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CALMING THE HEARSE HORSE:
A PHILOSOPHICAL RESEARCH PROGRAM
FOR LEGAL ETHICS*

DAVID LUBAN**

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?1

Carl Sandburg

The study of legal ethics is part of the study of ethics, and the study
of ethics is part of philosophy. In a nutshell, this is why an adequate
legal ethics curriculum must do more than examine the ABA Code of

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1. C. SANDBURG, The Lawyers Know Too Much, in SMOKE AND STEEL 85 (1948). The
full poem reads:

The lawyers, Bob, know too much.
They are chums of the books of old John Marshall.
They know it all, what a dead hand wrote,
A stiff dead hand and its knuckles crumbling,
The bones of the fingers a thin white ash.
The lawyers know a dead man's thoughts too well.
In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howeveres,
Too much hereinbefore provided whereas,
Too many doors to go in and out of.
When the lawyers are through
What is there left, Bob?
Can a mouse nibble at it
And find enough to fasten a tooth in?
Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?
The work of a bricklayer goes to the blue.
The knack of a mason outlasts a moon.
The hands of a plasterer hold a room together.
The land of a farmer wishes him back again.
Singers of songs and dreamers of plays
Build a house no wind blows over.
The lawyers — tell me why a hearse horse snickers hauling a lawyer's bones.
Professional Responsibility and the case law; it must also incorporate philosophical arguments and writings geared specifically to lawyers' ethical dilemmas. The problem is that only a handful of philosophically informed books and articles on lawyers' ethics exist. The philosophical issues in legal ethics need more research, and the legal ethics curriculum needs the written products of that research.

My aim in this paper is to convince you of this, by laying out a philosophical research program for legal ethics. By this I mean a survey of the hard, unsolved, and mostly unexplored issues in legal ethics that are amenable to treatment by moral philosophy. The survey is not meant to be exhaustive, and I do not doubt that other, perhaps better, ways of laying out the problems might be found. It is characteristic of philosophy that disagreements are as much over the way questions are posed as over the way they are answered. Even if the research program I am proposing seems wrong-headed, it will serve its purpose if it incites the reader to come up with a better one.

The need for new curricular materials in legal ethics has become evident. Since 1974, all American law schools have been required to offer a course in legal ethics (or "professional responsibility") to receive ABA accreditation; as of 1978 the course was a requirement for graduation in 85% of American law schools, and was taken by over 30,000 law students each year. Despite these facts, and the demand for the course they indicate, the professional responsibility curriculum is not wholly satisfactory to law students or professors. A recent survey of over 1,300 students indicated that the professional responsibility course is held in "low esteem" and "may even be socializing students into believing that legal ethics is unimportant." Much of this low esteem can be attributed to the nature of the material.

The conduct of lawyers is, of course, regulated by a written code of ethics (the ABA's Code of Professional Responsibility in most states) which has statutory force. The study of the Code language and its underlying public policy considerations is the main focus of existing textbooks in legal ethics. That is fine as far as it goes, but it does not go far enough. The Code of Professional Responsibility is less sophisticated than other parts of the black-letter law. Enforcement is generally reserved for the most egregious violations, and consequently the body of case law in professional responsibility is small and the litigation is not very complex. For this reason, the intellectual content of Code-centered

courses in professional responsibility pales by comparison with, say, Federal Jurisdiction or Contract Law.

In addition, students may be hostile to the course for defensive reasons: it tells them what to do and how to conduct their careers. Some of the constraints it discusses may work against the young lawyer's economic self-interest; others, which propose limits to adversariality on behalf of clients, seem to undermine the whole point of legal work, namely doing a job for the person who hires you. The Code attempts to justify its rules by stating the profession's ideals in the form of so-called "Ethical Considerations." In my experience, however, students find the Ethical Considerations vague, self-serving, and rhetorical — really just an incantation of slogans (The Adversary System, The Lawyer-Client Relation, The Service-Oriented Profession, The Law Reformer).

The problem is that slogans will not do when the subject is the validity of these very slogans. There is a basic ambivalence in such a course: is it just another law school course analyzing a piece of the law (the Code of Professional Responsibility), or is it a course on ethics in a broader sense? The course seems to promise the latter, but traditional teaching methods usually deliver only the former. Law students want to address the wider questions in a way that is as intellectually rigorous as the study of, say, Constitutional Law. They complain that the analysis of a written code of rules, even buttressed by more general discussions of public policy, does not approach the dilemmas of legal practice in a sufficiently reflective way. The dilemmas need a theory, and the textual materials should provide it.

The legal profession has tried to provide guidance. In 1952, the American Bar Association and the Association of American Law Schools established a Joint Conference on Professional Responsibility to bring "home to the law student, the lawyer and the public an understanding of the nature of the lawyer's professional responsibilities."4 The Joint Conference Report defended the lawyer against "the layman's charge that he is nothing but a hired brain and voice."5 It analyzed the various roles a lawyer plays. Some of this analysis found its way into the ABA Code. The tone of the Code is optimistic:

Not every situation which [a lawyer] may encounter can be foreseen, but fundamental ethical principles are always present to guide him. . . .

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor.

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5. Id.
So long as its practitioners are guided by these principles, the law will continue to be a noble profession.6

This optimism has not been borne out by experience. The Code fails to provide guidance in many situations;7 some of its provisions are virtually unenforceable; some have been found illegal by the courts.8 The courts have disciplined lawyers for violating the Code's merely "aspirational" Ethical Considerations as well as its mandatory Disciplinary Rules.9 The Code has been sharply criticized for failing to sort out the lawyer's conflicting obligations.10 Partly in response to the perceived inadequacy of the Code, a new ABA Commission on Evaluation of Professional Standards has proposed a total revision of the Code. At this writing the commission (often called the "Kutak Commission," after its chairman, Robert J. Kutak) has circulated unofficial versions of the new Model Rules of Professional Conduct. These rules are themselves highly controversial.11 Indeed, in response to them two alterna-


7. To cite two examples: (1) G. Hazard, Ethics in the Practice of Law 43–68 (1978), shows that the Code is premised on the single, identifiable client, and cannot be cogently interpreted in many corporate situations; (2) Note, Client Fraud and the Lawyer: An Ethical Analysis, 62 Minn. L. Rev. 89 (1977), shows that the Code as interpreted in the ABA opinions on ethics does not yield an answer to the question of whether to disclose client fraud in many cases. These examples could, of course, be multiplied. See generally ABF Annotated Code of Professional Responsibility (1979).


The "fundamental principles," whatever they are, have proven far more elusive than the framers of the Code anticipated.

Perhaps for this reason, a recent survey of fifty professors who teach professional responsibility revealed that one-third of them found existing texts inadequate for their purposes and preferred to assemble their own packages of materials. Professor Andrew L. Kaufman of Harvard Law School described the problem:

One difference between the teaching of professional responsibility and other law school courses is the relative lack of sophisticated writing in the field. The subject has been neglected for so long that the number of books and articles that treat the issues studied in the typical course with insight is relatively small, especially when one considers the breadth of the field. This paucity of material also exists if one considers other extremely relevant areas of knowledge—historical and sociological studies in the profession and writings in moral philosophy specially devoted to the law.

Many teachers want to supplement existing materials with philosophical work, and this has created a demand which, as Professor Kaufman indicates, is as yet unfilled.

Moral philosophy can help fill the gap because it is an investigation of the reasons for actions: it considers how one justifies what one does. Its distinctive feature is that it makes a person press the question of justification further than he is normally accustomed to doing. Thus, a lawyer might ordinarily answer the question, "Why did you do X?" by saying "Because the Code of Professional Responsibility says that that's what a lawyer must do." A moral philosopher is likely to press the question further by asking—whether there are good reasons for doing what the Code prescribes in that situation. The ultimate aim is to justify actions in terms of principles that provide the best and most coherent account of our moral perceptions.

To apply moral philosophy to the legal profession, we must identify the ethical problems faced peculiarly by lawyers and suggest, where possible, principles that will

13. M. Kelly, supra note 2, at 28.
15. This view is derived from J. Rawls, A Theory of Justice 46–52 (1971).
guide them in resolving these problems. What follows will illustrate the possibilities for such a philosophical research program.

EXAMPLES OF MORAL DILEMMAS FACING LAWYERS

Public opinion is not kind to lawyers. Thoughtful lawyers are apt to suggest that the public confuses the morality of a lawyer with that of his client: it assumes that a profession which is willing to counsel dishonest and unworthy clients is itself unworthy and dishonest. But, it is added, the public is wrong, for if lawyers were to do otherwise they would be setting themselves up as private gatekeepers of the legal system. For this reason, it is the essential condition of advocacy that the attorney's morals and the client's are distinct.16

A lawyer, then, may have a moral duty to assist in an immoral case. How can this be true? Ordinarily, we think that no one is morally bound to assist immorality. We may describe this as a conflict between ordinary morality and the role morality of lawyers. These do not always conflict, of course. For example, both ordinary morality and role morality would condemn a lawyer who swindles a client. But there will be cases in which the conflict is quite pointed, and these entitle us to ask how the demands of a professional role can override moral requirements which we thought were binding on everybody.

Most texts on professional responsibility work from examples. Many of these examples, however, do not represent conflicts between ordinary morality and role morality. Rather, they are puzzles over whether a certain act violates the Code. Many conflict-of-interest cases, for example, present situations as abstract and formal as chess problems, and often do not raise questions of ordinary morality. Conversely, some genuine conflicts between role morality and ordinary morality may not be found in textbook problems because the lawyer's duty under the Code is clear. Here are some examples of genuine conflicts between ordinary morality and lawyers' role morality.

Example 1  The client is the prosperous president of a savings and loan association. In leaner days he had borrowed

16. See ABA Code, supra note 6, s 2-26 thru 2-28; 7 EC 7-17. Lawyers themselves commit the same confusion, if confusion it is. A recent sociological study of lawyers' own perceptions of the prestige of different practices yielded a surprising result. Prestige did not correlate with the obvious variables, such as money or specialty. Rather it correlated with the prestige of the client: the higher the prestige of the client, the higher the prestige of the lawyer. Even in the minds of practitioners, the lawyer and the client are identified. See Heinz & Laumann, The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies, 76 Mich. L. Rev. 1111 (1978).
almost $5,000 from a man working for him as a carpenter. He now wishes to avoid repaying the debt by pleading the statute of limitations.\textsuperscript{17} He is sued by the carpenter and retains a lawyer.

The Code is unambiguous about the lawyer's duty in this example: "A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law. . . ."\textsuperscript{18} This Disciplinary Rule, moreover, is an uncontroversial portion of the role morality of lawyers. Thus, the role demands that the lawyer assist his client in this project. From the point of view of ordinary morality, however, it is wrong to assist someone in reneging on his legitimate debt.

Example 2 The client has raped a woman, been found not guilty by reason of insanity, and institutionalized. He wishes to appeal the decision by asserting the technical defense that he was denied his right to a speedy trial.\textsuperscript{19}

In this example the client is not attempting to do something immoral, but it is nevertheless clearly contrary to the general interest to loose a mad rapist on the public. From the viewpoint of ordinary morality, the lawyer who asserts this defense is behaving irresponsibly. As in the previous example, however, the lawyer has an adamantine duty to assert his client's legal rights, including the technical defense.

Example 3 A youth, badly injured in an automobile wreck, sues the driver responsible for the injury. The driver's defense lawyer has his own doctor examine the youth; the doctor discovers an aortic aneurism that the boy's doctor had not found. The aneurism is life-threatening unless operated on. The doctor reports to the defense lawyer that if the aneurism was not there when the plaintiff's doctor had examined him, this would indicate that it was a result of the accident. The plaintiff is

\textsuperscript{17} Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957) (cited as an example in Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L. J. 1060, 1064 (1976). Compare D. Hoffman, A Course of Legal Studies 754, at XII (1836) (pleading the statute in such a case involves the lawyer in "knavery") with G. Sharswood, Legal Ethics 83 (1854) (the lawyer must plead the statute).

\textsuperscript{18} ABA Code, supra note 6, at DR 7–101 (A)(1).

willing to settle the case for $6,500, but the defense lawyer realizes that if the youth learns of the aneurism he will demand a much higher amount.\textsuperscript{20}

Once again, the lawyer’s role-responsibilities are unambiguous. He must keep the client’s secrets unless the client is contemplating commission of a crime. Secrets are “information gained in the professional relationship . . . the disclosure of which . . . would be likely to be detrimental to the client.”\textsuperscript{21} Thus, the knowledge of the aneurism is a secret. Nevertheless, it is plain that ordinarily, without the special duty of confidentiality, it would be incumbent on a person to tell the youth. An innocent life may be at stake.

\textbf{Example 4} The client is accused of rape, but claims the prosecutrix “consented in every way,” and instructs his attorney to enter a plea of not guilty. As they prepare for trial, an embittered former suitor of the victim tells the attorney that he knows she is promiscuous. In this jurisdiction a defense of unchastity is still legally valid, and the ex-suitor’s testimony would probably suffice to obtain acquittal. It is likely, moreover, that such testimony would ruin the victim’s reputation in the small town where she lives, and would lead her fiancé to break off their engagement. During the trial the client admits to the attorney that his story is a lie, but insists on pressing the defense, which he says he has used successfully on another occasion. Should the attorney put the ex-suitor on the stand?\textsuperscript{22}

Once again, the lawyer’s unequivocal role-derived duty is to offer the defense as effectively as possible.

In discussions of examples like these, the point is often made that the lawyer is free to refuse the case. Now, refusal or withdrawal from a morally troublesome case may be the most practical method to relieve a lawyer of an otherwise intolerable conflict. But the fact that such a strategy is available does not resolve the moral issue itself, for some lawyer will have to take the case. If it is morally obligatory for the “last lawyer in town” to do so, it surely must be morally permissible for him.

\textsuperscript{20} Spaulding v. Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (1962).
\textsuperscript{21} ABA Code, supra note 6, at DR 4–101(A).
But, of course, what is permissible for the last lawyer is permissible for any lawyer, else legal ethics becomes a matter of musical chairs, in which the last lawyer to opt out of the role is the loser. Thus, the possibility of opting out does not yield a strategy for reconciling the lawyer's role with ordinary morality. Nor does it resolve the examples to note that in some the problem arises from a law that permits morally dubious outcomes. It is too simple to blame the law rather than the lawyer, for in every case the lawyer must decide to be the agent who brings about the outcome. It is the lawyer who pushes the red button. He cannot escape the fundamental conflict between ordinary and role morality that these examples illustrate.

LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

I shall now argue that no written code is capable of resolving the tensions between ordinary and role morality. Codes should be seen as simply one part of the black-letter law, a proper object of legalism and casuistry. A lawyer caught in a conflict between role obligations and ordinary morality — a conflict heightened by the fact that the client is paying the fees — is inevitably tempted to view the Code as telling him what he can get away with. Indeed, since the Code requires zeal on behalf of the client, it can be argued that anything the Code does not forbid the lawyer from doing for the client is required. In practice, I suspect that any code would be read this way, whether it mandated zeal or not. Similarly, a typical law review article on the ethics of dealing with client perjury will go through various black-letter rules concerning client perjury, attempting to resolve ambiguities and inconsistencies among them, in borderline cases. The question is always, "Is this allowed?" It is true that the policies behind the rules are examined to shed light on the meaning of the rules; nevertheless, the act in question turns out to be either 100% permissible or 100% forbidden.

This, however, is a simple-minded view of morality. It suggests that a person is good who does not break the rules; the only question then concerns degrees of goodness, which can be left to the angels to decide.

Moral life is not like that. A person may do things which are within his moral rights, but which nevertheless would open him to moral criticism. Brian Barry tartly observes, "Victorian novels and biographies are thickly populated with self-righteous prigs who never did anything wrong . . . but still managed to make life hell for everyone around them."\(^2\)\(^3\) And one cannot state in the form of a rule that following the rules is not good enough.

Another reason exists for saying that ethics and regulation don't coincide. The reason may be stated in the form of a paradox: regulation is supposed to resolve a certain type of problem; ethically perfect regulations, however, recreate this problem rather than resolve it; thus, imperfect regulations may be better than perfect ones. Let us see why this is so.

Adversarial tactics, in law as elsewhere, tend to escalate more or less independently of anyone's intentions. Game theorists call the structure that compels escalation a "Prisoner's Dilemma": a lawyer engages in the practice because not to do so would put him at a disadvantage relative to other lawyers who do. All the lawyers might recognize that it would be better for all concerned if no one engaged in

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### The Prisoner's Dilemma

A and B, suspected of a crime, are placed in separate cells. The district attorney knows he doesn't have the evidence to convict them; he needs a confession from at least one. In order to obtain it, he tells each of them (separately) the following: (a) If either of you confesses and turns states evidence and the other doesn't, the one who confesses will go free and the other will get ten years; (b) If both of you confess, you will each get five years; (c) If neither of you confesses, you will each get 1 year on the lesser charge of carrying a concealed weapon.

Assume that neither A nor B cares what happens to the other. What should either of them do in order to save himself? Game theorists represent the situation in the following matrix:

<table>
<thead>
<tr>
<th></th>
<th>Confess</th>
<th>Do not Confess</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confess</td>
<td>-5</td>
<td>0</td>
</tr>
<tr>
<td>Do Not Confess</td>
<td>-10</td>
<td>-1</td>
</tr>
</tbody>
</table>

In each box the left number represents A's payoff in years; the right number represents B's. A reasons as follows: "B can either confess or not. If B confesses, my better option is to confess (five years rather than ten). If B does not confess, my better option is, once again, to confess (zero years rather than one). Thus, no matter what B does, I should confess." Let us call this the "dominance argument" because the strategy of confessing dominates the strategy of not confessing.

B, however, reasons the same way. Thus, both A and B are driven by the dominance argument to confess, even though both of them can see that this pair of strategies leads to a much worse outcome than if neither of them confesses. Both of them realize this, but it doesn't matter: the problem is that each knows that the other has the dominance argument available to him. Even if A and B both want to refrain from confessing, and both believe that the other wants to as well, it won't help. The problem is that A knows that B knows that A is aware of the dominance argument; thus, A knows that B has a reason for confessing, namely that B suspects that A might confess. Knowing this gives A a reason to confess. Obviously, the levels of mutual mistrust can multiply indefinitely. The point is that the bare possibility that either A or B might mistrust the other — and how could that possibility be ruled out? — generates the Prisoner’s Dilemma.

The Prisoner's Dilemma is the subject of a vast literature. A clear account may be found in R. LUCE & H. RAIFFA, GAMES AND DECISIONS 94 (1957).
the practice, but this recognition, even buttressed with the knowledge that other lawyers share in it, does not help anyone unilaterally refrain from it.

Such practices — of which the tactical motion to disqualify opposing counsel is one example\(^{25}\) — tend to move the behavior of the profession toward its lowest common denominator, more or less independently of what lawyers really want. Code regulations interrupt this process by allowing lawyers to behave "well" safely, without worrying that they will be punished for their restraint by other lawyers unilaterally defecting from high standards. In this sense, the purpose of regulations is not to force lawyers to toe the line against their will, but to enable them to act as they would wish to anyway.

This will not happen unless the regulations are enforced. And enforcement, in turn, will prove impossible if the standards are set too high, even if everyone wishes to comply. If a lawyer thinks the standards are high, he will think that ethics committees are likely to allow violations to go unsanctioned. Once this bare suspicion establishes itself, the margin of mistrust that generates the Prisoner's Dilemma is back. Perhaps a lawyer does not think the regulations are onerous to comply with; even so, if he believes others will find them stringent, he will expect them not to be enforced. Once again, the Prisoner's Dilemma appears. Indeed, this will happen even if no lawyers are bothered by a regulation, but some believe that others believe they might be. Such is the logic of suspicion.

It follows that regulations should be much less stringent than moral considerations alone might dictate — mild enough, we might say, to avoid even the appearance of unenforceability. Paradoxically, a code which is morally second-best might be better than best. The rules should lie just at the margin between unenforceability and insubstantiality.

In addition, a code must spell out its requirements in reasonably specific rules. That often means providing detailed procedures and drawing behavioral lines the particulars of which are not justified by appeal to moral theory.

But if this is so, and if as a consequence the written codes of ethics must distort moral requirements by practical ones, we have additional grounds for the claim that the moral problems will not be served by an analysis of codes.

This is not to say that codes of ethics have no place; rather, it is to suggest that their place is in the sphere of black-letter law, on a par

with the laws of legal malpractice and licensing.\textsuperscript{26} Viewed in this way, legalistic interpretation makes perfect sense. We may refer to this branch of positive law as \textit{professional responsibility}. "Legal ethics," on the other hand, will denote the study of the moral problems confronting lawyers. The preceding considerations show that professional responsibility is not the same as legal ethics. An examination of legal ethics, nevertheless, should contribute to a code of professional responsibility. Lawyers’ responsibilities will be clarified by the analysis of moral problems of their practice, and this is the task of legal ethics.

\textbf{ROLE MORALITY}

Legal ethics, I have suggested, is concerned primarily with conflicts between ordinary morality and the role morality of lawyers. This generates questions on two levels: individual problems which lawyers face in their day-to-day practice, such as the examples given above; and institutional questions concerning the lawyer’s role in society, such as the justification of the adversary system and delivery of legal services.

First, however, the distinction between role and ordinary morality needs theoretical credentials,\textsuperscript{27} for it does not lack obscurities. How can role morality conflict with ordinary morality? If it is morally wrong for me to harm an innocent person gratuitously, then how can going to law school, being admitted to the bar, and taking money for the deed make it right?\textsuperscript{28} Sociologists suggest, however, that we always act in some social role or other.\textsuperscript{29} Every role carries its own behavioral norms. By that reasoning, all moralities must accommodate to roles. It is hard to see which side is right.

Indeed, one may be skeptical of the very distinction between role and ordinary morality. There is only one morality, we may say, but


\textsuperscript{28} Ladd, \textit{supra} note 26, at 155.

\textsuperscript{29} See, \textit{e.g.}, E. Goffman, \textit{The Presentation of Self in Everyday Life} (1959).
some of its precepts pertain only to individuals in special situations. The
duty of charity, for example, applies only to the prosperous; the duty to
repay debts, only to debtors. These are not different moralities; they are
parts of ordinary morality. Similarly, the duty of partisan zeal in a legal
context applies only to lawyers, but this does not make it a different
morality — rather, it is a special district of the universal morality. 30

Implicit in this argument is a rejection of the analogy that gives our
elements their power — the analogy that likens a lawyer helping a
client evade a debt by pleading the statute of limitations to a lay-person
becoming an accomplice-in-dishonor. The argument appears to answer
the problem posed by the examples. The lawyers involved were not
required to act as laymen would, because no layman is ever in
circumstances sufficiently like the lawyer's to make the analogy
appropriate.

Why is this? The answer must lie in the fact that the lawyer
pleading the statute of limitations is not just an accomplice in the
client's unworthy designs; he is also involved in administering the law,
a fact which in itself alters the moral dimensions of the situation.

But why should the fact that the lawyer is administering the law as
well as assisting the client make any moral difference? The answer,
evidently, must lie in the claim that the law is a system with moral
authority. This need not be absolute authority (else civil disobedience
would always be immoral, an absurd suggestion), but it is plausible to
assume that the law carries at least some moral weight over and above
the system of legal sanctions. Particularly in a democracy, it seems that
the law embodies the social contract that enables us to live together. Let
us call this view the normative conception of law.

There is another side to the story, however. The law can often be an
instrument of oppression and injustice, used by some individuals or
classes in society against others. In that case its moral authority over
the victims evaporates: I may yield to the blackjack, but I owe it
nothing. And even when the law is not intended to oppress, it can
frequently be manipulated to oppress in specific cases. Let us call this
way of treating the law the instrumental conception of law. Viewed this
way, the social contract does not lift us out of the war of all against all.
It is just another weapon in that war.

The problem is that, in an adversary system, the lawyer's job is
often to treat all law as instrumental: laws are to be manipulated in
order to attain the client's ends. This point is well-expressed by the

30. The importance of this point was emphasized to me by Robert Condlin and Ted
Finman. This part of my discussion owes much to conversations with Condlin.
Japanese novelist Yasunari Kawabata: "When a law is made, the cunning that finds loopholes goes to work. We cannot deny that there is a certain slyness . . . , a slyness which, when rules are written to prevent slyness, makes use of the rules themselves." If it is true that the lawyer's role transforms law from a normative to an instrumental system, then it would be mystification to call such behavior "enforcing the authority of the law;" it is strategic behavior designed to win, with little more to be said. In that case the argument designed to assimilate role morality to ordinary morality does not succeed.

The issue between these positions is not a simple one. My purpose is not to settle the issue, only to raise it.

Problems continue even if we allow the distinction between role morality and ordinary morality. In each of the examples, the lawyer is asked to do something that seems to be morally unacceptable. How can appealing to the role justify the action? The obvious move is to claim that (1) the moral responsibility for the actions falls on the role and not on the role-agent, and (2) the role itself is morally desirable. The first of these, however, seems simply false. We would not allow a torturer to evade moral responsibility by saying, "I personally would never pull out your toenails, but that's my job." If the role is immoral, the agent becomes immoral by acceding to it. Thus, the whole burden of the argument falls on the claim that the role is a morally good one. But this in its turn may not matter. In the second example, we might find ourselves inclined to say, "Who cares about the role? All that matters is that this lawyer is loosing a mad rapist on the city." The goodness of the role matters only if we do not evaluate role-derived actions as isolated cases, but think of them as instances of policies which are morally good. If we describe what the lawyer is doing as "defending the right of an improperly tried individual to his freedom" rather than "loosing a mad rapist on the city," his act seems to promote the public interest.

The question, then, is whether the individual action or the general policy under which it is subsumed is the logical subject of moral evaluation; whether, to put it another way, the lawyer evaluates his actions on a retail or wholesale basis. Let us call the former the doctrine of Acts Over Policies, the latter, the doctrine of Policies Over Acts. This issue appeared in the discussion of utilitarianism in the 1950's:

32. Lawyers commonly think this way when they are engaged in actions they find odious. See Brazil, The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice, 3 J. Legal Prof. 107 (1978); Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3 (1952); Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U.L. Rev. ___ (1980).
Acts Over Policies approach ("act-utilitarianism" in the literature) the agent was supposed to do the action that created the greatest utility, while on the Policies Over Acts approach ("rule-utilitarianism") he was supposed to follow the rule that created the greatest utility even if it was harmful on the given occasion.  

The appeal to role morality assumes that Policies Over Acts is the right approach — that, for instance, if the policy of zealous advocacy is a good one, the lawyer should follow it even on the occasions when he knows it will result in harm. And indeed, there is a good reason for putting policies over acts: it leads to greater predictability and regularity in social behavior. If we could not count on persons occupying certain social roles to act according to the expectations of the roles, we would live in a very capricious society indeed.

A strong argument may be made, however, in favor of Acts Over Policies. An agent confronts his decisions one at a time. If, after balancing the wrong done by breaking role against the wrong done by acting in role, he sees that an action is morally unacceptable, it cannot be correct to sweep this insight under the rug by saying that the individual action is not the logical subject of moral evaluation. As Bernard Williams puts it in an argument against rule-utilitarianism, "Whatever the general utility of having a certain rule, if one has actually reached the point of seeing that the utility of breaking it on a certain occasion is greater than that of following it, then surely it would be pure irrationality not to break it?"  

This issue deserves careful consideration, for if actions rather than policies are the objects of moral evaluations, it may not be possible to justify behavior by appealing to social roles.

Another problem emerges when we analyze the lawyer's role a bit more carefully. It includes and is defined by the ultimate goals of the role (representing individuals and groups in legal processes), the ground-rules that constrain the actions performed in pursuit of these goals (such as the ABA Code), the specific duties which the ultimate goals imply, and the typical practices lawyers engage in because other lawyers do.

This last, as we have seen, may be viewed as composed of outcomes to Prisoner's Dilemma games. We may take as examples the practice of puffery in negotiation; or the use of dilatory tactics; or attempting to drive up the other side's legal costs by getting its counsel disqualified.

33. Some classic papers in this debate are collected in Contemporary Utilitarianism (M. Bayles ed. 1968).
34. B. WILLIAMS, supra note 27, at 102.
Practices such as these tend, I have argued, to move the behavior of the profession toward its lowest common denominator. If they are to be justified by reference to role morality, even indirectly through the argument that they are corollaries to the lawyer's duty to give the client the best possible representation, then an unpleasant result follows: role morality justifies any practice the profession habitually engages in.

All this is not intended to suggest that the theory of role morality is incoherent, just that if it is to be made coherent, a sophisticated account must be offered of the distinction, an account that spells out exactly how moral responsibility is to be assumed by the role, and how role morality is to be appealed to in offering justifications for action.

**AN ANALOGY TO PUBLIC OFFICIALS**

The conflict between role obligations and ordinary morality is a familiar one in politics, where it is especially clear that to act at all is to risk dirty hands. Machiavelli wrote that he loved his native city better than his own soul, prompting the following comment from one modern writer:

At the time he wrote, the expression was no cliché but meant literally that one was prepared to forfeit an everlasting life or to risk the punishments of hell for the sake of one's city. The question, as Machiavelli saw it, was not whether one loved God more than the world, but whether one was capable of loving the world more than one's own self.

Moral compromise is the risk if one is to act in the public realm at all; to try to keep clean hands is self-indulgent. The ordinary morality of clean hands is the morality of private life; it is superseded by a role morality when one becomes a public official precisely because the community's interest is more important than one's own private interest. That, at any rate, is the most plausible justification of political morality. It does not mean that ordinary morality loses its force — Machiavelli may lose his soul — but this says only that the moral dilemma which is resolved in favor of political morality is a genuine dilemma.

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The lawyer resembles the public official in certain respects. Commentators have described lawyers as "free-lance bureaucrats, not tied to any major established bureaucracy, who can be hired to use, typically in a bureaucratic setting, bureaucratic skills. . . ." The lawyer, moreover, like the politician, seeks to promote certain interests through verbal and persuasive means often backed by threats, in a situation that is frequently marked by maneuvering and mistrust. Most importantly, the lawyer, like the public official, is acting on behalf of someone else; both lawyer and official represent a constituency.

But there's the rub. The conflict between political and ordinary morality was resolved in favor of the former only because of the importance of the public interest, as expressed, for example, in the doctrine of "reasons of state." The lawyer, however, typically represents private and not public interests. Even so-called "public interest" lawyers treat the public interest they hope to represent through the persons of private clients. How can the attorney claim to be bound by the "dirty hands" morality of public officials when he or she is acting on behalf of a merely private interest? The step from "reasons of state" to "reasons of Driver's Insurance Company" or "reasons of David Luban" as a justification for violating someone's moral rights is a step into absurdity.

Think once again of the statute-of-limitations dilemma posed in the first example. Everyone knows that it is immoral to welch on a debt: How is a lawyer permitted to do for the client what is immoral for either to do for himself?

Formulating our problem in this way suggests two lines of investigation. First, one could explore more thoroughly the similarities and differences between the concepts of legal and political representation. This involves coming to grips with the distinction between public and private interests (a fundamental problem of social decision theory) and the claim of the community's interest to precedence over private interests (a fundamental problem in the theory of political obligation). Second, one could focus directly on the lawyer viewed as a functionary of the legal system (hence, as a public official) and attempt to transfer the theory of political morality directly to the context of lawyering. This is

39. In the original Roman usage the term "clientela" included political dependency as one of its senses and had nothing to do with lawyers. E. Badian, Foreign Clientelae (264-70 B.C.) 1-13 (1958).
where particulars must be addressed. What is the public role of the securities lawyer? How candid must a lawyer be in a negotiation? Whose confidence must corporate counsel keep? Can a legal services attorney help an indigent client evade an unfair law that is victimizing her? The only way to analyze the duties of the lawyer as public official is to get down to cases.

The strategy in both these approaches, of course, is to investigate hard questions in legal ethics by looking for analogies in better-explored areas of political theory. It remains to be seen how fruitful such a strategy proves to be. The analogy to political morality appears to be one of the most promising approaches to the subject.

**THE ADVERSARY SYSTEM**

The Joint Conference Report of the ABA-AALS\(^4^1\) begins by claiming that the major obstacle to fostering an understanding of lawyers' professional responsibility is the failure to understand the rationale of the adversary system. The task, then, is to provide this rationale, which, in turn, may justify lawyers' roles in that system.

In the narrow sense of the term, "the adversary system" refers only to a method of conducting courtroom litigation. However, in a broader sense other lawyering functions are also adversarial: negotiation is a comparatively clear example, but even advising a client and filling out forms may assume an adversarial format. Generally speaking, a lawyer will operate in an adversarial format when his client's gain is another party's loss. Despite the very real differences among tasks, they involve similar moral dilemmas, arising from conflicts between the lawyer's duty to promote his client's interests and other moral duties.

For the sake of simplicity, let us focus on the adversary system as it works in litigation. Three main justifications are usually offered for it:

A. *The Truth Theory* suggests that the adversary system is the best method for arriving at the truth, hence yielding a just outcome. This theory is based on the idea, very similar to Sir Karl Popper's theory of scientific rationality,\(^4^2\) that the way to get at the truth is a wholehearted dialectic of conjecture and refutation. If each side attempts to prove its case, with the other side trying as energetically as possible to assault the steps of the proof, it is more likely that all of the aspects of the situation will be presented to the fact-finder than if it attempts to investigate for itself with the help of the lawyers.

\(^{4^1}\) See note 4 and accompanying text *supra*.

This theory may bring a smile to the lips of a trial lawyer. The two adversary attorneys are each under an obligation to present the facts in the manner most consistent with his client's position — to prevent the introduction of unfavorable evidence, to undermine the credibility of opposing witnesses, to set unfavorable facts in a context in which their importance is minimized. The assumption is that two such accounts will cancel out, leaving the truth of the matter. But there is no reason to think this is so — they may simply pile up the confusion, particularly in those frequent cases when the facts in question concern someone's character or state of mind. It is scarcely an exaggeration to say that the tricks of the trial lawyer's trade are designed to obfuscate unpleasant truths.

B. The Rights Theory suggests that the real goal of the adversary system is not to arrive at the truth of the matter, but to guarantee that each party to the proceeding has his rights fully protected by an advocate. Particularly in a criminal proceeding, protection of the rights of the accused is the paramount consideration, and this protection requires an advocate whose loyalties are undivided.

This theory, too, has its problems. What is the lawyer in Example 4 to do when his client insists that he press the defense of unchastity? Clearly, advancing the defense violates the moral rights of the victim, who is being damaged by the attorney. One might reply that the attorney's job deals with legal and not moral rights; but if we are looking for a moral justification of the attorney's job, this reply begs the question.

The Rights Theory would work if legal rights were more important than moral rights, or if the adversary system was the best way of protecting both. The first idea has no plausibility at all; why, in our examples, are the legal rights of the debtor more important than the moral rights of the creditor, the legal rights of the rapist more important than the moral rights of his once-and-future victims, the legal rights of the defendant's insurance company more important than the moral rights of the youth? Nor will the adversary system protect moral rights: it commits the advocate to the project of promoting his client's legal rights whether they are moral or not.

It is not even clear that the adversary system is the best way of defending legal rights. Often it is the best lawyer, not the best case, that wins. (Consider the old cynicism, "A jury is twelve men and women deciding who has the better lawyer.") Occasionally a lawyer can get

44. M. Freedman, supra note 22, at 1–8.
results for the client to which the client is not entitled. In that case, it is wrong to say that the proceeding has defended the winner's legal rights; in reality, it has denied the loser's legal rights.45

C. The Checks-and-Balances Theory invokes the notion of what might be called moral division of labor. The idea is that behavior which looks wrong from the viewpoint of ordinary morality is justified by the existence of other social roles, the purpose of which is to counteract the excesses resulting from role-behavior.46 Zealous advocacy is justified by the fact that each side is furnished with a zealous advocate. In litigation the impartial arbiter provides a further check.

Will this justify the adversary system? Suppose that a lawyer is about to embark on a course of action that is unjustified from the point of view of ordinary morality, such as attempting to win an unfair, lopsided judgment for his client. If the lawyer is a zealous adversary advocate he will do whatever he can to avoid the opposing counsel's attempts to foil him in his designs. But in that case, how can he claim that the existence of the opposing counsel morally justifies him in his action? Certainly the fact that a man has a bodyguard in no way excuses you for trying to kill him, particularly if you bend all your ingenuity to avoiding the bodyguard.

There is another problem with the Checks-and-Balances Theory. It attempts to justify a system of roles by the fact that the system is self-correcting — in other words, injuries perpetrated by one part of the system will be rectified by another. Rectification, however, is seldom instantaneous; it generally costs time, energy, money, worry, and an arduous passage through the bureaucratic straits. Thus, even if the system of checks-and-balances eventually yields a morally equitable result, the process itself inflicts damages. It appears, then, that the existence of the system cannot morally justify inequitable acts undertaken within it. The system is not the solution.

None of these arguments is intended to be the last word on the subject. To say, moreover, that three standard justifications for the adversary system do not work is not to say that the adversary system is not justified. This discussion is intended only to show that the philosophical work involved in justifying the adversary system as it is used to provide a foundation for legal ethics remains to be done. It is an open problem.

45. Legal Realists might object that there are no legal entitlements apart from what the courts may be predicted to give. This objection, however, does not defend the adversary system, for it shows that any system that merely decides cases is a perfect defender of legal rights.

46. Nagel, supra note 37, at 85–86, defends a checks-and-balances theory for public officials.
Clients in the United States obtain legal services in three ways: by hiring a lawyer, by receiving philanthropic "pro bono publico" legal assistance, or by receiving legal aid from legal services organizations and judicare or pre-paid plans. Legal services are expensive, and consequently indigents are totally dependent on pro bono or legal aid lawyers for their needs. These, however, do not come close to meeting the enormous demand. Moreover, middle-income individuals who do not qualify as indigents and are therefore not eligible for legal aid may not be able to afford lawyers. It has been claimed that middle- and lower-income people have little need for lawyers; this does not, however, appear to be borne out by the facts. The problem is exacerbated by the fact that legal aid organizations, overwhelmed by applications, must often choose between providing low-quality service to all comers or performing "triage" by concentrating on legal problems which involve large numbers of people — in which case the poor person with an unusual legal problem is out of luck.

This state of affairs may not appear to present moral problems. Lawyers, like anyone else, have a right to sell their services to whomever they want. The fact that a poor person cannot afford a lawyer is no different from the fact that a poor person cannot afford a chauffeur — no one has a right to another's beneficence.

This argument overlooks an important point about the lawyer's role, however. The lawyer is in part a creation of the legal system, "an officer of the court," and the legal system has as its function the adjudication and distribution of legal rights. It is a fact of life that access to the system often requires a lawyer. Indeed, the organized bar has worked energetically to ensure that the number of processes that

47. One survey estimates that "the nation's 320 federally-funded local legal service groups (which don't handle criminal matters) can serve only about 1.5 million of this country's 29 million poor." J. Jenkins, Futurelaw: Lawyers Confront the 21st Century 6 (Bureau of National Affairs, Inc. Report 1979).


51. See Fried, supra note 17, at 1076–78 (defending the lawyer's right to sell his services to whomever he wants).
formally require a lawyer is as large as possible.\textsuperscript{52} To put legal services on the market is thus in practice to deny legal rights to those who cannot afford a lawyer. Your legal rights, however, should not depend on how much money you have. Our society has already recognized that a lawyer must be provided to indigents charged with felonies,\textsuperscript{53} misdemeanors when the sentence could be a jail term,\textsuperscript{54} and juvenile delinquency.\textsuperscript{55} People should not have to face loss of liberty simply because they are unable effectively to assert their legal rights. But certainly there are other legal processes in which the inability to assert legal rights can have consequences as drastic as brief loss of liberty: loss of custody of a child, of a multi-thousand dollar judgment, of compensation for a serious injury, or even of a driver's license.\textsuperscript{56} This suggests that legal services should be provided free or at a reduced cost whenever an individual is facing extremely severe consequences through inability to assert his legal rights because he cannot afford legal assistance.\textsuperscript{57}

If this argument is right, how should legal services be provided to those who cannot afford them? This may appear to be a question safely left to the welfare economists and legislators. I believe, however, that important philosophical questions arise in this area, questions that depend on an analysis of the lawyer's role obligations. I shall illustrate by briefly discussing one recent proposal, the imposition of a \textit{pro bono} duty of (say) forty hours per year on lawyers.\textsuperscript{58} The objection can be raised that this imposes an undue burden on the marginal practitioner who is barely eking out a living. A more fundamental objection, however, is that a \textit{pro bono} duty in effect selectively taxes lawyers to provide a public service. This seems quite inequitable; if it is in the

\textsuperscript{52} See, e.g., Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978) (a secretarial service that assists people in filling out forms required in uncontested divorces is engaging in the unauthorized practice of law).
\textsuperscript{55} In re Gault, 387 U.S. 1 (1967).
\textsuperscript{56} See Argersinger v. Hamlin, 407 U.S. at 44-66 (J. Powell, concurring).
\textsuperscript{57} It appeared at one point that a due process right to appointed counsel would emerge following Boddie v. Connecticut, 401 U.S. 371 (1971) (a state-imposed filing fee for divorce denies due process by denying indigents access to the court), but the Court has interpreted Boddie very narrowly. \textit{See} United States v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam); \textit{Lassiter v. Dep't of Social Servs., No. 79-6423 (---, filed ---, 1979); Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights (pt. 1) 1973 DUKE L. J. 1153.}
\textsuperscript{58} \textit{SPECIAL COMMITTEE ON THE LAWYER'S PRO BONO OBLIGATIONS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE PRACTICE BY EVERY LAWYER} 5, 30-32 (1979) (judicial theories for denying compensation to court-appointed attorneys are based on the lawyer's role).
public interest to make legal services available to all, the expense should fall on the entire public, not just on the lawyers. Public defenders are financed by public monies; why not lawyers for indigents and middle-income people as well?

The proponent of the *pro bono* duty replies that a major reason indigents and middle-income people need expensive legal services is that the profession has used its privilege of self-regulation to its own advantage. It is perverse for the profession to insist that a lawyer be required, for example, to fill out routine forms, while arguing at the same time that if the public wants everyone to have the lawyer's services it must pay the market rate. The *pro bono* duty, rather than constituting a tax on lawyers, can be viewed as a fee which they pay the public in return for special privileges granted to the legal profession.

The real issue here is the lawyer's role. Many different obligations are built into it; to what extent do these include a duty to further the general legal welfare? The ABA's formal answer is: not much. Only public interest lawyers have an obligation to assure that "maximum" legal services are made available where they are needed; for the rest of the bar, working for the public good is merely "aspirational." The question, however, is not settled by ABA Formal Opinions alone. The deeper issue is whether the legal profession is to be viewed as fundamentally part of the private sector that happens to have as its stock-in-trade expertise in dealing with the legal system, or fundamentally an arm of the legal system that happens to compensate itself by billing private clients. This is not just a question about whether the bottle is half-full or half-empty. If the lawyer is essentially a private individual, then special justification must be given for a tax which is imposed on him selectively. If, on the other hand, the lawyer is essentially a creature of the court — hence, of the sovereign public which created the courts — he functions to promote whatever values the legal system itself is supposed to promote. The public then has the right to define the lawyer's role with those values in mind.

According to this analysis, the question of the *pro bono* duty is not just a question of distributive justice, but also is a debate over the nature of the lawyer's role and its obligations. It thus forms part of the subject of legal ethics.

59. Well known examples of this may be found in the areas of probate, uncontested divorces, and real estate title searches. See also Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978).

60. See note 58 supra.

61. See ABA Code, supra note 6, at Canon 2; ABA Comm. on Professional Ethics, Opinions, Nos. 324 (1970), 334 (1974), Informal Opinions, No. 1208 (1972); Bellow & Kettleson, supra note 50.
THE TEACHING OF LEGAL ETHICS

A black-letter approach to legal ethics does not, I have argued, teach legal ethics at all. It teaches the ABA Code of Professional Responsibility, which is unlikely to be of much help in a genuine moral dilemma.

Professional-responsibility teachers, however, are frequently unsure as to what besides the Code should go into the class. There is a strong sentiment against "preachy" courses that attempt to tell law students about the Good, the True, and the Beautiful. Various reasons are given to back up this sentiment: preachiness is condescending or even insulting insofar as it assumes that the student is not moral or intelligent enough to make up his own mind about right and wrong; or, morals is a matter of opinion; or, if a person is not moral by the time he gets to law school, an ethics class is not going to make him moral; or, a lawyer's morality is the written code of ethics.

Obviously, some of these reasons are better than others. Our discussion, however, suggests the following reflections. First, it will not be possible to count on students' preformed moral personalities to resolve the ethical problems they will face as lawyers, because their personalities are preformed by ordinary morality. In cases of severe conflict between ordinary morality and role obligations, the most common reaction is simply to suspend moral judgment and do whatever the role demands. This, of course, merely evades ethical problems rather than solves them.

Second, the fact that moral dilemmas involve genuine clashes of values may imply that there will be no automatic procedure for resolving them, and thus that the individual judgment of the lawyer will play the crucial role. This makes it hard to see how legal ethics can be taught, for an entire semester of agonizing problems with no solutions will foster nothing but skepticism and cynicism.

This pessimistic view is not forced on us, however. The fact that moral dilemmas cannot be solved by a "rational computational morality" (to use Stuart Hampshire's phrase⁶²) does not mean they are merely the subject of opinion with nothing more to be said. Judgment may be trained: a connoisseur of wine cannot give a decision-procedure for what he does, but that in no way implies that his judgment is just talk. The

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problem is how one sets about training moral judgment. I suggest two approaches:

(1) According to Aristotle, "it is by doing just acts that the just man is produced," "states of character arise out of like activities," and "the virtues we get by first exercising them."63 The Aristotelian approach to teaching practical judgment places the student in a situation where practical judgments must be made. The appropriate setting for this is the legal clinic, in which students handle actual cases under the supervision of faculty members who attempt to provide theoretical instruction organized around the practice in which the students are engaged. Both philosophical and empirical work need to be done around this possibility, the former to assess the theory of moral epistemology on which the approach rests, and the latter to discover whether the clinics in fact provide a better setting than classrooms for students to address ethical problems.64

(2) The Aristotelian approach may seem merely to push the problem back one step, however. If problems of legal ethics do not have a decision-procedure, just what is it that students are supposed to be trained to do? Encountering a problem that no one can tell him how to solve is not likely to train a student to do anything.

Despite the absence of a decision-procedure, however, a teacher may be able to explain how to think about problems. The role of the legal ethics course should be to attempt to equip students with intellectual skills they can use to pinpoint conflicts, analyze arguments, and discuss the questions of principle that underlie various ethical problems.65 A natural place to look for materials useful to such an enterprise is moral philosophy; these may complement the familiar public-policy approach utilized in traditional legal analysis.66 It is unlikely, however, that discussions pitched at the level of generality of, for example, debates over utilitarianism, will be useful in a legal ethics course, if only for the reason that law students always have something better to do than read them. What is needed is a literature that is philosophically sophisti-

63. ARISTOTLE, NICOMACHEAN ETHICS 1105b9, 1103b21, 1103a32 (1973).
66. For a spirited defense of the role of moral philosophy in jurisprudence, see R. DWORINK, TAKING RIGHTS SERIOUSLY (1977).
cated but specific to the legal context. In recent years, applied ethics has enjoyed a vigorous growth in interest; there have been impressive achievements, combining detailed empirical work with state-of-the-art moral philosophy. We may expect that a dialogue between lawyers and philosophers will generate a wealth of pedagogically valuable material on legal ethics. Of course, new material does not change what goes on in a classroom; but creating it will be an important step.