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Abstract
The ethics of professionals are different from the ethics of the community at large. Conduct which would be unethical by community standards is ethical within the context of a profession. This article examines the ways in which a different professional ethic can be justified and, by reference to a contemporary play, considers the consequences of such justifications.
"ETHICAL FICTIONS AS ETHICAL FOUNDATIONS": JUSTIFYING PROFESSIONAL ETHICS

BY NANCY LEE FIRAK*

The ethics of professionals are different from the ethics of the community at large. Conduct which would be unethical by community standards is ethical within the context of a profession. This article examines the ways in which a different professional ethic can be justified and, by reference to a contemporary play, considers the consequences of such justifications.

I. JUSTIFYING PROFESSIONAL ETHICS

There is little debate that professional ethics differ from community ethics¹ and that some conduct, which would be unethical by community

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1 By "ethics" I shall mean "a group of moral principles or a set of values" relating to right and wrong, duty and obligation. Webster's Third New International Dictionary of the English Language (1964).

For purposes of this paper, "ethics" and "morals" shall be considered synonymous though the latter is often taken to have a more limited application to rules of behaviour. See e.g., L. Churchill, "The Professionalization of Ethics" (1977) 60 Soundings 40 at 41.

When I refer to "community" ethics or "ordinary" ethics I mean those general ethical principles of right and wrong, duty and obligation believed by society to be valid and to promote approved goals. More specifically, the terms "community" and "ordinary" ethics are intended to be distinguished from "professional ethics."

When distinguishing between professional ethics and ordinary or community ethics, in addition to those specific characteristics of professional ethics discussed in the text, I appeal to the reader's common-sense understanding of the differences that exist. I acknowledge, however, that one might mean several things by the term "professional ethics." M. Martin in "Professional and Ordinary Morality: A Reply to Freedman" (1981) 91 Ethics 631 at 631 cites the following possible definitions:

(1) Professional morality consists of the standards endorsed by professionals or professional societies. Ordinary morality is the set of standards people endorse in their nonprofessional, private lives. (2) Professional morality is the set of binding moral obligations to which professionals ought to be committed because of their special skills, functions, working milieu, etc. Ordinary morality is the set of valid moral considerations and morally correct judgments considered in abstraction from the special context of the professions and the specific moral obligations of professions. (3) Ordinary morality in some sense "emanates from" or has its origin (or justification?) in basic features of the human condition, whereas professional morality derives from the special roles of professionals. (4) Professional morality is a set of valid moral principles which sometimes requires acts that are immoral for anyone except persons having professional status. Ordinary morality is the set of considerations which would make the acts immoral in the case of nonprofessional agents.

If forced to choose, I would say number four most closely articulates what I mean by the term "professional ethics."
standards, is ethical within the context of a profession. For example, both the medical and the legal professions require the keeping of patient-confidences even under circumstances when the layperson would reveal them. Lying, while condemned by community ethical norms, is expected, even required, by social scientists, physicians, and lawyers.


I will assume for the purposes of this paper that one cannot discuss professional ethics in a meaningful way unless one discusses professional morality as it is manifested in conduct. This is, however, debatable.


4 Social scientists may intentionally deceive their human subjects in the course of experiment. Physicians or research scientists may deceive their subjects about the nature of their condition or the therapeutic value of treatment. Bok, ibid. at 220-41, 182-202; Churchhill, supra, note 1. The social consequences of such lies are investigated in Bok at 47-72.


A physician, for example, may lie to a patient about the seriousness of his or her illness if, within the physician's judgment, the overall health of the patient would be threatened by honest disclosure. The physician's unethical conduct, lying, pursues the community-approved ideal of preservation of the patient's health. A lawyer negotiating for a client may 'exaggerate' and 'misrepresent' the settlement terms to secure the most advantageous outcome without respect to what is fair or reasonable. Such behaviour pursues the socially approved ideal of the legal autonomy of clients.

Justification of the differences between professional and ordinary ethics proceeds on two levels: the professional ideal and the professional role. These levels of justification are related and often merged in the course of analysis of professional ethics, but are really two distinct arguments.

Justification of a different professional ethic at the level of the professional ideal is founded on the belief that the professions represent important ethical ideals which are considered by the community "to serve a vital moral function in society." The ethical ideals of each professional

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7 By "justified," I mean to show to be right, just, or appropriate by giving reasons.

8 Some commentators on professional ethics conclude there can be no justification for a different professional ethic and call for the unification of ordinary and professional ethics. See A. Smith, "The Ethics of Society Rather than Medical Ethics" (1982) 8 J. Med. Ethics 120; C. Selinger, "There Are No Such Things as Professional Responsibilities of the Lawyer!" in D. Weckstein, ed., Education in the Professional Responsibilities of the Lawyer (Charlottesville: University of Virginia, 1970) at 271; J. Dubik, "Social Expectations, Moral Obligations and Command Responsibility" (1984) 2 Int'l J. App. Phil. 49 (military ethics are the same as ordinary ethics); J. Ellin, "Business Ethics" in Robison, Pritchard & Ellin, eds., supra, note 2 at 77 (urging that business ethics should no longer be distinguished from community ethics).

9 Goldman, supra, note 5 at 7. On community approval of professions and institutions, see Williams, supra, note 2 at 260.
institution vary. The medical profession, for example, represents the ideal of physical and mental health. The legal profession professes to be the guardian of justice and the rule of law. The clerical profession pursues attainment of spiritual tranquillity.

Common to all professions is the elevation of certain norms or values above their usual moral importance. The professional must elevate certain values or goals, those central in his profession, such as health, or legal autonomy of clients, or profits, to the status of overriding considerations in situations in which they might not appear overriding from the viewpoint of normal moral perception. In doing so he will elevate certain interests to those to whom he is professionally obligated, e.g., legal clients, political constituency, patients, or stockholders, over other interests or those of other individuals, in apparent violation of rights expressive of these other interests.

Although such values are among those considered to be ethically significant by the community, the professional places professional values at a higher position in the ethical hierarchy. ... [T]his leads professionals to decisions in resolving value conflicts which conflict with the decision which could be recommended by ordinary morality (given its different hierarchy of values).

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10 The ethical ideals of the different professions may be in conflict. Thus, in the example in the opening paragraph, the medical ethical ideal of giving help, or at least doing no harm, allows the physician to lie to a patient about the seriousness of her or his physical condition. (For a discussion of this ethic, see Bok, supra, note 3 at 220-49). On the other hand, ideals of the legal profession, which elevate the autonomy and integrity of the individual's 'right to know', would require full disclosure to the patients so they could make their own decisions. See e.g., V. Unan, "The Right to Choose an Unproven Method of Treatment" (1979) 13 Loyola (L.A.) L. Rev. 227; Cf supra, note 5.

A patient's informed consent has been the subject of law suits. See e.g. R. Beller, "From Informed Consent to a Duty to Convince: Truman v. Thomas" (1981) 18 Hous. L. Rev. 917; Wilson v. Scott (1967), 412 S.W. 2d 299 (Texas); Cobbs v. Grant (1972), 8 Cal. 3d 229, 502 P. 2d 1.


11 American Bar Association, Model Code of Professional Responsibility Preamble (1982). The Model Code of Professional Responsibility was promulgated by the ABA in 1969 and was adopted in some form by virtually all the states. While there may be a number of other, additional sources for a lawyer's professional responsibilities, such as state or federal statute or court rule, the Model Code sets forth the ethical standards of the profession. Violation of the standards of the Model Code can lead to reprimand, suspension, or disbarment.

Dissatisfaction with the Model Code led the ABA to appoint the Kutak Commission to update and clarify the perceived inadequacies and ambiguities of the Model Code. The final product of the Commission, the Model Rules of Professional Conduct was adopted by the ABA in 1983. Since then eleven states had adopted the Model Rules in place of the Model Code, see Nix v. Whiteside (1986), 106 S. Ct. 988 at 995, n.4.

12 Goldman, supra, note 5 at 2.

13 Ibid. at 3-4.

14 Freedman, supra, note 2 at 10.
The more highly elevated particular professional norms or values are within a profession, the greater the difference between ordinary and professional ethics is likely to be.

Under this argument of justification, professional ethics are more stringent than ordinary ethics.\textsuperscript{15} The resolution of ethical problems is more complicated for the professional than for the layperson.\textsuperscript{16} The professional must consider not only the elevated values of the profession but also the degree to which the institutional ideals of the profession itself are advanced.\textsuperscript{17}

If the professional finds that professional conduct not only violates community ethics but also fails to advance the professional ethical ideal, he or she is confronted with the obligation to refuse to abide by the professional ethic. Hence, the professional should violate the professional code of conduct, and instead should conform to the community ethic.\textsuperscript{18}

A critical inquiry by the community or by professionals (as individuals or as institutions) is necessary to determine whether the higher professional ideal has value to the community,\textsuperscript{19} and whether or not the different

\textsuperscript{15} Ibid. at 4.

Another way of thinking about this:

Law professors and lawyers erroneously believe that their legal training and their intellectual tools will enable them "to strip a problem, any problem, down to its essentials." The socialization process begun in law school creates and provides the lawyer with a new model of the world . . . which excludes much from its vision. As Professor Scheingold has noted: "When we accuse someone of being legalistic, we suggest an excessive zeal for purely formal details which becloud rather than clarify the real issue."


The perception that the ethics of the lawyer are less rather than more complex than those of the layperson is addressed at pages 9 through 12, infra.

\textsuperscript{16} On a psychiatrist's professional ethical dilemma about whether to maintain the confidentiality of a patient who intends to commit suicide, one author has said:

What is essential to understand here is that the weights are different for an ordinary citizen as opposed to the professional. For the ordinary citizen, there is relatively little doubt which course of action to take. For the professional, it is not clear what should be done . . . The burden of justification is on the professional who wishes to breach confidentiality. This is not so with ordinary persons. The bond of confidentiality between two persons in a nonprofessional capacity is simply not that strong.

Starr, supra, note 3 at 131.

\textsuperscript{17} Freedman, supra, note 2 at 10.

\textsuperscript{18} This will be called, in Parts II and III of this paper, a professional foul.

\textsuperscript{19} Many commentators criticize the notion that professional ethics serve community ideals and point to the substantial connection between the professions' interest in self-preservation and their adherence to distinct ethical codes. See e.g., E. Pellegrino, "Toward a Reconstruction of Medical Morality: The Primacy of the Act of Profession and the Fact of Illness" (1979) 4 J. Med. Phil. 32; Emmet, supra, note 3; L. Newton, "Professionalization: The Intractable Plurality of Values" in Robison, Pritchard & Ellin, eds., supra, note 2 at 23-26; Veatch, supra, note 3; J. Kultgen, "Evaluating Codes of Professional Ethics" in Robison, Pritchard & Ellin, eds., supra, note 2 at 225; J. Elkins, "All My Friends Are Becoming Strangers: The Psychological Perspective in Legal Education" (1981) 84 W. Va. L. Rev. 161 at 212 ("The radical critique of legal education [is that] [l]aw schools exist to produce professionals who utilize their legal expertise to support the dominant ruling class in society."); M. Diamond, "Law, the Problems of Poverty and the 'Myth of Rights'

professional ethic tends to achieve the higher ideal. For example, within the legal profession, "all of the arguments that support the . . . amorality of the lawyer on institutional grounds can succeed only if the enormous degree of trust and confidence in the institutions themselves is itself justified."\(^{20}\)

Individual professionals, however, rarely make such inquiries and rarely deviate from the conduct their professions consider to be required, even when such conduct is in conflict with community ethics.\(^{21}\) Contemporary criticism of the professions charges that this is so not because individual professionals are making poorly reasoned ethical choices, but because there are no choices being made; that there is no serious inquiry into the value of the professions' ethical ideals at any level.\(^{22}\) Professional education, for example, is criticised for its failure to provide meaningful

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The purpose of the legal profession, as manifested by its Code of Professional Responsibility, has been suggested to be merely to preserve the adversary system (as distinguished from achieving the purposes of that system) or to insulate the profession from regulation or to serve as a guide to public relations. See e.g., R. Abel, "Why Does the ABA Promulgate Ethical Rules?" (1981) 59 Tex. L. Rev. 639; P. Shuchman, "Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code" (1968) 37 Geo. Wash. L. Rev. 244; J. Lieberman, Crisis at the Bar: Lawyers' Unethical Ethics and What to Do About It (1978); J. Bennett, Outlaws in Swivel Chairs (New York: Comet Press Books, 1958); F. Cady, "Old Wine in New Bottles — Teaching Professional Responsibility in New Settings" in P. Keenan, ed., Teaching Professional Responsibility, Materials and Proceedings from the National Conference (Detroit: University of Detroit School of Law, 1979) at 223.


\(^{21}\) I mean this in a general way. Individual professionals are occasionally sanctioned for failing to abide by professional standards of conduct. (Lawyers, for instance, are disciplined for failure to abide by one or another of the disciplinary rules of the Code of Professional Responsibility.) But on such occasions, the professional has perhaps too zealously observed professional norms or taken to an extreme the autonomy of professional ethics. I will argue later that one who seriously rejects professional norms of conduct will be removed from the profession altogether. See page 28-29, infra.

\(^{22}\) Franck & Weisband, supra, note 2 at 180. They continue, "The result, in decision-making circumstances, has been described by the psychologist Irving Janus as 'group think'.''

The central problem in professional ethics as actually practiced is not that professionals often fail to live up to their unique official codes and professional principles; nor that they lack the will to enforce them. It is rather that they often assume without question that they ought to live up to them.

Goldman, supra, note 5 at 33.

On the failure of professionals generally to inquire into the coherence of professional conduct and professional ideals see A. Donagan, "Justifying Legal Practice in the Adversary System" in Luban, ed., supra, note 2 at 123 (lawyers); Franck & Weisband, supra, note 2 (members of congress); Elkins, supra, note 15 at 735; Newton, supra, note 19 at 27-29 (lawyers, physicians, physicists).

For the proposition that "[f]ormal education in law does not prepare lawyers for the moral perils of the profession," see A. Eshete, "Does a Lawyer's Character Matter?" in Lubin, ed., supra, note 2 at 271.
ethic education\textsuperscript{23} and for its inability to equip professionals with the intellectual and humanitarian skills to make ethical decisions.\textsuperscript{24}

At the same time, it is recognized that the process of professionalization (including professional education and socialization) involves the adoption of a professional role.\textsuperscript{25} When one adopts a role\textsuperscript{26} "one is not acting strictly as an individual. Since adopting a role means that one


Some have raised the question whether legal ethics should be taught; that is, whether the ethics of the profession are worth transmitting. Wasserstrom, for example, raises the question of whether the adversary system is worth its human costs. Wasserstrom, \textit{supra}, note 20. Others urge careful assessment of the relative morality of the lawyer against the morality of the individual, see e.g., G. Postema, "Moral Responsibility in Professional Ethics" (1980) 55 N.Y.U.L. Rev. 63; D. Luban, "Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics" (1981) 40 Md. L. Rev. 451; J. Elkins, "Moral Discourse and Legalism in Legal Education" (1982) 32 J. Leg. Ed. 11.


\textsuperscript{26} "Role consists of the activity the incumbent would engage in were he to act solely in terms of the normative demands upon someone in his position." E. Goffman, \textit{Encounters} (Indianapolis: Bobbs-Merrill, 1961) at 85.

The term has also been defined in this way:

The concept of role is thus one which enters into the sociologist's account of social interaction. It is needed in describing the repeatable patterns of social relations which are not mere physical facts and which are structured partly by the rules of acceptable behaviour in the society in question.

adopts a certain set of rules and expectations, one is then bonded to those who operate within the same rule-governed framework." 27 Professionals are apparently no more likely to attempt to act outside their roles than others. "Societies, groups and organizations tend to systematize the process of making value judgments; indeed they systematize the very process by which they perceive reality. Few individuals deliberately choose to set themselves against this process." 28 In short, having accepted the professional role requires the individual to accept the professional ethic. 29

In a complex society, an individual plays a number of roles; each may require a different standard of conduct and contemplate a different ethical ideal. Moreover, because of the complexity of society and of the pervasive character of the professions within it, no individual professional can possibly fulfill the ideals of the entire institution. The individual professional is but one actor in a larger professional and social system in which there are many necessarily diverse roles, all of which no one individual can play. For example, no single lawyer can accomplish 'justice' or himself protect the rule of law. However, one lawyer performing the role of defence attorney can, with others performing such roles as prosecuting attorney and trial judge, proceed toward fulfilment of the institutional ideal. 30

The second level of justification of the differences in professional and ordinary ethics is founded upon these premises. It proceeds at the

27 Bowie, supra, note 3 at 58-59.
28 Franck & Weisband, supra, note 2.
29 Summarizing the position of R. Niebuhr in Moral Man and Immoral Society (1932), Little says,

...[T]he collective ego, whether one's country, corporation or occupational team, is more constraining, more inescapable, in determining one's action in the public world than the individual ego is.... [I]t is emphatically not possible for people acting in roles that are representative of group interests to avoid by very far protecting and favouring their group's special interest, or going to extreme lengths, if necessary, to satisfy that interest.... It is rather like Kant's notion of a "pragmatic necessity": If one chooses to act in a collective context, then one must (of necessity) act in reference to group self interest.

D. Little, "Duties of Station vs. Duties of Conscience: Are There Two Moralities?" in Jones, ed., supra, note 2 at 127.

30 Some commentators would go even further. A division of moral labour both at the level of practice and at the level of theories about what the practice ought to be will have a better chance... of leading to the improvement of the ways we seek to develop morality than will any search for the one true unified moral field theory of everything anyone might do.... I worry.... that if everyone in every role is obligated to take all moral considerations into account as completely as all others, there will be more of a tendency than otherwise for no one to take any moral considerations into account, and for responsibility to be even easier to evade than if different roles have more limited and specifiable obligations and expectations.

V. Held, "The Division of Moral Labor and the Role of the Lawyer" in Luban, ed., supra, note 2, 60 at 64; S. Wolf, "Ethics, Legal Ethics and the Ethics of Law" in ibid. at 38.
level of the professional role rather than at the level of the professional ideal.

This reasoning places weight upon the role that the person occupies and locates concerns about how one ought to behave within a context of what is required, expected, or otherwise appropriate of persons occupying that role. Such reasoning is often used to deflect or defuse potential moral criticism by explaining that the role constitutes a sufficient reason for doing or not doing something that would otherwise be . . . morally wrong to do or not to do.31

For example, in the legal profession, the role of the advocate within the adversary system would be justified in this way:

It is good . . . that the lawyer's behaviour and concomitant point of view are role-differentiated because the lawyer qua lawyer participates in a complex institution which functions well only if the individuals adhere to their institutional roles. . . . The adversary system . . . is simply a better method than any other that has been established by which to determine the legally relevant facts in any given case. It certainly is a better method than the exercise of private judgment by any particular individual. And the adversary system works only if each party to the controversy has a lawyer, a person whose institutional role it is to argue, plead and present the merits of his or her case and the demerits of the opponent's. Thus if the adversary system is to work, it is necessary that there be lawyers who will play their appropriate, professional institutional role. . . .32

Justification of differences between professional ethics and ordinary ethics which proceeds at the level of the professional role has a very different focus than justification which proceeds at the level of the professional ideal. Although institutional ideals may inform the inquiry, the role itself, not the ideal behind the role, is the focus of the ethical inquiry.33 Professional conduct, which at the ideal level is justifiable only

32 Wasserstrom, supra, note 20 at 9-10.
33 An example of how the differing focus is manifested in legal education is suggested by J. Elkins in an article in which he challenges what he calls the "psychological perspective" in legal education. He says specifically of Professor Andrew Watson:
Most troubling is Watson's use of the psychoanalytic perspective to "fit" law students to the professional role. The implicit assumption is that the professional role is an appropriate one. . . . Watson does not . . . determine whether the professional role generally serves socially desired ends. . . . There is real fear, which Watson does very little to dispel, that the underlying reason for "handling" psychological factors is to make it easier to adapt to contemporary role demands and to alleviate the suffering which comes from realizing that, as professionals, we do too little to secure social justice and a more humane world.
Elkins, supra, note 19 at 183-84.
See also E. BenGershom, "Ethical Aspects of Clinical Chemistry" (1983) 9 J. Med. Ethics 207 in which the author urges clarification of the ethical obligations of the laboratory scientist whose isolation from the patient and whose reliance upon the presumed ethical soundness of the physician's determination encourages the elimination of all ethical inquiry. See also R. Schwartz, "Institutional Review of Medical Research" (1983) 4 J. Leg. Med. 143.
if demonstrably in pursuit of a higher ethical ideal, has itself become
the ethical standard or ideal.34

Roles are defined by rules of behaviour. As a result, role-justified
professional ethics are necessarily discussed within the context of the
individual professional’s conformity to certain rules or codes of conduct.35
Since the rules of the profession define the parameters of the professional
role, role-justified professional ethics focus inquiry on the content and
interpretation of codes of conduct.

A professional code [of ethical conduct] can . . . be justified on functional grounds,
as promoting the kind of relationship within which a job is most likely to be
done effectively. But its importance is not only functional; the behaviour becomes
valued on its own account as a matter of professional integrity, and adds to the
respect with which a professional person is regarded in the community.36

In return for conforming conduct, a professional code insulates the
individual in the professional role from responsibility for his or her conduct.
It creates a framework within which the professional can act out that
role without ethical accountability.37 Thus, professional roles create
“special duties, . . . define responsibility and allocate power” while
separating, for purposes of ethical accountability, the individual from
the professional role.38 In this sense, “[w]hen one acts or makes decisions
in a professional role, one acts within a certain fixed framework which
is defined by the constitutive rules of the organization. . . . [O]ne often
has to take into account commitments and earlier decisions made by
others.”39 Thus, for example, it has been argued that professional engineers
who collectively create a product dangerous to the public may not be
considered morally responsible as individuals for the consequences, though
the collective entity (the organization in which they work) may be held

34 “Professional ethics, then, is grounded in nothing beyond a professional group definition
of its own character and tradition. Certainly physicians, as citizens, have more universal sources
of obligation; but, as professionals, the source of norms is the profession itself.” Veatch, supra,
note 3 at 11.

35 Emmet, supra, note 3 at 154. “What is ethical within a profession frequently is stipulated
by ethical codes. . . .” Varga, supra, note 23. See also, Pellegrino, supra, note 19 at 33.

36 Emmet, supra, note 3 at 162 (emphasis added).

37 The phenomena by which a professional code of ethics is reduced to a manual on etiquette
is discussed in Part II, infra.

at 14-15. He continues, “That officeholders and office are distinct makes possible the resolution
of conflict, survival after failure, correction after corruption. To introduce the person as an element
in law of this kind seems subversive of the system.”

537 at 541.
accountable. The lack of personal accountability for unethical conduct under the protective cloak of a professional ethic is widely criticised.

At this level of justification the professional's ethical universe is simplified:

at best the lawyer's world is a simplified moral world; often it is an amoral one; and more than occasionally, perhaps, an overtly immoral one. ... It is the nature of role-differentiated behaviour that often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts — and especially various moral considerations — that would otherwise be relevant if not decisive. ... To be a professional is to be enmeshed in role-differentiated behaviour. ... One's role as a doctor, psychiatrist, or lawyer, alters one's moral universe.

At this level of justification, professional ethics are viewed as a discrete system operating largely — though not entirely — separate from life. This conception of discrete professional roles exist[s] not only in the minds of professionals and laypersons in the community, but [is] also effectively institutionalized in the structure and codes of the professions and the process of professional education. They include, but go far beyond, a systematic set of positive norms of professional conduct, for a professional role also defines an identity for its occupant. A role requires certain personal qualities and these personal qualities, Goffman notes, if "effectively imputed and effectively claimed, combine with a position's title ... to provide a basis of self-image for the incumbent" as well as a basis for the image others have of him or her.

For reasons that are not entirely clear, analysis and criticism of professional ethics generally do not distinguish between these two levels of justification. The assumption that professional ethics must be different from those of the community may be so ingrained that it is difficult to challenge at all. Perhaps both levels of justification can validly account for some degree of deviation of professional from community ethics.

40 This argument is raised, then criticized, in ibid.
Other articles on collective responsibility of professionals working as a group or as employees in ethically questionable situations include, P. French, ed., Individual and Collective Responsibility (1972); R. Downie, "Collective Responsibility" (1969) 44 Philosophy 66.

41 See e.g., Churchill, infra, note 1; Agich, supra, note 25.

42 "The interposition of special norms is to simplify the moral universe and to shift decisions toward consequences that are cumulatively best, but unlikely to be achieved by individual well-intentioned agents acting on their own." Goldman, supra, note 5 at 23. Rich, supra, note 30 at 781; Wasserstrom, infra, note 20 at 2, 8-9; Wasserstrom, supra, note 20 at 29-30; Emmet, supra, note 3; Bowie, supra, note 3 at 59 (physicians).

Notice this is diametrically opposed to the justification of a different professional ethic at the level of the ideal. At that level, the ethical universe of the professional was understood to be more complicated than that of the ordinary person. See pages 2 to 4, supra.

43 Wasserstrom, supra, note 20 at 2-5.

44 G. Postema, "Self-Image, Integrity and Professional Responsibility" in infra, note 2 at 287. The consequences to the individual's well-being of a role morality which is different from personal morality have been the subject of numerous books and articles and will be discussed in Part III, infra.
It may be difficult to envision as a matter of theory the social and personal consequences of the adoption of one level of justification over the other.

The gap between abstract principles and practical applications is often bridged by literature through which "... we get to experience the human drama and ... [get] a more complete look at the way people are, with all their ambiguities and contradictions." Part II of this article discusses a play by Tom Stoppard in which the personal and social implications of professional ethics that deviate from community norms are probed. The characters in the play are confronted with ethical dilemmas which force them to examine the validity and limitations of the role and ideal justifications upon which their system of ethics are founded. Part III considers the implications of Stoppard's message for the ethics of the legal profession.

II. TOM STOPPARD'S PROFESSIONAL FOUL

"A conception of a professional role, then, is less like an idealized code of law and more like a sketch of a dramatic part." British playwright Tom Stoppard is sometimes included among dramatists of the Theatre of the Absurd. Yet in his later plays, including Professional Foul, he moves away from the sense of futility characteristic of the absurd as "he extends the limits of absurdity by dramatizing the outside world concretely, as a part of a recognizable social system. ... [H]e creates characters who are not resigned to absurdity but are determined to battle against such a vision of the world. ..." So while his characters may find themselves in an absurd universe — one that is unpredictable, amoral, indifferent to the existence of man — they "are struggling, not surrendering. They are aware of the absurdity, yet they are unwilling to resign themselves to it."

The setting of Professional Foul is Prague, Czechoslovakia in 1977, where two international events, a philosophical consortium and a World Cup qualifying soccer match between England and Czechoslovakia, are

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46 Postema, supra, note 44.
50 Ibid. at 153.
being held. In the course of these events two of Stoppard’s characters, Broadbent, a professional soccer player, and Anderson, a philosophy professor, are confronted with ethical dilemmas that challenge the justifications of the ethical principles upon which their professional lives are built.

In Professional Foul, Broadbent plays centre position for the English soccer team. During the World Cup match, just as a Czech team member is about to score yet another goal, Broadbent is confronted with an ethical dilemma. He can abide by the written rules of the game, in which case he will be incapable of preventing the Czech player from scoring the certain goal, or he can break the written rules, that is, act unethically, by deliberately tackling his opponent from behind, thereby risking serious physical injury to the Czech player. The advantages to be gained by breaking the rules are significant. If the tackle is not noticed by the referee, Broadbent will have saved a certain goal. Should the opposing player be injured, then one of the most skilled of the opposing team will be unable to play. On the other hand, the disadvantage to breaking the rules is merely that, should Broadbent be caught, a penalty kick will be assessed; and a penalty kick might be blocked. Broadbent resolves his dilemma by tackling his opponent from behind. He commits a professional foul.

Broadbent’s tackle is a ‘foul’ because it is carried out in a manner that is in violation of the written rules of the game. Significantly, however, his tackle is termed a “necessary foul,” a “deliberate foul,” a “professional foul.” This language infers that although Broadbent’s conduct is a violation of the written rules of the game, it is not totally unanticipated. To the contrary, “necessary” and “professional” fouls are by inference a required part of the game, especially when such fouls advance the purpose of the game (to demonstrate superior skill by achieving a higher score). Thus, although the written rules might prohibit such conduct, the alternative of rule-breaking conduct not only exists, it is defined by special game language and is anticipated by the existence of a prede-termined sanction, a game penalty.

Broadbent's unethical conduct was not only anticipated, it was implicitly required by the unwritten rules of the game. A reporter who comments upon Broadbent’s tackle remarks: “there was nothing to prevent

\[51\] Supra, note 48 at 85.

\[52\] Ibid. at 106.

\[53\] Ibid. at 85.

\[54\] "The deliberate foul is called professional because it is justified by its purpose — a victory for the team and honour to England.” L. Gabbard, The Stoppard Plays (Troy, N.Y.: Whitson Publishing, 1982) at 140.
Deml scoring except what Broadbent took it on himself to do, which was to scythe Deml down from behind." The reporter's tone suggests that Broadbent was required to choose to break the rules, that he had really no option except to tackle Deml, and that his choice, once made, had the mark of a professional obligation.

One should distinguish game-anticipated unethical conduct which is being called a 'professional foul' from unethical conduct not anticipated by the game. Given that the objective of a soccer game is to score more points than the opponent, Broadbent could also have pursued that objective by taking out a gun and shooting the Czech player. This unethical conduct is unanticipated. No penalty exists for it. It is not a recognized form of non-compliance with the rules of the game. Indeed, the rules of the game do not deal with use of guns at all. Community penalties rather than game penalties would apply to Broadbent's action and he would face the consequences of his unethical conduct not in the game but in society. If Broadbent had taken out a gun and shot the Czech player, he would have been acting outside the approved deviation of the role of a soccer player. Since he would also have been acting outside the permitted actions of a citizen, he would have to bear the predetermined community penalty.

Since "[a] game, after all, is only a model of reality," it is ordinarily understood to create a closed universe of experience. A player of a game ordinarily is capable of distinguishing between the ethics of his role as a player (which are defined by the rules of game conduct) and the ethics of his personal life (which are defined by community norms). A player is expected to distinguish such role-justified conduct as the tackle of another player (even an 'illegal' tackle) and conduct appropriate to everyday life. (Tackling people who are walking along the street is not part of the role.)

Mc Kendrick, a young philosophy professor who is in Prague for the philosophical consortium, is morally outraged by Broadbent's tackle. Mc Kendrick objects that Broadbent fails to recognize that violating the

55 Supra, note 48 at 92 (emphasis added).
57 The line between a professional foul — one expected by the rules and permitted in the course of the game — and conduct which carries with it civil liability is at times a fine one. In Hackbart v. Cincinnati Bengals Inc. (1979), 601 F. 2d 516 (10th Cir.), defendant football player was held civilly liable for an intentional blow struck after plaintiff opposing player had blocked him. The court reasoned: "The intentional striking of a player in the face or from the rear is prohibited by the playing rules as well as the general customs of the game. . . . Undoubtedly these restraints are intended to establish reasonable boundaries so that one football player cannot inflict a serious injury on another." (at 521).
rules of the game is unethical conduct that intrudes or spills over into ordinary life, negatively affecting both the personal ethics of the player and the ethics of the community as a whole.

MC KENDRICK: How can you expect the kids to be little gentlemen when their heroes behave like yobs — answer me that ... if you've got yobs on the field you're going to have yobs on the terraces. . . .

Roy [Broadbent] is sensitive because he gave away a penalty today, by a deliberate foul. To stop a certain goal he hacked a chap down. After all, a penalty might be saved and broken legs are quite rare — it's perfectly all right — you were adopting the utilitarian values of the community, for the good of the team, for England! But I'm not talking about particular acts of expediency. No, I'm talking about the whole ethos.59

Mc Kendrick's point is that the notion of a professional foul is a dangerous one, contaminating the privileged ethos of the game and undercutting the moral foundations of those who are not subject to the game's gentle sanction of a game penalty. Mc Kendrick believes that persons of public stature (even professional game players) have an obligation to exhibit the highest standards of conduct. These standards are corrupted by the notion of a professional foul.

Yet Broadbent (contrary to Mc Kendrick's charge) is uncomfortable with the notion of a professional foul. When, a few days before the game, it is brazenly suggested to him that such a professional foul might become appropriate, he cuts short the conversation lest it be overheard.60 And, goaded by Mc Kendrick's tirade, Broadbent threatens and finally strikes the young philosopher.61 Although the other characters believe Mc Kendrick takes too seriously the consequences to ordinary life of Broadbent's game conduct, the latter apparently — perhaps instinctively — realizes that unethical game conduct spills over into a player's personal life.62 In point of fact, Broadbent's violent reaction to Mc Kendrick reveals such a spill.

The central character in Professional Foul is Anderson, an Oxford professor of philosophy who has been invited to deliver a paper entitled "Ethical Fictions as Ethical Foundations" to the philosophy consortium. In the course of the play, Anderson's professional ethics are challenged by his observation of the violation of human rights by a totalitarian State.

At the opening of the play, Anderson is revealed to be completely out of touch with any part of the field of philosophy except that of

59 Supra, note 48 at 105-6.
60 Ibid. at 68.
61 Ibid. at 109.
62 See R. Buhr "The Philosophy Game in Tom Stoppard's Professional Foul" (1981) 22 Midwest Q. 407 at 412; Gabbard, supra, note 54 at 143-44.
his own narrow theoretical interests, admitting: "I'm afraid as I explained I'm not very good at keeping up with the philosophical." He is vague and fastidious, at once embarrassed and threatened by physical phenomena which are so foreign to Anderson as to be unnatural: "Have you noticed the way the wings [of the airplane] keep wagging? . . . Solid steel. Thick as a bank safe. Flexing like tree branches. It's not natural." He is a stereotypical academic: dropping names, playing elitist one-upsman ship games, and denigrating all those who do not share his precise scholarly niche.

Anderson delights in the manipulation of language. Yet he is not confident that the medium of language, upon which he relies to convey his thoughts and scholarship, is suitable for the task of communication. He describes linguistic analysis as "[a] lot of chaps pointing out that we don't always mean what we say, even when we manage to say what we mean. Personally, I'm quite prepared to believe it." In fact, Anderson is careless with language, presuming on one hand that the arrangement of words has no effect on their meaning; asserting, on the other, that the moral quality of an act can be improved by changing its descriptive label. Anderson recharacterizes Mc Kendrick's field of academic interest, which Mc Kendrick describes as the philosophical assumptions of social science, as the science of social philosophy. He politely attempts to diminish the gravity of the human rights violations in Czechoslovakia by casting the facts in the most conciliatory of terms, while admonishing Mc Kendrick for refusing to confront the truth:

ANDERSON: There are some rather dubious things happening in Czechoslovakia. Ethically.
MC KENDRICK: Oh yes. No doubt.
ANDERSON: We must not try to pretend otherwise.
MC KENDRICK: Oh quite. I mean I don't. My work is pretty political. I mean by implication, of course. As yours is. . . .

Anderson's facility with language and his isolation from the world outside academia have provided him a means by which and an environment in which ethical conduct has become estranged from ethical ideals. Anderson recognizes individual rights and self-determination as valid ethical ideals. These ideals he labels 'fictional' because they are abstract and incapable of scientific proof. The problem is that Anderson's code of ethical conduct, which perhaps was originally intended to achieve

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63 Supra, note 48 at 51.
64 Ibid. at 45 (emphasis in original).
65 Ibid. at 45.
66 Ibid. at 47-48.
such ethical ideals, has deteriorated into rules of social etiquette or customary manners. He has then elevated conformity with rules of etiquette to have ethical value in itself. Anderson believes that if everyone acts in a polite manner, moral order will be achieved and maintained. He no longer probes the reality behind appearances of good manners. Conforming behaviour has become an end in itself; it is morality.

Anderson relegates duty and correct behaviour to the status of good manners, club rules and etiquette, yet he raises all of these normative rule systems to an ethical dimension when he explains that “the history of human calumny is largely a series of breaches of good manners.” For Anderson the ‘moral ought’ becomes a pragmatic rule that is recognized as a fiction but treated as if it were an absolute truth.\(^{67}\)

Repression of individual expression by the State is the backdrop against which Anderson’s ethical dilemma arises. On the night he arrives in Prague, Anderson is confronted at his hotel by Hollar, his former philosophy student. Although Hollar took a first in philosophy when he studied in England, he is now employed by the State to clean the lavatories at the bus station. At great peril to himself, Hollar has written a manuscript critical of the State’s repression of individual rights. He asks Anderson to smuggle the manuscript out of the country so it can be published. Anderson’s code of manners requires him to refuse to assist Hollar.

**ANDERSON:** . . . Now, you know, really, I’m a guest of the government here.

**HOLLAR:** They would not search you.

**ANDERSON:** That’s not the point. I’m sorry . . . I mean it would be bad manners, wouldn’t it?

**HOLLAR:** Bad manners?

**ANDERSON:** I know it sounds rather lame. But ethics and manners are interestingly related. The history of human calumny is largely a series of breaches of good manners. . . . Perhaps if I said “correct behaviour” it wouldn’t sound so ridiculous. . . .\(^{68}\)

Since Anderson is in Prague as a guest of the State, to criticise the State in any way, to take advantage of the privileges he is afforded as a guest, is impolite, hence unethical.

By manipulating language Anderson attempts to modify the reality Hollar reveals. Anderson substitutes the phrase “correct behaviour” for “bad manners” in an effort to ignore the growing recognition that his code of manners may be out of touch with the reality of the state’s violations of individual rights. Although the technique works in the realm


\(^{68}\) Supra, note 48 at 60.
of academic intellectual speculation, in ordinary life the real character of a thing is not changed by the words used to describe it.

Hollar explains his thesis to Anderson, expecting its natural fundamental truth to persuade Anderson to agree to smuggle the manuscript out of the country.

HOLLAR: ... The ethics of the State must be judged against the fundamental ethic of the individual. The human being, not the citizen. I conclude there is an obligation, a human responsibility, to fight against the State correctness. Unfortunately that is not a safe conclusion.69

The reliability of language here fails Anderson again for while Hollar is expressing concern for his physical safety, Anderson presumes Hollar's term "safe" means that the conclusion of his thesis is not analytically sound. Anderson thereupon launches a hypothetical argument as if all that is happening between him and Hollar is casual speculation upon various theoretical alternatives.

By refusing to recognize the facts of human suffering presented by Hollar, Anderson keeps intact his code of manners, even building into the code little shelters of 'law' as the ultimate symbols of civilized manners.70

Hollar maintains that the relationship between the individual and the State should be governed by natural or inherent rights so that the individual must be protected against the collective. In contrast, Anderson believes that the individual and the State freely enter into a reciprocal contract. According to this reasoning, Anderson is morally bound to obey the laws of Czechoslovakia, for he has entered the country of his own free will. However, Hollar is justified in fighting against the State because he was not free to accept or reject its laws. Anderson rationalizes that opposition to the state would be morally wrong for him but right for Hollar.71

Anderson's refusal to smuggle the manuscript is based in part on notions of contract as if the political world in which he finds himself is constrained by notions of consent and self-determination.

ANDERSON: Perhaps the correct thing for me to have done is not to have accepted their invitation to speak here. But I did accept it. It is a contract, as it were, freely entered into. And having accepted their hospitality I cannot in all conscience start smuggling... you know... it's just not ethical.
HOLLAR: But if you didn't know you were smuggling it —
ANDERSON: Smuggling entails knowledge.
HOLLAR: If I hid my thesis in your luggage, for instance.

69 Ibid. at 61.
70 Justification of a professional ethic which differs from a community norm sometimes proceeds on a contract theory. See e.g. Bowie, supra, note 3 at 60; Dubik, supra, note 8 at 52-53; Veatch, supra, note 3 at 1; Wasserstrom, supra, note 31 at 31, 33; Goldman, supra, note 5 at 6.
71 Cobley, supra, note 56 at 59.
Anderson: That's childish. Also, you could be getting me into trouble, and your quarrel is not with me. Your action would be unethical on your own terms — one man's dealings with another man. I am sorry.72

Anderson's ethics obscure reality with rhetoric and verbal felicity. He “overlook[s] the more complex elements of human nature and suffering... [He] construct[s] and adopt[s] fictions and systems which allow [him] to order [his] life; but to maintain these fictions or systems, [he is] forced to sacrifice other individuals.”73 Anderson refuses Hollar's plea to smuggle the manuscript out of the country. But because Hollar convinces him he will be searched when he leaves Anderson's hotel, Anderson agrees to keep the manuscript and drop it off at Hollar's apartment the next day.74

When Anderson arrives at the apartment he finds that, the night before, Hollar was not merely searched but also was arrested and that Hollar's wife and son have endured a police search of their home for the ensuing twenty hours. Anderson too is detained and questioned by state police.75 While Anderson is at Hollar's apartment the police pretend to find American dollars hidden beneath the floor boards. This discovery will enable the police to charge Hollar with the crime of black market currency trafficking rather than with political dissidence.76

The reality of the violation of the individual rights by the authoritarian State imposes itself upon Anderson first hand, yet at this point, he still

72 Supra, note 48 at 62-63.
73 Supra, note 67 at 326.
74 Hollar is a target of police investigation because of his dissident political views and because he signed Charter 77. Charter 77 was a manifesto drafted by a Czech human rights organization which proclaimed "that the Czechs had been deprived freedom of speech and worship and the rights to privacy and due process that had been guaranteed by the International Covenants on Human Rights confirmed in Helsinki in 1975." F. Londré, Tom Stoppard (New York: F. Ungar, 1981) at 144.

In fact, Czech playwright Vaclav Havel, on whom the character Hollar is said to be based, signed Charter 77 and was imprisoned for four months. Stoppard had later visited Havel in Czechoslovakia after he was released. Two years afterwards Havel was sentenced to prison for four and a half years "on charges of slander and subversion against the state." Ibid. 145-46. See also Gabbard, supra, note 54 at 136.
75 Anderson charges that the treatment he is receiving by the police is bad manners: "I am a guest of the Czechoslovakian government. I might almost say an honored guest." Supra, note 48 at 83.

Anderson was on his way to the soccer match in which Broadbent was to commit his professional foul. That he left the philosophical consortium to attend the match suggests Anderson's code of manners is not as rigid as he tells Hollar it is. Gabbard analyzes this element of Anderson's character development in ibid. at 142-44.
76 In effect, the police have committed a professional foul: "[Hollar] appears, thereby, to be a criminal rather than a dissident. This deliberate violation of the Czech constitution, which guarantees its citizens freedom of expression, protects the government from the embarrassing truths in Hollar's manuscript. In the eyes of the police, this is a professional foul." Ibid. at 140.
refuses to recognize that conformity to his code of manners is contrary to the ideal of the preservation of individual rights which underlies them.  

Later that evening, Hollar's wife and son find Anderson at his hotel. It is when Anderson is informed by Hollar's politely deferential son that Hollar will remain imprisoned on false currency charges in retaliation for his suspected speech violations, (and that Anderson himself is possibly in danger), that he is squarely faced with an ethical dilemma which "forces Anderson to deny either his moral principles [of conduct] or his humanitarian interests." Anderson must decide whether to commit a professional foul by acting outside the code of conduct that has always governed his professional and personal life but that now halts the advancement of ideals to which he is committed.

Anderson decides to take actions that are contrary to his rules of conduct but that are responsive to the ideal of individual freedom. First he changes the content of the paper which he reads to the philosophical consortium. Distinguishing now between individual rights and community rules, Anderson defines the former as primary, inherent, and natural, the latter as "a secondary and consequential elaboration of primary rights." He characterizes ethical systems generally as artificial structures that must yield to the fundamental ideals or natural truths which must override mere codes of conduct.

Anderson commits a second professional foul by deciding to smuggle Hollar's thesis out of the country. The difficulty is that, while upon his

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77 The police repeatedly trick Anderson into betraying damaging information about Hollar's political activities. These underhanded police methods finally compel Anderson to lie to his investigators, a breach of "good manners" he had earlier condemned. Anderson also cheats the police by handing over two innocent colloquium papers instead of Hollar's thesis. Although these actions represent a change in behaviour, Anderson does not yet demonstrate a fundamental change in philosophical attitude. His opposition to the State is justified because the State does not live up to its side of the contract. Anderson thus reacts to a breach in a collective rights agreement; he is still not converted to Hollar's argument for inherent individual rights.

Supra, note 56 at 60.

78 Ibid. at 59.

79 This is a professional foul. At the start of the play, Anderson's ethics are role-justified. In his role of visiting philosopher he has an ethical obligation to fail to recognize — and certainly to refuse to criticise — what are obvious and demonstrated human rights violations by the state. He after all did travel to Czechoslovakia voluntarily, and is after all only a guest. It is impolite to mention one's host's bad habits and certainly peace is most likely to be maintained if one keeps silent. Conformity with the required code of ethics therefore has a peace-keeping quality and is safer and easier to boot. That Anderson criticizes his host in a public forum and through a medium that the State has not consented to is clearly a violation of the rules of Anderson's code of manners. It is, however, consistent with Anderson's ethical ideals.

80 Supra, note 48 at 111-12.
arrival in Prague Anderson was safe and unlikely to be searched by customs police,\textsuperscript{81} his subsequent contact with Hollar and Hollar's family and his reading of his modified paper to the consortium have brought him to the attention of the State. Now he will surely be searched. Anderson must therefore find someone else to take the manuscript out of the country.

In the opening scene of the play, Anderson had met Mc Kendrick, a younger philosophy professor, on the plane to Prague. Anderson, the senior and well-known professor, tells Mc Kendrick he is going to do something "a tiny bit naughty \ldots [u]nethical."\textsuperscript{82} Mc Kendrick presumes Anderson means he intends to engage in subversive political activity though Anderson is merely referring to his intention of leaving the consortium and going to the World Cup soccer match. Mc Kendrick, who fancies himself as fashionably to the left of the political spectrum, tries to get Anderson to tell him what the subversive activity will be. Anderson replies, "I don't think I'm going to tell you. You see, if I tell you, I make you a co-conspirator whether or not you wished to be one. Ethically I should give you the opportunity of choosing to be one or not."\textsuperscript{83}

In the course of the play, Mc Kendrick reveals himself to be somewhat of a bumbler. Although he clearly presents no political threat to the State and is unlikely to be searched when he leaves Prague, he cannot be trusted to be discrete with knowledge of Hollar's thesis. Anderson hides Hollar's manuscript in the luggage of the unsuspecting Mc Kendrick, thereby exposing Mc Kendrick to genuine danger. Anderson reasons that this action is warranted by the importance of the ideal involved, notwithstanding that it makes Mc Kendrick a co-conspirator without his consent and that it is, therefore, unethical.

Mc Kendrick is furious when (safely past the customs officials) he discovers how Anderson has used him. He accuses Anderson: "It's not quite playing the game is it?"\textsuperscript{84} But this is the point, of course: Anderson's ethics have evolved beyond a sense that games or roles or codes of manners are binding when they fail to achieve the ideals upon which they are (or should be) founded.

Anderson's decision to smuggle the manuscript of Hollar's thesis out of the country is clearly approved by Stoppard. But the method by

\textsuperscript{81} Ibid. at 60.
\textsuperscript{82} Ibid. at 48.
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid. at 124.
which he has accomplished the decision without Mc Kendrick’s consent is ethically troublesome. “[T]he question of consent places Anderson into an uncomfortable ambiguous light. If moral interests permit us to scorn the need for consent, the logical conclusion of political behaviour based on such interests would be anarchy.” Yet surely anarchy is as destructive to the rights of the individual as is totalitarianism.

The ethical ambiguity of Anderson’s actions is a typical quality of the professional foul. To pursue a higher ideal by abandoning mere rules of conduct (when the latter fail to achieve that ideal purpose) is ethically good, yet to violate another person’s individual rights in pursuit of the goal is ethically bad. Rules of conduct are specifically developed to prevent this kind of injury.

Notwithstanding that Stoppard’s stand on the ethical quality of conduct is “perversely ambiguous,” he clearly does not believe ethics to be entirely relative. In fact, in Stoppard’s universe although “everything is relative yet . . . moral absolutes exist.” Stoppard’s objective in creating Broadbent’s and Anderson’s dilemmas is to explore the ethical complexities of the professional foul.

III. IMPLICATIONS FOR THE ETHICS OF THE LEGAL PROFESSION

When one starts thinking about role-justified conduct, one naturally starts thinking about games. Discussion of ethical standards which are justified by rules of a professional role is facilitated by use of a game metaphor. The comparison of the law to a game, for example, is not uncommon, particularly when the adversary system and the lawyer’s role-

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85 Some commentators imply that Mc Kendrick’s obnoxious character makes Anderson’s action ethically unobjectionable. See supra, note 54 at 143-44; Londr6, supra, note 74 at 150-51; T. Whitaker, Tom Stoppard (New York: Grover Press, 1983) at 144-45.

86 One commentator suggests:

The difference between a foul and a necessary action is in the point of view. To the home team the foul is a praiseworthy expediency; to the opponent it is a punishable offense — a semantic difference . . . Anderson offers the solution in a spontaneous remark, “the important truths are simple and monolithic. The essentials of a given situation speak for themselves, and language is as capable of obscuring the truth as of revealing it.” His words state the play’s overruling theme.

Supra, note 54 at 144-45.

87 Supra, note 56.

88 K. Tynan, “Withdrawing with Style from the Chaos” (19 December 1977) 53 New Yorker 41 at 46.
Justified ethics within the adversary system are the subject of discussion. As in other games, competition in the law game is guided by special rules. Like players of other games, players of the law game assume various legal roles which allow them to behave in ways that would be considered unethical in ordinary life. Legal proceedings (especially those that take place within the formal adversary system) are considered to be circumscribed or specially bounded off from ordinary life. The rules of the legal game are intended to control the ‘test of skill’ in a lawsuit so that each participant has fair opportunity to ‘perform’ or present his or her side of the case without the competition exploding into violence. Legal contests are refereed by judges who are expected to be impartial and uninvolved with the actual course of ‘play’. Law has a special jargon. Individual lawyers acquire superstar status and are perceived to be available to play for the ‘team’ or side which can offer the best compensation. There is even a uniform for lawyers and judges which, while not always mandatory, is at least universally recognized as appropriate.

However, use of the game metaphor to illuminate a role-justified system of ethics can obscure the real ethical issues. Games are different from law in significant ways. The purpose of games is commonly understood by the community to be a test of skill, whether that purpose is taken seriously (as by competitors or professional players) or lightly (as by players just for fun).

The rules of appropriate game conduct are related to the purpose of the game. Even when the rules are broken, they are broken in order to achieve the purpose of the game. In this way professional fouls in games can be anticipated: game players who break the rules will do so in order to secure an advantage in the measurement of skill tested by the game.

Players who participate in games do so voluntarily. Only those who agree to be players are subject to being tackled. All the players of a game share an understanding of the purpose and rules (written and unwritten) of the game. Even a tackle that is carried out in a manner that is in violation of the rules is not unexpected in a soccer match. The decision of a player to participate in a game has consequences only to him- or herself and other players. By deciding to play soccer one


does not thereby also subject one's spouse and children to the possibility of being tackled.

Games are artificially bound by time and space.90 Both players and observers are clear about when the rules of the game apply and when community norms of conduct apply. The privilege to knock a person to the ground is limited to the playing field and to time-in play.

On the other hand, the purpose of the law game is much more difficult to identify. It may be to maintain order, to achieve justice, to provide each individual the maximum amount of freedom without limiting the freedom of another. It may be all three of these or there may be other purposes. The absence of a commonly understood purpose of the law game has, as a consequence, rules governing the players that are confusing or even contradictory.91

Role-justified conduct focuses on conformity of behaviour and involves the elevation of rules of conduct to ethical norms. So those who play the law game in the role of lawyer commit themselves to acting in conformity with the rules of the game — *The Code of Professional Responsibility*. Yet those who are determined to play their roles strictly by the rules, may find it impossible to do so without breaking the rules, for the *Code* is internally inconsistent.92 The inconsistencies perhaps exist because the *Code* is intended to provide the means by which a variety of purposes are to be achieved.

It is clear that professional fouls are anticipated by the rules of the lawyer role. Categories of unethical conduct have been named and penalties have been determined. The participants in the legal profession (and not the society) are responsible for evaluating the misconduct and for imposing the penalty. The penalty is often disproportionately lenient in comparison to the advantage the lawyer perceives would be gained by unethical conduct. However, unlike in games, the lack of clarity of purpose and internal coherence of the *Code* makes the lawyer's pro-

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90 The set of rules [of a game] ... tells us what [conduct] should not be given relevance [and] also tells us what we are to treat as real. There can be an event only because a game is in progress, generating the possibility of an array of game-meaningful happenings. ... In addition to these game-meaningful events, we find game-generated roles or identities. ... A matrix of possible events and a cast of roles through whose attachment the events occur constitute together a field for fateful dramatic action, a plane of being, an engine of meaning, a world in itself, different from all other worlds except the ones generated when the same game is played at other times. ... Games, then, are world-building activities. Goffman, *supra*, note 26 at 26-27.

91 Compare, for example, *Model Code of Professional Responsibility, supra*, note 11, DR 1-102(A)(5), DR 4-101(B), and DR 7-101(A)(1).

92 See generally *ibid.*, Canons 4 and 6.
fessional foul unpredictable. Other role players in the law game cannot anticipate for what purpose a written rule might be broken and cannot predict when another lawyer will feel it necessary to abandon the written rules.

Not all those who become involved in the law game are volunteers, as are the players of real games. Often those who are not actual law-game players are most profoundly affected by the contradictory and deviant code of ethical conduct and by the professional fouls of lawyers. The undermining of public confidence in politics and the legal profession as a whole which resulted from the unethical conduct of Watergate lawyers has been documented.93

Predicting the relative consequences of a lawyer's unethical behaviour in the context of a professional foul is impossible, for such conduct is far more intrusive into life than is the unethical behaviour of a soccer player. While Broadbent's unethical conduct has subtle implications about the obligations of athletes as folk heroes, the person most immediately threatened is the opposing player to whom Broadbent could have caused serious injury. A lawyer who rejects the rules of the profession will cause injury to his client or to his adversary's client; that is, to individuals who are not voluntary participants in the legal system (the game) and who are not parties to the ethical Code (the rules) that has allowed them to be "hacked down from behind." Because the legal institution controls the penalties for any professional fouls about which 'non-players' complain, either by malpractice suits or by disciplinary actions, such 'non-players' have little recourse except within the legal system that has allowed them to be injured.

Furthermore, the distinction between role morality and personal morality is far less easy for lawyers to maintain than for game players. There is "a sense of omnipotence that one acquires in law school [that] is directly related to the fact that law is so pervasive in our culture. The domain of law extends to virtually all individual and social problems."94 Law games are not easily confined to court rooms or to behaviour occurring during the regular work week. In fact it has been suggested that lawyers find it difficult to act except within the ethics of the legal role.

The legal persona . . . can touch the private life of the self profoundly. Commonly, the legal persona dominates the individual's personality . . . In such a case of psychological identification, the legal persona is internalized and becomes indistinguishable at a psychological level from other disguises of the self. The effects

93 See e.g., D. Harward, ed., Crisis in Confidence, The Impact of Watergate (Boston: Little Brown, 1974).
94 Elkins, supra, note 23 at 16.
of overidentification with the lawyer's role lead to rigidity and an inability to change masks as required by society.95

As a result, the ethics of the professional role become the ethics of the individual.96 Yet viewed in even the most flattering light, principles of legal ethics and the norms of the Code of Professional Responsibility are clearly inappropriate as models for such personal morality.

One critic suggests that Stoppard objects most to the implication that when life's institutions are compared to games these institutions are often perceived as being intrinsically unimportant or optional: since games are normally perceived as closed systems of rules with little or no overlap with actual life, institutions such as law or ethics are often viewed in the same manner when they are compared to games.97

Comparison of law to a game trivializes it and ignores the important differences between the two.

Thinking of law as a game, and legal ethics as its rules, is useful insofar as the metaphor is used to demonstrate the fallacies that such institutions are something completely different from life and that unethical conduct within institutional roles is without consequence to those outside them. Beyond this, the usefulness of the metaphor diminishes, and, as Stoppard suggests, is potentially dangerous. For law is not a game, it does not operate completely independently of the rest of society, and yet lawyers are largely unaccountable for their professional fouls to any but those who are also within and protected by the legal system. The lack of a demonstrably coherent relationship between the purpose of law or of the adversary system and the Code governing the actions of lawyers, along with the inconsistencies in the Code itself, further warn against a view of law as a neat, closed universe in which privileged unethical behaviour is safely bounded.

When rules defining ethical conduct become of value in themselves without regard to the consequences of those rules to people who do not participate in the game, the comparison of law and lawyers to games and players becomes inappropriate. At that point the dimensions of the danger of relying solely on either the game metaphor or upon role-

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95 Ibid. at 749.
97 This is perhaps what is behind the periodic calls for education in legal ethics that emphasizes the responsibilities of the lawyer as a member of society rather than as a player of the role of advocate.
98 See e.g. Shuchman, supra, note 19; Selinger, supra, note 8; J. Noonan, "Other People's Morals: The Lawyer's Conscience" (1981) 48 Tenn. L. Rev. 227.
differentiation to justify the deviation of professional legal ethics from those of the community become clear. At this theoretical impasse, justification of the different professional ethic on the level of the ideal becomes useful. Yet that level of justification requires an inquiry into the actual relationship between professional conduct and the achievement of the ethical ideal. It is not clear that such a relationship between the real and the ideal exists in the ethics of the legal profession.

Like Anderson, lawyers tend to lose touch with the natural world beyond the artificial structure of the profession. The complexity and esoteric quality of legal concepts, the growing need for specialization within a narrow field of law, and the rules of the professional role combine to create an environment and means by which lawyers become professionally and ethically isolated from ordinary life.

Lawyers are, like Anderson, clever at manipulating language which is the vehicle by which legal theory and legal argument are advanced. Lawyers are trained to cast the facts of a single event in several different (even contradictory) forms and are then taught how to argue that each form accurately represents reality.

Yet lawyers seem to lack Anderson's suspicion about the suitability of language for the task of communication and instead by their "utterances show their own belief, as long as they act as lawyers or judges ... in the power of their words." They fail to recognize that their "language concepts screen and structure [their] perception and allow [them] to organize information and experiences. ... [W]hat the lawyer characterizes as 'out there' is not a true picture of an objective event or scene but a personal and social assessment." Lawyers' ability to manipulate

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98 On the engulfment of the person by the professional role, cf. notes 94-96, supra, and accompanying text.

99 In several ways the modern [legal] system has created a gap between legal norms and actual values or interests of individuals in society. First, the mere (and necessary) formality of the rules of evidence and procedure can drive up cost, increase delays and exclude from the court's consideration information that all parties might otherwise consider relevant and reliable. Second ... the rules of law themselves may be out of step with the parties' values. Pluralism by definition suggests differences in perspective and potential conflicts in values. This problem is aggravated by efforts to minimize judicial discretion in order to maximize predictability and efficiency. Such developments may of necessity increase the alienation towards the legal system in cases where freer discretion would produce more equitable results.

Finally, legal rules are designed to be administered by lawyers. The language and the formalities create barriers between the parties and the resolution process. The lawyers' "professionalism" discourages either participation or a genuine sense of control over the outcome of the dispute. The "priesthood" of lawyers reinforces this process.

Rich, supra, note 20 at 783.


100 Supra, note 38 at 25.

101 Elkins, supra, note 15 at 742-43.
facts and language and their failure to recognize the consequent distortion of what is ordinarily perceived to be reality have serious consequences for ethical decision making\textsuperscript{102} because:

\[ \text{[t]he morally relevant facts may include much more than the professional is accustomed to considering... On the whole, a professional tends to emphasize those aspects of a case that his own technical skills allow to surface. A willingness to face neglected facts may be... important... in attacking a moral problem.}\textsuperscript{103} \]

The way lawyers use language and the customs of legal analysis encourage the perception that what is ethically good is entirely relative, or a matter of clever argument.\textsuperscript{104}

This perception is reinforced by the notion that the professional role justifies a professional ethic. When the diversity of roles within the complex institution of law is taken to justify ethical behaviour that differs from the community norm,\textsuperscript{105} the rules governing ethical conduct within the professional role become prominent. In fact there is enormous pressure on lawyers to conform to the rules of ethical conduct of the profession set forth in the \textit{Code of Professional Responsibility}. One source of pressure to conform is the mandatory character of the \textit{Code}. A lawyer who violates the rules is subject to discipline or disbarment.\textsuperscript{106} A lawyer who refuses to conform his ethical conduct to that required by the rules of the \textit{Code} will be denied the privilege to practice the profession.\textsuperscript{107} The consequence may be that only those who are willing to conform to the professional code of behaviour will be permitted to participate in the profession.

\textsuperscript{102}Language can also be used to avoid ethical accountability. \textit{Supra}, note 38 at 10-12.


\textsuperscript{104}[S]ince professional integrity is often taken to be the most important mark of personal integrity, a very likely result is often that a successful lawyer is one who can strictly identify with [the requirements of professionally ethical behaviour]. [T]he unwanted consequence [is] that practical deliberation, judgment, and action within the role are effectively cut off from ordinary beliefs, attitudes, feelings and relationships — resources on which responsible judgment and action depend.

\textsuperscript{105}Postema, \textit{supra}, note 2 at 78.


\textsuperscript{107}Although the \textit{Code} states that it is not intended to be a standard for civil liability (\textit{Model Code of Professional Responsibility}, Preliminary Statement, \textit{supra}, note 11), conformity with the substance of the \textit{Code} may insulate the lawyer from malpractice liability.

\textsuperscript{107}Anderson's option of committing a professional foul or of rejecting his ethics of manners to achieve the goal of the preservation of human rights may not be an option available to the lawyer. Anderson, having made his moral decision, can return to Oxford to speculate and write about his new-found insight. Lawyers who commit professional fouls, who reject the manners of the \textit{Code}, of the adversary system, or of the law, may very well so alienate themselves from it that (presuming they are permitted to remain in the legal fraternity) they are incapable of operating successfully within it.
Another source of pressure to conform is the psychological comfort of the insulating effect of the Code: lawyers who observe the requirements of the Code bear no professional accountability for the ethical consequences of their acts. A third source of pressure to conform to the rules of conduct of the Code is the phenomena by which the lawyer's personal and professional morality are closely identified. A lawyer may know that the rules of ethical conduct of the Code serve purposes distinct from those of the professional ideal but you're so hung up on them you want to treat them as if they were God-given absolutes... So you end up using a moral principle as your excuse for acting against a moral interest.

As Stoppard demonstrates through Anderson, one must beware when inflexible rules of conduct become ethical values in themselves and allow one to ignore ethical ideals such as those which promote the exercise of inherent individual rights. The danger that this may occur within the legal profession is real, for to an extent the Code is a code of manners.

When in the age of robber barons and their lawyers, the profession began to put its ethics into codes, there appeared a distinction between etiquette and regulation on the one hand and morals on the other. Each generation of American lawyers since then has revised its code of ethics; and each revision says less about morals, and what it does say about morals less precisely.

Furthermore, to a significant degree in legal ethics, conduct which conforms to the written rules of the profession is equivalent to ethical conduct. By merely conforming to the behavioural norms of the Code one can possess the privileges and power attendant to the practice of law. To be certain they are professionally ethical, lawyers need only to behave in the manner directed by the Code. There is no need for them ever to look behind the formalities of professional manners to the consequences of maintaining them. Unless lawyers are careful, they may

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108 Cf. supra, notes 94-96 and accompanying text.
109 See e.g. J. Kelly, "Notes on the Teaching of Ethics in Law School" (1981) 5 J. Leg. Prof. 21.
110 Supra, note 48 at 99.

In an article exploring criteria for evaluating professional codes, the mere existence of a code is viewed critically:

One's first reaction to codes of professional ethics is that they are a Good Thing — that they cannot hurt and may improve the way important occupations are practiced. But this assumption can be challenged. . . . [P]rofessions have an important and growing role in society and their codes play a part in professionalization as well as in the subsequent performance of professional tasks. . . . We need to decide whether code-mongering is a desirable practice and, if it is, how it ought to be conducted and the content that is appropriate for the final product.

Kultgen, supra, note 19 at 227.
come to believe that conformity with professional ethics is the same as ethical conduct.

Yet this is not so. The ethics of the profession frequently conflict with those of the community at large. The legal system does not always achieve the ethical ideal of justice for it enforces legal rights rather than moral rights. It is not equally accessible to all citizens and all who come within it are not treated uniformly. The adversary system fails to achieve the ideal goal of fairness and accessibility insofar as it fails to make equal the ability of all litigants to present their cases through equally zealous and equally competent attorneys. Indeed, the adversary system has not been tested against other possible systems of justice and found to be the single best.

On the other hand, the legal system still has an enormous degree of credibility and authority, notwithstanding contemporary criticism. Important questions of social justice and individual rights are referred to lawyers and courts for resolution. What Anderson said about the motivating force of an ethical ideal is at least as true for lawyers as for other people:

[N]atural justice, however illusory, does inspire many people's behaviour much of the time. . . .
There is a sense of right and wrong that precedes utterance. It is individually experienced and it concerns one person's dealings with another person.\textsuperscript{113}

The concept of a professional foul is one that can be useful in analyzing the ethical obligations of lawyers. While it is not without its ambiguities, Stoppard's notion of a professional foul recognizes the complexities of mixed loyalties\textsuperscript{114} and illuminates those shadowy boundaries between legality and community ethics. It can help emphasize the need to realign the ethics and services of the profession with the needs of the community.\textsuperscript{115} Certainly the concept of the professional foul can help keep the professional code of ethical conduct from deteriorating into a code of manners. And it provides an ethical alternative to

\textsuperscript{112} Luban, \textit{supra}, note 24 at 468-70.
\textsuperscript{113} \textit{Supra}, note 48 at 118.
\textsuperscript{114} "The moral dilemma [within the institutionalized context of professional practice] is not what is my duty or obligation or which value has priority, but to whom am I loyal? Whom or what am I advancing through this decision?" A. Dallery, "Professional Loyalties" in M. Bradie, T. Attig & N. Rescher, eds., \textit{The Applied Turn in Contemporary Philosophy} (Bowling Green, Ohio: The Applied Philosophy Program, Bowling Green State University, 1983) at 73, 74.
\textsuperscript{115} There are identifiable social needs and there are professions serving them; but there does not appear to be any one-to-one correspondence between profession and need. To be sure, the ABA proclaims the legal profession "guardians of the Rule of Law", but the thrust of the legal profession seems to be much more toward the settlement of disputes, and it is from that need that lawyers are wont to trace their own origins. Newton, \textit{supra}, note 19 at 28.
professionally mandated conduct when conformity with the latter can only demonstrate or promote the failure of the ideals upon which the ethics of the legal profession are (or should be) founded.