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LAWYERS, CONTEXT, AND LEGITIMACY: A NEW THEORY OF LEGAL ETHICS

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Even good lawyers get a bad rap. One explanation for this is that the professional rules governing lawyers permit and even require behavior that strikes many as immoral. The standard accounts of legal ethics that seek to defend these professional rules do little to dispel this air of immorality. The revisionary accounts of legal ethics that criticize the professional rules inject a hearty dose of morality, but at the cost of leaving lawyers unrecognizable as lawyers. This article suggests that the problem with both the professional rules and the extant accounts of legal ethics is that they treat the role of lawyer as largely uniform, whereas lawyers actually serve several importantly different roles in different contexts. The central insight of the article is that legal ethics must be fundamentally context-sensitive: what lawyers are morally permitted or required to do depends on the context in which they are working. Additionally, by taking context into account, this article presents a theory of legal ethics that is appropriately shaped and constrained by normative political philosophy and norms of political legitimacy.

Specifically, the article argues that people act as lawyers in three different contexts: State v. Individual (situations in which the State seeks to apply some general law to a particular individual), Individual v. Individual (situations in which private individuals are engaged in a dispute), and Individual v. State (situations in which individuals object to some conduct of the State on constitutional or other grounds); that the value of lawyers, qua lawyers, stems from a different source in each of these contexts; and that a theory of legal ethics must take into account both of these first two claims. This article develops one such theory—the Multi-Context View. To demonstrate how the theory applies in practice, the article applies the

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Multi-Context View to two significant issues in legal ethics: the ethical issues involved in deciding whether to represent a client and the moral permissibility of the use of tactical delay.

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INTRODUCTION

Lawyers: what are they good for? This article contends that this is the proper first question of legal ethics and that an account of legal ethics must be developed in light of an answer to it. Extant accounts of legal ethics have implicitly assumed a uniform answer—that lawyers all have the same purpose—although different views have been offered as to what that purpose is, or how lawyers in particular roles (prosecutor, defense attorney) contribute to its achievement.² The professional rules governing lawyers are also uniform in that they permit, require, and prohibit the same conduct—the same zealotry, the same tactics—regardless of whether

² See *infra* notes 19-32 and accompanying text.

one represents an immigrant facing removal, a parent battling for custody, a criminal defendant facing years in prison, or a corporation attempting to extract as much money as possible in a settlement.³

The intuition that drives this article is that this simpleminded uniformity regarding lawyers is a mistake. Lawyers work in an incredible range of contexts, dealing with many different kinds of law. The larger background purposes of criminal law, immigration law, constitutional law, tort law, contract law, property law, family law, corporate law, administrative law, and so on, are not uniform. One might ask, then: why would the proper purpose of lawyers be the same across all these different contexts? Most importantly, why would the appropriate ethical norms governing the conduct of lawyers be the same in all of these different contexts?⁴

The thesis of this article is that a plausible account of legal ethics must be context-sensitive, taking account of the context in which a lawyer works. In arguing for this thesis, the article will defend three related claims. The first claim is that people act as lawyers in three fundamentally different contexts: State v. Individual (situations in which the State seeks to apply some general law to a particular individual), Individual v. Individual (situations in which private individuals are engaged in a dispute), and Individual v. State (situations in which individuals object to some conduct of the State on constitutional or other grounds). The second claim is that the value of lawyers, qua lawyers, stems from a different source in each of these contexts. The third claim is that a theory of legal ethics must take into account both of these first two claims. This article develops one such theory—the Multi-Context View—and applies this theory to two core issues in legal ethics: the ethical issues involved in deciding whether to represent a client and the moral permissibility of the use of tactical delay.

This article presents an account of legal ethics that is appropriately and fundamentally shaped and constrained by normative political philosophy and in particular norms of political legitimacy.⁵ And, although some have

³ The one exception is that different professional rules govern the conduct of prosecutors. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983) [hereinafter MODEL RULES]. See also *infra* notes 41-46 and accompanying text.

⁴ Examples of the uniformity assumption are common. William Simon, for example, argues that “the key issues of legal ethics are jurisprudential, that is, they implicate questions of *the* nature and purpose of the legal system.” WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 13 (1998) (emphasis added).

⁵ Early 19th Century work in legal ethics did occasionally draw on republican political philosophy. See, e.g., Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence and Legal Ethics*, 75 *FORD. L. REV.* 1339, 1347-50 (2006) (describing a 19th Century conception of the lawyer as an intermediary between the government and the people who works toward the public good). And some recent work has argued that, when lawyers are deciding how to act at the margins of law, they must take into account issues in normative political philosophy and legal philosophy. For an

argued that criminal defense⁶ and criminal prosecution⁷ might raise distinctive ethical issues, this is the first article to argue that legal ethics should be systematically different depending on whether one represents an individual against the State, or whether one represents a private individual against another private individual.⁸ Additionally, this article is the first to argue that context matters not just because of power imbalances—between the State and the individual, or between powerful and less powerful individuals—but also because of the differing purposes of legal and political institutions in these different contexts.

The Multi-Context View delivers a number of surprising conclusions. Lawyers representing individuals against the threat of State action are morally permitted to use a range of relatively aggressive tactics, but only

excellent overview, see Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 1 (2011). Theorists in this camp “draw on jurisprudential theories to ground lawyers’ interpretations of the ‘bounds of the law’ in the role that lawyers play in the legal system and the role that law plays in society.” *Id.* at 14. Although interesting, and perhaps closest to this article’s general spirit, this work only seeks to connect ethical guidance of lawyers with larger social and political concerns with respect to those issues that arise when lawyers are considering the bounds of law that (on these views) are the appropriate constraint on partisan advocacy. See, e.g., W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 2-7 (2010).

⁶ See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 63 (1988) (presenting and defending the “criminal defense paradigm” which “includes any litigation context in which zealous advocacy is justified by virtue of the fact that we have political reasons to aim at prophylactic protection from the state, even at the expense of justice”); Deborah L. Rhode, *Ethical Perspectives on Law Practice*, 37 STAN. L. REV. 589, 605-08 (1985) (suggesting that certain practices might be justified in the criminal defense context that are harder to justify outside of that context); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471 (1966) (noting that special factors apply in the criminal context). But see SIMON, *supra* note 4, at 170-94 (taking issue with the view that criminal defense is different in a way that requires systematically different analysis).

⁷ See *infra* notes 42-46 and accompanying text.

⁸ In this respect, the account defended here shares affinities with the position that Luban defends, on which lawyers are to consider the relative strength of their adversaries, and to limit their partisan zeal in those instances in which they are representing clients of equal or greater strength than their opponent. See LUBAN, *supra* note 6, at 63-65. Luban’s motivation for this position is similar to the motivation for this article’s account, although he does not develop a detailed or systematic account in light of these different possible situations. He presents the issue as one of power (whether State or private), and he turns to what he calls “common morality” to determine how lawyers ought to behave when they face an adversary that is equal or weaker to their own client. *Id.* at 63, 149. Others have suggested that context matters, but have not developed this idea in a systematic way. See WENDEL, *supra* note 5, at 82 (“All lawyers’ duties . . . are moderately context-specific, while being structured at a high level of generality by the settlement function of the law”); SIMON, *supra* note 4, at 138 (“Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice”).

insofar as those tactics are not aimed at obscuring the truth about materially relevant facts. Importantly, this is true for all kinds of State action—whether, for example, the State action aimed at the particular individual is in the criminal, immigration, child custody and child welfare, or administrative regulatory context. On the other hand, lawyers representing private individuals against other private individuals are morally required to constrain and shape their representation in ways that are sensitive to the overall equity of the dispute’s eventual resolution given the background legal entitlements. The role of lawyers in this context is much like the role of another kind of representative: the political representative. On at least the more plausible accounts of the ethics of political representation, political representatives are charged with advocating for the interests of their constituents, but in a way that is compatible with the interests of the nation.⁹ Similarly, lawyers representing private individuals against other private individuals should operate with their client’s interests in mind, but also with an eye toward reaching equitable resolutions to private disputes and providing equitable redress to privately inflicted injuries.

As should be clear, the Multi-Context View requires a departure from the standard conception of legal ethics that permits highly partisan, zealous advocacy on behalf of one’s client regardless of context. This departure is a welcome consequence of the account. Many explanations have been offered to explain two well-documented facts about lawyers: lawyers are, on average, unhappy compared to other people of similar economic and social standing,¹⁰ and lawyers fall well below doctors and other professionals in terms of how others regard them.¹¹ One possible explanation for these facts is that being a lawyer requires one to behave morally badly, at least in a wide variety of circumstances, and that, rather than being an impediment to this bad action, the professional rules of conduct often explicitly require it. One aim of the article is to offer a way of viewing legal ethics in which lawyers play normatively important and

⁹ For general discussion of the ethics of political representation, see, Alexander A. Guerrero, *The Paradox of Voting and the Ethics of Political Representation*, 38 PHIL. & PUB. AFF. 272, 277-83 (2010); Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214 (2009).

¹⁰ See, e.g., Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874-75, 881-88 (1999) (referencing and discussing numerous studies documenting the unusually high rates of depression and unhappiness amongst lawyers).

¹¹ See, e.g., Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 62 (reporting the findings that only one American in five considers lawyers to be “honest and ethical,” and that “the more a person knows about the legal profession and the more he or she is in direct personal contact with lawyers, the lower [his or her] opinion of them”).

positive roles, and in which the value of lawyers will be salient to lawyers and non-lawyers alike, while at the same time offering an account of legal ethics that has the resources to provide meaningful guidance in a range of hard cases, and which leaves the lawyer in a role that is recognizable to all as lawyerly. The account offered here suggests a way of rethinking and even rehabilitating the role of the lawyer; it is a call to reform the role of the lawyer, not a call to eradicate that role.

The article will proceed as follows. Section II discusses the distinction between the law governing lawyers and legal ethics, and discusses the current state of the debate in legal ethics. Section III introduces the three different contexts in which lawyers operate. Section IV discusses and distinguishes the differing values of lawyers in these contexts. Section V applies these conclusions about the differing value of lawyers to two of the thornier issues in legal ethics—client selection, and the permissibility of tactical delay. Section VI briefly discusses objections and replies.

I. LAW AND LEGAL ETHICS

A. *The Distinction Between Law and Ethics*

It is worth beginning by drawing a distinction between:

(1)(a) the *laws* that govern people in their capacity as lawyers—those legal rules that govern the conduct of lawyers and will be enforced, if necessary, by the public institutions of the State (including courts)—and (b) the *professional rules* that various bodies of lawyers have adopted, typically via private professional organizations such as bar associations, as defining appropriate conduct for lawyers; and

(2) the *ethical truths* about and *ethical principles* regarding how lawyers ought to behave in general and/or in particular situations.

With a few exceptions, the legal regulation of lawyers works like this: various bar associations, particularly the American Bar Association, draft the professional rules that govern lawyers' conduct, and these drafted codifications are then adopted by particular state courts.¹² They become

¹² See STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3-4 (2011); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 2-5 (2d ed. 2002).

‘law’ in this sense, although often their main effect is to determine who is and can remain licensed to practice law.¹³ Other kinds of sanctions and fines sometime attend the violation of various laws and professional rules.¹⁴

All of this—the laws and professional rules that regulate lawyering—should be kept distinct from the *ethics* of lawyering, just as *what is legal* is kept distinct from *what is ethical* in other contexts.¹⁵ Suppose the Bush Administration’s lawyers were correct: the use of water-boarding as an interrogation technique is legal—is legally permissible—in the United States. There remains a separate and distinct question of whether the use of water-boarding is ethical—is morally permissible (this article will use ‘ethical’ and ‘moral’ as synonyms). The same kinds of distinctions are appropriate with regard to legal ethics and the laws and professional rules that actually regulate the conduct of lawyers.¹⁶

One cannot ordinarily infer that X is morally permitted simply in virtue of X being legally permitted. We do not always want to draw the lines regarding what is legal and illegal so that they match up with the lines regarding what is moral and immoral. For example, although it may be morally bad to mistreat your friend (say, by standing her up on her birthday), there are reasons why we wouldn’t want this to be illegal. And of course there are things that we want to make illegal which are not immoral: say, parking your car for more than 2 hours in a one-hour parking spot when there are vacant spots nearby.

There are always several questions we might ask about some possible conduct, X. Questions of *morality*: is doing X morally forbidden, permitted, required? Questions of *legality*: is doing X illegal? Questions of *legalization* and *illegalization*: if doing X is immoral, but is not presently illegal, should we make it illegal; if doing X is illegal, but not immoral, should we make it legal?

It is worth noting that the Multi-Context View would, in some cases, require lawyers to depart from the existing legal rules regarding how they ought to behave. In this sense, the view might be seen as ‘revisionist.’ In

¹³ *Id.* at 1-2.

¹⁴ *Id.*

¹⁵ For relevant discussion, see Schiltz, *supra* note 10, at 908-09; David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 44-55 (1995) (discussing how the professional rules are, and were intended to be, distinct from ethical rules).

¹⁶ There are possible complications here. First, a legal system might explicitly incorporate moral norms into the law. For relevant discussion, see W. J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994). Second, on some theories of law, immoral laws do not, or should not, count as law. *See generally*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 326-340 (1978). These complications can be left aside for the purposes of this article.

another sense, however, the view is not revisionist, in that it does not require giving up our intuitive views or core beliefs about morality or about how individuals, acting as lawyers, morally *ought* to behave in a variety of circumstances—or so the article will argue.

This article introduces a new theory of legal ethics, a theory about how lawyers ought to behave in various situations, and a theory about how lawyers ought to think about and reason through questions concerning how they ought to behave. Once one has developed and embraced a theory of legal ethics, one may be in a position to evaluate and criticize existing laws and professional rules governing the conduct of lawyers. In doing this, however, one must remember that there can be good reasons not to make immoral conduct illegal and to make morally innocent conduct illegal, and that questions of legalization and illegalization are distinct normative questions not directly answered by a determination that some underlying conduct is moral or immoral. This article will mostly not address the question of how to operationalize or whether to legally codify the ethical view it sets out, although it will draw attention to concerns in that regard as they arise.

B. A Brief Introduction to Legal Ethics

This article reaches new and perhaps surprising conclusions about legal ethics in part because, by beginning with the question of the broader social and political value or potential value of lawyers, it begins in a different place than standard discussions of legal ethics. Charles Fried is credited with setting “the terms of inquiry for philosophical legal ethics”¹⁷ with the foundational question: “Can a good lawyer be a good person?”¹⁸ More recently, Daniel Markovits has reframed the question: can the “actions, commitments, and traits of character typical of the [legal] profession . . . be integrated into a life well-lived?”¹⁹ Academic discussions of legal ethics have mostly focused on addressing one or another version of these questions, beginning with a concern about integrating the norms of the legal profession with ordinary *personal* (or “interpersonal”) morality, rather than by considering how norms of *political* morality might shape and constrain the appropriate norms of the legal profession. A brief presentation of these debates is useful to make explicit how the Multi-Context View presented in

¹⁷ Alice Woolley, *If Philosophical Legal Ethics is the Answer, What is the Question?*, 60 U. TORONTO L.J. 983, 983 (2010).

¹⁸ Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976).

¹⁹ DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 1 (2010)

this article is different.

Academic discussions of legal ethics typically begin by noting that the “standard conception”²⁰ or “dominant view”²¹ of the good lawyer requires partisan, zealous advocacy for one’s client to the legally allowable limit, as defined by relevant law and rules of professional conduct.²² As William Simon puts it, the “core principle of the Dominant View is this: the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim.”²³ Bradley Wendel presents the three core principles of the standard conception: the principle of partisanship (“[t]he lawyer should seek to advance the interests of her client within the bounds of the law”), the principle of neutrality (“[t]he lawyer should not consider the morality of the client’s cause, nor the morality of particular actions taken to advance the client’s cause, as long as both are lawful”), and the principle of nonaccountability (“[i]f a lawyer adheres to the first two principles, neither third-party observers nor the lawyer herself should regard the lawyer as a wrongdoer, in moral terms”).²⁴ It is then typically noted that the standard conception permits and even requires conduct that would be immoral if engaged in by non-lawyers.²⁵

²⁰ WENDEL, *supra* note 5, at 6; LUBAN, *supra* note 6, at xx; Gerald J. Postema, *Moral Responsibility in Legal Ethics*, 55 N.Y.U. L. REV. 63, 73-74 (1980).

²¹ SIMON, *supra* note 4, at 7.

²² For example, Simon contends that “the Dominant View is assumed in the most important provisions of each of the two ethical codes promulgated by the American Bar Association—the *Model Code of Professional Conduct* [sic] of 1969 and its successor, the *Model Rules of Professional Conduct* of 1983.” SIMON, *supra* note 4, at 8. Perhaps the clearest expression of this is in the 1969 *Model Code of Professional Responsibility*, and particularly Canon 7 of that Code: “A Lawyer Should Represent a Client Zealously Within the Bounds of Law,” which is given teeth under Disciplinary Rule 7-101(A)(1), which states that a lawyer “shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1969) [hereinafter MODEL CODE]. As Monroe Freedman and Abbe Smith point out, the Dominant View is less clearly central in the 1983 *Model Rules of Professional Conduct*, although they highlight reasons to think that this difference does not suggest a repudiation or disavowal of the Dominant View. See FREEDMAN & SMITH, *supra* note 12, at 83-84.

²³ SIMON, *supra* note 4, at 7.

²⁴ WENDEL, *supra* note 5, at 6. These principles have been formulated with some variation over the last thirty years. See, e.g., LUBAN, *supra* note 6, at xx; Postema, *supra* note 20, at 73-74.

²⁵ The classic statement of the position is by Lord Brougham, in his representation of the Queen in *Queen Caroline’s Case*:

. . . An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing

But this does not yet establish a negative answer to Fried's question.

Defenders of the standard conception²⁶ argue: that being a lawyer is a special role; that, because being a lawyer is a special role, the moral assessment of lawyers must come not at the level of particularized assessments of individual conduct, but at the level of the role itself; that the lawyer's role as part of the Adversarial System requires lawyers to abide by the standard conception; and that the Adversarial System is morally good or justifiable in a way that makes the conduct it requires of lawyers morally good or justifiable. In short, the particular conduct gets its value or justification from the role, which gets its value or justification from the system. A good lawyer can be a good person because she is playing an essential role in a good system.²⁷

Those who take issue with the standard conception have called all of these claims into question.²⁸ Those in this camp often then offer their own, often highly moralized (and only thinly legal), version of how good lawyers ought to behave. Simon, for example, defends a view the central maxim of which "is that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice."²⁹ Luban defends what he calls "moral activist" lawyering:

this duty he must not regard the alarm, the torments, the destruction
which he may bring upon others.

Trial of Queen Caroline 8 (1821) (quoted in MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975)).

²⁶ See, e.g., Fried, *supra* note 18; FREEDMAN, *supra* note 25; TIM DARE, *COUNSEL OF ROGUES?: A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* (2009); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617 (1986).

²⁷ This is not to say that this focus on the big picture removes all personal tension with occupying such a role. For concerns in this regard, see, e.g., Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RTS. 1, 6 (1975); MARKOVITS, *supra* note 18, at 149.

²⁸ See generally, SIMON, *supra* note 4, at 26-76; LUBAN, *supra* note 6, at 50-147; Postema, *supra* note 20, at 78-81.

²⁹ SIMON, *supra* note 4, at 9. At various points, Simon clarifies that he intends to "use 'justice' interchangeably with 'legal merit'," because "[t]he latter has the advantage of reminding us that we are concerned with the materials of conventional legal analysis; the former has the advantage of reminding us that these materials include many vaguely specified aspirational norms." *Id.* at 138. It is somewhat hard to know what to make of Simon's equation of *justice* and *legal merit*. In reading the book, one has the definite sense that Simon intends his account to require lawyers to engage in a great deal of decidedly moral reflection. And it is clear that he does not want his view to be a Simple Entailment View, on which there is a simple entailment from *X is legally permitted* to *X is morally permitted*, at least not if we are understanding 'legally permitted' in anything like the usual way. Does Simon allow that there might be fundamental conflicts between justice and legal merit? His equation of the two would suggest that the answer is no. Instead, it seems

The morally activist lawyer shares and aims to share with her client responsibility for the ends she is promoting in her representation; she also cares more about the means used than the bare fact that they are legal. . . . [she] will challenge her client if the representation seems to her morally unworthy; she may cajole or negotiate with the client to change the ends or means; she may find herself compelled to initiate action that the client will view as betrayal; and she will not fear to quit. . . . she sees severe limitations on what partisanship permits.³⁰

Neither of these two proposals offers specific principles of justice or morality to guide lawyers' conduct in particular circumstances.

Defenders of the standard conception worry that these revisions contort the role of lawyer into something entirely inappropriate (what do lawyers know about morality or justice?), and would yield results that would be morally worse than the results under the standard conception. One worry in this vein is that empowering lawyers to use their personal judgments about morality to condition and constrain their representation will lead to rule by an "oligarchy of lawyers."³¹ Defenders of the standard conception argue that, while perhaps not perfect, the standard conception at least strikes a balance between the private interests of particular individuals and the public interest of society, by promising "clients that the pursuit of their ends will be limited only by objective and identifiable external constraints rather than by their lawyers' personal or idiosyncratic moral or political views" and by promising "the public that 'the pursuit of private ends will not unduly frustrate public purposes',"³² since this pursuit must be within the bounds of law. Bradley Wendel has helpfully recast the standard conception as a view on which lawyers are morally permitted and required "to protect the legal entitlements of clients."³³

This article starts from the assumption that both sides of this debate are

that he wants us to understand "legal merit" more expansively. *Id.* at 77-108, 156. It is outside the scope of this article to offer a full examination and explication of Simon's view. Accordingly, this article will understand his basic view to be that lawyers should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice—where we must understand that justice is, at least in some instances, bound up with (and perhaps determined by) what the law actually is.

³⁰ LUBAN, *supra* note 6, at xxii.

³¹ Pepper, *supra* note 26, at 17; *see also* W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 376-83 (2004) (worrying that such accounts license lawyers to impose their moral views on their clients, even with respect to deeply contested issues of personal morality).

³² Kruse, *supra* note 5, at 15 (paraphrasing and quoting David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 471-74 (1990)).

³³ WENDEL, *supra* note 5, at 6.

getting something right. Those who take issue with the standard conception are correct that the Adversary System role-based defense is inadequate. In particular, though there is something plausible about the focus on the larger institutional role that lawyers play, this defense is too indiscriminate in allowing morally problematic behavior even in cases—and whole categories of cases—in which doing so contributes nothing to whatever it is that is supposed to give value to the Adversary System (e.g. realization of just outcomes, production and discernment of the truth, preservation of individual dignity³⁴). And it is implausible that something as permissive as the standard conception (particularly given how lax and unrestrictive the law governing lawyers currently is) is required to sustain the Adversary System, even if it is worth sustaining. Finally, the Adversary System defense treats all lawyers equivalently, regardless of the background context—a mistake, as this article will argue.

On the other hand, those who take issue with the moralized accounts of lawyering are correct that these accounts provide inadequate constraint on lawyers' conduct, that they provide the wrong kind of constraint (appealing only to individual lawyers' views of personal morality), and that they give inadequate guidance to lawyers attempting to make hard ethical decisions.

In short, both sides give an inadequate answer to the question “what are lawyers good for?” And the answers are inadequate in a similar way. Both accounts treat *being a lawyer* as a largely uniform role that has a uniform moral purpose and justification, with only an occasional acknowledgment that prosecutors and other “government” lawyers may have some special responsibilities, or that criminal defense may present unique concerns. The defenders of the standard conception see all lawyers as serving their role to support the adversarial system or the legal system more generally. Even if we grant the value of the adversarial system in some contexts, this portrayal of the role of the lawyer fails to take into account the differences in the different positions that lawyers might occupy, and it fails to make plausible the view that the exclusive or highest aim of the lawyer should be to do her part in this adversarial process. Most significantly, these accounts typically have little to say about the general purpose of what happens in different legal contexts, and so the explanation of *how* or *why* the lawyer's role in the adversarial system alters his or her moral obligations is lamentably thin.³⁵

³⁴ See, e.g., FREEDMAN & SMITH, *supra* note 12, at 37-39, 121-22.

³⁵ For a notable exception, see WENDEL, *supra* note 5, which presents a sustained argument in defense of the standard conception on the grounds that lawyers must respect the law, and must advocate in fidelity to the law, in those instances in which the law represents a significant “social achievement” insofar as it represents a reasoned settlement of disagreement in a pluralistic society. *Id.* at 9. Although this article sets out a view at odds with Wendel's, his view is perhaps the one with the most similar methodological approach, attempting to ground legal ethics in larger structures of social and political

Those accounts that reject the standard conception and which suggest that lawyers should always act in the pursuit of justice,³⁶ or always with an eye on a wide range of moral and institutional considerations,³⁷ fail to appreciate the variety and nature of situations in which lawyers operate.

This under-specification of the different roles of lawyers, and this failure to better understand the full normative story of which lawyers are a part, is not just conceptually problematic. These failings also result in an account of legal ethics that often gets the wrong answer, which lacks the resources to get beyond the defense of simple platitudes, and which generally fails to give detailed and well motivated guidance in what all acknowledge are the ‘hard cases’ that lawyers face.

The purpose of this article is not to present decisive objections to extant views. Rather, the aim of this article is to offer an alternative conception of legal ethics, and to make evident what is attractive about that picture. As this article aims to demonstrate, the Multi-Context View provides a more specific and concrete set of moral considerations, ones directly connected to the proper purposes of lawyers; and it provides more detailed direction and insight as to how lawyers should think through specific ethical issues.

II. THE THREE CONTEXTS

This section identifies the three main contexts in which lawyers operate, and explains why each of those contexts is normatively significant. Within each of these contexts, lawyers engage in a number of different activities. In particular, lawyers engage in work for clients that can be called *before-the-fact* (advising, counseling, drafting, researching) and work that is *after-the-fact* (helping to litigate, mediate, and settle disputes, or to defend against complaints or State allegations). This article will concentrate on ethical issues that arise with respect to the after-the-fact kind of work, although the basic account can be extended, suitably modified, to cover the before-the-fact work as well.

A. *State v. Individual*

The first context this article will discuss is the context in which the State, through its agents, is contemplating or threatening to take action vis-à-vis a particular individual.

The State taking action vis-à-vis a particular individual is an important and distinctive subclass of situations in which the State takes actions which

morality.

³⁶ SIMON, *supra* note 4, at 9.

³⁷ LUBAN, *supra* note 6, at 125-27, 140.

are, in fact, adverse to a particular individual's interests, or which harm a particular individual. Almost everything the State does benefits some people and harms others, and these benefits and harms are often predictable and significant. There are significant moral issues regarding how and on what grounds the State may choose to distribute these benefits and harms, issues that concern both the justice and legitimacy of a State. Here, let us focus not on the moral evaluation of the general decisions a State (or agents of a State) might make regarding the distribution of benefits and harms, but on a particular way in which State action might lead to harm to particular individuals: the application of law (created through legislation, agency rulemaking, or other formal mechanisms) to particular individuals.

This leaves aside, for example, the way in which a State's decision to spend a third of its budget on national defense benefits companies involved in making military equipment; or the way in which a State's decision to build a highway here rather than there will decrease the property values of certain individuals' homes; or the way in which the use of country-of-origin quotas in immigration law makes it harder for some individuals to enter the State than it would be without a quota system. The State takes many broad actions which will cause benefits and burdens to fall to particular individuals, although the State takes no further or *particularized* actions regarding those individuals. The above are all ways in which the State can harm or benefit individuals, but which do not fall under the heading of the application of general laws to particular individuals.

Instead, the focus here is on instances in which the State concentrates its attention on particular individuals, and maintains that certain conditions, call them *triggering conditions*, obtain, requiring that some general law be applied to the particular individual. It is an obvious fact, too obvious to generally warrant mentioning, that most laws are stated at a high level of generality. A criminal law against theft will bar everyone from doing certain things, in certain situations, with certain mental states. It will not, say, bar Alex Guerrero (in particular) from stealing from the Walmart at Marketplace Boulevard in Trenton, NJ (in particular). Instead, a law will identify certain general triggering conditions (including, for example, the elements of a criminal offense) and certain consequences that should or may follow if those triggering conditions obtain, assuming that no other justifying or excusing conditions obtain. Because law usually regulates the conduct of agents—individuals or various groups comprised of individuals—the triggering conditions will usually concern the behavior (or lack thereof) and accompanying mental states (or lack thereof) of agents.

Thus, the first lawyering context, more precisely stated, is this: the context in which the State will or might take action vis-à-vis a particular individual, P, by maintaining that, because certain legally codified

triggering conditions obtain in P's specific situation, that law should be applied to P, and certain consequences may, or should, follow with respect to P. This describes, albeit abstractly, many of the direct confrontations that occur between the State and particular individuals. To identify some of the main categories of cases, it includes all situations in which individuals are said to have violated the criminal law, when immigration law is applied to particular people, when an individual is deemed to be mentally ill and in need of involuntary commitment to a medical facility or involuntarily administered medication in order to prevent him from harming himself or others, when it is suggested that some individual does not qualify for a government benefit that he has been receiving or has attempted to receive, when the State threatens to remove a child from a parent's custody and to terminate that parent's parental rights, and, arguably, when the State maintains that some corporation (owned, collectively, by some group of individuals) has exceeded the allowable limits of expelling some pollutant into the environment. It is easy to focus on the criminal case to the exclusion of other cases,³⁸ but, as the article will suggest below, that is a mistake.

Lawyers play two very different roles in this State v. Individual context (henceforth, the "SVI context"). Some lawyers are employed by the State to argue that the relevant triggering conditions do obtain. Other lawyers are employed by private individuals to argue that the relevant triggering conditions do not obtain, and/or that justifying or excusing conditions do obtain (so that either the person should not suffer the consequences although the triggering conditions obtain, or that the person should receive different consequences because of his or her particular circumstances). Call lawyers of the first kind *State Lawyers* and call lawyers of the second kind *Individual Lawyers*. Both State and Individual Lawyers are, arguably, involved in the joint enterprise of ascertaining what the relevant triggering conditions are (what the relevant law is and what it requires in detail³⁹), and

³⁸ For example, see the debate between LUBAN, *supra* note 6, at 58-66; SIMON, *supra* note 4, at 170-94; and FREEDMAN & SMITH, *supra* note 12, at 80-82.

³⁹ The rest of the article will focus on the role that lawyers play in various contexts with respect to determining whether the relevant triggering conditions obtain—taking for granted that it is clear what the relevant triggering conditions are. In any particular dispute, there may be disagreement about what the law is (which particular law applies, what the law requires), what the facts are, how the law should be applied to these particular facts, or whether (legally or factually) there are extenuating or exonerating circumstances. Lawyers work on and face ethical issues regarding every component of a dispute. This article focuses on cases in which what the relevant triggering conditions are is clear only to simplify the discussion, and to highlight how the view developed has applications throughout legal ethics, not only when issues arise at the bounds of law as with the recent "jurisprudential turn" in legal ethics. See, e.g., Kruse, *supra* note 5, at 14-30.

whether the relevant triggering conditions do in fact obtain. In systems like those employed in the United States, that joint enterprise is conducted via means of adversarial process.

Although there is a sense in which both State and Individual Lawyers are part of a joint enterprise, this obscures the different role that each kind of lawyer is serving in the SVI context. Fundamentally, Individual Lawyers are needed to help ensure that the State acts against particular individuals only in those cases in which the relevant triggering conditions actually obtain. Individual Lawyers are needed to protect against one way in which the State might threaten to undermine individual autonomy, to act illegitimately, or to inappropriately dominate—not by the enactment of dominating or draconian laws, but in the illegitimate, indiscriminate, or otherwise inappropriate application of general laws to particular individuals.

Importantly, all of this discussion is presented against a background on which the State is assumed to act legitimately when it enacts legislation and creates law through other mechanisms. When political entities act, it is often to force people to act in a certain way, to delimit the scope of what people can do, to take things from them—always with the threat of the government’s physical force behind these orders, delimitations, and takings. It is natural to ask: what, if anything, makes this morally permissible? This is the question of political legitimacy. If a political action is legitimate, then it is an instance of morally justified use of political power, where political power is defined as action backed by monopolistic, coercive force.⁴⁰

This article will proceed on the assumption that the State, via legislative action, is involved in a wide variety of instrumentally valuable and legitimate endeavors. The threat of illegitimate action that arises here is not due to the process of law creation in general, or even the substantive aims

⁴⁰ Here I follow Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 689-90 (2002) (“[A]n entity has political legitimacy if and only if it is morally justified in wielding political power, where to wield political power is to attempt to exercise a monopoly, within a jurisdiction, in the making, application, and enforcement of laws.”). Though the concepts of political legitimacy and political obligation (roughly: the duty of people living in a jurisdiction to respect or obey the law) are often seen as intertwined (*see, e.g.,* WENDEL, *supra* note 5, at 87 (“[a] legitimate law is one which by right creates obligations on citizens, such as the obligation to respect the law”)), this article will not treat them as such. One way that legitimacy and political obligation have been linked is by those who argue that if a political entity is legitimate, then those living under the political entity’s jurisdiction have an obligation to obey the dictates of that political entity. *Id.* This article endorses the views of Robert Ladenson, Christopher Wellman, and others who argue that there is no relationship between a political entity (or action) being legitimate and anyone having an obligation to ‘abide by’ that entity (or its actions). *See, e.g.,* Robert Ladenson, *In Defense of a Hobbesian Conception of Law*, in AUTHORITY 32, 36-37 (Joseph Raz ed., 1990); Christopher Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. 211, 211-12 (1996).

embedded in those laws, but through the process of application of law to particular individuals. It is pointless to have various kinds of constraints—constitutional limitations enforced by an independent judiciary, democratic processes of lawmaking, etc.—regarding the manner of enactment and the content of laws that the State can enact, if those constraints can be subverted in the application of laws to particular individuals. Just as doctors are needed to ward off the evils of disease and illness, Individual Lawyers are needed to ward off these particular evils of State domination and of illegitimate State action. Of course, Individual Lawyers themselves are not enough to accomplish this end. They are part of a larger system, a system that includes, essentially, an independent judiciary, the decisions of which will, if necessary, be backed by the coercive power of the State.

The role of State Lawyers is different. In a democratic system of government, there is a sense in which enacted legislation can be viewed as originating from ‘the People.’ Jeremy Waldron and others have argued that, as a result, legislation is owed a certain kind of respect, embodying as it does the hard-won compromise views of a sometimes deeply divided political community.⁴¹ If this is right, then the precise details of legislation, as enacted (or administrative rulemaking, if one can tell a similar ‘democratic pedigree’ story) are owed a kind of respect. State Lawyers can be seen as helping to ensure that the law is actually applied as enacted—that is, that all and only those individuals who actually satisfy the relevant triggering conditions are made subject to the relevant consequences.⁴² Importantly, although under-application of the law risks failing to give full effect to the democratic authority behind the law, over-application of the law, as discussed above, risks illegitimate State action and acts of State domination of individuals.

Below, after the introduction of the second lawyering context, this article will discuss the particular way in which the SVI context alters the moral situation for Individual Lawyers, and the ways in which their ethical responsibilities and deliberations about what they ought to do also are affected by the fact that they are lawyering in an SVI context.

⁴¹ See, e.g., JEREMY WALDRON, LAW AND DISAGREEMENT 6-16 (1999)

⁴² This point is expressed well by the Supreme Court in *Berger v. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

295 U.S. 78, 88 (1935).

The rest of this article will leave aside discussion of State Lawyers. Three reasons motivate this choice. First, the role of State Lawyer presents a host of distinct ethical issues, and, just for reasons of keeping the scope of the article manageable, it is useful to keep them separate. Second, State Lawyers provide a less useful contrast case than the other kinds of lawyers, partly because their role is so different. State Lawyers do not represent private clients,⁴³ and therefore there are no issues relating to client control, strategy, and tactical choices. Additionally, State Lawyers have the unusual powers to initiate and direct investigations, to decide whether to prosecute or bring other actions against private individuals, to designate the crimes or offenses to be charged, and to accept or reject guilty pleas or other concessions. These different issues and powers all require distinct ethical consideration. Third, and perhaps most relevantly, the unique position of State Lawyers (and especially prosecutors) is already recognized. The ABA,⁴⁴ Model Code of Professional Responsibility,⁴⁵ and Model Rules of Professional Conduct⁴⁶ all recognize the distinctive role of the prosecutor and the way in which this role alters the ethical duties of prosecutors. It would be good to have this difference appreciated for all State Lawyers, and not just prosecutors, but the basic line of thought is already widely embraced.

B. Individual v. Individual

A second, quite different context in which lawyers operate is in disputes between individual, non-state actors. These disputes can take many forms. For example: one person complaining that another has harmed him physically or emotionally through intentional or negligent action; has violated his property rights; has failed to abide by his contractual obligations; has failed to live up to his responsibilities as a spouse or parent; or a group of shareholders complaining about the way in which corporate

⁴³ See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1697 (2000) (“The prosecutor doesn’t have a client; he has a constituency.”).

⁴⁴ ABA STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE: THE PROSECUTION FUNCTION 3-1.1 (3d ed. 1993) (“Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor’s obligation is to protect the innocent as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. Thus, the prosecutor has sometimes been described as a “minister of justice” or as occupying a quasi-judicial position.”).

⁴⁵ MODEL CODE EC 7-13 (noting that the responsibility of the prosecutor “differs from that of the usual advocate; his duty is to seek justice, not merely to convict”).

⁴⁶ MODEL RULES Rule 3.8, Comment (stating that the prosecutor “has the responsibility of a minister of justice and not simply that of an advocate”).

directors have run the corporation. In this Individual v. Individual context (henceforth, the “IVI context”), the State is involved in the background, helping to air and resolve a dispute between two private parties, and, if necessary, to enforce the resolution of the dispute. The lawyers involved represent private individuals or private entities. One side will initiate the suit by filing a complaint, the other side will present its side of the story in response, and a neutral State official, a judge (or, in some cases, a jury), will make some determination given the background law and the particular facts (as found by the judge). The background law in these contexts, at least in the United States, is often the product of common law lawmaking, not democratic legislation.

Call lawyers on each side of disputes in this context *Private Lawyers*. What is the role of Private Lawyers? One thing is clear: there is no meaningful sense in which either side’s lawyers will count as primarily defending their client in a confrontation with the State. Neither side is involved in protecting an individual from the possibly indiscriminate or inappropriate use of State power, at least not directly.⁴⁷ To answer the question of the role of Private Lawyers in the IVI context, it is necessary to step back and consider the purposes of having disputes between private individuals resolved in this way at all.

Much has been written about the purpose(s) of and/or justifications for these various areas of law, often described generally as “private” law⁴⁸—tort law, contract law, property law, corporate law, family law, and the like—and the reasons there might be both for having any legal regulation in these areas and for having it take the form that it does in the United States

⁴⁷ It is of course true that, just as with the SVI context, there are ways in which a State bent on domination of a certain kind could use the IVI context to dominate particular individuals. For example, the State could refuse to recognize claims brought against individual citizens when they were brought by other individual citizens of a certain racial or ethnic group. Or the State, through the supposedly independent and unbiased judiciary, could have a policy of always deciding claims in the IVI context in favor of members of a particular political class, religious tradition, or employment background. The article assumes that the State’s role in the IVI context does not have this character, and that the judges and other State officers involved in the IVI context do so as basically neutral arbiters of private disputes. This assumption does not require that every judge is free from biases—such an assumption is of course unwarranted in any system that employs human judges. Rather, the assumption is just that these judicial biases are not systematic, are not uniform, and are not an effort on the part of the State to exert dominion over particular citizens or on behalf of other citizens. If this assumption does not hold for some particular society, the gap between the appropriate conduct of lawyers in the SVI context and the appropriate conduct of lawyers in the IVI context narrows considerably.

⁴⁸ See, e.g., LOUIS KAPLOW & STEVEN SHAPELL, *FAIRNESS VERSUS WELFARE* (2002); JULES COLEMAN, *MARKETS, MORALS, AND THE LAW* (1988); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973); John Gardner, *Some Types of Law*, in *COMMON LAW THEORY* (Douglas E. Edlin, ed., 2007).

system. The explanation this article offers will not be particularly novel, except, perhaps, in its catholic embrace of several of the existing justifications.

Most simply, law in those areas that comprise the IVI context is needed to allow us to live together in a way that is both peaceful (harmonious, stable) and productive (beneficial, efficient, cooperative). The basic view here begins by emphasizing the benefits and difficulties of society. On a fundamental level, human beings are social animals: we enjoy living and interacting with other people, having relationships, forming families and communities, and sharing in cultural, religious, and intellectual activities with others. We would want these things for our lives even if there were no other benefits, instrumental or otherwise, to living in society.

But there are other benefits to living in society. These stem from familiar sources: from division of labor and cultivation of expertise through specialization, from the ability to establish markets and systems of exchange, from the ability to work together in various group enterprises, and from other ways in which social life can be harnessed to efficient and productive ends. Thus, some of the need for legal dispute resolution in this area stems from the need to help support this economic order—protecting property rights to create incentive structures, enforcing contracts to promote efficient and beneficial exchange between unfamiliar individuals, allowing the creation of various entities that can be organized to achieve specific ends, and so on. And some of the need for dispute resolution stems from the need to keep the peace that arises whenever many different people are living in proximity to each other—allowing peaceful resolution of disputes stemming from the dissolution of certain personal relationships, from disputes in which one individual claims to have been harmed by another (intentionally, recklessly, or negligently), from disputes over custody of children and ownership of property, and so on. Permitting private individuals, even relatively powerless ones, to avail themselves of the legal system when they feel that important concerns of theirs have been harmed can be seen as an important component of securing what John Rawls has referred to as “stability for the right reasons,”⁴⁹ rather than social peace and stability that results from imbalances in power or from fear.

In sum, the picture is this. People will live together, and there are benefits to people living together. But when people live together, they will have disputes. The harm from these disputes can be reduced if there are legal structures in place in order to channel these disputes to peaceful, just, stable, and fair resolutions. Additionally, to achieve some of the benefits of living together, it is necessary to have background legal structures in place.

⁴⁹ JOHN RAWLS, *POLITICAL LIBERALISM* xxxix (1993).

So, for both of these reasons—reasons that this article will refer to as the interests in *peace* and *productivity* as a kind of shorthand—where there is society, it will be useful to have something like the IVI legal context in place.

Notably, while in the case of democratically enacted law, the explanation of its normative significance was explained in part by the procedure by which it was arrived at—namely, democratic process and compromise—in the case of much private or common law, the explanation of its normative significance is not primarily the process by which it was created, but rather the ends toward which it is directed: securing and promoting peaceful and productive social relations. Below the article will consider what role Private Lawyers play in helping to achieve these ends of peace and productivity.

C. *Individual v. State*

There is a third context in which lawyers work: those circumstances in which an individual challenges some decision or action of the State, typically on the grounds that the State has acted or made a decision in a manner that is unconstitutional or otherwise inappropriate. Call this the *IVS context*. It is true that these cases are often high profile and legally significant. However, they make up only a small fraction of cases, and they raise distinct ethical issues. For both of these reasons, this article will discuss the IVS context only briefly.

In IVS cases, lawyers representing individuals objecting to State action or State process help in all of the usual ways: by framing claims, formulating and presenting legal arguments, abiding by formal process, and so on. IVS cases have an obvious connection to concerns in normative political philosophy. In a system like that in the United States, with a judicial branch that has as part of its reason for existence the aim of checking executive and legislative power and State action in general (typically by means of holding the executive and legislative branches to various procedural and substantive limitations on State action set out in the Constitution), lawyers who represent individuals raising claims against the State play a vital role. Members of the judiciary are not in a position to scour the countryside for possible Constitutional violations, particularly given the sizable federal and state system, and so it is crucial that individuals have help in identifying and bringing challenges to State action that overreaches or is otherwise illegitimate or inappropriate. This is a fundamental, if perhaps underappreciated, role that lawyers play in a political system like the one in place in the United States. The ethical situation of lawyers occupying this role is distinctive, as has been tacitly

acknowledged by the Supreme Court.⁵⁰

On the other side, lawyers representing the State in these actions play the important role of helping to ensure that the State is not barred from acting in ways that are permitted by the Constitution, simply because someone raises the argument that the State should be so barred. This is important both to help establish the contours of what is constitutionally permissible, but also to prevent democratically enacted legislation, or actions taken by a democratically elected executive, to be inappropriately blocked. This role is complex in ways that have perhaps not always been adequately appreciated. At least some of the furor over John Yoo, the “torture memos,” and the proper role of the Office of Legal Counsel and the ethical obligations of lawyers serving in that Office stems from these complexities.⁵¹ These are important issues, certainly, but ones that, like the general discussion of the IVS context, are better addressed separately. Accordingly, the rest of the article will leave to one side those cases that have a significant IVS component.

D. Blended Cases

Of course, there will be some cases that do not fit neatly into the three categories identified above. For example, consider a case in which a statute gives individual citizens a private right of action, so that individual citizens can bring a claim against other private individuals. On the above taxonomy, guided by its formal (rather than functional) sorting mechanism, these claims would appear to fall into the IVI context. However, these claims may look identical, or almost identical, to claims that could have been brought by the State on the basis of that same statute, in which case they would be SVI-context cases. It is plausible that in both instances, the case will have some elements of each of the two contexts.

Additionally, a significant subset of IVS cases will be blended cases.

⁵⁰ See, e.g., *In re Primus*, 436 U.S. 412 (1977). In that case, Edna Smith Primus, a lawyer working for the ACLU, wrote to a mother on welfare who had been sterilized as a condition of continued Medicaid assistance (this was unofficial policy in South Carolina). The ethics committee of Primus’s state bar filed a complaint against her, charging her with solicitation, and she received a public reprimand. Primus appealed to the Supreme Court, which sided with her, noting that “[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating information to the public,” and that “the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants.” *Id.* at 431.

⁵¹ See, e.g., Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225 (2006); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 455 (2005);

For example, some cases that begin as SVI cases end up having an IVS character as well. Consider a case like *Lawrence v. Texas*,⁵² in which a main argument raised by the Individual Lawyer in defense was not that the triggering conditions of the criminal statute did not obtain, but that the statute itself was unconstitutional.⁵³

Or consider those cases in which the State is involved in litigation with private individuals, but in its role as an employer, or as a party to a contract, or as a defendant to a tort claim. These cases might involve elements of all three of the above contexts, and the ethical issues for lawyers are arguably more complicated as a result.

The rest of the article will not address the issue of blended cases, but it is worth making two brief comments about them. First, they are certainly going to be a small number of the total number of cases—creating trouble (if they do) only at the margin. Most cases will be clearly an instance of the State acting against an individual or an instance of private parties seeking to resolve a dispute. Second, there is no reason that blended cases couldn't have a distinct set of ethical and legal norms governing them, at least in principle, particularly given that they do involve a more complex normative situation than the non-blended cases. One might even imagine legal doctrines that would allow lawyers in blended cases to be governed by a distinct set of rules—rules that only applied (perhaps) upon petition by a lawyer and after the presiding judge determined that it was a genuinely blended context. These legal rules could even be the existing Model Rules, given that they are currently specified in a fully general manner.

Having identified the three different contexts, and the significantly different roles that lawyers occupy in them, one might already suspect that *how* lawyers ought to behave—the ethics of lawyering—may well differ in the different contexts. It is that thought that the article will explore in the next several sections. In particular, the article will discuss the value of lawyers in the SVI and IVI contexts, and will argue for a particular conception of the different roles of lawyers in those contexts, complete with standards of ethical conduct for those who choose to occupy those roles.

III. THE VALUE(S) OF LAWYERS

We can divide the world up, roughly, into those things that we find already existing in the world and those things that we make and create out of the materials that we find. The things that we make include various political institutions and the *roles* that individuals occupy within those institutions. For those things that we make, and particularly those that we

⁵² 539 U.S. 558 (2003).

⁵³ *Id.* at 563-64.

find being made and remade over time and across societies, it makes sense to ask, for some particular made thing, what the *point* of the thing is, what purpose it serves, what function it has, and why we are inclined to continue making it (if we are so inclined). More particularly, if we assume the normative significance of the SVI and IVI contexts is as the article has presented it above, we can ask what value lawyers might add or what purpose they might serve within these contexts. Call this possible value the *functional value* (although the value can be a cluster or set of values) of these lawyers. Once some functional value has been settled upon, there remains the difficult inquiry into how best to engineer things so that those who occupy that role best achieve that potential functional value.

A. *The Value of Individual Lawyers in the SVI Context*

In the SVI context, the primary normative concern is that general laws be applied to particular individuals if and only if the relevant triggering conditions actually obtain. It should be clear that Individual Lawyers can be valuable in helping to address this concern. One way to identify the specific value of Individual Lawyers is to ask what things would be like if there were no Individual Lawyers in the SVI context.⁵⁴

Consider, for example, a system in which Individual Lawyers are absent, and in which individuals stand on their own before a judge, and against the State, attempting to argue that, contrary to what had been suggested by the State, a general law should not be applied to them because this or that triggering condition did not obtain in their particular case. Assume that the State will be represented by a prosecutor or other State Lawyer, since there is an interest, rooted in giving effect to democratic pronouncements, in making sure that the law actually is applied when the relevant triggering conditions obtain.⁵⁵ What problems might arise in such

⁵⁴ One need not travel to an imaginary world in order to encounter an SVI system that operates without Individual Lawyers. Consider, for example, the inquisitorial systems that operate without State or Individual Lawyers, in which a State official (such as a judge inquisitor) is solely responsible for ascertaining whether the relevant triggering conditions in fact obtain. Although this article will not conduct a discussion of the relative merits of such systems, it will suggest that there are definite reasons, stemming from distrust of the State, to be concerned about a system in which State officials (although perhaps different officials) are solely responsible both for creating the laws, and for ascertaining whether a particular individual is in violation of the law.

⁵⁵ What might be lost if State Lawyers were subtracted from the picture? In a world in which Individual Lawyers are also absent, there are several worries. One is that the judge comes to be solely responsible for determining both what laws might be appropriately applied, and whether the relevant triggering conditions for those laws obtain in the particular case. This puts a heavy burden on the judge, but it also means that there is little to prevent the over-application or imprecise application of law to particular cases by an

a system? What are the benefits that Individual Lawyers provide?

The first and most obvious problem is simply that law, particularly as embodied in modern legislation and administrative law, is elaborate and complex. Legal process and procedures—pre-trial, during trial, and at the appeal stage—are also elaborate and complex. The ability to discern which facts are important and knowing how to develop an evidentiary record are skills that require both legal and practical knowledge and experience. Without professional assistance, individuals might fail to succeed in their case, even when the truth as to whether the relevant triggering conditions obtain (or whether excusing conditions obtain), is, in fact, on their side.⁵⁶ This is problematic in that it is bad for particular individuals, but also in that it means that it is more likely that the State will act illegitimately or inappropriately against particular individuals—taking triggering conditions to obtain when they do not. Requiring individuals to respond to State action against them unassisted by counsel is not all that different from telling people that, rather than having a doctor help them to diagnose and treat their illness, they may go to the library and figure it out on their own. The Sixth Amendment and similar provisions that provide for a right to counsel, even

agent of the State. A second concern is that, in the absence of State Lawyers, there is no one whom ordinary individuals can see as centrally responsible for ensuring that the law is in fact applied in those cases in which the relevant triggering conditions obtain. On the other hand, in a world in which Individual Lawyers are present, but not State Lawyers, there are worries that either the presentation of facts will be biased too much in favor of the individual, or that the judge will become a de facto State Lawyer, essentially attempting to do the work and possibly adopt the stance of an adversary, while still attempting to be ‘neutral.’ Both of these outcomes would be problematic.

⁵⁶ As Judge Howard Dana wrote in a 2006 American Bar Association Resolution, “[w]ith rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks [of lawyering] and are destined to have limited success no matter how valid their position may be.” Howard H. Dana, *ABA Resolution*, Aug. 2006, reprinted in 15 TEMP. POL. & CIV. RTS. L. REV. 507, 517 (2006). There are also a number of empirical studies that document the importance of assistance of counsel in a variety of contexts. See, e.g., Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL’Y REV. 385 (1995); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419 (2001); PETER FINN & SARAH COLSON, NAT’L INST. OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 19 (1990) (finding that “those victims who are not represented by counsel are less likely to get protection orders—and, if an order is issued, it is less likely to contain all appropriate provisions regarding exclusion from the residence, temporary custody of children, child support, and protective limitations on visitation rights”). This is a somewhat controversial area of social science research, however, and it can be difficult to establish conclusive results. See, e.g., D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L. J. ___ (2011).

for those who cannot afford counsel, in the context of criminal defense, tacitly recognize this difficulty in one SVI context. Arguably, this right should be extended to SVI contexts other than just the criminal one.

A second concern is that, in the absence of Individual Lawyers (and really in the absence of roughly equal access to lawyers⁵⁷), individuals who are more intelligent, or who have more education and resources, would be at a considerable advantage in responding to State action against them. These individuals would have a better sense of how to present and frame their case, how to investigate and research facts and applicable law, how and whether to present excuses and defenses, and so on. They could also pay others to perform these services for them, even in the absence of a formal professional class of trained and licensed lawyers. Unless there were laws prohibiting it, there would almost certainly come to be people who served a role similar to lawyers, at least with respect to the behind-the-scenes preparation of legal claims and defenses. One should worry about this because it means that those individuals with fewer resources and talents will be disproportionately subject to State action in instances in which the triggering conditions do not obtain. This is bad for those particular individuals, but it is also bad insofar we as a political community want the State to treat people equally and legitimately, even if their intelligence levels or available resources differ.

A third concern is that the presence of State Lawyers (or other comparable State officials) and the absence of Individual Lawyers creates an imbalance in skill and expertise that might well lead to general laws being applied to particular individuals even when the relevant triggering conditions do not obtain. The extent of this concern depends, in part, on how State Lawyers conduct themselves—an issue this article does not address. But this is another reason that Individual Lawyers are needed—because there is an interest in having State Lawyers, and there are concerns about having one without the other.

A fourth concern, related to these first three, is that in the absence of Individual Lawyers, individuals who are or might be threatened with adverse State action might well find the State's conduct and the process afforded them suspect. If taken to an extreme, this might undermine the

⁵⁷ One concern even in a world with lawyers, like ours, is that in many confrontations with the State in SVI contexts, individuals cannot afford an Individual Lawyer and are not otherwise provided one, or are only provided one in a nominal sense. Additionally, how much one can afford to pay for an Individual Lawyer dramatically affects the quality of the Individual Lawyer that one will have to defend one against the State. This is bad for the poorer individuals, obviously, but it is also bad for everyone to the extent that all are concerned about inappropriate overreaching on the part of the State. These are real concerns, and highlighted as such by this account. Addressing them, however, is outside the scope of this article.

stability of the system of law. Individual Lawyers give individuals non-violent recourse to defend themselves against the State, and reason to think that the operations of the State are reasonable and appropriate.

One possible cost of having Individual Lawyers is that there may be cases in which, although the relevant triggering conditions do in fact obtain, the Individual Lawyer is able to convince a judge or a jury that they do not obtain (and, let us suppose, the represented individual could not have accomplished this feat without the help of a lawyer). Obviously, the magnitude of this cost will depend, in part, on how Individual Lawyers behave—a point that the article will consider below.

The need for Individual Lawyers stems from the fact that laws are stated generally and require specific application to particular individuals. Might one devise a system that obviated the need for lawyers by eliminating the need for general laws to be applied to particular individuals? Even leaving aside the possible fairness-related concerns (including arbitrary, politically-motivated, and otherwise inconsistent application of the law, making the government one of “men,” not of laws), the more practical concerns are likely to doom any such proposal. Hyper-specific laws are obviously unworkable. It is hard to see how a democratic system of government could work without something like statutory lawmaking of the ordinary, generally-stated sort.

Similar feasibility concerns doom proposals that would simplify or streamline both legislation and legal procedure so that laypeople could perform competently in their own defense. Modern policymaking is complex and legislation must be complex in order to guide the application of law to specific cases. Similarly, legal procedure is complicated largely because of fairness and equity concerns, and because of the need to have rules that cover a wide range of problems and situations. For both legislation and legal rules, at least some technical or legalistic formulation is necessary in order to ensure clarity and uniformity of application. This is not to say that improvement is impossible, just that there will be limits to how much can be done in that regard.

Given these constraints on the operation of a democratic State, Individual Lawyers are essential to protection of individual interests against the threats of State domination and of illegitimate State action. Individual Lawyers protect individual interests against the threats of State domination and of illegitimate State action by helping individuals navigate the complex legal and factual waters, regardless of personal skill or (ideally) resources, and by helping ensure that the process by which general laws are applied to particular individuals is fair and (if done properly) generally acceptable. This is of value both for particular individuals threatened by the State, and for those concerned to keep the State from acting except in those cases in

which it is legitimately authorized to do so (when the relevant triggering conditions do in fact obtain).

B. The Value of Lawyers in the IVI Context

The primary normative concerns in the IVI context are not about political legitimacy directly, but about using private law to achieve peaceful and productive social relations through the equitable resolution of disputes between private individuals. Given these concerns, what value do Private Lawyers contribute? Imagine that there were no lawyers in the IVI context. Instead, all cases in the IVI context would be handled simply by the parties to the dispute, with each side making its case before a neutral judge. What would be different?

In the actual world, imbalances in the quality and availability of lawyers—with wealthier individuals having both better access to lawyers, and access to better lawyers—means that we already see some of what we would expect to see in the absence of any lawyers at all. So it is not as if all of these effects appear only upon the disappearance of Private Lawyers. For the moment, let us treat the imbalances in availability and quality as artifacts of our system—not as a necessary component of any lawyered IVI context—and so consider the relevant contrast world to be one in which everyone has reasonable access to Private Lawyers.

One likely consequence would be that some kinds of disputes currently resolved through the legal system would either not be resolved at all, or would be resolved via extra-legal means.⁵⁸ This would happen primarily because the number of people who might have claims but do not know or suspect this would increase. Many lawyers make a practice of advertising with respect to particular kinds of claims, and this may both alert people to the fact that they have suffered an injury that can be placed at someone's door, and that there is a straightforward way to seek redress. Failure to address or resolve injuries is one way in which both peace and productivity would be threatened by the absence of lawyers, since, arguably, a primary role of much of the law in this area is to promote both peace and productivity, but the law only can do that if it actually informs and constrains behavior. Additionally, some disputes might be resolved via non-legal means simply because neither party involved would know that there was a way to resolve and channel the dispute through legal process. This might be beneficial in some cases—legal process is not an unequivocal

⁵⁸ For relevant general discussion, see William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC. REV. 631 (1981) (presenting a view regarding how disputes are conceptualized and transformed into legal concerns).

panacea—but there would be certainly some instances in which both peace and productivity were threatened by the use of extra-legal dispute resolution.

A second consequence would be that individuals who do bring claims may be considerably less adept at framing them in the most sensible or intelligible way, given the nature of their grievances. This might make things more difficult for judges, or at least require judges to be more flexible in how they resolve claims—perhaps requiring parties to redraft complaints more frequently, and so on. It also might require dramatic revisions of various formal features of legal process. As noted above, formal legal process has various things to recommend it, including helping to maintain fairness, consistency, and transparency of process across a range of cases.

A third consequence would be that some individuals against whom a complaint was brought would not be aware that they had a legal defense, and/or would not know how to respond to the complaint in an effective fashion. This might mean that disputes were resolved unfairly, or that it simply was more difficult for judges to know how to decide a case.

A fourth consequence is that individuals with more education and resources would be at a considerable advantage. They would have a better sense of when they had a meritorious legal claim, the best way to frame that claim, how to investigate and research legal claims, how to present a defense to a claim, and so on. They could devote more time and energy to dealing with legal problems, and could, and probably would, pay others to do this for them. Indeed, it would not be surprising if, even without a formal professional class of trained and licensed lawyers, and even if one were not allowed to have someone else speak for one before a judge, there would come to be people who served a role similar to lawyers, at least with respect to the behind-the-scenes preparation of legal claims and defenses.

As noted above, one might wonder the extent to which this is different from the current system in the United States. But it is very different than it might be in a system in which, say, all Private Lawyers were paid the same, came from a common pool, were randomly assigned to particular cases when some independent official determined that a lawyer was required, and were paid from a pool into which every person paid according to their means. We could imagine the provision of Private Lawyers in the way that police or firefighters are provided. Or, alternatively, individuals could purchase legal insurance in the same way that they purchase health insurance, and Private Lawyers would be paid via insurance, just as most doctors are. This is not the place to argue for such dramatic restructuring of the private legal market, but it does provide some reason to think that such restructuring might be appropriate.

In summary, in the IVI context, Private Lawyers are useful to help individuals identify when and against whom they may have a legal claim, to frame their claims and responses in legally relevant terms, to formulate and present legal arguments once litigation has begun, to help ensure that they abide by the relevant formal legal process in making and responding to claims, and to help individuals to identify and agree to fair and/or acceptable settlement terms. These all have at least two additional effects, which are related to the core functional value of Private Lawyers: (1) helping the State, via judges or other neutral arbiters, to ensure that individual injuries and disputes are resolved more formally, more transparently, and (in theory) more equitably; and (2) helping to steer some disputes or injuries into the legal arena for redress in line with existing law. Both of these effects lead to resolutions that are more conducive (at least in theory, to the extent that the background law supports this aim) to the social benefits of peace and productivity.

IV. MAKING BETTER LAWYERS

Given the accounts of the functional value of Individual and Private Lawyers sketched above, one can now ask the following question: what ethical codes of conduct for Individual and Private Lawyers will best enable those lawyers to realize this functional value?

Assume that the functional value of a car is fast, economical, relatively safe transportation. Given this functional value, there are engineering and design questions that arise regarding how to build a car that best achieves this functional value. There are practical constraints on this design project (e.g. the laws of physics, the cost of various materials, time and effort required to build various models). And there may be tensions between these various sub-values that arise as a practical matter (speed and affordability, say) or as more endemic features of these sub-values (speed and safety).

Analogous considerations arise with respect to the realization of the functional value of various occupational roles. However, instead of design questions having to do with choice and arrangement of physical materials, for 'design' of occupational roles, the main engineering choices concern the training, selection for, and development of skills; and the codes of conduct relating to the deployment of those skills in particular contexts. Just as in the case of cars and other technological items, there are practical constraints on how one can 'engineer' various occupational roles. Individuals who might fill these roles are human beings. Accordingly, they are not omniscient, they have imperfect capacities for understanding and applying various rules, they lack an unerring moral compass, and so on. More

specifically, the main variables for ‘engineering’ the role of lawyer are the rules and norms regarding training and background entrance licensing requirements, client selection and solicitation, development of legal strategy, lawyer-client confidentiality, and decisions concerning withdrawal from representation.⁵⁹

By altering the rules and norms covering the above aspects of being a lawyer, one can significantly alter what it is to serve the ‘role’ of being a lawyer. Additionally, if the functional value of a particular role is morally significant—as it arguably is in the case of lawyers—then the best codes of conduct will also come to have moral significance.

One final caveat. What a lawyer reasonably believes about various facts (particularly the facts about the triggering conditions that relate to his client or potential client’s case) can alter the ethical situation in which a lawyer finds herself. In order to avoid these additional complexities, the rest of the article will assume that all of the lawyers under discussion are in the following epistemic situation: they are uncertain, and reasonably so, about the material facts that relate to their client (or potential client). Throughout the article, ‘uncertain’ means not just that an individual lacks certainty, but that the individual is ‘in the middle’ with respect to what they believe about whether the triggering conditions obtain.⁶⁰

The following two questions will frame the rest of the article:

(Q1) If the functional value of Individual Lawyers is protecting individual interests against the threats of State domination and of illegitimate State action by helping individuals navigate complex legal and factual waters, then what are the appropriate rules and norms with respect to (a) client selection and (b) use of tactical delay?

(Q2) If the functional value of Private Lawyers is encouraging

⁵⁹ This article focuses on legal ethics and not legal education, and will leave aside questions of training and background entrance requirements. It must be noted, however, that the education and training must be adequate to ensure that those employed as lawyers can serve the role, and that the education will need to also include education regarding the proper role for lawyers, including (perhaps) education regarding the way in which what is proper, may shift depending on the context and the particular role they are playing. In the interest of space, and to give a sense of how the contextual account makes a difference, this article will limit the focus to two core issues in legal ethics: client selection and the use of tactical delay.

⁶⁰ In more formal terminology, let us suppose that the individual’s credence in the proposition that the relevant triggering conditions obtain is between, say, .3 and .7 (with certainty that the proposition is true equal to 1.0, and certainty that the proposition is false equal to 0).

disputes to be resolved equitably, in the legal arena (when appropriate), in order to help achieve the social benefits of peace and productivity, then what are the appropriate rules and norms with respect to (a) client selection and (b) use of tactical delay?

The way in which these questions are presented highlights the way in which the background context affects the ethical issues for each kind of lawyer. In what follows, the article will discuss these two ethical issues with the aim of showing how the difference between the SVI and IVI contexts makes a difference.⁶¹

It is helpful to have a view with which to contrast my own. The standard conception of legal ethics discussed in Section II can serve that role. The basic premise of that view is that if a tactic or course of action is legally permissible (or even arguably legally permissible), then it is morally permissible (and perhaps morally required). There are a variety of relevant sources of legal permission in this context. One source is the particular procedural rules that govern in the relevant jurisdiction or court. These include rules relating to discovery, brief length and format, extensions and deadlines, motion practice, introduction and examination of evidence, and so on. Many of these rules are formally and precisely stated, with judges empowered to alter them in certain cases, on certain grounds. A second source is the relevant substantive law—whether common law, legislatively-enacted statutory law, administrative regulation, or some other kind. A third source is the set of legal regulations governing the conduct of lawyers that have been formally adopted in a particular jurisdiction. Obviously, because of this third source, one cannot discuss what is ethically permitted apart from discussion of what is legally permitted by existing legal regulations governing the conduct of lawyers. The standard conception is what might be called a Simple Entailment View, because it suggests that there is a simple entailment from *X is legally permitted* to *X is morally permitted*, where ‘X’ is some course of conduct that a lawyer is considering.

The standard conception provides a useful contrast, both because it is widely (if largely implicitly) accepted, and because for each potential ethical issue, what it says to lawyers in these various situations is this: (1) ask whether X is arguably legally permitted; (2) if yes, then ask whether X

⁶¹ In general, the discussion that follows concerns the ethics of legal representation under what might be called conditions of full-compliance, or “ideal theory.” See, e.g., A. John Simmons, *Ideal and Nonideal Theory*, 38 PHIL. & PUB. AFF. 5 (2010). The ethical issues become somewhat more complicated under conditions of non-compliance, when others are not acting as they ought to act. How complicated depends in large part on the scope and obviousness of non-compliance. Of course, we can anticipate that not everyone will act as they ought to, which provides an additional complication in the translation from ethical theory to legal rules.

would benefit one's client; (3) if X would benefit one's client, then one should (or at least may) do X. Thus, the standard conception provides an opportunity to contrast what the Multi-Context View requires with what is legally required and legally permissible. It is also useful to see exactly how lax or how restrictive the standard conception is in practice.

A. *The Decision to Represent*

Decisions to represent clients receive little moral scrutiny under current rules of professional responsibility. To the extent that the canons of professional responsibility have encouraged ethical reflection on client selection questions, it is mostly to allow individuals to decline to represent those clients whose character or cause they find personally repugnant. There are virtually no legal requirements imposed on the decision whether or not to represent a client. The 1969 Model Code states that “[a] lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client,”⁶² and the 1983 Model Rules state that “[a] lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.”⁶³ The early 1908 Canons of Professional Ethics stated that:

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, [and] what cases he contest in Court for defendants...⁶⁴

Despite the paucity of legal requirement or formal guidance, some, such as Monroe Freedman and Abbe Smith, have argued that “there are few decisions that a lawyer makes that are more significantly moral than whether she will dedicate her intellect, training, and skills to a particular client or cause.”⁶⁵ Unfortunately, few have treated the ethical issues involved as connected to larger issues of political legitimacy. This section discusses what the Multi-Context View requires of lawyers with regard to the decision to represent.

⁶² MODEL CODE EC 2-26.

⁶³ MODEL RULES Rule 6.2, Cmt. [1]. This comes up in a rule requiring lawyers to accept court appointments “except for good cause.” *Id.*

⁶⁴ CANONS OF PROFESSIONAL ETHICS, Canon 31 (1908).

⁶⁵ FREEDMAN & SMITH, *supra* note 12, at 74.

Call this the *moral separation principle*:

Moral Separation Principle: A lawyer's decision to represent an individual should not be viewed as a moral endorsement of that individual, nor need it be made solely or even largely on the basis of the apparent moral attractiveness of the individual or the individual's cause; and the lawyer should not be held morally accountable for, or morally complicit in, what the individual has done pre-representation simply because the lawyer decides to represent that individual.

Here is a reason to endorse the moral separation principle that any plausible view of legal ethics must take into account: in both the IVI and SVI contexts, and particularly in the latter, there will be some individuals with unpopular causes who are accused of having done horrible things, and who might appear—and even be—guilty of the conduct of which they are accused and which is the basis of their unpopularity. If lawyers were judged, morally, on the basis of which clients they chose to represent, these unpopular individuals might not receive any representation at all. In the SVI context, this would be problematic because some people who seem to satisfy the relevant triggering conditions may not, or there may be excusing or other relevant circumstances; and, even in clear cases, one might want there to be a kind of procedural safeguard and consistent method to ensure that the State is always constrained before taking action. In the IVI context, one might worry that even legitimately unpopular individuals should have their disputes resolved equitably (even if it is a resolution that will cost them significantly), and we want even these disputes to proceed through formal, legal processes when doing so is appropriate. It is worth noting that although some of these reasons apply even when we are certain, they apply with even more force when we are uncertain (and reasonably so), about whether these unpopular individuals actually do satisfy the relevant triggering conditions or about the material facts regarding the dispute between two private parties, one of whom is unpopular.

A second, less instrumental reason to endorse the moral separation principle is that on the conception of lawyers that this article defends, lawyers are simply involved in helping people, albeit in a very particular kind of way. The key is to define and limit the nature of this help so that it is morally appropriate to extend it to all—or almost all—who need it. (Much as we think this of doctors and teachers and the help they provide.)

One should not hold lawyers morally accountable for choosing to

represent an individual, but for the *way* in which they will represent the individual—what they will do on the individual’s behalf, how they will do it, and so on. The problem, then, is not the moral separation principle, but marrying that principle to what David Luban has called the “principle of partisanship” which “identifies professionalism with extreme partisan zeal on behalf of the client” and the “principle of nonaccountability” which “insists that the lawyer bears no moral responsibility for the client’s goals or the means used to attain them.”⁶⁶ The first of these principles concerns how lawyers ought to behave once they have decided to represent an individual; the second principle concerns the extent to which lawyers should be morally accountable for their client’s aims and conduct. The moral separation principle suggests that lawyers should not be held accountable for their client’s aims and conduct *pre-representation*, before they agreed to represent the client. But it says nothing about whether lawyers should be accountable for their client’s aims and conduct *post-representation*; particularly, it says nothing about whether lawyers should be accountable for the way in which the lawyer helps their client to structure and pursue their aims through the legal process.

The next section argues that the principle of partisanship is false, and that the principle of nonaccountability is false insofar as it goes beyond the moral separation principle to suggest that lawyers bear no accountability for what their clients do or seek once representation has begun. As a result, in making a decision whether to represent someone or not, lawyers need not refrain from representing someone simply because that person is accused or has even done something morally reprehensible, but one must be clear as to what one is and is not willing to do in the course of representing someone, and one will be held accountable for what one does on a client’s behalf, and for how one does it.⁶⁷ The following sections will spell out this view in more detail.

Note that this puts the Multi-Context View’s treatment of the decision to represent in stark contrast with those who have argued that *because* extreme partisan zeal is required, once one has decided to represent a client, extreme moral care is needed in selecting clients.⁶⁸ There are serious problems with

⁶⁶ LUBAN, *supra* note 6, at xx.

⁶⁷ Freedman and Smith make a related point when they note that “[o]ne of the most important considerations in deciding to accept or reject a client is that the lawyer, in representing that client, might be required to use tactics that the lawyer finds offensive . . . [t]he proper solution to the lawyer’s moral objections to using such tactics, however, is not for the lawyer to take the case and deny the client his rights; rather, the lawyer should refuse to take the case.” FREEDMAN & SMITH, *supra* note 12, at 74.

⁶⁸ *Id.* at 73-74 (“No lawyer is required to represent a client . . . If a lawyer chooses to commit herself to serve that client, however, then the lawyer is duty-bound to seek the lawful objectives of his client through reasonably available means permitted by law . . .”)

putting all of the moral decisionmaking weight on this first choice. First, one will often not have enough information about one's client to go in for this kind of extreme solidarity. Second, there will be clients who should not have any representation on Freedman's account, but in the SVI context, particularly, this may be seriously problematic. Third, even given an initial moral screening, extreme partisan zeal of the sort Freedman envisions is morally unjustifiable in a range of cases, some of which will be discussed below.

If lawyers are not (or at least not usually or always) to decide whom to represent on the basis of the moral worthiness of the person or the person's cause, how are they to make this decision? This question does not admit of a simple or universal answer. Lawyers decide to represent people because they believe in the person's case, because they have a personal connection, because the person was referred to them in their position at a legal services provider. Perhaps most commonly, lawyers make representation decisions on financial grounds.⁶⁹ As currently structured, much of the legal profession is a profit-driven business, and one reason that clients are chosen is because they have money, or the case promises to be simple and financially profitable, or because the client will require a lot of business down the road, or all of these. Although it is plausible that the current structure of the legal profession creates or at least worsens many of the injustices of the legal and political system, this is not the place to argue for systematic reform (such as moving to a legal market structured in the way that the health care market is, relying on significant state subsidization and insurance markets). Accordingly, this article will only present and defend two necessary conditions, one for each of the two contexts, that must be satisfied in order for a decision to represent a client to be morally permissible. Importantly, these are only necessary conditions—satisfaction of them is necessary, but not necessarily sufficient, for the decision to represent to be morally permissible.

The first necessary condition, for decisions to represent made in the IVI context, is this:

IVI Representation Principle: A Private Lawyer may permissibly decide to represent a client only if, at the time at which she is making the decision, she reasonably believes that by representing the client she will contribute to bringing about a more equitable resolution of some dispute or grievance than would result if the client were unrepresented.

(quotation marks and citation omitted).

⁶⁹ And, of course, Freedman and Smith are correct in stressing that the need to earn a living counts as a moral consideration. *Id.* at 76.

The second necessary condition, for decisions to represent made in the SVI context, is this:

SVI Representation Principle: An Individual Lawyer may permissibly decide to represent a client only if, at the time at which she is making the decision, she reasonably believes that by representing the client she will make it more likely that

(a) the State will take action against the client only if the relevant triggering conditions actually obtain; and

(b) if the triggering conditions obtain, the client will receive an outcome which is legally appropriate, given the client's situation (including possible excusing or extenuating circumstances),

than if the client were unrepresented.

These principles focus on a lawyer's beliefs about how she will be able to conduct herself in the course of representing the client, what the client will ask of her, and what her efforts in representing the client will bring about. There is a decidedly aspirational component to these conditions, as they concern what one believes about how one will act in the future and what those actions will accomplish, rather than what one believes about what one's client has done in the past. They are also fairly weak conditions, in that they will not rule out many potential clients. This is a part of the larger picture on which what is relevant is not who one's client is, but how one goes about representing him.

In part because they are largely forward-looking, these two principles are compatible with both the moral separation principle (in letter and spirit) and with the proper purpose of lawyers in the IVI and SVI contexts. They are also compatible with widely shared judgments that it is morally permissible (if not morally good) to represent unpopular individuals in a broad range of cases.

There is a question of what is required in making a lawyer's belief *reasonable* under these two principles. It might, for example, seem overly demanding to require that lawyers engage in extensive legal and factual investigation prior to deciding whether to represent an individual or not. Of course, some research and investigation must be required—one could not come to have a reasonable belief about a matter as important as this without

some investigation.⁷⁰ And such investigation would, at any rate, be prudent for all of the other reasons that go into making a decision to represent someone. This part of the conditions should not be construed to require much in the way of investigation, although one of the steps that a lawyer should undertake in attempting to decide whether she can see her possible representation satisfying the condition is to talk to the potential client about what she is willing to do, what the client expects, and about the circumstances in which the lawyer would decide that she cannot continue the representation.

A related, but somewhat more complicated issue about the “reasonable belief” component is posed by the IVI Representation Principle, which requires Private Lawyers to assess whether by representing the client one will contribute to bringing about a more equitable resolution of some dispute or grievance than would result if the client were unrepresented. There are several different factors that might go into the assessment of whether the resolution will be more equitable if one represents the person than if no one does. First, one must assess what one knows about the relevant facts and law, and, in light of this, what one believes the likely resolution will be (or, more accurately, what the various possible resolutions might be, and how likely each of these are) if one represents the person, and if no one represents the person. Second, one must make a normative evaluation of these various outcomes in terms of how equitable they are. The term ‘equitable’ is meant to include a number of distinct considerations, and there will certainly be reasonable disagreement about what makes a resolution equitable, and whether some particular resolution is equitable.⁷¹ There will be familiar, if controversial, assessments of whether the resolution comports with justice, whether (between two particular private parties) it is a fair resolution, whether the law that requires or permits the resolution is legitimate or just, whether (when statutes are implicated) the resolution is in harmony or tension with the letter and/or spirit of democratically enacted law, and so on.⁷² Different moral views,

⁷⁰ See Alexander A. Guerrero, *Don't Know, Don't Kill: Moral Ignorance, Culpability, and Caution*, 136 PHIL. STUDIES 59 (2007) (arguing that one's epistemic obligations increase as the moral significance of what one is contemplating doing increases).

⁷¹ The use of the term “equitable” is intended to carry echoes of the traditional doctrine of equity that enable judges some leeway in applying law to particular cases, so that if a particularly morally problematic result would follow, equity might provide some relief. That said, “equitable” is meant more in the way that philosophers might use the term, with its connotations of fairness, regard for others as moral equals, and moral appropriateness.

⁷² A related value is that of transparency. Transparency has both a local and a global aspect to it. The local concern is that all parties involved in the dispute understand both

theories of justice, legitimacy, and (in some cases) even theories of democracy may give different answers to the question of whether a particular resolution is equitable. Because of this, judging the reasonableness of a particular belief that representation makes equitable resolution more likely is a complex matter, and requires, at least in part, making judgments about the reasonableness of the other beliefs (about justice, morality, interpersonal fairness, and so on) that undergird the belief.

This article will not offer a full account of when substantive moral beliefs of this sort are reasonable; it is worth noting, however, that whatever account one embraces, it will have to countenance a fairly wide range of views as reasonable. In Rawlsian terms, it will have to be compatible with reasonable pluralism about the good (including the political good).⁷³ This is not because of any liberal-minded reasons of tolerance or the inappropriateness of appeals based on one's own comprehensive doctrine, but simply because the available evidence on these questions underdetermines what one is rationally required to believe. But these are large topics, and the article will not venture further into them here. In practice, what the IVI Representation Principle requires is just that lawyers focus their attention on this question, and do so in a way that is reasonable.

It is worth noting that this is to paint a significantly more 'moralized' picture of the role of the lawyer, particularly for Private Lawyers, who are sometimes viewed as little more than lubricating agents for the capitalist engine. This provides one significant reason, at least on this account, to encourage and provide time for sustained reflection on ethics and political

what is being done and why it is being done. As noted earlier, formal law and legal procedure is complex and not always easy for laypeople to understand. One value that Private Lawyers provide is making the legal resolution of disputes and injuries between private parties *more* intelligible to laypeople than it might otherwise be. This is arguably both inherently valuable (in the way that all kinds of knowledge, and particularly knowledge about significant developments in one's life, is inherently valuable), and valuable because understanding the reason for a particular resolution is almost certainly necessary (even if not sufficient) for acceptance of that resolution—particularly for any party that might suffer or see itself as the losing party as a result of the resolution reached. The global transparency concern is related to the value of publicity, and in particular to the value of having disputes resolved in a way that is intelligible to third-parties so that they feel that the law is fair and equitable, and so that they can structure their own actions in light of probable legal outcomes. Although an important value, transparency will typically be of secondary importance, except in those cases in which it is plausibly a part of what makes some resolution equitable or not.

⁷³ RAWLS, *supra* note 49, at 63-64 (“That a democracy is marked by the fact of pluralism as such is not surprising, for there are always many unreasonable views. But that there are also many reasonable comprehensive doctrines affirmed by reasonable people may seem surprising, as we like to see reason as leading to the truth and to think of the truth as one.”).

philosophy for those individuals training to become lawyers.

Private Lawyers should consider how they might contribute to the equity of some dispute resolution when deciding to represent a client in order to ensure that their efforts will contribute to social peace and productivity. Inequitable resolutions of private disputes, particularly those that result at least partly because of the contribution made by Private Lawyers, do not contribute to social peace—if anything, they detract from it. They detract from social peace both because of the instability of the particular inequitable resolution, and because people come to see the legal process as one that generates inequitable resolutions—meaning both that they don't trust its results, and that they will be disinclined to resort to it (unless they are in a category such that the inequity is consistently in their favor). If the legal process comes to be seen as untrustworthy, this may eventually undermine productivity (people won't want to make contractual agreements, won't do business or cooperate with strangers, and so on).

It is worth discussing one significant difference between the IVI and SVI Representation Principles: the former is considerably more 'moralized' than the latter. In particular, the SVI Representation Principle is concerned with, at most, legal and factual appropriateness of the resolution, given the existing law. The IVI Representation Principle, on the other hand, requires lawyers to make a moral judgment about the resolutions that their representation might contribute to bringing about. One reason for this is that in the SVI context, the operative assumption is that the State creates law legitimately and that, in particular, the relevant law is legitimate. (Otherwise, it would be a blended or purely IVS context, and the ethical situation might be significantly different.) In the IVI context, there is no such background assumption. A second reason for this is that the purpose of Individual Lawyers can be realized in almost any possible SVI representation situation; whether or not it will be realized turns more on how the Individual Lawyer conducts herself, rather than on the nature of the client's situation. This is not true for Private Lawyers. There are many possible representation situations in which their efforts would work against their proper purpose according to the Multi-Context View.

One objection to the IVI Representation Principle is that it requires lawyers to make moral assessments that are, as one might put it, above their pay grade. As Judge George Sharswood wrote in his influential 1854 lectures on legal ethics, "[t]he lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury."⁷⁴ There are at least two possible concerns in this vein. One is that it is morally inappropriate for

⁷⁴ GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 27 (2d ed. 1860).

lawyers to make these judgments, or to act on them, because that is not part of their *role* in the institutional structure. A second concern is that, even if lawyers have the skills of the right sort, the specific information situation that they are in when making these judgments is somehow inadequate—the case is premature, underdeveloped, and so on, and as a result it is inappropriate for lawyers to decide not to represent a client on these grounds, at this early stage. The first concern—that this is not the lawyer’s appropriate role in the system—is simply question begging as an objection to an account of legal ethics that argues that this is part of the lawyer’s appropriate role. To the extent that the suggestion has merit, it seems that this is a consequence of the going accounts of legal ethics—and in particular the standard conception discussed above that suggests that lawyers are morally permitted to take any case they like and to conduct those cases using an expansive range of questionable tactics—rather than a fact that can be appealed to in order to support those accounts.⁷⁵ The other concern requires more of a response.

The second concern is that even if lawyers are not particularly morally deficient, it is inappropriate for the decisions of the sort required by the IVI Representation Principle to be made at such an early point—before extensive fact-finding, discovery, legal research, adversarial presentation and scrutiny of evidence, and so on. Here, it is important to remember what the account asks of lawyers, and to recall the caveats offered earlier about what will count as a reasonable belief. Neither of the two representation principles requires anything like a full or final judgment on the legal or moral merits of an individual’s case. Indeed, both are focused more on what the client will expect from the lawyer going forward, and what the lawyer believes that she can contribute in the way of help to the possible client. There are reasons that, on any plausible account, it will be important

⁷⁵ One reason to think that lawyers will do a bad job as any kind of moral safeguard is because they have financial motives to see all clients as viable, and there are essentially no financial or legal consequences to taking on morally questionable clients or cases. Judges and juries lack these possibly corrupting influences, or so the suggestion goes, and so they will do better at making moral judgments about the equitable nature of various possible resolutions than lawyers would. Although this might be correct, it would only mean that lawyers would tend to be *overinclusive*—taking cases when it is morally inappropriate to do so—rather than *underinclusive*—choosing not to represent clients when they morally could or should. But, an objector might continue, lawyers are motivated by money to represent some people, but to *not* represent others—namely, those others who can’t pay. Here, it is important that the IVI Representation Principle is only a necessary condition on morally permissible legal representation; problems generated by these kinds of financial incentives suggest, if anything, that rather than a take-all-comers approach as endorsed by Judge Sharswood and others who would have lawyers do less in the way of initial screening, both decision to represent *and* decisions *not* to represent should be subject to regulation or moral scrutiny.

to consider these questions before deciding to represent someone, precisely because withdrawal has serious costs. First, there are situations in which withdrawal will signal something about one's beliefs about the merits of the client's case. Second, there are practical and financial costs that the client will incur, or will have incurred, if one chooses to withdraw down the road. For both of these reasons, a lawyer should consider the question of whether he or she will have moral concerns during the course of representation prior to deciding to represent the person.

As should be clear from this discussion, the above representation principles, although somewhat weak, may rule out taking on a client if it is clear to one that the client wants one to help him pursue an inequitable or otherwise problematic outcome (in the IVI context) or to help a client contend that the triggering conditions do not obtain when the lawyer is certain, and reasonably so, that they do obtain. One may represent a client in the SVI context because one reasonably believes that one can help that client to receive an outcome which is legally appropriate, given the client's situation. These two representation principles take on added heft when the full picture—particularly with regard to what one owes one's client once one has decided to represent him—is in view. The article will now consider one such issue—the use of tactical delay—that arises after a lawyer has decided to represent someone.

B. Legal Strategy and Tactical Delay

This section discusses a central ethical issue that may arise once a lawyer has decided to represent an individual: whether, and on what grounds, to use tactics that will delay the legal proceedings. This is one of a number of tactical issues that might have been discussed—whether to use misrepresentation or deception, whether to exploit what appear to be legal loopholes, whether to use extralegal means of influence against one's legal adversary, and so on. This article focuses on tactical delay, in particular, because it demonstrates the distinctive features of the Multi-Context View and because it presents a relatively discrete ethical question.

There are a number of different reasons that a lawyer might be tempted to take actions (filing motions, extending discovery, and so on) the main, or only, purpose of which is to delay various aspects of the legal process. One relatively mundane reason would be in order to make some scheduled aspect of the legal process fit better with her (personal or work-related) schedule (call this *scheduling conflict*). A second reason would be to increase the amount of money that she is paid for the particular case—to stretch the work, so to speak—if she is paid based on an hourly fee structure (call this *personal enrichment*). A third reason, particularly apparent in the

IVI context, is to increase the cost of the legal proceeding to the other side, so that one's own (presumably wealthier) client can prevail simply by exhausting the other side's resources (*resource exhaustion*). A fourth kind of reason is to gain a specific legal advantage for one's own client by extending the proceeding—perhaps extending the proceeding will mean that one is unlikely to be assigned to an unsympathetic but soon-retiring judge, or key witnesses will be harder to locate or will testify less disadvantageously, or significant evidence will deteriorate or disappear (*legal advantage*). A fifth kind of reason is to gain a non-legal advantage for one's client—keeping them out of prison or from having to pay a fine for a longer period of time, or allowing a business deal to go through before litigation gets very far along (*non-legal benefit*). What should one make of the ethics of acting to delay for one or more of these reasons? And do the reasons upon which a lawyer acts make a difference?

1. The Law Regarding Delay and the Standard Conception

In order to see what the standard conception says about these questions, one must consult those sources of law that determine what is currently legal (or arguably legal). According to the *Model Rules*, “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”⁷⁶ The Comment to this rule says a bit more:

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purposes of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a

⁷⁶ MODEL RULES R. 3.2. Rule 1.3 also requires that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” *Id.* at Rule 1.3. This rule provides little additional content to aid in resolving questions about permissible delay, and has been construed as defining the requirements of zealous representation and diligence. See GILLERS, *supra* note 12, at 45-49.

legitimate interest of the client.⁷⁷

Many states have adopted some version of this Model Rule; others have adopted no rule concerning delay at all.⁷⁸ The Federal Rules of Civil Procedure include at least two relevant passages. Federal Rule of Civil Procedure 1 states that the Federal Rules of Civil Procedure shall be construed to secure the just, “speedy,” and inexpensive determination of every action.⁷⁹ Rule 11, the “most frequently invoked [attorney] sanctions rule,”⁸⁰ requires attorneys to sign every pleading, motion, or other paper to certify that the paper is not being presented for any improper purpose, including to “cause unnecessary delay” in the litigation.⁸¹ Other Federal Rules similarly prohibit filing discovery requests or affidavits supporting or opposing motions for summary judgment “solely for the purpose of delay.”⁸²

What, concretely, do these legal rules require? Model Rule 3.2 requires that a lawyer make *reasonable* efforts to expedite litigation *consistent with the interests of the client*. There are at least four large-scale concerns about this rule that suggest that in practice, clearly falling afoul of it will be quite difficult to do.

First, one must only take those efforts that are consistent with the interests of one’s client. A 1981 draft of this rule, which was not adopted, specified that the reasonable efforts to expedite must be “consistent with the *legitimate* interests of the client.”⁸³ Strikingly, the adopted version does not cabin the interests of the client in this way. The Comment to Rule 3.2, which states that “[n]or will a failure to expedite be reasonable if done for the purposes of frustrating an opposing party’s attempt to obtain rightful redress or repose,”⁸⁴ appears to suggest that “reasonable” in Rule 3.2 should be read expansively, so as to bring the 1981 draft and the adopted version of the rule closer together. The problem with this reading is that, on a natural reading of Rule 3.2 itself, the reasonable efforts to expedite that are required are just those that are consistent with the interests of one’s client. If one fails to expedite because expediting would not be in one’s client’s interests—perhaps *because* expediting would benefit the opposing party’s

⁷⁷ *Id.* R. 3.2 cmt.

⁷⁸ See GILLERS, *supra* note 12, at 241-43 (noting that California, Ohio, and Virginia, among other states, omit Rule 3.2).

⁷⁹ FED. R. CIV. P. 1.

⁸⁰ GILLERS, *supra* note 12, at 242.

⁸¹ FED. R. CIV. P. 11.

⁸² See, e.g., FED. R. CIV. P. 26(g)(2)(B); FED. R. CIV. P. 56(g).

⁸³ See *Legislative History of Model Rule 3.2, 1981 Draft*, in Gillers, *supra* note 12, at 245.

⁸⁴ MODEL RULES, Cmt. to Rule 3.2.

attempt to obtain rightful redress in some way—then one does nothing impermissible according to Rule 3.2.

Second, the Model Rule is not framed in terms of *prohibiting* or *limiting* actions that might *delay* litigation, but is instead framed in terms of when, and to what extent, lawyers are required to take actions that will *speed up* litigation. One concern is that this seems to presuppose some normal pace for litigation, against which particular efforts to expedite can be measured as reasonable or unreasonable, or as consistent with one's client's interests or not. A similar concern is raised by the Rule 11 requirement that papers not be filed to cause an *unnecessary* delay. What makes a delay necessary or not? Without relatively straightforward answers to these questions—perhaps adverting to the kinds of reasons for necessary or appropriate delay—statements of this sort pack almost no practical punch.

Third, the Comment to Rule 3.2 states that “[d]ilatory practices bring the administration of justice into disrepute,”⁸⁵ but there is no statement of what would count as a dilatory practice. It is not obvious, for example, that even failing to make a reasonable effort to expedite litigation would count as a *dilatory* practice. One could fail to expedite litigation without thereby engaging in anything that would count as a dilatory practice. Failing to run is not the same as dragging one's feet—one might simply be walking at a normal pace. As a result, this lead sentence of the Comment serves as little more than empty rhetoric.

Fourth, both the Comment and the Federal Rules suggest that one only runs into trouble if one takes actions for the *sole* purpose of delay. The Comment states that “[t]he question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay,”⁸⁶ while the Federal Rules require that, for example, one not file discovery requests “solely for the purpose of delay.”⁸⁷ What if one takes a course of action not solely for the purpose of delay, but for one of the other reasons identified above (many of which are, quite plausibly, “substantial”)—a scheduling conflict, the desire for personal enrichment, to exhaust one's opponent's resources, legal advantage, or non-legal benefit? It is hard to believe that all of these would count as acceptable other purposes, but the legal rules do not make clear which count and which do not. More to the point, one appears to be off the hook if one has at least *some* other reason than just delay. This is, admittedly, a stubbornly literal reading of these provisions, but it is not obvious what other reading is appropriate. Additionally, since all that is required on the standard conception is that the action in question be *arguably* legal, it seems

⁸⁵ MODEL RULES, Cmt. to Rule 3.2.

⁸⁶ *Id.*

⁸⁷ FED. R. CIV. P. 26(g)(2)(B), 56(g).

that if a literal reading (even a stubbornly literal reading) licenses the action, then the action is permissible on the standard conception.

So, under the existing legal rules, which of the above reasons appear to be acceptable, or sometimes acceptable, grounds on which to take actions that will delay the proceedings? The Comment to Rule 3.2 and the “reasonable” qualification in the rule itself both appear to license delay for reasons related to scheduling conflicts. Indeed, the language of the Rule suggests that the main point of the rule may be to keep lawyers from slowing things down for their own reasons (whether personal scheduling or financial) even when moving things along would be in their client’s interest. Otherwise it is hard to see why it would be necessary or appropriate to highlight that the reasonable efforts to expedite must be made only if they are consistent with the interests of one’s client. Little specific guidance is given in the Rule or the Comment as to when postponement for personal reasons is appropriate; it is clear that such postponement should not be routine.

Assuming that the personal enrichment of his or her counsel is not in a client’s interest, personal enrichment will not be an appropriate motivation for failing to make reasonable efforts to expedite litigation. There is still the problem of defining the appropriate baseline against which efforts to expedite will be judged as reasonable or not, but it is clear that failing to take some effort solely because doing so will increase one’s fee is not a permissible reason to fail to expedite.

With regard to delay or failing to expedite so as to deplete or exhaust one’s opponents financial and other resources, to obtain legal advantage, or non-legal benefit, it seems that the Comment to Rule 3.2 intends the Rule to have teeth that it does not have. In particular, the Comment’s statement that “[n]or will a failure to expedite be reasonable if done for the purposes of frustrating an opposing party’s attempt to obtain rightful redress or repose,”⁸⁸ seems like an attempt to address the concern about delay in order to exhaust the other side’s resources. However, as noted above, on a natural reading of Rule 3.2 itself, the reasonable efforts to expedite that are required are just those that are consistent with the interests of one’s client.⁸⁹ With regard to delay (or, more precisely, failure to expedite⁹⁰) in order to obtain a legal advantage or non-legal benefit, Rule 3.2 instructs lawyers to expedite

⁸⁸ MODEL RULES, Cmt. to Rule 3.2.

⁸⁹ Additionally, there is another argument that, at least in many cases, a lawyer would be reasonable in not believing that one’s opponent sought “rightful” redress or repose.

⁹⁰ As noted above, there is substantial logical space between failing to expedite litigation and intentionally delaying or prolonging litigation. Thus, there is even a non-frivolous argument that none of the Model Rules actually address the question of whether or on what grounds one may take actions that one knows will delay the legal process.

litigation when it is in their client's interests to do so; it says nothing about when lawyers may fail to expedite litigation when *that* is what is in their client's interests. Indeed, the requirement that lawyers expedite litigation only when it is consistent with their client's interests implies that lawyers should *not* expedite litigation when it is not in their client's interests.

We can make this more explicit. Imagine one is representing a wealthy client against a relatively poor individual. One knows that the longer the litigation takes, the more likely that one's opponent will simply drop the case, and it is in one's client's interests that the case simply be dropped (let us assume that this is an arena in which punitive damages or attorney's fees are unlikely to be awarded, or that there are other unrecoverable costs to one's opponent of lengthy litigation). There is a choice point where one could take some action, A, which would speed up the litigation. Straightforwardly, doing A is not in one's client's interests. Thus, according to Rule 3.2 itself, one is not required to do A, and one may even be required to *not* do A. But, according to the Comment, it is not "reasonable" to *not* do A, because not doing A is equivalent to failing to expedite, and one would be doing it (arguably) to frustrate an opposing party's attempt to obtain rightful redress. Here, again, the omission of "legitimate" as a constraint on which of one's client's interests are relevant is crucial. As a result, the Comment's last statement, that "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client,"⁹¹ does not bar lawyers from failing to expedite in the above scenario.⁹² Given these tensions between the Rule and the Comment, the Rule wins out: the *Model Rules* are explicit that "[t]he Comments are intended as guides to interpretation, but the text of each Rule is authoritative"⁹³ and that "Comments do not add obligations to the Rules."⁹⁴ Thus, despite the language in the Comment, it seems clear that taking actions that will not expedite, or will even slow, the pace of litigation in order to exhaust the other side's resources is permissible under Rule 3.2.

The Federal Rules of Civil Procedure are no more help, in that even the most relevant passage, that of Rule 11, which requires that lawyers attest

⁹¹ MODEL RULES, Cmt. to Rule 3.2.

⁹² Note that this provision just states that financial interest or benefit cannot *save* an "otherwise improper" delay. *Id.* But there is no guidance as to what constitutes an improper delay, nor is there discussion about whether a failure to expedite counts as delay (as argued above, on a natural reading of those terms, it does not). In particular, this provision does not state that an action, A, which constitutes delay or failure to expedite, but which is taken solely to provide financial or other benefit to one's client, is thereby improper.

⁹³ MODEL RULES, Scope, at ¶ 21.

⁹⁴ *Id.* at ¶ 14.

that they are not taking actions to “cause unnecessary delay,”⁹⁵ does not specify when delay may appropriately count as necessary. It seems plausible to assume that at least in some instances, the fact that one will lose one’s case unless one seeks certain items through discovery (which will have the effect of causing delay), will make the resulting delay appropriately “necessary.” The problem is that Rule 11 provides no guidance as to which of the many delaying actions that might help one’s case are appropriately viewed as necessary and which are unnecessary. Given that the standard conception only requires that one take actions which are arguably legal, it seems that Rule 11 will impose few actual obstacles, even with respect to the actions that it explicitly covers.

In conclusion, then, the existing legal rules impose almost no constraints on lawyers contemplating some action that will lead to delay—neither on the circumstances in which such actions are appropriate, nor on the grounds on which such actions can be taken. The only real constraints are that lawyers should not take actions which cause delay to accommodate their personal schedule too frequently, and lawyers should not fail to expedite litigation or slow litigation down when it is in their client’s interest for things to go more quickly—ruling out delay for the personal enrichment of the lawyer.

2. Delay in the IVI Context

This section and the next will consider the question of how Private Lawyers (in the IVI context) and Individual Lawyers (in the SVI context) ought to act and think about the use of tactical delay. In both cases, consideration of the lawyer’s particular role informs the account of what the lawyer may permissibly do with respect to delay. For all of the cases under discussion, recall that we are imagining lawyers who are uncertain, and are reasonable in being uncertain, about whether the material facts are actually favorable to one’s client or not. The situation may be different if the lawyer’s epistemic situation were different—if, for example, an Individual Lawyer were certain, and reasonably so, that his client had in fact committed the crime of which he was accused.

This Section will begin by considering the case of Private Lawyers in the IVI context. Recall that the value of lawyers in the IVI context is to help and encourage individual injuries and disputes to be resolved equitably in order to achieve the social benefits of peace and productivity. If a dispute resolution mechanism is too slow, people will not avail themselves of it, and, if they do, there will be some instances in which the slowness of

⁹⁵ FED. R. CIV. P. 11.

the process will adversely affect the equity of the resulting outcome. These considerations suggest that, other things being equal, Private Lawyers should do what they can to avoid taking actions that slow the legal process. Of course, other things are not always equal—in some instances, actions that will cause delay are necessary to achieve greater equity in the resolution of the dispute. But Private Lawyers should be aware that delay comes with a cost and so should, for example, minimize the delay caused from things such as repeated rescheduling. These considerations also provide a reason, though perhaps not the most obvious reason, against taking actions that delay litigation solely for the purpose of lining their pockets. The more obvious reason against personal enrichment as a reason for delay is that delay for this reason is tantamount to theft or fraud. It also serves none of the interests identified above, and increases the cost of resolving disputes and injuries through the legal arena, which will make people less likely to seek redress through legal means.

It may be permissible to take actions that delay the legal process if a Private Lawyer reasonably believes that those actions will help achieve more equitable resolutions. Perhaps, for example, a Private Lawyer believes that whether her client owes damages to another individual depends on when a particular email was sent, and so she submits a discovery request (assume these email records are otherwise discoverable) covering the relevant period of time. She believes that this evidence is essential to an equitable resolution of the dispute. If her belief is reasonable, and if the request is tailored as narrowly as possible given what she believes, her action seems morally unobjectionable.

One might imagine a similar case in which the lawyer does not necessarily believe that taking some action is essential, but she believes that the action is *likely* to be necessary (perhaps she believes that there is an 80% chance that the action will prove to be necessary), or just that the action is likely to make the resolution more equitable. If one does not take actions that one believes have a high likelihood of contributing to an equitable resolution, there is a worry that the resulting resolution will be tainted and possibly unstable. It would be reasonable to wonder whether the resolution would have been substantially different, and more equitable, if one had taken the action in question. Thus, it seems morally permissible for Private Lawyers to take actions that they reasonably believe are likely to bring about a more equitable resolution.

Of course, a distorted version of this line of thinking can lead to a kind of hyper-zealousness, where the lawyer takes every possible action that might possibly make a difference, even if that possibility is incredibly remote. The distortion in thinking of this sort is that zealotry of this kind is not balanced by concern for the costs of delay—the legal costs for

both sides, the prolonged dispute, the distastefulness of one's experience with the legal process—all of which can affect the equity of the particular dispute resolution, and have larger effects on whether people resolve their disputes peacefully and productively through the legal arena. On the account defended here, a lawyer must always have in mind her client's interests, but only those interests that are compatible with a resolution that is generally equitable—not just good for one's client.

In light of the above, we can formulate a condition on taking actions that will delay the legal process:

IVI Delay Principle: A Private Lawyer may take an action, A, that will delay the legal process if and only if she reasonably believes that, all things considered, doing A has a positive expected value with respect to bringing about a more equitable resolution to the dispute than not doing A.

This condition is a necessary and sufficient condition for the moral permissibility of taking what one might call *delaying actions*. This condition is strict, given how many actions might be taken that will delay the legal process. For each action contemplated, a Private Lawyer must ask (a) will this action delay the legal process, and (b) if so, is this action one that has positive expected value with respect to bringing about a more equitable resolution, even given the costs of the delay? The notion of expected value is simply a function of how good various outcomes are (from a perspective of equity) and how likely it is that those outcomes will occur. Let's say there are three possible outcomes from a particular delaying action, A. One of these would be very good from a perspective of equity (delay leads to some key piece of the puzzle being obtained, meaning a much more equitable resolution). One of them would be somewhat good (delay doesn't turn up anything, but does make both sides feel that the resolution achieved is more equitable and justified than it otherwise would have been). And one of them would be very bad (delay leads to a dramatically inequitable resolution). We can assign numeric weights to these different outcomes: +100 for the first, +10 for the second, and -100 for the third. The expected value is a function of these values and how likely it is that they will obtain:

$$\begin{aligned} & (\text{likelihood of outcome 1} \times 100) + \\ & (\text{likelihood of outcome 2} \times 10) + \\ & (\text{likelihood of outcome 3} \times -100) = \\ & \text{Expected Value} \end{aligned}$$

So, if there were a 10% chance of outcome 1, a 50% chance of outcome 2, and a 40% chance of outcome 3, then the expected value of the action is $10 + 5 + -40 = -25$, meaning that the expected value of A is negative, and the IVI Delay Principle would rule it out.

This principle requires Private Lawyers to take into account the costs of delay to both sides. This general task should be familiar, at least for those relatively scrupulous lawyers who presently seek to minimize legal costs to their clients. Another distinctive feature of this condition is that the relevant costs are not just financial costs (although, for resource exhaustion and equity reasons, these remain significant), but the general costs to the eventual quality of the resolution of the dispute.

As in the case of the IVI Representation Principle, the IVI Delay Principle places substantial responsibility on Private Lawyers to consider the equity of the resolution that they are helping to bring about. Indeed, this is a theme of the Multi-Context View: legal ethics for Private Lawyers is centrally bound up with the lawyer's role in the quality of legal resolutions, and Private Lawyers are, as a result, morally obligated to concentrate their attention—with respect to both belief formation and decisionmaking—on this concern. Part of the Private Lawyer's role in this process is that they are representing one of the parties in the dispute, and it is the responsibility of a Private Lawyer to make sure that her client's interests are reflected in the final resolution. Whether or not this has happened is one of the significant determinants of whether the resolution is in fact equitable.

This brings to the fore a tension in the role of the Private Lawyer on the Multi-Context View. On the one hand, Private Lawyers represent particular individuals, they are employed by one of the several parties in the dispute, they know one of the two (or more) sides of the story particularly well, and they are focused on the interests of one of the parties. On the other hand, Private Lawyers are morally required to constrain and shape their representation in ways that are sensitive to the overall equity of the dispute's eventual resolution. In this way, the role of Private Lawyers is much like the role of another kind of representative: the political representative. On at least the more plausible accounts of the ethics of political representation, political representatives are charged with advocating for the interests of their constituents, but in a way that is consonant with the interests of the nation.⁹⁶ There are accounts of political representation that would have representatives either ignore those concerns that didn't implicate their constituents' interests, or focus just on the interests of the nation, but the more plausible accounts do not attempt to so neatly resolve the possible predicaments that political representatives might

⁹⁶ For general discussion of the ethics of political representation, see, Guerrero, *supra* note 9, at 277-83; Rehfeld, *supra* note 9, at 216-20.

encounter.

Rather than being a defect of the account, then, drawing attention to the similar dual role of Private Lawyers is one of the important advances of the account. On this account, a Private Lawyer is less like an adversarial opponent and more like a particular kind of mediator, but a mediator hired to work for a particular person. In this role, the Private Lawyer helps to mediate the dispute or resolve the injury by making her case for a particular resolution to yet a third person, a person who works for neither side.

This discussion raises another issue regarding the IVI Delay Principle: namely, what is required regarding the reasonableness of the belief that some action will have positive expected value with respect to bringing about a more equitable resolution. Obviously, it is difficult for an individual to have much information about precisely which actions will prove to be useful in this way, particularly at early stages in the litigation. Importantly, one only has to believe that the action in question has positive expected value—not that the action is *necessary* to bringing about an equitable resolution (so that if one didn't take the action, the resulting resolution would not be equitable). Thus, the question is whether the action is likely to improve the equity of the resolution, even given the delay the action imposes—whether the action is 'worth it' from a perspective of equity.

Even with this clarification, difficulties remain. First, there is a concern that because a Private Lawyer represents only one of the parties involved, what she knows about the case is somewhat one-sided. Second, there is a concern of what we might call *advocate bias*—the tendency of people hired for the purpose of (or otherwise charged with) helping or explaining or defending some view to begin to see or filter the world in partial or blinkered ways, so that it is harder to see or interpret evidence that suggests that this view is false or incorrect. These two concerns might lead a Private Lawyer to see certain delaying actions as improving equity in cases in which this belief seems unwarranted. Both of these concerns suggest that it may take some work in order for a Private Lawyer's belief to be reasonable. Of course, a good lawyer will see the importance of identifying, investigating, and anticipating those facts and arguments that most support the position opposed to her client's view. This gains new importance on my account, however, and Private Lawyers may have to engage in explicit practices when considering whether some action meets the IVI Delay Principle test in order to keep themselves honest and in order for their beliefs to count as reasonable.

Under the IVI Delay Principle, several of the reasons for delay identified above will not be permissible reasons for which to take delaying actions. Consider, for example, resource exhaustion. In most cases, taking

delaying actions in order to exhaust the other side's resources will not contribute to bringing about a more equitable resolution. There might be exceptional cases in which the legal process appears to be aimed toward an inequitable resolution, and in which exhaustion of the other side's resources might meet the requisite test. Imagine, for example, that one's client is wealthy, considerably wealthier than her opponent. And one reasonably believes that one's client's case is meritorious—the dispute ought to be resolved in her favor. However, one also reasonably believes that because, say, the judge is strongly biased against people of one's client's socioeconomic class, one's client will not have the dispute resolved in her favor if the case goes to trial. In such a case, delay in order to exhaust may be morally permissible. The key, of course, is that both of one's beliefs must actually be reasonable (and not the product of biased or wishful thinking).

What about the use of delay in order to secure some legal advantage? As should be expected, whether use of delay in order to obtain legal advantage is morally permissible depends on the nature and source of the advantage that would be obtained. If one side can gain legal advantage through delay, this may undermine the central values of peace and productivity; it depends on whether the advantage gained leads to a more equitable resolution or a less equitable resolution. Consider, for example, one standard way in which delay can produce legal advantage: the worsening of available evidence (because the delay erodes witnesses' memories, for example, or makes witnesses harder to locate, or increases the chance that important evidence will be lost or destroyed). Given that a likely essential component of an equitable resolution is that the resolution is in line with the truth about material facts of the case, in most cases in which advantage could be secured in this manner, the resulting resolution would be straightforwardly less equitable, informed as it would be by less evidence, or lower quality evidence. There might be cases in which the worsening of available evidence actually improved the equity of the resolution—perhaps truthful testimony will point in a direction that is in fact incorrect—but these cases will be unusual. Or consider the use of delay to increase the likelihood of assignment to a judge whom one knows to be favorable to claims like those of one's client. Use of delay in this way would be impermissible unless one had reason to believe that this was not just better for one's client, but was also better for equity.

On the other hand, there might be cases in which delay to secure legal advantage is essential to a more equitable resolution. Consider, for example, a situation in which delay is necessary to provide time to track down the key witness, whose testimony will fundamentally alter the resolution of the dispute, and do so in a more equitable direction. Delay

still has costs—increasing the average length of legal processes makes people less likely to pursue legal resolution—and so Private Lawyers should attempt to do what they can without use of delay. But there will be instances in which delay to secure legal advantage is morally permissible. Or consider a situation in which a Private Lawyer faces a very short deadline—a deadline that gives her little time to do the factual and legal research necessary to represent her client in a way that seems adequate to her. In such a situation, if she can delay the proceedings to get more time to prepare, it is plausible that under the IVI Delay Principle she may do this, and even that she has an obligation to do so. She might not know enough to know that there is a key witness that she should track down, but she knows that she doesn't know enough to assess whether some particular resolution would be equitable or not. A resolution arrived at in such circumstances is not likely to be equitable, nor are the reasons supporting the resolution likely to be apparent. Again, however, one must consider the larger costs both to delay in general, and to securing delay on instrumental grounds of this sort. These costs provide reasons for all involved to help make such short time-line situations infrequent.

What about the use of delay by Private Lawyers to obtain some non-legal benefit for one's client? Cases in which this will be permissible will be even rarer, simply because it will be the unusual case in which obtaining some non-legal benefit will lead to a more equitable resolution of the particular dispute or injury. Some simple rescheduling situations will be like this—by moving a court date back a few weeks, one's client is able to finish an important work-related project (unrelated to the legal case). If she is not allowed to finish this project, this will be another cost imposed on her by the events that give rise to the dispute and the legal process of resolving the dispute itself, a cost which (let us assume) will not be recovered as part of the resolution, and which (we might imagine) will mean that the eventual resolution is less equitable than it might otherwise be. Rescheduling benefits of this sort must always be balanced out by the costs of delay, however, in the assessment of whether the IVI Delay Principle would permit the delaying action. Additionally, it is worth noting that whether an additional 'external' cost from the legal process is one that undermines the equity of the resolution turns, at least in part, on where the fault lies with respect to the creation of the injury or dispute itself. Other non-legal benefits of delay will often be straightforwardly in tension with the aim of bringing about an equitable resolution—such as delaying in order to put off paying some amount of damages for as long as possible—and it is therefore impermissible to take delaying actions for reasons of this sort.

3. Delay in the SVI Context

A different set of considerations affects the moral permissibility of taking delaying actions in the SVI Context. Individual Lawyers' clients typically face serious, stressful, if not potentially life-altering consequences, and so there are reasons to want the uncertain position those clients are in to be resolved sooner rather than later, other things being equal. And in the criminal context, at least, there may be individuals—victims or the families thereof—who have an interest in having the legal process move as quickly as possible. And in every SVI case, there is some State interest in the background which, other things being equal, it is likely better to realize sooner rather than later. All of these interests in speed must be qualified; it is an interest in speed but only insofar as speed is compatible with precision—getting the 'right' result based on whether the triggering conditions actually obtain or not.

Those individuals who know that the triggering conditions do obtain, and that this is likely to eventually be demonstrated, may not be in any particular hurry to have the appropriate consequences befall them, if they suspect that this is their fate. But this interest in delay, which falls under the non-legal benefit category of reasons for seeking delay, is not a proper reason for a client's lawyer to take delaying actions. If the triggering conditions obtain, individuals have no legitimate right to suffer the relevant consequences later rather than sooner. On my account, it is no part of the Individual Lawyer's moral responsibility to help her client avoid what consequences may appropriately befall her client in the situation in which the relevant triggering conditions actually obtain. The Individual Lawyer can argue about what the relevant triggering conditions are; or can argue that those conditions do not obtain; or that there is no or inadequate evidence that they obtain; or that there are reasons that even though the triggering conditions do obtain, the consequences should be different or lessened for her particular client. But it is not the Individual Lawyer's moral responsibility to help her client avoid the appropriate consequences if the relevant triggering conditions do obtain, nor is it her duty to put off these consequences for as long as possible, nor is it permissible for her to take actions solely to achieve that end.

Given the role of the Individual Lawyer on my account, here is the condition for permissible tactical delay in the SVI context:

SVI Delay Principle: An Individual Lawyer may take an action, A, that will delay the legal process if and only if she reasonably believes that, by doing A she will make it more likely that

(a) the State will not take action against her client unless the relevant triggering conditions actually obtain⁹⁷; and

(b) if the triggering conditions obtain, the client will receive an outcome which is legally appropriate, given the client's situation (including possible excusing or extenuating circumstances)

than if she does not do A.

The core animating idea, as with all moral responsibilities of Individual Lawyers, is that the lawyer's role is to do what she can to ensure that the State takes action against her client only if the relevant triggering conditions obtain; and, if they obtain, that only legally appropriate consequences follow. There are several things to note about this principle. First, it only speaks to when delay is morally permissible. It doesn't require Individual Lawyers to delay in every instance in which the lawyer reasonably believes that delay makes it more likely that the State will not take action against her client unless the relevant triggering conditions obtain. Other principles govern when the disclosure or communication of even confidential information to the court or the opposing side is morally appropriate or morally required. Second, it is not balanced against considerations about the interests of others—victims, society in general, or even the client himself—that might be affected by delay. This is different than in the IVI context, in which other effects of delay are always relevant. The reason for this difference is that in the SVI context, the moral importance of preventing State action when it is not warranted takes precedence, in part because the interests of victims, society, and others in a quick resolution have as a necessary predicate that the resolution is an appropriate one.

It should be clear that, under the SVI Delay Principle, delay for some scheduling purposes will be appropriate, but that the conflicts must be significant, and that delay for reasons of personal enrichment will never be appropriate. And although the State's resources are not unlimited, the strategy of delay in order to exhaust the State's resources is not typically practicable, and it is rare that it would satisfy the SVI Delay Principle (particularly in cases of the kind under discussion, in which the Individual Lawyer is uncertain about whether the triggering conditions obtain).

The principle makes no explicit provision for delay in order to obtain non-legal benefits. This might increase the cost of being brought into an

⁹⁷ Or, as an alternative but equivalent formulation, that the State will take action against her client only if the relevant triggering conditions obtain.

SVI case for individuals (and provides one reason that prosecutors and other agents of the State must exercise their power to bring cases against individuals with care), but it is a concession to the importance of the State and other interests in quick resolution (insofar as speed is compatible with accuracy), and an acknowledgment that in the SVI context, what is of paramount importance is making sure that the State acts only if the relevant triggering conditions obtain. On the other hand, in some situations, if one's client faces problems or concerns that rescheduling could ameliorate, and if these concerns are sufficiently serious so that one's client is considering capitulating to the State even while contesting that the triggering conditions obtain, an Individual Lawyer might appropriately take actions that would delay the process, as condition (a) would be satisfied.

What the SVI Delay Principle says about delay in order to secure legal advantage is more complicated. Consider a few examples of how the SVI Delay Principle applies. First, consider a case in which an Individual Lawyer is uncertain, and reasonably so, about whether the relevant triggering conditions obtain. That Individual Lawyer knows that a witness, call him *Damaging Witness*, will testify truthfully in a way that suggests that the triggering conditions do obtain, and harms her client's argument that the relevant triggering conditions do not obtain. The lawyer also knows that, if she can delay the case for a few months (assume there are actions she could take that would have this effect), *Damaging Witness* will become unavailable to testify (through some innocent series of events).

What does the SVI Delay Principle imply about this case? Given her present epistemic situation, in which she is uncertain about whether the relevant triggering conditions obtain or not, she has no reason to think that by delaying she will make the (a) and (b) conditions more likely to obtain. In particular, although she may reasonably believe that, by delaying, she will make it more likely that *the State will not take action against her client*, she would not thereby make it more likely that *the State will take action against her client only if the relevant triggering conditions actually obtain*. This requires some explanation. Consider some arbitrary event *E*. Making it more likely that (1) *E will occur* is not the same thing as making it more likely that (2) *E will occur unless some other condition, C, obtains*. If we want to go to Mars, but only if it isn't too expensive, then we don't want to just take actions that make it more likely that we will go to Mars (full stop); we want to take actions that will make it more likely to go to Mars *so long as it isn't too expensive*. Here, the efficacy of delay is insensitive to what the facts actually are; the delay is simply *information reducing*, and thereby (given other background facts) makes successful prosecution (or whatever) less likely.

Perhaps more to the point, given her uncertain epistemic situation, it is

not reasonable for the lawyer to believe that by delaying she is making (a) *and* (b) more likely. After all, the delaying action will make satisfaction of (b) less likely if the triggering conditions obtain that if she did not take the delaying action. The information being reduced is ostensibly relevant to what it is reasonable to believe about whether the triggering conditions obtain or not. This information is relevant not just to what a court or other ultimate decisionmaker should believe, but also to what the lawyer herself should believe, given her current uncertain epistemic situation. The Damaging Witness's testimony is relevant evidence, and all that the Individual Lawyer knows about the testimony is that it suggests that the triggering conditions do obtain.⁹⁸ Given this, it is not reasonable for the lawyer to believe that by delaying, she is making it more likely both that (a) the State will not take action against her client unless the relevant triggering conditions actually obtain and (b) if the triggering conditions obtain, the client will receive an outcome which is legally appropriate.

Contrast this with a case in which an Individual Lawyer, also reasonably uncertain about whether the relevant triggering conditions obtain, knows that by delaying, she can make it so that a witness, call him *Helpful Witness*, will become available. Helpful Witness, as his name suggests, will testify truthfully in a way that helps her client's argument that the relevant triggering conditions do not obtain. If the Individual Lawyer knows only this, it does seem reasonable for her to believe that by taking this action, she is making it more likely that the State will not take action against her client unless the relevant triggering conditions actually obtain.⁹⁹ She is considering delaying in order to present truthful information relevant to the question of whether the triggering conditions obtain—that alone makes it reasonable to believe that she is making it more likely that the State will not take action against her client unless the relevant triggering conditions actually obtain. In general, delay that increases information about whether the triggering conditions obtain or not will be morally permissible, while

⁹⁸ Now, it is possible that in a more unusual kind of case, the Individual Lawyer, although uncertain about whether the triggering conditions obtain, is certain that the Damaging Witness's testimony is misleading about the question of whether the triggering conditions obtain. This might be because the lawyer is certain that the Damaging Witness is lying, or because the Individual Lawyer knows some additional information that suggests that the testimony, although truthful, is misleading or irrelevant. In such a case, the Individual Lawyer might be ethically permitted to delay, although it is possible that a more effective course of action would be to use the information she has to undermine the Damaging Witness's testimony with the jury or court in the same way that it was undermined for her.

⁹⁹ It is possible, of course, that Helpful Witness's testimony, truthful though it may be, is ultimately misleading—in fact, the relevant triggering conditions do obtain. If an Individual Lawyer knew this, it would not be permissible to delay in order to have this testimony available.

delay that decreases information of this sort will not be.

There is a third kind of case, in which an Individual Lawyer just knows that there is an individual who might know something relevant, without knowing whether the testimony will be damaging or helpful to her client's argument that the triggering conditions do not obtain. Call such a witness a *Black Box Witness*. In certain circumstances, an Individual Lawyer might reasonably believe that delaying in order to allow the Black Box Witness's testimony will make it more likely that the State will not take action against her client unless the relevant triggering conditions obtain. In particular, she might be either in the dark about what happened—so any information is valuable—or she might be somewhat desperate to counter the State's account—so it is worth taking the risk of finding out what is in the black box. Whether or not a lawyer actually should take a black box risk of this sort is a hard question, not governed by the SVI Delay Principle. That principle only licenses her to take the risk in certain cases.

The discussion has focused on one kind of strategic choice concerning delay in order to impede testimony from a Damaging Witness, or make available testimony from a Helpful Witness or a Black Box Witness. A full discussion of the range of strategic choices that confront Individual Lawyers is outside the scope of this article. It should be clear, however, that Individual Lawyers will be morally permitted to take those actions that they reasonably believe will 'improve' or tend to improve the fit between State action and the actual facts of the case (aligning things so that the State does not act when the triggering conditions do not obtain, or so that the State will act when they do), and that they will be morally prohibited from taking actions that they reasonably believe will 'worsen' the fit.

One might object to the SVI Delay Principle and the Multi-Context View's general take on Individual Lawyering on the grounds that Individual Lawyers should be able to represent their clients more aggressively, doing whatever they can to prevent the State from acting against them, just as (the objection suggests) the State will be doing whatever it can, or at least whatever it can within certain parameters, to act against their clients. On this view, the Adversary System involves this kind of full-on, no-holds-barred partisan advocacy, and the truth about the matter is more likely to emerge through a process of this sort.¹⁰⁰ Some defend this view as particularly appropriate in the context of criminal defense, even if it is inappropriate in other contexts.¹⁰¹

The problem with this view is that it has no basis in reality. This is not the place to mount a full attack on this view, but it is clear that there are some actions, and kinds of action, which will only undermine the ability of

¹⁰⁰ See *supra* notes 20-27 and accompanying text.

¹⁰¹ See *supra* note 6.

the process to get the right result. Consider, for example, delaying in order to keep a Damaging Witness from testifying truthfully, when one does not know that the witness's testimony is somehow misleading or distracting. Taking actions of this sort simply reduces the relevant information available. It is no answer to allow the other side to do the same thing in similar circumstances—this is only to compound the problem: as the adage goes, two wrongs don't make a right. This makes the system *fair* in a certain way, but it does nothing to improve the *accuracy* of the process. William Simon argues, "The problem with aggressive defense is that it impedes the state's ability to convict the guilty without affording any significant protection to the innocent."¹⁰² Allowing delay in the above circumstance would make it so that some innocent people will not be convicted, but it does this indiscriminately, simply by making it so that fewer people in general will be convicted. Any arbitrary rule that made things harder for the State would have a similar effect—e.g. a rule that the State could not do any independent investigation, or that the State could only introduce a total of five pieces of evidence, or could only file briefs that were under three pages in length. Even if we are more concerned with convicting the innocent than letting the guilty go free, there are limits to what this concern permits—we would not, for example, endorse a rule that allowed Individual Lawyers to destroy potentially damaging evidence, even though such a rule would make it so that some innocent people would avoid conviction. The SVI Delay Principle requires lawyers to strike an appropriate balance between acting in their clients' interests while doing so within parameters that are morally defensible.

This section has discussed how the Multi-Context View's take on the purposes of Individual and Private Lawyers, respectively, shapes and constrains the moral principles that govern the decision to represent a client and the decision to use tactical delay. These are, of course, just particular examples of how that view will apply in different kinds of cases. A full defense and presentation of the view would require elaboration of a full range of such principles, including discussion of how those principles fit together. The hope is that in discussing these two examples in some detail, the full outlines and implications of the view will be more apparent.

V. OBJECTIONS AND REPLIES

This Section will briefly present and respond to three different objections.

Objection One: Isn't the Multi-Context View's take on the IVI context,

¹⁰² SIMON, *supra* note 4, at 175.

and in particular on the role of Private Lawyers, just as idealized as the moralized views of Simon and Luban, and therefore just as problematic? Additionally, shouldn't we just acknowledge that Private Lawyers are basically just for-profit businesspeople, hired guns?

Reply: No. Unlike the views of Simon and Luban, the background value story regarding the IVI context is one that is specific and appropriate to the circumstances of the Private Lawyer. As should be clear, the basic background values of peaceful and productive resolution of private disputes and injuries give detail and structure to the principles governing the conduct of Private Lawyers in specific circumstances. Private Lawyers are not instructed to rely entirely on their personal moral beliefs or their beliefs about justice to guide their decisionmaking. In response to the second "realist" point, it is worth stressing that perhaps the largest failing of the Adversarial System defense of the standard conception is its inadequacy in providing a moral justification for the conduct of what this article calls Private Lawyers. By permitting and even requiring lawyers to engage in conduct that worsens conflicts; opens up social rifts and divisions; allows and even causes harms and injuries to go unaddressed; enables individuals to avoid the social costs of their actions; and so on, the standard conception account of legal ethics incurs a heavy moral debt, one that it is not clear that the Adversary System defense can discharge. Although their own positive accounts of legal ethics are flawed, Luban and Simon and others have established a substantial and compelling case against the standard conception.¹⁰³

Objection Two: Isn't the SVI context sketched too broadly—wouldn't it be more appropriate to treat the criminal context as different and unique (as Luban and others have done¹⁰⁴), and to leave other instances of State action against individuals in the same category as those areas covered in the IVI context?

Reply: No. The same concerns about the legitimate application of general laws to particular individuals arise in other non-criminal contexts such as immigration law, child welfare law, mental health law, and so on. Additionally, there is no morally principled way of drawing a line between the criminal context and these other contexts. Along any dimension of "seriousness," the seriousness of consequences (deportation, involuntary commitment, termination of parental rights) in these other contexts can equal or exceed the seriousness of (at least some) consequences in the criminal context.

¹⁰³ See generally, SIMON, *supra* note 4, at 26-76; LUBAN, *supra* note 6, at 50-147.

¹⁰⁴ LUBAN, *supra* note 6, at 62-65.

Objection Three: Even if one grants that the Multi-Context View gets the purposes of lawyers right with respect to the different contexts, this leaves open the question of whether these purposes are (a) the *only* appropriate aims of Individual and Private Lawyers, respectively, and (b) whether these aims are constrained in any way.

Reply: The identified aims are not the only appropriate aims of individuals occupying those roles, nor are those aims to be pursued without constraint. Rather, the aims described above for Individual Lawyers and Private Lawyers, respectively, are simply those aims that are distinctively aims of people occupying those particular roles. These aims are distinctively theirs, qua Individual or Private Lawyer. This does not mean all other aims of theirs vanish. For one, all of their normal pursuits and projects still provide them with aims of various sorts. Coming to occupy these particular roles does not automatically eliminate all other aims. Similarly, Individual and Private Lawyers, although their moral obligations may be altered because of the roles they occupy, are not unconstrained by all other moral considerations. Perhaps the greatest mistake of the dominant view is the suggestion that in virtue of occupying the role of lawyer so many of one's ordinary moral obligations simply disappear. The important point here is just that even if being a lawyer does alter some of the moral landscape for an individual, it does not remove all other moral considerations, and in some cases these other considerations will trump. It is true that becoming a lawyer, and acting as a lawyer, does require one to take up certain aims—those described above—whether one is an Individual Lawyer or a Private Lawyer. And therefore it is true that one shouldn't take on this role if one is unwilling to pursue these aims alongside, and perhaps (in some cases) instead of, whatever other aims one already has. The aim of the Multi-Context View is not to eliminate all possible sources of moral conflict, but to reduce the space between the role of the lawyer and ordinary morality, and to identify a conception of the lawyerly role that makes moral sense; that is of evident moral value.

CONCLUSION

This article has presented and defended a new theory of legal ethics—the Multi-Context View—on which what lawyers are morally permitted and required to do is sensitive to the context in which they are working, and their particular roles in that context. In particular, lawyers work in three different contexts: the context in which the State pursues action against a particular individual (the SVI context), the context in which one private individual seeks to redress an injury or resolve a dispute with another private individual (the IVI context), and the context in which an individual

challenges some action of the State (the IVS context). Individual Lawyers in the SVI context have the functional role of protecting individuals from the threat of State domination and illegitimate State action by helping to ensure that the State takes action against particular individuals only in those cases in which the relevant triggering conditions actually obtain. Private Lawyers in the IVI context have the functional role of helping to achieve social peace and productivity by helping to ensure that disputes and injuries between private individuals are redressed equitably through the legal system. For both Individual and Private Lawyers, then, there is an account of what they should help to bring about. These functional roles shape and constrain the ethical principles governing the conduct of lawyers in these contexts. The article then considered what the Multi-Context View would require and permit of lawyers with respect to the decision of whether to represent a client and the issue of whether and when use of tactical delay was morally permissible, and contrasted these implications with what the standard conception of legal ethics would require and permit.

Let me conclude with two final thoughts. The first thought is that, unlike with some of the accounts of legal ethics, there is a relatively natural way in which to translate the ethical picture offered into a legal code. The basic idea here would be to have different professional rules that apply to lawyers working in the different contexts, just as there are different professional rules now for lawyers working as prosecutors. Rather than having a monolithic model code or model rules, there could be a model code that was divided into two or three parts, each part covering lawyers working in a different context. This needn't be unduly complex, and there could even be background rules or default rules (even just a reversion back to the existing Model Rules) that applied for those blended cases at the intersection of one or more of the contexts. Of course, given the details I've suggested, the content of the legal rules would be dramatically different, and there are reasons to be wary of shifting too quickly from ethics to law, including reasons stemming from lack of full compliance and from concerns about the current structure of the legal marketplace.

Stepping back a bit, the article has argued (1) that there are many different areas of law, which give rise to several importantly different legal contexts, (2) that law in these contexts has different background purposes and different normative significance, (3) that how a lawyer ought to behave in a particular legal context is shaped and constrained by the background purpose and normative significance of the law in that particular legal context, and therefore (4) that the ethics of legal representation is not uniform across contexts—legal ethics must be context-sensitive. The second thought is that one can accept this basic picture even if one does not accept my particular partitioning of legal contexts, or my particular views

about the background purposes of law in these contexts, or my particular construal of the way in which these background purposes affect how lawyers ought to behave. The hope is that the basic ethical picture is plausible, even if one is not fully convinced by the particular way in which I've filled in that basic picture.