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The Good, the Right, and the Lawyer

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The Good, the Right, and the Lawyer

Trevor C.W. Farrow

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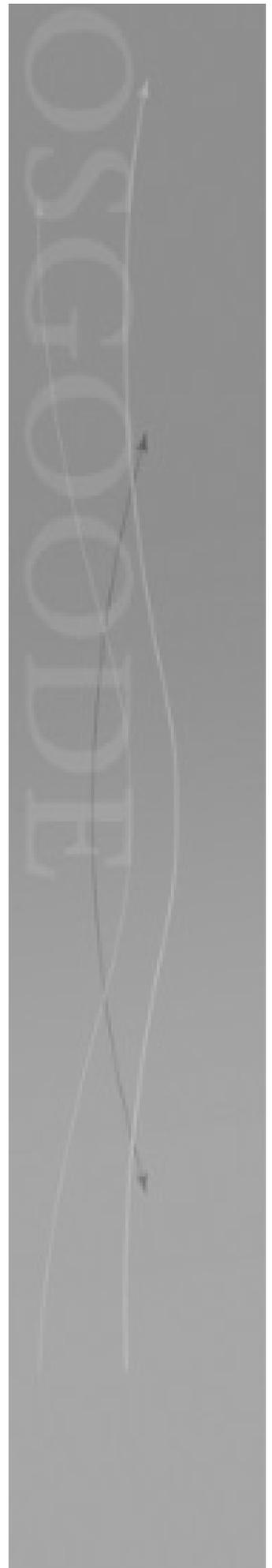
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Comparative Research in
Law & Political Economy



THE GOOD, THE RIGHT, AND THE LAWYER

Trevor C. W. Farrow¹

INTRODUCTION

Most legal ethics scholars have seen it: the cartoon depicting a lawyer standing at a crossroad with a two-way directional sign indicating “legal” to the left and “moral” to the right. The caption on the cartoon simply reads: “how to stump a ... lawyer.”² In a simple, but powerful (and humorous) way, the cartoon essentially depicts the fundamental question that has traditionally divided legal ethics scholars into two basic camps: those who think that, in addition to (or notwithstanding) the law, lawyers can or should be guided by some sense of personal or communal morality when doing their clients’ work; and those who do not.³ This question can be asked in several different ways and from several different perspectives. Broadly put, should the lawyer be guided by her own sense of what is ethical, moral, just or good; or should she essentially be neutral to those moral or other issues in favour of simply following her client’s instructions within the boundaries set out by the law? Put in theoretical terms more familiar to

¹ Osgoode Hall Law School, York University, tfarrow@osgoode.yorku.ca. This paper was first presented at a panel entitled “Moral Pluralism and Legal Ethics” at the Law and Society Association’s 2011 Annual Meeting (San Francisco, California, 3 June 2011). I am grateful for comments from my co-panelists: Russell Pearce, Eli Wald, Brad Wendel and, in particular, Alice Woolley (the chair of the panel). I also benefitted from views expressed by Allan C. Hutchinson in his essay “A Loss of Faith: Law Justice and Legal Ethics” [on file with author].

² Wiley Miller, “How to Stump a Corporate Lawyer” *Non Sequitur* (8 December 2006), reprinted online: GoComics <<http://www.gocomics.com/nonsequitur/2006/12/08/>> (accessed 27 May 2011) [for the purpose of this essay, I have exchanged the word “moral” for the word “ethical” as it appeared in the original cartoon].

³ For a discussion of this question, see e.g. Trevor C. W. Farrow, “Sustainable Professionalism” (2008) 46 *Osgoode Hall L. J.* 51 at 62. See also Rob Atkinson, “How the Butler Was Made to Do It: The Perverted Professionalism of the Remains of the Day” (1995) 105 *Yale L.J.* 177 at 184. See further Robert K. Vischer, “Legal Advice as Moral Perspective” (2006) 19 *Geo. J. Legal Ethics* 225 at 227; William H. Simon, “Visions of Practice in Legal Thought” (1984) 36 *Stan. L. Rev.* 469 at 469; W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010) at § 1.2; Alice Woolley, *Understanding Lawyers’ Ethics in Canada* (Markham: LexisNexis, 2011) at c. 2.

debates between liberalism⁴ or libertarianism⁵ on the one hand and communitarianism⁶ (for example) on the other: is the good prior to the right when it comes to lawyers and the work they do for their clients? And in terms of basic legal ethics theory, the question boils down to this: by what standard should lawyers ultimately be guided when answering the question of how they should act: the law only, or the law and something else?

The purpose of this essay is to look critically at this set of questions, which can, for the sake of simplicity, be collapsed as follows: is there a role for moral pluralism – or morality at all – in legal ethics thinking? In so doing, I have essentially two main goals. First, I contextualize this discussion by very briefly looking at the leading conceptions of the lawyering role that have unsuccessfully grappled with these issues to-date. Second (and here is the main purpose of this essay), I look at a new attempt to address these issues that is provided by W. Bradley Wendel in his recent book *Lawyers and Fidelity to Law*.⁷ While providing an extremely elegant and admirable argument, I ultimately conclude that Wendel’s account is an insufficient account of the lawyering role. Through this discussion, I provide a few comments on my own theory of why the lawyering role must take into account some vision of the good (in addition to the right). And while notions of the good can include various aspects of justice, ethics, morality, religion, and so forth, I primarily look at how the lawyering role must take into account something more than law (contemplated by the right), which – again for the sake of simplicity – amounts to

⁴ Although many theories could be cited, see e.g. John Rawls, *infra* at n. __ and accompanying text.

⁵ See e.g. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

⁶ See e.g. Michael J. Sandel, “Political Liberalism”, Review Essay (1994) 107 Harv. L. Rev. 1765; Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Michael J. Sandel, *Democracy’s Discontents: America in Search of a Public Philosophy* (Cambridge, Mass.: Belknap, 1996). See also Michael Walzer, “The Communitarian Critique of Liberalism” (1990) 18 Political Theory 6. See further Charles Taylor, “Cross Purposes: The Liberal-Communitarian Debate” in Charles Taylor, *Philosophical Arguments* (Cambridge, MA; London: Harvard University Press, 1995).

⁷ *Supra* note __.

something akin to a sense of morality that is animated by visions (albeit potentially contested visions) of justice. Having said that, the purpose of this essay is not to develop my own theory of lawyering, which I have sought to do elsewhere.⁸

CONCEPTIONS OF THE LAWYERING ROLE

DOMINANT MODELS OF LAWYERING

What has come to be known as the standard or dominant conception of the lawyer's role answers the question of whether morality has a part to play in the lawyering role essentially in the negative. On this view, lawyers are to be guided by what the law deems to be relevant in the context of their client's interests.⁹ Further, what a lawyer thinks personally about a client's case – in the words of Alberta's former *Code of Professional Conduct* – is “essentially irrelevant”.¹⁰

This view of the lawyering role fits with an Enlightenment sensibility that, in liberal democracies governed by a strong sense of procedural justice, the plurality of individual interests and preferences of a citizenry must be trumped by an overriding and collective democratic requirement for the supremacy of the rule of law. Because society cannot (and likely should not) possibly agree on what Aristotle sought to articulate as the “good life” for each of its members,

⁸ See *infra* note __ and accompanying text.

⁹ There are several familiar sources for this conception of lawyering. See e.g. generally Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975); Stephen L. Pepper, “The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities” (1986) *Am. Bar Found. Res. J.* 613; Charles Fried, “The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation” (1976) 85 *Yale L.J.* 1060. More recently, see e.g. Alice Woolley, *Understanding Lawyers' Ethics in Canada*, *supra* note __. For a general discussion of these dominant models, see Farrow, “Sustainable Professionalism”, *supra* note __ at 63-71.

¹⁰ Law Society of Alberta (LSA), *Code of Professional Conduct* (2009) at c. 10, r. 11 (commentary 11). For Alberta's new code, see LSA, *Code of Conduct* (version 2011_V1, effective 1 November 2011) at r. 4.01 (commentary). The “essentially irrelevant” provision is no longer in the new code. However, the new code does provide that the lawyer “has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.” See similarly American Bar Association (ABA), *Model Rules of Professional Conduct* (1983, as amended) [*Model Rules*] at “Preamble and Scope”, para. 2; Canadian Bar Association (CBA), *Code of Professional Conduct* (2009, as amended) at c. IX; Federation of Law Societies of Canada (FLSC), *Model Code of Professional Conduct* (adopted 15 October 2009 and 17 March 2011) at r. 4.01(1) (commentary).

particularly in an increasingly globalized and morally pluralistic world, society has brokered a boundary – typically in the form of the law¹¹ – that provides the outer limit around the space within which people can otherwise freely pursue their own individual notions of the good. Liberal democratic theorists and legal positivists take the view that the role of law is essentially to frame a landscape in which fair contests of rights and interests can take place. Formal institutional structures are put in place to regulate the relationships and distributional choices of citizens in social life. For example, according to Joseph Raz:

The law provides the general framework within which social life takes place. It is a system for guiding behavior and for settling disputes which claims supreme authority to interfere in any kind of activity. It also regularly either supports or restricts the creation and practice of other norms in the society. By making these claims the law claims to provide the general framework for the conduct of all aspects of social life and sets itself up as the supreme guardian of society.¹²

Similarly, according to John Rawls, “the law defines the basic structure within which the pursuit of all other activities takes place.”¹³ A procedurally robust, but substantively limited (or neutral) institutional framework for the operation of society is a pre-condition to the peaceful coexistence and flourishing of a pluralistic society in which each individual member can pursue their own needs, wants and dreams. Put simply, on these various liberal theories,¹⁴ the right is prior to the

¹¹ Of course other forms of rules help to guide and shape social conduct, including customs, religions, etc.

¹² Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford and New York: Oxford University Press, 1986) at 120-121.

¹³ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Belknap, 1999) at §38, p. 207.

¹⁴ A number of familiar theories could be cited here (theories that, although liberal in overall sensibility, differ from each other on a number of issues – issues that do not need to be developed for the purpose of this essay). See e.g. John Rawls, *A Theory of Justice*, *supra* note __; John Rawls, *Justice as Fairness: A Restatement*, ed. by Erin Kelly (Cambridge, MA and London: Belknap Press, 2001); H. L. A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994); Joseph Raz, *The Authority of Law: Essays on Law and Morality*, *supra* note __. For a different perspective, see Ronald Dworkin, *Law's Empire* (London: Fontana, 1986); Ronald Dworkin, “Is Law a System of Rules?” in Ronald Dworkin, ed., *The Philosophy of Law* (Oxford: Oxford University Press, 1977) at c. II; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996); Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985); Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

good.¹⁵ As such, and coming back to the lawyer's role, what guides the lawyer's actions must be what the law provides in terms of legitimate (legal) client interests. Clients need to be free to pursue all that they want and are entitled to, provided that by so doing, they stay within the confines of the law.

ALTERNATIVE MODELS OF LAWYERING

Alternative models of professionalism have developed in opposition to this standard conception. The basic reason for the disquiet of these alternative models is simple: the act of realizing on a given client's interests, however legal, does not always fit squarely with a lawyer's individual (or society's collective) sense of ethics or morality (the "good"). And further, who is to say that a client's interests should be privileged in society over those of other legitimate rights holders, particularly in situations in which the client has the advantage of legal representation and other interested individuals or groups do not?¹⁶ On these views, client interests should not be seen in such a sacrosanct light. And further, from the lawyer's perspective, simply taking on the role of advocate should not absolve the lawyer of the personal responsibility (or opportunity) associated with the outcome of the lawyer's actions on behalf of a client. For example, assisting a manufacturer to stretch its allowable toxic effluent to the very limits of an arguably allowable – although aggressive – reading of environmental protection standards may fit with the law as it

¹⁵ For a general discussion, see Trevor C. W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, in progress) at c. 2.

¹⁶ There are several familiar sources for these alternative conceptions of the lawyering role (again, while there are differences – which are sometimes significant – between these various theories, those differences do not need to be developed here for the purpose of this essay). See e.g. variously Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford: Oxford University Press, 2000); David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988); William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998); Robert K. Vischer, "Legal Advice as Moral Perspective", *supra* note __; Duncan Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes" (1987) 18 *Tex. Tech. L. Rev.* 1157; Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin, 2006); David M. Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 *Dal. L.J.* 267. For a general discussion of various alternative models of lawyering, including my own, see Farrow, "Sustainable Professionalism", *supra* note __ at 71-83, 83-103.

currently stands, but it may be at odds with what the lawyer thinks is good for herself, for the community (and potentially also for the client). And bracketing the relevance of that personal view diminishes the potential of the lawyering role to do good things in society (of course with the knowledge of and instruction from the client – nothing in these theories advocates the unprofessional undermining of client interests).¹⁷

Like their dominant counterparts, these alternative views of the lawyering role also find purchase in the same codes of conduct that have traditionally defined the standard conception of the lawyering role. For example, the FLSC’s *Model Code of Professional Conduct* prohibits an advocate from knowingly assisting a client to do anything that the lawyer considers to be “dishonourable”.¹⁸ The ABA’s *Model Rules* go further, providing that a lawyer is guided by “personal conscience,” and further, that when representing a client, a lawyer “may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”¹⁹ Similarly, the revised version of Alberta’s code, which formerly rendered the advocate’s own view of a client’s case “essentially irrelevant”, continues to provide that, when deciding on an appropriate course of action for a client, a lawyer “may find it necessary to ... consider general moral principles....”²⁰

LAWYERS AT THE CROSSROAD

¹⁷ See Farrow, “Sustainable Professionalism”, *supra* note __ at 83-100.

¹⁸ FLSC, *Model Code of Professional Conduct*, *supra* note __ at r. 4.01(2)(b). See further CBA, *Code of Professional Conduct*, *supra* note __ at c. XIII (commentary 3); Law Society of Upper Canada, *Rules of Professional Conduct* (adopted 22 June 2000, in effect 1 November 2000, as amended) at r. 4.01(2)(b).

¹⁹ ABA, *Model Rules*, *supra* note __ at “Preamble and scope”, para. 7, and *ibid.* at r. 2.1. See further *ibid.* at “Preamble and scope”, paras. 9 and 16.

²⁰ Law Society of Alberta, *Code of Conduct*, *supra* note __ at “Preface”.

Generalizing, the dominant models, as we have seen, bracket morality in deference to the law's overriding guiding hand when it comes to the lawyer's role. Alternative models typically reject this moral indifference to the outcome of the lawyer's daily efforts on behalf of the client. And the codes of conduct that purport to sustain both accounts do not provide a clear answer, on their face, on how to resolve the apparent conflict. So where does that leave us? One answer to this question is that we are at an impasse. That is the answer envisaged by the cartoon of the lawyer at the crossroad described at the outset of this essay.²¹ But that is not a helpful answer in terms of providing lawyers with any meaningful guidance on how to act, or by what yardstick they could potentially evaluate their conduct. Another answer is that we need a different form of professionalism, which is what I sought to develop in my 2008 "Sustainable Professionalism" article.²² Another answer is offered through a different approach to lawyering, which has been provided by Brad Wendel. It is to that account to which I now turn in the second (main) part of this essay.

FIDELITY TO LAW: A NECESSARY BUT INSUFFICIENT ACCOUNT

STRENGTHS OF THE THEORY

In his recent book *Lawyers and Fidelity to Law*,²³ Brad Wendel provides a very powerful and comprehensive account of legal professionalism. In this account, Wendel essentially adopts a standard – dominant – conception of the lawyering role. He is guided by a vision of professionalism that requires a bracketing of the lawyer's personal moral preferences in the

²¹ See *supra* note __ and accompanying text.

²² Farrow, "Sustainable Professionalism", *supra* note __ at 78-103. See also Trevor C. W. Farrow, "The Promise of Professionalism" in Benoit Moore, Catherine Piché and Marie-Claude Rigaud, *L'avocat dans la cité: éthique et professionnalisme* (Montréal: Les éditions thémis, forthcoming). See further Trevor C. W. Farrow, "Post-9/11 Lawyers" in David L. Blaikie, Thomas A. Cromwell and Darrel Pink, eds., *Why Good Lawyers Matter* (Toronto: Irwin Law, 2012) 167 at 180-193.

²³ See *supra* note __.

context of carrying out a client’s legal work. His reason for doing so is very much guided by the liberal – Enlightenment – view of society that was articulated above.²⁴ Put in professional terms, this understanding of society leaves clients free to define their own notions of what counts as good or just, provided that the results of such deliberations obtain within the bounds of the law. The lawyer’s role, on this theory, is to seek to promote their client’s ability to enjoy this deliberative enterprise.

However, notwithstanding that Wendel adopts liberalism as a fundamental animating principle behind his theory of lawyering, he does so with one very important distinction. Rather than privileging their client’s *interests*, Wendel makes it clear that his vision of the lawyering role requires that lawyers should act to protect their client’s legal *entitlements*.²⁵ In this way, Wendel distances himself subtly, although importantly, from a vision of lawyers zealously swinging in the winds of their client’s chosen interests. No longer is the client’s interest the driving force behind the lawyer’s role. Rather, it is the right to which the client is entitled – democratically provided through society’s properly functioning institutional legal arrangements – that now acts as the ultimate engine that drives the lawyering enterprise. By linking the lawyer’s role, the client’s legal entitlements, and the democratically created institutional arrangements by which those entitlements are forged, the lawyer becomes, for Wendel, an important part of the political process upon which modern rule of law-based democracies are premised. Lawyers are better seen, according to Wendel, not as ordinary moral agents, but rather as analogous to “political officials”²⁶ or “quasi-political actors”.²⁷ As such, their job is

²⁴ See *supra* notes __-__ and accompanying text.

²⁵ Wendel, *Lawyers and Fidelity to Law*, *supra* note __ at 6.

²⁶ See *ibid.* at 8.

²⁷ See *ibid.* at 11.

ultimately to promote the legal entitlements of their clients, not to moralize about those entitlements. However, although taking a morally neutral stance with respect to their client's entitlements, given the social value played by lawyers, Wendel is of the view that the lawyering role has "moral value".²⁸ In this sense, Wendel recognizes the institutional moral worth of the lawyering enterprise (as a system), as opposed to any moral deliberation at the day-to-day client level in the context of individual retainers. This view accords with Rob Atkinson's general description of the morality at play for the typical dominant view of lawyering (what he describes, below, as "neutral partisanship"):

[When] proponents of neutral partisanship describe their model as amoral, they are not referring to its ultimate grounding, which is emphatically moral. They are referring, rather, to the lawyer's immunity from the task of scrutinizing the morality of particular client acts. Theirs is the morality at the wholesale but not the retail level; a morality of the long run, not the particular case; a morality of fidelity to role obligations, not attention to particular acts.²⁹

Wendel's version of the dominant model of lawyering has much to commend it. First, his shift from interests to entitlements seems to add significant value in terms of concerns raised earlier by the alternative models of lawyering about the potential moral vacuum caused by a purely interest-based vision of the lawyer-client relationship.³⁰ By promoting *entitlements*, he lends further credibility – through institutional legitimacy – to the various interests and courses of action that clients seek to pursue. He therefore avoids some of the very worst examples of lawyering outcomes in which clients pursue interests at the unfortunate or improper expense of

²⁸ See *ibid.*

²⁹ Rob Atkinson, "How the Butler Was Made to Do It: The Perverved Professionalism of the Remains of the Day", *supra* note __ at 187-188.

³⁰ See *supra* notes __-__ and accompanying text.

others (perhaps through unjustifiable legal loopholes, mistakes, exercises of raw power, etc.).³¹ Second, his theory also fits with current liberal democratic notions of governance, in which citizens can (at least in theory) expect to receive certain entitlements under the law, the making of which (again at least in theory) those citizens participated in through various democratic institutional procedures.³² This entitlement theory is therefore legitimized by its own liberal democratic underpinnings. Third, his theory also purports to provide the lawyer with a coherent set of rules by which to act. What the law says is legal is what the lawyer should be guided by – nothing more and nothing less. Although some moral deliberation is possible within the defined territory of the law,³³ there is no need to descend into the messiness of moral pluralism, which – according to Wendel’s dominant model – cannot possibly provide the lawyer with a coherent set of guidelines by which predictably to operate in any given retainer. The theory is therefore not only consistent with the political philosophy that it backstops, it is also internally consistent with the product of the institutional arrangements that it seeks to protect – namely the law. Through its external and internal consistency, Wendel’s theory purports to provide lawyers with a coherent blueprint by which to provide an answer – in essentially every case – to the basic lawyering question: “how should I act?”

PROBLEMS WITH THE THEORY

So with all of these purported strengths, what is the problem? In my view, there are really two fundamental concerns that I have with Wendel’s theory. My first concern is an operational concern. By seeking a coherent theory of lawyering, while attractive for its promise of universal

³¹ See Wendel, *Lawyers and Fidelity to Law*, *supra* note __ at c. 2.

³² In this sense, Wendel’s theory of lawyering could be seen as being consistent with a vision of participatory law contemplated by Habermas. See generally Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge, MA: MIT Press, 1996).

³³ See Wendel, *Lawyers and Fidelity to Law*, *supra* note __ at 54.

prescription, Wendel ultimately does more harm than good. His theory provides a necessary, although not a sufficient guide for lawyers. I have no problem with the notion that client entitlements (or interests for that matter) are to be operationalized within the bounds of the law. Rule of law based societies require at least that kind of fidelity to the law. However, by taking a robust notion of moral deliberation off the table in the context of the lawyer-client relationship, Wendel does not provide lawyers with an adequate theory to make sense of their clients' entitlements.

What Wendel has done is essentially both to download and upload the role of moral deliberation in the context of lawyers, clients and society. On his theory, lawyers download to their clients the responsibility of deliberating about the morality of choices surrounding individual arrangements and exercises of power. Further, lawyers upload to judges, politicians and other public officials the responsibility to deliberate about the morality of collective choices and institutional arrangements in the public lawmaking sphere. Of course in theory this institutional moral disaggregation makes sense. It fits with the basic democratic law making structure in which it operates. And it relieves the lawyer of responsibility for the moral outcome of their client's causes. However, there is a fatal flaw to its logic. Given law's indeterminate nature, I do not think that it is possible (or desirable for that matter) to relieve the lawyer from occupying the residual moral space that remains in the context of interpreting laws for the benefit of advising clients – at the individual client (“retail”) level. If the law were perfectly determinate, then we would not need to worry. However, it is not a controversial statement to say that law is not determinate. It is often fluid, open-textured, unpredictable and even internally inconsistent at times. If there is a 25 mile per hour residential speed limit, why can ambulances drive faster than that? Or more simply, and elegantly, what does it mean to

prohibit vehicles in the park?³⁴ Most theorists agree that many laws are clear on their face. And to the extent that they are not, typically core and marginal (or exceptional) interpretations can be readily determined. However, there are other laws that, by their nature, require a heavier amount of interpretation and – potentially – moral deliberation in order adequately to understand and apply them in any given context. What does it mean for a corporate director to act in the “best interests of the corporation”? Do those interests include financial interests, environmental interests (individual and collective), labour interests, equality interests, etc.? If so, how are they to be balanced? What if they conflict? On its face the dictate is unclear. Context and interpretation matter.³⁵ Similarly, what does it mean to negotiate in “good faith”? What is a “reasonable” contractual term?

These sorts of laws and rules do not just allow, they require a certain level of normative (often including moral) engagement on the part of legal counsel in order for client’s properly to understand their entitlements and for lawyers properly to understand how to advise on those entitlements. In fact, modern codes of conduct contemplate this kind of moral deliberation and engagement. For example, the ABA’s *Model Rules* provide that:

Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living... Within the framework of these Rules...many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules....

³⁴ Recall the Hart-Fuller debate. See e.g. H. L. A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv. L. Rev. 593; Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1958) 71 Harv. L. Rev. 630.

³⁵ For a judicial discussion of these issues in the context of corporate law, see *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560.

The Rules do not ... exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules....³⁶

And further, as we saw earlier, the ABA's *Model Rules* also provide that a lawyer may refer to various considerations, including "moral" factors, when advising a client.³⁷ Similarly, in Canada, the FLSC's *Model Code of Professional Conduct* provides that (in the specific context of organizational clients):

[L]awyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organization's and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable and consistent with the organization's responsibilities to its constituents and to the public.³⁸

Wendel would likely take no issue with these provisions; conceding that – within the bounds of the law – lawyers are free to engage in a moral dialogue with their clients, who according to Wendel, do not necessarily have any less (or more) moral training or authority than lawyers.³⁹ However, he would stop at the point at which the lawyer reaches the boundary of the law. And my point is that, in many cases, finding that boundary is not an easy task, and in many cases, it requires a very active and deliberate moral conversation. As such, in all but the very clearest of cases (involving the clearest of laws), morality is not incidental, but is rather central, to the lawyering role. It is in that sense that fidelity to law is a necessary part of the lawyering

³⁶ ABA, *Model Rules*, *supra* note __ at "Preamble and scope", paras. 9 and 16.

³⁷ *Ibid.* at r. 2.1. See further *supra* note __ and accompanying text.

³⁸ FLSC, *Model Code of Professional Conduct*, *supra* note __ at 2.02(1) (commentary).

³⁹ See comments from Brad Wendel at "Moral Pluralism and Legal Ethics" panel presentation, *supra* note __ [on file with author].

role; but it is far from a sufficient condition of the lawyering role. Without this kind of moral engagement, lawyers will be less able fully to understand and advise on the entitlements to which their clients lay claim. Lawyering is about more than simply formal rule application; it is very often much more about active and engaged moral deliberation.

My second main concern with Wendel's theory goes beyond this operational challenge and looks at its underlying (and problematic) normative assumption. For Wendel's theory to work, law, and the entitlements it creates, must be based on what he calls "lawful power", which he distinguished from "raw power".⁴⁰ Raw power (or power that "just is"⁴¹), according to Wendel, provides that "those who possess it can do nasty things to other people."⁴² Lawful power, in contrast, provides that "those who are subjects of legitimate authority have a reason to do what the authority asks of them, apart from the fear of being subjected to unpleasant consequences."⁴³ As such, laws, and the entitlements they create, are legitimate and worthy of fidelity on the part of lawyers to the extent that those laws and entitlements are created pursuant to exercises of lawful power.

On its face, this aspect of Wendel's theory appears sound. However, on a closer look, it becomes quite problematic – for the simple reason that exercises of lawful power and raw power are not so easily distinguished, at least not on present day social conditions. I do not think it is controversial to say that society, in large measure, is driven by money and power. Again put very simply, clients and law makers are typically (although perhaps not always) driven by money and the power and influence of interest groups. Of course there are nuances and

⁴⁰ Wendel, *Lawyers and Fidelity to Law*, *supra* note ___ at 2. See further *ibid.* at 59-66.

⁴¹ *Ibid.* at 60.

⁴² *Ibid.*

⁴³ *Ibid.*

exceptions. But the core of these statements is clearly true on any fair reading of society. One only needs to look at the inequities that surround us on a daily basis, about which the Occupy Movement so powerfully and recently reminded the world. If we did have a society in which access to law and politics was truly equal, then maybe we could legitimately bracket raw power from lawful power. But we don't. And we won't for some time (if ever). Those with money and those with power are those that primarily wield the tools of power (both legitimate and otherwise).

And here is where lawyers enter the discussion again. Lawyers play an increasingly significant role in what law gets made, how it gets made, and how its fruits (entitlements) are distributed. As Roberto Unger has commented,

[I]n the relatively deenergized democracies of today much of the controversy over the basic structure of social life, driven out from the arena of government-centered politics, passes into the hands of the professions ... under the guise of technical expertise. It matters how the professions relate to the citizenry and how the discourse and practice of each profession suppresses or exhibits transformative opportunity in social life.⁴⁴

Given that lawyers – particularly in jurisdictions with self-regulatory regimes – have a monopoly over the provision of these important legal services, the discussion about how law is made and how it gets deployed cannot take place on a value neutral basis. Otherwise, social inequity will be perpetually continued. Justice will become less, not more accessible to more groups in society – particularly those at the margins. To the extent that making justice accessible forms part of the bargain of self-regulated professionals, a theory of lawyering that simply distributes power to power cannot be sustained. For example, in Ontario, in exchange for the privilege of self-regulation, the Law Society of Upper Canada has taken on a “duty” to “act so as to facilitate

⁴⁴ Roberto M. Unger, *Democracy Realized: The Progressive Alternative* (London: Verso, 1988) 255.

access to justice....”⁴⁵ Wendel’s theory is inconsistent not only with what lawyers should do, but with what lawyers – at least in Ontario – have collectively promised to do in the context of promoting access to justice. Further, not only have Ontario lawyers collectively promised to facilitate “access” to justice, they have also taken on an equally powerful duty to “maintain and advance the cause of justice and the rule of law.”⁴⁶ Wendel’s theory is certainly, as we have seen, consistent with the second part of that promise. There is no doubt that fidelity to law promotes the rule of law. However, if the duty were just about protecting legal entitlements, based on typical rules of statutory interpretation, the word “justice” would not have been included in this statutory mandate. Because it was, the word justice must mean something more. And to me, what it means is that more is at stake than simply a thin notion of operational legal protection. Although perhaps aspirational in nature (at least in practice, although not on its face), what this statutory promise requires is a more robust vision of lawyering that takes seriously not only the legal rules by which it operates, but also the justice of its output. Put simply, more is at stake than the basic requirement of fidelity to law. Through consistent and considered moral deliberation, lawyers are engaged in a much grander enterprise – not only the protection of the rule of law, but also the creation of a just society.

TWO POTENTIAL COUNTERARGUMENTS

Before I conclude, I will now discuss two counterarguments that I anticipate might be raised about my comments in this essay. First, a question might be raised as to how we can regulate deliberations about justice in a liberal democracy. My initial answer is quite simple: we can’t, other than to say that deliberations about justice must be conducted professionally and in

⁴⁵ *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2.

⁴⁶ *Ibid.*

good faith. I recognize that this answer lacks the desired internal coherence that Wendel seeks to promote with his theory. I am OK with that. Because given the inadequacy of law, I do not think that Wendel, in the end, successfully provides any more coherence than I do. Neither law nor justice is a determinate concept. Pretending that they are cheapens both the process by which lawyers operate as well as the normative content of the fruits of their labour. Rather, we must embrace the moral aspect of the lawyering role, provide lawyers with as much guidance and courage on how to engage in this powerful enterprise, and then to the extent that they get it wrong, seek to educate, regulate and – if necessary – castigate in appropriate circumstances. That is the best we can do. And to me, that is a good thing.

Second, by welcoming moral engagement on the part of lawyers, will we not be opening the door to a tyranny of lawyers who will refuse to take on unpopular clients and causes? To-date, this has not proven to be a significant problem. However, to the extent that we are successful with efforts increasingly to diversify the bar, which is reflective of an increasingly pluralistic society, what counts as “good”, “bad”, “just”, “unjust”, “moral” or “immoral” will necessarily very much depend on the eye of the beholder. Notions of ethics, morality and justice will be seen as differently by a diverse bar as they are by a diverse client base. That is also a good thing. As I earlier mentioned, provided the deliberative lawyering role is exercised professionally and in good faith, within the bounds of the law, then a plurality of moral perspectives at the lawyering level will reflect the fabric of a vibrant and morally diverse society. Further, individual lawyers need to understand the diverse moral perspectives of their clients and be able to engage, at different levels and from different perspectives, with this fundamental lawyering requirement.

CONCLUSION

Calls for lawyers not only to be competent, but to do good in society, are not new. As Martin Mayer stated decades ago:

[I]f lawyers cannot look at the society as a whole and say that certain aspects of their work ... represent a plus for this society and for the world of our children, then ... lawyers should try to find a way to salvage what is worth doing out of their work and be influential in the production of what is going to happen next.⁴⁷

More recently, similar sentiments were raised by Canada's Governor General:

[H]ow do we craft a new definition of the lawyer as professional? ... We enjoy a monopoly to practise law. In return, we are duty bound to serve our clients competently, to improve justice and to continuously create the good. That's the deal.... For many today, the law is not accessible, save for large corporations and desperate people at the low end of the income scale.... We must engage our most innovative thinking to redefine professionalism and regain our focus on serving the public....⁴⁸

Being part of the solution, not part of the problem, is consistent with what many people want (and expect) from the lawyering role: students, judges, many clients and lawyers themselves. Lawyers not only want to be competent, they typically also want to do good.⁴⁹ And here we arrive back to where we started: the lawyer at the crossroad.⁵⁰ But rather than being faced with an either/or choice, lawyers need to have a command of, and an ability to use both: that which is legal and that which is moral. Put differently, on political theory terms, the lawyer needs access to both the good and the right. Wendel is correct that lawyers need to demonstrate fidelity to the law. And seeing this fidelity in terms of entitlements rather than interests is, in my

⁴⁷ Martin Mayer, "The Trial Lawyers" in Grace W. Holmes, ed., *Excellence in Advocacy* (Michigan: Ann Arbor, The Institute of Continuing Legal Education, 1971) 51 at 60.

⁴⁸ Rt. Hon. David Johnston, "The Legal Profession in a Smart and Caring Nation: A Vision for 2017" (Address delivered at the CBA Canadian Legal Conference, Halifax, 14 August 2011), online: Governor General of Canada <<http://www.gg.ca/document.aspx?id=14195>>.

⁴⁹ For further comments on my own theory of lawyering, see Farrow, "Sustainable Professionalism", *supra* note __; "The Promise of Professionalism", *supra* note __.

⁵⁰ See *supra* note __ and accompanying text.

view, a significant advance in terms of the dominant theory of lawyering. However, fidelity to law, while necessary, is not a sufficient condition of lawyering. Lawyers also need the space and ability to roll up their sleeves and get into the moral muck of their retainers. Only then can lawyers start to achieve not only a fidelity to law, but also a fidelity to justice. And to the extent that lawyers are playing an increasingly powerful role in the way that law is developed and deployed, seeing the lawyering role in this way is becoming increasingly important for the wellbeing of both the profession and society.