

Article

Lawyers, Justice, and the Challenge of Moral Pluralism

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Some of the most compelling questions of legal ethics define the lawyer's professional role in the gap between what is legally permitted and what is just.¹ Perhaps for that reason, professional responsibility hypotheticals are replete with clients who want to use the law for arguably immoral purposes—from criminal defendants who want to avoid punishment to corporate executives who want to avoid government regulation.² Because these clients do not want to break the law outright, ethical standards do not clearly indicate whether lawyers should be professionally obligated to represent them or ethically restrained from doing so. Instead, questions about the lawyer's role rest in larger issues of justice.

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1. See generally Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181 (1999).

2. See, e.g., Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1737 (1993) (“[One of the] notable characteristics of the clients who appear with frequency in professional responsibility courses [is that] they are almost always people who want wealth or freedom and have violated or are willing to violate commonly accepted norms of conduct to achieve these goals.”).

The question whether representing an arguably immoral client serves or undermines justice divides legal ethicists into two main camps: traditionalists and social justice theorists. In the traditional model, or “standard conception” of lawyering, the gap between law and justice is not the concern of individual lawyers,³ who adopt an attitude of moral neutrality toward the interests of their clients.⁴ Traditionalists defend such “amoral lawyering” by appealing to the lawyer’s role of providing the client with access to the law regardless of the purposes to which the client may wish to put the law.⁵ In contrast to this traditional model, social justice theorists propose alternative models in which the lawyer plays a more active role in conforming client conduct to the requirements of justice.⁶ These social justice models hold individual lawyers professionally responsible for closing the gap between law and justice by refusing legal ser-

3. Stephen Pepper has been the leading defender of the traditional adversarial model of lawyering. In a 1986 article, Pepper first laid out his defense of “amoral lawyering” in what he called the “first-class citizenship model.” Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615 [hereinafter Pepper, *Lawyer’s Amoral Role*]. He has revisited and refined his view in later articles. See, e.g., Stephen L. Pepper, *Access to What?*, 2 J. INST. FOR STUDY LEGAL ETHICS 269 (1999) (defending the primary role of lawyers as providing access to law, not justice, but discussing parameters for moral dialogue with clients concerning the gaps between law and justice); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) [hereinafter Pepper, *Counseling at the Limits*] (discussing the considerations in answering the jurisprudential question of how to define “the law” to which lawyers are to provide access).

4. See, e.g., Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (noting that moral neutrality is a central component of “the standard conception of the lawyer’s role”); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36 (describing the “principle of neutrality”); see also Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673–74 (1978) (arguing for the lawyer’s moral nonaccountability when operating as an advocate in the adversary system).

5. See, e.g., Pepper, *Lawyer’s Amoral Role*, *supra* note 3, at 617–18.

6. This Article addresses three distinct yet related social justice models. The “moral activist” model, conceptualized primarily by David Luban, was laid out in a series of articles culminating in his 1988 book, DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988). The “contextual lawyering” model, originated in the work of William Simon, was also developed in a series of articles and more recently formulated in WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998). The “lawyer as friend” model was developed by Thomas Shaffer and Robert Cochran in THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994).

vices to clients seeking immoral ends,⁷ interpreting the bounds of what is legally permitted in the way that best promotes justice,⁸ and structuring client counseling to ensure that moral considerations are addressed.⁹

This Article revisits the debate between the traditional and social justice theorists¹⁰ by recasting the question at its center. Instead of inquiring what the lawyer should do when asked to assist an *immoral client*, it asks what the lawyer should do when asked to assist a client *with whom the lawyer fundamentally morally disagrees*. By shifting the question away from the immorality of the client and onto the diversity of moral viewpoints between the lawyer and client, this Article focuses attention on a subject that has been largely missing from the debate among legal ethicists: the challenge of moral pluralism.¹¹ Moral pluralism recognizes the existence of a diversity of reasonable yet irreconcilable moral viewpoints, none of which can be objectively declared to be “right” or “wrong” from a standpoint outside of its own theoretical framework.¹²

7. See, e.g., David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 642 (“[A] lawyer’s decision not to assist a client in a scheme that the lawyer finds nefarious is [not] any different from . . . other instances of social control through private noncooperation.”).

8. See, e.g., SIMON, *supra* note 6, at 138–39.

9. See, e.g., SHAFFER & COCHRAN, *supra* note 6, at 48.

10. The debate is perhaps most classically framed in *Symposium on the Lawyer’s Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 611, in which Stephen Pepper offers a defense of “amoral lawyering,” Pepper, *Lawyer’s Amoral Role*, *supra* note 3, and David Luban responds by defending the “Lysistratian prerogative” of the lawyer not to represent a client bent on pursuing immoral ends, Luban, *supra* note 7. As Bradley Wendel recently noted, the differences between the traditionalists and social justice lawyering theorists have developed into “[a] remarkably stable debate . . . in legal ethics” between those who “regard[] lawyers as primarily moral agents who are under ordinary moral obligations notwithstanding their professional role” and those who “rel[y] on the professional role to create a kind of excuse for conduct that would be considered immoral if engaged in by non-professionals.” W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 367 (2004).

11. Pluralism has been defined as “a state of society in which members of diverse . . . groups maintain an autonomous participation in and development of their traditional culture or special interest within the confines of a common civilization.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 955 (11th ed. 2003).

12. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (discussing how modern democratic societies can accommodate differing viewpoints by emphasizing consensus on certain broad political conceptions). According to John Rawls, “A modern democratic society is characterized . . . by a pluralism of comprehensive religious, philosophical, and moral doctrines . . . [n]o one of

What justice might look like in a morally pluralistic society has become a central issue in liberal political philosophy within the past decade.¹³ Despite its prominence in political philosophy, however, legal ethicists have paid little attention to the significance of moral pluralism for and its impact on the debate over lawyers, morality, and justice.¹⁴ The recognition of moral

[which] is affirmed by citizens generally.” *Id.* at xvi. Rawls recognizes that these foundational disagreements are both reasonable and fundamentally irreconcilable. *See id.* at xvi–xvii, xxiv–xxvi.

13. Recent analyses and critiques of the efforts of political philosophers to meet the challenges that moral pluralism poses for liberal theories of justice include, for example, ANDREA T. BAUMEISTER, *LIBERALISM AND THE ‘POLITICS OF DIFFERENCE’* (2000) (arguing for a theory of liberalism based on value pluralism in order to better accommodate difference); MONIQUE DEVEAUX, *CULTURAL PLURALISM AND DILEMMAS OF JUSTICE* (2000) (arguing that most liberal theorists do not adequately address issues of justice for cultural minorities and advocating a new approach that would offer political respect for and recognition of cultural pluralism); and JOHN TOMASI, *LIBERALISM BEYOND JUSTICE: CITIZENS, SOCIETY, AND THE BOUNDARIES OF POLITICAL THEORY* (2001) (arguing that the boundaries of liberal theorizing must be expanded beyond questions of justice and legitimacy). *See also* THE IDEA OF A POLITICAL LIBERALISM: ESSAYS ON RAWLS (Victoria Davion & Clark Wolf eds., 2000) (collecting essays that critique Rawls’s efforts to ground his theory of justice in a morally neutral political conception); TOLERATION, IDENTITY AND DIFFERENCE (John Horton & Susan Mendus eds., 1999) (collecting essays that respond to the problem of moral pluralism and attempt to provide a better understanding of difference and how to accommodate it by taking identity into account). *Compare, e.g.*, JOHN GRAY, *TWO FACES OF LIBERALISM* (2000) (arguing that in the face of moral pluralism, liberalism needs to abandon the search for a justification based on rational consensus), *with* WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* (2002) (arguing, contrary to John Gray, for the continued vitality of liberal theory even in the face of the persistence of deep value pluralism).

14. Recent lawyering theory literature that explores moral pluralism includes, for example, Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984 (1995) (critiquing two main approaches to lawyering and offering additional principles to guide lawyers); Wendel, *supra* note 10, at 363–65 (commenting on the relationship between law and pluralism); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1 (1999) [hereinafter Wendel, *Public Values*] (outlining an approach to lawyering in a morally pluralistic society that considers the foundational values of the legal profession); and W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113 (2000) (arguing that a model of ethics for lawyers must include consideration and accommodation of different professional values). Additional discussions regarding morality and lawyering can be found in Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992) (criticizing older and newer approaches to role morality for lawyers and arguing for another approach that reflects the individual moralities of lawyers rather than public norms); Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469 (1998) (arguing that lawyers should not be forced to accommodate their

pluralism poses challenges for both the traditional and social justice models of lawyering. To help illustrate these challenges, this Article explores a hypothetical lawyer-client relationship in which a lesbian couple, in an effort to adopt or conceive a child, seeks legal assistance from a lawyer who believes that homosexuality is a morally corrupt lifestyle that damages children. In such a case, the lawyer and the clients have morally diverse—and probably irreconcilably different—views of what morality and justice require, and there is no clear legal or societal consensus about which view is correct.

As this Article demonstrates, neither the traditional nor the social justice models of lawyering provide an adequate account of the lawyer's professional role in the face of fundamental moral disagreement. The traditional model fails because the vision of lawyering as technical expertise on which the model relies does not acknowledge the impact of the lawyer's own moral commitments on the tasks of legal interpretation and legal counseling. The model also fails because it does not provide adequate strategies for dealing with that impact in the face of fundamental moral disagreement. Similarly, the social justice models fail because, although they recognize a role for the lawyer's moral commitments in the tasks of lawyering, their justifications for the lawyer's refusal to accept a case on the grounds of morality or justice do not explain why the client deserves legal representation at all.

This Article proposes that in light of the existence of moral pluralism, lawyers should treat fundamental moral disagreements under a "moral conflict of interest" analysis. A moral conflict of interest framework would both recognize that an individual lawyer's moral commitments may impair legal representation and provide a reason, based on the professional duties that lawyers owe to clients, for affirming that lawyers should sometimes refuse representation on moral grounds. Although the building blocks for a moral conflict of interest analysis are already present in existing ethical standards, the profession has been reluctant to wholeheartedly embrace the idea of moral conflicts of interest. As the language and application of professional responsibility standards reflect, a fear of denying legal representation to unpopular clients—sometimes

moral beliefs to professional norms); and Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003) (arguing in support of a client-centered lawyering approach in which lawyers serve their clients notwithstanding personal disagreement with their clients' goals).

described as the “last lawyer in town problem”—underlies the profession’s reluctance to allow lawyers the prerogative to decline representation on moral grounds.

Part I of this Article examines moral pluralism, focusing on the explanations that political and moral philosophers have given for how citizens within a stable and democratic society come to have divergent and irreconcilable moral beliefs, with attention to the implications of moral pluralism for legal ethics. It joins other legal ethicists in concluding that the existence of moral pluralism buttresses the traditionalist notion that lawyers should not serve a moral screening function, denying access to the law on the basis of their moral assessments of clients’ cases.¹⁵ However, it goes on to examine the lawyer’s internal moral perspective, showing that the very reasons that urge political tolerance of those with differing moral views also suggest that individuals will have strong commitments to their own moral beliefs. Parts II and III of this Article explore the implications of moral pluralism for legal ethics by applying the traditional model of lawyering and three social justice models to the lesbian family planning hypothetical and demonstrating the inadequacy of each model in explaining the lawyer’s obligations in a society characterized by moral pluralism. Finally, Part IV introduces the “moral conflict of interest” standard, explains how it could operate to cure the deficiencies in both traditional and social justice models of lawyering, and defends it against the criticism that allowing lawyers to abstain from representing clients based on moral concerns would eviscerate access to justice.

I. MORAL PLURALISM

In a society characterized by moral pluralism, citizens hold firmly to moral beliefs derived from a diversity of moral, religious, and philosophical sources.¹⁶ There is no way to reconcile the differing moral conceptions because no one comprehensive doctrine for determining right from wrong is accepted by all citizens.¹⁷ John Rawls’s 1993 book, *Political Liberalism*,¹⁸ can

15. See, e.g., Pepper, *Lawyer’s Amoral Role*, *supra* note 3, at 617–18 (arguing that social justice should be decided through the processes of law, not by individual lawyers acting as moral screens); see also *infra* notes 56–60 and accompanying text.

16. See, e.g., RAWLS, *supra* note 12, at xvi.

17. See *id.*

18. RAWLS, *supra* note 12.

be seen as ushering in the modern debate in political philosophy over moral pluralism.¹⁹ While a full analysis of Rawls's understanding of justice as a political concept is beyond the scope of this Article,²⁰ his rather striking vision of moral pluralism as a normal and desirable state of affairs has interesting implications for theorists who seek to define the role of the lawyer in a just society.

What is striking about Rawls's view of moral pluralism is that it envisions moral pluralism as a natural and inevitable development, indeed "as the natural outcome of . . . human reason under enduring free institutions."²¹ "To see [moral] pluralism as a disaster," Rawls writes, "is to see the exercise of reason under the conditions of freedom itself as a disaster."²² Rather, he views the emergence of a plurality of reasonable yet incompatible moral, philosophical, and religious doctrines as the mark of a truly free and democratic society in which individuals are politically able to pursue their own conceptions of the good.²³ Quite simply, according to Rawls, the divergent and uncompromising moral schisms of pluralism must be understood as a sign that liberalism is working the way it should. Rather than seeking to "cure" it, we should understand moral pluralism as a natural and permanent feature of modern democratic societies.²⁴

How moral pluralism can be explained as a natural and permanent condition of free societies is an interesting question. Why is it that under conditions of political freedom, individuals

19. See, e.g., MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 184–218 (2d ed. 1998) (responding at length to Rawls's reconceptualization of justice around political liberalism); TOMASI, *supra* note 13, at 9 (describing Rawls's political liberalism as "a radically new liberal view").

20. In *Political Liberalism*, Rawls posits that principles of justice can be accepted as part of an "overlapping consensus" of minimal commitments that all reasonable comprehensive conceptions will share. See RAWLS, *supra* note 12, at 133–72. Rawls's quest to reformulate his theory of justice on political rather than metaphysical grounds continued until his ill health intervened, and his last unfinished manuscript was eventually edited by Erin Kelly and published in 2001. See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, at xii–xiii (Erin Kelly ed., 2001).

21. RAWLS, *supra* note 12, at xxiv.

22. *Id.* at xxiv–xxv.

23. See, e.g., *id.* at xxiv–xxvi.

24. See, e.g., *id.* at xvi; see also SUSAN MENDUS, IMPARTIALITY IN MORAL AND POLITICAL PHILOSOPHY 11–13 (2002) (summarizing Rawls's conclusion regarding the inevitability of moral pluralism and arguing that two features of the modern world that affect contemporary political philosophy are the permanence of pluralism and the significance of religious and moral beliefs).

will diverge in their views of what is right and wrong rather than converging around a social consensus? What accounts for moral differences that run so deep that they cannot be bridged through rational argument or empirical investigation? This section explores three possible explanations, drawn from political and moral philosophy, of how the emergence of a diversity of incommensurably different moral viewpoints can be viewed as a natural and understandable feature of modern democratic societies. It then outlines the implications of this view of moral pluralism for the role of the lawyer in a morally pluralistic society, given the lawyer's dual roles as a political agent within a system of justice and as an individual possessing an internal moral perspective on his or her own moral values as well as the moral values of others.

A. SOURCES OF MORAL PLURALISM

The explanations advanced by moral and political theorists of the sources of moral pluralism can be divided into three distinct categories.²⁵ One type of explanation—the “epistemological difficulty” explanation—understands moral reasoning as a search for moral truth or moral consistency, which is arrived at by applying reason to one's moral intuitions. This view of morality allows for the existence of universal moral truth, but it recognizes the difficulty of actually reaching a correct assessment of that truth. Moral pluralism, under this account, arises from the fallibility of human reason. The second type of explanation—the “value pluralism” explanation—understands personal morality as a commitment to a set of core values chosen from among a plurality of incommensurable values. Under this view, the range of values is simply too broad and diverse to result in a clear hierarchy of values, and there are multiple right choices that one might make in prioritizing them. However, the choices any one individual makes in prioritizing values create personal commitments that shape that individual's other life

25. Although theoretically distinct, these explanations do not divide liberal theorists into clearly differentiated schools of thought. Indeed, many theorists accept multiple explanations or explanations that are an amalgam of the three theoretical types described in this section. *See, e.g.*, GALSTON, *supra* note 13, at 28–38 (describing expressive liberty, value pluralism, and political pluralism as three sources of pluralism with which liberalism must contend); RAWLS, *supra* note 12, at 56–58 (providing a list of factors, which overlap all three categories, that lead to the creation of a plurality of comprehensive moral doctrines).

choices and value commitments and that become integral to that individual's personal identity. The third type of explanation—the “cultural identity and experience” explanation—recognizes that persons in society are members of various sub-cultures and communities, not merely individuals, and that their membership in those other communities inevitably shapes their values and influences their experiences of the world.

1. The Epistemological Difficulty Explanation

The epistemological difficulty explanation is consistent with claims that moral truth exists, but it acknowledges the difficulty of arriving at correct moral judgments given the many factors that come into play in assessing right and wrong conduct.²⁶ The epistemological difficulty explanation supposes a process of moral reasoning that involves rationalizing one's judgments in particular cases into principled explanations for those judgments. One leading example of such a process is the “reflective equilibrium” posited by Rawls in his earlier and seminal work, *A Theory of Justice*.²⁷ In the process of reaching reflective equilibrium, we begin with moral judgments in particular situations—judgments that arise from an intuitive “sense of justice.”²⁸ We generalize these intuitive moral judgments into moral principles that explain the judgments and can be applied to other similar situations.²⁹ Our particular moral judgments and the more general moral principles then play off each other in a process of mutual revision.³⁰ In some cases, we revise our intuitive moral judgments to make them consistent with our general moral principles.³¹ In other cases, we revise our general moral principles to better account for our intuitive moral judgments.³² Eventually we reach a balance between our intuitive sense of justice and our rationalized and generalized principles—a balance that Rawls calls “reflective equilibrium.”³³

26. Rawls calls the many factors that can lead to different moral judgments the “burdens of judgment.” RAWLS, *supra* note 12, at 54–58.

27. JOHN RAWLS, *A THEORY OF JUSTICE* 40–43 (rev. ed. 1999).

28. *Id.* at 41.

29. *Id.*

30. *Id.* at 42–43.

31. *Id.*

32. *Id.*

33. *Id.*

In *A Theory of Justice*, Rawls wrote that he “[o]ok] for granted” that the outcome of this process of reflective equilibrium—“the principles that characterize one person’s considered judgments”—would be “either approximately the same for persons whose judgments are in reflective equilibrium, or if not, that their judgments [would] divide along a few main lines.”³⁴ After recognizing the permanence of “reasonable pluralism” in his later work, Rawls revised that view. In *Political Liberalism*, Rawls explains how, based on a variety of factors relating to the fallibility of the process, conscientious and reasonable persons could be expected to differ markedly in their considered judgments as well as in the comprehensive doctrines of morality or religion that explain these judgments.³⁵ The factors relating to fallibility include the complexity of the evidence that bears on a moral issue; the varying weight that different people give to different considerations; the existence of difficult cases; and the existence of moral conflicts requiring tradeoffs between principles, which people may negotiate in different ways.³⁶

The epistemological difficulty explanation thus allows for the existence of moral truth. It is consistent with a view that given access to complete information and perfect rationality, moral questions are capable of right and wrong answers. The problem is that those answers elude our practical human capabilities and thus remain outside of our reach.³⁷ The complexity

34. *Id.* at 44.

35. RAWLS, *supra* note 12, at 56–58. Rawls admits the fallibility of this process, noting that some—even all—reasonable results may be “false.” *Id.* at 58. Rawls views the ultimate outcome of this process as the development of a reasonable comprehensive doctrine that rationalizes one’s moral beliefs. *Id.* at 58–60. According to Rawls, reasonable comprehensive doctrines “express views of the world and of our life with one another” in “more or less consistent and coherent” systems grounded in moral, philosophical, or religious traditions of thought. *Id.* at 58–59.

36. *Id.* at 56–57. Rawls notes additional factors that relate to the other two explanations of moral pluralism. He refers specifically to Isaiah Berlin’s conception of a plurality of incommensurable values, and he notes that some variation will result from the fact that “in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens’ total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.” *Id.* at 57. These considerations are discussed *infra* as the value-pluralism explanation and the cultural identity and experience explanation, respectively.

37. Lawyering theorist Paul Tremblay has drawn from the psychological theory of cognitive bias to illustrate how our beliefs about the world may be influenced by our preexisting biases. See Paul R. Tremblay, *Client-Centered Counseling*, Symposium, *Client Counseling and Moral Responsibility*, 30 PEPP.

of the task of moral reasoning, the fallibility of our beliefs, and the intricate interplay between our preexisting beliefs and the way we view the world combine to create epistemological difficulty in reaching moral certainty. The result is a plurality of reasonable moral beliefs.

2. The Value Pluralism Explanation

The second explanation for moral pluralism, that of value pluralism, arises from the notion that there exists a plurality of incommensurable values—such as justice, kindness, loyalty, fairness, honesty, and the desire to please—that cannot be rationalized into a single, coherent moral system.³⁸ According to value pluralists, the task of properly discerning a single principle that underlies, explains, and reconciles one's moral judgments into an orderly hierarchy is not just difficult and subject to error; it is simply not possible.³⁹ The articulation of the idea that there is a plurality of incommensurable values is generally credited to Isaiah Berlin.⁴⁰ According to Berlin, conflict between values is “an intrinsic, irremovable element in human life.”⁴¹

L. REV. 615, 618–22 (2003). Although Tremblay believes that we basically share a deep set of common values and that rational application of our common moral principles would lead to common results, he notes that we disagree about the concrete application of those values in particular situations. *See id.* at 618. Because of biases deeply embedded in the way we process information, he contends, we resist the factual inquiry that might resolve what appears to be moral difference because we tend to find fault with the reliability of information that contradicts our preexisting biases and tend to be convinced by information that supports our preexisting views. *See id.* at 622–23.

38. *See, e.g.*, STUART HAMPSHIRE, MORALITY AND CONFLICT 20–22 (1983).

39. *See id.* at 12 (“[T]he underlying structure of one's moral beliefs' . . . is something that one may look for and yet may fail to find, not only because one is not ingenious enough to find it, but perhaps also because it may not be there to be found.”).

40. *E.g.*, GALSTON, *supra* note 13, at 4–5 (“The concluding section of Berlin's ‘Two Concepts of Liberty’ has helped spark what may now be regarded as a full-fledged value-pluralist movement in contemporary moral philosophy.”); *see also* ISIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958), *reprinted in* LIBERTY 166, 216–17 (Henry Hardy ed., 2002) [hereinafter BERLIN, TWO CONCEPTS]. Berlin himself traces its roots to nineteenth-century Romantic idealism. *See, e.g.*, ISIAH BERLIN, *The Pursuit of the Ideal*, in THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS 1, 2–4 (Henry Hardy ed., Princeton Univ. Press 1997) (1990) [hereinafter BERLIN, *The Pursuit of the Ideal*]. For other theories that draw support for liberalism out of value pluralism, *see*, for example, GALSTON, *supra* note 13; HAMPSHIRE, *supra* note 38; and JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

41. BERLIN, TWO CONCEPTS, *supra* note 40, at 212–13.

Value pluralists claim the existence of “many kinds of life in which humans can thrive” as “a fact about human nature,” rejecting ideals of human perfection based on one conception of “the good life.”⁴² According to value pluralists, it is not possible to order one’s life around all positive values because there is a “moral scarcity . . . built into the fabric of human life”⁴³ and no common currency with which positive values can be compared or traded off against one another.⁴⁴ For example, situations may arise that require one to choose between loyalty to one’s friend and fairness to others, or between being truthful and being kind.⁴⁵ A rationalist would say that there are right answers in these circumstances and that the trick is figuring out the complex hierarchy among values as it plays out in particular situations.⁴⁶ A value pluralist, however, would view these kinds of situations as requiring individuals to choose between competing and incommensurable values.⁴⁷

According to the value pluralists, individuals define their life goals, and even their personal identities, through the process of committing themselves to certain core values that subsequently shape their other goals and choices.⁴⁸ A person’s choices may not be made directly, but instead may arise through situations in which he or she experiences conflicting values and must choose between them.⁴⁹ The result of the sur-

42. GRAY, *supra* note 13, at 9–10.

43. *Id.* at 10.

44. See, e.g., HAMPSHIRE, *supra* note 38, at 155. This is generally what is meant by the notion of the “incommensurability” of values. See, e.g., RAZ, *supra* note 40, at 321–66 (discussing the notion of incommensurability).

45. E.g., HAMPSHIRE, *supra* note 38, at 37.

46. See *supra* notes 35–37 and accompanying text.

47. This is not to say that there is never a clearly superior answer when values come into conflict. Value pluralists generally concede a core of values that must be present to make any human life worthwhile. Joseph Raz calls these “biologically determined needs and desires,” such as health or the need for food. RAZ, *supra* note 40, at 290. Likewise, Stuart Hampshire asserts, against arguments for relativism, that there are certain “essential virtues.” HAMPSHIRE, *supra* note 38, at 37. Among these essential virtues, he lists “courage, fairness or justice, loyalty, love and friendship, intelligence and skill, and some self-control.” *Id.*

48. Raz distinguishes human goals that are subject to choice from those that are biologically determined. RAZ, *supra* note 40, at 290–91. According to Raz, human goals are hierarchically arranged—or “nested within hierarchical structures”—so that the more fundamental or important goals help to shape the subsidiary goals that will lead to the attainment of the higher goals. See *id.* at 292–93.

49. See, e.g., HAMPSHIRE, *supra* note 38, at 31–43; see also RAZ, *supra*

plus of incommensurable positive values and the myriad of choices that individuals make in ordering these values in their life choices is a plurality of different value systems. These systems may be in conflict with one another, creating a plurality of reasonable yet ultimately incompatible moral views.

3. The Cultural Identity and Experience Explanation

While the value pluralists tend to view incommensurable-value conflict as a condition of human nature, the third explanation for moral pluralism situates value differences more specifically within the cultural identities and personal experiences of individuals.⁵⁰ According to the cultural identity and experience explanation, one's choice of values is not simply an individual commitment to be a certain kind of person, but is rather an outgrowth and expression of one's cultural identity. Andrea Baumeister has noted the parallel between moral pluralism and the political demands of various religious, ethnic, and national minorities within multicultural democracies.⁵¹ The culturally based values in minority communities hold a special status within a larger society because they define a way of life that has normative authority for members in those communities in ways that go beyond individual members' value choices.⁵²

note 40, at 290–91 (“Some . . . goals a person may have adopted deliberately, some he may have chosen. Others he may have drifted into, grown up with, never realized that anyone can fail to have them, etc.”).

50. The insight that different cultures have developed values in different ways was an important source of the value pluralists' rejection of a unity or harmony of values as a matter of human nature. See, e.g., BERLIN, *The Pursuit of the Ideal*, *supra* note 40, at 10–11 (tracing his own views on value pluralism to the eighteenth-century writer Johann Gottfried Herder's recognition of variations in the “centre of gravity” of different cultures regarding ends).

51. BAUMEISTER, *supra* note 13, at 13, 16 (comparing the challenges that national and ethnic minorities pose for liberalism to the challenge posed by early value pluralists). Baumeister's work tests the adequacies of the various theoretical responses to moral pluralism within liberal theories against the demands for political inclusion of religious, ethnic, and national minorities, as well as feminist critiques of classical liberalism. See generally BAUMEISTER, *supra* note 13; Andrea T. Baumeister, *Multicultural Citizenship, Identity and Conflict*, in TOLERATION, IDENTITY AND DIFFERENCE, *supra* note 13, at 87.

52. See, e.g., Bhikhu Parekh, *The Logic of Intercultural Evaluation*, in TOLERATION, IDENTITY AND DIFFERENCE, *supra* note 13, at 163, 163. The recognition of minority-community values creates special political tensions because it implicates issues of group rights and cultural survival, which are difficult to fit within the liberal focus on individualism and individual autonomy. See *id.* at 163–64.

One's status as a member of an outsider community due to one's race, class, sex, experience of disability, or sexual orientation can also produce different experiences of social life that affect the development of one's values.⁵³ Outsider perspectives can embody deep value differences, illustrated famously by Carol Gilligan's assertion that in contrast to the "justice ethic" exemplified by traditional rationalist moral theory, women have developed an "ethic of caring" based on maintaining relationships.⁵⁴ Additionally, outsider perspectives can contribute to widely differing understandings of many "factual" situations, which can lead to differing moral outlooks over a range of moral and social issues.⁵⁵

Although the three foregoing explanations of the sources of moral pluralism are not fully consistent with each other, they need not be seen as mutually exclusive. Each of the explanations of the sources of moral pluralism can be viewed as being accurate to some degree. For example, when we reflect on our moral beliefs, attempting to justify them to ourselves or perhaps to others, we go through a process something like Rawls's "reflective equilibrium." We also have certain core values to which we are committed, and these values shape our subsequent life choices. Finally, our perspectives on the world, both in terms of how we judge facts and how we prioritize values, are affected by our social situation and cultural upbringing.

B. IMPLICATIONS FOR LEGAL ETHICS' MODELS OF LAWYERING

Accepting these explanations of the sources of moral pluralism as more or less accurate, two important points for

53. Sylvia Lazos Vargas has called these different ways of perceiving social phenomena differing "epistemologies" that operate by virtue of one's membership in majority or minority groups. See Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 155 n.13 (1999). The recognition that outsiders have different perspectives has generated a whole genre of "outsider jurisprudence" to juxtapose the seemingly "objective" perspectives embodied in the law with the differing perspectives of "outgroup" members. See, e.g., STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 158-62 (2000) (discussing the connections between "outsider jurisprudence" and postmodern thought).

54. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Whether outsider perspectives are an appropriate basis for a full-blown alternative moral theory is controversial, since by nature they arise out of the experience of being oppressed.

55. For a discussion of the various forces that create different perspectives, see, for example, Lazos Vargas, *supra* note 53, at 184-96.

lawyering theory follow. One conclusion, typically drawn by political philosophers, is to emphasize the importance of societal tolerance of different moral viewpoints and of political neutrality between competing conceptions of the good.⁵⁶ This conclusion follows from both rationalist and value-pluralist accounts. It follows from the rationalist view of the fallibility of our moral beliefs that no one person's or group's conception of morality is necessarily right, and that the best approximation of what is right for society will come from allowing maximum freedom and diversity of beliefs to thrive.⁵⁷ Likewise, it follows from a value-pluralist perspective that if persons' differing value choices can be equally legitimate, and if living according to those beliefs, once chosen, is central to their human flourishing, then the imposition of political constraints on the exercise of those beliefs is a particularly intrusive exercise of state authority into individual autonomy.⁵⁸

Because the lawyer is a political actor, playing a role within a larger system of justice, the use of his or her professional role to impose his or her personal morality in ways that silence opposing moral viewpoints or frustrate individual autonomy on moral grounds has been problematic for lawyering theory.⁵⁹ The focus of much of the recent discussion in legal ethics that addresses moral pluralism has been on this political

56. Although this statement describes the general conclusion of liberal political theory, there is significant internal debate among liberal political theorists about the limits of political neutrality between competing conceptions of the good. *See, e.g.*, SANDEL, *supra* note 19 (exploring the possibilities for applying justice in a neutral way in a society characterized by moral pluralism).

57. *See, e.g.*, GRAY, *supra* note 13, at 3 ("For liberal thinkers who sought a rational consensus on the best life, toleration was a remedy for the limitations of human understanding. . . . It was this manifest imperfection of human reason that underpinned the ideal of toleration as a means to consensus."); JOHN STUART MILL, ON LIBERTY 88 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (arguing that our fallibility about right and wrong should justify tolerance for freedom of expression of a variety of viewpoints and that "[a]ll silencing of discussion is an assumption of infallibility").

58. *See generally* RAZ, *supra* note 40 (discussing the responsibilities of government in creating and promoting freedom, and arguing for a political theory of freedom and tolerance based in the assumptions of value pluralism).

59. For example, Pepper argues that it is inappropriate for a lawyer's personal moral beliefs to perform the public function of denying access to the law. *See, e.g.*, Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 665–66 ("The lawyer, unlike the spouse or friend, is part of the *formal* system of law *imposed* by the community . . . and therefore has different obligations from those of the spouse or friend.").

role that lawyers play.⁶⁰ What has received less attention are the implications of moral pluralism for the internal moral perspective of the individual lawyer—that is, how the lawyer is likely to view his or her own moral beliefs and the beliefs of others, and how that perspective affects his or her lawyering.⁶¹

As this section demonstrates, three features of our internal experience of morality follow from the political and moral theorists' explanations of the sources of moral pluralism. First, we have a strong tendency to view our own moral beliefs as true. Second, we tend to view the moral beliefs of those with whom we disagree as mistaken. Finally, we experience a significant betrayal of self if we fail to act in accordance with our moral values. This Article later argues that the impact of this internal moral perspective poses serious challenges to a lawyer attempting to represent clients with whom the lawyer fundamentally morally disagrees.

It follows from the process of something like Rawls's "reflective equilibrium" that when we have reached considered moral judgments, we have a strong tendency to view these judgments as true. This is because from our internal perspectives, we have explained our moral judgments to ourselves and made them rationally consistent with our other beliefs. Our considered judgments fit together into larger systems of beliefs that make sense to us and provide us with a satisfactory way of determining right from wrong—satisfactory enough that we are willing to invest it with great and overriding value in our own lives. The fact that we have gone through this process and reached this result gives our moral judgments a kind of truth value for us.⁶² Moreover, because we have grounded our beliefs in generalizable principles, we understand our moral beliefs as

60. See, e.g., Atkinson, *supra* note 14; Morgan & Tuttle, *supra* note 14; Wendel, *supra* note 10.

61. *But cf.* Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209 (2003) (describing from a moral phenomenological perspective how lawyers view their participation in professionally sanctioned activities that violate the dictates of ordinary morality).

62. See, e.g., Peter Jones, *Beliefs and Identities*, in TOLERATION, IDENTITY AND DIFFERENCE, *supra* note 13, at 65, 81 ("To hold a belief is to hold that something is the case. It is not to declare 'this is who I am.'" [sic]); *id.* at 82 ("[M]y commitment to what I believe cannot be primarily a commitment to an identity; it must be a commitment to the truth or the rightness of what I believe."); *cf.* MENDUS, *supra* note 24, at 75 (noting that when we decide to act on the basis of values that form a core part of our personal identities, we do not do so out of care for our identities but out of care for the things that we value).

being true not only for us, but true for other people as well.⁶³ We may recognize that other people disagree with us about what is morally right and wrong, but from our internal perspectives, we do not think that such disagreement places them beyond the reach of moral rules.

From the internal perspective, there is a strong tendency to view conflicting moral beliefs as involving moral or factual mistakes. In other words, because we recognize the fallibility of the process, we easily believe that it is possible to make moral mistakes. However, it is much easier for us to believe that *others* have erred than it is to believe in *our own* errors regarding moral judgments. As John Stuart Mill writes, “[F]ew think it necessary to take any precautions against their own fallibility, or admit . . . that any opinion, of which they feel very certain, may be one of the examples of the error to which they acknowledge themselves to be liable.”⁶⁴ Our social standings, whether as insiders or outsiders, can further contribute to the belief that others are simply morally mistaken. If I experience the world from the perspective of the dominant culture, that culture will reflect my perspective to such a large extent that it may be difficult for me to realize the ways in which my perspective is not universally shared.⁶⁵ On the other hand, if I experience the world from an outsider perspective, I will be quite aware that the assumptions of the dominant culture are at variance with my perspective, and this knowledge may lead me to discount the judgments of members of the dominant culture.

63. See, e.g., R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* 107–16 (1981) (arguing that the property of universalizability is inherent in the use of moral imperatives); MARCUS GEORGE SINGER, *GENERALIZATION IN ETHICS: AN ESSAY IN THE LOGIC OF ETHICS, WITH THE RUDIMENTS OF A SYSTEM OF MORAL PHILOSOPHY* 34 (Atheneum 1971) (1961) (arguing that generalization “is at the heart of moral reasoning” because “it is presupposed in every attempt to give a reason for a moral judgment”).

64. MILL, *supra* note 57, at 88. Our sense of the fallibility of others may only be increased by a consciousness that what we believe to be factually true about the world does not seem to match the factual predicates on which differing moral views are based. For example, if my beliefs are based on facts about the world as I perceive it, I may view those who reach different moral judgments as being simply ill informed. I will perhaps think that if they had correct information, they would come to the same moral judgment that I have reached.

65. See, e.g., HARLON L. DALTON, *RACIAL HEALING* 105–16 (1995) (discussing the phenomenon of white people not seeing themselves as having a race); Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, *PEACE & FREEDOM*, July/Aug. 1989, at 10 (describing the effect of whiteness in shaping her experience of the world), *reprinted in* INDEP. SCH., Winter 1990, at 31.

Because our personal moral commitments play such an important role in shaping our lives and personal identities, acting contrary to our moral values engenders a sense of personal failure and special regret, even if that failure is due to circumstances outside of our control.⁶⁶ Once chosen or articulated through life decisions, achieving a life consistent with our values becomes an important part of our personal identities—or, in the words of Bernard Williams, the nexus of “ground projects” that give shape and meaning to our lives.⁶⁷ As Williams writes, loss or frustration of our “ground projects” would “remove meaning” from life in an important respect, such that we may feel that we “might as well have died.”⁶⁸ Rawls writes in a similar vein that “[i]f we suddenly lost [our conceptions of the good], we would be disoriented and unable to carry on,” and if we were to change them suddenly, as in the case of a religious conversion, “we [would be] likely to say that we are no longer the same person.”⁶⁹ Even if we could have chosen different projects at some point in time, the success of our chosen projects is ultimately deeply connected with our personal well-being.⁷⁰

This picture of our internal moral experiences is not intended to convey the idea that we can never get outside of our own moral perspectives. Indeed, tools such as empathy can help us to appreciate diverse cultural and moral perspectives in a

66. Significantly, value pluralists admit the existence of “moral dilemmas”—situations in which one’s values come into irreconcilable conflict that require one to make an immoral choice. *See, e.g.*, RAZ, *supra* note 40, at 359–66; BERNARD WILLIAMS, *Moral Luck*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980*, at 20, 31 (1981). In a moral system in which “right answers” can be found, most notably utilitarian theories, it is difficult to explain the existence of the moral regret, or even despair, that such situations create. However, this inability to explain a moral phenomenon that we experience has been taken as a criticism of those theories. For a fuller discussion of the phenomenon of agent regret in lawyering, see Markovits, *supra* note 61.

67. *See* WILLIAMS, *supra* note 66, at 33–39 (discussing the relationship of “ground projects” to morality); BERNARD WILLIAMS, *Persons, Character and Morality*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980*, *supra* note 66, at 1, 12–14 (discussing the nexus of “ground projects” that give meaning to a person’s life); *see also* RAWLS, *supra* note 12, at 31 (describing a person’s moral commitments as “specify[ing] moral identity and giv[ing] shape to a person’s way of life”); RAZ, *supra* note 40, at 313–20 (discussing the relationship between morality and personal well-being).

68. WILLIAMS, *supra* note 67, at 13.

69. RAWLS, *supra* note 12, at 31. Although Rawls is not a value pluralist, he acknowledges the possibility of value pluralism as one potential source of moral pluralism. *See supra* note 36.

70. *E.g.*, RAZ, *supra* note 40, at 294–99.

way that transcends mere toleration and approaches true respect. However, despite our ability to transcend our own internal moral perspectives, it is not an easy task. As Thomas Nagel notes, “[W]e can’t fully take on . . . skepticism . . . toward our own beliefs while we’re having them.”⁷¹ We can affirm toleration of, and even respect for, diverse moral views as a political ideal. Yet, when confronted with a moral viewpoint sharply different from our own on a subject that matters to us, or when asked to assist another in actions that we view as immoral, our own considered moral beliefs have a strong hold on us.

The lawyer must thus toe a delicate line. As a political actor, the lawyer is charged to be neutral between competing legitimate moral perspectives. On the other hand, the lawyer is also an individual who is subject to the limitations of an internal moral perspective from which he or she tends to view his or her own moral beliefs as correct and vitally important, and from which he or she tends to view fundamentally differing moral beliefs as mistaken. As the next sections show, the tensions between the internal moral perspective of the lawyer and the political task of lawyering pose problems for both the traditional and the social justice models of lawyering. This Article explores these tensions by applying both traditional and social justice lawyering models to a hypothetical lawyer-client relationship characterized by deep and incommensurable moral division.

C. LAWYERING IN A WORLD OF MORAL PLURALISM: LESBIAN FAMILY PLANNING AS A CASE STUDY

No other issue in contemporary American society illustrates fundamental moral division better than the divergence in moral beliefs about homosexuality.⁷² That is the conclusion of sociologist Alan Wolfe, whose extensive study of middle-class moral values concluded, in part, that “the question of homosexuality reveals two genuinely different moral camps in America that disagree profoundly about the fundamental nature of what they are contesting.”⁷³ Wolfe asserts that moral differ-

71. THOMAS NAGEL, *THE VIEW FROM NOWHERE* 88 (1986).

72. ALAN WOLFE, *ONE NATION, AFTER ALL* 72 (1998).

73. *Id.* at 79. Wolfe’s Middle Class Morality Project involved interviewing two hundred residents of eight geographically and demographically diverse suburbs. *See id.* at 21–30. These interviews were designed to explore issues that were thought to divide middle-class Americans in a “culture war” between American liberals and conservatives in order to “test the hypothesis that mid-

ences over homosexuality may well be the kind of differences that test the limits of middle-class moral tolerance in a way that “cannot be talked out.”⁷⁴

To demonstrate and test the efficacy of lawyering models in the face of moral pluralism, this Article applies the traditional model and three alternative social justice models of lawyering to a hypothetical lawyer-client relationship involving the divisive issue of homosexual parenting. The clients are a lesbian couple who wish to have a child together, either through adoption or alternative methods of conception. The lawyer, however, believes that a homosexual lifestyle is morally wrong and harmful to children. Viewed from the moral perspective of the lawyer, this lawyer-client relationship incorporates all the elements of a standard professional responsibility hypothetical: the clients want to use the law to promote an immoral end, the law arguably allows them to do it, and their actions will visit harm on an innocent third party. By situating these familiar elements within a moral framework in which there is no moral consensus and little ground for moral compromise, it is possible to explore the challenges that moral pluralism poses for both traditional and social justice lawyering models.

dle-class Americans no longer share a common moral worldview but are bitterly divided into traditionalist and modernist wings.” *Id.* at 21. Wolfe ultimately concluded that “[o]n moral matters, there is no unanimity in America.” *Id.* at 276. On a number of issues such as “respect for homosexuality, support for postmodern families, [and] sympathy toward immigration,” the Project revealed that middle-class Americans were strongly divided into different camps. *Id.* However, rather than being locked in a “culture war” that divided “one group of Americans and another,” the Project concluded that the real divide was “between sets of values important to everyone.” *Id.* at 279. While recognizing the strong divisions in moral values that characterize American society, the Project found middle-class Americans to be “tolerant to a fault,” “moderate in their outlook on the world,” and “reluctant to impose values they understand as virtuous for themselves on others.” *Id.* at 278.

74. *Id.* at 81. In an interesting sense, Rawls is exploring the philosophical foundations for the situation observed by Wolfe: the development of values of tolerance in the face of sharp moral disagreement. See generally RAWLS, *supra* note 12. As others have noted, the puzzle of tolerance despite moral heterogeneity is a central issue for Rawls’s political liberalism. See, e.g., TOMASI, *supra* note 13, at 9 (“Political liberalism, insofar as it starts with anything, starts with a very general idea of *society*—something like the idea of a moral union, or democratic agreement, in the face of reasonable pluralism.”); John Horton & Susan Mendus, *Toleration, Identity and Difference*, in TOLERATION, IDENTITY AND DIFFERENCE, *supra* note 13, at 1, 2–3. Indeed, the central question Rawls explores is how “there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines.” RAWLS, *supra* note 12, at xviii.

The hypothetical that this Article proposes includes the following facts: Tina and Donna, the clients, are a lesbian couple. Although they do not live in a jurisdiction that allows them to marry, they have done everything they can do legally to put their property into joint ownership so that their property rights duplicate those of a married couple. Tina and Donna want to have a child together, either through adoption or artificial insemination. They are seeking advice on how to use existing law to structure their family so that their child can have a family relationship that best approximates the kind of relationship the child would have if Tina and Donna were legally married. They believe—somewhat naively, as we shall see—that they will be able to arrange their parenting rights in much the same way that they have arranged their property rights.

Tina and Donna seek legal advice from Rex, a family law and probate lawyer who has been practicing for thirty years. Rex is well versed in the law of his jurisdiction and is somewhat familiar with the laws of other jurisdictions in his areas of practice. He has what he would characterize as traditional family values: he believes it is in the best interests of children to be raised in two-parent families, with one mother and one father, so that children can have the benefits of stable marital families and dual-gender role modeling. Based on his religious tradition and moral upbringing, he believes that homosexuality is sinful and wrong. He also believes that it can be emotionally and psychologically harmful to children to be exposed to a homosexual lifestyle.

If Tina and Donna were a married couple, their relationships with their child would be legally symmetrical whether the child was born into the marriage or adopted by them. When a child is born into a heterosexual marriage, the parental relationships are secured by legal presumptions that make the rights of the husband legally symmetrical to those of the wife,⁷⁵ and even prefer his legal parenthood over the paternal claims of a man who is known to have actually provided the child's genetic material through intercourse or sperm donation.⁷⁶ This

75. A biological mother's legal parenthood is usually established by the act of childbearing, without more. Paternity is usually established by showing a biological and care-giving connection to a child or by demonstrating that a marital relationship existed between the child's mother and supposed father at the time the child was conceived. See, e.g., Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 691–93 (2001).

76. See *id.* The legally presumed parenthood of a husband may override

preference for the husband's paternity is consistent with a range of laws and policies dictating that "every child should have one mother and one father, neither more nor less,"⁷⁷ coupled with a desire to protect the sanctity of the marital family.⁷⁸

Tina and Donna's options for duplicating this set of legally symmetrical parental rights incident to marriage may be slim or nonexistent, depending on the law in their jurisdiction. The marital presumptions that create legally symmetrical parental relationships between married partners are probably unavailable to them.⁷⁹ Unless the adoption statute in their jurisdiction is construed to permit co-parent or second-parent adoption,⁸⁰

the parental claims of a nonmarried biological father. See *Michael H. v. Gerald D.*, 491 U.S. 110, 123–27 (1989) (rejecting the argument of a child's biological father that his biological relationship plus the parenting relationship he had established with the child created a liberty interest sufficient to override California's conclusive presumption that the mother's husband was the legal father of the child). Even if the wife has been artificially inseminated with sperm donated by another man, state statutes may presume that her husband is the legal father of the child. *E.g.*, CAL. FAM. CODE § 7613(a) (West 2004) ("If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.").

77. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-traditional Families*, 78 GEO. L.J. 459, 468 (1990); see also *id.* at 468–73 (tracing the preference for the "one-father/one-mother" definition of parenthood through several legal doctrines).

78. See *Michael H.*, 491 U.S. at 123–27 (upholding a state law creating a presumption of paternity in the husband and relying in significant part on the historical respect for the marital family).

79. Barring the intervention of sophisticated reproductive technology, only one of them can be the biological parent of the child. Moreover, in most jurisdictions only one of them can be the adoptive parent. William B. Rubenstein, *Divided We Propagate: An Introduction to Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 UCLA WOMEN'S L.J. 143, 145 (1999) ("[S]econd parent adoptions remain the exception . . . as they are approved in only a handful of states . . .").

80. In the handful of states that have recognized co-parent or second-parent adoptions for same-sex couples, the authority is rarely granted explicitly in the statute. Annette R. Appell, *Lesbian and Gay Adoption*, ADOPTION Q., 2001, at 75, 78 [hereinafter Appell, *Lesbian and Gay Adoption I*] ("Connecticut is the only state, to my knowledge, with an adoption act that specifically permits non-marital co-parent adoption . . ."). Rather, courts have inferred such authority by interpreting statutory language using a "best interests of the child" standard. See *id.* at 80–81. In updating her review of lesbian and gay adoption law in 2003, Annette Appell noted that three state statutes explicitly permitted second-parent adoptions, adding California and Vermont to the tally. Annette R. Appell, *Recent Developments in Lesbian and*

Tina's and Donna's parental rights will be legally asymmetrical: one of them will be the legal parent of the child by birth or adoption, and the other will be considered by law to be a "third party" without the protections incident to legal parenthood—a "legal stranger[]" to the child."⁸¹

Although Tina and Donna have likely discussed some of their options with each other before arriving at Rex's office, information about the legal dimensions of the situation will undoubtedly raise the questions in ways that they have not anticipated and with which they will have to struggle. Rex will have to advise them what the law permits them to do; inform them of the legal obstacles that stand in their way; and help them assess what they want to do in light of those legal opportunities and barriers, as well as in light of their own moral commitments and beliefs.

The sections that follow explore how the traditional model and various social justice models of lawyering would approach Rex's legal representation of Tina and Donna. Each model would define the justice issues involved in the representation in a slightly different manner. Yet in each of the models, the goals of justice that the model defines would be frustrated by the recognition of moral pluralism and what such recognition entails for the competing political obligations and the individual internal moral perspective of the lawyer.

II. THE TRADITIONAL MODEL OF LAWYERING

The traditional model of lawyering initially appears to respond well to the question of lawyering in a society characterized by moral pluralism because it defines the lawyer's professional duties to the client from a perspective of moral neutrality toward the client's objectives. While the profession's aspiration to provide legal assistance to clients regardless of any particular moral judgment of the clients' ends is defensible in a morally pluralistic society, the ability of the individual lawyer to deliver legal assistance free of moral judgment is questionable. Because the lawyer operates from within the bounds of his or her own internal moral perspective, his or her ability to achieve the traditionalists' goal of maximizing client autonomy within

Gay Adoption Law, ADOPTION Q., 2003, at 73, 73–74, 82 n.3. However, other states have moved in the opposite direction, specifically banning adoption by homosexual parents. *See id.* at 74–75, 81.

81. Polikoff, *supra* note 77, at 511.

the limits of the law would be compromised if the lawyer were to accept representation of a client with whom he or she fundamentally morally disagreed. As this section shows, despite the aspirations of the traditional model to moral transcendence, the lawyer's internal perspective on morality and justice necessarily comes into play in many cases of routine legal representation.

A. JUSTICE AND MORAL TRANSCENDENCE

For traditionalists, justice is defined through the ideals of individual liberty, diversity, and autonomy.⁸² According to traditionalists, lawyers serve the ends of justice by making legal representation available so that citizens can exercise their autonomy to pursue any end permitted by law.⁸³ As Stephen Pepper has argued, for the system of justice to operate properly, citizens need lawyers to provide "access to the law" in order to pursue their objectives in an increasingly complex system of legal regulation.⁸⁴ In a frequently cited analogy, Pepper likens the law to "a very large and very complicated machine" that is theoretically available to the public, but that cannot be put to use without the assistance of a skilled mechanic.⁸⁵

Under the traditional model, it is not the lawyer's role to pass moral judgment on the aims of the client, nor is it the lawyer's duty to evaluate the substantive justice of the client's cause. Rather, the lawyer owes the client a professional duty to advance the client's interests under the limits set by law, and the lawyer's performance of that duty within the context of the adversary system is said to ensure social justice. This "amoral

82. See, e.g., Pepper, *Lawyer's Amoral Role*, *supra* note 3, at 616–18. In defending the traditional model, Pepper notes that "liberty and autonomy are a moral good, that free choice is better than constraint, [and] that each of us wishes, to the extent possible, to make our own choices rather than to have them made for us." *Id.* at 616–17.

83. See, e.g., *id.* at 617.

84. See, e.g., *id.* at 617, 620–21. Charles Fried, in a similar vein, has argued that lawyers can be morally conceptualized as "special purpose friends" who are justified in preferring the interests of their particular clients over the collective interests of society. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1071–73 (1976).

85. Pepper, *Lawyer's Amoral Role*, *supra* note 3, at 623–24. Pepper explores this analogy further in later articles, using the notions of "law as a public good" and the lawyer's role as providing "access to the law" to delineate the limits of the advice that lawyers can give clients under a "legal realist" notion of law as encompassing enforcement policies as well as written rules. See, e.g., Pepper, *Counseling at the Limits*, *supra* note 3.

role” as a neutral advocate is morally defensible, Pepper argues, because it ensures that the equality and autonomy of citizens within a system governed by the rule of law will not be compromised by the moral judgments of an “oligarchy of lawyers.”⁸⁶ Any conflict created between this advocacy role and the lawyer’s fidelity to his or her own moral commitments is viewed as a conflict between the lawyer’s professional duties as a client representative and the lawyer’s autonomy. Hence, the choice of the lawyer to refuse to provide professional services on moral grounds is seen as a self-indulgent choice to prefer the lawyer’s personal interests over his or her professional duties.⁸⁷

The traditional lawyer, concerned primarily with promoting his or her client’s autonomy within the limits of the law, must therefore be committed to limiting any interference of his or her moral perspective with client decision making by transcending his or her own internal moral perspective. On a theoretical level, moral transcendence is accomplished by positing a vision of the lawyer as a legal technician. On a more practical level, moral transcendence is actualized through two possible strategies: moral detachment and nonjudgmental empathy. This section examines the vision of the lawyer as a legal technician, the persistence of that vision despite its recognized instability, and the difficulties with the strategies of moral detachment and empathy in the face of fundamental moral disagreement.

1. The Traditional Lawyer as a Legal Technician

The traditional model is supported by a vision of the lawyer as a legal technician, in which the lawyer’s moral, political, or religious beliefs are viewed as irrelevant to the nature or quality of the legal representation that the lawyer provides.⁸⁸

86. Pepper, *Lawyer’s Amoral Role*, *supra* note 3, at 615–19.

87. *See id.* at 632 (describing the refusal of lawyers to accept representation on moral grounds as a kind of professional “conscientious objection” that “always remains an alternative” but that should be limited to “extreme cases”).

88. Following Sanford Levinson, David Wilkins calls this vision of lawyering “bleached out professionalism.” David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1504 (1998) (citing Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578 (1993)). Wilkins describes “bleached out professionalism” as “central to the dominant model of American legal ethics,” *id.* at 1504, and as allowing members of the profession to believe “that differences among lawyers that might matter outside the professional sphere are irrelevant when evaluating the pro-

The lawyer's professional expertise, defined in the professional rule governing the duty of competence,⁸⁹ consists of knowing the relevant law and applicable procedures and being able to apply them to the facts that the client brings to the lawyer in a particular case.⁹⁰ Because legal expertise is viewed as technical in nature, any lawyer is assumed to be able to provide legal representation in a relatively consistent manner to any client.

Professional ethical standards reveal some cracks in the facade of this traditional vision of the lawyer as a legal technician, suggesting that moral considerations may play a role in legal representation. The adoption of an exception to the duty to take court-appointed cases based on the lawyer's personal repugnance can be seen as a limited recognition that legal representation may be impaired if the lawyer strongly disagrees with the client's objectives.⁹¹ Likewise, the rule governing the lawyer as "advisor" permits the lawyer to refer to considerations outside the law—such as "moral, economic, social and political factors"—in executing his or her duty to "render candid advice"⁹² based on the recognition that legal and moral issues may be intertwined with legal representation.⁹³

However, despite this limited recognition that lawyering may involve recourse to moral considerations, the traditional model of lawyering does not view the lawyer's moral viewpoints as an obstacle to effective legal representation. Accordingly, the lawyer is free to accept or decline a case based on his or her personal preferences—whether those preferences spring from

fessional practices of lawyers," *id.* at 1505.

89. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

90. Competent representation is defined—largely in cognitive terms—as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* The commentary to the Model Rules of Professional Conduct (Model Rules) elaborates that competence requires the lawyer to possess the ability to analyze precedent, evaluate evidence, and spot legal issues, and even permits the lawyer to gain competence "in a wholly novel field" in the course of representing a client by engaging in "necessary study" and association with more experienced lawyers in that field. *Id.* R. 1.1 cmt. 2.

91. The Model Rules permit lawyers to decline appointment if "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." *Id.* R. 6.2(c).

92. *Id.* R. 2.1.

93. The comment to the rule notes that "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions," and that "[p]urely technical legal advice . . . can sometimes be inadequate." *Id.* R. 2.1 cmt. 2.

financial self-interest or personal belief that the client's cause is just⁹⁴—and the lawyer is shielded from any presumption that his or her decision to take a particular case reflects his or her personal beliefs.⁹⁵ Even the lawyer's role in providing moral advice remains closely tethered to the vision of the lawyer as a legal technician, as the lawyer is cautioned not to stretch the boundaries of his or her professional expertise when other more qualified professionals are available to deal with the client's nonlegal concerns.⁹⁶

2. Strategies of Moral Transcendence: Detachment and Empathy

As lawyering theorists note, the lawyer is an individual with moral beliefs that may conflict with the dictates of his or her professional duties under the traditional model, and practical strategies are thus needed for transcending the impact of those moral beliefs on professional activities. Gerald Postema has famously argued that lawyers operating under the traditional model have strong incentives to employ strategies of moral detachment, distancing themselves personally from their professional role.⁹⁷ Morally detached lawyers distance themselves from the legal arguments they make, from their own judgments of the justness of their clients' causes, and from their clients' moral personalities.⁹⁸ According to Postema, the

94. Lawyers motivated primarily by personal profit, for example, may choose to represent morally repugnant clients who will pay them handsomely while choosing to decline representation of needy clients on grounds of moral repugnance. *See, e.g.*, DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 59 (2000) (“[T]he bar’s rhetorical commitments to the unpopular have functioned most often to justify representing the disreputable wealthy, not the discreditable indigent.”).

95. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002) (“A lawyer’s representation of a client . . . does *not* constitute an endorsement of the client’s political, economic, social or moral views or activities.”) (emphasis added).

96. *Id.* R. 2.1 cmt. 4 (reminding lawyers that “[m]atters that go beyond strictly legal questions may also be in the domain of another profession” and encouraging lawyers to recommend consultation with professionals in other fields). Moreover, although Rule 2.1 grants specific permission for a lawyer to engage in moral counseling, it also qualifies that permission by suggesting that the lawyer should not offer unwanted advice. *Id.* cmt. 5 (cautioning that “a lawyer is not expected to give advice until asked by the client” and “ordinarily has no duty . . . to give advice that the client has indicated is unwanted” unless “doing so appears to be in the client’s interest”).

97. Postema, *supra* note 4, at 73–81.

98. *Id.* at 75–80.

result of this moral distance is “a curious kind of *impersonal* relationship” between lawyers and clients.⁹⁹

As even strong proponents of client autonomy recognize, morally detached legal representation can potentially distort a client’s autonomous pursuit of his or her goals. A morally detached lawyer would typically approach a client as a bundle of legal interests, determining how the law could be used to maximize the legal rights and interests of someone in the client’s situation.¹⁰⁰ As Warren Lehman puts it, such legal counseling is, in essence, directed at a hypothetical client, based on what most clients would want—such as wealth maximization, freedom from restraint, or avoidance of regulation—and may fail to respond to the needs or values of the actual client.¹⁰¹ More perversely, as Pepper has pointed out, a lawyer providing advice based on a client’s abstracted legal interests may implicitly pressure the client to make decisions that diverge from the client’s actual values.¹⁰² Because the success of the moral detachment strategy depends on an accurate match between a lawyer’s assessment of what most people would want and a client’s actual values, the distorting effects of moral detachment are heightened in cases in which there is a fundamental divergence in the moral perspectives of a lawyer and a client.

In answer to the perverse effect of detached lawyering, client-centered lawyering theorists have suggested a different strategy.¹⁰³ They exhort the lawyer to employ strategies of non-judgmental empathy to fully understand the client’s situation and to help the client make decisions that are consistent with

99. *Id.* at 81.

100. *See, e.g.,* Simon, *supra* note 4, at 39–42; *see also* Warren Lehman, *The Pursuit of a Client’s Interest*, 77 MICH. L. REV. 1078 (1979) (criticizing the personal/professional divide in client counseling).

101. Lehman, *supra* note 100, at 1087–88; *see also* Pepper, *supra* note 1, at 188–89.

102. *See* Pepper, *supra* note 1, at 188–90. Lehman also points out the perversity of morally detached lawyering in an example of a woman of his acquaintance who was newly recovering from alcoholism and who felt strongly that staying in her house would pose a threat to her sobriety. Rather than consulting a lawyer, she went ahead and sold the house, fearing that a lawyer would talk her into delaying the sale until she could avoid the capital gains tax. Lehman, *supra* note 100, at 1089.

103. *See, e.g.,* DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991) (emphasizing the importance of understanding the client’s legal circumstances as well as his or her nonlegal goals and needs).

the client's actual values.¹⁰⁴ Empathy, depending on how one defines it, involves actually experiencing the feelings of another, or at least understanding the situation of another from the other's perspective.¹⁰⁵ Client-centered representation borrows the concept of empathy from Carl Rogers's nondirective psychotherapeutic technique. Rogers defined empathy as "understanding the experiences, behaviors, and feelings of others as they experience them," and as "entering into the experience of clients in order to develop a feeling for their inner world and how they view both this inner world and the world of people and [events] around them."¹⁰⁶ Because empathy builds on the bonds of common humanity, it is a powerful tool for bridging many kinds of social, economic, and cultural differences.

However, there are significant obstacles to employing empathy in the face of fundamental moral disagreement. Although we can experience empathy for people similar to ourselves in what Lynne Henderson has called an automatic or "unreflective" manner, using empathy to enter the internal worlds of others who are different involves a more conscious choice.¹⁰⁷ We may encounter strong internal resistance to making the choice when deep moral divisions are at stake, fearing that opening ourselves to the perspectives of others is tantamount to condoning their views.¹⁰⁸ Internal resistance may also grow out of experiences that have shaped our own values, causing us to affirmatively reject the way others prioritize values or see the world.¹⁰⁹ Moreover, as Stephen Ellmann has thoughtfully sug-

104. See *id.* at 40–42, 260–61, 279–80.

105. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1578–87 (1987) (exploring several meanings and uses of the concept of empathy); see also Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLINICAL L. REV. 135, 139–41 (2002) (same).

106. BINDER ET AL., *supra* note 103, at 40 (alteration in original) (quoting G. EGAN, *THE SKILLED HELPER* 87 (3d ed. 1986)). By using "active listening" techniques to reflect back both the factual and emotional content that the client has expressed, the lawyer can help the client elucidate his or her situation from his or her point of view, including the significance to the client of events and circumstances and his or her feelings about them. See *id.* at 52–61.

107. See Henderson, *supra* note 105, at 1584–85.

108. See *id.* (discussing Bruno Bettelheim's moral choice not to empathize with the motivations of Nazi doctors). Henderson questions the wisdom of the moral choice not to empathize because it is also important to attempt to empathize despite moral disagreement—even with Nazis—so that we can understand the appeal of those objectionable views. See *id.* at 1585.

109. Taking a psychological perspective, Laurel Fletcher and Harvey Weinstein examine two reasons for which a lawyer may fail to identify with a

gested, even nonjudgmental expressions of empathy may be received by clients as tacit messages of approval.¹¹⁰ When we encounter someone considering conduct we deem immoral, we may be reluctant to send such messages of approval.¹¹¹

B. REX AS A TRADITIONAL LAWYER

Under the traditional model, Rex's deep moral disagreement with Tina and Donna's objectives would not pose an obstacle to legal representation. Although Rex would have the freedom to decline to represent them, he would also be free to take their case. He could accept representation simply because he was bored with the run-of-the-mill divorce case, or because he would be able to bill them for a lot of hours, or for no particular reason at all. As previously discussed, his representation would not be deemed a personal endorsement of his clients' objectives, and he would be shielded from public disapproval for his decision to take their case.

As previously shown, the traditional model remains confident that Rex would be able to transcend his moral commitments through strategies of empathy or detachment. However, Rex would likely encounter intense resistance to employing strategies of empathy to truly enter Tina and Donna's world. The kind of family planning that Tina and Donna wish to pur-

client: (1) because of "the rejection by the lawyer of tendencies in him or herself that the lawyer perceives in the client," and (2) because of the lawyer's values or biases. Fletcher & Weinstein, *supra* note 105, at 143. As an example of the latter, Fletcher and Weinstein suggest that "a lawyer's own experience of an alcoholic mother may interfere with her ability to competently represent a client seeking to maintain custody of her child against a state petition charging the mother with neglect." *Id.* at 144; *see also* David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1053-56 (1995) (exploring the difficulty of separating personal views one finds abhorrent from professional and political advocacy).

110. *See* Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 992-93 (1992); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 733-39 (1987).

111. For example, even Stephen Pepper, a strong proponent of client autonomy, suggests that it may be appropriate in certain situations involving counseling a client on legally permissible but morally distasteful options for a lawyer to "simply state, 'Yes the law allows that,' with a tone clearly indicating that the lawyer does not approve the conduct, and is not supporting or suggesting it," Pepper, *supra* note 1, at 203, or to indicate by his or her body language that "[t]his would be a terrible thing to do," *id.* at 204. These verbal and nonverbal expressions of disapproval are, of course, exactly the opposite of the nonjudgmental stance of empathic regard.

sue runs counter to some of Rex's deep moral beliefs about homosexuality, and it is not just a theoretical disagreement. From Rex's perspective, Tina and Donna's scheme will bring concrete harm to an innocent child and will cause less tangible, but not less important, damage to the fabric of the important social institution of the family. As our examination of the internal moral perspective demonstrated, Rex's personal involvement in doing wrong would likely be experienced by him as a betrayal of his own ideals, and perhaps his own identity.¹¹² To the extent that his values arise out of community, it may be experienced as a betrayal of that community as well.¹¹³ Although the traditional model of lawyering proclaims that his advancement of their interests is not a personal endorsement, Rex could not morally avoid the fact that, from his point of view, his legal advocacy for Tina and Donna would make the world a worse place.¹¹⁴

Rex would be more likely to avoid the discomfort of empathy by employing strategies of moral detachment. He would probably resort to advising his clients based on his understanding of what the law allows them to do and what is in their best legal interests. In other words, he would revert to the legal rights and interests of hypothetical persons in Tina and Donna's situation and assess their choices from this depersonalized stance. However, the distorting effects of such a strategy may be particularly acute in Tina and Donna's situation, where society does not provide clear answers and where there may be significant ambivalence in their own articulation of their values.

Tina and Donna's legal decisions will have an impact on their relationships with each other and with other people in profound and uncertain ways, introducing a host of moral considerations that are intertwined with the legal options they must explore. For example, they will have to consider the ef-

112. See *supra* notes 61–70 and accompanying text.

113. See Wilkins, *supra* note 109, at 1041 (noting the moral and social significance of ties between individual black Americans and the black community, which create additional burdens of justification).

114. See, e.g., David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955 (1995) (defending the view that lawyers should be held responsible for the damage they contribute to collective harms, even if in the individual case they cause no measurably tangible harm); Wilkins, *supra* note 109, at 1031–32 (discussing the view that lawyers should be held responsible for the effects of their representation).

fects on their child of the biological relationships the child would have—or would not have—with each of them, along with the psychological and emotional impacts on their child of being biologically related to one but not to the other of them. They will have to decide whether they want their child to know who his or her biological father is, whether they want the child to have a relationship with that person, and if so, what the nature and extent of that relationship would be. They will have to think about the impact of societal disapproval or prejudice as it may affect a child raised in a lesbian-parented household and how the legal structure of their family may aggravate or mitigate that impact.

Tina and Donna have probably already discussed these issues before consulting a lawyer. But it is realistic to assume that they are ambivalent about some of them, such as the question of whether to promote a relationship between their child and the child's biological father. On one hand, they may think that it would be a good thing for their child to know his or her father and may even feel that they owe it to their child to facilitate a relationship with a father figure. On the other hand, they may wonder if these inclinations are a betrayal of their commitment to raise a child in an alternative family structure—a “selling out” of their ideals.¹¹⁵ After understanding their legal situation, Tina and Donna will have to add the ingredient of legal risk to their decision-making process. A lawyer who is employing a strategy of moral detachment is likely to disengage from careful counseling and advise them to proceed in the way most likely to protect their legal interests. In this case, that means discouraging any relationship between their child and his or her father.¹¹⁶ The implicit pressure to default

115. See, e.g., Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 18–22 (1996) (noting the value-laden reasons offered in a study of lesbian parents for choosing known donors as well as the reasons given for choosing anonymous donors).

116. Because of the way many artificial insemination statutes are worded and interpreted, prospective lesbian mothers are advised that “[t]he only way to insure that a lesbian family will not suffer the disruption of a donor suing for parental rights is to use an anonymous sperm donor and have the insemination done . . . through the auspices of a physician.” *Id.* at 24 (quoting APRIL MARTIN, *THE LESBIAN AND GAY PARENTING HANDBOOK: CREATING AND RAISING OUR FAMILIES* 86–87 (1993)). The leading case on parental rights is *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Ct. App. 1986). In this case, two women decided to have a child together, and one of them, Mary K., inseminated herself with sperm provided by Jhordan C. *Id.* at 532. At issue was the California

to legal interests presented by such limited counseling may allow Tina and Donna to avoid confronting their own ambivalence and making a choice that is fully consistent with their values.¹¹⁷

As this example shows, both strategies intended to help a lawyer transcend his or her internal moral perspective and provide morally neutral legal advice and counseling to a client—moral detachment and nonjudgmental empathy—are problematic in the face of fundamental moral disagreement. The perversity of moral detachment and the obstacles to employing empathy across deep moral divisions combine to frustrate the very thing that the traditional model seeks to achieve: the client's autonomous pursuit of his or her own values within the law.

III. SOCIAL JUSTICE MODELS: LAWYERS AS MORAL AGENTS, JURISPRUDENTS, AND FRIENDS

Having seen the problems facing Rex as a lawyer operating under the traditional model, this section turns to the social justice models of lawyering. Under the social justice models, the lawyer's commitments to act morally and to further the ends of justice are viewed as intrinsic components of the lawyer's professional duties. When the lawyer refuses to extend professional services on moral grounds, social justice theorists understand it as a choice to prefer professional duties owed to the public over professional duties owed to the client. Because they reject the vision of the adversary system that reconciles these duties by conflating social justice with partisan advocacy, social justice theorists endorse a more active role for the lawyer's moral commitments in legal representation.

artificial insemination statute, which provided that “[t]he donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.” *Id.* at 533 (quoting CAL. CIV. CODE § 7005(b)). [Editor’s Note: Section 7005(b) was repealed in 1994. However, the language quoted by the court appears nearly identically in CAL. FAM. CODE § 7613(b) (West 2004).] The court of appeals construed this section strictly to require the involvement of a physician to effect the statutory termination of the sperm donor’s potential paternal claims. *Id.* at 535.

117. See Bernstein, *supra* note 115, at 22 (“[I]t seems likely that *some* lesbian mothers would prefer to parent with known donors, but are scared to do so in light of the threats posed by known donors to the planned lesbian family.”).

Applying each of the three social justice models discussed in this section to the lesbian family planning hypothetical, the likely result is that Rex would decline to represent Tina and Donna or would eventually terminate representation. Given the difficulties that the lawyer's internal moral perspective poses for lawyering across a fundamental moral divide, the social justice models seem to get that answer right. Tina and Donna would probably be better off without Rex as their lawyer. However, the efficacy of each of these social justice models is undermined by the fact that none of the models explain why Tina and Donna are morally or legally deserving of any representation at all. If diversity in moral perspectives is the natural outcome of reason in a free society, social justice in a morally pluralistic society would seem to demand legal representation of all clients with reasonable, though diverse, moral perspectives.

A. MORAL ACTIVIST LAWYERING

The moral activist model of lawyering arises from a critique within moral philosophy of the lawyer's professional role-differentiated behavior. The central inquiry of moral activists is sometimes framed with the question, "Can a good lawyer be a good person?"¹¹⁸ This question implies both that the lawyer's partisan role may demand behavior that violates the directives of ordinary morality and that the lawyer's role within the adversary system of justice illegitimately excuses those actions.¹¹⁹ The answer that moral activists give is that the lawyer should be held morally accountable for his or her professional behavior, even when that behavior is dictated by his or her professional role.

1. Moral Activism Explained

David Luban is generally credited with pioneering the most comprehensive philosophical critique of the lawyer's amoral partisan role and articulating a morally engaged alter-

118. Fried, *supra* note 84, at 1060. This question has resonated for moral theorists interested in redefining the lawyer's role along moral activist lines. See, e.g., Pepper, *Lawyer's Amoral Role*, *supra* note 3, at 614 (characterizing the question as symbolizing ten years of "heated academic discourse" on the subject of moral justification for the lawyer's "amoral role").

119. See, e.g., Fried, *supra* note 84, at 1061-62 (describing these concerns); see also Schwartz, *supra* note 4, at 678-95 (considering the lawyer's moral obligations when functioning as a nonadvocate); *Symposium on the Lawyer's Amoral Ethical Role*, *supra* note 10; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 2-15 (1975).

native vision, which he calls moral activism.¹²⁰ Luban's primary concern is to close the gap he apprehends between legally justified and morally justified behavior.¹²¹ The problem with the professional duty of zealous advocacy, in Luban's view, is that "zeal" means "pushing claims to the limit of the law and then a bit further, into the realm of what is 'colorably' the limit of the law," a marginal territory that "inevitably lie[s] beyond moral limits."¹²²

Luban's moral activism would subjugate the lawyer's professional obligations to his or her moral obligations, requiring the lawyer to determine the moral justification for the adversary system in the context in which he or she practices and to weigh the strength of that moral justification against the moral offense resulting from actions he or she takes.¹²³ After critiquing an impressive range of arguments in favor of adversary justice,¹²⁴ Luban concludes that the adversary system is only weakly justified on the "pragmatic" ground that it "seems to do as good a job as any at finding truth and protecting legal rights."¹²⁵ Accordingly, the practices of strong partisan advocacy would be outweighed by concerns of ordinary morality in most civil cases.¹²⁶ Specifically, the moral activist lawyer would not be morally justified in "pursu[ing] . . . substantively unjust ends" on behalf of his or her client, "manipulat[ing] . . . morally

120. See, e.g., SIMON, *supra* note 6, at 248 (acknowledging that "David Luban has done more than anyone else to bring depth to the field" and that Luban has "pioneered the critique" of the traditional view of the lawyer's professional duty of zealous advocacy); Paul Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 14 (1995) ("It was David Luban . . . who established the issue of role morality in the central position it possesses in legal ethics today.").

121. Luban's stated aim in promoting moral activist lawyering is "to make the law more just and the lawyer's clients more public spirited." LUBAN, *supra* note 6, at xvii. He notes that citizens encounter the law through lawyers, and "[s]ince the law as it touches us cannot be different from what lawyers do, it will not be better than lawyers care to make it." *Id.*

122. David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 89 (David Luban ed., 1983).

123. See LUBAN, *supra* note 6, at 129–33, 148–49.

124. *Id.* at 67–92.

125. *Id.* at 92.

126. See *id.* at 149 (arguing that because it has only a weak pragmatic justification, "the adversary system doesn't excuse more than the most minor deviations from common morality" and that "[i]n the civil suit paradigm, there is no adversary system excuse to speak of"); see also *id.* at 133–37 (discussing generally the weight to be assigned to justifications in determining the validity of an "institutional excuse").

defensible law to achieve outcomes that . . . violate its spirit,” distorting the truth, or employing means “that inflict morally unjustifiable damage on other people.”¹²⁷

Even so, Luban maintains that in some types of cases—in what he calls the “criminal defense paradigm”—the goals of the adversary system go beyond resolving disputes through accurate fact-finding; in such cases, the additional goal of overprotecting individuals from the state more strongly justifies the lawyer’s traditional adversarial role.¹²⁸ Interestingly, Luban’s criminal defense paradigm extends well beyond actual criminal cases to include any civil case in which relatively weak individual clients face off against economically entrenched institutional actors in the private sphere.¹²⁹ Though the results are different in the criminal defense paradigm, the analysis remains the same. The lawyer’s actions must be justified not merely by appealing to the lawyer’s advocacy role, but also by analyzing the links in the “chain” that connect the lawyer’s actions to the moral justification for the adversary system itself and by weighing the strength of that justification against the ordinary moral wrongs that the lawyer’s actions will cause.¹³⁰

Luban differs from the traditionalists in his assessment of the justice issues involved in denying legal representation to clients based on moral concerns. As previously discussed, the traditionalists view the lawyer’s decision to refuse representation on moral grounds as a self-indulgent choice that undermines the justice of providing “access to the law” to any client with arguably legal claims.¹³¹ In contrast, Luban endorses the exercise of what he calls the lawyer’s “Lysistratian prerogative” . . . to withhold services from those of whose projects [the lawyer] disapproves.¹³² According to Luban, it is simply not a moral wrong to deny legal services in the aid of immoral ends because respecting autonomy is only a *prima facie* good that

127. *Id.* at 157.

128. *See id.* at 63.

129. *See id.* at 63–65. For example, Luban would hold that zealous partisan advocacy is morally justified for “one-shot” individuals litigating against wealthy “repeat players,” such as those described in Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974). LUBAN, *supra* note 6, at 64–65.

130. *See* LUBAN, *supra* note 6, at 128–47 (describing in detail the calculus that justifies actions within “role morality”).

131. *See supra* note 87 and accompanying text.

132. LUBAN, *supra* note 6, at 169. *See id.* at 166–69 for a discussion of the rationale underlying this option.

must be weighed against the moral goodness (or badness) of the choices that people make by exercising their autonomy.¹³³ Rather than viewing the denial of representation on moral grounds as a threat to justice, Luban views the lawyer's decision not to participate in the "nefarious schemes" of an unscrupulous client as part of a "dense network" of "informal social pressure"¹³⁴ that helps society survive by supplementing the law's proscription of antisocial behavior.¹³⁵

2. Rex as a Moral Activist Lawyer

If Rex were a moral activist lawyer, he would hold himself morally accountable to avoid social injustice from occurring through the actions he took in his professional role. Based on his moral commitments, Rex would probably refuse to take Tina and Donna's lesbian family planning case.¹³⁶ Rex would likely view Tina and Donna's wish to raise a child within a lesbian household as causing needless harm to an innocent third party. Moreover, from within his own moral perspective, Rex would not conceptualize Tina and Donna as falling within Luban's criminal defense paradigm. A more lesbian-friendly lawyer might see them as individuals struggling against deep and powerful forces of entrenched homophobia and thus as falling within the paradigm.¹³⁷ However, Rex would see their desire to raise a child as threatening the important social institution of the traditional family and as potentially damaging the

133. See Luban, *supra* note 7, at 637–43.

134. LUBAN, *supra* note 6, at 168.

135. See *id.* at 168–69.

136. A moral activist lawyer could, on the other hand, agree to represent Tina and Donna with the objective of "influenc[ing them] for the better," *id.* at 160, or attempting to "transform and redeem [them]," *id.* at 163. Luban envisions the lawyer engaging his or her client in moral dialogue about the "rightness or wrongness of [the client's projects]." *Id.* at 173. To achieve the ends of social justice in such counseling, Luban would permit the lawyer to use coercive tactics, such as threats of withdrawal "or even a betrayal by the lawyer of a client's projects" in the event that the lawyer remains convinced (after due dialogue) that what the client wants to do is immoral. *Id.* at 174.

137. Compare Luban's treatment of the moral dilemma faced by a criminal defense attorney in deciding whether to cross-examine a truthful rape victim. *Id.* at 150–52. Luban writes that although "[t]he defendant is confronted by the state, . . . the victim is confronted by the millennia-long cultural tradition of patriarchy," and "any powerful social institution is a threat, including diffuse yet tangible institutions such as patriarchy." *Id.* at 151. While Luban ultimately concludes that the proposed cross-examination should not be allowed to proceed, he admits that "[t]he question is a very close call" and that he has arrived at his answer "without much confidence." *Id.* at 152.

very fabric of society.¹³⁸ By withholding legal services, Rex would see himself applying “informal social pressure” through noncooperation in a “nefarious scheme.”¹³⁹ Simply put, as a moral activist, Rex would justify his refusal of representation on the ground that if all lawyers refused to assist the Tinas and Donnas who came to their offices, the world would be a better place.

The problem with moral activist Rex’s decision to decline to represent Tina and Donna is not its result but its justification. Luban’s argument depends on an appeal to shared norms, which is problematic in a society characterized by reasonable moral pluralism.¹⁴⁰ It cannot be argued that within a morally pluralistic society the lawyer serves a legitimate role in the administration of justice by filtering out the legal claims of persons with whom he or she happens to fundamentally disagree. Therefore, although Rex reaches the right result under the moral activist model, the justification supporting Rex’s decision to decline representation is inconsistent with the recognition of moral pluralism.

B. CONTEXTUAL LAWYERING: THE LAWYER AS JURISPRUDENT

The contextual lawyering model builds on the critiques of the adversary system made by the moral activists, but its incorporation of justice considerations into professional decision making arises from jurisprudential rather than moral theory.¹⁴¹ The primary question in the contextual lawyering model centers on the meaning of the law. From the jurisprudential perspective of contextual lawyering, unjust legal claims are not

138. From Rex’s perspective, Tina and Donna’s desire to parent a child together could be categorized as what Luban calls a “collectively harmful action.” Luban, *supra* note 114, at 960. In other words, through their creation of a lesbian-parented family, Tina and Donna would be acting in a way that, if aggregated, would make the world a qualitatively different place by changing societal norms concerning family structure. *See id.* at 960–61.

139. LUBAN, *supra* note 6, at 168.

140. For a fuller explication of this point, see Atkinson, *supra* note 14, at 867–71, 906–47.

141. *See, e.g.*, David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 874–76 (1999). Luban notes that his and William Simon’s “conclusions and arguments on many subjects are the same” and that “some readers might regard [them] (as [he does]) as kindred spirits because of [their] shared criticisms of adversarial ethics and [their] advocacy of what Simon calls ‘ethically ambitious or high-commitment lawyering.’” *Id.* at 874 (quoting SIMON, *supra* note 6, at 205).

judged by standards of morality, but by standards of legal merit.¹⁴² This theoretical movement away from considerations of personal morality to considerations of legal merit would seem to circumvent the major difficulty posed in a morally pluralistic society: lawyers using representation decisions to impose their morality on those with whom they morally disagree.¹⁴³ Because contextual lawyers base their representation decisions on values immanent in the law, their appeal is ostensibly to society's norms rather than to their own.¹⁴⁴ However, as this section demonstrates, the theoretical appeal of this approach breaks down in its application to an area of law fraught with deep moral divisions and to a lawyer-client relationship itself characterized by the same deep moral divisions that are reflected in the law.

1. Contextual Lawyering Explained

William Simon is the primary proponent of contextual lawyering, a sophisticated vision of the lawyer as jurisprudent that he has developed over the course of two decades.¹⁴⁵ Simon shares Luban's concern that traditional ethical standards lead to "injustice in the circumstances at hand" in service of a vision of "greater justice . . . elsewhere and later" that the adversary system is ultimately unable to deliver.¹⁴⁶ However, Simon envisions the lawyer not as a private moral agent attempting to accommodate his or her professional-role behavior to the dictates of ordinary morality, but rather as an institutional actor charged with respecting and enforcing public values inherent in the law.¹⁴⁷ Rather than viewing the ethical dilemmas of lawyer-

142. See, e.g., SIMON, *supra* note 6, at 9–11, 138–69 (describing a "contextual" approach to legal ethics); Luban, *supra* note 141, at 879–85.

143. See *supra* Part I.B.

144. See, e.g., Wendel, *supra* note 10, at 372–74.

145. See, e.g., SIMON, *supra* note 6; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); William H. Simon, *Ethics, Professionalism, and Meaningful Work*, 26 HOFSTRA L. REV. 445 (1997); William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996). Another prominent proponent of contextual lawyering is Deborah Rhode. See, e.g., RHODE, *supra* note 94, at 66–67; Deborah L. Rhode, *Ethics in Counseling*, Symposium, *Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 602, 603 (2003) (characterizing her approach as "contextual").

146. See SIMON, *supra* note 6, at 2. Simon critiques the argument that a client has a right to the zealous advocacy of a lawyer in the pursuit of immoral ends, *id.* at 26–52, and the argument that such advocacy ultimately produces justice, *id.* at 53–76.

147. See *id.* at 15–18.

ing as conflicts between the lawyer's personal morality and the requirements of law, Simon perceives them as problems of contextual interpretation of what the law requires.¹⁴⁸ Simon is careful to distinguish his broader, more substantive vision of law from principles of morality that are "socially grounded outside the legal system."¹⁴⁹ For him, judgments about justice or legal merit are distinctly legal in nature, "grounded in the methods and sources of authority of the professional culture."¹⁵⁰

Simon's vision of justice—or, as he also calls it, legal merit¹⁵¹—depends on his rejection of a narrow positivist vision of law. He defines positivism as the notion that "legal norms are strongly differentiated from nonlegal ones" by having been legislatively enacted or judicially created or otherwise made law by some authority having jurisdiction to declare law¹⁵² and by virtue of being "commands or prohibitions backed by sanctions."¹⁵³ Following Ronald Dworkin, Simon argues that this narrow view of law is untenable and that law must be construed more broadly to include background values or principles that are "part of the law in the sense that they affect the decisions of cases"¹⁵⁴ by virtue of being invoked in interpreting the scope and meaning of legal pronouncements.¹⁵⁵ These background principles and values have substantive moral content and make an important connection between law and justice: they both justify enacted law and provide grounds upon which to criticize enacted law.¹⁵⁶

148. *See id.* at 79–95; *see also* Luban, *supra* note 141, at 882–84.

149. SIMON, *supra* note 6, at 17.

150. *Id.* at 138. Simon's vision of the legal interpretation required of contextual lawyers has been described as "very Dworkinian" in nature. Luban, *supra* note 141, at 886; *see also* Wendel, *supra* note 10, at 373 (describing the influence of Ronald Dworkin's jurisprudence on Simon's view).

151. Simon points out that each phrase, "justice" and "legal merit," captures part of what law includes: "The latter has the advantage of reminding us that we are concerned with the materials of conventional legal analysis; the former has the advantage of reminding us that these materials include many vaguely specified aspirational norms." SIMON, *supra* note 6, at 138.

152. *Id.* at 37; *see also id.* at 79.

153. *Id.* at 37.

154. *Id.*

155. *See id.* at 37–39. For a fuller explication of Dworkin's concept of principles as part of the law, *see* RONALD DWORBIN, TAKING RIGHTS SERIOUSLY 14–45 (1978).

156. *See* SIMON, *supra* note 6, at 79–85 (generally contrasting positivist and substantivist visions of law).

In determining the “bounds of the law” that constrain the lawyer’s advocacy, Simon would have the lawyer reject categorical ethical rules and instead employ a case-by-case analysis, utilizing what he calls the basic maxim of his contextual view of legal ethics: “Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”¹⁵⁷ Simon notes that other institutional actors, such as judges or juries, “are generally able to make more reliable determinations of the [substantive legal] merits than are individual lawyers.”¹⁵⁸ However, the lawyer must be aware that there may be “important occasions” in which these other institutional actors may be poorly positioned to make reliable decisions because they lack relevant information or because they are corrupt or incompetent.¹⁵⁹ Somewhat controversially, Simon’s contextual view would counsel the lawyer to disregard interpretations of the law—even controlling legal interpretations—that are incompatible with the underlying principles of the law.¹⁶⁰

Simon’s contextual lawyer would look similar to Luban’s moral activist lawyer in professional decisions, though the basis on which the decisions would be justified differs in a significant respect. The contextual lawyer, like the moral activist lawyer, would feel justified in refusing to represent a client seeking ends that undermined rather than advanced the interests of justice.¹⁶¹ However, the contextualist would have a *legal*

157. *Id.* at 138; *see also id.* at 138–39 (describing the notion of “contextual judgment”). Simon argues that this “contextual view” of legal ethics requires the lawyer to determine what justice requires by resolving tensions along three axes: “Substance versus Procedure, Purpose versus Form, and Broad versus Narrow Framing” of the requirements of law. *See id.* at 139.

158. *Id.*

159. *Id.* at 140. According to Simon, the lawyer should use a case-by-case analysis to decide how closely to hew to the institutional role of advancing the client’s interests, guided by the following maxim: “[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution.” *Id.*

160. *See id.* at 145–46. This view has been criticized as showing insufficient deference to and respect for the importance of positive law as society’s best effort to resolve moral differences. *See, e.g.,* Wendel, *supra* note 10, at 401 (criticizing Simon’s approach as too discretionary). In arguing in favor of an “authority conception,” Wendel notes that “good faith disagreement would be resolved by the lawyer’s deference to governing legal norms.” *Id.* at 375.

161. As Simon explains, the specter of lawyers engaging in “anything more than minimal scrutiny of the merits of client goals and claims” frequently raises a concern about representation being denied to “unpopular clients.” SIMON, *supra* note 6, at 160. However, he argues that the concern for unpopu-

argument to justify his or her refusal to represent the client: the client's case has no legal merit.¹⁶²

2. Rex as a Contextual Lawyer

If Rex were a contextual lawyer of the sort envisioned by Simon, his primary commitment would not be fidelity to his own moral principles, but fidelity to the moral principles inherent in the law, as they are expressed in both substantive and procedural standards. However, when faced with the legal issues inherent in lesbian family planning—where the divisions of moral pluralism are reflected in the law—Rex's understanding and interpretation of the fundamental principles of law would inevitably be shaped by his moral views. Thus, the legal analysis of background principles in the law, which Simon envisions as an escape from the vagaries of personal moral judgment, would not provide Rex with a neutral standpoint from which to mediate his fundamental moral disagreement with Tina and Donna's objectives.

For example, one important legal question that will come into play in advising Tina and Donna is whether pursuing co-parent or second-parent adoption is a legally available option.¹⁶³ If we assume, for example, that the statute in Tina and Donna's state resembles that in many states, it probably explicitly permits adoptions by single persons and by married couples, but it says nothing about adoptions by same-sex couples.¹⁶⁴ As with many adoption statutes, there may be case law or statutory authority directing courts to construe the provisions of the adoption statute in light of the overarching purpose of promoting the best interests of the child.¹⁶⁵ One strategic option would therefore be to attempt to convince a judge that the

lar clients ought to be based on "what the source of the unpopularity is." *Id.* at 162. According to Simon, "If the unpopularity reflects a valid assessment of the legal merits of the client's claims and goals, there should be no concern at all." *Id.*

162. Indeed, Simon deliberately uses the terms "justice" and "legal merit" interchangeably to illustrate that his vision of justice is based on norms inherent in the law. *See id.* at 138.

163. In co-parent adoption, a gay couple seeks to adopt an unrelated child together, much as a married couple would adopt a child that was not born to either spouse. Appell, *Lesbian and Gay Adoption I*, *supra* note 80, at 77. In a second-parent adoption, the child is typically born to one partner in a lesbian couple, and the other partner seeks to adopt the child much as a stepparent would. *Id.*

164. *Id.* at 79.

165. *Id.* at 80.

co-parent adoption would be in the child's best interests and that the statute should thus be construed to permit it.¹⁶⁶

A lesbian-friendly lawyer who viewed Tina and Donna as a legitimate family yet to be recognized by the law would not have a problem making this argument under Simon's contextual model. Such a lawyer would view the narrow framing of laws around the two-parent heterosexual family as shortsighted. The lawyer would view Tina and Donna's efforts to structure their actions to preserve the stability of each of their relationships with the child as a fulfillment, rather than a corruption, of the "fundamental purposes"¹⁶⁷ of the law: protecting the important liberty and privacy interests inherent in parenthood¹⁶⁸ and promoting the best interests of children.¹⁶⁹

Rex, however, does not believe that it is in a child's best interests to be adopted by Tina and Donna, and he probably views the language of the adoption statute as safeguarding im-

166. This type of approach has succeeded in some cases. *See, e.g., In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 536–38 (N.J. Super. Ct. App. Div. 1995) (finding that it was in the best interests of the children to be adopted by their mother's lesbian partner); *In re Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) (noting that a construction of the adoption statute at issue that would deny parental rights "based solely on [a] biological mother's sexual orientation or marital status . . . would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the adoption statute's historically consistent purpose—the best interests of the child"). However, this approach has also been rejected in some cases. *See, e.g., In re Angel Lace M.*, 516 N.W.2d 678, 682–83 (Wis. 1994) (refusing to apply a "best interests of the child" analysis to interpret an adoption statute so as to allow a woman to adopt her lesbian partner's child).

167. Simon defines a "fundamental purpose" as "vindicat[ing] a basic value," SIMON, *supra* note 6, at 146, and asserts that "the clearer and more fundamental the relevant purposes, the more the lawyer should consider herself bound by them," *id.* at 145–46.

168. For explication of some of these arguments, see, for example, Appell, *supra* note 75, at 688–89, 732–37 (defining the "parental rights doctrine" as "the fuller doctrine that defines parents and limits intervention into the family" and concluding that lesbian and gay parenting does not fundamentally challenge the doctrine); and Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841 (1997) (criticizing custody decisions in gay- and lesbian-parent cases as inconsistent with fundamental constitutional principles of parental rights).

169. *See, e.g.,* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (criticizing the legal, policy, and social science analyses at the heart of arguments that gay and lesbian custody and visitation presumptively controverts the best interests of children); *see also* Polikoff, *supra* note 77, at 491–527 (discussing the adaptation of older legal doctrines in order to address the best interests of children in light of many new forms of family).

portant principles protecting the two-parent heterosexual family and as a fundamental expression of society's deeply held faith in the "sanctity of marriage."¹⁷⁰ He would see the narrow construction of the adoption statute as properly protecting children from exactly the type of legal manipulation of the family paradigm that Tina and Donna are trying to undertake. The idea that a court might interpret statutes broadly, using the "best interests of the child" standard to legitimate a lesbian-parented family would be seen as an incompetent or corrupt use of judicial power. Attempts to structure Tina and Donna's relationship in ways that promote that kind of judicial decision making would be viewed by Rex as running contrary to the fundamental background principles supporting the heterosexual family that are inherent in the law.¹⁷¹

Contextual lawyering theorists might object at this point that Rex would be wrong about the background principles of the law and that this hypothetical simply demonstrates that bad lawyers make bad law. But it is difficult to argue that principles of logical consistency or narrative coherence of the law would determine one correct answer to the question of whether adoption statutes should be construed to permit lesbian co-parenting. One could call the legal, constitutional, and moral analysis that underlies Rex's position wrong, but only from

170. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (refusing to find that a state statute presuming the paternity of the husband when a child is born into a marriage violates the due process rights of the supposed biological father and observing that "our traditions have protected the marital family against [such claims]"); cf. Polikoff, *supra* note 77, at 468 (identifying the theory that "every child should have one mother and one father, neither more nor less," as a central component of the traditional legal definition of parenthood).

171. The scholarship of Lynn Wardle provides a paradigm for the type of analysis in which Rex would likely engage. See, e.g., Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345 (2003) (analyzing the fairness, desirability, and constitutionality of laws and policies that favor married over unmarried couples where adoption is concerned and concluding that such a preference for marriage is most consistent with the public interest); Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1 (2000) (challenging the idea that the structure and stability of families has no significant impact on the social and political welfare of society); Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349 (2003) (examining the historical and contemporary importance of the marital family unit in the development of government and suggesting that according the same treatment to alternative relationships may detrimentally affect the Constitution); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (arguing that gay and lesbian parenting may have adverse effects on children being raised in such homes).

within a moral framework that does not see homosexuality as immoral. From within a normative framework that views homosexuality as deviant, Rex's analysis would remain sound.¹⁷²

Because his moral commitments would lead him to an interpretation of the law that would delegitimize Tina and Donna's legal objectives, it is likely that Rex the contextual lawyer, just like Rex the moral activist lawyer, would simply fail to form a lawyer-client relationship with Tina and Donna. However, as a contextual lawyer his denial of representation would look quite different. Rather than telling Tina and Donna that he could not represent them because what they wanted to do was immoral, he would tell them that it was not legally possible. In one sense they would get more from Rex's counsel than they would from the moral activist lawyer, who would have given them a lecture on morality and shown them the door. But in another sense they would get less because the legal authority with which the contextual lawyer would speak would leave them with little motivation to seek a second opinion from a lawyer more sympathetic to their situation.

C. THE FRIENDSHIP MODEL OF LAWYERING: THE LAWYER AS MORAL COLLABORATOR

A third model of lawyering vests the issue of justice in the quality and integrity of the lawyer-client relationship itself, drawing on conceptions of "justice as care," client goodness, and friendship. Because this friendship model defines justice in terms of the process that occurs within the lawyer-client relationship rather than in terms of the outcome of that process, it holds out hope for bridging the divisions inherent in moral plu-

172. See, e.g., Ball & Pea, *supra* note 169, at 256–57 (acknowledging that Wardle's views concerning the harmfulness of homosexual parenting "are shared by many judges, legislators, and members of the public" and that while his article "attempts to present a coherent position criticizing the view that gays and lesbians should have the same parental rights as heterosexuals," his conclusions "are flawed, both normatively and empirically"). The notion that society is deeply divided over the issue of homosexuality, and that the law does not resolve that division, is, in essence, the force of Justice Scalia's dissent in *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (noting that in invalidating Texas's sodomy law on constitutional grounds, the Court had "taken sides in the culture war"). It should be noted that Scalia's criticism was not to say that moral considerations had no place in the law, but rather that the courts are the inappropriate institutions in which to resolve them. See *id.* at 603 ("Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best.").

ralism. The question for the friendship model of lawyering is whether this hope can be fulfilled in the face of fundamental moral disagreement.

1. Lawyering as Friendship Defined

Thomas Shaffer and Robert Cochran have developed the most sophisticated version of the “lawyer as friend” model of lawyering.¹⁷³ Shaffer and Cochran describe the lawyer-client relationship as “a relationship in which the lawyer sees the client as a collaborator in the good.”¹⁷⁴ They invoke an Aristotelian conception of friendship to explain that true friends do not merely take pleasure in one another’s company or prove useful to one another.¹⁷⁵ Rather, friends are “mutually concerned that

173. See SHAFFER & COCHRAN, *supra* note 6 (setting forth the “lawyer as friend” model and providing a framework for its use in client counseling). Shaffer and Cochran distinguish the lawyer as friend model from other possible models: the “lawyer as godfather,” in which the lawyer decides alone what the client’s best interests are and pursues those interests without regard to the client’s reservations, *see id.* at 5–14; the “lawyer as hired gun,” which encompasses traditional models based on maximizing client autonomy, *id.* at 15–29; and the “lawyer as guru,” which encompasses both moral activism and contextual lawyering, *id.* at 30–39. Cochran also collaborated with John DiPippa and Martha Peters on a lawyering-skills textbook that elaborates on the lawyer as friend model. See ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* (1999) (referring to this approach as the “collaborative decision-making model”); *see also* Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 378–96 (1998) (discussing the lawyer as friend model in the context of counseling criminal defendants regarding confessions).

174. SHAFFER & COCHRAN, *supra* note 6, at 47. This use of the friendship metaphor and the reliance on Aristotelian theories of friendship has received the most attention by critics and commentators on Shaffer and Cochran’s work. *See, e.g.*, Robert J. Condlin, “What’s Love Got to Do with It?—It’s Not Like They’re Your Friends for Christ’s Sake”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211 (2003) (criticizing the friendship model of lawyering as involving pretense and adverse effects on lawyers and instead advocating a fiduciary/agent model); Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran’s Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L.J. 1 (1995) (criticizing Shaffer and Cochran’s friendship model and proposing the “rank stranger” model as a better approach). Shaffer and Cochran have defended their approach in the face of such criticism. *See, e.g.*, Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, 18 U. ARK. LITTLE ROCK L.J. 69 (1995) (responding to Jack Sammons’s criticisms as set forth in Sammons, *supra*).

175. SHAFFER & COCHRAN, *supra* note 6, at 45–47. Aristotle indeed categorized friendship into three types: friendship based on utility, friendship based on pleasure, and friendship based on goodness. ARISTOTLE, *THE NICO-*

both of them be and become good persons.”¹⁷⁶ Shaffer and Cochran envision a lawyer-client relationship in which the lawyer and the client help each other become better people through caring, truthfulness, and moral conversation.¹⁷⁷

The central feature of the lawyer as friend model is moral conversation, which Shaffer and Cochran view as an unavoidable component of legal representation.¹⁷⁸ In their view, moral dialogue pervades law-office conversations because “[l]egal claims rest on normative considerations” and because “almost all decisions made in the law office will benefit some people at the expense of others” and will thus have moral implications.¹⁷⁹ Part of the job of a lawyer in moral conversation with a client is to help “enable[] the client to care for others” by showing care toward the client, confronting the client with “moral insight” into things that the client cannot see about himself or herself, and collaborating with the client in the difficult task of “[d]etermining what the good requires” in a particular circumstance.¹⁸⁰

As in the moral activist model, the lawyer working within the friendship model would ultimately be held morally accountable for his or her actions, but Shaffer and Cochran take issue with the moral elitism implicit in this model. They point out that the moral activist, concerned primarily with just out-

MACHEAN ETHICS bk. VIII, ch. 3 (David Ross, trans., rev. by J.L. Ackrill & J.O. Urmson, Oxford Univ. Press 1980). According to Aristotle’s virtue ethics, friendship based on goodness is the “perfect friendship” because friendship based on utility or pleasure is incidental and thus less enduring than friendship based on goodness. *Id.* at 195–96. It is unclear why enduring friendship should be the benchmark for a professional relationship that is by nature contingent on the professional providing useful services to the client. See Sammons, *supra* note 174, at 14–15. However, the notion of Aristotelian friendship is probably best understood as a metaphor for the kind of mutuality and respect that Shaffer and Cochran believe should characterize a lawyer-client relationship.

176. SHAFER & COCHRAN, *supra* note 6, at 48.

177. *Id.* at 47–48.

178. *Id.* at 1.

179. *Id.* Morality, they explain, is much less about stark choices between things that are “morally right” and “morally wrong” and much more pervasively about choices “between something that is better and something that is worse.” See *id.* at 23.

180. *Id.* at 47. At other places, Shaffer and Cochran write that their friendship model offers the opportunity for the lawyer and the client to “engage in moral reasoning together,” *id.* at 113, to “participate in a shared moral life during legal representation,” *id.* at 126, and to “humbly seek after the good, recognizing that collaboration is difficult,” *id.* at 48.

comes, is not averse to manipulating, controlling, or overriding client decisions to produce the right result,¹⁸¹ in the tradition of “gentleman lawyers” who take it as “[t]heir responsibility for their clients and for society . . . to see that their clients do the right thing.”¹⁸² Shaffer and Cochran view manipulation or preemption of client moral decision making as inconsistent with the primary commitment to client goodness,¹⁸³ as “deeper moral growth comes when we act morally in freedom, from internal rather than external direction.”¹⁸⁴

Shaffer and Cochran reject the moral activist and contextualist focus on just results and instead define morality in terms of goodness¹⁸⁵ and ethics in terms of caring,¹⁸⁶ drawing on a range of classical, theological, and feminist sources.¹⁸⁷ Shaffer has suggested that the lawyer might view his or her legal practice as “a professional life of ministry to clients.”¹⁸⁸ In this ministry, the lawyer needs to care not just about the effects of his or her actions on the client’s behalf, but also about the “type of person the client is becoming during the representa-

181. *See id.* at 32–35.

182. *Id.* at 32–33. Shaffer and Cochran characterize the moral activist approach to client counseling, particularly as it is advanced by William Simon, as the “lawyer as guru.” *Id.* at 32.

183. *See id.* at 38–39; *see also* Cochran, *supra* note 173, at 380–81.

184. Cochran, *supra* note 173, at 380.

185. *See* SHAFFER & COCHRAN, *supra* note 6, at 42–48.

186. *See id.* at 71–72.

187. The lawyer as friend model is built on deeply embedded theological conceptions of what it means to be a good person, both for the lawyer and for the client. Shaffer, for example, has worked out the main tenets that underlie the lawyer as friend model in answer to the question, “Is it possible to be a Christian and a lawyer?” THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 32 (1981). Shaffer describes his vision of lawyering as a “calling” to the “practice of law as a ministry.” *Id.* at 35–36; *see also* Thomas L. Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975) (discussing Christian values in relation to the Code of Professional Responsibility); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 986–91 (1987) (discussing the importance of religious tradition in legal ethics); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231, 247–53 (1979) (describing the role for religious principles in lawyering). Cochran’s own work has proceeded along more secular lines of developing what he calls the “collaborative approach” to lawyering. *See generally* COCHRAN ET AL., *supra* note 173 (criticizing the “authoritarian” and “client-centered counseling” models of lawyering and discussing the merits and operation of a “collaborative” model). Shaffer and Cochran also draw on Aristotelian conceptions of friendship, SHAFFER & COCHRAN, *supra* note 6, at 45–46, and the feminist ethic of care, *id.* at 71.

188. SHAFFER, *supra* note 187, at 10.

tion.”¹⁸⁹ The collaborative lawyer-client relationship thus emulates theologian Martin Buber’s conception of the “I-Thou relationship,” in which the lawyer seeks both “to change something in the [client], [and] also to . . . be changed by him.”¹⁹⁰

The lawyer as friend model seems to assume a personal affinity between lawyer and client that would be particularly challenging in a modern democratic society characterized by moral pluralism. As commentators on Shaffer and Cochran have pointed out, the Aristotelian conception of friendship arose out of an aristocratic view of friendship between men of equal status and virtue, which does not take account of the differences in power and status between lawyers and their clients.¹⁹¹ However, Shaffer and Cochran defend their lawyer as friend model as workable despite the obstacles posed by differences in moral values.¹⁹² Although they recognize that such differences may create a barrier to moral discourse in the law office, they do not perceive those differences to be insurmountable.¹⁹³ For one thing, they argue, most people in America “are

189. SHAFFER & COCHRAN, *supra* note 6, at 44.

190. *Id.* at 37 (quoting MARTIN BUBER, I AND THOU (Kaufman trans., 1942) (1923)).

191. See, e.g., Condlin, *supra* note 174, at 254–57, 294–97 (discussing Aristotle’s conception of friendship as communal sharing of virtue that served as “the prototypical social and political relationship” and arguing that this type of friendship is impossible to achieve in the lawyer-client context); Sammons, *supra* note 174, at 13–26 (arguing that Shaffer and Cochran’s account of the lawyer-client relationship fails because it has no community of shared values as an analog for the *polis*, or city-state, in which Aristotle’s ethics were situated). Shaffer and Cochran themselves concede that Martin Buber, whose conception of an “I-Thou relationship” provides another analog for the lawyer as friend model, “almost despaired of *professional* relationships as places for moral counseling” because of the inequality inherent in the professional relationship. SHAFFER & COCHRAN, *supra* note 6, at 37 (discussing MARTIN BUBER, THE KNOWLEDGE OF MAN (M. Friedman & R. Smith trans., 1965)).

192. SHAFFER & COCHRAN, *supra* note 6, at 49–52. Shaffer and Cochran also address differences in power and status, cautioning that “moral conversation carries with it the danger of domination” of the client by the lawyer. *Id.* at 50. However, they argue that “the greater peril arises from a failure to discuss moral issues.” *Id.* at 51. Moreover, as Cochran elaborates elsewhere, a lawyer can adjust for power differentials by “regulat[ing] the intensity with which [the lawyer] engages the client in moral discourse,” Cochran, *supra* note 173, at 391, being “more hesitant to push” in situations in which “[certain] determinants of power are primarily on the lawyer’s side,” and pursuing moral discourse more freely “[w]hen the determinants are equal or primarily on the side of the client,” *id.* at 394. See also *id.* at 391–96 (discussing several factors for the lawyer to consider in deciding how intensely to pursue moral discourse with the client).

193. SHAFFER & COCHRAN, *supra* note 6, at 49–52.

likely to share . . . some of the moral values that are most likely to be relevant in the law office—justice, mercy and truthfulness”—which can provide “a starting point for addressing moral issues.”¹⁹⁴ But Shaffer and Cochran do not shy away from moral discourse between lawyers and clients whose morality is “starkly different.”¹⁹⁵ In their view, diversity in moral values provides unique opportunities for growth because “moral insight often comes from conversation with someone who sees a problem from a different point of view.”¹⁹⁶

2. Rex and the Lawyer as Friend Model

If Rex were a lawyer in the Shaffer and Cochran tradition, his primary commitments would be to the relationship with Tina and Donna, to their moral development, to his own moral development, and to their common pursuit of the good. A lawyer operating under the friendship model would approach the moral questions with humility and would be open to changing his views through moral dialogue with his clients. Upon hearing Tina and Donna describe their situation and their goals, he would not be as quick to show them the door and instead would be more likely to welcome the opportunity for the moral growth—both theirs and his own—that having clients with such different values would present.

But could Rex successfully take the approach suggested by Shaffer and Cochran as a framework for moral discourse?¹⁹⁷ As a first step in this framework, Rex would attempt to involve or empower Tina and Donna through empathic responses, active listening techniques, and direct acknowledgment that the lawyer “is not an expert on the life of the client, and that the thoughts, feelings, and values of the client will be most important in determining much of what they do during the representation.”¹⁹⁸ Although Rex would try hard to do this, for reasons

194. *Id.* at 49.

195. *Id.* at 50.

196. *Id.*; see also Cochran, *supra* note 173, at 395 (arguing that although “[w]e find it easier to discuss moral problems with those who share a common tradition with us,” we can also “gain insight from those who are different from us”).

197. Unlike Luban and Simon, see *supra* Part III.A–B, Shaffer and Cochran are quite specific in laying out a technique that the lawyer can use to walk the line they draw between raising moral issues and imposing values on the client. SHAFFER & COCHRAN, *supra* note 6, at 113–34; see also Cochran, *supra* note 173, at 383–90.

198. Cochran, *supra* note 173, at 385; see *id.* at 383–85; see also SHAFFER &

previously discussed,¹⁹⁹ it is doubtful that he would be able to truly empathize with Tina and Donna without suspending some of his very deeply held values. Furthermore, because the lawyer when acting as a friend must remain genuinely engaged in the dialogue and open to mutual striving for the good, the strategy of moral detachment and its default to purely legal interests would not be available to a lawyer operating under the lawyer as friend model.

As a second step, Rex would try to “sensitize” Tina and Donna to the moral concerns raised by their situation, asking them what effect their decisions will have not only on their interests, but also on the interests of others.²⁰⁰ For example, he might ask them how they think their child will feel being raised in a lesbian home or whether they think their child will regret growing up without knowing his or her father. Following Shaffer and Cochran’s framework, Rex would then move on to introducing moral judgment into the dialogue by beginning to frame the questions about the effects on others in moral terms of fairness, kindness, or justice.²⁰¹ For example, Rex might ask Tina and Donna whether they think it will be fair to their child to raise him or her in a home without a father or in a lifestyle that may be damaging to the child’s emotional or psychological well-being.

At this point, it is probable that the moral dialogue would simply break down. It is difficult to see how this kind of questioning could stay within the boundaries of deference to Tina and Donna’s fundamental moral values. If he is to remain authentic, it seems that Rex would either have to confront Tina and Donna with his own fundamental values, accept their answer that they do not think that their lifestyle is immoral or damaging to children, or take the conversation to an even deeper level of moral conversation to try to reconcile the fundamental moral differences on the basis of some deeper level of shared values.

However, the most likely scenario is that Rex would eventually perceive himself to be in a situation that Shaffer and

COCHRAN, *supra* note 6, at 114–15 (discussing how the lawyer can involve the client in decision making).

199. See *supra* notes 61–70, 112–14 and accompanying text.

200. See SHAFFER & COCHRAN, *supra* note 6, at 119–20; see also Cochran, *supra* note 173, at 385–86.

201. See SHAFFER & COCHRAN, *supra* note 6, at 125–28; see also Cochran, *supra* note 173, at 386–90.

Cochran describe as “failed mutuality,” in which the client is “determin[ed] to walk a road the lawyer cannot take.”²⁰² As in the moral activist and contextualist models, Rex would probably decline to represent Tina and Donna. However, the reasons for declining representation are neither as judgmental as those of the moral activist nor as comfortably authoritative as those of the contextual lawyer. Instead, Rex would probably feel a tinge of regret that he was unable to reach a common moral ground with Tina and Donna or that, in their determination to walk their chosen road, they missed an opportunity to seek the path of goodness that would make them better people.

The problem with the lawyer as friend model is that though subtler, it is still based on an agenda to move the client in a particular moral direction: toward “the good.” As previously explained, it is far easier from our internal moral perspectives to accept the fallibility of someone else’s conception of “the good” than it is to admit that our own views are in error.²⁰³ Even if we believe, as Shaffer and Cochran suggest, that underneath our moral plurality a level of shared values exists,²⁰⁴ the law-office context seems ill suited to moral conversations of the depth required to reconcile sharply divergent moral views. Setting aside the probably prohibitive emotional and psychological costs, we have to wonder, for example, whether Rex would be billing Tina and Donna for the time they would all be investing in a process of such deep exploration and attempted reconciliation of moral values that arise from such different sources.

D. INADEQUACY OF THE LAWYERING MODELS

When moral pluralism is taken into account, neither the traditional model nor the alternative social justice lawyering models adequately explain the lawyer’s role in the gap between

202. SHAFFER & COCHRAN, *supra* note 6, at 52.

203. See *supra* notes 64–65 and accompanying text. Coming from a religious perspective, Howard Lesnick also discusses the tension between the “truth value” with which a religious lawyer would regard certain moral claims and the problem of moral relativism that affirming a plurality of moral views might presuppose. Lesnick, *supra* note 14, at 1490. He resolves the tension by noting that “the problem with objective truth is not its existence, but its accessibility to our discernment.” *Id.* Since all human beings necessarily fall short of divine understanding, pluralism both allows evil to masquerade as truth and permits one to use plural judgments about truth to come closer to its collective discernment. See *id.* at 1490–91.

204. SHAFFER & COCHRAN, *supra* note 6, at 49.

law and justice. In the case of the traditional lawyering model, the lawyer is free to proceed with the representation—and may even be encouraged to undertake it—without regard to the lawyer’s own moral commitments. However, this view disregards the important role that moral considerations may play in legal interpretation and client counseling. This view also fails to address the distorting effects that “amoral lawyering” may create, especially in the face of fundamental moral disagreement between the lawyer and the client, where empathy fails to bridge the gap. By contrast, the social justice models, by equating the lawyer’s judgments of the morality or justice of the client’s cause with the public interest, state or imply that if the lawyer is unable to represent the client for reasons based on the lawyer’s judgments of what is moral, just, or good, then the client is simply undeserving of legal representation. Disturbingly, the social justice models do not suggest that the better result would be for Tina and Donna to have a different lawyer—a lesbian-friendly lawyer who could view the morality and justice of their objectives from a shared point of view—even though this is what social justice in a morally pluralistic society would seem to require.

IV. MORAL CONFLICTS OF INTEREST

This section introduces a framework for understanding moral disagreements between lawyers and clients as “moral conflicts of interest” that may impair legal representation. This framework neither sets a lawyer’s moral commitments aside as extrinsic to legal representation nor equates them with the public good. Rather, it views the lawyer’s moral commitments as part of the package of services that the lawyer brings to the client. It thus prefers the social justice models’ inclusion of a lawyer’s consideration of issues of morality and justice as intrinsic to legal representation over the traditional model’s view of them as extrinsic considerations that must be transcended in an effort to provide neutral and technical legal representation. As a consequence, a moral conflict of interest framework contemplates that a lawyer’s moral commitments, like his or her financial commitments, may in some cases impair the lawyer’s loyalty and independence of professional judgment. This impairment springs from the important and sometimes inextricable role—noted by the social justice theorists—that judgments about morality and justice play in the lawyer’s interpretation of

what the law allows or requires, as well as in discussions with the client about the wisdom, prudence, and morality of the client's goals.

A. MORAL CONFLICTS OF INTEREST AND PROFESSIONAL ETHICAL STANDARDS

At their core, conflict of interest analyses arise out of a concern that two essential features of a lawyer-client relationship, loyalty and independent professional judgment, might be impaired by a lawyer's other commitments.²⁰⁵ Although impairment is typically thought to arise from duties owed to other clients²⁰⁶ or from the lawyer's own financial interests,²⁰⁷ the building blocks for a moral conflict of interest analysis are already present in existing ethical rules. For example, the conflict of interest rule set forth in the Model Rules of Professional Conduct (Model Rules) prohibits (with certain exceptions) representation that may "be materially limited by . . . a personal interest of the lawyer."²⁰⁸ Later rules clarify that a lawyer's "personal interest" includes such things as his or her "strong political beliefs."²⁰⁹ Likewise, the preamble to the Model Rules refers to the fact that ethical problems may arise from a "conflict between a lawyer's responsibilities to clients, to the legal system and to the *lawyer's own interest in remaining an ethical person*."²¹⁰ Additionally, the standards in the Model Rules governing acceptance of court appointments and withdrawal from representation recognize that if a lawyer finds a client's cause or an action the client insists on taking to be personally "repugnant," representation may be impaired. But neither standard mandates that the lawyer decline or withdraw from representation under such circumstances.²¹¹

205. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2002).

206. See *id.*

207. See *id.* R. 1.8(a).

208. *Id.* R. 1.7(a)(2). According to the commentary to Rule 1.7, a conflict of interest "materially limit[s]" representation if "it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." *Id.* R. 1.7 cmt. 8.

209. *Id.* R. 1.10 cmt. 3.

210. *Id.* pmb., para. 9 (emphasis added).

211. The Model Rules permit lawyers to seek to decline appointment if, among other reasons, "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." *Id.* R. 6.2(c). A similar standard of "repugnan[ce]" or

Using these building blocks in the existing rules, it is possible to recognize moral conflicts of interest under traditional conflict of interest standards. A moral conflict of interest analysis would require individual lawyers merely to ask the same question about their personal moral commitments that they ask about their own financial commitments: whether their commitments will “materially limit” whatever level of moral engagement is necessary for effective, partisan representation in the case at hand.²¹² Applying traditional conflict of interest principles, if a lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation”²¹³ notwithstanding the existence of a conflict of interest, the lawyer must typically disclose the conflict to the client and give the client the option of consenting to the representation.²¹⁴ If the client does not consent, or if the lawyer cannot reasonably conclude that he or she can provide “competent and diligent representation”²¹⁵ in the face of moral disagreement with the client’s objectives, then the lawyer must decline the representation.²¹⁶

The lesbian family planning scenario discussed in this Article represents a paradigmatic example of a moral conflict of interest that would require a lawyer to refuse representation. As with other conflict of interest paradigms—such as a lawyer who simultaneously represents the plaintiff and the defendant

“fundamental disagreement” defines a permissive ground for withdrawal from a case that the lawyer has voluntarily undertaken. *Id.* R. 1.16(b)(4) (“[A] lawyer may withdraw from representing a client if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”). However, a lawyer’s request to be relieved of representation may be denied even if this showing is made. *Id.* R. 1.16(c). It should be noted that the Model Rules are much more amenable to recognizing a moral conflict of interest than is the Model Code of Professional Responsibility (Model Code). For example, the Model Code specifically states that “repugnance of the subject matter of the proceeding” is not a “compelling reason[]” excusing a lawyer from a court-appointed case. MODEL CODE OF PROF’L RESPONSIBILITY EC 2-29 (1980).

212. *Cf.* MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2002) (recognizing that a lawyer’s personal interests may give rise to a conflict of interest that may prohibit the lawyer from representing a client).

213. *Id.* R. 1.7(b)(1).

214. *Id.* R. 1.7(b)(4) (requiring the lawyer to obtain “informed consent, confirmed in writing,” from each client affected by the conflict of interest). For a full description of the circumstances under which a lawyer is permitted to seek the client’s consent to a conflict, see *id.* R. 1.7(b).

215. *Id.* R. 1.7(b)(1).

216. *Cf. id.* R. 1.7 (stating in general terms when a lawyer must decline representation due to a conflict of interest).

in the same lawsuit—the value of the paradigm is to provide a yardstick against which lesser conflicts can be measured and compared.²¹⁷ The lesbian family planning example serves this role in two ways: First, the divergence between the lawyer's moral commitments and the client's objectives in this example is fundamental and irreconcilable. Second, the moral divergence is directly and centrally implicated in the tasks of legal representation. Not all moral disagreements between lawyers and clients will pose such an insurmountable barrier to representation. A reduction of either factor—the degree of moral disagreement between lawyer and client or the centrality of moral issues to the case—would diminish the conflict.²¹⁸ Although not addressed specifically in this Article, it should also be noted that intense moral identification between a lawyer and a client may create conflict of interest problems of its own.²¹⁹

A moral conflict of interest standard would not require a lawyer to disclose his or her moral views to every client in every case, any more than the lawyer need disclose his or her

217. See, e.g., *id.* R. 1.7 cmt. 6 (describing “directly adverse” conflicts as arising (1) when a lawyer “act[s] as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated”; and (2) “when [a] lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client”); *id.* R. 1.7 cmt. 7 (adding that such a conflict may also arise when “a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer . . . in another, unrelated matter”).

218. As the Model Rules suggest, “Ordinarily, clients may consent to representation notwithstanding a conflict.” *Id.* R. 1.7 cmt. 14. David Wilkins has illustrated how consent might be a viable option even in an extreme example of moral conflict: the case of Anthony Griffin, a black lawyer who chose to represent a grand dragon of the Ku Klux Klan in opposing a request for a Klan membership list. Wilkins, *supra* note 109, at 1030, 1038. While such a wide divergence in moral perspectives is likely to pose considerable challenges to effective representation, Griffin avoided these challenges by limiting his representation to the First Amendment rights that were implicated by the case. See *id.* at 1043–44, 1053–54.

219. See generally Spaulding, *supra* note 14. Norman Spaulding advocates a client-centered model of lawyering founded on the principles of competent service to clients and access to legal services by the public, a model that prefers “thin” rather than “thick” personal identification between lawyer and client. *Id.* at 17–19. He argues that an identification that is too “thick” may impair a lawyer’s independent professional judgment. *Id.* at 22–38 (discussing “role confusion, lawlessness, maldistribution of legal services, and professional balkanization” as four dangers that may arise when there is “thick” identification); cf. discussion *infra* Part IV.B.2 (describing a conscientious tax objection situation in which “thick” identification may be considered as impairing professional judgment). However, a full exploration of this type of moral conflict of interest is beyond the scope of this Article.

financial holdings to every client in every case. Many instances of moral difference will simply not raise a conflict of interest problem. A lawyer and client may hold divergent moral views—even on fundamental moral issues—but the legal representation may not bring those divergent moral considerations into play. For example, Rex may encounter no impairment in representing Tina and Donna in a dispute with a neighbor about an easement on their property because that legal dispute would not raise his fundamental disagreement with them over the morality of homosexuality. Similarly, a lawyer and a client may subscribe to very different sources of moral authority but reach similar conclusions on many of the ordinary moral considerations that are likely to arise in legal representation and hence see no reason to explore the underlying justifications for their views.²²⁰

B. RELUCTANCE TO EMBRACE MORAL CONFLICTS OF INTEREST

Despite the amenability of existing conflict of interest standards to recognition of moral conflicts of interest, the bar has been reluctant to fully embrace a moral conflict of interest standard. Two state bar opinions help to illustrate this reluctance.

1. Moral Opposition to Abortion

In 1996, a Tennessee lawyer sought an ethics opinion on whether he could, on the basis of his moral and religious beliefs, decline court appointments to represent minors who were seeking judicial waivers of parental consent to obtain abortions.²²¹ The lawyer stated that “he [was] a devout Catholic and [could not], under any circumstances, advocate a point of view

220. See, e.g., Wendel, *Public Values*, *supra* note 14, at 114 (drawing on Rawls’s conception of an “overlapping consensus” to note that “two parties [may] agree on normative principles to resolve a dispute” even if they disagree about “more deeply held or fundamental principles” because “[t]he locus of certainty is the particular case, not the moral first principles”); see also Pepper, *supra* note 1, at 197–99 (making the similar point that even if different individuals apply different theories to justify and explain their moral positions, their moral intuitions often converge).

221. Bd. of Prof’l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 96-F-140 at 1, 3 (June 13, 1996) [hereinafter *Tenn. Formal Op. 96-F-140*], available at http://www.tsc.state.tn.us/OPINIONS/Ethics/BdofProResp/_PDF_Files/92-99/96-f-140.pdf; see also Lesnick, *supra* note 14, at 1469–71 (discussing the Tennessee ethics opinion in arguing that the legal profession should accommodate and respect the lawyer’s religious beliefs).

ultimately resulting in . . . the loss of human life.”²²² At least implicitly drawing on conflict of interest principles, the lawyer argued that his moral views would impair his ability to counsel minor clients effectively in judicial bypass proceedings.²²³ He even sought ethical permission to advise his clients about alternatives to abortion and permission to counsel them to speak with their parents or legal guardians²²⁴—the very thing the minors were seeking to avoid with a judicial bypass.

The Board of Professional Responsibility of the Supreme Court of Tennessee rejected the lawyer’s claim, finding that “[a]lthough counsel’s religious and moral beliefs are clearly fervently held,”²²⁵ they did not constitute a “compelling reason[]” to decline a court appointment in the absence of a further factual record showing that they created a conflict of interest.²²⁶ In so doing, the Board treated the lawyer’s desire to engage his moral sensibilities as a self-indulgent act from which he should simply abstain rather than as an impairment of his lawyering abilities. The Board highlighted the dangers of the lawyer imposing his moral views on his clients through such a counseling process, noting that “counsel strongly recommend[ing] that his client discuss the potential abortion with her parents or with other individuals or entities which are known to oppose such a choice” would “call[] into question” the lawyer’s duty of undivided loyalty to his client.²²⁷ However, the Board instructed the lawyer that his moral beliefs “must yield to the moral beliefs”

222. Tenn. Formal Op. 96-F-140, *supra* note 221, at 3.

223. *Id.*

224. *Id.* at 1.

225. *Id.* at 3.

226. *See id.* at 3–5. The Board pointed out that Tennessee’s professional responsibility standards tracked the Model Code rather than the Model Rules. *See id.* at 3. Hence, the standards mirrored the language of EC 2-29, which states that a lawyer “should not seek to be excused from undertaking [a representation by court appointment or bar association request] except for compelling reasons.” MODEL CODE OF PROF’L RESPONSIBILITY EC 2-29 (1980); *see also* Tenn. Formal Op. 96-F-140, *supra* note 221, at 3 (referring to the Model Code). The Board cited the Model Code provision to specify that

[c]ompelling reasons . . . do not include such factors as: “. . . the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.”

Id. at 3–4 (quoting MODEL CODE OF PROF’L RESPONSIBILITY EC 2-29 (1980)).

227. Tenn. Formal Op. 96-F-140, *supra* note 221, at 2.

of his clients,²²⁸ thereby embracing the traditionalist view that moral transcendence is possible and preferable.

Had the Board been sensitive to a moral conflict of interest analysis, it would have accepted the lawyer's request not to be appointed by the juvenile court in cases involving judicial bypass of parental consent to abortion. The lawyer here articulated a strong personal moral objection to representing minors in judicial bypass proceedings and claimed that such moral objection would affect his ability to provide legal representation and counseling.²²⁹ In fact, he expressed a desire to counsel minors out of taking advantage of the very procedure that he was appointed to assist them in using.²³⁰ Under a moral conflict of interest standard, this kind of fundamental moral opposition to a client's pursuit of a clearly lawful objective would be viewed, like the lesbian family planning example, as a nonwaivable conflict. In other words, the lawyer probably would have been compelled to decline representation even if he had desired to take the cases.

2. Conscientious Tax Objection

In 2003, a California lawyer sought an ethics opinion from the State Bar of California Standing Committee on Professional Responsibility and Conduct regarding professional ethics issues raised by her sincere belief that "the entire state and federal tax system is immoral."²³¹ The lawyer had joined an association that opposed taxation and had publicly advocated civil disobedience in the form of refusing to pay taxes.²³² Her practice, however, included business transactional work and estate and tax-planning services, and she stated that she had received "a substantial number of client referrals from her speeches on behalf of and through her contacts in the [association]."²³³ The lawyer said that despite her beliefs and her public advocacy that the tax laws are immoral and ought to be resisted, she ad-

228. *Id.* at 5 (quoting Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 84-F-73 (1984)).

229. *Id.* at 3.

230. *See id.* at 2.

231. *See* State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. No. 2003-162 at 1 (2003) [hereinafter Cal. Formal Op. 2003-162], available at http://calbar.ca.gov/calbar/pdfs/ethics/OPN_2003_162.pdf.

232. *Id.*

233. *Id.*

vised her clients to abide by the law, a practice that the Committee endorsed.²³⁴

In its opinion, the Committee deviated from the more traditional view of lawyers as legal technicians and questioned the lawyer's competence to represent clients in tax matters.²³⁵ Based on the fairly broad definition of competence in California's ethics rules—a definition that includes an emotional component²³⁶—the Committee observed that the lawyer's "mental or emotional state" could "prevent[] her from performing an objective evaluation of her client's legal position, providing unbiased advice to her client, or performing her legal representation according to her client's directions."²³⁷ In other words, the Committee acknowledged that because the lawyer was ideologically committed to resisting tax laws, she might have a tendency to discount client values that ran counter to the goal of avoiding those laws.²³⁸

Curiously, the Committee failed to carry its insight about the adverse effects that the lawyer's ideological commitments may have on her competence to the conclusion that those commitments raised a potential conflict of interest.²³⁹ The Committee treated the conflict of interest issue as a potential conflict between the lawyer's activities with an association that advocates taxpayer civil disobedience and the representation of clients. It did not address the potential conflict between the lawyer's personal moral commitments and her clients' interests.²⁴⁰ Despite noting the potential for impaired representation, the Committee concluded that the lawyer need not disclose her relationship with the anti-tax association to any of her present or prospective clients.²⁴¹

234. *Id.* at 1–2.

235. *See id.* at 3–4.

236. *Id.* at 3. Specifically, the California rule defined competence as "the application of 'the 1) diligence, 2) learning and skill, and 3) *mental, emotional* and physical ability reasonably necessary for the performance of legal services.'" *Id.* (quoting CAL. RULES OF PROF'L CONDUCT R. 3-110(B)); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

237. Cal. Formal Op. 2003-162, *supra* note 231, at 3.

238. *See supra* notes 100–02 and accompanying text for examples of how clients' values may be overridden or ignored by lawyers who unreflectively assume that clients wish to maximize their tax savings.

239. *See* Cal. Formal Op. 2003-162, *supra* note 231, at 2–3.

240. *See id.* at 2–3.

241. *Id.*

For clients who had sought the lawyer's tax-planning services as a result of attending her public presentations advocating tax resistance, the potential for conflict is less of a concern. Those clients would have chosen her knowing her views—and quite probably because her views coincided with their goals. However, one can imagine that the situation would be quite different for clients who had simply sought her tax-planning advice without knowing her moral opposition to taxation. In those cases, the potential for divergence between the lawyer's ideological commitments and her clients' goals would be greater. Her clients would seemingly have a right, under conflict of interest standards, to disclosure and consent to the potential impairment of independent professional judgment that the Committee had identified. Yet the Committee declined to treat the lawyer's commitments as creating a potential conflict of interest subject to disclosure and consent requirements.

These cases demonstrate the bar's reluctance to fully commit to a moral conflict of interest standard, despite available building blocks in the professional standards governing competence, withdrawal, and declining court appointments. As the next section demonstrates, this reluctance may well be rooted in a deeper professional concern for providing universal representation and access to justice in a way that remains neutral between competing moral viewpoints. This deeper concern is not trivial. Embracing a moral conflict of interest framework would undoubtedly aggravate the logistical challenges of providing universal representation by encouraging lawyers to prejudge their willingness and ability to represent clients when confronted with moral division. However, even noting the likely impact on the provision of legal services, this Article argues that the benefits of a moral conflict of interest framework would outweigh its costs because the framework would not so much change the realities attending the provision of legal services to needy clients as it would elevate the ideal against which access to justice is gauged.

C. MORAL CONFLICTS OF INTEREST AND MORAL ABSTENTION FROM REPRESENTATION: THE LAST LAWYER IN TOWN PROBLEM

Though not requiring changes to existing ethical rules, the conceptualization of lawyers' moral beliefs as potential sources of moral conflicts of interest provides a new and different framework within which issues at the intersection of morality and law can be analyzed and discussed. This section explores

how a moral conflict of interest framework would both illuminate and redefine the debate over moral abstention from representation. Though theoretically sound and in many ways more satisfactory than traditional approaches, the reconceptualization of moral abstention has some troubling implications for issues of access to justice.

Moral abstention—or the refusal by a lawyer to accept a case on moral grounds—reveals an underlying tension between lawyers' discretion in client selection and a duty held by the profession as a whole to make legal representation universally available to all who need it.²⁴² Professional ethical standards attempt to mediate this tension by permitting lawyers to exercise wide-ranging autonomy in client selection, except in cases of great public need. Hence, lawyers are generally free to accept or decline cases for any reason, including moral disagreement with clients' aims.²⁴³ However, ethical standards contain exceptions or limitations on lawyers' generally unchecked autonomy to accept or decline representation when it comes to politically unpopular or financially needy clients.²⁴⁴

242. Both the Model Code and the Model Rules charge lawyers with such a duty. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY Canon 2 (1980) ("A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available[.]"); MODEL RULES OF PROF'L CONDUCT R. 6.2 (2002) ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . .").

243. *E.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 573 (student ed. 1986) (stating that with the exception of unpopular clients in need of representation and court appointments, "a lawyer may refuse to represent a client for any reason at all—because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral").

244. For example, the Model Code discourages lawyers from "lightly declin[ing] proffered employment" and suggests that "in furtherance of the objective of the bar to make legal services fully available," lawyers should accept "[their] share of tendered employment which may be unattractive both to [them] and the bar generally." MODEL CODE OF PROF'L RESPONSIBILITY EC 2-26 (1980). Likewise, when a court seeks to appoint a lawyer for "a person unable to obtain counsel," the Model Code states that the lawyer "should not seek to be excused . . . except for compelling reasons," which "do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case . . . or the belief of the lawyer regarding the merits of [a] civil case." *Id.* at EC 2-29 (endnote omitted). The Model Rules soften this proscription somewhat, allowing a lawyer to seek to decline a court appointment if "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship." MODEL RULES OF PROF'L CONDUCT R. 6.2(c) (2002). However, the Model Rules seek to shield lawyers from public criticism for taking on unpopular cases with the disclaimer that "[a] lawyer's representation of a client, including representation

Though ethically permitted in most cases, the appropriateness of a lawyer's moral abstention has been the subject of debate in legal ethics.²⁴⁵ The predominant view is to cast the question of moral abstention as a struggle between the lawyer's personal moral autonomy—the right not to be called into professional service over one's moral objection—and the lawyer's professional duty of public service.²⁴⁶ Viewed in the light of this predominant rubric, a lawyer's moral abstention appears on the same ground as claims by other professionals. Pharmacists, for example, are currently embroiled in a debate over whether it is permissible for them to refuse, on moral grounds, to fill prescriptions for certain contraceptive medications or the “morning after” pill.²⁴⁷

The tensions between the individual autonomy of individual lawyers in client selection and the bar's concern with providing universal legal representation to all clients regardless of moral or political popularity are illustrated by what has come to be called the “last lawyer in town problem.”²⁴⁸ The last lawyer in town problem arises out of the injustice created when the legal profession fails to provide representation to clients with legally cognizable claims because of the sequential operation of lawyers' individual choices not to represent them.²⁴⁹ In other words, the concern is not with any *one* lawyer refusing services

by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.” *Id.* R. 1.2(b). The commentary to Rule 1.2 reveals nonaccountability as integral to a strategy of encouraging universal representation by protecting lawyers from public censure for the client representation choices they make. *See id.* R. 1.2 cmt. 5. (“Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.”).

245. *See, e.g., Symposium on the Lawyer's Amoral Ethical Role, supra* note 10.

246. *See, e.g., WOLFRAM, supra* note 243, at 575 (describing lawyers as having “nonmandatory professional obligation[s] to do their fair share of representing unpopular clients” that “pit[] . . . the social ethic of universal legal representation against a lawyer's possible individual moral values”).

247. *See, e.g.,* Monica Davey & Pam Belluck, *Pharmacies Balk on After-Sex Pill and Widen Fight*, N.Y. TIMES, Apr. 19, 2005, at A1.

248. *See generally* Teresa Stanton Collett, *The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?*, 40 S. TEX. L. REV. 137 (1999) (discussing whether it is morally permissible for a lawyer to refuse to represent a client who is seeking immoral ends if the client would be unlikely to otherwise obtain legal representation).

249. *See, e.g., id.* at 138; Murray L. Schwartz, *The Zeal of the Civil Advocate*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS, *supra* note 122, at 150, 168–69.

to a client for moral reasons, but is rather with the specter of *every* lawyer exercising this right of refusal, until the client is left with no lawyer at all.

The last lawyer in town problem has two aspects: a logical aspect and a logistical aspect. In its logical aspect, the last lawyer in town problem is a hypothetical story that illustrates the problem of “free riding” that arises by virtue of a collective duty (held by the legal profession as a whole) to provide legal representation, a duty that must be implemented through the actions of individual lawyers. The story posits a client whom every lawyer in a hypothetical town full of lawyers (which represents the legal profession) would be loath to represent.²⁵⁰ The first lawyer in town would be free to refuse to represent the client because other lawyers are available to help the legal profession meet its collective duty to provide universal representation. The second lawyer in town would also be justified in refusing representation, as would the third and fourth and so on until the client reached the last lawyer in town. At that point, because the client had been refused representation by every other available lawyer, the only way for the legal profession to realize its collective duty to provide universal representation is for the last lawyer in town to take the case.²⁵¹ However, the professional duty of the last lawyer in town logically implies a duty on every other lawyer in town to take the case, rather than “free riding” on his or her ability to pass off the profession’s collective duty of providing universal representation to some other lawyer based on the happenstance that he or she had been approached first rather than last.²⁵²

250. See, e.g., Collett, *supra* note 248, at 145 (explaining that to test the last lawyer in town problem, “it is necessary to posit a set of facts that command broad agreement as to the legality but immorality of the client’s objectives”); Schwartz, *supra* note 249, at 165 (noting that the problem requires one to “assume a case as to which there would be a consensus about the immorality and potential harm of some contemplated behavior that is not prohibited by law”).

251. See, e.g., Schwartz, *supra* note 249, at 169.

252. See, e.g., Pepper, *supra* note 59, at 660 (arguing for a presumption that “each lawyer has the (enforceable) obligations of the last lawyer in town” because of the psychological and financial costs involved in getting to the “last lawyer” as well as the difficulty of knowing when the “last lawyer” has effectively been reached); Wendel, *supra* note 10, at 387 (“[T]he reasons that [the last lawyer in town] should continue to represent the client . . . are generalizable to the situation of the second-to-last lawyer as well.”). *But see* Schwartz, *supra* note 249, at 169 (“Were a lawyer to volunteer for the representation without independent moral justification, the expression of [moral repugnance to the proposed conduct by all lawyers] would be lost. The lawyer should let

Once the existence of moral pluralism is taken into account, the logical part of the last lawyer in town problem effectively disappears. The logical problem depends on the premise that all available lawyers share the same set of moral values and would find the same clients morally repugnant. The hypothetical universe of available lawyers looks different, though, once moral pluralism is introduced because the universe is now morally diverse. There may be many clients whom the first lawyer would be morally loath to represent, but these clients would not present the same moral quandary to the second lawyer. When the first lawyer refuses representation on grounds of moral repugnance, he or she can be seen not as “free riding,” but rather as passing the client on to a lawyer who is more capable of representing the client without the impairment of moral conflict.

By employing a moral conflict of interest framework, a lawyer’s decision not to represent a client on moral grounds can thus be cast in a new light that differentiates that decision from the claims of other professionals who might wish to exercise their moral autonomy to refuse professional service. Under a moral conflict of interest framework, moral abstention is redefined as a component of a lawyer’s duty to provide competent representation. While the *source* of the conflict lies in a lawyer’s resistance to acting in ways that are contrary to the lawyer’s personal moral views, the *reason* for morally abstaining is to protect the interests of the client. Reinterpreted through a moral conflict of interest framework, moral abstention is viewed as a protection of the public from lawyers who are unable to provide legal representation characterized by unimpaired loyalty and independent professional judgment rather than as self-indulgence.

The logistical side of the last lawyer in town problem is different and is in many ways more challenging. The logistical problem is concerned with actual communities of lawyers and with the practical problem of clients finding lawyers willing to represent them. It does not go away when the existence of moral pluralism is taken into account because it recognizes the practical problem of outsiders with morally defensible and legally cognizable claims who may get shut out of legal representation in particularly closed and homogeneous legal communi-

ties.²⁵³ The next section turns to these logistical challenges, especially as they impact the delivery of legal services to those who rely on the beneficence of pro bono or government-subsidized legal assistance.

D. MORAL CONFLICTS OF INTEREST AND ACCESS TO JUSTICE

It is tempting at first glance to say that recognizing moral conflicts of interest would do little damage to existing systems for delivering legal services, except perhaps to provide a check on some of the more self-interested reasons that motivate lawyers to distribute their legal services to well-paying clients with questionable moral aims.²⁵⁴ Given the generally unchecked autonomy that lawyers already exercise over client selection, and the “personal repugnance” exception to the more general duty to accept court appointments,²⁵⁵ it would seem that lawyers already have *permission* to decline cases on moral grounds. The larger impact of *requiring* lawyers to do so would seem to fall on lawyers who choose to take cases *despite* their moral distaste for particular clients or causes. These lawyers are more likely to be found among the ranks of the rich and powerful, representing clients who can pay them enough money to assuage their moral qualms.

However, by imposing professional pressure on lawyers to prejudice the morality of the kinds of cases or clients they undertake to represent, the effects of embracing a moral conflict of interest standard go deeper into the legal culture in ways that would affect the delivery of legal services to clients who cannot afford to purchase their lawyers’ loyalties. This professional pressure comes in part from reconceptualizing moral abstinence as not merely a matter of lawyers’ autonomy but, in some cases, as a professional obligation. It comes also from the necessity of identifying moral conflicts of interest at an early point in the representation, so as to avoid the harm that may

253. As Teresa Stanton Collett has observed, “Lawyers in particular geographic regions have evidenced common moral commitments, and these commitments have affected the lawyers’ willingness to represent particular causes.” Collett, *supra* note 248, at 143. Collett uses an abortion case in Guam—described as “a relatively small and predominantly Catholic community”—as an example of this phenomenon. *Id.* (quoting *Guam Soc’y of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 699 (9th Cir. 1996)).

254. For a recent analysis of the principles by which economic and other pressures distribute the “resources of dispute resolution,” see Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89 (2005).

255. See *supra* note 211 and accompanying text.

come from identifying a conflict after a significant investment of time and expense. The conservatism and risk aversion inherent in a moral conflict of interest approach may be felt in lawyers' choices of practice area as well as their choices of clients. It may shield lawyers from experiencing the capacity of empathy to bridge some of the gaps that they may assume exist between themselves and potential clients. The effects of moral prejudice may be especially pernicious in denying legal services to needy clients, precisely because their life circumstances place them in a different social class from lawyers who may have little real understanding of the choices and challenges that such clients face.

Moreover, moral choice implies moral accountability, and the existence of a moral conflict of interest standard would accordingly hold lawyers publicly accountable for their client-selection choices. To the extent that lawyers' own moral commitments become necessary factors (rather than just optional ones) in selecting clients, the moral conflict of interest standard would remove the protective shield currently provided by the disclaimer that a lawyer's representation of a client does not represent the personal views of the lawyer.²⁵⁶ Subjecting lawyers' client-selection choices to this greater public scrutiny could erode the ideological and political support for the universal provision of counsel, which the bar employs to defend the representation of unpopular clients.

These concerns are troubling. Rather than denying their significance, this Article instead points out the off-setting benefits that would be gained by elevating the ideal of universal representation against which access to justice is measured. Universal legal representation is, after all, not a reality in our society but an ideal toward which our procedure-based system of justice aims. As currently defined, the ideal of universal representation can be minimally met by providing a lawyer—any lawyer—to every client.²⁵⁷ A heightened standard for universal

256. See *supra* note 244.

257. As critics of the status quo have noted, it is a discouraging trend that even in cases where there is a constitutional right to counsel and the stakes are enormously high—such as when a client is a defendant facing the death penalty in a capital case—the goal of universal representation can be met by providing a licensed member of the bar with nothing more than a pulse. See, e.g., RHODE, *supra* note 94, at 62–63 (“Courts have declined to find inadequate representation where attorneys were drunk, on drugs, or parking their car during key parts of the prosecution’s case. And defendants have been executed despite their lawyers’ lack of any prior trial experience, ignorance of all rele-

representation would change that ideal and affect the way we think about implementing it. For example, a more ambitious ideal would discourage certain types of legal service delivery systems, such as those in which members of a bar are automatically placed on a court list for appointment in whatever cases a court deems necessary.²⁵⁸ Instead, it would encourage public-defender systems that permit lawyers to “opt out” of representation in certain types of cases in which their representation would be compromised based on their moral or ideological commitments.²⁵⁹ And it would encourage the cultivation, financial support, and geographic deployment of lawyers with sincere commitments to certain types of unpopular representation to meet the need for that representation where it arises. By making the ideal of competent representation more ambitious, a moral conflict of interest framework would thus challenge the profession to be more creative in providing better-quality legal representation to a wider range of clients.

Requiring lawyers to articulate their own reasons for undertaking representation in morally controversial cases rather than hiding behind the shield of nonaccountability might also enhance the goals of larger dialogue over contested moral issues in a society characterized by moral pluralism. A 1993 exchange between Monroe Freedman and Michael Tigar in the *Legal Times* illustrates the benefits of such accountability. Freedman has long viewed client selection as the quintessential moral question for lawyers²⁶⁰ and would hold lawyers to a “burden of public justification” in answering the question, “Is this really the kind of client to which I want to dedicate my training, my knowledge, and my skills as a lawyer?”²⁶¹ In 1993,

vant death penalty precedents, or failure to present any mitigating evidence.”); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 489–94 (1993) (discussing the low standards in many jurisdictions for appointing counsel in capital cases).

258. Cf. WOLFRAM, *supra* note 243, at 571–72 (discussing the English “cab rank” rule, under which barristers are required to “accept any case in which [the barrister’s] clerk negotiated an appropriate fee with the client’s solicitor”).

259. See Abbe Smith, *When Ideology and Duty Conflict*, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS 18, 26 (Rodney J. Uphoff ed., 1995) (arguing for an “opt-out” standard that asks “not whether the defender could do a competent job or an adequate job, [but] whether the client would be proud to have that defender as a lawyer; whether the client will be well-served”).

260. See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 74 (3d ed. 2004).

261. See Monroe Freedman, *Must You Be the Devil’s Advocate?*, LEGAL

Freedman challenged Tigar to meet this burden regarding Tigar's representation of John Demjanjuk, the man suspected of being the Nazi war criminal Ivan the Terrible who oversaw the mass murder of Jews at the Treblinka concentration camp.²⁶² Tigar responded by chastising Freedman that his "burden of public justification" would "undermine[] the right to representation of unpopular [clients]."²⁶³ However, Tigar went on to meet the burden, providing an impassioned defense of the justice of Demjanjuk's case,²⁶⁴ which is ultimately more convincing than a simple appeal to the justification that "everyone deserves a lawyer."

It should not surprise anyone that Tigar's explanation of his choice to represent Demjanjuk is ultimately more satisfying than would be a simple appeal to the procedural justice of universal representation.²⁶⁵ By the nature of their work, lawyers are called on to understand and empathize with their clients and to tell their clients' stories in ways that persuasively portray their clients as the protagonists in court, in negotiation, to allies, and to opponents. Indeed, lawyers' abilities to tell their clients' stories convincingly from the clients' perspectives are measures of the effectiveness of their lawyering. By requiring a lawyer to articulate honestly his or her reasons for taking a morally controversial case that the lawyer has chosen, a moral

TIMES, Aug. 23, 1993, at 19, *reprinted in* UNDERSTANDING LAWYERS' ETHICS, *supra* note 260, at B-383, B-384 to -385.

262. *Id.*, *reprinted in* UNDERSTANDING LAWYERS' ETHICS, *supra* note 260, at B-383, B-385; *see also* Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES, Sept. 6, 1993, at 22, *reprinted in* UNDERSTANDING LAWYERS' ETHICS, *supra* note 260, at B-385, B-385 to -386.

263. Tigar, *supra* note 262, *reprinted in* UNDERSTANDING LAWYERS' ETHICS, *supra* note 260, at B-385, B-387. However, even Tigar maintains that "lawyers have a responsibility to their own conscience for the kinds of clients they choose to represent and the positions they choose to advance." *Id.*, *reprinted in* UNDERSTANDING LAWYERS' ETHICS, *supra* note 260, at B-385, B-388.

264. *Id.*, *reprinted in* UNDERSTANDING LAWYERS' ETHICS, *supra* note 260, at B-385, B-385 to -386. In this defense, Tigar notes that exculpatory evidence indicating that Demjanjuk was not Ivan the Terrible had been withheld from the defense in his trial and pleads the unfairness of his client's having "lived for more than 16 years under a cloud of government allegations" despite the fact that "[s]ince at least 1978, the government has had solid evidence that these charges were false." *Id.*, *reprinted in* UNDERSTANDING LAWYERS' ETHICS, *supra* note 260, at B-385, B-386.

265. For a discussion of the gap between political justifications for criminal defense work and the motivations that sustain public defenders, *see* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

conflict of interest standard would help to ensure that lawyers are such effective advocates.

CONCLUSION

The stories about lawyers' professional duties in the gap between law and justice are most often told from the point of view of lawyers as moral protagonists faced with immoral clients. The lesbian family planning hypothetical presented in this Article retells the story of moral conflict from the point of view of clients faced with a lawyer who cannot see them as moral protagonists. Modifying the classic professional responsibility story in such a way allows us to explore the implications of moral pluralism for legal ethics.

This Article argues that both the traditional and social justice models of lawyering fail to address adequately the concerns of lawyers and clients facing a fundamental moral divide. Traditionalists assert that lawyers should provide morally neutral access to the law, but the traditional model does not acknowledge the degree to which lawyers' internal moral perspectives prevent such neutral representation. Social justice theorists, on the other hand, do recognize the role that lawyers' moralities play in legal representation, but the social justice lawyering models do not explain why clients who are not immoral but who instead morally disagree with their lawyers are entitled to any legal representation.

This Article proposes a better alternative to the traditional and social justice models of lawyering in the form of a moral conflict of interest standard. This standard would prohibit lawyers from representing clients with whom they fundamentally disagree on moral grounds. Mandatory disclosure and consent or withdrawal in such cases would ensure that clients receive competent and unimpaired representation from lawyers who view them as moral protagonists.

Lawyering theory literature makes it clear that morality matters. It matters to the law, it matters to clients, and it matters to lawyers as well. Lawyers' personal moral perspectives are not annoyances to be ignored or transcended, like an athlete playing through the pain of an injury. Instead, lawyers' moral commitments, like their financial commitments, carry the unique potential to interfere with their professional loyalty and independence of judgment. In a morally pluralistic society, clients deserve to be informed of and protected from such interference.