

C Fordham Law Review
April, 2002**Colloquium: What Does It Mean to Practice Law "In the Interests of Justice" in
the Twenty-First Century?*****1699 THE LAWYER AS CITIZEN**
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I. The Moral Schizophrenia of the Lawyer-Person

The moral schizophrenia of the lawyer-person wrought by the American adversarial system's differentiation of professional morality from personal morality is at once alienating and anesthetizing. Alienating in that it separates a person from her/his actions taken in performing a professional role by attributing responsibility for these actions and their consequences to the role itself rather than to the individual. Anesthetizing in that it permits if not requires a professional to constrict the moral universe inhabited on the job, extruding moral sentiments that she/he otherwise might feel, numbing the moral sense of ordinary personal responsibility.

There are basically four ways to treat this problem of split moral personality. The first and second are to jettison one or the other of the conflicting moralities to strive completely either to professionalize (de-personalize) or to personalize (de-professionalize) a lawyer's morality. The third is to deny the conflict altogether, by arguing that a good lawyer is ipso facto a good person. And the fourth is to try to bridge the discontinuity between professional and personal morality, by developing a conception of integrated moral personality and responsibility.

The first--the lawyer as professional--is represented by what William H. Simon has called "the Ideology of Advocacy" [\[FN1\]](#) and by the *1700 ABA Model Rules of Professional Conduct. The second--the lawyer as person--is manifested in what might be termed "the Philosophy of Personal Responsibility," expressed in its most extreme form by Jean-Paul Sartre in his early existentialist period (when he held that to take role moralities seriously is a form of "bad faith," an evasion of one's absolute responsibility for who one is and what one does). [\[FN2\]](#) It is illustrated in somewhat less extreme form by the Kantian philosopher John Ladd (who argues that the very idea of an organized professional ethics is an absurdity, an intellectual and moral confusion, [\[FN3\]](#) and also evidently thinks that the notion of role morality, like the causal theory of organizational responsibility, provides comfort to those who wish to evade personal moral responsibility). [\[FN4\]](#) In still less radical form, the lawyer as person is represented by Simon (who calls for a non-professional ethics), [\[FN5\]](#) Richard Wasserstrom (who advocates some degree of de-professionalization), [\[FN6\]](#) and Arthur Applbaum (who argues that professional roles do not shield actors from "the public and political reasons that actors have by virtue of being simply persons or citizens"). [\[FN7\]](#) The third--a good lawyer as ipso facto a good person--is expressed by Charles Fried's conception of "the lawyer as friend." [\[FN8\]](#)

The fourth--which I shall label "the lawyer as citizen"--I mean to sketch. It has much in common with the work of Deborah Rhode, [\[FN9\]](#) David Luban, [\[FN10\]](#) Robert Gordon, [\[FN11\]](#) Thomas Nagel, [\[FN12\]](#) Sanford & Mortimer Kadish, [\[FN13\]](#) and Gerald Postema [\[FN14\]](#) (and is for the most part *1701 compatible with that of Ladd, Simon, Wasserstrom, and Applbaum). [\[FN15\]](#) But it lays emphasis upon the lawyer's responsibility not just to the client or to herself/himself, but also to the laws themselves, understood not on a positivist model of the rule of rules [\[FN16\]](#) but on a Rawlsian/Dworkinian constructivist model of law as integrity. [\[FN17\]](#) In short, it emphasizes not only professional integrity and personal integrity, but also what Dworkin calls the integrity of the law itself. [\[FN18\]](#) A pre-

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supposition of this quest is that there can be no coherent and defensible conception of the lawyer's responsibilities--whether professional, personal, or principled--apart from a coherent and defensible political philosophy and jurisprudence.

Practicing lawyers are understandably dubious of the suggestion that political philosophy and jurisprudence have anything to teach them about professional morality, whether as distinguished from, or integrated with, personal morality. Admittedly, it would be useless and inapt to tell practicing lawyers that whenever they are faced with a complex moral dilemma they simply should ask, "What course of action would the parties in John Rawls's original position [FN19] choose?" Moreover, if confronted with a practical conflict, they hardly would find it helpful to be told, in Nagel's terms, that given the singleness of decision and the fragmentation of value, they must exercise what Aristotle called practical wisdom, or judgment. [FN20] Nonetheless, how one conceives law and the legal system, as a matter of political philosophy and jurisprudence, importantly bears upon how one conceives the lawyer's role and responsibilities as well as to whom these responsibilities are owed. F.H. Bradley reportedly said that one who denies that metaphysics is meaningful is a fellow metaphysician *1702 oneself. The same goes for every branch of philosophy and every practical problem in life.

Lord Brougham stirringly formulated the zealous partisanship conception of the lawyer's role during his defense of Queen Caroline as follows:

[A]n 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, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion. [FN21]

What is eloquent and inspiring is not necessarily coherent and defensible. Vince Lombardi, in his own way, eloquently inspired his football players with the slogan "Winning isn't everything, it's the only thing." We might well commend this as locker-room pep-talk; it is doubtful that we would base a conception of good sportsmanship upon it. Why, then, would we base a conception of professional responsibility and good lawyering upon Lord Brougham's remarks instead of consigning them to speeches at law school graduations and American Bar Association conventions? The first and third routes above--the Ideology of Advocacy and the lawyer as friend--attempt to provide a justification of the zealous partisanship conception of the lawyer's role. I shall criticize these in reverse order, putting to one side the differences between the criminal and the civil contexts.

II. Fried's Lawyer as Heteronomous, Meretricious Friend

Unlike Montaigne, who sought to reconcile the tension between professional morality and personal morality by leading two radically separate lives [FN22]--being a good lawyer in public and a good person in private--Charles Fried argues that there is no fundamental incompatibility between the two, indeed, that a good lawyer is ipso facto a good person. [FN23] It is easy to overlook this aspect of his argument by concentrating upon his conception of the lawyer as friend. This latter notion is grossly misinterpreted if we understand "friend" in any plausible ordinary language sense. For in ordinary language, the expression "special-purpose friend" rings quite oddly, as *1703 Fried readily acknowledges. [FN24] And what Fried offers as "the classic definition of friendship"--"that like a friend [the lawyer] . . . adopts your interests as his own" [FN25] (albeit for money)--does sound rather more like the classical notion of prostitution, as Simon pointedly suggests. [FN26]

Whatever else may be said of it, Fried's conception of the moral foundations of the lawyer-client relation does possess the virtue of being rooted explicitly in a general moral theory. Appropriately enough, its faults are as deep as the flaws in this theory. Only if we understand this will we be able to comprehend that "friend" is a term of art in Fried's libertarian theory of right and wrong. The moral universe of this theory, much like that of Robert Nozick's libertarian theory, is sparsely populated, inhabited almost entirely by negative individual rights. [FN27] Accordingly, virtually the only way one can wrong another person is to violate her/his rights--which is to say that Fried's theory of right and wrong is more aptly dubbed a theory of rights and wrongs. There is hardly any independent concep-

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tion of good and bad, [FN28] from which standpoint the lawyer within her/his rights could be said not to be a good lawyer, let alone a good person. Within this barren libertarian moral universe, "friend" is the category of claimants whose demands on me I am not entitled to brush off with a cold stare, the response "I am within my rights in ignoring you," and the query "Or have I wronged you by violating your rights?" If the central question is "And Who is My Neighbor?", [FN29] then perhaps "the lawyer as neighbor" would be a more appropriate appellation than "the lawyer as friend."

Fried says that his conception of the lawyer as friend "grows out of the profoundest springs of morality: the concepts of personality, identity, and liberty." [FN30] The lawyer, as the client's special-purpose friend in regard to the legal system, [FN31] ministers to "the need to maintain one's integrity as a person" [FN32]--just as the doctor, as the client's special-purpose friend in regard to the body, "helps maintain *1704 the very physical integrity which is the concrete substrate of individuality." [FN33] Fried explains: "When I say the lawyer is his client's legal friend, I mean the lawyer makes his client's interests his own insofar as this is necessary to preserve and foster the client's autonomy within the law." [FN34] The lawyer so understood is a devoted and dear friend indeed.

To Fried, it does not matter that such legal friendship, unlike natural friendship, is non-reciprocal, and that it is bought and paid for. [FN35] To raise these objections is to fail to understand his conception of legal friendship. For he introduces this notion

to answer the argument that the lawyer is morally reprehensible to the extent that he lavishes undue concern on some particular person. The concept of friendship explains how it can be that a particular person may rightfully receive more than his share of care from another: he can receive that care if he receives it as an act of friendship. [FN36] But it would seem that Fried's lawyer as limited-purpose friend for hire, in specially caring for the autonomy of the client's moral personality through a relation that "systematically runs all one way," [FN37] ironically becomes the living instrument [FN38] of the client--that, if you will, the meretricious friend becomes the heteronomous [FN39] agent or tool.

Moreover, Fried claims that whenever a lawyer exercises her/his legal right to help whatever "friends" she/he chooses, she/he does something which is morally worthy, entitling her/him to self-respect. [FN40] Central to this claim is his argument that "legal counsel--like medical care--must be considered a good, and that he who provides it does a useful thing." [FN41] But neither lawyering nor doctoring, pace Fried, is good in itself. There is something to be learned about legal care from the fact that we can comprehend the concept of "the litigious society" [FN42] as a diseased society. As for medical care, the notion of "the therapeutic society" [FN43] as a sick society likewise is intelligible.

*1705 Fried anticipates the objection that, whatever the force of his analogy with respect to the personal relation between individual lawyers and individual clients, it is weaker with regard to the rather more impersonal relation between individual lawyers and institutional clients, whether governmental or corporate. (He says nothing about the further disanalogy brought about by the rise of institutional lawyers in mega-firms spread throughout the country and indeed the world.) Fried writes:

My model posits a duty of exclusive concern (within the law) for the interests of the client. This might be said to be inappropriate in the corporate area because larger economic power entails larger social obligations, and because the idea of friendship, even legal friendship, seems peculiarly farfetched in such an impersonal context. After all, corporations and other institutions, unlike persons, are creatures of the state. Thus, the pursuit of their interests would seem to be especially subject to the claims of the public good. [FN44] "But," Fried insists, "corporations and other institutions are only formal arrangements of real persons pursuing their real interests" [FN45]--leaving aside that he is in effect piercing the veil of the corporation's legal personality to get at the real persons, and thus the real moral personality behind it. Fried continues: "If the law allows real persons to pursue their interests in these complex forms, then why are they not entitled to loyal legal assistance, 'legal friendship,' in this exercise of their autonomy just as much as if they pursued their interests in simple arrangements and associations?" [FN46]

Now even if behind the veil of corporate legal personality we can find the autonomy of "real" moral personality, the

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fact remains that it is the corporation itself, not the real persons, that is the client. And the corporation as such possesses no autonomy, no moral personality. The translator of Kant's *The Metaphysical Elements of Justice*, [FN47] John Ladd, has argued with characteristic vigor that "[s]ince . . . formal organizations are not moral persons, and have no moral responsibilities, they have no moral rights. In particular, they have no moral right to freedom or autonomy." [FN48] This is not to deny that formal organizations are legal persons or that they have legal rights. It is, however, to undermine what Fried calls the moral foundations of the lawyer-corporate client relation. I do not wish to imply that corporations are necessarily immoral. But I do mean to suggest that because corporations are immortal--they have no soul to save or *1706 damn, [FN49] no autonomy to respect or violate--it would be a category mistake to think that Kant's second formulation of the categorical imperative--the end in itself formulation--applies to them. [FN50] Or, in Rawls's terms, corporations do not possess the two powers of moral personality--the capacity for a sense of justice and the capacity for a conception of the good--that are the necessary and sufficient conditions for being owed justice and respect. [FN51]

Quite apart from autonomy and heteronomy, categorical and hypothetical imperatives, the existence of large institutional clients and large institutional law firms raises complex issues of moral responsibility that the Ideology of Advocacy and Professional Responsibility has not adequately addressed. It has focused more on the problem of "dirty hands" [FN52] than on what Dennis F. Thompson has called the problem of "many hands." [FN53] One need not embrace the perhaps extreme view of Ladd, that the notion of organizational responsibility "gives aid and comfort to [individuals or groups of individuals] who want to avoid responsibility for the social decisions in which they participate," [FN54] to recognize that when the smiling face of the lawyer as friend meets the faceless organization man the opportunities for evasion of responsibility multiply.

Finally, Fried casts himself as a participant in the Kantian revolt against consequentialism [FN55] and in the consolidation of the paradigm shift in moral theory from teleological utilitarianism to deontological liberalism in the wake of the publication of Rawls's *A Theory of Justice*. But in characterizing justice as fairness as a deontological theory, and in differentiating it from utilitarianism as a teleological theory, Rawls writes: "It should be noted that deontological theories are defined as non-teleological ones, not as views that characterize the rightness of institutions and acts independently from their consequences. All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy." [FN56] Likewise, any conception of professional responsibility that offered what Deborah L. Rhode has termed "the refuge of role" [FN57] to an advocate who totally disregarded consequences-- indeed who, like Lord Brougham, maintained that it *1707 was her/his professional duty to "go on reckless of consequences" [FN58] and who accordingly disclaimed all personal responsibility for this course of action-- would be irrational, crazy, not to say irresponsible. [FN59]

Fried had begun by stating his moral inquiry thus: "Does the lawyer whose conduct and choices are governed only by the traditional conception of the lawyer's role, which these positive rules [of the ABA Model Code of Professional Responsibility] reflect, lead a professional life worthy of moral approbation, worthy of respect--ours and his own?" [FN60] I do not wish to imply that the lawyer as friend is the lawyer as enemy--that the lawyer who is friend to the institutional client, or who is a zealous advocate in the tradition of Lord Brougham, is necessarily an enemy to the common good. But I do mean to suggest that the good lawyer by this zealous partisanship conception of the lawyer's role is not as unproblematically the good person by Fried's purportedly Kantian moral theory as Fried would have us believe. [FN61] Therefore, we may doubt that the good lawyer is ipso facto the good person, and accordingly reject the third route.

III. The Ideology of Advocacy

What of the first route--leading the radically separate lives of the good lawyer in public and the good person in private--represented by the Ideology of Advocacy and Professional Responsibility? This route has been incisively criticized by Simon, Wasserstrom, Postema, and Rhode, among others. Wasserstrom argues for de-professionalization--for lawyers "to see themselves less as subject to role-differentiated behavior and more as subject to the demands of the moral point of view." [FN62] Along similar although more radical lines, Simon contends that if we are to take seriously the values invoked to justify the Ideology of Advocacy and Professional Responsibility-- individuality,

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autonomy, dignity, and the like--we must abandon this ideology and legal professionalism for an alternative conception of non-professional advocacy and non-professional ethics that furthers the "value of law" as opposed to the "rule of law." [\[FN63\]](#) In this respect, *1708 his proposal bears affinities to my notion of the lawyer as citizen pursuing the integrity of law itself understood on the constructivist model as the forum of principle as contrasted with the positivist model as the rule of rules. Postema eschews the routes of de-professionalism and professionalism in favor of a conception of integrated moral personality and responsibility along with a conception of the lawyer's role as a role that requires practical judgment having recourse to the ends it is designed to advance. [\[FN64\]](#) Finally, Rhode argues for a contextual moral framework that requires lawyers to accept personal responsibility for the moral consequences of their professional actions. [\[FN65\]](#) These conceptions mesh well with and help give content to the idea of the lawyer as citizen.

In order for professional role to offer the safe refuge from the ordinary moral responsibilities of the citizen that the Ideology of Advocacy seeks, the following preconditions would have to obtain. First, litigation would have to be what Rawls calls a situation of "pure procedural justice" instead of "imperfect procedural justice." [\[FN66\]](#) Second, it would have to be more nearly a completely autonomous language-game than it is, so as not to require resort to background morality in interpreting legal materials. And third, the lawyer's role would have to be more fixed or well-defined than it is, so as not to require recourse to institutional and background ends in exercising professional judgment.

It should be granted to the Ideology of Advocacy that the American adversarial system depends for its fair and just administration upon the performance of the differentiated roles of advocate, judge, and jury. For the lawyer advocate to confound these roles by negatively pre-judging a client's case would be to risk compromising the integrity of the system's processes and therefore tainting its outcomes.

So far well and good, but the Ideology of Advocacy seems to go further, whether it takes the high road of the crusading champion of rights or the low road of the cynical hired gun. It appears to blur or obliterate the distinction between imperfect procedural justice and pure procedural justice. "Imperfect procedural justice," Rawls writes, "is exemplified by a criminal trial": [\[FN67\]](#)

The desired outcome is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged. The trial procedure is framed to search for and to establish the truth *1709 in this regard. But it seems impossible to design the legal rules so that they always lead to the correct result. The theory of trials examines which procedures and rules of evidence, and the like, are best calculated to advance this purpose consistent with the other ends of the law. Different arrangements for hearing cases may reasonably be expected in different circumstances to yield the right results, not always but at least most of the time. A trial, then, is an instance of imperfect procedural justice. Even though the law is carefully followed, and the proceedings fairly and properly conducted, it may reach the wrong outcome. An innocent man may be found guilty, a guilty man may be set free. In such cases we speak of a miscarriage of justice: the injustice springs from no human fault but from a fortuitous combination of circumstances which defeats the purpose of the legal rules. [\[FN68\]](#) Rawls concludes: "The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it." [\[FN69\]](#)

By contrast, "pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed." [\[FN70\]](#) Rawls offers gambling as an illustration of this situation, and any other game would serve as well. The analogy that lawyers often draw between a trial and a game is overdrawn to the extent that it collapses the distinction between imperfect procedural justice and pure procedural justice. The same holds for the "fight" theory as against the "truth" theory of trials. [\[FN71\]](#) The trouble with the Ideology of Advocacy lies not in the shortcomings of procedural justice as such, contra Simon, [\[FN72\]](#) but in its tendency to confound imperfect procedural justice and pure procedural justice and in its concomitant plea of "the epistemological demurrer." [\[FN73\]](#) This is an unacceptable plea not only in the court of substantive justice, as Simon may imply, but also in the court of imperfect procedural justice.

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*1710 Furthermore, even if the legal process is analogous to a game, it is only a relatively autonomous language-game. Ladd uses Wittgenstein's concept of a language-game [\[FN74\]](#) in analyzing moral responsibility and instrumental rationality in formal organizations, [\[FN75\]](#) and Dworkin uses it in analyzing the institutions of legislation and adjudication. [\[FN76\]](#) The games of chess and baseball, for example, are quite autonomous from background morality and independent criteria of justice. That is, the moves, defenses, and referee's or umpire's decisions are made quite independently of considerations external to the rules and character of these games. Ladd writes: "Furthermore, while playing a game it is thought to be 'unfair' to challenge the rules. Sometimes it is even maintained that any questioning of the rules is unintelligible." [\[FN77\]](#) Were litigation a completely autonomous rather than merely a relatively autonomous language-game, the route of curing the moral schizophrenia of the lawyer-person by jettisoning personal morality for professional morality would be more plausible (and perhaps more palatable) than it is in fact. But legal materials are not self-interpreting, and in making arguments about how they should be interpreted, one must have resort to background morality. [\[FN78\]](#)

Moreover, unlike a doctor, who can minister to the needs of a patient without vouching for the justice of the patient's ends, the lawyer-advocate must affirmatively make the case for the justice of the client's ends, or at any rate must seem to endorse and must try to persuade others to adopt the points of view articulated on behalf of the client's cause. To the **citizen**, therefore, the **lawyer** appears hypocritical or insincere in matters of grave importance to the polity. Wasserstrom suggests that this helps to account for the peculiar hostility that is directed by lay persons toward **lawyers**: "The verbal, role-differentiated behavior of the **lawyer** qua advocate puts the **lawyer's** integrity into question in a way that distinguishes the **lawyer** from the other professionals." [\[FN79\]](#)

It may be that, whatever the **lawyer** realizes when reflecting upon the adversarial system from the external, critical standpoint of the philosopher, the **lawyer** qua advocate is obligated by role and bound psychologically to blur [\[FN80\]](#) or obliterate the distinction between pure and imperfect procedural justice. (Perhaps the fight theory alone is comprehensible to those engaged in legal combat.) For one thing, when the lawyer is discharging the responsibilities of the role of *1711 advocate within the trial process, the "theory of counter attitudinal advocacy" [\[FN81\]](#) suggests that she/he may persuade herself/himself in the process of trying to persuade judge and jury. This may occur for reasons of cognitive dissonance, incentive, or self-persuasion.

For another, the prejudices (in Hans-Georg Gadamer's sense) [\[FN82\]](#) that an interpreter of legal materials brings to bear upon their interpretation is importantly constitutive of understanding. There are no interpretive "brute facts" that are "just there" prior to any "interpretive strategy." [\[FN83\]](#) And the prejudices that the advocate-interpreter is bound by role to bring to bear in constructing legal arguments are pro-client--happily for the client and to some degree happily for the psyche of the lawyer. Both the theory of counter attitudinal advocacy and the hermeneutic conception of understanding thus offer some comfort to the split moral personality of the lawyer. Unhappily for the lawyer, she/he may have to argue different sides on a given issue from one case to the next. John Stuart Mill may well be right that "[h]e who knows only his own side of the case knows little of that." [\[FN84\]](#) Fortunately for the system, truth may out from the clash of both sides, but unfortunately for the lawyer, who may have to make the case for both sides, not truth but skepticism may out.

What Nagel has well called "the fragmentation of value" [\[FN85\]](#) both lends some plausibility to the Legal Process tradition's project of allocating institutional roles [\[FN86\]](#) and suggests its ultimate limitations. As against the grand systematizers who would develop a reductive unification of ethics, Nagel provides a more pluralistic conception of five fundamental types of value: special obligations, rights, utility, perfectionist ends, and private commitments. [\[FN87\]](#) Roughly speaking, the Legal Process tradition allocates responsibility for utility to legislatures and for rights to courts, and it assigns special obligations of roles to the various sorts of participants in the legislative and judicial processes. But the very fragmentation of values and allocation of roles that is to facilitate the processes of decision may intensify as well as alleviate practical conflicts--conflicts thrown up by or rooted in the disparity between the fragmentation of value and the singleness of decision. [\[FN88\]](#) Their sound resolution requires practical *1712 wisdom or judgment, [\[FN89\]](#) but the allocation of roles seems to forbid anyone to exercise such all-encompassing

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judgment.

This appearance is sharpened to the degree that we conceive the allocated roles to be what Postema, following Mortimer and Sanford Kadish, [FN90] has termed "fixed roles" rather than "recourse roles." [FN91] If litigation were an institution completely autonomous from background morality, and if the role of a lawyer were as fixed as that of a clerk, there would be no need for her/him to have recourse to background and institutional ends in order to discharge professional responsibilities as well as personal responsibilities. Whatever shelter a fixed role may offer its occupant, however, a recourse role does not provide complete refuge from personal responsibility or at any rate it undermines the radical distinction between professional and personal responsibility that the Ideology of Advocacy is at pains to maintain.

If the Ideology of Advocacy and Professional Responsibility errs on one side in attempting to jettison personal responsibility, then the Philosophy of Personal Responsibility [FN92] may err on the other in trying to jettison professional responsibility and so to break down the partial though not complete refuge of role. Even if, as Nagel puts it, role-agents "seem to have a slippery moral surface," [FN93] there is something to the special status of action in a role. It does not necessarily bespeak bad faith, it is not inevitably an evasion of personal responsibility. Nagel suggests that "[i]f roles encourage illegitimate release from [ordinary] moral restraints it is because their moral effect has been distorted." [FN94] It is not only those who would cloak license in the responsibilities of role who distort the moral effect of roles; those who would completely disrobe role-agents may do likewise. For, as Nagel insists, "there is something to the idea of a moral discontinuity" [FN95] between personal and professional morality. But the discontinuity is not so great as to liberate and insulate the role-actor from all considerations external to the role itself.

The Kadishes distinguish two sorts of considerations that may guide the conduct of a role-agent. First, "role reasons"--reasons based on the constraints of his role tempered by whatever discretion recourse to role ends may afford him." [FN96] And second, "excluded reasons"--reasons that he may recognize as an individual but that in his role he *1713 cannot take into account." [FN97] They suggest that when the role reasons for undertaking an action and the excluded reasons conflict, a person committed to a role "does not simply weigh the role reasons equally against the excluded reasons, and then act according to whichever set of reasons is greater." [FN98]

Instead he acknowledges his obligation to his role by imposing an extra burden, or surcharge, so to speak, on the excluded reasons, so that they must have significantly greater weight than the role reasons, rather than merely greater weight, in order to sway him. [FN99]

The Kadishes argue, moreover, that in dealing with obligations of role, the surcharge on excluded reasons is either finite or infinite. First, "[i]mposing a finite surcharge is the practical result of being a person who at once accepts his obligation to a role and continues to think of himself as an individual with other commitments as well." [FN100] Second, "imposing an infinite surcharge is the practical result of being a person who puts his obligation to a role unqualifiedly first." [FN101] In the Kadishes' view, "[i]t is difficult to see how an absolutely unqualified commitment to any role can be defended." [FN102] To accept a role that imposes, or at least in its most rhetorically excessive moments seems to impose, an infinite surcharge would be tantamount to selling oneself into role-slavery. No profession, even if it could define a fixed role as contrasted with a recourse role, is entitled to exact such a surcharge. Role-slaves of this sort would be irresponsible **citizens**. The **lawyer** as **citizen** would submit to only a finite surcharge.

IV. The Lawyer as Citizen

Within the conception of the **lawyer** as **citizen**, I include the proposals of Simon, Wasserstrom, Postema, and Rhode, to say nothing of the implications of Nagel and the Kadishes. I also have in mind a notion of the **lawyer's** responsibility neither to the client nor to herself/himself but to the laws themselves, understood on the Rawlsian/Dworkinian constructivist model of law as integrity. [FN103] The **lawyer** as **citizen** looks upon the laws so understood with the reflective, critical attitude characteristic of what H.L.A. Hart calls the internal point of view, [FN104] or what Sotirios A. Barber terms the standpoint of the **citizen** as constitutionalist. [FN105] Conceptions of

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lawyer's responsibility have focused too much upon professional *1714 integrity and personal integrity and too little upon the integrity of the law itself. [\[FN106\]](#)

In *Punishment and Responsibility*, Hart suggests that the diverse applications of the word "responsibility" (for example, role-responsibility, causal-responsibility, liability-responsibility, and capacity-responsibility) may share a unifying feature encapsulated in its etymology, which suggests that the notion of an "answer" plays a central part. [\[FN107\]](#) He observes that the original meaning of the word "answer," as in the Latin *respondere*, "was not that of answering questions, but that of answering or rebutting accusations or charges, which, if established, carried liability to punishment or blame or other adverse treatment." [\[FN108\]](#) Hart argues that there is "a very direct connexion between the notion of answering in this sense and liability-responsibility." [\[FN109\]](#) And he contends that "[r]ole-responsibility is perhaps less directly derivable from the primary sense of liability-responsibility: the connexion is that the occupant of a role is contingently responsible in that primary sense if he fails to fulfil the duties which define his role and which are hence his responsibilities." [\[FN110\]](#)

To whom is the lawyer primarily responsible? That is, to whom must the lawyer ultimately answer? To the client? To the adversarial system? To the legal process merely, or to the legal substance also? To the laws themselves, and to the principles of justice that they should further? Let us imagine a dialogue between the laws and the lawyer analogous to the dialogue between the laws of Athens and Socrates in Plato's *Crito*. In holding the lawyer to moral account, would the laws be satisfied by a lawyer who took refuge in role in defense of a life at law spent, for example, in pursuit of the Ideology of Advocacy or in adherence to the Model Rules of Professional Conduct? Or would the laws more likely dismiss such a lawyer as a sophist unworthy of citizenship?

Suppose that in answering to the laws, the lawyer were passionately to quote Lord Brougham's stirring formulation of the zealous partisanship conception of the lawyer's role, which bears repeating:

[A]n 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, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of *1715 a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion. [\[FN111\]](#) What if the laws were to ask in reply, "Who gave you license to assume such a 'first and only duty' to the exclusion of your duties as a citizen, and therefore to exclude all considerations of consequences for your country?" Would it be a complete response for the lawyer to retort, "You, the laws, are the author of my acts, for the adversarial system that you have established prescribes the duties which define the lawyer's role, and I have but fulfilled these responsibilities. I am but an actor in your play."

This response perhaps is initially plausible, and indeed the trial is often analogized to the theatre, and the legal personae are accordingly likened to the *dramatis personae*. To hold the *dramatis personae* responsible for the consequences of their actions within the play would be absurd, not only because the play is fictitious, but also because the actors' scripted roles are quite well-defined. An actor need not answer to the literary critic; the author alone is responsible for the script.

But, it is not so to the same degree with the legal personae; lawyers may hide behind the professional mask to a lesser extent. For one thing, their roles are not so well-defined--their scripts call for much improvisation, and so they must extemporaneously exercise their creativity and judgment. For another, real world consequences for their fellow citizens and country follow from their actions, both when they play the routine parts and when they improvise, both when they may wear the professional mask and when we may pluck it from their faces. Lawyers thus may be held to answer to the moral critic and to the laws. They may attribute only partial authorship of their acts to the laws themselves and to the roles they define, which did not give lawyers license to abrogate fully their responsibilities as citizens. [\[FN112\]](#) De-personalization or professionalization "nourishes the illusion that personal morality does not apply to [a professional or official role] with any force, and that it cannot be strictly assigned to [one's] moral account." [\[FN113\]](#)

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***1716** And so, the **lawyer** as **citizen** promises to be superior, as a treatment for the moral schizophrenia of the **lawyer**-person, to the Ideology of Advocacy, which in its highest aspirations borders on sophistry, to the **lawyer** as friend, who turns out to be a heteronomous, meretricious friend, and to the Philosophy of Personal Responsibility, which strips **lawyers** altogether of the professional mask. Sanford Levinson once called for a Protestant constitutional revolution and the installation of the "lawyerhood of all **citizens**" akin to Luther's "priesthood of all believers." [\[FN114\]](#) Likewise, this essay is a call for the citizenship of all **lawyers**. [\[FN115\]](#)

[\[FN1\]](#). Professor of Law, Fordham University School of Law. I am happy to have the opportunity to publish this paper in the Fordham Legal Ethics Colloquium inspired by Professor Deborah L. Rhode's book, *In the Interests of Justice: Reforming the Legal Profession*. I had the good fortune (as a student at Harvard Law School) to take the required course on *The Legal Profession* from Deborah (while she was a visiting professor there in the 1984-85 academic year). Indeed, I wrote this paper for her course! For publication, I have updated the paper somewhat, but the main arguments remain the same. Happily (and I hope not just because I was a student in Deborah's course), there are affinities between my conception of the lawyer as citizen and Deborah's proposal for a contextual moral framework that requires lawyers to accept personal responsibility for the moral consequences of their professional actions. See Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* 66-67 (2000).

[\[FN1\]](#). William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 30, 30 [hereinafter Simon, *Ideology*]. More recently, Simon has called this approach "the Dominant View." William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* 7 (1998) [hereinafter Simon, *Practice of Justice*].

[\[FN2\]](#). Jean-Paul Sartre, *Existentialism and Humanism* (Philip Mairet trans., 1948).

[\[FN3\]](#). Geoffrey C. Hazard, Jr. & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation* 122 (3d ed. 1994) (excerpting John Ladd, *The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion*, in *Professional Ethics Activities in the Scientific and Engineering Societies* (R. Chalk et al. eds., 1980)).

[\[FN4\]](#). Cf. John Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 *Monist* 488, 513-14 (1970).

[\[FN5\]](#). Simon, *Ideology*, supra note 1, at 33-34, 130-44. In his important book, Simon argues for institutionalizing "a Contextual View." Simon, *Practice of Justice*, supra note 1, at 195-215.

[\[FN6\]](#). Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts.* 1, 12 (1975).

[\[FN7\]](#). Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* 109 (1999).

[\[FN8\]](#). Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060 (1976).

[\[FN9\]](#). Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000).

[\[FN10\]](#). David Luban, *Lawyers and Justice: An Ethical Study* (1988).

[\[FN11\]](#). Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. Rev.* 1 (1988).

[\[FN12\]](#). Thomas Nagel, *Ruthlessness in Public Life*, reprinted in *Mortal Questions* 75 (1979) [hereinafter Nagel,

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Ruthlessness]; Thomas Nagel, The Fragmentation of Value, reprinted in *Mortal Questions* 128 (1979) [hereinafter Nagel, Fragmentation].

[FN13]. Mortimer R. Kadish & Sanford H. Kadish, *Discretion to Disobey: A Study of Lawful Departures From Legal Rules* (1973).

[FN14]. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 *N.Y.U. L. Rev.* 63 (1980).

[FN15]. See also Tanina Rostain, [Ethics Lost: Limitations of Current Approaches to Lawyer Regulation](#), 71 *S. Cal. L. Rev.* 1273 (1998) (advancing an interpretation of Lon Fuller's view of **lawyers** that is similar to my notion of the **lawyer as citizen**).

[FN16]. See, e.g., Antonin Scalia, [The Rule of Law as a Law of Rules](#), 56 *U. Chi. L. Rev.* 1175 (1989).

[FN17]. See Ronald Dworkin, *Law's Empire* 176-224 (1986); John Rawls, *Political Liberalism* 90-99 (1993); see also James E. Fleming, [Constructing the Substantive Constitution](#), 72 *Tex. L. Rev.* 211 (1993).

[FN18]. See Dworkin, *supra* note 17, at 176-224; Ronald Dworkin, *Law as Interpretation*, 60 *Tex. L. Rev.* 527, 532, 543 (1982). Sharon Dolovich's analysis of integrity in this symposium, while it has affinities to this notion, seems to focus more on personal integrity than on the integrity of the law itself. Sharon Dolovich, [Ethical Lawyering and the Possibility of Integrity](#), 70 *Fordham L. Rev.* 1629, 1669-86 (2001).

[FN19]. John Rawls, *A Theory of Justice* 17 (1971). Nonetheless, posing questions through using Rawls's notion of the "veil of ignorance" can be a useful and illuminating thought experiment for modeling fairness and impartiality. See, e.g., Rhode, *supra* note 9, at 113.

[FN20]. Nagel, *Fragmentation*, *supra* note 12, at 135, quoted in Postema, *supra* note 14, at 67-68. Nonetheless, an important work in legal ethics does attempt to "rescue the virtue of practical wisdom from the embarrassment that now surrounds it." Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 51 (1993).

[FN21]. Fried, *supra* note 8, at 1060 n.1 (quoting 2 *Trial Of Queen Caroline* 8 (J. Nightingale ed., 1821)).

[FN22]. See [Charles P. Curtis, The Ethics of Advocacy](#), 4 *Stan. L. Rev.* 3, 20 (1951) (quoting IV *Essays De Montaigne* 152-53 (Variorum Charpentier ed., 1876)), quoted in Postema, *supra* note 14, at 63-64.

[FN23]. See Fried, *supra* note 8, at 1061.

[FN24]. *Id.* at 1071.

[FN25]. *Id.*

[FN26]. Simon, *Ideology*, *supra* note 1, at 108; see also Simon, *Practice of Justice*, *supra* note 1, at 19-20 (criticizing Fried's conception of the lawyer as friend).

[FN27]. See Robert Nozick, *Anarchy, State, and Utopia* (1974). See the incisive critiques by H.L.A. Hart, *Between Utility and Rights*, reprinted in *Essays In Jurisprudence and Philosophy* 198, 199-208 (1983), and Thomas Nagel, *Libertarianism Without Foundations*, 85 *Yale L.J.* 136 (1975) (book review).

[FN28]. It should be noted that the titles of the three parts of Charles Fried, *Right And Wrong* (1978), are "Wrongs,"

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"Rights," and "Roles." On good and bad, as against rights and wrongs, as moral categories, see Brian Barry, *And Who Is My Neighbor?*, [88 Yale L.J. 629, 636-43 \(1979\)](#) (reviewing Fried, *supra*), and Thomas Nagel, *Subjective and Objective*, in *Mortal Questions* 196, 203-04 & 204 n.8 (1979).

[\[FN29\]](#). Barry, *supra* note 28, at 629.

[\[FN30\]](#). Fried, *supra* note 8, at 1068.

[\[FN31\]](#). *Id.* at 1071.

[\[FN32\]](#). *Id.* at 1073.

[\[FN33\]](#). *Id.* at 1072.

[\[FN34\]](#). *Id.* at 1073.

[\[FN35\]](#). *Id.* at 1074-75.

[\[FN36\]](#). *Id.* at 1074.

[\[FN37\]](#). *Id.*

[\[FN38\]](#). By "living instrument," I mean of course to echo Aristotle, *Politics* 9-11 (Ernest Barker trans., 1962).

[\[FN39\]](#). See Immanuel Kant, *Foundations of the Metaphysics of Morals* *433 (heteronomy distinguished from autonomy).

[\[FN40\]](#). Fried, *supra* note 8, at 1074-75.

[\[FN41\]](#). *Id.* at 1077.

[\[FN42\]](#). See, e.g., *Doing Better And Feeling Worse: Health in the United States* (John H. Knowles, M.D. ed., 1977); Jethro K. Lieberman, *The Litigious Society* (1981).

[\[FN43\]](#). See, e.g., Ivan Illich, *Medical Nemesis: The Expropriation of Health* (1976); Philip Rieff, *The Triumph of the Therapeutic* (1966).

[\[FN44\]](#). Fried, *supra* note 8, at 1075-76.

[\[FN45\]](#). *Id.* at 1076.

[\[FN46\]](#). *Id.*

[\[FN47\]](#). Immanuel Kant, *The Metaphysical Elements of Justice* (John Ladd trans., 1965).

[\[FN48\]](#). Ladd, *supra* note 4, at 508.

[\[FN49\]](#). See Barry, *supra* note 28, at 643-51 (emphasizing the relationship between the "soul" and Fried's notions of

"integrity" and "autonomy").

[FN50]. See Kant, *supra* note 39, at *428-29.

[FN51]. Rawls, *supra* note 17, at 15-20, 29-35, 299-304; Rawls, *supra* note 19, § 77.

[FN52]. On "dirty hands" in relation to political action, see Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *Phil. & Pub. Aff.* 160 (1973).

[FN53]. Dennis F. Thompson, *Political Ethics and Public Office* 40-65 (1987).

[FN54]. Ladd, *supra* note 4, at 514.

[FN55]. See Barry, *supra* note 28, at 629-35.

[FN56]. Rawls, *supra* note 19, at 30.

[FN57]. Deborah L. Rhode, [Ethical Perspectives on Legal Practice](#), 37 *Stan. L. Rev.* 589, 617 (1985).

[FN58]. See *supra* note 21 and accompanying text.

[FN59]. Rhode argues for a contextual moral framework that requires lawyers to accept personal responsibility for the moral consequences of their professional actions. Rhode, *supra* note 9, at 66-67.

[FN60]. Fried, *supra* note 8, at 1061 (emphasis added).

[FN61]. I shall not take up the question raised by the Kantian Ladd, whether the very idea of a code of professional ethics is an absurdity--an intellectual and moral confusion. Hazard & Rhode, *supra* note 3, at 98 (excerpting John Ladd, *The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion*, in *Professional Ethics Activities in the Scientific and Engineering Societies* (R. Chalk et al. eds., 1980)).

[FN62]. Wasserstrom, *supra* note 6, at 12.

[FN63]. Simon, *Ideology*, *supra* note 1, at 33-34, 130-44; see also Simon, *Practice of Justice*, *supra* note 1, at 79-85 (arguing for furthering a substantive instead of a positivist conception of the law); *id.* at 138 (arguing for a "Contextual View" of legal ethics whereby "[l]awyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice").

[FN64]. Postema, *supra* note 14, at 64, 81-83.

[FN65]. Rhode, *supra* note 9, at 66-67. A similar conception inspires Russell Pearce's proposed Model Rule 1.0. Russell G. Pearce, [Model Rule 1.0: Lawyers Are Morally Accountable](#), 70 *Fordham L. Rev.* 1805 (2002).

[FN66]. Rawls, *supra* note 19, at 85.

[FN67]. *Id.*

[FN68]. *Id.* at 85-86.

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[FN69]. *Id.* at 86.

[FN70]. *Id.*

[FN71]. Compare Jerome Frank, *Courts on Trial* (1949), with Marvin Frankel, *Partisan Justice* (1978), and Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 *U. Pa. L. Rev.* 1031 (1975). Yet, Rhode might argue that, in the criminal context, "an ethic of zealous advocacy remains crucial." Rhode, *supra* note 9, at 74. Rhode appears to find the Ideology of Advocacy crucial both as compensation for the dearth of legal resources available to indigent defendants and in recognition of two "distinctive" features of criminal proceedings: "their potential for governmental abuse" and "their effect on individuals' lives, liberty, and reputation." *Id.* at 72.

[FN72]. Simon, *Ideology*, *supra* note 1, at 38.

[FN73]. This phrase is from Rhode, *supra* note 57, at 618, but I may be using it differently, to include as well what she calls "the appeal to agnosticism," if not everything she includes under "Skepticism: The Refuge of Role." *Id.* at 617, 620.

[FN74]. Ludwig Wittgenstein, *Philosophical Investigations* 7 (G.E.M. Anscombe trans., 3d ed. 1968).

[FN75]. Ladd, *supra* note 4, at 491-92.

[FN76]. Ronald Dworkin, *Taking Rights Seriously* 101-07 (1977).

[FN77]. Ladd, *supra* note 4, at 492.

[FN78]. See Dworkin, *supra* note 76, at 101-07.

[FN79]. Wasserstrom, *supra* note 6, at 14.

[FN80]. See Erwin Chemerinsky, *Protecting Lawyers From Their Profession: Redefining the Lawyer's Role*, 5 *J. Legal Prof.* 31 (1980).

[FN81]. *Id.* at 32-34.

[FN82]. Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2000) (1960).

[FN83]. See Stanley Fish, *Is There a Text In This Class?: The Authority of Interpretive Communities* (1980).

[FN84]. John Stuart Mill, *On Liberty* 35 (Elizabeth Rapaport ed., 1978).

[FN85]. Nagel, *Fragmentation*, *supra* note 12, at 128-41.

[FN86]. See, e.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[FN87]. Nagel, *Fragmentation*, *supra* note 12, at 129-33.

[\[FN88\]](#). Id. at 128, 134-35.

[\[FN89\]](#). Id. at 135.

[\[FN90\]](#). Kadish & Kadish, supra note 13, at 22-23, 33-36.

[\[FN91\]](#). Postema, supra note 14, at 81-83.

[\[FN92\]](#). See supra text accompanying notes 2-4.

[\[FN93\]](#). Nagel, Ruthlessness, supra note 12, at 75.

[\[FN94\]](#). Id. at 76.

[\[FN95\]](#). Id. at 80. Nagel makes this remark with reference to the discontinuity between the private morality of citizens and the public morality of persons who hold official roles, but it applies just the same to the discontinuity between the private morality of citizens and the professional morality of lawyers.

[\[FN96\]](#). Kadish & Kadish, supra note 13, at 27.

[\[FN97\]](#). Id.

[\[FN98\]](#). Id.

[\[FN99\]](#). Id. at 27-28.

[\[FN100\]](#). Id. at 28.

[\[FN101\]](#). Id.

[\[FN102\]](#). Id.

[\[FN103\]](#). See sources cited supra note 17.

[\[FN104\]](#). H.L.A. Hart, The Concept of Law 56-57 (1961).

[\[FN105\]](#). Sotirios A. Barber, On What The Constitution Means (1984).

[\[FN106\]](#). On the integrity of the law itself, see sources cited supra note 17.

[\[FN107\]](#). H.L.A. Hart, Punishment And Responsibility: Essays in the Philosophy of Law 212-14 (1968).

[\[FN108\]](#). Id. at 265.

[\[FN109\]](#). Id.

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[\[FN110\]](#). Id.

[\[FN111\]](#). See citation supra note 21.

[\[FN112\]](#). Benjamin Zipursky cautions that, contra Rhode, "[t]aking responsibility for all of the consequences of one's actions as a lawyer, or taking responsibility for the actions as if they were one's own, does not provide a tenable or defensible way of understanding the lawyer's role." Benjamin Zipursky, [Regulation and Responsibility for Lawyers in the Twenty-First Century](#), 70 Fordham L. Rev. 1949, 1955 (2002). Zipursky's point is not inconsistent with mine. He concludes that, parallel to my conception of the lawyer as citizen, "a lawyer can reject the suspension of morality" (de-professionalization), "without losing the distinction between her role as a lawyer and the place of the client whom she is advising" (de-personalization). [Id. at 1956](#).

[\[FN113\]](#). Nagel, Ruthlessness, supra note 12, at 77.

[\[FN114\]](#). Sanford V. Levinson, The Specious Morality of the Law, Harper's, May 1977, at 35, 99 n.; see also Sanford Levinson, "The Constitution" in American Civil Religion, 1979 Sup. Ct. Rev. 123.

[\[FN115\]](#). For a sketch of an understanding of the lawyerhood of all citizens and the citizenhood of all lawyers, see Russell G. Pearce, Democracy and Professionalism: How the Decline of Professionalism Will Reinvigorate Democracy 12-15, Baker & McKenzie Lecture at Loyola University-Chicago School of Law (1997) (manuscript on file with the Fordham Law Review); cf. Russell G. Pearce, [Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role](#), 8 U. Chi. L. Sch. Roundtable 381 (2001) (chronicling the shift in the conception of lawyers' professional role from a citizen model--"identify[ing] and pursue[ing] the public good when serving in government positions, as civic leaders, and as representatives of clients"--to a "hired gun" model--zealously pursuing clients' self-interests (emphasis added)).

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