Bennett, said president’s lawyer, did an awful job. See, e.g., ALAN DERSHOWITZ, SEXUAL McCA nrnsM at 12-25.


On April 12, 1999, Judge Susan Webber Wright held the President of the United States in contempt. John M. Broder and Neil A. Lewis, Clinton is Found to be in Contempt on Jones Lawsuit, N.Y. TIMES, April 13, 1999, A1, A20. She slapped the commander-in-chief with a hefty $1,202.00 fine and Mr. Clinton was required to pay $91,000 of Ms. Jones’ lawyers’ fees. Merciless wench.
On cross-examination, the janitor is asked whether the plaintiff's lawyer provided the witness with the new suit he is wearing, and whether the lawyer paid the witness $1,900 to testify in the case. The witness answers no to each question. In fact, each of the answers is false. The lawyer does not suggest that the witness correct his testimony, nor does he take any other remedial action. On closing argument, the lawyer argues the witness's testimony as evidence in the case.

Has the lawyer acted ethically?95

The answer to the question, according to the Code of Professional Responsibility and ABA model rules, is that the lawyer has acted ethically because the lawyer did not solicit false testimony and the witness is not a witness for the critical question of liability in the case.96 However, from a moral perspective, a witness has lied. Granted, it is not the lawyer who has not been candid with the court. But, the court has false information. A morally disengaged analysis would find either that the invisible hand will work or that, as an agent or advocate, the role is not one of representing others who choose to commit perjury. From a rules perspective, lying is permitted because the rules do not require its revelation. How long can a lawyer's moral compass survive in a profession in which lies need not be condemned or revealed?97 The danger of this extent of moral disengagement is that a lie no longer seems to be a problem. The issue is no longer whether lying is morally wrong but, rather, when lying is acceptable.

Certainly the moral debate on lying, apart from our code, is by no means an area of bright lines. Scholars in moral philosophy note that the prophet Elijah lied to the Syrians98 to save his people. Rebekah and Jacob lied to Isaac.99 Anne Frank's friends lied to

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95. Testimony of Geoffrey Hazard in People v. Friedman, as reported in MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 128 (1990).
96. But for very different reasons; i.e., for the birthright; i.e., the money.
97. Which sounds suspiciously like the beginning of a lawyer joke. Although most lawyer jokes begin, "A priest, a lawyer and Atila the Hun are together in a life boat . . . . ," but seriously.
98. 2 Kings 6:21-22 (for a lying Elijah).
99. See Genesis 27, where Rebekah and Jacob schemed, complete with hairy hands, to dupe Isaac into giving Jacob, instead of Esau (the firstborn) the birthright. Esau went to hunt venison and the next thing he knew, the will was invalid. The lying here, however, is slightly more problematic. They weren't lying to stop a war, as in the case of Elijah, they were lying to change intestate succession or the probate of a will (all depending upon how you view birthrights).
government officials to save her life.\textsuperscript{100} Atticus Finch lied to protect Boo Radley.\textsuperscript{101} Moral examination focuses on the lie and the circumstances. Legal ethics focuses on the client's right to lie and the lawyer's obligation to protect that lie. Which brings us to \textit{Class Action},\textsuperscript{102} a case of lying, disclosure, and obfuscation. Gene represents product liability plaintiffs and his daughter, Maggie, represents big-time corporate defendants. She finds out her client is guilty as sin and even has a memo to prove it. Her boyfriend/senior partner is the man who truly bungled the product manufacture approval years earlier and she faces a classic triangle: my father as my opponent; my boyfriend as a sleaze; and Rule 11 mandatory disclosure breathing down my neck.

To disclose or not to disclose, therein lies the question.\textsuperscript{103} And how does a lawyer's nondisclosure here differ from the nondisclosure of a client's absolute confession of guilt? Moral disengagement becomes more challenging with each movie.

Suppose, in yet another truth versus fiction situation, that a real estate lawyer has closed a real estate deal\textsuperscript{104} and then learns that her client induced the deal by fraud. The lawyer still has some post-closing matters and wonders what her ethical obligations are. Professor Shaffer analyzes the ethical obligations as follows:

Under the \textit{Model Code of Professional Responsibility}, the answer is governed by DR-7-102(B)(1) and DR 4-101. When a lawyer "receives information clearly establishing that . . . [his] client has . . . perpetrated a fraud upon a person or tribunal," the lawyer is required by DR 7-102(B(1) to "promptly call upon his client to rectify the [fraud]." Further, if the client does not do that, the lawyer "shall reveal the fraud to the affected person or tribunal." DR 4-101(A) does protect the confidentiality of all information gained in the professional

\textsuperscript{100} \textit{ANNE FRANK, THE DIARY OF ANNE FRANK} (1986).
\textsuperscript{101} I.e., Gregory Peck lied to protect Robert Duval, see supra note 50. Boo was apparently frightened of what hero status would do to him. The irony of a person named "Boo" being frightened and/or shy has not escaped the author.
\textsuperscript{102} \textit{CLASS ACTION} (1991). It's another Gene-Hackman-as-a-lawyer-flick. Gene Hackman plays Jedediah Tucker Ward (see, the name spells trouble), a plaintiff's lawyer in the habit of brining class action lawsuits against corporations. His daughter (played by Mary Elizabeth Mastrontonio—her real life name) represents corporations. The two face off in a classic Rule 11 confrontation of discovery, rules, ethics, and parent/child tension.
\textsuperscript{103} The author paraphrases Polonious from Shakespeare's \textit{Hamlet}, Act III, Scene 2 (Mel Gibson, to continue the Hollywood theme).
\textsuperscript{104} Generally involving land, many dollars, title insurance, and the potential of Chapter 7 bankruptcy if the lawyer messes anything up.
Moral Disengagement and Lawyers

relationship, but DR 4-101(C)(2) permits the lawyer to reveal confidential information when permitted to do so under any other disciplinary rule. Thus, depending on how you read the applicable provisions, the Model Code appears either to require the lawyer to divulge the client's past fraud (DR 7-102(B)(1): "shall reveal") or to permit the lawyer to do so (DR 4-101)(C)(2): "may reveal"). We now know, however, that the drafters of the Model Code did not intend either result. DR 7-102(B)(1) was included in the Model Code late in the drafting process, and its effect on DR 4-101(C) was "not appreciated" by the drafters. According to a member of the drafting committee, the apparent effect of DR 7-102(B)(1) was the result of an "oversight" and a "drafting error." As stated by the ABA Committee on Ethics and Professional Responsibility, for reasons of both tradition and policy it would be "unthinkable" for a lawyer to disclose a client's fraud in violation of confidentiality. Accordingly, the ABA clarified DR 7-102(B)(1) in 1974 by adding an "except" clause. As a result, the lawyer is required to reveal the client's fraud "except when the information is protected as a privileged communication." The ABA Committee on Ethics and Professional Responsibility then explained that the phrase "privileged communication" refers to what the Model Code calls "secrets," which include information that might be embarrassing to the client. As Hazard has wryly remarked, "fraud is always embarrassing," and the addition of the "except" clause to DR 7-102(B)(1) therefore "eviscerated the duty to report fraud."

So, the standards of the legal profession boil down to this compelling thought: perpetrating a fraud is acceptable if such action saves a client from embarrassment. Public embarrassment is the greater moral evil according to the rules of our sandbox. Under the rules, a lawyer who is morally offended by the antics of

106. Will no one stand up and say, "Yes, but some clients just beg for embarrassment," or we could settle for a little self-righteousness, "If the client hadn't been such a scallywag in the first place, this embarrassment would not be an issue." I do not expect a full Arthur Kirkland turn-around by the lawyer, which would require the lawyer to stand at the title company and say, "Whatever you do, don't buy this property. It's all a sham, a scheme, a gigantic fraud. Save yourselves. Go back before it's too late." Should such an outburst occur, I dare say the title company personnel might voice a regret or two as well.
107. And, let's face it, the truth, when revealed in judicial proceedings, is almost always embarrassing. See the president, discussed supra notes 91-94.
a conniving client is left with the conscience baggage of finalizing a deal that victimizes another.

IV. A Periodic Moral Reengagement

To minimize the dilemma between code ethics and personal ethics, attorneys require a periodic reality check beyond the rules—a form of moral reengagement. The same basic reminders and ethical tests that business people use to help keep their similar rationalizations about earnings management, securities fraud, and antitrust activities in check would be helpful for members of the profession.  

Beyond the rules, beyond the code, and, hopefully, beyond the need for moral disengagement, there are some simple questions lawyers could pose as they evaluate anything from the decision to represent a client to duties with regard to witnesses and truth, or the lack thereof: (1) Have I considered the long-term impact of my decision on this client, my career and the justice system? (2) Is this decision balanced? How would I feel if I were opposing counsel? (3) How would my conduct be reported by an informed and critical reporter? (4) Would I be comfortable if all members of the profession followed my standards? (5) Have I counseled my client about the long-term implications of his decisions?  

These five questions refocus morality from professional to personal and, oddly, could serve to reinstate professionalism through personal reengagement.

In *The Verdict*, Paul Newman plays a ne’er-do-well lawyer who...
manages to land a gold mine of a malpractice case.\textsuperscript{111} When Newman clinches expert testimony from a fellow physician, he asks the good doctor why he is testifying. When the doctor responds, "to do the right thing." Newman seems surprised and the doctor adds, "Isn't that why you're doing it?" The morality of a good cause is lost in the too-long-disengaged mind of Newman the lawyer. Perhaps the real tragedy of disengagement is the inability to appreciate the truly noble accomplishments an effective lawyer makes.

Ethics is the moral science of doing less than the law allows and more than the law requires. Absolute reliance on professional rules produces an atmosphere and profession in which the minimum becomes the maximum. Legally appropriate is not always morally sound. Nor is legally appropriate particularly good for the soul. Periodic reengagement brings a sense of perspective.

In The Rainmaker,\textsuperscript{112} Jon Voight and the lawyers for the insurance company take steps to prevent depositions of key company employees by Matt Damon, the whipper snapper bad-faith-refusal-to-pay plaintiff's lawyer whose partners are Mickey Rourke and a quasi-licensed Danny DeVito. The ragtag bunch eventually brings down the insurer but not without Matt Damon confronting John Voight with the line, "Do you even remember when you sold out?"

In another scene in And Justice for All, Arthur Kirkland sits with a friend of his grandfather and reminisces about how his grandfather had paid for his legal education because, to his grandfather, being a lawyer was the highest honor and profession one could achieve. It is the thought of his grandfather's pride that causes Kirkland's snap and admonition to the jury about his client's guilt, "If he's allowed to go free, then there's something really wrong going on here." Within the profession, the process of moral disengagement is causing something really wrong to occur. We are a profession of crackerjack minds and endless procedure, but one could not call us a nice profession. In the movie Harvey,\textsuperscript{113}

\begin{itemize}
  \item \textsuperscript{111} After a long advertising campaign of passing business cards out at funeral homes and, on occasion, being tossed out for doing so. See Rule 7.3 of the Model Rules of Professional Conduct for some thoughts on solicitation.
  \item \textsuperscript{112} The Rainmaker (Constellation Films, Douglas Reuther Productions, American Zoetrope 1997).
  \item \textsuperscript{113} Harvey (Universal International Pictures 1950). Jimmy Stewart gives a stellar performance as Elwood. Josephine Hull won an Oscar for her role as Vita Louise, Elwood's sister, who with the help of a morally disengaged judge, seeks to have Elwood and Harvey,
Harvey's friend, Elwood P. Dowd, offered the following advice to a psychiatrist, "Dr. Chumley, my mother used to say to me, 'In this world, Elwood . . . you must be oh, so smart or oh, so pleasant.' For years I was smart. I recommend pleasant. You may quote me."

Just as there are moments of lawyer shame in cinema, there are moments of power, morality, and even lawyers being nice. Replay the words of Atticus Finch's closing argument in *To Kill a Mockingbird*, witness Tom Cruise's hard-fought victory in *A Few Good Men*, or watch with admiration as Wilford Brimley halts the leaks from a grand jury proceeding in *Absence of Malice*. There will come with reengagement a sense of pride in what the profession can do. However, in these examples, the lawyers were not only doing what they could do, they were doing what they should do. In these last memorable cinematic looks at lawyers' work, morality and code ethics were one and disengagement was simply not in the cards. And so there is a full circle back to the origins: avoiding the schizophrenia of disengagement—those who do, don't snap, the upside of reengagement. For years we in the profession have been morally disengaged. I recommend more reengagement. You may quote me.

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114. *A FEW GOOD MEN* (Castle Rock Entertainment, Columbia Pictures Corp. 1992). In this movie, Tom Cruise, Demi Moore, and Kevin Pollack team up against Kevin Bacon and, with a frightening cross-exam of Jack Nicholson, win the case. Tom's memorable line, shouted to the Easy Rider himself, is "I want the truth."

115. *ABSENCE OF MALICE* (Columbia Pictures Corp. 1981). You can't go wrong with a film that includes both Paul Newman and Wilford Brimley. Also, Sally Field (we like her too, we really, really like her) plays an investigative reporter attracted to an old, but-still-very-much-Butch-Cassidy, Paul Newman. Ms. Field is duped by a government strike force attorney named Elliott (you see, that's trouble already, Elliott is not a good name for a strike force attorney) into printing a story on an organized crime family and their crimes. Field is lured into the trap when Elliott leaves a file on his desk and then leaves the room. Field rifles the file and does a page one story that implicates Newman (Michael Gallagher) in a murder of a union boss (Joey Diaz). Newman loses his business and a friend when the friend tries to clear him by telling Field she was with Newman when the murder was committed. Determined to get even, Newman lures Field into yet another trap in which she prints further damaging stories. The stories clear Newman but destroy the careers of Elliot and the district attorney. Wilford Brimley (James G. Wells as Assistant Attorney General for the Strike Force) may be at his career best as he fires all of them in a showdown in a federal district court building with Angeline (the court reporter) present along with threats of "subpoenies."

116. Such is the stuff of moral reengagement: the word "wrong" creeps into vocabularies.