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Three Foundations of Legal Ethics: Autonomy, Community, and Morality

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INTRODUCTION

Despite sustained focus on lawyers' ethics in contemporary practice,[1] teaching[2] and scholarship,[3] there is still much dissatisfaction with lawyers' ethics. There are many causes of this dissatisfaction, including a decline in

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1. *See* J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982) (providing a systematic character study of the Chicago Bar); F. ZEMANS & V. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION (1981) (examining law school's role in development of lawyers and legal profession); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504 (1985) [hereinafter R. Nelson] (examining relationship between practice in large firms and their political, legal, and professional attitudes).

2. *See generally* ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, AM. BAR ASSOC., REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979); ABA SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION, AM. BAR ASSOC., LAW SCHOOLS AND PROFESSIONAL EDUCATION (1980); E. Gordon Gee & Donald W. Jackson, *Current Studies of Legal Education: Findings and Recommendations*, 32 J. LEGAL EDUC. 471 (1982); Elizabeth D. Gee, *Legal Ethics Education and the Dynamics of Reform*, 31 CATH. LAW. 203 (1987); Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537 (1991) (studying effects of law office work on the formation of students' professional values); Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247; *Teaching Legal Ethics: A Symposium*, 41 J. LEGAL EDUC. 1 (1991) (offering perspectives on the content and process of legal ethics instruction).

3. For a sampling of the leading literature, *see generally* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) [hereinafter Morgan, *Evolving*]; Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 [hereinafter Pepper, *Ethical Role*]; Deborah L. Rhode, *Ethical Perspectives on*

lawyer professionalism apparent to many[4] and lawyers' failure to adhere to fundamental ethical or social norms. Additionally, the increased commercialism of law practice, notably evident in the 1980s, has elevated the demands of practice and, concomitantly, reinforced lawyers' predisposition to prefer their own and especially their clients' interests over other obligations central to the professional role.[5]

Legal Practice, 37 STAN. L. REV. 589 (1985); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) [hereinafter Simon, *Discretion*].

4. There is a widespread perception that current law practice has become too commercial, becoming "more like a trade than a profession, with an emphasis on money and profit rather than on service and justice." Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine; The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1232 (1991). There is a "collapse of professionalism . . . currently developing in practice." *Id.* at 1239; *accord* Morris Harrell, *Preserving Professionalism*, 69 A.B.A. J. 864 (1983) ("the practice of law [is] becom[ing] just another business"); Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 331 (1990) ("lawyers are professionals, supposedly wedded to the idea that service to the public comes before their own monetary gain"). Professor Morgan has noted that

> we as lawyers seem to be losing a sense of ourselves as trustees of a tradition of justice, a tradition which is important in preserving a sense of social unity . . . . I believe that it is because of lawyers' preoccupation with the desires of the client, to the exclusion of all else, that lawyers have been experiencing a period of decline in professionalism — a decline which has been going on for at least fifteen or twenty years.

Thomas D. Morgan, *The Fall and Rise of Professionalism*, 19 U. RICH. L. REV. 451, 452 (1985) [hereinafter Morgan, *Professionalism*]. Professor Morgan attributes the decline in professionalism to a number of sources: "the rights revolution of the 1960s," *id.* at 457; "the growth in the number of lawyers," *id.* at 458; "that the rewards of success today are so high for the really successful practitioners that there is very little incentive to invest one's time in issues that transcend the private client," *id.* at 459; and that "the financial pressures in the practice of law today are such that one often cannot afford to look beyond the short-range and the practical." *Id.* at 460. These concerns seem particularly legitimate when even the American Bar Association (ABA) condemns widespread commercialism in the legal profession. COMMISSION ON PROFESSIONALISM, AM. BAR ASSOC., REPORT TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES (1986), *reprinted in* 112 F.R.D. 243, 251 (1986) (asking whether profession has "abandoned principle for profit").

On the other hand, it may simply be a myth "that the professions embody a long tradition of professional training, self-regulation, and dedication to public service. . . . [T]he 'golden age of professionalism' may never have existed." Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 782. Indeed, at the turn of the century, Louis Brandeis observed: "Able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people." LOUIS D. BRANDEIS, BUSINESS — A PROFESSION 321 (1914). Still, "much might be gained if we look at the 'nobility' of our profession and its 'traditional preference for the welfare of others over self' as a beautiful myth . . . understood to be [a] metaphor . . . [for] express[ing] truth." Michael Distelhorst, *Living in the Faith of Our Special Myths*, 19 CAP. U. L. REV. 1135, 1141 (1990). "Let us continue to live in the faith of our special myth as we continue to aspire to our 'historic' ideals." *Id.* at 1144.

5. Studies involving broad segments of the lawyer population, ranging from large corporate practice to small firms and solo practitioners, indicate that attorneys strive to maximize their clients' self-interest and, in the process, take on the values of their clients. HEINZ & LAUMANN, *supra* note 1, at 360-65 (1982); John P. Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 898-99, 911 (1983); R. Nelson, *supra* note 1, at 505, 538. In an earlier article, the present author spoke of the "congruence of values between attorneys and their clients" and how this causes an undervaluation of ethical questions. Edward J. Eberle, *Toward Moral Responsibility in Lawyering: Further Thoughts on the*

This article contends that the current dissatisfaction over legal ethics can be traced, in part, to a more fundamental confusion in lawyers' thinking about the practice of law.[6] As professionals, lawyers owe duties to clients, society, and conscience. These duties are part of broader conceptions of autonomy, community, and morality.[7] These conceptions form the foundations of law practice, supplying the reasons for acting in the capacity of a lawyer. However, lawyers are confused as to how to balance these foundations, and how to reason properly from them. Lawyers tend to overemphasize client autonomy interests to the detriment of relevant community or morality interests.[8]

Deontological Model of Legal Ethics, 64 ST. JOHN'S L. REV. 1, 7 (1989) [hereinafter Eberle, *Moral Responsibility*]. *See also* Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 741-42 (1988) (observing decline of public-spiritedness by lawyers and increasing willingness to promote client interests without regard to competing interests).

These issues are critical to the legal profession. Clients' dominance of lawyers robs lawyers of their independence. This may effect who sets the standards of the profession. Indeed, lawyers may themselves lack the power or the will to set the standards for the profession. "In sum, the influence of client interests may threaten the profession's coherence and identity." John P. Heinz & Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1142 (1978). Additionally, "[i]f lawyers do not moderate the tendencies of clients to extract the maximum advantage from the legal system, we can expect legal outcomes to become increasingly skewed in favor of resourceful parties, thus undermining the legitimacy of legal institutions." R. Nelson, *supra* note 1, at 508.

6. Professor William E. Nelson agrees that "lawyers face a crisis in thought about ethical issues" but that most analyses of professional standards erroneously assume "a single, coherent set of ideas derived from the adversary system of adjudication." William E. Nelson, *Moral Ethics, Adversary Justice, and Political Theory: Three Foundations for the Law of Professional Responsibility*, 64 NOTRE DAME L. REV. 911, 911 (1989) [hereinafter W. Nelson]. In contrast, Nelson posits that ethical issues are complicated, implicating "at least three different and unrelated conceptional approaches." *Id.* at 912. These are moral ethics, adversary systemic values, and political values. *Id.* "[I]t is no wonder that confusion abounds when the complexity is not even appreciated." *Id.* Of course, "[t]he demands of practice itself and changing social, economic, political, and moral forces cause immense confusion." Lawry, *supra* note 4, at 313.

7. The preamble to the 1983 *Model Rules of Professional Conduct* explains these duties as follows:

> A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. . . . In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living.

MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1983) [hereinafter MODEL RULES].

8. This reflects the dominant view of the profession that duties owed clients eclipse those owed society or conscience. *See, e.g.*, Lawry, *supra* note 4, at 332 n.146 (characterizing the belief that "[a] lawyer's primary obligation, loyalty and responsibility must be to his client" as "the obsessive client-centered approach to the *Code* and to the vocation of lawyering."). *See also* authorities cited *supra* note 5. Of course, "complex economic, social, and ideological dynamics are responsible for lawyers sharing clients' interests, and it is a mischaracterization of the range of forces at work to attribute this mutual self-interest to the 'lawyers' feeble moral fiber or crass material preoccupation.' " Eberle, *Moral Responsibility, supra* note 5, at 7 (footnotes omitted). Nevertheless, the dominant view

The purpose of this article, therefore, is to clarify the central conceptions of the profession as a way of sharpening thinking about ethics.[9] Certainly the autonomy, community, and morality foundations are significant, generate a rich set of reasons to act, and have an important range of applications to legal ethics. While these foundations both relate to and differ from one another, much writing on legal ethics has emphasized their differences.[10] What is needed now, however, is a focus on their interrelationships. By connecting these foundations, more clarity and conceptual coherence may be brought to legal ethics. Lawyers can then look to a more coherent framework for reasoning and providing advice and ethical guidance to their clients. In this way, the current sense of confusion in lawyers' thinking about ethics can be ameliorated.

To accomplish these objectives, the article examines briefly, in Part I, the strengths and limitations of each foundation. While each foundation is

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runs counter to the central conceptions of the professional role, as traditionally expressed, *see, e.g.*, ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953) (defining profession as "a group of men pursuing a learned art as a common calling in the spirit of a public service") or as presently codified in the *Model Rules*. *See supra* note 7. *See also* Rhode, *supra* note 3, at 629 ("Much of what is problematic in legal practice springs not from venality but from factual or normative uncertainty, together with a tendency to resolve all possible doubts in a single, client-oriented direction. That tendency arises from a complex set of social and ideological as well as economic concerns.").

9. "To meet the highest demands of professional responsibility the lawyer must not only have a clear understanding of his duties, but must also possess the resolution necessary to carry into effect what his intellect tells him ought to be done." Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) [hereinafter *Joint Report*].

10. In the rich tradition of legal ethics that has arisen, most scholars have emphasized one of the three foundations over the others. Prominent proponents of an autonomy model of legal ethics include: Monroe Freedman, *see* FREEDMAN, *supra* note 3, at 50 ("Once the lawyer has chosen to accept responsibility to represent a client, however, the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause."); Charles Fried, *see* Fried, *supra* note 3, at 1066 ("[I]t is not only legally but also morally right that a lawyer adopts as his dominant purpose the furthering of his client's interests."); and Stephen Pepper. *See* Pepper, *Ethical Role, supra* note 3, at 618, 634 ("[T]he client's conscience should be superior to the lawyer's . . . the professional must subordinate his interest to the client's when there is a conflict.").

The most prominent communitarian in legal ethics is Thomas Shaffer. *See generally* THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS (1985) [hereinafter SHAFFER, AMERICAN LEGAL ETHICS] (offering images for people to aspire to or emulate) ; Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 965 n.8 (1987) [hereinafter Shaffer, *Radical Individualism*] (arguing that it is desirable to achieve an organic community, one "created by people through the mutual practice of the virtues, and through mutual support in the pursuit of the good.").

Those preferring moral concerns over the others include David Luban, *see* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 159 (1988) ("[R]ules [should] be redrafted to allow lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends."); William Simon, *see* Simon, *Discretion, supra* note 3, at 1083 ("Lawyers should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims.").

important, each captures only part of the professional lawyering role. Accordingly, lawyers should look at clients and their legal problems in a more complete way, considering all aspects of a problem, rather than relying exclusively on ideas drawn from any one foundation.

Part II highlights the connections among the foundations in order to imbue the profession with more conceptual coherence. In this way, a sound framework is established to apply to the demands of concrete cases.

Nevertheless, even application of this integrated approach to legal ethics will not necessarily generate solutions to all questions of professional responsibility. Ethical questions are complicated. Their solution calls for hard-headed, critical reasoning and prudential judgment, involving the best of our reasoning capabilities. That task requires talents no less demanding than any other legal questions,[11] as Part III illustrates in relation to two central questions of legal ethics — subornation of perjury in criminal cases and the resolution of problematic moral dilemmas where duties to client, community, and conscience seem unresolvable.

I. THE STRENGTHS AND LIMITATIONS OF EACH FOUNDATION

Legal ethics consists of at least three conceptual foundations, those of autonomy, community, and morality.[12] Each of these provides important reasons for attorneys to act. The autonomy foundation, described in Part II.A. is client-centered, emphasizing lawyers' fidelity to clients in helping them achieve their due in society.[13] By contrast, the community foundation, described in Part II.B. highlights the importance of lawyers' character and obligations to community, including the courts and system of law.[14] The morality foundation, described in Part II.C. emphasizes the pursuit of

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11. "[T]he task of deciding professional responsibility questions becomes as complex as that of deciding any other legal question, and it is no wonder that confusion abounds when the complexity is not even appreciated." W. Nelson, *supra* note 6, at 912.

12. There are other conceptual approaches to legal ethics. For example, Professor William Nelson views professional responsibility as implicating at least three different and unrelated conceptual approaches: moral ethics, adversary systemic values, and political values. W. Nelson, *supra* note 6, at 912.

Professor Freedman, on the other hand, "think[s] of lawyers' ethics as rooted in the Bill of Rights as expressed in our constitutionalized adversary system." Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 55-56 (1991) [hereinafter Freedman, *Ethical Ends*]. His view is "client-centered, emphasizing the lawyer's role in enhancing the client's autonomy as a free person in a free society." *Id.* at 56. While emphasizing client "autonomy" aspects of professional responsibility, Professor Freedman is also concerned about the lawyer's autonomy and the clients' and attorneys' own morality. *Id.* at 55 n.6. *See also* Edwin H. Greenbaum, *Attorneys' Problems in Making Ethical Decisions*, 52 IND. L.J. 627 (1977) (finding a client-oriented and public interest model running through legal ethics literature).

13. *See infra* notes 31-97 and accompanying text.

14. *See infra* notes 98-124 and accompanying text.

ethical ends by ethical means as a foundation for all conduct, including professional practice.[15]

In this way, each foundation captures a part of the professional lawyering role, reflecting key attributes of legal ethics. Autonomy speaks to lawyers' duties to clients; community addresses lawyers' duties to others and, collectively, to society; morality addresses lawyers duties to conscience. Each foundation thereby implicates somebody or something important beyond the lawyer — autonomy implicates concrete others, individual or corporate clients; community addresses the larger human society and its system of law; morality bespeaks an accountability to certain ethical ideals.

Nevertheless, while each foundation is useful and has an important range of applications, no one foundation alone is fully coherent, able to generate satisfactory answers to all questions of professional responsibility.[16] Ethical problems are complicated, often involving a matrix of ideas, principles, or interests. In this way, questions of professional responsibility reflect the demands, diversity, and dynamics of life, as do other legal questions.

Yet, for these reasons, it seems more fruitful to address professional responsibility by drawing upon all three foundations of legal ethics rather

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15. *See infra* notes 125-180 and accompanying text.

16. Each foundation poses complex theoretical and practical difficulties. The autonomy foundation, for example, raises complex questions as to its reach. At what point do other claims trump client interests? Given a lawyer's promise of confidentiality, for example, should the lawyer breach that promise and disclose a client's admission of past harm, ongoing harm, or intention to commit harm to appropriate persons outside the attorney-client relationship? These are serious questions which test the limits of reliance on autonomy as a foundation. They also raise important practical problems, such as, how to maintain confidentiality in the face of threatened harms, or alternatively, how to disclose in these circumstances without compromising one's client.

Likewise, the community foundation raises difficult issues. As a foundational theory, communitarianism must develop reliable institutions, concepts, and regimes to protect community without sacrificing individual rights and minority interests. Stephen L. Pepper, *Autonomy, Community, and Lawyers' Ethics*, 19 CAP. U. L. REV. 939, 944, 962-63 (1990) [hereinafter Pepper, *Autonomy*]. More practically, in the face of conflicts of competing values, should ultimate duties be owed to moral ideals, client interests, or community norms? For example, in representing a criminal defendant who has confessed his guilt, does one now disclose this out of a sense of duty to community, either to enforce compliance with the law society has established to punish those guilty of crimes or to protect societal members from future threats of harm posed by this defendant? Or does one remain silent and zealously represent the client in order to uphold the concept of due process of law, itself a foundational norm. Resolving these tensions between individuals and community calls for careful judgment.

Morality has limitations as a foundation for legal ethics as well. Not all professional questions raise moral issues. A dominant concept in our legal system, zealous representation, for example, is not usefully informed in any degree of specificity by fundamental ethical values that can solve satisfactorily concrete problems. Certainly moral concepts of loyalty and confidentiality underlie this duty. Nevertheless, these concepts do not address usefully what duties are owed to interests other than one's client. For example, what duties are owed to adverse parties, or to opposing counsel? Are there obligations to point out the weakness of their case, whether in arguments used, evidence put forth, or precedents relied upon or overlooked. These questions are more ones of professional etiquette than of ethics.

than relying exclusively on any one. Indeed, to the extent solutions are sought only through reliance on any single foundation, thinking tends to become distorted. The urge to fit solutions into preordained patterns of thought too easily results in cases being compromised to achieve symmetry with such patterns. While there is virtue in simplifying thinking, overreliance on such thinking can be too limiting, becoming its own straightjacket if not scrutinized.

Lawyers' propensity to maximize client interests, even to the detriment of relevant social or moral interests, is an example of such one-dimensional thinking.[17] For example, consider the conduct of lawyers at the Wall Street law firm of Sullivan & Cromwell in *Beiny v. Wynyard*.[18] Desiring privileged information in the hands of a nonparty, the liquidator of a defunct law firm that previously represented the trust then being disputed, the lawyers subpoenaed the liquidator for the information with notice of a deposition, but no notice was rendered to the other parties in the dispute. Upon request, the lawyers also assured the liquidator that the files requested would be made available to opposing counsel in the dispute, but this also was not done. Sullivan & Cromwell's cover letter requesting the documents also misrepresented that they represented the executor of the will when, in fact, the will had not yet been offered for probate.

Once the materials were turned over, Sullivan & Cromwell cancelled the deposition. With the deposition cancelled, the lawyers argued that it no longer was necessary to comply with notice requirements. They then used information obtained from the subpoenaed documents to surprise the opposing party, the trustee of the estate, at her deposition.[19]

The court concluded that the lawyers cleverly abused the system, "chart-[ing] a course which [they] knew to be at variance with acceptable discovery practice so as to obtain by stealth that which could not be readily obtained through proper channels."[20] "Not only were the rules flaunted, but Sullivan & Cromwell repeatedly lied in order to carry out its hardball strategy."[21] Worse, the lawyers "saw nothing wrong with anything they did; they showed no embarrassment over their wrongdoing; and they defended themselves to the bitter end."[22]

Beiny is representative of the "obsessive, client-centered approach" to lawyering that contributes to the current dissatisfaction with lawyers eth-

17. *See supra* notes 5 and 8 and accompanying text. Indeed, "particularly under competitive circumstances, the likelihood of ethical tunnel vision increases." Rhode, *supra* note 3, at 627.

18. 517 N.Y.S.2d 474 (N.Y. App. Div. 1987).

19. *Id.* at 476.

20. *Id.* at 478. The firm was ultimately disqualified from further representation in the matter. *Id.*

21. Lawry, *supra* note 4, at 324.

22. *Id.* at 326.

ics.[23] This approach is the product of distorted thinking, overemphasizing client autonomy interests to the detriment of relevant community or moral interests. It is a mistake to view legal ethics solely from the standpoint only of promoting the client's cause.

In place of such tunnel-vision, proper ethical thinking should fairly take into account the range of considerations implicated in cases. For example, in *Beiny*, lawyers' duties to uphold the integrity of the legal system require them to obey rules for rendering proper notice, including to adverse parties, in making discovery requests, as part of an orderly and fair process for discovering information.[24] Duties to conscience should have prevented the deliberate lies and misrepresentations. In this way, client autonomy interests could properly be promoted within relevant social and moral constraints.

In unpacking the conceptual confusion underlying the practice of law, it is crucial to recognize squarely the several foundations which apply to legal ethics. It is a mistake to view the discipline through the lens of only a single foundation, as the lawyers in *Beiny* saw only their client's autonomy interests. Instead, lawyers should derive reasons for acting from all three foundations. These reasons will not necessarily be mutually incompatible. In fact, they may reinforce one another, providing a more solid basis for conduct.

Certainly each foundation differs in significant ways from the others. In fact, clear tensions among them exist. Indeed, when reasons from autonomy or community conflict with those from morality, moral reasons should presumptively prevail, as demonstrated in Part III. In this way, the morality foundation is the top vertex of the triangle framing the concepts of legal ethics, with autonomy and community securing the two bases.

Nevertheless, having focused so much on the differences among these foundations,[25] it is now time to highlight their connections. There are several reasons for this focus. First, the strengths and limitations of each of the autonomy, community, and morality foundations have by now been so well developed, critiqued, and revised that the discipline has little to gain from continuing this cycle of critique.[26] Second, to the extent the dialogue on legal ethics consists of nothing other than argument and counter-argument, there is a danger that the discipline will spiral into undue skepticism, if not cynicism, about the efficacy of establishing a convincing ethical base to the profession. Third, to the extent confusion marks concep-

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23. *Id.* at 332.

24. The court notes that twenty days' notice was proper. Beiny v. Wynard, 517 N.Y.S.2d 474, 477 (N.Y. App. Div. 1987).

25. *See supra* note 10 and accompanying text.

26. Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 27 (1991) (describing limitations of current legal ethics scholarship and, hence, the need to move in a different direction).

tualization of the field, it is likely that lawyers' ethics will continue to disenchant. Fourth, since ethical decisionmaking is complicated, reflecting at least the three foundations of autonomy, community, and morality, it seems more fruitful to establish a more complete, ultimately more cohesive, framework for solving questions of professional responsibility. In this way, a stronger ethical base to the profession may be forged, one that more faithfully reflects its central tenets, but also meets its needs.

Better reflecting the key attributes of lawyering, such an integrated perspective more realistically captures the complexity of life and law and thereby better bridges the gap between theory and practice. This approach also provides legal ethics with more conceptual coherence and stability, anchoring practice, so that lawyers can reliably draw upon a set of central conceptions to solve concrete professional responsibility problems. In this way, a sound framework may be forged from which to apply careful attention to the demands of concrete cases.[27] Lawyers can then more confidently render advice and ethical guidance to their clients.

In reasoning through problems of professional responsibility and rendering advice and ethical guidance, therefore, lawyers should address clients and their problems in all of their dimensions — not just legal concerns, but also moral, psychological, human, economic, social, and prudential interests, as appropriate.[28] Interests relevant to clients involve duties to themselves in achieving their rights under the law, duties to community arising from their connections and sense of belonging to others, including lawyers and our system of law, and duties to conscience as given content by fundamental moral norms.

Lawyers should likewise bring their full human dimensions to bear in their relationship with clients. Relevant lawyer interests include duties to clients in helping empower and enable them to achieve their rights within the constraints of a complicated legal system; duties to community on account of lawyers' connections and sense of belonging to others, including clients, fellow members of the legal profession, and the broader community of law and society; and duties to conscience as given content by fundamental moral norms.

This more comprehensive relationship between two morally autonomous and fully connected people responsive to their obligations is more likely to address responsibly the full range of concerns implicated in concrete

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27. Pepper, *Ethical Role, supra* note 3, at 658 ("[I]t is essential that professionals have a coherent structure to apply to the ethical problems they confront if their choices are to be educated and thought through.").

28. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 668 (1986); Pepper, *Autonomy, supra* note 16, at 949, 957 (elaborating on the ideal paradigm of the attorney-client relationship).

cases.[29] The relationship sought here is a cooperative, interdependent one where both lawyer and client inform one another, as compared to patronization or domination of one by the other.[30] This fuller relationship might prove indispensable to achieving more sensible solutions to problems, thereby ameliorating the dissatisfaction with lawyers' ethics.

Part II next describes a fuller set of ideas constitutive of this more comprehensive dialogue between attorneys and their clients. These ideas are drawn from each of the three foundations of legal ethics. Again, the emphasis is on building a set of central ideas which form a sound framework to apply to the solution of professional responsibility questions. Part III illustrates how this framework may be applied, using the dynamic of sound, practical reasoning and prudential judgment. Such critical, imaginative reasoning might be our best hope at present for reaching a broad range of satisfactory solutions to legal ethical questions.

II. THE IDEAS CONSTITUTING A COMPREHENSIVE DIALOGUE

The purpose here is to set forth the central ideas constitutive of the lawyering role. These ideas are drawn from each of the three foundations of legal ethics, those of autonomy, community, and morality. The ideas described are not meant to be exclusive. Indeed, each foundation is richer than portrayed here. Rather, the emphasis is on identifying a set of central ideas that reflect the main tenets of the profession, illuminating the area within which lawyers ought to dwell. This Part first briefly describes the central ideas comprising each of the autonomy, community, and morality foundations of legal ethics. Each subsection then highlights the connections between one foundation and those of the other two. In this way, an overlapping conceptual consensus is achieved, revealing the central ethical core of the profession.

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29. The key to this more comprehensive relationship is the "moral dialogue" elaborated on by Professor Shaffer. *See, e.g.*, Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979) [hereinafter Shaffer, *Practice*] ("The beginning and end of a lawyer's professional life is talking with a client about what is to be done. My claim here is that this is a moral conversation." (footnote omitted)). Now, of course, the moral dialogue is a standard part of the literature. *See* FREEDMAN, *supra* note 3, at 57; Lawry, *supra* note 4, at 353; Pepper, *Ethical Role, supra* note 3, at 630-32.

30. Shaffer, *Practice*, *supra* note 29, at 234-37, 246, 248-50, 252-53 Although lawyer and client are autonomous moral agents, their relationship is a mutually dependent one. Lawyers should not patronize clients, make decisions for them, defer to them absolutely, or isolate themselves from them. Instead, Professor Shaffer advocates a collaborative model of a continuing moral dialogue between them. *Id. See also* Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 319-20 (1987) [hereinafter Shaffer, *Good Client*] (drawing upon Martin Buber, the relationship sought is an "I-Thou" one where each can inform the other morally and emotionally, as opposed to an "I-It" relationship, where the lawyer counsels but refuses to be counseled). *See* Lee A. Pizzimenti, *The Lawyer's Duty To Warn Clients About Limits On Confidentiality*, 39 CATH. U. L. REV. 441, 475-76 & nn.150 & 152 (1990).

A. THE AUTONOMY FOUNDATION

1. Description

The autonomy foundation of legal ethics is the standard conception of contemporary law practice, viewing the lawyer as a facilitator of her client's interests and rights within the legal system.[31] Pursuant to this conception, lawyers' primary loyalties are to clients in helping them achieve their due in society.[32] By applying their specialized legal knowledge and skill to their clients' problems, lawyers[33] help clients achieve personal freedom, liberty, and dignity — in short, their "autonomy." In this sense, autonomy is a base idea or set of ideas constitutive of legal ethics.[34]

In this traditional view of the profession, lawyers have special reasons to act on behalf of their clients; they owe special loyalty obligations to clients.[35] These ideas support a presumption in favor of attorney loyalty to clients, a presumption rebuttable only in the face of more compelling claims.[36] In this sense loyalty means fidelity to particular people — individual clients — as compared to loyalty to community or certain moral ideals or values.

As professionals, lawyers should, of course, be trustworthy, honest, competent, diligent, fair, loyal, and discreet.[37] But lawyers should also be thoughtful and prudent about themselves, their craft, their obligations, and their clients.[38] Professional responsibility standards capture these ideas most centrally in the provisions covering duties of competence,[39] confidenti-

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31. The present author described an "autonomy" model of legal ethics in earlier articles. *See* Anthony D'Amato & Edward J. Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U. L.J. 761, 764-70 (1983); Eberle, *Moral Responsibility, supra* note 5, at 2-3. The "autonomy" model described in these earlier articles has certain parallels to the autonomy foundation described herein, but also differs in significant ways. Summarily stated, the autonomy foundation propounded here provides a much richer description of the concept of autonomy.

32. Professor Freedman speaks of a client-centered ethic of trust and confidence. FREEDMAN, *supra* note 3, at 87.

33. Professor Hazard speaks of this professional role as a lawyer's "specific station in life, a particular vocation." Geoffrey C. Hazard, Jr., *My Station as a Lawyer*, 6 GA. ST. U. L. REV. 1, 7 (1989).

34. Pepper, *Autonomy, supra* note 16, at 944. Professor Pepper has elaborated on the autonomy foundation of legal ethics in his articles. See Pepper, *Autonomy, supra* note 16; Pepper, *Ethical Role, supra* note 3.

35. M. BAYLES, PROFESSIONAL ETHICS 77-99 (2d ed. 1989). *See also* Pepper, *Ethical Role, supra* note 3, at 615 ("The very idea of a profession connotes the function of service, the notion that to some degree the professional is to subordinate his interests to the interests of those in need of his services.").

36. Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 397 (1992) (elaborating on concept of loyalty in lawyering).

37. MODEL RULES pmbl.; BAYLES, *supra* note 35.

38. Carrie Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 5 (1991) ("For me, the good lawyer is loyal and faithful to her client but also thinks about how the tools of her craft are being put to use; it matters what interests and whom she serves.")

39. MODEL RULES Rule 1.1.

ality,[40] diligence,[41] zealousness of representation in pursuit of client objectives,[42] and loyalty to clients.[43]

At the root of this conception of autonomy is belief in the inherent dignity of human beings.[44] Autonomy empowers people to make choices concerning their lives without coercion, manipulation, or oppression, all contrary to the ideal of autonomy.[45] In this way autonomy promotes personal freedom, self-determination, and self-realization of one's talents, abilities, and overall destiny in life.[46] Such self-realization, in turn, facilitates achievement of rationality, prudence, commitment, and responsibility, all desirable virtues.

Because our society is complicated and legalistic, resort to the law is often necessary to make meaningful choices about life. Since the law itself is complex, laypersons cannot effectively exercise the autonomy they possess without the assistance of lawyers.[47] By applying their professional knowledge and skill to the needs of their clients, lawyers provide this access to the law, facilitating client choice. Ideally, attorneys should explain and explore the options available to laypersons with respect to their problems so that clients can meaningfully participate in their affairs and make informed choices about them.[48] In this way, lawyers empower others to discover and pursue their autonomy.[49]

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40. MODEL RULES Rule 1.6.

41. MODEL RULES Rule 1.3.

42. *Compare* MODEL RULES Rule 3.1 *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) [hereinafter MODEL CODE] (stating that a lawyer should represent a client zealously within the bounds of the law).

43. MODEL RULES Rules 1.7 to 1.11 (concerning conflicts of interest).

44. Professor Freedman argues convincingly for recognition of the inherent dignity of each person. FREEDMAN, *supra* note 3. "One of the essential values of a just society is respect for the dignity of each member of that society. Essential to each individual's dignity is the free exercise of his autonomy." *Id.* at 57. "I find deep moral significance in the dignity of the individual and in the way that dignity is respected in the American constitutional adversary system." *Id.* at 121. "The central concern of a system of professional ethics, therefore, should be to strengthen the role of the lawyer in enhancing individual human dignity within the adversary system of justice." *Id.* at 42.

45. Pepper, *Autonomy, supra* note 16, at 944-46. "The opposite of autonomy is unchosen or unaccepted restraint: domination and oppression by others." *Id.* at 945. This is very much a Kantian notion — a desire to be a free, autonomous being, to be treated as an end, not just a means. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (L.W. Beck trans., 2d ed. 1959) ("Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."). *See also* supra note 154 and accompanying text.

46. *See* Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 420-21, 447-49 (1992) [hereinafter Eberle, *Practical Reason*] (describing value of self-realization in First Amendment theory).

47. FREEDMAN, *supra* note 3, at 47 ("[S]ocial institutions [and the law] are so complex that without the assistance of an expert adviser, an ordinary lay person cannot exercise the personal autonomy to which he or she is morally and legally entitled within the system."). *See also* Fried, *supra* note 3, at 1073.

48. FREEDMAN, *supra* note 3, at 48 (citing Sylvia A. Law, *Afterward: The Purpose of Professional Education, in* LOOKING AT LAW SCHOOL, 205, 212-13 (Gillers ed., 1977)).

49. Pepper, *Autonomy, supra* note 16, at 940.

The quality of autonomy has a yet more concrete meaning within the American constitutional system. Rooted in the fundamental freedoms embodied in our Bill of Rights, a person may exercise choice with respect to a catalogue of constitutional rights that include freedom of expression, conscience, and exercise of religion, equality, and due process of law, including a sphere of personal privacy.[50] These freedoms aid, enforce, and enlarge the content of autonomy that may be achieved, individually and collectively.

Because equality is central to our regime of constitutional rights, all persons should have access to a full entitlement of rights or other legal entitlements in order to pursue their ends. Each person should be free to construct and follow his or her own vision.[51] Less than complete access to the fullness of the law is a form of second class citizenship, intolerable in a society that values equality.[52]

Autonomy possesses a deeper and richer meaning than individual self-realization. Individual rights and claims are also fundamental relational concepts for personal expression.[53] There are a rich spectrum of ways in which such entitlements may be exercised. For example, one can exercise these rights or claims selfishly, selflessly, beneficently, belligerently, defensively, offensively, carefully, or carelessly. How one expresses his or her rights says a great deal about the person's character and personality. Such expression, in turn, affects others. There is skill, even art, to the proper exercise of rights.[54]

One can also choose to withhold exercise of one's rights or claims, or

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50. U.S. CONST. amends. I, V, XIV. Professor Freedman is a forceful advocate of a system of legal ethics rooted in the Bill of Rights. FREEDMAN, *supra* note 3, at 7 ("[T]he central concern of lawyers' ethics is . . . how far I should be required to go — to achieve for my client full and equal rights under [the] law . . . . I think of lawyers' ethics as being rooted in the Bill of Rights as expressed in the American adversary system.").

51. *See generally* Eberle, *Practical Reason, supra* note 46, at 420-21, 430, 447-49, 457-59, 486-88 (discussing the values of equality and self-realization in the theory of free speech).

52. Pepper *Ethical Role, supra* note 3, at 618 ("It is apparent that a final significant value supporting the first-class citizenship model is that of equality. If law is a public good, access to which increases autonomy, then equality of access is important."). *See also* LON L. FULLER, THE MORALITY OF THE LAW 49-51 (1964) (declaring that the essential element of law's inner morality is that the content of the law be readily available to those who are governed by it); Fuller & Randall, *supra* note 9, at 1216 (stating that "one of the highest goals of society must be to achieve and maintain equality before the law").

53. JOEL FEINBERG, SOCIAL PHILOSOPHY 67 (1972) [hereinafter FEINBERG, SOCIAL] (arguing that person is a rightholder "when he has a claim, the recognition of which is called for — not (necessarily) by legal rules — but by moral principles, or the principles of an enlightened conscience."); Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 2 PHIL. & PUB. AFF. 7 (1978) [hereinafter Feinberg, *Voluntary Euthanasia*] (contending that rights can be waived, transferred, overridden, vindicated, violated, forfeited, or sold, among other functions). *See generally* John Tomasi, *Individual Rights and Community Virtues*, 101 ETHICS 521, 524-25, 527 (1991).

54. Tomasi, *supra* note 53, at 527.

relinquish, transfer, or abandon them.[55] Entitlements can have important value when withheld. They can also be held selfishly, selflessly, beneficently, belligerently, defensively, offensively, carefully, or carelessly. Voluntarily withholding rights or claims can exhibit special moral worth, expressing with great force the meaning of the entitlement, and the content of personal character.[56]

For example, consider the conduct of some small town trial lawyers evidenced in a study. These lawyers "were unwilling to use sharp tactics to gain an advantage over a lawyer they knew and regularly dealt with. As one said, 'you don't file a five-day motion on Charley Jones when he's on a two-week vacation, or try to take advantage of him. If he's forgot to file an answer, you don't ask the judge for default, you call him . . . [F]airness is more important than winning.' "[57] Or consider forgiving a debt or rescheduling its repayment so as not to push someone involuntarily into bankruptcy. Or consider not asserting technical defenses to defeat just claims.

Beyond self-realization and expression, constitutional rights form a vital part of the liberal political strategy in helping guarantee the necessary sphere of autonomy for people to live their lives free from the coercive power of government or other majoritarian groups in society. In theory, a regime of civil rights does not impose any particular conception of the good. Rather, rights limit the role of government and dominant social groups from determining visions of the good that all might otherwise be coerced to follow. By limiting official power, rights allow people to pursue freely their individual and collective conceptions of the good.[58] This guarantees a certain minimal level of opportunity for all people to realize their talents, aspirations, and goals in life. Minority persons, groups, viewpoints, and beliefs are thereby especially safeguarded from oppression. Rights thus

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55. Joel Feinberg explains:

> [w]hen a person has a discretionary right and fully understands the power that possession gives him, he can if he chooses make sacrifices for the sake of others, voluntarily give up what is rightfully his own, freely make gifts that he is in no way obligated to make, and forgive others their wrongs to him by declining to demand the compensation or vengeance he may have coming . . . . Imagine what life would be like without these saving graces.

JOEL FEINBERG, RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY 156 (1978) [hereinafter FEINBERG, RIGHTS].

56. Tomasi, *supra* note 53, at 525. Rights or claims can thereby give expression to "saving graces," like "fraternity, benevolence, generosity and forgiveness." *Id.*

57. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1547 (citing Donald Landon, Clients, Colleagues & Community: The Shaping of Zealous Advocacy in Country Law Practice (n.d.) (unpublished manuscript), which has since been published as Donald Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 AM. B. FOUND. RES. J. 81, 107.).

58. Allen E. Buchanon, *Assessing the Communitarian Critique of Liberalism*, 99 ETHICS 852, 854, 858 (1989). Buchanon states that "the liberal political thesis rests on the plausible assumption that we cannot afford to rely on . . . luck . . . to achieve . . . a stable set of humane values." *Id.* at 872.

help preserve the dignity of all persons and, in this way, the overall integrity of society.[59]

Rights also speak to the dynamics of human personality and community. They provide a mechanism for the testing out of varied opinions, ideas, and conduct. Alternative and varied conceptions of the good may thus be put to the hard test of experience. In this way, rights help preserve the balance between stability and change in individuals and society, giving vent to dissent, difference, and creativity.[60] Rights thereby help modulate society, allowing for the open possibilities of change and human progress.[61]

This country's private legal system (contracts, corporations, wills, trusts, property, etc.) also enables people to pursue meaningfully their autonomy.[62] Of course, regulatory law has grown immensely, circumscribing individual choice. Still, private law leaves a great deal of room for individual choice to structure personal affairs. This also helps diffuse power throughout society.[63]

It is access to this world that lawyers provide when they facilitate others' autonomy. Lawyers both aid others' realization of autonomy and help protect others against encroachments of their freedom.

2. Connection to Community

As individuals, human beings are both separate from and related to others. Community helps form one's character, but each person also needs to make choices about community. While it is desirable to be connected to others, it is also desirable to be separate. One may choose to form relations with others, as well as to seek tranquility or solitude. One may seek to do both. Much of life involves working out this tension between individuality and community, and this tension must be worked out in legal ethics as well.[64]

One way to lessen this tension is by connecting autonomy and community through the concept of well-being, a concern for the good of self and of

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59. Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 35 (Harold J. Berman ed., rev. ed. 1973).

60. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) (describing the safety value function of free speech in "achieving a more adaptable and hence a more stable community . . . maintaining the precarious balance between healthy cleavage and necessary consensus").

61. JOHN STUART MILL, ON LIBERTY 14 (1958) (1st ed. 1859); Eberle, *Practical Reason*, *supra* note 46, at 419.

62. Pepper, *Ethical Role*, *supra* note 3, at 617.

63. Pepper, *Autonomy*, *supra* note 16, at 943 n.12.

64. *Id.* at 940-42. Pepper highlights the communitarian view, which "emphasizes the socially embedded and connected nature of human life, the fact that we are necessarily and basically connected to others: first to families; later to larger intermediate groups; ultimately, and pervasively, a large part of our 'selves' determined by and part of the culture and society in which we are raised." *Id.* at 940.

others. Certainly a necessary component of well-being is autonomy. A degree of control over life is essential to well-being.[65]

But another vital aspect of well-being is relations to others, including sharing activities or interests. Autonomy allows one to form these relations with others.[66] Indeed, "connection and community are part of what we all want, they are part both of what we *are* and of what we *choose*, and the combination" constitutes part of our autonomy.[67] In this sense, autonomy and community complement one another.

Crucial to accomplishing this is how rights or claims are exercised. Rights or claims may be exercised in ways that form relations with others, contribute to others' realization of control over their lives, or do justice, individually and collectively. Again, attorneys should consider desisting from sharp legal tactics to gain an advantage or rescheduling payment of debts.[68] Or consider efforts to obtain equal opportunities for all citizens in education[69] or other important aspects of life.[70] Rights can thereby form the basis for genuine, noncoerced human connection, discourse, and community.

Exercise of rights can also protect and sustain community. When people exercise constitutional rights they check government, mediating between government on the one hand, and communities or individuals on the other. Rights thereby act as a bulwark for the preservation of spheres of liberty in which people can group together for common purposes. This helps diffuse power throughout society, elaborating a more intricate system of checks and balances than formal structural division of governmental power, thereby allowing people and communities to realize their potentials and aspirations free from official coercion. Genuine, freely chosen communities can thus be formed. These communities are intermediate between the state and citizens. It seems too difficult and risky to form large-scale, all-encompassing communities.[71]

In such intermediate communities, noncoerced expression, choice, and

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65. David Luban, *The Lysistratian Prerogative: A Response To Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 642-43.

66. Buchanon, *supra* note 58, at 878, 878-80 (discussing how theories of Dworkin, Feinberg, and Rawls can be interpreted to "include not only the value of individual autonomy but also that of individual well-being").

67. Pepper, *Autonomy, supra* note 16, at 945.

68. *See supra* note 57 and accompanying text.

69. Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (holding that the "separate but equal" doctrine has no place in public education).

70. Reynolds v. Sims, 377 U.S. 533, 567-568 (1964) (holding that the Equal Protection Clause requires seats in state legislatures to be apportioned on a population basis so that one person has one vote).

71. In the modern era, communities have been the source of society's greatest nightmares as well as dreams. Attempts at forming all-inclusive political communities have resulted in totalitarianism as in Nazi Germany and the Soviet Union. Thus, it seems preferable "to lower our sights" and focus on creating and sustaining intermediate communities instead. Buchanon, *supra* note 58, at 860.

conduct can be exercised in the more intimate context of families, friends, neighborhoods, churches, synagogues, universities, organizations, associations, or jobs, among other settings.[72] People should "naturally form and join the social relations and forums in which they come to understand and pursue the good."[73] This is especially important in our pluralistic society, where no single, overarching vision of community reigns.

Exercise of constitutional rights especially protects communities of thought, religion, belief, or association from coercive governmental power. For example, consider exercise of First Amendment free exercise of religion rights. In *Wisconsin v. Yoder,*[74] Amish were able to realize their goal of living in a "church community separate and apart from the world" by exercising these rights.[75] They successfully challenged a state compulsory high school education requirement by demonstrating that this requirement "[carried] with it a very real threat of undermining the Amish community and religious practice as they exist today."[76] Compulsory high school education required the Amish "to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[77]

Or consider exercise of First Amendment freedom of expression and association rights. In *NAACP v. Button,*[78] the NAACP successfully challenged a Virginia law directed at the NAACP's litigation strategy in achieving desegregation. The Supreme Court held that, as applied to the NAACP's activities, the law violated the First Amendment.

> [T]here is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right 'to engage in association for the advancement of beliefs and ideas.' . . . [W]hile serving to vindicate the legal rights of members of

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72. *See id.* at 856-57. Buchanon notes that:

> Communitarians emphasize that a genuine community is not a mere association of individuals. Members of a community have common ends, not merely congruent private interests, and these are conceived of and valued as common ends by the members. If I am a member of a community I share goals and values with other members. . . . [T]he distinction between 'mine' and 'theirs' breaks down or at least recedes into the background.
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> In contrast, in a mere association, individuals conceive of their interests as independent and potentially opposed. Their relationships with one another are viewed not as in themselves constituting the good of their endeavors but as the means toward private goods independently identified. The close-knit, harmonious family is usually taken as a paradigm of community, while a contractual relationship between economic agents in the market serves as an archetype for mere associations.

Id.

73. Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 904 (1989).
74. 406 U.S. 205 (1972).
75. *Id.* at 210.
76. *Id.* at 218.
77. *Id.*
78. 371 U.S. 415 (1963).

> the American Negro community, [the NAACP] at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.[79]

In these ways, exercise of autonomy can enhance community and community autonomy. Reasons or ideas drawn from each need not be incompatible. In fact, they can be mutually supportive. This interrelationship can form the basis for a richer concept of self-realization, communication, and connection.

Nevertheless, while individuals are connected, they are also separate from one another. There is tension between individuals and community as well as connectedness. It is important to recognize the fault lines running between autonomy and community.

For example, overemphasis on autonomy can lead to disconnection and isolation. Individuals' pursuit of wholly self-interested ends without regard to consequences is egoistic. Radical individualism of this sort can undermine the possibilities for forming commitments or connections to others, thereby undermining community.[80] In legal ethics, radical individualism manifests as hyperpartisanship and overzealousness, a zeal beyond what the concept of loyalty to client requires. When unbounded by respect for the law or morality, such conduct undermines the law.[81]

For example, consider again the lawyers' overzealousness in *Beiny*. Promoting the client's case should not call for bending discovery rules or misrepresenting crucial facts.[82] Or consider

> [v]arious harassment techniques [like] . . . calling the opposing counsel on the telephone in the middle of the night, letting the air out of his automobile tire, or sending him a phony client to waste his time . . . [o]r tak[ing] an unwarrantably restrictive view of the other side's discovery requests — which apparently has already become "good adversary practice" among practitioners, showing how the word "good" can be perverted.[83]

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79. *Id.* at 430-31.

80. Of course, egoistic conduct of this sort is not moral, *see* D'Amato and Eberle, *supra* note 31, at 798, nor is it beneficial to society. *See generally* Shaffer, *Radical Individualism*, *supra* note 10.

81. Postema, *Self-Image, Integrity, and Professional Responsibility*, *in* THE GOOD LAWYER 286, 311 n.9 (David Luban ed., 1983) (arguing that "the principle of partisanship requires the lawyer zealously and with exclusive loyalty to pursue the client's objectives . . . ."); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978) (describing the principle of nonaccountability: "when acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved"); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 572, 574 (1991) ("Since partisan advocacy is unconstrained by moral considerations, it results in adversarial excesses that themselves serve to undermine the legitimacy of the law.").

82. *See supra* notes 18-24 and accompanying text.

83. D'Amato and Eberle, *supra* note 31, at 768.

Or consider making "truthful opposing witnesses look like liars or fools," defeating "just claims on technicalities if it can be done," failing to disclose adverse applicable precedent, or other tactics of delay, obfuscation, or abuse.[84]

Still, it is not inevitable that such radically individual conduct occur or persist or that autonomy and community ideas clash with one another in this way. Rather, these ideas can complement one another too. Consider exercise of free speech rights, where expression of personal views also serves society's interest in the free dissemination of ideas. For example, one can consider how exercise of commercial speech rights disseminates important matters of public interest: "[a] manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals . . . [or] a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs."[85]

Lawyers play a vital role in linking these concepts of autonomy and community, in building and sustaining our society.[86] While lawyers empower and enable others, they also connect others to community by communicating the constraints of the law and society. These constraints reflect underlying moral and social ideas which, in turn, form the backdrop against which choice is exercised. Thus, autonomy is not without limit; rather, it is constrained by moral and social norms.

Accordingly, one must develop a capacity to exercise rights and claims properly, within this context. There is a need to achieve "the right balance between support for the group and protection for the individual,"[87] a balance each individual must work out as part of the fabric of life.

3. Connection to Morality

Autonomy also has important connections to morality. Since autonomy empowers one to act, one can choose to act in ways or in favor of ends that are either good or bad in a moral sense. Thus, while it is good for people to act autonomously, not all autonomous acts are morally good — whether they are or not depends on their moral quality. To determine this question

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84. David Luban, *Introduction* to THE GOOD LAWYER 1-2 (David Luban ed., 1983). A lawyer is, of course, obligated to disclose controlling legal authority directly adverse to the client if not disclosed by opposing counsel. MODEL RULES Rule 3.3(a)(3).

85. Virginia State Bd. of Pharmacy v. Virginia, 421 U.S. 748, 764 (1976).

86. MODEL CODE pmbl. ("Lawyers, as guardians of the law, play a vital role in the preservation of society."); *accord* MODEL RULES pmbl. ("Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.").

87. Pepper, *Autonomy, supra* note 16, at 963.

one must evaluate conduct, both with respect to ends pursued and the means by which they are advanced.

In legal ethics, autonomy and morality are linked over a wide range of choices. Most choices that attorneys make possess a moral dimension. For example, the decision whether to represent a particular client is a choice that possesses moral quality,[88] as is the choice of the means to carry out the client's ends.[89] Likewise, the decision to decline or terminate the rendering of services is also a choice that has a certain moral quality. In these ways, lawyers are morally accountable for their conduct.

Beyond this convergence, the autonomy and morality foundations can unravel, revealing a gulf in belief between proponents of these two views of legal ethics. Past the initial decision of engagement, for example, autonomists would defer to the client or the system of justice on most questions of legal ethics, on the assumption that these bodies bear ultimate responsibility for the representation. In an automonist's view, lawyers are justified in advancing clients' cases within the constraints of the legal system without further assumption of moral responsibility for their conduct.[90]

Legal moralists, on the other hand, do not countenance relinquishment of responsibility to clients or the system of law. Instead, they argue that lawyers should assume fundamental moral responsibility for their actions throughout the course of representation, both with respect to ends advanced and the means by which they are achieved.[91] In this view, lawyers are responsible for the advice they give, and the tactics, arguments, and strategies they employ to achieve client ends.[92] Autonomy entitles one to exercise, and assume, such moral responsibility.

In assuming such responsibility, morally conscious lawyers need to be careful that they not substitute their views for those of their clients, make decisions for them, or otherwise act paternalistically.[93] Lawyers and clients are independent moral agents, each responsible for their own conduct. Therefore, lawyers must respect the dignity and autonomy of clients,

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88. *See* FREEDMAN, *supra* note 3, at 49.

89. Stier, *supra* note 81, at 565 ("Lawyers are morally responsible for . . . their decision whether or not to represent particular clients . . . [and] for the kinds of arguments and tactics they decide to use on behalf of a client . . . .").

90. Kathleen S. Bean, *A Proposal for the Moral Practice of Law*, 12 J. LEGAL PROF. 49, 54 (1987); Eberle, *Moral Responsibility, supra* note 5, at 3-4, 37-39; Shaffer, *Good Client, supra* note 30, at 327 ("The *meaning* of the legal ethics of autonomy is that lawyers should not be moral influences on their clients."). On the other hand, Monroe Freedman advocates moral counsel, but once the client makes a decision, the lawyer should promote client desires. *Id.* at 327-28 (citing Monroe Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978)).

91. Eberle, *Moral Responsibility, supra* note 5, at 4, 39.

92. Stier, *supra* note 81, at 565.

93. Eberle, *Moral Responsibility, supra* note 5, at 4, 5. Lawyers should not "superimpose their moral standards on clients . . . . [However,] there is an appropriate place for moral concerns in practice, and lawyers should not be shy about raising them when relevant." *Id.*

including clients' right to make decisions affecting their interests. While it is desirable to offer, even assert, conscience when required, it is improper for lawyers to impose it.[94] Ultimately, clients are responsible for their use of lawyers' advice.[95]

Likewise, clients need to respect the dignity and autonomy of their lawyers, including morally responsible lawyers' pursuit of ethical ends and means in their conduct. It is essential that lawyers and clients respect the boundaries of their respective moral autonomy and accompanying zone of decision-making.[96] To the extent client objectives conflict with such attorney moral autonomy, and such conflict is unresolvable upon consideration and consultation, lawyers and clients may need to part ways. Boundaries have concrete limits. Of course, any such parting must be carried out in a professionally responsible fashion.[97]

B. THE COMMUNITY FOUNDATION

1. Description

A second foundation of legal ethics is community. The community foundation consists of a lawyer's character, obligations to the legal system as officer of the court, and, more broadly, guardian of the law, and obligations

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94. Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDUC. 29, 40 (1991) ("[T]o accept moral responsibility is not necessarily to impose it.").

95. Stier, *supra* note 81, at 565.

96. Professor Stier identifies a "boundaries principle" that "affirms the moral autonomy of both the client and the attorney, . . . requir[ing] lawyers to respect the boundary between themselves as independent moral agents and their clients as independent moral agents." *Id.* at 564. The boundaries further entail lawyers' moral responsibility for their own acts, including clients chosen, advice given, and tactics used on behalf of clients. On the other hand, clients are morally responsible for their acts, including the "goals those arguments and tactics seek to further." *Id.* at 565. But clients are not morally responsible to their lawyers; rather, only to themselves. *Model Rule* 1.2 outlines the scope of representation as a boundary between objectives of representation, where "a lawyer shall abide by a client's decisions," and means by which the objectives are pursued, of which the lawyer "shall consult with the client." MODEL RULES Rule 1.2. Nevertheless, "[b]oth lawyer and client have authority and responsibility in the objectives and means of representation." *Id.* at cmt. [1]. Professor Maute has amplified the objectives/means model of decision-making set forth in the *Model Rules*. *See generally* Judith L. Maute, *Allocation of Decisionmaking Authority under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984). While decisionmaking is shared, each has presumptive spheres of authority. *Id.* at 1066-67. "The client has ultimate authority over objectives, . . . [including] the client's overall purpose or desired result, other matters affecting the client's legal rights, obligations, or financial interests, and subjective concerns, including business, political, moral, or personal values." *Id.* at 1063. The lawyer has presumptive authority over legal, tactical, and technical issues, and may override client choice when the law requires other results. *Id.* at 1064-66. Borderline questions should be resolved through consensus and cooperation. *Id.* at 1061-62.

97. The author of this article has previously described scenarios involving such conflicts, resulting in lawyer disclosure and withdrawal in a professionally responsible manner. Eberle, *Moral Responsibility, supra* note 5, at 25-28, 32-36.

to society at large, as public servant. In this way, a lawyer is guided by a professional ideal consisting of fidelity to the virtue of good character and to the concept of a just system of law,[98] as compared to the loyalty to clients characteristic of the autonomy foundation.

These community ideas are the concepts through which a lawyer personally influences and affects people, making, molding, and shaping the community of law. The community of law, in turn, helps constitute a just, well-ordered society. In these ways, community is a base idea or set of ideas constituting legal ethics.

Character is crucial to legal ethics and the ethical practice of law. Certain "excellences of character . . . are demanded by and displayed in law practice,"[99] like candor, honesty, discreetness, sound judgment, and courage. In this sense, character is the foundation on which an individual's practice of law is built.

The quality of character is most apparent in the approach one brings to interpretation and application of the law, especially professional responsibility standards. How one interprets the law speaks to the type of person one is. In this way, character is indispensable to professional responsibility. One can approach the law as either a good or bad reader.[100]

A good reader tries to read the law fairly and honestly and then apply it in a faithful manner. Good readers are persons of good character who possess integrity and soundness of moral principle. They have the capacity to apply moral principles to concrete situations and engage in moral reasoning, picking out the right reason to act and so acting. Lawyers should strive to act

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98. McChrystal, *supra* note 36, at 387.

99. Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 861 (1987). *See also* MODEL RULES Rule 8.1, 8.4; MODEL CODE EC 1-3, DR 1-101 to DR 1-103.

100. Professor Stier states:

> [the] integrity thesis reads the [professional responsibility] standards as they are addressed to those seeking ethical guidance — persons of good character. . . . The law of lawyering is designed to be read, first, by lawyers with good character who are disposed to be good lawyers. Such persons meet the good reader requirement by seeking to read a text honestly and implement it fairly. For good readers, the integrity thesis proposes a way of understanding the standards agreeably with their characters. In contrast, persons of bad character will not be induced to act as persons of virtue simply by providing them with a set of rules.

Stier, *supra* note 81, at 587-88 (footnotes omitted). Professor Stier's argument builds on the jurisprudence of legal positivism, which emphasizes the separation of law from morality. According to this philosophy, the law is best understood as a set of statements of what the law is, not what the law ought to be. Nevertheless, while there is no *necessary* connection between law and morals, it does not follow that there is *no* connection. Professor Stier accepts the separation of law from morality in professional responsibility law but argues there is ample room for the exercise of ethical discretion. Of course, much depends on whether one approaches the law as a good or bad reader. *Id.* at 580-91.

in all their professional dealings in this way, as a person of good character would act.[101]

By contrast, a bad reader is like Holmes' bad man.[102] Such a reader is inclined not to read the law in a virtuous way. Rather, the bad reader sees the law as a set of commands which must be obeyed out of fear of sanction. While the bad reader responds to law in its mandatory character and therefore complies with it in minimal ways, the good reader strives to realize law's aspirations.

Character is also important as a basis for forming relations or connections to others. Truthfulness, honesty, loyalty, courage, tolerance, and fairness are virtues others properly desire to emulate, learning by example how to act.[103] How one acts has consequences for others.[104] Lawyering involves this sense of responsibility to others. It influences the respect others have for one another and the law, among other effects.[105] Each person should thus

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101. Professor Shaffer has been instrumental in building a legal ethics around character and then relating character to community. *See* Thomas L. Shaffer, *The Legal Ethics of Belonging*, 49 OHIO ST. L.J. 703 (1988) [hereinafter Shaffer, *Belonging*]; Shaffer, *Radical Individualism*, *supra* note 10, at 964 n.4, 978 (applying Aristotelian ethic to acquire the "moral art of seeing"); Thomas L. Shaffer, *Legal Ethics After Babel*, 19 CAP. U. L. REV. 989, 997 (1990). [("Virtue and good character are goals in themselves.") [hereinafter Shaffer, *Babel*]. *See also* Lawry, *supra* note 4, at 337 ("[L]awyers should try to act in all of their professional dealings as a good person should act.").

102. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897):

> You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

Id.

103. SHAFFER, AMERICAN LEGAL ETHICS, *supra* note 10 (stories of characters and virtues worth emulating); Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as A Moral Argument*, 26 GONZ. L. REV. 393, 396 (1991) [hereinafter Shaffer, *Moral Argument*]. Shaffer explains:

> [*v*]*irtue words,* as distinguished from *principle words*, speak about moral qualities. Aristotle and his teachers and his students taught morals by describing the virtues they noticed in admirable people . . . .
>
> The virtues are good habits. . . . This way of looking at our moral lives is focused on being good, rather than being right . . . . Virtue words focus on persons more than on actions; on good habits rather than quandaries and choices.

Id. (footnote omitted); Thomas L. Shaffer & Mary M. Shaffer, *Character & Community: Rispetto As a Virtue in the Tradition of Italian-American Lawyers*, 64 NOTRE DAME L. REV. 838 (1989); Michael I. Swygert, *Striving to Make Great Lawyers — Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching*, 30 B.C. L. REV. 803 (1989).

104. Morgan, *Professionalism*, *supra* note 4, at 462.

105. *See* Morgan, *Evolving*, *supra* note 3, at 705 ("The impact of a legal dispute is rarely confined to the situation of the parties involved. Whether justice is secured in a particular case affects not only the treatment of the individuals but also the laws which govern the conduct of others and the respect which they will accord to the law.").

be thoughtful about these choices. In this way, character is an indispensable foundation for community.

A lawyer's role as officer of the court and, more broadly, guardian of the law, entails additional duties to the system of law and society at large, helping further shape the community of law.[106] In their seminal 1958 Report of the Joint Conference, Lon Fuller and John Randall stated that "the lawyer's highest loyalty . . . runs, not to persons, but to [the law's] procedures and institutions." The lawyer's role within the legal system therefore "imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."[107] These are positive obligations which may limit what a lawyer may achieve for his or her clients. In this way, duties to clients are mediated by interests of justice or the law, another example of autonomy being constrained by moral and social norms.

These aspects of legal ethics are captured most centrally in the standards of professional responsibility covering honesty, trustworthiness, and fitness to practice law;[108] truthfulness in statements to others;[109] respect for rights of third parties;[110] candor toward the court;[111] fairness to opposing parties and counsel;[112] and obligations to perform pro bono[113] and law reform activities.[114]

Recently, a fuller communitarian ethic has emerged in response to perceived excessive individualism in society.[115] Our society's over-emphasis

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106. *See* MODEL CODE pmbl. ("Lawyers, as guardians of the law, play a vital role in the preservation of society.").

107. Fuller & Randall, *Joint Report*, *supra* note 9, at 1162. *See also* MODEL CODE pmbl. ("The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government.").

108. *See, e.g.*, MODEL RULES Rules 8.1 to 8.4.

109. *See, e.g.*, MODEL RULES Rule 4.1.

110. *See, e.g.*, MODEL RULES Rule 4.4.

111. *See, e.g.*, MODEL RULES Rule 3.3.

112. *See, e.g.*, MODEL RULES Rule 3.4.

113. *See, e.g.*, MODEL RULES Rule 6.1.

114. *See, e.g.*, MODEL RULES Rule 6.4.

115. *See supra* note 80 and accompanying text. Leading communitarian work includes: ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981) (offering a neo-Aristotelian view of ethics, emphasizing person's character and virtues, which derive from community); MICHAEL SANDEL, LIBERALISM, AND THE LIMITS OF JUSTICE (1982). "[C]ommunity describes not just what they *have* as fellow citizens but also what they *are*, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity." *Id.* at 150. Valuable descriptions of communitarianism can be found in Buchanon, *supra* note 58, at 852-53 (listing five major tenets of communitarianism); Pepper, *Autonomy, supra* note 16, at 940-42 (summarizing recent communitarian writings); Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445 (1987) (defining and piecing together the moral underpinnings of communitarian thought). In addition, Professor Shaffer has been a leading proponent of a communitarian view in legal ethics. *See* sources cited *supra* notes 10, 101, 103. Of course, there are

of autonomy too easily separates people from relations with others, thereby promoting atomism and isolation. This devalues commitment, obligation, and duty, undercutting the ties one has with others. Ultimately, this can undermine community, including its system of law.

In place of preoccupation with achievement of autonomy, therefore, communitarianism emphasizes obligations too — to others, to community or communities, and to society at large. In this view people matter; the human person is not just a collection of interests or an independent chooser with respect to a bundle of rights. Rather, a person is both uniquely constituted and a constituent part of community, inextricably bound to others and the social setting in which one lives. Belonging thus becomes the central value, not freedom.[116]

The emphasis in ethics changes, correspondingly, from a regime of rules to a focus on the human person: fostering the development of good character, virtue, certain habits of reflection, and dispositions for acting. In legal ethics, good lawyers should strive to fulfill this ideal of a professional, acting as trustworthy, honest, fair, civil, and respectful attorneys. Good lawyers should also not bully, coerce, deceive, or humiliate those they deal with in the course of professional life (whether judges, opposing counsel, or parties, clients, or witnesses.). Additionally, they should not abuse or obfuscate the legal process. Lawyers should be thoughtful about their craft and its effects on others in this way.

2. Connection to Autonomy

As ideas from community can enhance autonomy, so too can autonomy ideas enhance community. Most importantly, autonomy helps build community by infusing it with content and meaning. The key then becomes achievement of the right kind of community, as compared to realization of any community. The right kind of community strengthens human freedom, well-being, dignity, and equality, enlarging opportunities for self-realization, communication, and connection.[117]

An important source to so constitute community is society's concept of

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alternative communitarian views. *See, e.g.,* William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1984) [hereinafter Simon, *Decline*].

116. Selznick, *supra* note 115, at 447. Professor Shaffer speaks of coming home, of finding where one belongs. Shaffer, *Babel*, *supra* note 101, at 1006.

117. Gerald Doppelt, *Is Rawl's Kantian Liberalism Coherent and Defensible?*, 99 ETHICS 815, 839-40 (1989) (noting that Rawlsian justice and Kantian self-determination "entails just the right kind of community, tradition, compassion and nurture, and so on for modern Western society: namely, the kind which strengthens human freedom and dignity for all, and does not come through the exclusion or oppression of certain groups"); Selznick, *supra* note 115, at 448 ("[M]orality is to be taught and encouraged not mainly by precept, but by enlarging opportunities for communication, interdependence, and responsibility.").

constitutional rights. The norms there embodied include dignity, equality, fairness, justice, freedoms of thought, expression, and conscience, toleration, due process, and sufficient privacy so that persons can freely develop their lives. These rights prescribe ideals to aspire to, individually and collectively.[118] Individuals' exercise of these rights, in turn, transmits important norms, ideas, and aspirations that can transform others, including whole communities, if not society at large. For example, again consider the NAACP and others' assertion of free speech and associational rights in favor of human equality, which dramatically changed American society over the past thirty years.[119] Additionally, how one exercises rights and claims provides substance and definition to character. In these ways, rights form part of the normative content of community. Ultimately, the community society builds reflects its values, and the values reflected form its tradition, part of the fabric of each individual.

Lawyers play a crucial role in making and molding the community or communities they participate in on a daily basis. Lawyers transmit the limits as well as the power of autonomy, directing realization of autonomy against the social and moral backdrop of community.

3. Connection to Morality

A key influence of morality on community is a community's commitment to, and realization of, justice. Justice as a branch of morality dictates that a community be fundamentally fair.[120] Equality, fairness, and due process are attributes of justice that infuse such quality into community. These norms additionally constrain community, helping keep it honest, true, genuine, and inclusive. In addition, there is an important public interest in "seeing [that] justice [is] done."[121]

Other moral ideas similarly constitute, constrain, and guide community. Honesty, fidelity, maintenance of promises and confidentiality, non-maleficence, beneficence, and personal and social responsibility, among other ideas, prescribe "ideals of what kinds of character are worth

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118. Tomasi, *supra* note 53, at 522 ("[T]he moral quality of any intimate community is importantly connected to the capacity of each community member to conceive of herself as an independent holder of rights."). Tomasi adds that:

> [R]ights are richer moral concepts than Sandel, or the other communitarians, have recognized. Because right holders must often decide whether to assert or withhold their claims, a rights-based system offers a ready framework for a system of ethics prescribing ideals to those right holders, ideals of what kinds of character are worth developing, of what kinds of persons they should be.

Id. at 535.

119. *See supra* notes 78-79 and accompanying text.

120. D'Amato & Eberle, *supra* note 31, at 780.

121. Morgan, *Evolving, supra* note 3, at 705.

developing,"[122] enlightening us as to what kind of people we should be.[123] Morality is taught and nurtured in this way — through example.

Finally, there are other important relational dimensions to morality too. Morality speaks to how an individual should treat others. It requires that one treat others as he or she would like to be treated and not treat others in ways one would find intolerable were the situation reversed.[124] In these ways, character embodies morality, forming a rich foundation for relating to others.

C. THE MORALITY FOUNDATION

1. Description

The third foundation of legal ethics is morality, derived from moral philosophy. Moral principles help guide thinking and conduct, especially important concerns given the pressures of contemporary law practice. In this way, a lawyer measures her conduct against certain ethical ideals and values — attempting to remain faithful to conscience — instead of measuring it against the loyalty to clients of the autonomy foundation or the fidelity to the ideal of good character or a just legal system constitutive of the community foundation.

Moral reasons to act are generally based on teleological or deontological theories. Utilitarianism is the most widely applied teleological theory, judging right and wrong by the impact of conduct on others. The morality of conduct depends on whether it advances the greatest good of the greatest numbers, on whether it promotes the greatest balance of good over evil.[125] Thus, "[n]o action has intrinsic worth until we can assess all of its relevant impacts, both upon all other parties and the actor." "[T]he usefulness of the results of action is the only valid test of moral rightness and wrongness."[126] In this sense, the theory is result-oriented.

In contrast, deontological theories require certain acts to be performed for their intrinsic worth, "regardless of their consequences for human happiness."[127] Deontology, the "science of duty,"[128] judges conduct by first principles that define rights or duties worth obeying. The intrinsic worth of the act itself determines morality. Thus, consequences are not the sole criterion on which to judge conduct, although they may be relevant. For example, Kant, the leading deontological theorist, asserted that people

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122. Tomasi, *supra* note 53, at 535.
123. *Id.* at 531, 535.
124. Eberle, *Moral Responsibility, supra* note 5, at 15-16.
125. *See* WOLFRAM, *supra* note 28, at 72-75.
126. *Id.* at 73.
127. D'Amato & Eberle, *supra* note 31, at 772.
128. *Id.*

must always be treated as an end in themselves, and not as a means to an end.[129] This requires that each person be accorded dignity and respect.

Certain deontological principles provide convincing reasons to act for lawyers, helping guide reasoning and conduct. These *prima facie* principles should presumptively apply absent some compelling circumstance. Consider, these examples: (1) fidelity to our system of law and clients, including preservation of confidentiality in attorney-client communications and promotion of client interests, (2) non-maleficence, including duties to avoid abuse of the legal system or those affected by it and obligations to prevent physical and financial harms to innocent third parties, (3) providing access to the legal system, and (4) truthfulness and honesty, including recognition that lying, perjury, misrepresentation, misappropriation, fraud, stealing, and cheating are moral wrongs.[130]

Of course, it is not useful to apply a teleological-deontological dichotomy too rigidly. The morality foundation contains elements of each. For example, basic welfare assumptions like the pursuit of happiness or pleasure (or in this sense "autonomy") are utilitarian. But constitutional rights or professional norms that limit these utilitarian conceptions are deontological. For example, while the lawyers in *Beiny* properly wanted to promote their clients' interests, their zeal should reasonably have been bounded by professional norms regulating the discovery process.[131] The teleological goal should have been constrained by the deontological one. "Nonetheless, the division is a useful one for the limited purpose of general orientation in an otherwise complex area of thought."[132]

Furthermore, legal ethics is not wholly synonymous with moral ethics; there are important differences between desirable professional conduct and desirable nonprofessional or "ordinary" conduct.[133] For example, professional confidentiality obligations may limit one's responses to requested

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129. KANT, *supra* note 45, at 46.

130. *See* D'Amato & Eberle, *supra* note 31, at 773, 783-84, 787, 795-98; Eberle, *supra* note 5, at 21 n.87. *See also* WILLIAM D. ROSS, THE RIGHT AND THE GOOD 20-24 (1930); Joel Feinberg, *Civil Disobedience in the Modern World, in* PHILOSOPHY OF LAW 134 (Joel Feinberg & Hyman Gross eds., 3d ed. 1986) [hereinafter Feinberg, *Disobedience*]. Prima facie principles are presumptions that certain duties are morally required to be performed absent some compelling countervailing interest. *See* ROSS, *supra*, at 20. Whether such duties actually apply depends upon a considered evaluation of all morally significant aspects of a given circumstance. *Id.*

131. *See supra* notes 18-24 and accompanying text.

132. WOLFRAM, *supra* note 28, at 73.

133. *Id.* at 76-77. The difference between professional and nonprofessional or ordinary morality is referred to as "role-differentiation." "Role-differentiation signifies that the ethical obligations one undertakes as a lawyer are distinct from and supersede the ethical obligations one is under in one's non-professional everyday life." Stier, *supra* note 81, at 553. Many defend a sharp distinction between legal and ordinary ethics. *Id.* For example, one should consider the arguments of Professors Freedman and Fried, *supra* note 3. By contrast, this article argues for closer integration of professional ethics with the ordinary norms of morality.

information. As an advocate or negotiator, a lawyer is not ordinarily required to tell the other side all of what he knows or thinks about the merits of his case. In contrast, one would behave differently towards friends.[134] Legal ethics requires lawyers to so prefer their clients' valid claims, in the absence of more compelling claims.[135]

Nevertheless, moral behavior is an important aspect of professional responsibility. Like the other foundations, morality is a core set of ideas comprising legal ethics. Professional responsibility standards capture these ideas most clearly in the provisions covering confidentiality (especially the exceptions to the obligation),[136] truthfulness,[137] fairness,[138] and advice incorporating moral considerations.[139]

Much professional conduct, in fact, can usefully be guided through application of ethical principles. For example, it is desirable to keep promises, be truthful and honest, and not cheat or steal. Sadly, there is too much blatant disregard of fundamental ethical norms and professional responsibility rules.[140] In this way, the moral tension of practice might be less than perceived; it may be easier to be a good lawyer and person than the legal community assumes.[141]

Moral philosophy can clarify reasoning in other ways, too. For example, Kant's ethical theory may be useful to professional practice. He calls for implementation of a critical reasoning methodology that subjects actions and choices to a moral appraisal, requiring that one accept the critical moral principle involved in the moral appraisal. This self-evaluation demands an impartial point of view so that in formulating conduct one must consider oneself as both agent and object of action, actor and subject. To be credible in the Kantian sense, actions and judgments must be scrutinized to ensure that they provide a basis for standards of conduct which are consistent,

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134. Hazard, *supra* note 33, at 3-4.

135. McChrystal, *supra* note 36, at 415.

136. *See* MODEL RULES Rule 1.6.

137. *See* MODEL RULES Rule 3.3 (requiring candor toward court); MODEL RULES Rule 4.1 (requiring truthfulness to third parties).

138. *See* MODEL RULES Rule 3.4 (requiring fairness to opposing party and counsel).

139. *See* MODEL RULES Rule 2.1.

140. One should note, for example, the flagrant misconduct observed by some legal interns in a study conducted by Professor Hellman. Hellman, *supra* note 2, at 583 n.165, 603-05 (discussing situations in which: lawyer lies to client to disguise own negligence; lawyer's negligence results in unnecessary extra jail time for client; lawyer plans to mislead court as to identity of real client; lawyer defending insurance case passes adverse confidential information about insured to insurance company; lawyer plans to lie if caught in declining to disclose identity of doctors sought in valid discovery request; lawyer counsels client to fabricate evidence; lawyer exacts sexual favors in lieu of collecting fee); *see also* Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 663 (1990) ("Lawyers deceive their clients more than is generally acknowledged by the ethics codes or by the bar.").

141. Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 460 (1990) [hereinafter Morgan, *Thinking*].

dispassionate, and universally applicable, at least to similarly situated people.[142]

Of course, it may not be feasible for lawyers, or any of us, to realize such universal moral principles all the time, if at all. Nevertheless, the importance of Kant's theory is as an ideal toward which to aspire, should one so choose. While striving for universal applicability, therefore, conduct should be founded at least on a principled ethical justification, a more attainable standard.[143]

This need to justify conduct provides a means by which responsibility can be assumed for one's actions and choices, even in the professional role, rather than hiding from it behind a professional mask. In this way, Kant's theory provides a framework for making professional actions more congruous with moral norms. Importantly, this provides a basis for a more searching and principled justification for conduct.

Of course, law practice presents a range of moral choices.[144] Some problems arising in practice call for straightforward application of ethical principles, such as maintenance of confidentiality or desistance from lying or committing fraud. Absent compelling countervailing circumstance, these are easy cases to solve.

Useful solutions to other problems can be guided through fidelity to constitutional rights, such as the due process guarantee of right to counsel in criminal cases or, in that context, making the state prove its case against a defendant. In this way, the due process right helps structure a lawyer's thinking and conduct. The concept of due process also covers the problem of "the last lawyer in town," obligating a lawyer to represent reprehensible or undesirable clients regardless of a lawyer's personal misgivings about taking such a case.[145]

But other problems involve a complex of competing principles, values, or

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142. The present author has previously sketched a Kantian deontological model of decisionmaking that provides a framework for addressing moral values in practice, including a way to resolve conflicts among prima facie moral values. *See* Eberle, *supra* note 5, at 12-20. Kant's theory has been quite influential. WOLFRAM, *supra* note 28, at 72.

143. *See* Eberle, *Moral Responsibility, supra* note 5, at 14-15 (citing Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 917 (1981)). *See also*, Stier, *supra* note 81, at 604 (stating that integrity depends on reasons for action).

144. "[S]eeing is a moral art." Pepper, *Autonomy, supra* note 16, at 953 (internal quotations omitted). One must learn to see that individuals have "moral choices every day . . . [as] part of the fabric of life." *Id.* (citing Shaffer, *Belonging, supra* note 101, at 70 and other work of Tom Shaffer). JOHN DEWEY, THEORY OF VALUATION 29-33 (1939) (declaring that the most important human and institutional choices are character-defining choices).

145. For example, one must consider defending the right of Nazis to assemble and demonstrate for "white power" in Skokie, Illinois, a community heavily populated by Jewish survivors of the Holocaust. *See generally* David Goldberger, *Skokie: The First Amendment Under Attack by its Friends*, 29 MERCER L. REV. 761 (1978); Morris L. Ernst & Alan U. Schwartz, *The Right to Counsel and the "Unpopular Cause"*, 20 U. PITT. L. REV. 725 (1959).

interests, whether conflicting moral, autonomy, or community reasons. These quandaries are among the most difficult to resolve satisfactorily. For example, it is not easy to calibrate loyalty obligations when a client presents a clear threat of danger to himself and others. Consider *Hawkins v. King County*,[146] where a man, Hawkins, "was mentally ill and of danger to himself and others."[147] Having been incarcerated for possession of marijuana, the question for Hawkins's attorney was whether to seek Hawkins release from custody, as he desired, or proceed to have him hospitalized or civilly committed, as Hawkins's mother and a psychiatrist urged.[148]

In situations like this, whose loyalty claims should take precedence — the client's or those threatened with concrete harm (in *Hawkins*, the mother)? Which moral claims take precedence — a lawyer's promise of confidentiality to his client or the duty to warn innocent third parties who are likely to be harmed by the client even if the threat is communicated confidentially in the professional relationship?

Questions like these are among the toughest of legal ethics. These problems present dilemmas, where two or more ethical claims or principles or other compelling interests conflict. In the face of such dilemmas, which claim should prevail? How does one make a choice?

In the *Hawkins* case, the lawyer chose to prefer his client's interests over the competing claims. Thus, he kept silent about the client's mental state at the bail hearing.[149] He then successfully obtained Hawkins' release from custody.[150] Later, Hawkins assaulted his mother and attempted suicide by jumping off a bridge, causing serious injury to himself.[151]

In problematic situations like *Hawkins*, it is necessary to analyze critically the situation so that it may be resolved in an ethically satisfying manner. Some lessons of moral philosophy may prove illuminating. W.D. Ross argued that moral conflicts, as in *Hawkins*, can arise in deontological theory. According to Ross, "it is incoherent to insist upon universal validity of any one moral rule to the exclusion of all others."[152] For example, the lawyer's moral obligation to maintain his client's confidence cannot always displace other competing moral values, such as the duty to warn innocent third

146. Hawkins v. King County, 602 P.2d 361, 365 (Wash. Ct. App. 1979) (holding that lawyer's duty of loyalty to client overrides disclosure of information of client's mental state, which made him dangerous to himself and others).

147. *Id.* at 363.

148. *Id.*

149. *Id.*

150. *Id.*

151. Hawkins v. King County, 602 P.2d 361, 363 (Wash. Ct. App. 1979).

152. D'Amato & Eberle, *supra* note 31, at 773 (citing Ross, *supra* note 130).

parties of imminent and serious harm. Instead, Ross' approach was to recognize these moral conflicts and then seek to resolve them.[153]

He viewed the problem as one of distributive justice, calling for the distribution of goods according to moral worth. But "while the principle to produce the most good ranks as a first principle, it is but one such principle which must be balanced by intuition against the claims of the other prima facie principles."[154] Accordingly, when presented with a conflict between competing moral (or, as appropriate, autonomy or community) claims one must try to find a "constructive answer . . . to the problem of assigning weights to competing principles of justice."[155] Ross suggests we consider the situation as carefully and fully as possible until we form a "considered opinion . . . that in the circumstances one [duty] . . . is more incumbent than any other."[156] While considered reflection may be "highly fallible . . . it is the only guide we have to our duty."[157]

John Rawls characterized this approach as "intuitionism." By intuitionism, Rawls meant a doctrine containing "an irreducible family of first principles which have to be weighed against one another by asking ourselves which balance, in our considered judgment, is the most just."[158]

Still, the obvious danger here is that principled results may not be obtained simply by applying "intuitionism" to the resolution of moral conflicts. In our world there is almost always a "plurality of principles" which must be balanced in determining which single principle in the plurality is "most just." This balancing inevitably requires the exercise of judgment.

But the problem is not irreducible.[159] Reliance on intuitionism can be reduced "by posing more limited questions and by substituting prudential for [unguided] moral judgment."[160] This focuses the appeal to intuition, "substitut[ing] for an ethical judgment, a judgment of rational prudence."[161]

Or consider what Aristotle called *phronesis* — "practical wisdom" or "sound judgment."[162] By such practical reason or judgment, Aristotle

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153. Eberle, *Moral Responsibility, supra* note 5, at 16.

154. JOHN RAWLS, A THEORY OF JUSTICE 40 (1971) (citing ROSS, *supra* note 130, at 21-27). (Ross' theory is a deontological intuitionist theory.)

155. *Id.* at 40.

156. ROSS, *supra* note 130, at 19.

157. *Id.* at 42.

158. RAWLS, *supra* note 154, at 34. Here, Rawls views intuitionism "in a more general way than is customary." *Id.*

159. Eberle, *Moral Responsibility, supra* note 5, at 19.

160. RAWLS, *supra* note 154, at 44.

161. *Id.*

162. VI ARISTOTLE, NICOMACHEAN ETHICS 153, Glossary 312 (Martin Ostwald trans., 1962).

means a careful deliberation upon the range of factors relevant to a problem, imaginably conceived.[163] A powerful imagination will yield a wider range of factors to be considered, adding further dimensions to solution of the problem.[164] Such careful deliberation requires both sympathy with interests one prefers (in the case of lawyers, client interests) and a certain measure of detachment so that the problem can be viewed more objectively.[165]

Such prudential or practical reasoning can help resolve moral conflicts or ethical problems generally. In the case of conflicts between moral principles, such reasoning can help determine which principle or principles are most just. In the *Hawkins* case, for example, disclosure of imminent concrete harm to identified victims should take precedence over confidentiality if that is the only way to prevent the harm.[166] Where moral principles clash with nonmoral values, moral principles should presumptively prevail. When nonmoral values or interests conflict, such practical reasoning can help guide the reasons to be preferred.

Ultimately, a lawyer must pick the reason or set of reasons to act upon. Upon careful deliberation, however, there is greater likelihood that the judgments reached will be judicious and reasoned. This requires intuitive comprehension and skill in "forming . . . these judgments about specific problems."[167]

Like "prudence" or wisdom in everyday affairs, this reasoning is better demonstrated than described.[168] It displays itself in the judgments reached in particular cases. In this way, prudential or practical reasoning seems well suited to the case-centered work of lawyers.[169]

Other problems of legal practice are, in fact, morally ambiguous. For example, it is not at all clear whether a lawyer should or should not "cross-examine a truthful and accurate witness to make her appear to be

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163. Anthony T. Kronman, *Practical Wisdom and Professional Character*, 4 SOC. PHIL. & POL. 203, 206-07, 216-17, 225 (1986).

164. *Id.* at 225 ("[I]magination is the root of practical wisdom, and the lawyer who possesses a powerful imagination will not only be able to conceive a wider range of solutions to the problems he confronts but will be more inclined as well to make those choices that we think of as being judicious or practically wise."). "[C]reative, normatively charged judgment is the distinctive ethical component of the ideal of professionalism." William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 66 (1991) [hereinafter Simon, *Trouble*].

165. Kronman, *supra* note 163, at 213-14.

166. Eberle, *Moral Responsibility*, *supra* note 5, at 19-37 (describing and applying such prudential or practical reasoning to resolution of such moral quandaries).

167. Kronman, *supra* note 163, at 206.

168. Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1647 (1987).

169. Kronman, *supra* note 163, at 207. *See infra* Part III., *infra*, (demonstrating an application of this reasoning).

mistaken . . . ."[170] Certainly, a lawyer's loyalty to clients requires zealous pursuit of the case. On the other hand, how one treats adversaries is an important ethical concern. The demands of the concrete case may well determine the proper balance.

Still other practice problems are without moral significance. For example, summoning a witness to court, even at inconvenience, does not ordinarily implicate morality. Or consider corporate law practice, much of which does not implicate value questions. Instead, studies indicate such practice consists mainly of technical tasks, like corporate governance, structuring business transactions, or compliance with regulatory agencies.[171]

Nevertheless, many professional responsibility problems present moral issues that call for choices to be made. This requires that we prioritize the values at issue. How we make these choices says a lot about who we are. Our integrity depends on our reasons for action. Our choices, in turn, give authority to ethics, the art of deciding what to do under the circumstances.[172]

2. Connection to Autonomy

An important connection between morality and autonomy is that morality depends on autonomy, the free exercise of choice. All moral decisions must partake of such autonomy.[173] Such freedom, in turn, makes for self-realization. This facilitates assumption of responsibility for one's choices and actions, a key goal of moral theory. In these ways, moral autonomy promotes the inherent dignity and freedom of persons.

Additionally, many of the freedoms contained in our Bill of Rights themselves embody moral ideas. One should consider, for example, due process fairness and freedoms of expression and conscience.[174] These freedoms enlarge the moral quality of dignity and autonomy that can be achieved, individually and collectively.

Nevertheless, while autonomy and morality are connected in ways, they are also in tension with one another. Unrestrained autonomy is egoistic, where "the good of the individual, as defined by the individual, is the

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170. FREEDMAN, *supra* note 3, at 161.

171. *See* ERWIN O. SMIGEL, THE WALL STREET LAWYER 160-65 (1969); Heinz, *supra* note 5, at 891, 902-03; R. Nelson, *supra* note 1, at 557.

172. *See* Shaffer, *Babel*, *supra* note 101, at 1001 ("What gives authority to morals in our lives . . . is that we have chosen them.").

173. FREEDMAN, *supra* note 3, at 48 (stating that "human autonomy is a fundamental moral concept"); Gerald Dworkin, *Moral Autonomy, in* 3 MORALS SCIENCE AND SOCIALITY 156, 160 (H. Tristam Englehardt, Jr. & Daniel Callahan eds., 1978) ("A moral agent must retain autonomy, must make his own moral choices.").

174. FREEDMAN, *supra* note 3, at 15, 22, 166.

paramount goal."[175] Any philosophy that allows unrestrained behavior by individuals is not moral because it allows everyone to advance their interests as they please. In this way, the "autonomy" model of legal ethics can easily constitute "surrogate egoism," where a lawyer acts on behalf of a client's unbridled egoism.[176]

Whether autonomous choices are moral or not, therefore, depends on their moral quality. Focusing on the moral quality of autonomy, then, one must evaluate the choices made. These choices call for a dispassionate, critical moral assessment in the manner described above.[177] Accordingly in legal ethics, lawyers should evaluate the objectives of the clients they choose to represent and the means by which such objectives are carried out.

In these ways, morality is connected to autonomy, and autonomy to morality. Rather than being mutually exclusive, they too can generate mutually compatible reasons for conduct.

3. Connection to Community

Like autonomy, morality helps give definition to character and, more broadly, community. On character, morality helps define one's present and future character. For example, moral ideas instruct us to be truthful, loyal, faithful, courageous, and tolerant, among other virtues.

Morality is also a focus on others as well as self. Morality requires that one treat others as one would like to be treated, and not treat others in ways one would find intolerable were the situation reversed. Morality also requires one to behave in accordance with rules of conduct equally applicable to all similarly situated and precludes one from fashioning exceptions for one's own choices, actions, and conduct.[178] How one treats oneself, and others, speaks genuinely as to the content of society's collective character. In these ways, morality is an important foundation for character.

Character is likewise crucial to morality. Professional responsibility is not just a set of ethically prescribed choices.[179] Lawyers must also make decisions on how to act in a given circumstance. This requires a capacity for sound judgment and practical wisdom, a process of imagination, careful deliberation, and intuitive comprehension.[180] In this way, lawyers form and prove their character.

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175. D'Amato & Eberle, *supra* note 31, at 798.

176. *Id.*

177. *See supra* notes 140-41 and accompanying text.

178. Eberle, *Moral Responsibility*, *supra* note 5, at 16. *See also supra* notes 140-41 and accompanying text.

179. Ian Johnstone & Mary P. Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 80 (1991).

180. Kronman, *supra* note 99, at 846-61 (describing process of deliberation and judgment); *See also supra* notes 162-69 and accompanying text.

With regard to community, morality is a primary source of the ideas that inspire people to group together and share a common experience. These ideas, in turn, provide definition and content to community. In achieving a desirable community, one could reliably look to constitute it with ethical norms, like fidelity, gratitude, non-maleficence, beneficence, maintenance of promises and confidentially, honesty, truthfulness, not committing fraud or cheating, and upholding the integrity of a just legal system. One would also look to a community committed to the principle of justice which, in turn, helps guarantee that a community will more effectively realize it by remaining fair and open to all, treating similarly situated persons in essentially similar manners, and realizing substantive justice.

In these ways, morality and community draw on one another. As rights can be compatible with virtues, therefore, virtues are indeed compatible with morals.

D. CONCLUSION

Having emphasized the connections among the three dominant foundations of legal ethics, a clear central ethical core to the discipline emerges, one drawn from and supported by each foundation. Central and clear ideas drawn from autonomy include self-determination, self-realization, loyalty, dignity, and equality, including access to a complete set of rights; from community comes character, virtue, well-being, and a range of obligations, including those to others, to our system of law, and to society; from morality comes fidelity, non-maleficence, beneficence, truthfulness, honesty, justice, and assumption of personal responsibility for life, including professional life. These concepts complement one another.

Each foundation thereby integrates into the others, forming an overlapping conceptual consensus. No one foundation is exclusive. While autonomy is not an exclusive foundation of legal ethics, neither is community nor morality. This integration brings more balance, stability, and clarity to the central conceptions of the profession. It also provides a certain structure, coherence, and substance to its underlying ethical base. In these ways, a central ethical core to the profession may be forged, illuminating the area within which lawyers ought to dwell.

From this vantage point, therefore, lawyers can more soundly reason and reliably structure advice and conduct. First, the integrated approach illuminates the central obligations of the profession. Central and clear problems of professional responsibility can thus be more easily solved. Second, the approach brings professional responsibility more in line with its underlying aspirations, ameliorating the dissonance between what attracts people to

the profession and its reality.[181] Third, the approach enables lawyers to draw upon a more complete set of concepts to apply to the concrete problems of their clients. The dialogue between lawyers and clients can thus be richer and more enlightening as compared to confining discussion to a set of ideas drawn from any one foundation. In reasoning through problems and rendering advice, therefore, lawyers are more likely to address the full range of interests implicated in cases, leading to more sensible solutions. Fourth, the approach facilitates a more comprehensive relationship between lawyers and their clients, involving the full persons of both clients and lawyers in a cooperative, interdependent enterprise. Dissonance between professional and private life can thereby be lessened.

Having integrated each dominant foundation into the ethical core of the profession, the next step is to implement this approach. This calls for integration too — of oneself and the professional role. A good reader integrates herself into the professional role, combining legal, moral, and prudential reasons into advice and conduct, acting as a good person would act.[182]

Ideally, of course, lawyers should empower clients to achieve autonomy in an ethical manner within the context of a just community. Inevitably, however, the demands of concrete cases call for accommodation of this ideal. This calls for integrity of character, good sense, and prudential judgment. In short, one must reason or learn to reason carefully, soundly applying the conceptions in the proper proportion, a process better demonstrated than described. Ultimately, solution of the concrete case is the acid test for deciding what to do. In these ways the path of a good lawyer is forged. Part III illustrates how these goals can be accomplished in two representative cases, subornation of perjury in criminal cases, and solution of problematic moral dilemmas in civil cases.

III. APPLYING THE INTEGRATED APPROACH

Application of an integrated approach to legal ethics can resolve more satisfactorily professional responsibility questions. There are several benefits to this approach. First, by crystallizing the central conceptions of the profession, solutions to central and clear problems are better illuminated. Second, by facilitating use of a more complete set of ideas in the dialogue between attorneys and their clients, difficult, problematic professional situations can more satisfactorily be resolved. More perspectives can be applied to the problem than would be the case if only a single foundation

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181. *See supra* note 11 and accompanying text; Johnson, *supra* note 4; Simon, *Trouble*, *supra* note 164, at 65 ("The reason that legal ethics is so consistently disappointing is that the prevailing conceptions of the subject fail to respond to the aspirations that draw people to it.").

182. Stier, *supra* note 81, at 555-58, 566-67.

were used. This helps clarify cases on the outer bound. Third, by involving the full persons of attorneys and clients in this enterprise, it is more likely that sensible solutions will follow. In these ways, the integrated approach maps out the area within which lawyers ought to dwell.

These goals are demonstrated by applying the integrated approach to two well-known cases. Resolution of central, fundamental problems is illustrated through examination of *Nix v. Whiteside*,[183] where an attorney to a murder defendant successfully dissuaded his client from falsely testifying to a crucial fact that might have established the defendant's innocence.[184] *Nix* illustrates how a firm conception of the professional role can illuminate resolution of a lawyer's duties to promote loyalty his client's interests in an ethical manner consistent with the law, demonstrating how duties to client, society, and conscience can properly be balanced.

Resolution of difficult, borderline cases is illustrated through examination of the second case, *Spaulding v. Zimmerman*,[185] the well-known dilemma of a twenty year old man who has suffered a life-threatening aneurysm, arguably from an automobile accident, that has been discovered by defendant's counsel but, as yet, remains unknown to the man or his counsel.[186] *Spaulding* illustrates how the integrated approach can be used to resolve problematic quandaries that arise in practice. The central question explored in this analysis is what a good lawyer should do in circumstances of moral complexity.

A. CENTRAL AND CLEAR SOLUTIONS: *NIX V. WHITESIDE*

1. Statement of the case

Nix is a paradigm of the autonomy set of ideas, here of an individual threatened with loss of personal liberty because of alleged participation in a murder crime. The defendant, Whiteside, "was convicted of second-degree murder by a jury."[187] The issue of relevance to Whiteside was his claim of self-defense, based on his statement that he stabbed the victim, Love, to death because Love "was pulling a pistol from underneath the pillow on the bed."[188] However, "no pistol was found on the premises" by the police in their search.[189] When questioned by defendant's attorney, Robinson, defendant's companions, who were present at the stabbing, stated that none

183. 475 U.S. 157 (1986).
184. *Id.* at 161-62.
185. 116 N.W.2d 704 (Minn. 1962).
186. *Id.* at 706.
187. Nix v. Whiteside, 475 U.S. 157, 160 (1986).
188. *Id.*
189. *Id.*

had seen a gun during the incident.[190] Robinson advised Whiteside that the existence of a gun was not necessary to establish a claim of self-defense and that only a reasonable belief that the victim had a gun was required.[191]

In preparation for trial, Whiteside told attorney Robinson consistently that he had not actually seen a gun in Love's hand, but had believed that the victim had one.[192] Love had a reputation for carrying guns.[193] About a week before trial, Whiteside for the first time told Robinson that he had seen something "metallic" in Love's hand.[194] When asked further about this, Whiteside responded, "if I don't say I saw a gun, I'm dead."[195]

Robinson did not believe Whiteside's revised account and he told Whiteside that such testimony would be perjury.[196] He repeated his advice that it was not necessary to prove that a gun was available but only that Whiteside reasonably believed that he was in danger.[197] When Whiteside insisted that he would testify that he saw "something-metallic," Robinson told him:

> we could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it . . . I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony.[198]

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190. *Id.*

191. *Id.*

192. Nix v. Whiteside, 475 U.S. 157, 160 (1986).

193. Whiteside v. Scurr, 744 F.2d 1323, 1325 (8th Cir. 1984).

194. *Nix*, 475 U.S. at 161.

195. *Id.*

196. *Id.*

197. Nix. v. Whiteside, 475 U.S. 157, 161 (1986).

198. *Id.* Significantly, in *Nix* the Supreme Court gave the state court's "factual finding that Whiteside would have committed perjury had he testified at trial actually to having seen a gun . . . a presumption of correctness." *Id.* at 180 (Blackmun, J., concurring). The Iowa Supreme Court found that Robinson was "convinced with good cause to believe" that Whiteside's testimony would be false. State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978). The United States Court of Appeals for the Eighth Circuit concluded that Robinson had a "firm factual basis for believing" that Whiteside's testimony would be false. Whiteside v. Scurr, 750 F.2d 713, 714 (8th Cir. 1984). It thus seems reasonable to conclude that Robinson believed Whiteside intended to commit perjury, as the Supreme Court implicitly concluded. *Nix*, 475 U.S. at 166. This makes *Nix* a relatively easy case, as compared to situations of contemplated perjury where evidence establishing the falsehood is much less clear.

On the other hand, in view of Whiteside's conflicting stories and the fact he did not admit that the proposed testimony was false, one could yet conclude that it was not "beyond a reasonable doubt that the testimony was false." Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1941 (1988) [hereinafter Freedman, *Client Confidences*]. In this article, Professor Freedman examines in detail the *Nix* record. In view of these considerations, some courts have insisted upon a "clearly established" or "actual knowledge" or "firm factual basis" standard of anticipated perjury. *See, e.g.*, United States v. Long, 857 F.2d 436,

Robinson also indicated he would attempt to withdraw from the representation if Whiteside insisted on committing perjury.[199]

At trial, Whiteside testified in his own defense, stating that he "knew" Love had a gun and that he believed Love was reaching for a gun, causing him to act quickly in self-defense.[200] On cross-examination, he admitted he had not actually seen a gun in Love's hand.[201] Robinson presented evidence to show a basis for Whiteside's asserted fear that Love had a gun.[202] After the jury returned a verdict of second-degree murder, Whiteside moved for a new trial on the ground he was denied a fair trial by Robinson's "admonitions not to state that he saw a gun or 'something metallic.' "[203] This motion was denied.[204]

Nix presents a classic trilemma of conflicting professional duties to client, court, and conscience. How we resolve these conflicts reveals our true priorities,[205] putting our conceptions to the acid test of experience as we decide what to do. Prior to resolving this case, it is worth exploring the ideas implicated.

2. Autonomy

Nix implicates most of the classic autonomy ideas. Indeed, few interests are as compelling as personal freedom, the stake for Whiteside. To protect this freedom, Whiteside was entitled to assistance of counsel to defend himself. Crucial autonomy ideas implicated include access to our regime of constitutional rights, especially due process and Sixth Amendment right to counsel guarantees. Assisting others to understand their rights is morally worthwhile.[206] Exercise of rights, in turn, aids vindication of individual dignity.[207] These rights also help preserve liberty by checking government, here in holding the state to its burden of proof prior to incarcerating

444 (8th Cir. 1988); Doe v. Federal Grievance Comm., 847 F.2d 57, 62 (2d Cir. 1988). Certainly a lawyer must use extreme caution in deciding that a client will commit perjury.

199. *Nix*, 475 U.S. at 161.

200. *Id.*

201. *Id.* at 161-62.

202. Nix v. Whiteside, 475 U.S. 157, 162 (1986).

203. *Id.*

204. *Id.* at 161-62. The Iowa Supreme Court affirmed Whiteside's conviction. State v. Whiteside, 272 N.W.2d 468 (Iowa 1978). Whiteside then petitioned for a writ of habeas corpus in the United States District Court of the Southern District of Iowa. The District Court denied the writ. On appeal, the United States Court of Appeals for the Eighth Circuit reversed and directed that the writ of habeas corpus be granted, Whiteside v. Scurr, 744 F.2d 1323, 1325 (1984), leading to the Supreme Court case.

205. FREEDMAN, *supra* note 3, at 10.

206. Fried, *supra* note 3, at 1075.

207. *See* Jones v. Barnes, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting) ("The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process.").

persons accused of crimes. Finally, these rights help assure that justice is maintained.

In acting as counsel, Robinson drew upon further autonomy ideas. He provided access to the law, including the options arising with respect to it, and the consequences of those choices. He explained all information relevant to the case, thereby aiding Whiteside to make informed decisions about his affairs. He also kept confidential all information learned in the representation, and zealously, loyally, and competently represented Whiteside's interests, including presentation of exculpatory evidence. In these ways, he helped Whiteside achieve his due in this matter.

The most important choice to make, of course, was what to do concerning the contemplated perjury. In explaining the law on this point, Robinson did not patronize or coerce Whiteside but instead told it like it was.[208] Candor is essential to lawyering, as truth is indispensable in deciding what to do. Reasonably convinced that the testimony would constitute perjury, Robinson told Whiteside that use of this testimony was against the law.[209] As an attorney, Robinson could not condone such use. If Whiteside did perjure himself, Robinson felt obligated to advise the court of the falsehood. In these ways, Robinson treated Whiteside as an independent moral agent, capable of deciding for himself what to do. Whatever Whiteside did, therefore, would determine his own fate. Any claim of prejudice in the case might thus reasonably be attributable to his actions[210]

Perhaps if Robinson did not himself believe the testimony to be perjurious, other strategies may have been possible. For example, in view of Whiteside's conflicting stories and the fact he did not admit that the proposed testimony was false, perhaps Robinson could have presented the testimony to the jury and allowed it to determine whether the testimony was false beyond a reasonable doubt.[211] Alternatively, Robinson could have relied on Whiteside's Fifth Amendment right against self-incrimination since "the government cannot enforce a rule requiring a lawyer to reveal her client's confidences regarding the client's perjury."[212] Any of these choices call for careful consideration of the relevant issues and principled justification.

Importantly, Robinson's choice was justifiable and "within the wide range of professional responses to threatened client perjury."[213] In fact, good ethics makes good strategy here. Few would believe Whitehead's falsehood in the context of the evidence establishing the crime. One could reasonably

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208. Pepper, *Autonomy*, *supra* note 16, at 946.
209. Nix v. Whiteside, 475 U.S. 157, 161 (1986).
210. Pizzimenti, *supra* note 30, at 462.
211. Freedman, *Client Confidences*, *supra* note 198, at 1941.
212. FREEDMAN, *supra* note 3, at 135 (citing Fisher v. United States, 427 U.S. 367 (1976)).
213. *Nix*, 475 U.S. at 166.

expect that cross-examination would uncover the contemplated falsehood.[214] In this way, Robinson's strategy probably saved Whiteside from the harm of the lie being exposed.[215]

Whiteside did not like what he heard. The law can be both empowering and limiting. Properly advised of the consequences of committing perjury, however, Whiteside chose not to so testify.[216] In this way, Robinson empowered Whiteside to make a meaningful choice about his life.

3. Community

The foremost idea traceable to community was Robinson's obligation as officer of the court to uphold the integrity of the law and its institutions, which Whiteside's desire to commit perjury directly challenged.[217] Crucial to fulfillment of this obligation was Robinson's character. Having recognized these interests of the law at stake, the key question became what to

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214. FREEDMAN, *supra* note 3, at 138 ("A panel on lawyers' ethics was once asked what the defense lawyer should do when a client proposes to commit perjury. 'Do me a favor,' a United States Attorney on the panel replied, 'Let him try it.' "). It is not clear that Robinson so advised Whiteside.

215. Indeed, cross-examination uncovered that Whiteside "had not actually seen a gun in Love's hand" in response to his testimony that "he 'knew' that Love had a gun and that he believed Love was reaching for a gun." Nix v. Whiteside, 475 U.S. 157, 161-62 (1986).

216. Professor Freedman finds Whiteside's choice on this point coerced by Robinson's threat to reveal the perjury. FREEDMAN, *supra* note 3, at 133; Freedman, *Client Confidences*, *supra* note 198, at 1940-41.

However, if one accepts the Supreme Court's conclusion that Robinson had good cause to believe that Whiteside would commit perjury, *Nix*, 475 U.S. at 180, then perjury is simply beyond the law and, therefore, a choice constrained by legal limits. This appears to be the basis on which the Supreme Court decided the case:

> Whether Robinson's conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a "threat" to withdraw from representation and disclose the illegal scheme, Robinson's representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*.

Id. at 171 (citations omitted). Of course, one might view the law as "coercive" in the sense that it directs compliance with its mandates, even in relation to the "bad man." *See supra* note 102 and accompanying text.

217. One could also view *Nix* as Professor Freedman does, as presenting the duty to uphold constitutional rights (here Fifth and Sixth Amendment rights), certainly an integral part of the integrity of our system of law. *See supra* note 198. Indeed,

> lawyers make their greatest contribution by their willingness to stand apart from a particular community and to operate by different rules, so that the integrity of the legal system may be protected. In other words, the role of the lawyer is to assure that society's system for justice is maintained and is available to provide an essential component which holds the society together.

Wells, *Toward a Kinder, Gentler, Legal Profession*, 19 CAP. U. L. REV. 967, 982 (1990).

The collision between a constitutional right and another prima facie norm, like the moral duty not to commit a lie in *Nix*, calls for quite careful assessment and resolution. Different choices and resolutions are possible. Required, however, is the foundation of choice on a principled basis.

do. Robinson chose without hesitation to act as a good reader of the law would act, fairly reading and applying the law even when in limitation of his client's interests.[218]

How Robinson acted had significance beyond himself. His conduct also affected others. Robinson acted with awareness of the broader consequences of his conduct, demonstrating professional character and courage, serving as an example for other professionals to emulate in similar circumstances. In this way, Robinson formed an important connection to the legal community. He also formed an important connection to the lay community by demonstrating the power and limitation of the law. This might especially influence others in the respect they accord the law.[219] In these ways, Robinson participated in the normative life of community, helping make and mold it.

4. Morality

Nix also implicated important moral ideas. Affirmative presentation of false evidence is prohibited by *prima facie* moral norms, like obligations to be truthful, to not misrepresent information, and to not lie or commit or suborn perjury. Besides being moral wrongs, these are also debilitating to the legal system. There is a public interest in seeing justice realized.[220] Other ideas traceable to morality include Robinson's fidelity to Whiteside, his preservation of Whiteside's confidences, and provision of access to the law so that Whiteside could exercise meaningfully his autonomy.

5. Solution

Having explicated the ideas drawn from each foundation of legal ethics, the next relevant step is their application. The central focus here is ascertaining a bound of autonomy as limited by community and morality. Concretely, *Nix* tests a limit on a lawyer's duty to advance client interests, as enforced by duties to comply with the law and adhere to professional and moral standards of conduct.

Focusing first on Robinson's ethical duty to advance Whiteside's interests, it is worth recognizing how clearly Robinson understood and performed this duty. He acted zealously, competently, diligently, loyally, and fairly on behalf of Whiteside. He presented evidence tending "to show a basis for Whiteside's asserted fear that Love had a gun"[221] but would not present the testimony that Whiteside had actually seen the gun despite

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218. *See supra* notes 100-02 and accompanying text.
219. Morgan, *Evolving, supra* note 3, at 705-06.
220. *Id.*
221. Nix v. Whiteside, 475 U.S. 157, 162 (1986).

Whiteside's desire that he do so, because Robinson reasonably believed this testimony to be false and therefore beyond the law.[222] In short, he empowered Whiteside to his full entitlement of rights under the law.

Central to Robinson's evaluation of Whiteside's case was that it was not resolvable solely by resort to the autonomy foundation. Equally compelling were obligations to comply with the law and standards of professional responsibility, traceable to the community and morality foundations. These obligations limited what Robinson could do for Whiteside, however loyal and zealous Robinson desired to be. Of course, from Whiteside's standpoint, anything might be permissible to achieve his freedom, even lying or the commission of perjury. In this spot, there is no telling what any of us might do. But as a professional, Robinson faced compelling community and moral obligations, which in this case limited autonomy.

Looking beyond autonomy to community, Robinson's dilemma became apparent. As an officer of the court, Robinson was under a positive obligation not to present perjured testimony or suborn its use. These duties underlie the integrity of the legal system, even if in limitation of client interests.

> These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. This special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and .... [A]lthough counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908.[223]

Robinson's ethical duty to advance Whiteside's interests was also constrained by moral norms, including duties to be truthful, to not misrepresent information, and to not lie or commit perjury. These are personal obligations that speak to Robinson's character. In resolving what to do, Robinson needed to determine his priorities. He needed to critically self-evaluate himself, impartially and dispassionately, considering himself as both actor

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222. *Id.* at 161.

223. *Id.* at 166, 168. Today this standard is codified in MODEL CODE DR 7-102 and MODEL RULES Rule 3.3.

and subject.[224] In so scrutinizing himself, he decided on conduct that could serve as a standard for others similarly situated: "we could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it."[225]

These professional and moral obligations took precedence over Robinson's loyalty to his client, Robinson decided. This decision took honesty and courage — honesty in fairly reading the law and courage in so acting to apply it. After all, the decision was less clear cut than it seems. Other responses were possible. The United States Court of Appeals for the Eighth Circuit concluded, for example, that a writ of habeas corpus could have been granted in Whiteside's favor on the ground that "Robinson's admonition to Whiteside that he would inform the court of Whiteside's perjury constituted a threat to violate the attorney's duty to preserve client confidences . . . [and] breached . . . standards of effective representation."[226]

In view of these countervailing legal and moral obligations, Robinson's ability to advance Whiteside's interests was bounded. Whatever the scope of Whiteside's autonomy, it "does not extend to testifying *falsely*" the Supreme Court concluded.[227] It is "crystal clear that there is no right whatever — constitutional or otherwise — for a defendant to use false evidence."[228] Therefore, Whiteside was not forced "into an impermissible choice between his right to counsel and his right to testify as he proposed for there was no permissible choice to testify falsely."[229] The Supreme Court wisely illuminated the lawyer's role in this situation. Lawyers confronted with similar problems can look to *Nix*, and Robinson, for guidance.

Given Robinson's clear understanding of the central conceptions constituting law practice, his solution was actually quite straightforward. Perjury is simply impermissible. In actuality, there was no "conflict" between autonomy and the other foundations. Rather, properly understood, au-

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224. *See supra* text accompanying notes 140-42.

225. *Nix*, 475 U.S. at 161.

226. Nix v. Whiteside, 475 U.S. 157, 163 (1986). The United States Court of Appeals for the Eighth Circuit believed that Robinson's threat of disclosure of the contemplated perjury "creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation." Whiteside v. Scurr, 744 F.2d 1323, 1329 (8th Cir. 1984). Of course, a client's intention to commit perjury is a well-recognized, though controversial and unsettled exception to confidentiality obligations. *Compare* MODEL CODE DR 7-102(B) *with* MODEL RULES Rule 3.3 (while DR 7-102(B) instructs the attorney to reveal a client's fraud provided the information is not privileged, *Model Rule* 3.3 has no analogous provision). The Eighth Circuit's reasoning is in line with the approach of Professor Freedman. *See supra* notes 198-207 and accompanying text. Professor Freedman, in reliance on the Fifth and Sixth Amendment, would prefer to present the testimony for the jury to decide beyond reasonable doubt.

227. *Nix*, 475 U.S. at 173 (emphasis in original).

228. *Id.*

229. *Id.*

tonomy was bounded by these countervailing social and moral norms. Thus, when Robinson advised Whiteside, he explained his obligations as a moral person and officer of the law. Robinson did not coerce Whiteside not to testify perjuriously. Rather, he explained the law and his obligations as an officer thereof were Whiteside to so testify. In particular, Robinson explained his decision on what he would do if Whiteside testified perjuriously. So informed, Whiteside decided not to testify that he saw a gun. Like Robinson, he made his own decision. Both Robinson and Whiteside were independent moral agents faced with important decisions, the proper stance in lawyer-client relationships. Each was responsible for their decision. Although each may not have been satisfied fully with the other's decision, each came to respect the other's boundary.

Of course, if Whiteside had insisted upon testifying perjuriously, or if he had actually so testified, *Nix* would have been a far more complicated case. While it is universally agreed that a lawyer's first duty is to attempt to dissuade a client from committing perjury, not all lawyers are as successful as Robinson. In situations of anticipated or actual perjury, the next step is far from clear. The conflict between a client's constitutional rights and a lawyer's ethical duties is pronounced. That, however, is another topic, beyond the scope of this article.[230]

From the broader standpoint of legal ethics, a similarly clear conception of the professional role can yield like easy solutions. For example, the integrated approach can readily solve cases like intentions to bribe or threaten witnesses or jurors, mentioned by the Court,[231] or using perjurious witnesses, appropriating money from or overbilling clients, deceiving, or not informing them, or acting dishonestly, among many other cases not mentioned by the Court. Most central and clear problems of legal ethics are readily resolvable given a clear understanding of the conceptions constituting the professional role. In this way, the inner core of legal ethics is obvious, mapping out a clear area in which lawyers should dwell.

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230. *See* FREEDMAN, *supra* note 3, at 129-41; Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521 (1988). Indeed, issues still left unanswered by *Nix* are: (1) "what standard of knowing must a lawyer meet before acting on the conclusion that the client's testimony will be perjurious;" (2) "what should a lawyer do in a case of actual or anticipated perjury;" and (3) "whether the fifth amendment privilege against self-incrimination is implicated when a lawyer divulges or threatens to divulge incriminating lawyer-client confidences to the court." Freedman, *Client Confidences*, *supra* note 198, at 1939-40. On the other hand, the importance of *Nix* is in illuminating what a lawyer can do consistent with the Constitution and ethical standards when a client reasonably indicates that he intends to commit perjury. In short, *Nix* illustrates how a sound choice can be made by a good person.

231. Nix v. Whiteside, 475 U.S. 157, 174 (1986).

B. MORAL DILEMMAS: *SPAULDING V. ZIMMERMAN*

1. Statement of the case

Spaulding v. Zimmerman[232] presents the reverse of *Nix*: a problematic situation of acute moral complexity which few of us would desire to encounter. David Spaulding sustained serious injuries in an automobile accident.[233] He was a passenger in a car driven by John Zimmerman, the defendant in the case.[234] After the accident, his injuries were diagnosed by his family doctor "as a severe crushing injury of the chest with multiple rib fractures; a severe cerebral concussion, probably with petechial hemorrhages of the brain; and bilateral fractures of the clavicles."[235] X-rays revealed that "the heart and aorta [were] normal"[236] A neurological examination also disclosed no aortic aneurysm.[237]

In the meantime, at defendant Zimmerman's request, Spaulding was examined by another neurologist, Dr. Hannah. In his report to Zimmerman's attorney, Dr. Hannah stated:

> The one feature of the case which bothers me more than any other part of the case is the fact that this boy of 20 years of age has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Whether this came out of this accident I cannot say with any degree of certainty and I have discussed it with the Roentgenologist and a couple of Internists . . . . Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm may dilate further and it might rupture with further dilatation and this would cause his death. It would be interesting also to know whether the X-ray of his lungs, taken immediately following the accident, shows this dilatation or not. If it was not present immediately following the accident and is now present, then we could be sure that it came out of the accident.[238]

When the trial began, the parties possessed only such information concerning Spaulding's physical condition as each respective's medical examiner had reported.[239]

> It is thus apparent that neither David nor his father, the nominal plaintiff in the prior action, was then aware that David was suffering the aorta

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232. 116 N.W.2d 704 (Minn. 1962)
233. *Id.* at 706.
234. *Id.*
235. *Id.* at 707.
236. *Id.*
237. Spaulding v. Zimmerman, 116 N.W.2d 704, 707 (Minn. 1962).
238. *Id.*
239. *Id.* at 708.

> aneurysm but on the contrary believed that he was recovering from the injuries sustained in the accident.[240]

The next day settlement was reached on this information.[241]

Two years later Spaulding had a physical exam, as required by the army reserve, of which he was a member.[242] This time the family physician discovered the aorta aneurysm.[243]

> He then reexamined the X rays which had been taken shortly after the accident and at this time discovered that they disclosed the beginning of the process which produced the aneurysm. He promptly sent David to Dr. Jerome Grismer for an examination and opinion. The latter confirmed the finding of the aorta aneurysm and recommended immediate surgery therefor. This was performed by him at Mount Sinai Hospital in Minneapolis on March 10, [244]

Spaulding then instituted a suit to vacate the prior settlement, requesting additional damages "due to the more serious injuries including the aorta aneurysm" allegedly resulting from the accident.[245] This suit was successful, resulting in the original settlement being set aside.[246]

The focus of the present analysis is on the conduct of defendant Zimmerman's lawyers[247] who possessed the knowledge of Spaulding's life-threatening condition but nevertheless concealed it at the time of the original settlement.[248] The question is whether this is how a good attorney should act. Would an integrated approach to legal ethics make a difference? Prior to answering these questions, let us explicate the ideas implicated in *Spaulding*.

2. Autonomy

The autonomy ideas implicated in *Spaulding* are representative of most civil cases. Zimmerman's attorneys were zealous advocates for his case, loyally promoting his interests. They acted competently, diligently, discretely, trustworthily, and, according to the court, in "good faith," although many might question this.[249]

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240. *Id.*
241. *Id.*
242. Spaulding v. Zimmerman, 116 N.W.2d 704, 708 (Minn. 1962).
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 709.
247. The attorneys for defendant John Zimmerman were Messrs. Field, Arveson & Donoho. Spaulding v. Zimmerman, 116 N.W.2d 704, 707 (Minn. 1962).
248. *Id.* at 709.
249. *Id.* at 709. The attorneys' conduct in withholding disclosure of Spaulding's medical condition

Assuming they were competent attorneys, they would have discussed Spaulding's medical condition with Zimmerman. They would have pointed out the implications of the medical findings for Zimmerman's case and awaited his direction as to what to do. It is essential that lawyers bring out all information relevant to a case and that they explore the goals to be accomplished with their clients. Only then can clients comment wisely about the case, offer their perspective, and make an informed decision about what to do.[250] In these ways, they would properly have respected and promoted their client's autonomy.

Apparently Zimmerman did not authorize his attorneys to disclose Spaulding's medical condition.[251] Not authorized by their client, the attorneys respected the confidence and chose to promote Zimmerman's interests to the fullest. In this way, the solution reached was a straightforward application of the "autonomy" model of legal ethics.[252]

3. Community

Character is the key value traceable to community, and it plays a multi-faceted role in *Spaulding*. On the one hand, the integrity of the attorneys' own character was at issue, tested by the conflicting interests of their client and Spaulding's well-being. On the other hand, the soundness of their professional character was also at issue in remaining loyal to Zimmerman.[253] Additionally, character has implications beyond this focus on self. How these lawyers acted had influence on others — other members of the legal community and members of society. Did these attorneys promote autonomy to the benefit or detriment of community? How they advised Zimmerman to exercise his rights, and how he did so, ultimately gave expression to the content of community.

A second fundamental concept in this analysis centers on the lawyer's obligation as an officer of the court. Ironically, no positive duty mandated action to save Spaulding's life. Indeed, concealment of this information was apparently permissible when the proceedings were adversary in nature. The court found the situation more troublesome when the parties submitted

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certainly tests the limits of duties of candor toward the court and fairness to opposing party and counsel. *See* MODEL RULES Rule 3.3; MODEL RULES Rule 3.4.

250. Pizzimenti, *supra* note 30, at 466, 488.

251. The case does not discuss the contents of the discussion among Zimmerman and his lawyers. *See Spaulding*, 116 N.W.2d 704.

252. *See supra* note 31 and accompanying text.

253. A lawyer's loyalty obligation to her client is a moral obligation of great significance. McChrystal, *supra* note 36. "However, the moral weight of the lawyer's obligation to clients can be overcome only by weightier moral concerns." *Id.* at 413. An imminent threat to life, as in *Spaulding*, is reasonably such a weightier moral concern.

their settlement to the court, however:

> [W]hen the adversary nature of the negotiations concluded in a settlement, [and] the procedure took on the posture of a joint application to the Court, . . . the true nature of the concealment appear[ed], and defendants' failure to act affirmatively . . . [constituted] less than full performance of an officer of the Court's duty to make full disclosure to the Court when applying for approval in minor settlement proceedings.[254]

The court based its ruling more on Spaulding's minority than his condition, revealing its prioritization of autonomy over morality when put to the acid test. The court thereby reflected the dominant autonomy ethos of legal ethics.

4. Morality

Spaulding presents compelling and problematic moral concerns. There is, of course, important moral value in preservation of confidentially and fidelity to one's client, which Zimmerman's attorneys faithfully upheld. Juxtaposed against these are the provocative moral questions concerning duties to court and conscience. As to court, a key question is whether the lawyers' concealment of Spaulding's medical condition was misrepresentation, an act inconsistent with obligations as an officer of the court.

As to conscience, Zimmerman's lawyers were tested by the knowledge of the immediate harm threatening but unknown to Spaulding. Ethically, this calls for a moral appraisal — of judging oneself impartially so that the judgment reached will withstand scrutiny so as to serve as a standard of conduct others would accept were the situation reversed. In this light, the attorneys would have difficulty justifying their conduct.

5. Solution

When applying these conceptions to *Spaulding*, the central focus is solving the problematic dilemmas that can arise in practice. These are difficult, borderline cases which test the limits of the legal community's reasoning, character, and judgment.

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254. Spaulding v. Zimmerman, 116 N.W.2d at 704, 709 (Minn. 1962). The court apparently believed that the negligence of Spaulding's lawyer and doctor in not discovering his medical condition, or not obtaining this information from Zimmerman, which they could have had they made the right motions or inquiries, excused the silence of Zimmerman's attorneys. In so reasoning, the court also apparently concluded that Zimmerman's lawyers did not run afoul of the professional responsibility standards then in effect concerning zealousness in furthering a client's cause and obligations of candor and fairness. *Id.* at 709-10. *See also* CANONS OF PROFESSIONAL ETHICS Canons 15 & 22 (1908). Today, such conduct might not be treated with impunity. *See* MODEL RULES Rule 3.3; MODEL RULES Rule 3.4.

Prior to evaluating *Spaulding* from an integrated perspective, it is worth reviewing the contrasting approach of Zimmerman's lawyers, which was a straightforward application of the "autonomy" model of legal ethics. In this view, they saw their role mainly as promoting the interests of Zimmerman to help him achieve his due in this matter, even to the exclusion of competing duties to court or conscience.

Of course, no canon of ethics or legal obligation required them to inform the other side of Spaulding's condition at the time of settlement, although the law and their obligations arguably changed when they sought the court's approval.[255] Possibly they acted on the assumption that the aneurism was not presently life threatening. In this way, the lawyers could maximize Zimmerman's interests in achieving a desirable settlement without regard to consequences while still acting, technically, within the bounds of the law.[256]

Nevertheless, even assuming their conduct was within the law, they undervalued competing concerns of court, conscience, and duty to Spaulding in relation to Zimmerman's interests in a way that seems troubling and distorted. In part, this is attributable to their confining solution of the case to the one foundation of autonomy. Analyzed solely from the perspective of autonomy, duties to court, conscience, or a third party would seem less compelling than promotion of Zimmerman's interests. The moral world of attorneys is thereby made simpler and less ambiguous than the moral world of ordinary life.[257] In this way, the professional role seemingly insulates lawyers from duties to society or conscience.[258]

Application of an integrated approach to professional responsibility yields strikingly different solutions to difficult, problematic cases like *Spaulding*. Rather than relying exclusively on any single foundation, a good lawyer should solve problems by drawing upon all foundations, applying them in the right proportion through careful, judicious practical reasoning. The intent here is not to undervalue autonomy. Rather, this approach treats

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255. *See supra* note 254 and accompanying text.

256. This is an example of the "morally pernicious effect" of a certain legal realism where lawyers intent upon realizing their clients' total autonomy

> view law as a malleable commodity to be used, bent, or manipulated as needed to achieve client goals. . . . All of this occurs within the bounds of the law, to be sure, but only by redefining and stretching the limits of the law to accommodate client autonomy interests, thus redefining society itself in the process. This process operates to transform or redefine the terms and meaning of law so that law can take on concrete value in promoting autonomy interests.

Eberle, *Moral Responsibility, supra* note 5, at 10.

257. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 2, 8 (1975).

258. *See* Eberle, *Moral Responsibility, supra* note 5, at 3-4, 10-12.

autonomy as a source of ideas from which to solve problems, along with the other foundations of community and morality.

In the context of the case, the autonomy ideas mainly relate to promotion of Zimmerman's interests in limiting the amount of his damages. His primary interest is thus financial. Juxtaposed against Zimmerman's financial interest are compelling community and moral ideas.

The community ideas are related to the lawyers' integrity of character as officers of the court in concealing the vital information concerning Spaulding's medical condition. This concealment cannot reasonably be considered fair play — to either the court or Spaulding. Positive obligations to the court mandate a higher level of conduct, one more faithful to the law and its institutions, than failing to disclose a material fact when disclosure is necessary to avoid perpetrating what seems, in the context, a misrepresentation.[259] So acting with impunity only encourages others to follow that course. Ultimately, such conduct will undermine the administration of justice, and, as a result, people's faith in it.

Even more compelling is the moral duty to act to save Spaulding from his peril. The potential harm to Spaulding is disproportionately high in relation to Zimmerman's financial interest. Nevertheless, while the value of life at issue is paramount, it is not the only reason to act. Important countervailing norms like preservation of confidentiality in attorney-client relations, loyalty to clients in zealously promoting their interests, discreetness, and good judgment are also relevant. These norms obligate the attorneys not to disclose Spaulding's medical condition without careful consideration, or to do so in a manner that unduly harms Zimmerman's case.

All of this leads again to the community foundation. Resolution of the *Spaulding* dilemma calls for good character and sound judgment. Persons of good character are likely to pick out the right reason to act, and so act, founding conduct on principled justification. Here good persons would recognize an obligation to act in some manner to save Spaulding's life.

Of course, a professionally responsible attorney must also address the concerns of his client. Especially relevant here is the attorney's role in ministering to his client's needs, addressing them as human beings, not just as right-holders. From this broader human perspective, it would be professionally irresponsible for the lawyers not to discuss Spaulding's medical condition with Zimmerman, and its connection to him. This discussion would, of course, include the impact of Spaulding's condition on Zimmerman's exercise of rights. But it would also include Zimmerman's sense of obligation to Spaulding.

It is hard to imagine how anyone in Zimmerman's situation would opt to

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259. *See* MODEL RULES Rule 3.3(a)(2).

minimize financial exposure at the cost of Spaulding's life after such a full discussion of relevant considerations. If one did as Zimmerman, it speaks tellingly about the content of character. In this light, Zimmerman's conduct is an example of radical individualism, an egoistic pursuit of self-interested ends without regard to consequences.[260] Such conduct undermines community.

Under the integrated approach, the focus would shift to how Zimmerman ought to exercise his rights. His lawyers would play a vital role here in advising how autonomy might properly be exercised consonant with community and morality. So viewed, it is not inexorable that Zimmerman exercise his rights so as to maximize his interests without regard to consequences. Upon deeper consideration of the values and interests at issue, he could as well exercise his rights, or withhold such exercise, in a manner to aid Spaulding.

This points to the proper solution of *Spaulding*, one that lies in the broader framework of legal ethics, employing all foundations. Turning first to moral considerations, one should subject contemplated conduct to impartial scrutiny, considering oneself as both agent and object of action. To be credible, actions must withstand objective scrutiny so that they would provide a principled justification for a standard of conduct others would likewise feel obligated to follow.

Applying these standards to *Spaulding*, the only two choices are concealment of the information with the belief that this will promote the interests of Zimmerman or revelation of the information, in some way, to act to save Spaulding's life, even if Zimmerman's rights are limited. Under any moral theory, life would predominate over financial interests. Most of us would have serious difficulty prioritizing money over life.[261] Indeed, were the situation reversed, Zimmerman and his lawyers would not want their lives valued so lightly. From an ethical standpoint, therefore, the only sensible solution is that the imminent threat to Spaulding's life is a higher priority compared to Zimmerman's interest in minimizing his financial exposure. Accordingly, most people would sense a moral obligation to disclose the information concerning Spaulding if that was the only way the harm could be prevented.[262] Good lawyers would thus ordinarily also act to save Spaulding's life, even if Zimmerman's rights were thereby limited. In this way, morality constrains, and directs, autonomy.

Whatever Zimmerman's lawyers do out of concern for Spaulding's well-being must, of course, be done in a professionally responsible manner consistent with their obligation of loyalty to Zimmerman. The above

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260. *See supra* notes 80-81 and accompanying text.

261. *See* Eberle, *Moral Responsibility*, *supra* note 5, at 24-26.

262. *See id.* at 27-28.

analysis demonstrates only that this one confidence should be disclosed, not that the lawyers are abandoning Zimmerman. In fact, the lawyers are confronting a loyalty trilemma among their duties to client, society, and conscience.[263] Prudence and good sense is required to resolve this quandary in a way that minimizes any damage to Zimmerman's case. No solution here is easy.

In this situation, a common solution advocated to protect someone like Spaulding, and yet skirt the prohibition against revelation of confidences, is to place an anonymous telephone call or otherwise unobtrusively channel one's adversary in the right direction so that the information may be "discovered." Perhaps some other way could be found to prompt Spaulding's doctor so he might discover the aneurysm on his own. Maybe the two physicians could discuss the case confidentially, so that Spaulding could learn the findings and Zimmerman's interests could be safeguarded.[264]

The fact that attorneys must resort to such solutions points out certain deficiencies in the current *Model Rule* on confidentiality. Under this rule, in the absence of client consent, a lawyer may disclose confidential information only when he reasonably believes it necessary to prevent the client from committing a criminal act that is likely to result in imminent death or substantial bodily harm.[265] Since Spaulding's condition did not arise from any criminal act by Zimmerman, the lawyers would not be able to reveal the information under *Model Rule* 1.6. The standard likewise prohibits disclosure in other compelling circumstance, like a client's disclosure that someone else is about to commit a crime likely to result in death or serious physical harm, or when a lawyer learns in the course of the attorney-client relationship that an innocent person is on death row.[266] Reworking of the confidentiality rule therefore seems necessary. While that topic is beyond the scope of this article, such revision should include, at a minimum, Professor Freedman's proposal for lawyers to disclose "when there is a reasonable likelihood that death will occur unless the lawyer reveals the information."[267] Life is certainly a higher priority than a promise of confidentiality.

An alternative solution, consistent with *Model Rule* 1.6, that might also

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263. For a full discussion of how to resolve such quandaries, *see* Eberle, *Moral Responsibility, supra* note 5, at 21-37.

264. In discussing *Spaulding*, Professor Morgan also proposes that "a lawyer should try to find a way to permit a doctor to disclose the findings to the plaintiff." Morgan, *Thinking, supra* note 141, at 454. One solution would be "to negotiate a 'use immunity' for the information. The lawyer would make the disclosure after a negotiated agreement that it would not be admissible at trial." *Id.* In short, imaginative ways need to be found to save Spaulding from his peril while protecting Zimmerman's interests as far as possible.

265. MODEL RULES Rule 1.6.

266. FREEDMAN, *supra* note 3, at 103-04.

267. *Id.* at 104.

provide the basis for a broader accommodation of the interests at issue would be for Zimmerman or, at his direction, his lawyers, to disclose the threat to Spaulding. This would certainly be an act of benevolence, generosity, and compassion. It would also be an act of good sense and fair play. While this might involve some sacrifice on Zimmerman's part, there might be benefits as well. For example, in response, Spaulding might not exercise his rights to extract the maximum penalty from Zimmerman out of genuine appreciation for Zimmerman's brave act in limitation of his self-interest. In short, the reward for Zimmerman's deliberate withholding exercise of rights might be a reciprocal withholding by Spaulding. A settlement might thus be reached that is fair and sensible. In this way, rights would have saving graces.

Beyond *Spaulding*, other problematic situations can be solved satisfactorily in this manner. Appropriate cases for this approach include the OPM Leasing scandal, where lawyers failed to disclose a fraudulent business scheme that resulted in approximately $30 million in damages;[268] the 1980s savings and loan debacle, where bankers, with counsels' assistance, defrauded their depositors;[269] the Ford Pinto case, where company officials calculated the cost of safety improvements to the car in relation to lives anticipated to be lost;[270] the Buried Body case, where lawyers kept the confidence of their client and therefore refused to disclose the whereabouts of their client's dead victims despite entreaties from parents of a victim;[271] a lawyer's revelation of his client's confidence in order to prevent the client's suicide;[272] and the *Tarasoff* situation, where the failure to disclose a confidential communication made by a mental patient to his physicians resulted in the death of the intended victim;[273] and its progeny.[274] In this way, some of the outer bounds of professional responsibility are illuminated, providing direction to lawyers searching for the area within which they ought to dwell.

CONCLUSION

Legal ethics needs to move beyond conceptualization along any single foundation. A crucial first step is harmonization of the underlying ethical

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268. *In re* OPM Leasing Services, Inc., Report of the Trustee Concerning Fraud and Other Misconduct in the Management of the Affairs of the Debtor.

269. *See, e.g.*, Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901 (D.D.C. 1990).

270. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981).

271. People v. Belge, 372 N.Y.S.2d 798 (N.Y. Crim. Ct. 1975).

272. People v. Fentress, 425 N.Y.S.2d 485 (N.Y. Crim. Ct. 1980).

273. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (en banc).

274. Hawkins v. King County, 602 P.2d 361 (Wash. Ct. App. 1979) (discussing a lawyer's duty of loyalty to client overrides disclosure of information of client's mental state, which made him dangerous to himself and others); *see supra* notes 145-51 and accompanying text.

bases to the discipline. By crystallizing the central conceptions of the profession, a certain structure, conceptual coherence, and stability is achieved, establishing a reliable framework to apply to the demands of concrete cases. This also imbues the profession with a central ethical core, illuminating the area within which lawyers ought to dwell.

Application of an integrated approach to ethics is preferable to its foundationalist alternatives. First, lawyers can draw upon a fuller set of ideas relevant to concrete cases rather than confining solutions to any one foundation. Second, the approach facilitates participation of the full person of lawyers and clients in structuring advice and ethical guidance as compared to the bareness of the conventional professional relationship. Third, attention can then shift to lawyers' (and clients') development of good character and application of careful, imaginative, practical reasoning and prudential judgment to concrete problems. In these ways, reliable and sensible solutions to professional responsibility problems are more likely to be achieved. So shifting the direction of work in legal ethics may prove indispensable to ameliorating society's ongoing disenchantment with the ethics of the American legal community.