Is Positivist Legal Ethics an Oxymoron?

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Abstract

Positivist legal ethics defines the duties of lawyers in light of the structure and ethics of law, and the relationship between the system of laws and those to whom it applies. But is positivist legal ethics in fact a theory of legal ethics? That is, does it identify the ethical principles and virtues of the good lawyer? This paper argues that it does not. Positivist legal ethics provides a theory of the ethics of law, from which it identifies the duties with which lawyers must comply. The duties it identifies are legal, not moral or ethical. That does not make positivist legal ethics wrong, but it does have important implications for the scope and limits of the theory. It means certain questions are central to positivist legal ethics that may not be that important to other theories (e.g., how law ought to be interpreted or reformed). But at the same time there are other questions that positivist legal ethics cannot answer. Moral questions left to lawyers' discretion or that the law does not address, and the point at which a lawyer may simply be unwilling to violate moral norms even if her role requires it, are things which positivist legal ethics cannot illuminate. Understanding the scope and limits of positivist legal ethics is essential for those who want to write and teach from that perspective, as well as for those who challenge it.

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INTRODUCTION

Imagine two hypothetical lawyers, John and Jack. Assume that they both always ensure that their representation of clients complies with the law, but that they nonetheless represent their clients very differently. John is polite and accommodating with opposing counsel. He pushes his case but is willing to give ground on issues where the law suggests he ought to. He accommodates requests for delays that don't prejudice his client, and sometimes even when they do if the prejudice isn't material. He consults with his clients regularly and keeps them well informed on all matters relevant to the retainer. He is polite and respectful in conversations with opposing counsel. He never makes comments that are gendered or that belittle a person because of their race or age. If he makes a mistake, he admits it, and if opposing counsel makes an obvious mistake, he points it out to them instead of trying to capitalize on it (provided he can do so without violating client confidentiality). When he cross-examines a witness, he is forceful but not degrading and he focuses on gaps in the testimony arising from the evidence as opposed to trying to shake or rattle a witness through aggressive questioning. He volunteers widely and provides pro bono legal services to clients who can't afford a lawyer. He mentors junior lawyers whenever he can and makes sure to teach them how to do the work that he expects of them. He never raises his voice, and he treats all of his staff kindly and pays them generously.

Jack, on the other hand, is an aggressive lawyer. He never lies to opposing counsel and never engages in sharp practice, but he pushes every case as hard as he can. He accommodates no requests for extra time, always requiring opposing counsel to go to court to get the time if they need it. He takes instructions from his client but makes it clear to them that he is in charge of strategy. He is not "uncivil," as a regulator might use that word, but he is aggressive with opposing counsel and frequently sarcastic. He takes the same approach with witnesses

under cross-examination, not harassing them but using sarcasm and aggression to try and shake them and undermine their credibility. Although he does not engage in discriminatory hiring or employment practices, he comments on the attractiveness of women lawyers and makes racist jokes. He bills honestly but charges the highest possible hourly rate he can for his services. He never does pro bono work and does not volunteer with any legal organizations. He hires junior lawyers, but pays them as little as he can, works them as much as possible, and shouts and swears at them if he thinks their work is below the quality he expects. And when their work is good, he does not say so.

Is there any ethical difference between John and Jack? Is one of them a more ethical lawyer than the other? Intuitively it seems obvious that John is a more ethical lawyer (and human) than Jack. But to a positivist legal ethicist, who derives lawyers' duties and obligations from the structure and function of the law itself, that intuition may not be correct. If both John and Jack limit their representation of clients to pursuing the client's interests within the bounds of legality, the positivist legal ethicist arguably sees no relevant ethical difference between them.

This paper considers the scope and limits of positivist legal ethics and, in particular, its ability to assess lawyers' ethical duties in cases such as this one, where the ethical issues go beyond compliance with the law.

What is positivist legal ethics? As noted, positivist legal ethics justifies and defines the lawyer's role based on the normative structure of legality.[1] Law solves the problem of deep moral pluralism—our "plurality of conceptions of the good."[2] By providing a fair system for reaching a provisional resolution of our differences,[3] law permits us to live in peace despite our intractable disagreements about the right thing to do and the right way to live.[4] Law has legitimacy and authority because it is essential for the creation of a civil society and because it is democratic.[5] More recently, positivist legal ethicists have emphasized the values that rule by law protects the autonomy and dignity of those to whom it applies.[6]

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1. For the two leading and most thorough explanations of a positivist approach to legal ethics see TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE (2009) [hereinafter DARE, COUNSEL OF ROGUES] and W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010) [hereinafter WENDEL, FIDELITY TO LAW]. For a useful history of the development of philosophical legal ethics scholarship, including positivism, see David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337 (2017).

2. JOHN RAWLS, POLITICAL LIBERALISM xvi (1993); DARE, COUNSEL OF ROGUES, *supra* note 1, at 60.

3. W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 88 (2005).

4. Wendel, FIDELITY TO LAW, *supra* note 1, at 55–56.

5. *Id*. at 90–91.

6. *See* Alice Woolley, *The Lawyer as Advisor and the Practice of the Rule of Law*, 47 U.B.C. L. REV. 743 (2014); Alice Woolley & Elysa Darling, *Nasty Women and the Rule of Law*, 51 U.S.F. L. REV. 507 (2017); W. Bradley Wendel, *Whose Truth: Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J. L. & HUMAN. 105 (2016) [hereinafter Wendel, *Truth*]; W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, (Cornell L. Sch. Legal Stud. Res. Paper Series, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120688.

Legal obligations diverge from moral obligations, but legality nonetheless has a normative purpose, origin, and structure which collectively justify the law's claim to govern our actions.[7]

From law's distinct normativity, positivist legal ethics derives role-specific obligations to govern lawyer conduct. Because of the law's normativity, it has legitimacy and authority, and because of the law's respect for the dignity and autonomy of those to whom it applies, clients have rights and entitlements under law. Further, given the law's complexity, clients cannot access those rights and entitlements without legal assistance. In providing such assistance, lawyers must represent clients while also respecting the legitimacy and authority of the law. Specifically, lawyers must act only with "mere zeal", not "hyper zeal."[8] They should pursue their clients' legal entitlements, not their legal interests.[9] And lawyers should approach the law in good faith, justifying any given assertion about the law "in light of the interpretive understanding of a professional community."[10]

Taking a positivist approach to legal ethics has significant implications. The duties of the lawyer that positivist approaches justify and define cannot be properly characterized as ethical duties.[11] They are rather legal duties—defined by law and identified through the ordinary rules of legal interpretation and application. Under a positivist approach, a lawyer's duties arise from what the law requires, permits, or enables; they are not moral or ethical duties to which considerations beyond legality are relevant.

Positivism does not mandate a technical or mechanical approach to identifying a lawyer's duties.[12] Indeed, a lawyer's legal duties must be identified with all the interpretive and normative rigor applicable to law in general—akin to our approach to, for example, constitutional or administrative law. The lawyer ought to answer legal questions about how to act as she would answer any other legal problem, drawing "on a familiar set of conceptual tools: the standard kinds of arguments about statutory language, the canons of interpretation, certain techniques for making analogies to precedential cases, arguments about institutional competence, and so on."[13]

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7. As discussed below, the "normative structure" of legality refers to the requirements to accomplish rule by law, as opposed to rule by force or fiat. They are the sorts of requirements of legality put forward by Lon Fuller, such as prospectivity, and the way in which those requirements are necessary for, and aim to achieve, respecting the dignity and autonomy of those subject to law. *See* LON FULLER, THE MORALITY OF LAW (2d ed. 1969).

8. DARE, COUNSEL OF ROGUES, *supra* note 1, at 76.

9. WENDEL, FIDELITY TO LAW, *supra* note 1, at 59–66.

10. W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1170 (2005).

11. Inherent in this paper's argument is the claim that a decision properly made exclusively through law is not an "ethical" decision. Ethics always references morality; Hart referred to ethics as a term "nearly synonymous" with morality. H. L. A. HART, THE CONCEPT OF LAW 168 (2d ed. 1994).

12. DARE, COUNSEL OF ROGUES, *supra* note 1, at 157.

13. Andrew Ayers, *What if Legal Ethics Can't Be Reduced to a Maxim*, 26 GEO. J. LEGAL ETHICS 1, 4 (2013).

In cases where a lawyer's response is legally justified but morally deficient, positivist legal ethics asserts that the relevant analysis should focus not on the lawyer's conduct (since the lawyer acted properly), but rather on the sufficiency of the law that justified that action. The positivist asks: How ought the law to change? What norms and policies support shifting what the law requires or permits of a lawyer in those circumstances? Should the interpretive principles lawyers use to identify the law, including the law as it applies to their own practices, be different from what they are? Positivist legal ethics mandates critical questions about lawyer conduct but, provided the lawyer acted lawfully, it directs those questions at the sufficiency of the law itself, not at the sufficiency of the lawyer's choice.[14]

At the same time, however, a positivist approach to legal ethics does not eliminate the genuine ethical dilemmas that lawyers face—the significant moral questions the law cannot answer and which go beyond the questions the law resolves. From time to time, the law gives lawyers moral discretion with respect to how they represent clients, leaving the answer to certain dilemmas to the lawyer's own moral judgment.[15] A lawyer "may," for example, reveal confidential

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14. A positivist approach can also consider the sufficiency of the lawyer's conduct, but the analysis will focus on the lawyer's competence and sufficiency in legal terms. For example, in the classic case of *Spaulding v. Zimmerman*, the literature focuses on the moral wrong of a lawyer not disclosing to an opposing party information critical to that party's health and welfare. 116 N.W.2d 704 (Minn. 1962). From a positivist approach, however, the focus should be on the lawyer's deficient lawyering—most significantly his failure to inform and consult his individual client and his failure to appreciate that a contract presented to the court (as this contract needed to be) without proper disclosure could be invalidated (and was, albeit two years later). It may be that the lawyer in *Spaulding* had a client so imprudent and morally defective that he would not have agreed to disclose the information if given proper legal advice, but we have no factual basis for thinking so. *See* Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions:* Spaulding v. Zimmerman *Revisited*, 83 MINN. L. REV. 63, 65, 91–94 (1998) ("The most likely conclusion is that the defense lawyers made this decision largely on their own."); Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 105–06 (2010). This is not to say that *Spaulding* has no moral dimensions and does not invite serious discussion about how to improve the law (as Cramton and Knowles discuss), but to say that in assessing the sufficiency of the lawyer's conduct qua lawyer, the positivist focuses on the lawyer's compliance with his legal duties, not his moral ones. Now positivist scholars also consider the possibility that at a certain point the demands of ordinary morality may be sufficiently consequential that a lawyer will choose to violate the requirements of her role to comply with what ordinary morality demands. As discussed below, however, positivists do not have entirely consistent identifications of when these circumstances arise, of whether that sort of choice violates the lawyer's role or is sometimes permitted, and they have no means for identifying when the demands of morality would be sufficiently great to explain or justify a lawyer's decision to breach her role obligations in favor of ordinary morality. *See infra* notes 127–29 and accompanying text.

15. Amy Salyzyn, *Positivist Legal Ethics Theory and the Law Governing Lawyers: A Few Puzzles Worth Solving*, 42 HOFSTRA L. REV. 1063, 1074 (2014). As discussed below, how positivist legal ethics frames the duties of lawyers where the law directs the lawyer to exercise moral discretion varies depending on whether the author adopts exclusive (Dare) or inclusive (Wendel) positivism. My argument will be that practically speaking, whether one adopts an exclusive or inclusive approach does not matter very much. Either way, the lawyer's analysis will have to incorporate moral concepts. As a consequence, it will not be usefully guided by positivist analysis. It will depend on moral analysis and on concepts about which positivism has nothing substantive to say.

information to prevent certain serious harms, but is not *required* to do so.[16] The law does not tell the lawyer *how* to exercise that discretion.

Further, lawyers may, from time to time, choose to ignore or reject their legal duties to protect other moral values—to be, as Luban called it, a "civil disobedient" to their professional obligations.[17] Whether or not her role permits it, a lawyer may decide other moral values should supersede those her role imposes.[18] And even if a lawyer does not go so far as to ignore or violate her role obligations, she may decide, as Tim Dare suggests she should, to work outside her role to pursue law reform or other social change.[19] Positivists note that these circumstances ought not to arise regularly—"lawyers should not imagine that these sorts of 'boundary crossings' are the norm"[20]—but provide no useful guidance for how a lawyer may assess whether they have arisen.

Finally, as demonstrated by the example with which I began, there are aspects of legal practice with ethical dimensions but about which the law makes no prescription or proscription. A lawyer has choices about how to *be* a lawyer that have ethical consequences, but that do not push against the edges of legality. We make qualitative moral judgments about the choices the lawyer makes, but the law provides no reference point for doing so, nor does it provide any guidance or direction for the lawyer trying to resolve them. And, as a result, neither does positivist legal ethics.

The law does not tell a lawyer how to exercise the moral discretion it permits him, it does not tell a lawyer when he ought to reject or go beyond what his role requires, and it does not tell a lawyer how to construct an ethical practice except where the ethical question is one the law addresses. These questions are questions of "legal ethics"—about what it means to be a good lawyer. They are important. But they are questions about which the law, and hence positivist legal ethics, has nothing satisfactory to say.

In short, this paper argues that positivist legal ethics *is* an oxymoron. Positivist accounts define and critique the lawyer's central obligations through legality, not through ethics or morality. They explain the ethics of law, not the ethics of

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16. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 7–8 (2016) [hereinafter MODEL RULES]; Salyzyn, *supra* note 15, at 1074. In a few states, the disclosure obligation is mandatory, but for our purposes, it is sufficient to note that it is often discretionary.

17. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 63 (2007). *See generally* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 55 (1988) (explaining that the lawyer's nonaccountability might be illusory if it depends upon the morality of the adversary system and if that system is immoral).

18. As discussed below, Brad Wendel concedes that the authority claim of legality is only weighty, not exclusionary, which leaves open the question of when a lawyer ought to favor other claims. WENDEL, FIDELITY TO LAW, *supra* note 1, at 113. Ayers emphasizes this point in his critique of Wendel. Ayers, *supra* note 13, at 15. That is, it is unclear whether the positivist position is that lawyers are sometimes justified in preferring the obligations of morality to their role, or whether sometimes, when faced with a moral dilemma, lawyers will simply choose to sacrifice their role obligations to those of morality.

19. DARE, COUNSEL OF ROGUES, *supra* note 1, at 53–55. *See also* WENDEL, FIDELITY TO LAW, *supra* note 1, at 173.

20. DARE, COUNSEL OF ROGUES, *supra* note 1, at 55.

lawyers.[21] To be precise, they explain the ethics of law and identify the legitimate and authoritative legal duties of lawyers that flow from that explanation, but they do not identify the "ethical principles and virtues" that make a person a good lawyer.[22] When lawyers face genuine ethical dilemmas, positivist legal ethics provides no guidance.

Yet this paper neither rejects nor criticizes positivist legal ethics. Indeed, in my view positivism provides the best general explanation for the lawyer's role and obligations in the legal system. The point is simply that what positivist legal ethics *means* needs to be fully accepted—in its implications for the lawyer's obligations, in its identification of the centrality of law reform when thinking critically about those duties, and in relation to the important ethical questions it cannot answer. Positivist legal ethics is a necessary, but not sufficient, answer to the question, "What ought a lawyer do?" It is a theory of the law and lawyers' authoritative legal duties, not a theory of everything. It is not even a theory of everything about lawyers. But its limited scope does not mean it is wrong.

Part I of this paper reviews the positivist approach to the lawyer's duties and demonstrates how, from a positivist perspective, decisions about lawyer conduct are categorically assessed through legality not morality. Part II explains why positivism's exclusive focus on the law precludes positivist explanations for the lawyer's role from being theories of "legal ethics." Part III further explores the analytical method and limitations of positivist legal ethics in relation to some central issues of legal ethics, namely, where the lawyer's role apparently requires the lawyer to violate ordinary moral obligations, and where the lawyer must decide what to do in the face of moral uncertainty or complexity. Part IV addresses the reasonable question of whether, in light of this analysis of positivist legal ethics, positivism ought to be rejected as a way of understanding the lawyer's obligations. Finally, Part V explores the implications of using a theory of lawyer conduct that is not a theory of legal ethics for scholarship and teaching.

I. POSITIVIST LEGAL ETHICS

A. THE POSITIVIST PERSPECTIVE ON LAW

At the risk of being simplistic, a system of laws can be understood in three ways. In one model, law exists as a matter of convention, as a pragmatic response to certain requirements we have for social ordering and dispute resolution. While we generally comply with the law, we have no reason to do so in circumstances where morality makes a serious contrary claim on our behavior.[23] In another

21. Susan Wolf, *Ethics, Legal Ethics and the Ethics of Law*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 38, 40 (David Luban ed., 1984).

22. *Id.*

23. I don't think any scholar takes this approach fully, but at points David Luban comes very close. In his assessment of the adversary system as a justification for lawyer role morality, Luban concludes that the adversary system should be kept "not because it is a mighty engine of truth and justice, nor because it realizes certain

model, law reflects moral norms. Legality and morality may diverge in practice from time to time, but law orients toward justice, and legal interpretation and application must occur in light of law's moral structure.[24]

Under either of these models—both of which inform legal ethics theories—lawyers' decisions about how to act will account for moral norms, either because moral norms are always relevant when we decide how to act or because, in accordance with the law's moral orientation, the lawyer "should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice."[25] Under either model, what a lawyer ought to do in any given case is directly informed by moral considerations.

Positivist legal ethics articulates a third distinct account of the system of laws.[26] It starts with the observation that any community or society will feature reasonable moral pluralism. We disagree about the right way to live and about "what outcomes are substantively unjust."[27] That disagreement is both intractable and reasoned: parties will not reach consensus[28] despite discussions in which both sides are rational, careful, and base their analysis on relevant facts and norms.[29] The problem then becomes, how do you create an orderly and peaceful society in the face of that disagreement, and how do you do so in a way that is fair and respects equality?[30]

A democratic system of law solves the problem of reasonable moral pluralism. It permits us to find common ground even where our moral norms diverge.[31] It both follows from and creates a fair procedure for figuring out what to do,[32] and it does so in a way that is institutionally neutral as to different substantive points of

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intrinsic human and social goods, but simply because the alternatives to it are not significantly better." LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY, *supra* note 17, at 104. Elsewhere Luban explores the attraction of a Fuller-ian concept of law, but ultimately concludes that Fuller is wrong to see law as moral, since it is possible to comply with Fuller's criteria while still enacting unjust laws. LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 17, at 127.

24. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998). [hereinafter SIMON, PRACTICE OF JUSTICE]. Simon does not suggest that law and morality are co-terminus, nor does he suggest that an orientation toward justice will produce a singular answer from all lawyers. However, he rejects the positivist perspective and argues that lawyers ought to make decisions in accordance with the "basic values of the legal system" and not simply the law's "concrete norms." *Id.* at 138. He argues, for example, that a lawyer "should hold client information in confidence except where disclosure is necessary to avoid substantial injustice." *Id.* at 56. *See also* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090–91 (1988).

25. SIMON, PRACTICE OF JUSTICE *supra* note 24, at 138.

26. For an analysis of the law which is conceptually similar but not limited to consideration of lawyers' ethics see SCOTT J. SHAPIRO, LEGALITY (2011).

27. WENDEL, FIDELITY TO LAW, *supra* note 1, at 88.

28. *Id.* at 55.

29. DARE, COUNSEL OF ROGUES, *supra* note 1, at 61.

30. WENDEL, FIDELITY TO LAW *supra* note 1, at 89–90. Wendel notes that this is what Jeremy Waldron has described as the "circumstances of politics," where we need a framework for cooperation, where we disagree but recognize that we are all equals who owe moral duties to one another. *Id.* at 90.

31. DARE, COUNSEL OF ROGUES, *supra* note 1, at 62.

32. *Id.*

view.[33] Law allows us to solve our problems of coordination and disagreement fairly; it allows us to work together in "mutually beneficial" ways,[34] and it does these things through a process that justifies our respect for its authority, even if we disagree with the specific compromise that results.[35] A democratic system of laws strives to ensure outcomes that are consistent with respect for "the equal political liberty of citizens who disagree"[36] and that result from procedures which adequately "satisfy criteria of fairness [and] representativeness."[37] The claim is not, of course, that the procedures creating law are perfectly fair, perfectly representative, or perfectly just. Rather, they are close enough to those things for us to accept the law that results as legitimate and authoritative.[38] The law will diverge from substantive moral norms—sometimes in ways that are troubling—but the institutions that create law nonetheless have moral properties and serve to protect moral values, such as the dignity and autonomy of the citizenry.[39]

This latter point becomes particularly clear when we move past what Jeremy Waldron has called Hart's "casual positivism" and emphasize the normative structure of governance by law and, in particular, the morality that law's process and structure reflect.[40] When a society chooses to govern through law, rather than through fiat or force, it chooses to govern in a way that permits respect for the dignity and autonomy of the person. The law respects "people's capacities for practical understanding, for self-control, for the self-monitoring and modulation of their own behavior"[41] and it treats "ordinary citizens with respect as active centers of intelligence."[42]

How does rule by law, in and of itself—that is, considered apart from the content of its rules and norms—protect the dignity and autonomy of ordinary citizens? It does so in four significant ways. First, rule by law assumes and depends

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33. "A central part of the liberal response to this fact [of disagreement] has been the establishment of procedures and institutions that aspire to an ideal of neutrality between the reasonable views represented in the communities to which they apply." *Id*. at 117.

34. WENDEL, FIDELITY TO LAW, *supra* note 1,at 54; *see also* Wendel, *Professionalism as Interpretation*, *supra* note 10, at 1184.

35. WENDEL, FIDELITY TO LAW, *supra* note 1, at 96–97.

36. *Id*. at 98.

37. *Id*. at 87, 91 (describing the idea that legal institutions must be adequately, but not ideally, representative); *see also id*. at 104–05.

38. Unsurprisingly, one critique of positivism is that the law in practice is *not* sufficiently fair, representative, or just to support its claim of legitimacy and authority. *See* David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 678–80 (2012).

39. WENDEL, FIDELITY TO LAW, *supra* note 1, at 43–44.

40. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 13–15 (2008); *see also* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 17, at 99–161 (exploring the significance of the legal theory of Fuller and Hart). Waldron's assertion that the normativity of law arises not just from its origins, but also from its form, procedure, and structure, has influenced the more recent work of Wendel and also my own. *See* Waldron, *supra* note 40, at 59. *See generally* Wendel, *Truth*, *supra* note 6; Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, *supra* note 6.

41. Waldron, *supra* note 40, at 26.

42. *Id*. at 59.

on the voluntary compliance of the citizenry. We enact laws publicly and prospectively, allowing people to know what is expected of them and to choose to comply. The law assumes the "responsible agency of ordinary human individuals."[43] The legal system makes laws publicly available in part to justify sanctions against those who ignore them, but it does not depend on the imposition of sanctions to function. Rather, the legal system relies on people doing what the law asks.[44] As Waldron notes, "[l]aw is inherently respectful of persons as agents; it respects the dignity of voluntary action and rational self-control."[45]

Second, laws (unlike moral norms)[46] can be deliberately changed. We have the laws which, if not what we might *personally* want or choose, are what we *collectively* want and have chosen, and which we may choose to reject. Law always incorporates the questions: should this law be different? Is it good enough? And, insofar as it invites those questions, law "conveys an elementary sense of freedom, a sense that we are free to have whatever laws we like."[47]

Third, we apply legal norms through procedures that allow the people subject to the law to participate and be heard. Adjudicators treat litigants respectfully, as having a "view or perspective of their own to present on the application of the norm to their conduct and situation. Applying a norm to a human individual is not like deciding what to do about a rabid animal."[48] Instead, resolving their disputes requires "paying attention to a point of view and respecting the personality of the entity one is dealing with."[49] The decision-maker must take into account the information the parties provide, the evidence they present, and the law on which they rely. The decision-maker's decision must then explain how the decision-maker addressed what the parties presented.[50]

Finally, law does not exist merely as a set of determinate rules (although some determinacy is necessary and possible). What a specific principle or rule means in any given case, or how it should be applied going forward, can shift or evolve depending on the arguments that are brought to bear upon it. Law has what Waldron calls "systematicity"[51]: a "coherence . . . integrating particular items into a structure that makes intellectual sense" as a whole.[52] Law's systematicity permits parties not only to argue about "what the law *ought* to be," but also about

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43. *Id*. at 26.

44. *See id*. at 27–28; *see also* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, *in* GETTING TO THE RULE OF LAW 3, 20 (James E. Fleming ed., 2011) ("Law's dignitarian faith in the practical reason of ordinary people may be an act of faith in their *thinking* . . . [that they can] think about and interpret the bearing of a whole array of norms and precedents to their conduct, rather than just the mechanical application of a single norm.").

45. Waldron, *supra* note 40, at 26.

46. HART, *supra* note 11, at 175.

47. Waldron, *supra* note 40, at 31.

48. Waldron, *supra* note 44, at 16.

49. *Id*.

50. *Id*. at 15.

51. Waldron, *supra* note 40, at 32.

52. Waldron, *supra* note 44, at 18.

"what the law *is*," considered in light of its own criteria, logic, and structures.[53] Law is a "matter of argument" as much as a set of rules.[54] The law's intellectual structure is a way of paying "respect to the persons who live under it, conceiving them now as bearers of individual reason and intelligence," who may engage with the law's content and its appropriate application to their circumstances.[55]

As Nigel Simmonds has explained, a system of laws "represents the only possible set of conditions within which one can live in community with others while enjoying some domain of entitlement that is secure from the power of others."[56] Katherine Kruse has observed that autonomy includes not just freedom from constraint, but also our positive capacity to determine our own ends and what our life will include.[57] The rule of law enables autonomy in both senses.

In short, governance through law, as opposed to governance by command or fiat, respects the equality, dignity, and autonomy of those to whom it applies. It arises from fair and respectful institutions that assume the equality of the citizenry and settles the inevitable and intractable disagreements that exist.

B. THE POSITIVIST PERSPECTIVE ON LAWYERS

Of course, the point of positivist legal ethics is not its jurisprudential account of the legal system *per se*. Rather, it is the duties of lawyers that follow from that jurisprudential account. This part briefly explains the central claims of positivist legal ethics about the lawyer's role and the constraints on that role; the following part (II) then analyzes those claims in more detail to explore the ways in which positivist legal ethics is (or, as it turns out, is not) a theory of lawyers' ethics.

Explaining law as a system designed to settle the problem of moral pluralism, to allow us to coordinate and plan our endeavors, and to operate in a way that respects our dignity and autonomy posits a particular role for the citizens[58] to whom the law applies. That role is at once participatory and permissive. Citizens vote, they present their perspective in legal disputes, and, through engaging with law's systematicity, they help set the content of law both going forward and in a particular case. Citizens also have the freedom to order their affairs within the boundaries of the law, to exercise rights granted by the law, and to enjoy the entitlements and benefits that the law provides.

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53. *Id.* at 19.

54. *Id.*

55. *Id.* at 36. Katherine Kruse has observed the importance of this idea to the rule of law, that law exists not just as a set of determinate rules to which a lawyer ought to be faithful, but also as a mechanism through which instability and argument in the law permits the law to arc towards justice. Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 520 (2011).

56. NIGEL SIMMONDS, LAW AS A MORAL IDEA 143 (2007).

57. Kruse, *The Jurisprudential Turn in Legal Ethics, supra* note 55, at 527 (citing JOSEPH RAZ, THE MORALITY OF FREEDOM 369–81 (1986)).

58. Meaning here simply those to whom the law applies, not those who qualify for the legal status of "citizen."

But citizens cannot do these things without assistance. The law is too complex and opaque, and on matters involving our own interests it can be difficult, absent some guidance, to discern the best way to advance those interests through the law.[59] The law *aims* to respect the dignity and autonomy of those to whom it applies, but that aim cannot be achieved if people do not have lawyers to help them access the law, discover its content, and contest its meaning. Lawyers allow the normativity of law to be more than an abstraction. They provide the skills citizens need to access and participate in the system of laws.

However, in exercising this function, a lawyer is subject to fundamental constraints. On the one hand, a lawyer cannot do *anything* the client wants—the interests the lawyer advances, and the matters on which he advises, must be legally salient, and the lawyer's work must reflect the rights, restrictions, benefits, and entitlements provided by law.[60] On the other hand, a lawyer cannot impose constraints on a client greater than those imposed by law. The social settlement of law, coupled with its respect for the dignity and autonomy of those to whom it applies, means that the client must be free to make her own moral decisions, and to choose what she wants to do (or not do) within the constraints of legality.

From these fundamental constraints positivist legal ethicists have articulated norms to govern lawyer conduct, norms that identify in general terms the need for lawyers to restrict their advocacy to what the law contemplates while also reflecting lawyers' obligation to facilitate the dignity, autonomy, and freedom of clients. Each ethicist uses somewhat different language to explain these constraints, emphasizing for example a lawyer's obligation of "fidelity to law"[61] or the need to limit representation to *mere* zeal, not *hyper* zeal,[62] but the constraints on lawyer conduct that they articulate are structurally the same. Specifically, each requires (1) that the lawyer treat the law as obligatory, and as constraining her representation of the client to that which the law provides; (2) that the client be permitted to exercise the rights and freedoms the law provides with the lawyer's help, not interference; and (3) that the lawyer not make decisions based on extra-legal considerations, except as determined by the client and permitted by law.

In short, positivist legal ethics constrain lawyers' representation of clients through *law*, not morality. As noted by Trevor Farrow, positivist theories upload and download moral decision-making—uploading to "judges, politicians and other public officials" who create the law, and downloading to clients who

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59. DARE, COUNSEL OF ROGUES, *supra* note 1, at 77.

60. DARE, COUNSEL OF ROGUES, *supra* note 1, at 79–80.

61. WENDEL, FIDELITY TO LAW, *supra* note 1, at 178. Wendel notes that this incorporates both the client's substantive and procedural requirements. *Id.* at 51. However, note that in a more recent work, Wendel seems to question the significance of procedural rules where those rules do not advance the norms of legality. *See* Wendel, *Truth*, supra note 6.

62. WENDEL, FIDELITY TO LAW, *supra* note 1, at 77–79; *see also* Kruse, *The Jurisprudential Turn in Legal Ethics*, *supra* note 55, at 505; Katherine R. Kruse, *Fidelity to Law and the Moral Pluralism Premise*, 90 TEX. L. REV. 657, 671 (2012) (reviewing WENDEL, FIDELITY TO LAW); Benjamin Zipursky, *supra* note 62, at 1175–77.

determine the moral scope of a retainer.[63] For the lawyer, questions about what a representation requires, and what it cannot include, must be determined by interpretation and application of the law.[64] Positivist theorists make this clear,[65] and for that reason devote considerable attention to analyzing the approach lawyers should take in interpreting and understanding what the law requires and the constraints it imposes. Wendel, for example, emphasizes the craft of lawyering:[66] the obligation of lawyers to seek the actual meaning of legal norms in light of the internal standards of good practice. As he puts it,

> The demand for reasoned justification requires that an interpretation of legal norms be grounded in materials (text, principles that are fairly deemed to underlie and justify legal rules, interpretive practices, hermeneutic methods, and so on) that are properly regarded in the relevant community as appropriate reasons.[67]

In approaching the lawyer's role in this way, positivists do not create a maxim to guide lawyer action—that is, "a maxim that tells lawyers how to promote the abstract value in their daily practice."[68] "do those actions consistent with fidelity to law." The point of positivism is not to treat law as a value and prefer it to other values, such as justice. Rather, positivism says that there is a multiplicity of values relevant to a lawyer's decision about what to do, and about a client's legal position, but that those values are the ones contained *in* the law, not ones that exist *outside* the law. The lawyer must assess those values through *legal* analysis,

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63. Trevor C. W. Farrow, *The Good, the Right, and the Lawyer*, 15 LEGAL ETHICS 163, 169 (2012).

64. Kruse, *Fidelity to Law and the Moral Pluralism Premise*, *supra* note 62, at 657 (emphasizing the centrality of interpretation to the positivist analysis).

65. As Anthony Alfieri notes, positivists elevate "respect for the law and the legal system to a normative plane." Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEX. L. REV. 635, 648 (2012) (reviewing WENDEL, FIDELITY TO LAW). *See*, *e.g.*, DARE, COUNSEL OF ROGUES, *supra* note 1, at 156 ("[T]he legal resources available to judges and lawyers, even when incorporated moral terms and considerations are available in the manner described, are narrower than the full resources of ordinary morality. That is a price we pay for the benefit of legal systems able to mediate between reasonable but inconsistent views of how we should resolve practical disputes."); WENDEL, FIDELITY TO LAW, *supra* note 1, at 207 ("A critic who wishes to establish that any lawyer is behaving unethically must engage with the nature of the legal reasoning given by the lawyer in support of her conclusion that the client has a legal entitlement to do something. If that reasoning passes muster, by the standards of the interpretive community, then the lawyer is justified in ethical terms."); W. Bradley Wendel, *Lawyering with Heart: A Warrior Ethos for Modern Lawyers*, 54 OSGOODE HALL L.J. 1371, 1379 (2017) (reviewing ALLAN C. HUTCHINSON, FIGHTING FAIR: LEGAL ETHICS FOR AN ADVERSARIAL AGE (New York: Cambridge University Press 2015)); Luban, *supra* note 1, at 359; W. Bradley Wendel, *The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations*, 30 CAN. J.L. & JURIS. 443, 462–63 (2017).

66. WENDEL, *supra* note 1, at 184; W. Bradley Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)*, 104 NW. U.L. REV. COLLOQUY 58, 68 (2009).

67. WENDEL, FIDELITY TO LAW *supra* note 1, at 195. Wendel notes that this looks contextual—a criminal defense lawyer has latitude to loophole the law and exploit technicalities that an advisor does not. *Id*. at 188–89.

68. Ayers, *supra* note 13, at 2.

interpretation, and application, not through *moral* analysis, interpretation, and application. A positivist account of the lawyer's role requires the lawyer to consider moral values indirectly, to the extent they are contained in law, rather than directly, through independent assessment of moral norms. It does not set out a moral maxim—"obey the law"—and then make that moral value prior to other moral values. Rather, it systemically shifts the analysis from morality to legality.[69]

Positivist accounts of the lawyer's role do not endorse "a view of judicial decision-making variously described as deductive, mechanical, non-normative, and constrained by literal meanings of statutory words."[70] Nor do they mandate a particular approach to legal interpretation and analysis. Positivist legal ethics asks certain things of legal interpretation—in particular, that it reflect the normative structure of legality and lawyer's role in relation to that structure—but it does not dictate a particular explanation for how that ought to occur.

It is true, as William Simon has pointed out, that a positivist account of the law necessarily precludes a strongly Dworkinian approach to the law, where the lawyer aims to do justice.[71] The positivist account has to concede that in some cases a proper interpretation of the law will produce results that are, substantively speaking, unjust.[72] Yet positivism does not require (and positivist legal ethicists

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69. To use an analogy, we wouldn't tell a constitutional lawyer assessing freedom of expression that the First Amendment was a maxim that the lawyer ought to privilege over other relevant moral considerations applicable to freedom of expression. We would rather tell the lawyer to advise her client based entirely on the jurisprudence arising from First Amendment principles, and to account for the moral values applicable to freedom of expression as resolved through that jurisprudence.

70. Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 912 (1995).

71. William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709, 709–10 (2012); William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987, 1000–01 (2010).

72. Wendel, *supra* note 10, at 1185. In a more recent paper, Wendel has argued that a lawyer has a duty of truthfulness in advocacy because the law ought to be interpreted in light of "legal values." He argues that while the law and accepted lawyer practices may not incorporate a direct obligation to truth, such an obligation can nonetheless be located in the general "demand for legal legitimacy." Wendel, *Truth*, *supra* note 6, at 148. In my view Wendel's argument in that paper fits uneasily with the positivist approach he otherwise adopts. He does not engage with the law that actually governs how and in what way lawyers put forward factual propositions in litigation (e.g., the law of evidence and procedure, and the law on witness coaching). He relies on two cases in which lawyers were disciplined for dishonest conduct, but does not consider whether those cases in fact reveal existing legal norms that prohibit dishonesty. *Id.* at 115–21. He equates lawyer beliefs (which he also asserts but does not demonstrate) to the standards of a professional community. *Id.* at 124. Further, and most importantly, he allows lawyers to directly engage with moral values, which a positivist theory precludes. *Id.* at 134–35. That the values in question are "legal" rather than "moral" does not make direct reliance on those values appropriate, except insofar as those values are *legally* relevant—that is, incorporated in the applicable law, properly interpreted in accordance with the practices and standards of the professional community. From a positivist perspective, the law does not only settle disputes about moral values, it also settles disputes about legal values, and what they practically require. Of course, legal interpretation is not value neutral. But there is a significant difference between interpreting the law in light of the sort of value judgments the interpretive practices of a professional community permit (which Wendel suggests in FIDELITY TO LAW) and ignoring the law in favor of legal values.

in fact universally reject) a technical approach to law, or one that views "legal norms . . . as obstacles to be planned around, or even costs to be incurred."[73] Indeed, positivism's emphasis on the normativity of law, on its systematicity, on its respect for the dignity and autonomy of the citizen, makes positivist legal ethics inconsistent with a technical approach to legal interpretation. In the positivist account, law is not simply a set of rules to be read acontextually and without understanding its origins, the purpose it serves, or its place in the broader norms that the law enshrines. Law captures and reflects important social values, and it must be interpreted as such.[74]

II. POSITIVIST LEGAL ETHICS IS AN OXYMORON

Positivist legal ethics thus defines the lawyer's duties in relation to the representation of a client through the law.[75] Does this make positivist legal ethics an oxymoron? That is, is a positivist theory of the lawyer's role necessarily not an account of "legal ethics"?

Answering this question requires defining what we mean by both "legal" and "ethics". Drawing from Susan Wolf, the "legal" in "legal ethics" can be understood simply as referring to lawyers—the subject of legal ethics is the ethics of lawyers ("being a good lawyer") not the "ethics of law."[76] Thus, and in accordance with common usage, lawyers' ethics and legal ethics are synonymous.

"Ethics" has a range of meanings. Generally speaking, ethics means morality. H.L.A. Hart suggests that ethics and morality are "nearly synonymous."[77] Similarly, the Cambridge Encyclopedia of Philosophy suggests that ethics is "commonly used interchangeably with 'morality.'"[78]

More broadly, ethics can be understood as referring to the question, "[H]ow should one live"?[79] Charles Fried invoked this broader concept of ethics when he asked the foundational question, "Can a good lawyer be a good person?"[80] Daniel Markovits articulated the question of legal ethics as being whether the "actions,

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73. Wendel, *supra* note 10, at 1176.

74. Wendel, *Response to Hatfield*, *supra* note 66, at 69–70.

75. As we will see, there is some complexity around this point insofar as positivists recognize that a lawyer may do things that go beyond the obligations attached to her role, although, in a sense, relating to that role (e.g., choosing clients, offering moral counseling). Further, a positivist recognizes that a lawyer may choose to step outside or ignore her role. As will be discussed there, however, positivist accounts of legal ethics provide no guidance to a lawyer on how to do those things.

76. Wolf, *supra* note 21, at 40. The ethics of law, in Wolf's account, relate to the purposes of the law, its capacity to "resolve disputes, to protect the rights and interests of persons and groups against unjust manipulation and interference by others, and to foster substantive goals" *Id*. at 43–44. The ethics of the lawyer are narrower, and require the lawyer to promote and protect "the interests of the individuals and groups whom he or she is contracted or otherwise assigned to help and protect" *Id*. at 44.

77. HART, *supra* note 11.

78. Robert Audi, CAMBRIDGE ENCYCLOPEDIA OF PHILOSOPHY 284–285 (2d Ed. 1999).

79. BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 1 (1985).

80. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976).

commitments, and traits of character typical of the [legal] profession . . . may be integrated into a life well-lived."[81]

Finally, ethics may simply mean providing a justification for action. In *Fidelity to Law*, Wendel suggests that his theory is one of "real ethics" because it goes beyond the ethical rules to provide "the reasons that must be given by way of justifying one's actions, as against a demand for justification by another person whose interests are affected."[82]

But this definition of ethics seems unsatisfactory, as the fact that an explanation justifies a choice or behavior does not, *ipso facto*, make that explanation ethical. For example, if I explained to a friend that I could not come dancing because I had a sore leg, that would justify my decision to my friend, but not on ethical terms.[83] Similarly, if I explained to my son that his iPad cracked because he did not hold on to it, and gravity pulled it to the ground, he might accept my explanation as factually accurate but again it would not be an ethical accounting of what had occurred. Wendel himself does not seem to mean "ethics" as simply "that which is satisfactorily explanatory," given that he references Fried's foundational question as the "demand for justification" that legal ethics must satisfy.[84] The question he answers is not merely how might someone be convinced pragmatically to have a lawyer do the things that lawyers do but, rather, how might a lawyer's work be justified in moral terms?

To be an account of legal ethics, a theory must, therefore, provide a moral account of the lawyer's decisions—some explanation for the morality of the lawyer's life and for the ability to integrate the lawyer's work into a life well-lived. As explained by Susan Wolf: "Legal ethics [must] be conceived as a subject that takes as its central purpose the study of what ethical principles and virtues are essential, not to being a good person, but rather to being a good lawyer."[85]

Positivist legal ethics does not provide that sort of explanation. Under Wolf's schemata, positivism is a theory of the ethics of law, not a theory of legal ethics; to be precise (if not concise), it is a theory of the ethics of law, and an identification of the legitimate and authoritative legal duties of lawyers, that flow from that theory. From its account of the ethics of law, of the purposes the law fulfills and the moral justification for governance by law and democratic legal institutions, positivism derives duties for the lawyer, but those duties are *legal* (requiring the lawyer to respect the law and interpret it in good faith) or *representational*

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81. *See* DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (Princeton University Press ed. 2008).

82. WENDEL, FIDELITY TO LAW, *supra* note 1, at 19.

83. I suppose one could come up with an ethical account based on the duty to self, but that seems strained.

84. *See* WENDEL, FIDELITY TO LAW, *supra* note 1, at 19.

85. Wolf, *supra* note 21, at 40.

(requiring the lawyer to defer to the client's decisions). They do not identify the ethical (moral) principles and virtues that make someone a good lawyer.[86]

What, though, of lawyers who violate the duties that positivist legal ethics mandates? What if they advance the interests of their clients with hyper-zeal, exploiting the law to achieve their clients' ends even when the law, properly interpreted and applied, does not permit them to do so? Can a positivist assess whether those lawyers acted "ethically"?

Consider an example Wendel discusses, of a lawyer who helps a welfare recipient exploit a legal loophole to avoid losing some of her benefits.[87] Under the applicable statute, the client should lose her benefits because she is living rent-free with a family member. Both Deborah Rhode and William Simon suggest that the lawyer would act appropriately in avoiding the application of the law as written, and in preserving the client's welfare benefits.[88] They posit a lawyer who does not engage in active dishonesty, but who pushes or manipulates the substance and process of the law to achieve a just result.[89] Wendel disagrees with their reasoning, rejecting "the position that the lawyer ought to believe herself to be permitted to work around legal prohibitions on the client's conduct, simply because the lawyer believes the law has got it wrong as a matter of justice."[90]

If Wendel is correct, and the lawyer acted improperly, would we also say that the lawyer acted unethically in terms of Wolf's definition—i.e., in how he exercised the "principles and virtues . . . essential to being a good lawyer"?[91] The lawyer pushed the boundaries of the law. He violated the obligations of his role, as positivists define them. He acted wrongfully. He acted unlawfully.[92] He did not respect the normative value of legality. But he did not act *unethically*, given the moral values he sought to pursue and that he did not act dishonestly. We might say that, in light of the ethical principles and virtues at stake, he was acting as a good lawyer even though he preferred the moral value of justice over the moral value of respect for law.

Yet the positivist rejects that consideration of the broader moral perspective. The positivist asserts that the only evaluative criterion relevant for considering this lawyer's behavior is whether it was lawful, and since the behavior was unlawful it was wrong. In making this assertion, the positivist does not contradict the moral evaluation of the lawyer's conduct posed here; the positivist simply declares that evaluation irrelevant and declines to consider it. To answer the

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86. It should be noted that from this point ethical and moral are used interchangeably, consistent with general usage. *See* note 11, *supra*.

87. WENDEL, FIDELITY TO LAW, *supra* note 1, at 133–35.

88. *Id.* (citing DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 76–79 (2000); WILLIAM SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 148–149 (1998)).

89. *Id.*

90. *Id.* at 135.

91. Wolf, *supra* note 21, at 40.

92. Not in the sense that he "broke the law" but in the sense that he acted inconsistently with what the law requires.

question originally posed: a positivist cannot assess whether or not the lawyer acted *ethically*, even where the lawyer violated the requirements that positivism imposes.

The key observation here is that positivists assess a lawyer's conduct on legal grounds, not moral. An ethical assessment may also be possible, but that is irrelevant in terms of what the lawyer's role legitimately requires him to do from a positivist perspective. In short, the categories of "ethical" or "unethical" are discarded. Instead, the relevant analytical categories are "lawful/justified" or "unlawful/unjustified." Under this framework, if the lawyer decided to apply the law and not to help the welfare recipient, we would say that the lawyer acted lawfully and was justified. We might not say he was *ethical*, given the broader moral perspective, but the positivist would unequivocally assert that the *ethics* of the lawyer's judgment simply does not matter. What the lawyer did was lawful, and therefore right. That would end the analysis.

In sum, the analytical method of positivist legal ethics simply rejects ethical analysis; the positivist's analytical tools, however powerful or persuasive, are tools of a very particular kind, of the lawyer's trade, not the ethicist's. The assessment of the duties of a lawyer, like, for example, the assessment of permissible state restrictions on speech, takes place through law and legal analysis, not morality. As a result, positivism serves only as a theory on the ethics of *law*, not lawyers, providing minimal guidance to lawyers who face problems that are genuinely ethical in nature (*i.e.*, that the law itself does not resolve).

III. THE ANALYTICAL METHODS AND LIMITS OF POSITIVIST LEGAL ETHICS

The prior section argued that positivist legal ethics is a theory of the ethics of law from which duties of lawyers can be derived, but that those duties are legal, not ethical, such that positivist legal ethics is not, in fact, a theory of legal ethics. This section develops and expands this argument through exploring how positivist legal ethics responds to some central problems of legal ethics; namely, how we respond to conflicts between the demands of a lawyer's role and the requirements of ordinary morality, and how we provide guidance to lawyers about the right thing to do in circumstances of moral uncertainty or complexity.

A. HOW DOES POSITIVIST LEGAL ETHICS RESPOND WHEN LAWYERS DO WICKED THINGS?

The legal ethics literature is replete with examples of lawyers who did (or are imagined doing) things that the law permits or requires but which are wrong on moral grounds. The lawyer's choice inflicts harm that, on any ordinary moral evaluation, we would condemn. Here are two of the most notable:

- ***Spaulding v. Zimmerman*:** Lawyers acting for a personal injury defendant and his insurer received a medical report about the plaintiff. The report

disclosed that the plaintiff suffered a potentially fatal aortic aneurysm as a result of the car accident caused by the defendant,[93] an aneurysm that could be successfully treated.[94] The plaintiff's lawyer did not request the report. The defendant's lawyers did not disclose it. The defendant's lawyers did not consult with the defendant about the decision not to disclose and may not have consulted with the insurance company funding the case. Instead, they "probably made the decision not to disclose on their own."[95] They negotiated a settlement agreement with the plaintiff that had to be approved by the court because the plaintiff was a minor. Upon the later discovery of the aneurysm, the court invalidated the settlement on the basis that the defendant's lawyers misrepresented the facts to the court.[96]

- **Alton Logan**: Two lawyers, Dale Coventry and Jamie Kunz, represented Andrew Wilson on charges of killing two police officers (crimes for which he was convicted). During their representation of Wilson, the lawyers heard a rumor that Wilson had also killed a security guard at McDonald's, a crime for which Alton Logan had been charged and convicted. Wilson admitted to Coventry and Kunz that he had killed the security guard. They swore an affidavit that they had privileged information to the effect that Alton Logan was not guilty of the crime. They did not disclose that information because of their legal duties of privilege and confidentiality, and because of their judgment that it would be wrong to put their own client in jeopardy of another capital case. They have said that they would have revealed the information had Logan been given the death penalty. They obtained consent from Wilson to disclose the information once he died, and they did so, at which point Logan was released, but only after spending twenty-seven years incarcerated for a crime he did not commit.[97]

Ordinary morality, considered without philosophizing or assessing the lawyer's professional obligations, requires disclosure in both cases. As David Luban has pointed out, *Spaulding* is an easy case, morally speaking.[98] Jeopardizing someone's life because otherwise your clients may have to pay what they legally owe is impossible to morally justify. Alton Logan is not much more difficult, although there is at least a plausible moral argument against disclosure. Andrew Wilson only gave his lawyers the information that he had killed the security guard

93. The medical report stated "The one feature of the case which bothers me more than any other. . . is the fact that this boy of 20 years of age has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. . .. Of course, an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm. . . might rupture with further dilatation and this would cause his death." Cramton, *supra* note 14, at 69 (quoting Spaulding v. Zimmerman, 263 Minn. 346, 349 (Minn. 1962)).

94. When the aneurysm was discovered two years later, it was surgically repaired but Spaulding suffered "permanent and severe speech loss" *Id*. at 71.

95. *Id* at 69.

96. *Id*. at 75.

97. "*26 Year Secret Kept Innocent Man in Prison*", 60 MINUTES (Mar. 6, 2008), https://www.cbsnews.com/news/26-year-secret-kept-innocent-man-in-prison/ [https://perma.cc/JHE8-MKQG].

98. Luban, *supra* note 38, at 689.

because they asked him to, and he did so on the expectation that it would be kept secret. In general, we think keeping secrets is a morally valuable thing to do and that, consequently, Wilson's lawyers had a moral obligation to keep the secret with which they had been entrusted. On the other hand, Wilson murdered the security guard and deserved the just consequences of his actions. Alton Logan deserved no such consequences. Given the enormous and unwarranted cost to Logan's life, dignity, and autonomy if Wilson's secret was kept, as weighed against the moral value of keeping the secret, disclosure seems justified on moral grounds. But the lawyers in both *Spaulding* and Alton Logan did not disclose. So how does a positivist respond?

The positivist response occurs in stages. First, the positivist considers whether the lawyers were justified in their choices by virtue of the law and their professional obligations. It pays no direct attention to the sorts of moral values noted above. The question for the positivist is: were the lawyers *legally justified* in not disclosing? For *Spaulding*, the answer is no. For Andrew Wilson's lawyers, the answer is yes.

The lawyers in *Spaulding* made a decision on behalf of their client which was not theirs to make. The client was entitled to know the facts and law relevant to the decision to settle and, to the extent there was a moral question that the law did not answer, to provide direction to the lawyer in that regard. The point of positivist legal ethics is, as Farrow notes, to upload or download moral decision-making;[99] it is not to allow a lawyer to make moral decisions without asking the client. Further, we have no reason to assume that the client in *Spaulding* would have refused to disclose. As Katherine Kruse has observed, the parties in *Spaulding* were neighbors and friends, and had been driving in the same car:

> Given the close relationship between John Zimmerman and David Spaulding and the devastating loss his own family had already suffered, Zimmerman likely would have consented—even wanted—to reveal medical information critically important to Spaulding's health and life.[100]

Assume for the moment (as legal ethicists generally do) that the lawyers in *Spaulding* had consulted with their clients, and assume, however implausibly, that the clients refused to disclose the medical report. What about those hypothetical *Spaulding* lawyers? At that point, the positivist has to consider the legal obligations of the lawyers in relation to disclosing information without client consent. As Wendel notes, there is an argument that the lawyers in *Spaulding* were permitted to disclose without consent.[101] Since the report was disclosable on the request of counsel for the plaintiff, the defendant had no legal right to keep

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99. Farrow, *supra* note 63 at 169.

100. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO J. LEGAL ETHICS 103, 106 (2010).

101. WENDEL, FIDELITY TO LAW, *supra* note 1, at 74–75.

the report secret. On the other hand, the lawyer has a general duty to maintain the confidentiality of any information received during a representation unless the client consents to its disclosure. Under this analysis of the hypothetical, *Spaulding* becomes a "hard case" in positivist terms, with the lawyers having to weigh and interpret the law to decide the most justifiable course of action, and running the risk of professional liability or discipline if they make the wrong choice.[102]

In the Logan case, the lawyers did consult with their client, Wilson. He did refuse to disclose, and the law prohibited disclosure absent that consent. This is not only because of Wilson's right to confidentiality, but also because of the evidentiary law of privilege and Wilson's constitutional rights to silence and counsel. The law puts enormous weight on a client's right to seek legal advice in confidence, particularly in criminal cases and where a client seeks advice about the legal significance of past bad conduct. There was no legal exception to Wilson's rights that applied unless, as the lawyers noted, Logan faced execution. Viewed in positivist terms, Coventry and Kunz acted with absolute propriety.

At this first stage of advising a lawyer about what to do or critiquing a lawyer's decision, positivist analysis focuses on law all the way down: does the law support the lawyer's choices? Often, the positivist analysis will be complicated. Determining whether a lawyer's advice was unethical, for example, may require a detailed analysis of the substantive law at issue. Even with matters that are addressed by law, such as the proper scope for the examination of a witness at trial, a positivist approach requires a careful assessment of the applicable *Model Rule*,[103] the law of evidence, the rules of procedure, and the substantive factual and legal matters at issue—clearly a much more thorough analysis than the relatively cursory one done here. The totality of the law will determine the relevance of the lawyer's questions and whether their prejudicial effect outweighs their probative value.[104] In all cases, the question is: given applicable statutes and case law, rules of conduct, conventions of interpretation, and the practices of the professional community, did these lawyers act in a way that the law permitted or required? On the facts of *Spaulding*, the answer is no. On a hypothetical reimagining of *Spaulding* in which the client refused to disclose, the answer is maybe.

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102. *Id.* I am uncertain how persuasive Wendel's interpretation of the conflicting law is here, if only because if there was a plausible legal case for disclosure, then professional discipline seems unlikely, even if the lawyer was wrong. So Wendel may be positing a plausible but morally unpalatable legal analysis, and an implausible but morally palatable analysis. I'm not sure that route is open on a positivist basis; in my view the lawyer has to take the plausible legal route, without direct consideration of the moral values at play, at least in the first instance. I cannot comment directly on this point however, having only constrained knowledge of the American law on point.

103. *See, e.g.*, MODEL RULES R. 3.4–3.5.

104. So, for example, the ethical scope for a defense lawyer cross-examining a sexual assault witness in Canada must be understood in light of the provision of Criminal Code, R.S.C. 1985, c C-46, which imposes a requirement of affirmative consent in sexual assault cases, the Supreme Court of Canada's explicit rejection of rape myths and stereotypes in its interpretation of the scope of the rape shield provisions and the language of those provisions. A different sort of analysis would be necessary in the United States. *See* ELAINE CRAIG, PUTTING TRIALS ON TRIAL: SEXUAL ASSAULT AND THE FAILURE OF THE LEGAL PROFESSION 41–60 (2018).

For the lawyers in Alton Logan, the answer is yes. But in identifying what the lawyer ought to have done, the considerations of ordinary morality with which we started are not considered.

That, though, does not conclude the positivist assessment of lawyer misconduct. A positivist confronted with a lawyer who acted lawfully but in ways that morality condemns does not stop thinking about the problem just because the law permitted or required the lawyer to do as she did. As befits a theory of the ethics of law, the positivist instead engages directly with the merits of the law that justified or required the lawyer's actions. Indeed, it is notable that *Spaulding* no longer has practical relevance because the law of confidentiality changed from having an exception permitting disclosure to prevent future crimes (which would not allow disclosure on *Spaulding*'s facts), to an exception permitting disclosure to prevent serious bodily harm or death (which would allow disclosure on *Spaulding*'s facts).[105] Whether or not *Spaulding* led to that shift in the law, it served to show the deficiencies in the law as it then was, and to suggest the type of law that ought to be adopted, namely one permitting a lawyer to disclose confidential information to prevent serious bodily harm or death.

In a recent article, Adam Belsey reviewed the law applicable to circumstances such as those faced by Coventry and Kunz that resulted in Alton Logan spending twenty-seven years in prison for a crime he did not commit. Belsey considers the availability of interpretive shifts in how lawyers assess the existing rules of confidentiality and privilege, and makes the case for law reform.[106] Specifically, he argues for the creation of an exception to lawyer-client confidentiality and privilege that would allow a lawyer to disclose information to prevent a wrongful conviction but would also grant use immunity to the client whose information has been disclosed.[107] That is the sort of analysis a positivist approach endorses in response to the legally justified moral wrong inflicted on Alton Logan.

A positivist can also engage with the question of how the law ought to be interpreted, and with the sufficiency of the interpretive practices of the professional community on which the lawyer is commenting. In observing that lawyers ought to look beyond the rules of conduct in assessing what the law requires, as I did

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105. The American Bar Association revised its Model Code in 2003. *Confidentiality and Its Relationship to the Attorney-Client Privilege* in VINCENT S. WALKOWIAK, THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 109, 114 (4th ed. 2008).

106. Adam Belsey, *When Innocence is Confidential: A New and Essential Exception to Attorney-Client Confidentiality*, 56 SANTA CLARA L. REV. 147, 147–49 (2016). It should be noted that following the Alton Logan case some states did adjust their confidentiality rules.

107. *Id*. at 172–75. Although Belsey does not note this, in Canada there is an "Innocence at Stake" exception to privilege which in very narrow circumstances allows an accused to use a third party's privileged information to demonstrate his innocence, while also providing use and derivative use immunity to the third party. Strangely that exception has not been included in Canadian codes of professional conduct, creating a situation where a lawyer could be compelled to disclose the information, but cannot do so voluntarily. Further, while the exception exists theoretically, no court has been willing to breach privilege for this purpose. *See* ALICE WOOLLEY, UNDERSTANDING LAWYERS' ETHICS IN CANADA §5.105–§5.114 (2d. Ed. 2017).

earlier in this section,[108] I am making this sort of claim. So too were the scholars who noted the many analytical deficiencies in the legal advice given to President George W. Bush on the legality of torture.[109]

Positivism's analytical method focuses on the law, not the lawyer. It does not mandate that a lawyer deciding what to do subject the law to ordinary moral analysis nor require that lawyer to interpret the law through the norms of justice. But it does support making the case for changes to the law and how it is interpreted when such wrongs occur. Positivism requires neither passivity nor commitment to the status quo.

Positivist analysis leaves a further option to the lawyer faced with doing something that the law permits or requires but that the lawyer views as unacceptable on moral grounds: the lawyer can decide to do something other than conform to her role obligations. Positivism explains why the law imposes legitimate and authoritative constraints on a lawyer, and why those constraints preempt ordinary moral considerations in a particular case. But a lawyer can choose to step out of her role. She can choose to compensate for her role obligations through ameliorative action—like advocating for law reform.[110] Indeed, such steps may be morally incumbent on her given her personal knowledge of the moral deficiencies in the law.[111]

More drastically, a lawyer may refuse to comply with what her role requires; she "may conclude that there are some things she will not do, even if the role requires them."[112] She may decide that when asked to choose between complying with the obligations of the role, or complying with the obligations of ordinary morality, she chooses ordinary morality. What positivism does not do, however, is shed any light on when a lawyer might "bear a responsibility"[113] to undertake law reform or be, in some sense, justified in breaking the obligations of her role.[114]

B. POSITIVIST LEGAL ETHICS AND GENUINE ETHICAL DILEMMAS

As discussed earlier, ethical questions turn on what one ought to do given "ethical principles and virtues,"[115] and/or on the question of how one ought to live.[116]

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108. *See supra* notes 104-105 and accompanying text.

109. LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 17, at 162.

110. DARE, COUNSEL OF ROGUES, *supra* note 1, at 149. "When the client's case is complete, however, the lawyer may well bear a responsibility to take on the role of law reformer arguing for reform, the need for and nature of which their legal expertise and familiarity with the particular case have made especially clear."

111. *Id.*

112. *See* WENDEL, FIDELITY TO LAW, *supra* note 1, at 174.

113. DARE, COUNSEL OF ROGUES, *supra* note 1, at 149.

114. As Ayers notes, Wendel appears to take varying positions on this point, suggesting that breach might be possible in circumstances where "injustice is . . . patent" and in a later article that breach is acceptable "when there has been a failure of the law to provide a basis for cooperating in the face of disagreement". *See* Ayers, *supra* note 13, at 18 n.81. *See also* Salyzyn, *supra* note 15, at 1070.

115. Wolf, *supra* note 21, at 40.

116. See *supra* notes 77–83 and accompanying text.

Positivist analysis uses the ethics of law, not morality, to define the obligations of lawyers. The problem, however, is that lawyers face choices that have ethical dimensions about which the law provides no useful direction.

Under the *Model Rules*, for example, the post-*Spaulding* exception to confidentiality gives a lawyer *permission* to disclose information to prevent serious bodily harm or death, but does not *require* the lawyer to do so.[117] As Amy Salyzyn and others note, this and other *Model Rules* provide explicit discretion to the lawyer, and reflects "the drafters' belief that lawyers should be allowed to balance moral and systemic considerations through case-by-case decision-making."[118] What does positivism say about how lawyers ought to *exercise* the discretion the law grants? Not much.

In considering the role of morality in decision-making by legal actors, positivists argue about how moral factors ought to be incorporated into legal decisions. Some argue for "exclusive positivism," where morality may only be incorporated into legal decision-making through law itself—that is, through how the law itself incorporates and applies moral considerations. Others argue for *inclusive positivism*, suggesting that the law, from time to time, permits legal actors to engage in first order moral reasoning when making decisions.[119] Positivists also make reference to the relevance of legal values and norms to decision-making by legal actors, and to underlying normative principles a lawyer can employ when resolving uncertainty in the law.[120] Positivists suggest that lawyers should leave decisions to clients; that the structure of legality emphasizes the moral agency of clients who thus ought to be the ones to weigh and assess moral questions as they arise.[121]

None of these points help the lawyer exercise his discretion about whether to disclose confidential information to prevent bodily harm or death. The lawyer should normally ask the client about disclosure.[122] The right of confidentiality belongs to the client and the lawyer should not assume the client would refuse to disclose information where someone else faces a reasonable possibility of serious bodily harm or death.[123] But the *Model Rules* provide discretion to the lawyer to disclose even if the client refuses to do so, or in circumstances where consulting the client is inappropriate.[124] Positivist analysis provides nothing useful for the

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117. MODEL RULES R. 1.6.

118. Bruce Green and Fred Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 298 (2006); Salyzyn, *supra* note 15, at 1073–74.

119. Dare provides a clear and useful explanation of this difference. *See* DARE, COUNSEL OF ROGUES, *supra* note 1, at 68–73.

120. *See* Wendel, *Rule of Law*, *supra* note 6, at 43; *see also*, Wendel, *Limits of Positivist Legal Ethics, supra* note 65, at 463.

121. Wendel, *Limits of Positivist Legal Ethics*, *supra* note 65, at 464.

122. The circumstances where the lawyer would not ask include most obviously where the threat to the third party arises from the client himself.

123. Kruse, *Beyond Cardboard Clients in Legal Ethics*, *supra* note 14, at 106.

124. MODEL RULES R. 1.6.

lawyer to consider in exercising this discretion. The lawyer may think like an exclusive positivist, but this is an area where the law does not say anything about how the discretion to disclose ought to be exercised—there is no extant jurisprudence on the relevant values or how the lawyer ought to weigh them, and there are no "content-independent application criteria" on which the lawyer can rely.[125] An inclusive positivist approach does nothing more than tell the lawyer that the law, from time to time, permits moral values to be employed. It does not direct the lawyer as to *which* values should be considered or *how* to account for them in this particular situation.

Considering legal values is also not particularly elucidating. At a general level, concepts like the law's respect for human agency and dignity do not speak usefully to the dilemma the lawyer faces. More specifically, having a rule permitting, but not requiring disclosure, shows that the law values client confidentiality and human life enough to grant the lawyer the discretion to disclose information despite the client's confidentiality, yet it still values confidentiality enough to make that disclosure discretionary not mandatory. Referring to legal values mostly just restates the question that the rule poses: how ought a lawyer reconcile the competing moral values on the facts of this case? The law poses the ethical question, but it does not answer it, which means that positivism cannot answer it either.

In addition to the ethical questions the law itself poses, lawyers make decisions about how to practice that have ethical dimensions but which do not implicate the law. For example, a lawyer can choose to pursue a matter in a variety of ways, and that choice may have moral dimensions in that one approach may be more respectful, charitable, reasonable, or fair than the other, yet both may fall within the margin for maneuver that the law permits to the lawyer.

Consider again our two hypothetical lawyers, John and Jack, with whom we began this paper. Most people would agree that John and Jack practice law very differently, and that the differences between them have moral significance. We reach different conclusions about the ethical quality of their actions and their lives. Yet from a positivist perspective, there is no difference between them. Unless Jack's billing, aggression, sexism, racism, and abuse of his employees violates the law, he is just as "ethical" as John from a positivist perspective. Positivism imposes only two evaluative criteria on lawyer conduct: (1) has the lawyer represented her client's interests, and (2) did she respect the law? Provided she did those two things, positivism says the lawyer acted properly and offers no further grounds on which to evaluate whether she is a good lawyer.

Yet the differences between John and Jack *do* relate to them as lawyers. How they engage with their clients and advance their client interests are not personal or external to their law practice; rather they are professional and internal to their law practice. The ethical quality of their actions speaks to their ethics as lawyers,

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125. DARE, COUNSEL OF ROGUES, *supra* note 1, at 73.

not merely to their ethics as people. But in speaking to their ethics as lawyers, it does not do so in a way with which positivism can engage.

The final ethical conundrum to which positivism provides minimal useful guidance is the one raised at the end of the previous subsection, where a lawyer must decide whether to go beyond her role to correct the law's moral failings or to violate her role obligations in order to protect other moral values.[126] One preliminary challenge in considering this issue is pinning down the precise nature of the ethical problem, particularly when it comes to violation of role. One way to understand the positivist position is that within the lawyer's role there are, in some rare circumstances, times when a lawyer is justified in choosing moral values over legal ones—that is, circumstances "where an injustice is so patent, and the result mandated by the regular functioning of the legal system so intolerable"[127] that the lawyer ought to choose morality over the ordinary obligations of the role.

The other way to understand the positivist position is to say that while the lawyer's role can never permit choosing a moral imperative over a legal one, an individual lawyer may sometimes simply choose to break the obligations of her role in order to comply with those of ordinary morality. The lawyer is not justified in making that choice vis-à-vis her role, but she makes it anyway. This view of positivism turns on the idea of a moral dilemma; sometimes people have incommensurable duties and responsibilities, and they have to choose which one to follow and which one to breach. The cost of that breach is called a "moral remainder."[128] A lawyer faced with a deeply immoral but legally required action may simply choose to accept the moral remainder of violating the duties of her role as a lawyer rather than those that she holds as an ordinary moral citizen.[129] And of course, if she made the opposite choice, the moral remainder would still be there, but would attach to her decision to violate her duties as an ordinary moral citizen while upholding her role as a lawyer. As Wendel notes, "lawyers have to deal with occasional moral remainders," and that is the case whether they choose to act in accordance with a morally justified role and violate ordinary morality or to violate their morally justified role and respect ordinary morality. The only question is *which* duty they violate when a moral dilemma arises.[130]

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126. See *supra* notes 113–115 and accompanying text.

127. WENDEL, FIDELITY TO LAW, *supra* note 1, at 121.

128. BERNARD WILLIAMS, MORAL LUCK 63 (1981).

129. Williams does not discuss this idea—the moral cost of violating the duties of role in favor of ordinary morality, but that parallelism follows from the point that the role of the lawyer has moral justification by virtue of the ethics of legality. If the legitimacy and authority of the lawyer's role obligations have moral foundations, then violating those obligations has a moral cost/remainder, even if one that is necessarily indirect because associated with the morality of law, not the morality of the specific act in question.

130. WENDEL, FIDELITY TO LAW, *supra* note 1, at 174. Wendel does not state explicitly that a lawyer who rejects her role for morality will suffer from a moral remainder, but the idea is implicit in the notion that the lawyer faces a genuine moral dilemma. *See* Terrance McConnell, *Moral Dilemmas*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2014), https://plato.stanford.edu/entries/moral-dilemmas/.

Thus, positivists may be suggesting that in some very limited circumstances, the lawyer's role contemplates moral obligations trumping the ordinary requirements of that role. Or they may be suggesting that, in the reasonably democratic societies with which we are concerned, a lawyer may sometimes face the moral dilemma of choosing between the demands of her role and those she holds as an ordinary moral citizen and may choose to violate her role to do what morality requires. Regardless of how one phrases the positivist position, however, the fact of the matter is that positivism itself provides no useful guidance to a lawyer about when ignoring the ordinary requirements of the role is justified or at least understandable.

Wendel suggests various points at which pursuing ordinary moral values may be warranted—patent injustice, intolerable outcomes, or failures of law at a structural level[131]—but positivism itself cannot explain or identify the criteria for assessing what constitutes injustice, intolerable outcomes, or failures of law. Positivism relies on the fact of moral pluralism in relation to specific moral dilemmas, and its analysis of the moral values of legality does not provide tools — either in terms of specific moral values or analytical method—for analyzing when injustice occurs. That is just not what positivist theories do. They claim the moral value of a lawyer's role obligations and locate those obligations in representation of clients within the law and respect for what the law provides, but they do not and cannot assess our ordinary moral obligations to one another or identify the point at which the claim of those obligations is significant enough to create a moral dilemma or to outweigh the claim of the lawyer's role. This is simply another ethical problem for the lawyer that positivism recognizes but in relation to which it offers no response.

These are the limits of a positivist approach to lawyers' duties and obligations. Positivism focuses on lawyers' legal obligations, and to the extent a lawyer faces a question that the law addresses, positivism tells the lawyer to answer that question through law. But when lawyers face genuine ethical dilemmas, questions that the system of laws does not or cannot address, then positivism provides lawyers with no direction.

IV. SHOULD WE ABANDON POSITIVIST LEGAL ETHICS?

The analysis to this point raises the reasonable question: should we reject positivist legal ethics? Positivism does not address the central question legal ethics is supposed to answer: "What ethical principles and virtues are essential to being a good lawyer?"[132] It instead explains the ethics of law and asserts the legitimacy and authority of the legal obligations that define the lawyer's role and duties. It

131. WENDEL, FIDELITY TO LAW, *supra* note 1, at 121; W. Bradley Wendel, *Three Concepts of Roles*, 48 SAN DIEGO L. REV. 547, 573 (2011).

132. Wolf, *supra* note 21, at 41.

cannot answer any ethical question faced by a lawyer that the system of laws does not answer.

Andrew Ayers argues against positivist theories based on their inability to provide meaningful practical guidance to lawyers facing an ethical dilemma; Ayers portrays positivism as having a methodological approach—the articulation of a maxim to guide lawyers' conduct—that does not accurately reflect the analytical structure of positivism.[133] He does not recognize the extent to which positivism incorporates the entirety, complexity, and normativity of the law to guide lawyer conduct. Nonetheless, the analysis here suggests that Ayers has a point: positivist theories only guide lawyer conduct in a very particular way, and without the direct incorporation of the sorts of moral considerations a lawyer may sometimes need to consider in order to decide what to do.

In my view, however, the limits of positivism do not justify rejecting it. Positivism should be rejected (or accepted) based on the plausibility of its premises about the function of law and of its derivation of the lawyer's role from those premises. Simply saying that positivism is a theory of the ethics of law from which lawyer's obligations can be justified and explained, rather than a theory of lawyers' ethics, and that positivism does not resolve all the ethical dilemmas lawyers face, does not in and of itself show that the theory is wrong. Whether positivist explanations of the lawyer's role are right or wrong—and for my part I think positivists provide the most persuasive account of the ethics of law and the lawyer's role—turns on their analytical merits, not on the limits of their analytical scope.[134] This is the case even though acknowledging the limits inherent to positivist accounts means positivism has to share space with other ethical theories in accounting for what lawyers ought to do and how they ought to practice, even though it is possible that, at points, *which* theory ought to apply could be contested. Provided the positivist account is sound in its explanation of the ethics of law and in what the ethics of law means for the obligations of lawyers, then the messiness and complexity in what follows reflects the messiness and complexity of life and legal practice, not deficiency in the theory.

Positivist theories of the lawyer's role do a great deal of work in explaining lawyers' obligations. They direct lawyers to identify their obligations through the instructions of their clients and what the law requires, permits, and enables. They tell lawyers that their obligations, so understood, are legitimate and authoritative and replace ordinary moral considerations in analyzing a situation. They tell lawyers that acting consistently with their role obligations can be justified in moral terms because of the role's relationship to the system of laws and to the ethics

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133. Ayers, *supra* note 13, at 12–13.

134. I am not here directly engaging with my view of why the positivist account is the most plausible or persuasive view on the law, mostly because I don't think there's much point; the explanation for a positivist approach is what it is, and a person will either view it as compelling or not. My point here is only that that's the relevant question in assessing the merits of positivism, not whether its analysis is limited in scope.

and norms of that system. They do not resolve problems faced by the lawyer that the law or a client do not or cannot answer. Those questions must be resolved in some other way. But the need to go beyond positivist understandings of the lawyer's role to answer those questions does not mean positivism is wrong; it just means that positivism does not do things it cannot do.

And it should not obscure the things that positivism *does* do. A lawyer who pays attention to the instructions of her client, and who attentively, comprehensively, and faithfully respects the law as it applies to her representation, will make good decisions. Some scholars see morality as unambiguously good and likely to generate positive decisions by lawyers and see the law as normatively deficient in substance and in the guidance it provides. But in the democratic societies with which we are concerned, that characterization seems inaccurate. As shown by the lawyers who advised President Bush on torture, lawyers who pursue what they think is right without attention to the law can inflict great harm.[135] That law represents a compromise to resolve the problem of moral pluralism does not demonstrate its moral deficiency nor does it suggest that compliance with the law will not impose meaningful normative constraints on lawyer conduct.

V. IMPLICATIONS OF POSITIVIST THEORY FOR TEACHING AND SCHOLARSHIP

Accepting the positivist explanations for the ethics of law and the role of the lawyer has implications for legal scholarship and teaching. Most obviously, it suggests the importance of focusing on the normative sufficiency of our laws, both in general and in relation to the law of lawyering. Do our laws provide proper direction to lawyers about how to advise clients, how to advocate on their behalf, and when to maintain client confidences? The normative focus of positivism on the *law*, rather than on lawyers, requires positivist scholars to look at the normative sufficiency of the laws governing lawyer conduct. By getting the law right—and by that I do not mean only rules about lawyers but rather the whole structure of the legal system—the tension between the lawyer's role and ordinary morality can be reduced. The conclusions the law reaches on moral questions do not have to be universally accepted. In fact, that's the point of legality from a positivist perspective. But scholars can help ensure that the law does not provide *unjustifiable* responses to moral dilemmas, as was potentially the case in *Spaulding*.

Positivism also demands that scholars focus on lawyers' interpretive practices and professional communities. If, for example, lawyers routinely ignore the plain text of the law or judicial decisions, scholars ought to critique those practices.[136] Positivists ought to also engage with the most defensible way to interpret the law. As noted before, positivism does not, in and of itself, mandate a particular

135. Luban, *supra* note 17, at 162.

136. CRAIG, *supra* n*ote* 104.

interpretive attitude (although it does exclude some). The question of how lawyers ought to think about, understand, and apply their obligations under the law, and what sound interpretive practices require, merits serious inquiry from ethics scholars.

The positivist approach also requires things of law professors. It requires law professors to take the law governing lawyer conduct seriously, and to teach the law of lawyers as rigorously as they would any other doctrinal area. That means not just teaching students the rules of conduct or other law that speaks directly to lawyer behavior, but also engaging with the effect of the law of evidence, the rules of procedure, and principles of legal interpretation on what lawyers ought to do. It means that professors cannot focus exclusively on moral questions.

At the same time, however, a law professor who accepts the positivist approach to the lawyer's role must also accept its limits. Her students will not be able to resolve every challenge they face through the law, and a professor preparing students for practice must think about how to equip her students for the broader ethical challenges that practice presents. She needs to consider how to alert students to the moral choices they face in deciding what kind of lawyer to be, and the need for a moral framework to decide how to exercise moral discretion when they are required to do so. She should encourage her students to know the limits of what they are prepared to do to satisfy the obligations of their role.

In short, positivist legal ethics requires two central things. First, it requires scholars and teachers to pay serious attention to the demands and sufficiency of the law. Second, it requires them to leave room for engagement with the moral questions that remain and with how lawyers ought to think about those questions. Scholars and teachers need to understand that although positivism does not answer those questions, lawyers have to do so.

CONCLUSION

Positivism cannot explain lawyers' ethics. It has no answer to the question of what ethical principles and virtues are necessary for a person to be a good lawyer. Positivism is a theory of the ethics of law, not lawyers. From that theory, positivism makes claims about the legitimate and authoritative legal duties with which a lawyer must comply when representing a client.

There is no such thing as positivist legal ethics, and that's okay. In a complex and engaged democracy, we try to get the law right. We engage with its deficiencies and work to make it better. The law fails regularly and often, but it also succeeds. It imposes meaningful constraints on our conduct, both in general and in terms of how lawyers represent their clients. A lawyer who approaches his legal obligations seriously and in good faith, who complies with the law in light of the norms and practices of his professional community, *is* a good lawyer. That positivism is not a theory of the good lawyer does not mean it cannot encourage lawyers to be good.

Understanding the scope and limits of positivist theories of the lawyer's role may help scholars engage with the virtues and limits of those theories—to challenge them on their premises and methodology rather than their answers. It may also help scholars and teachers who accept the positivist approach to understand the important questions that positivism poses, to recognize areas where lawyers require more than positivism to know what to do, and to help attorneys decide what kind of lawyer they want to be.