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THE ETHICS OF CLIENT SELECTION: A MORAL JUSTIFICATION FOR REPRESENTING UNPOPULAR CLIENTS

TCHIA (TIA) SHACHAR*

INTRODUCTION

Lawyers fulfill a unique and indispensable role in a democratic society. Albeit the obvious consensus in this matter, lawyers who take on the task of representing unpopular or unorthodox clients and causes are frequently the subject of heated debates and controversies. At one end of the spectrum, are those who vigorously assert that representing the 'man-in-trouble' at his worst time is the highlight of the legal profession, and its source of pride. On the other end, are those who preach for moral accountability and vigorously maintain that there is nothing noble in dedicating one's knowledge, skills and scarce resources for the sake of helping reprehensible people or advancing harmful or immoral goals.

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1 The concept of 'unpopular' or 'unorthodox' client cannot be exhaustively defined, since it is an amorphous amalgam of individual as well as collective cultural values. For the purposes of this essay, this concept will be roughly defined as to include all cases which attract negative public reaction (in contrast to public sympathy or indifference) either due to the client's deeds or ideology. See Charles W. Wolfram, A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 214, 225-226 (David J. Luban ed., 1983).

2 For a comprehensive introduction of the moral debate regarding client selection see, e.g., Monroe H. Freedman, Must You Be the Devil's Advocate?
Such debates and controversies usually produce a destructive “chilling effect” on the availability of counsel. Unpopular or unorthodox clients, which are often already situated at the oppressed and neglected margins of society, are thus prone to experience much greater difficulties in implementing the constitutional right to representation and finding a lawyer who will agree to represent them.

Notwithstanding the core principle of democracy, which provides that every person has an equal opportunity to competent representation, most lawyers, at some point in their careers, find themselves being forced to publicly justify their decision to represent certain clients. Common examples include the criminal-defense lawyer, who so (too) often confronts the question how can he sleep at night after representing notorious criminals – murderers, rapists, child molesters and the like; the civil-case attorney, who often confronts the question how can he look himself in the mirror after zealously representing evil-doers who use the law in order to advance goals which harm society; or the civil-rights attorney, who frequently confronts the question how can he silence his conscience after enlisting to his aid the Constitution or other fundamental norms so as to promote morally wrong causes and ideologies while society is overwhelmed with “real” and pressing injustices.


3 The cold war period provides us a striking example to that effect. Lawyers who agreed to represent suspected communists were vigorously persecuted by both the general public and the American Bar Association. The subsequent reluctance of most lawyers to represent such clients was, thus, an inevitable result. See: JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 231-262 (1977).
From a philosophical point of view, criticism or praise of those lawyers who undertake the task of representing unpopular clients or causes stems from the unique nature of the lawyer-client relationship. At the core of a lawyer's role lies the action of representation. In essence, this means that a lawyer's consent to represent a certain individual supposedly obligates the lawyer to enter the client's shoes, adopt the client's problem as if it was his own; and from that inside and intimate stance, do his best in order to provide an optimal solution for the client, within the boundaries of law and ethics.

Hence, the conception of the lawyer's role differs from the conception of the roles society assigns to all other professionals. For example, a physician neither enters his patient's shoes at any stage of the treatment, nor takes upon himself the patient's illness as if it was his own; and it is from that outside and remote stance that he aspires to implement his medical skills to aid the patient. A lawyer, unlike a physician or other professionals, has a distinct and unique role in a way that only he "becomes one" with the client, as a direct result of the action of representation. Hence, it is the lawyer – and not the physician or any other professional – who is prone to attract public attention due to decisions regarding the choice of clients.

The unique nature of the lawyer-client relationship raises the question whether the action of representation, which distinguishes the lawyer's role from the roles of all other professionals, necessarily creates an unbreakable correlation between the personal morality of the lawyer, and the moral identity of the individuals or causes he chooses to represent. Presented in another way, the question is whether a good lawyer, who zealously

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4 Id. See also David Luban, Reason and Passion in Legal Ethics, 51 STAN. L. REV. 873 (1999).
adheres to the ethical standards of professional responsibility regarding representation of unpopular clients or causes, can also be a good person, worthy of respect and approbation. Essentially, at the center of our inquiry stands the age-old universal controversy, regarding the nature of the moral clash between the norms of professional morality ('role morality') on the one hand, and the norms of personal and common morality, on the other hand.

This article will present the three prominent moral theories, which aspire to provide a solution to the controversy. Though profound and ingenious theories, I shall argue that they are nonetheless incapable of providing an adequate solution, because they all possess two identical logical impediments. The first impediment results from the theories’ aspiration to produce an ultimate analytical explanation, regarding the moral essence of the lawyer as a role agent within the legal system; however, producing such a unified explanation in pluralist-democratic societies is neither possible nor desired, in light of the highly complex nature of the action of representation. Secondly, in a futile effort to decode the ultimate moral essence of lawyering, all theories destroy – either deliberately or inadvertently – the essential analytical dichotomy between the lawyer’s professional and private spheres of life; thus, they all eventually rely on such an-

6 The phrase “role agent” refers to the function assigned to the lawyer within the legal system, by virtue of his professional occupation. See e.g., DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 138 (1988). The moral essence of the lawyer as a role agent stands at the heart of this essay, and will be discussed in length hereinafter.

7 Though it would be noted that each theory is not designed to stand in and of itself, but rather has to be fitted into a larger moral theory of professional conduct. A larger theory would determine the precise relations between the lawyer’s professional, private and communal spheres of life. But the focus of the present inquiry is only of theories regarding the essence of the action of representation and the manner they ought to reflect on the larger theory.

8 It shall be noted that the notion of a dichotomy between the lawyer’s professional and private spheres of life may be opposed on grounds of the freedom to choose between prospective clients. Those who oppose the said dichotomy may argue that the freedom given to the lawyer, to pick and
alytical frameworks which de-facto prevent a real possibility to create a clear-cut dichotomy between the lawyer as a professional and the lawyer as a private person.

As I shall argue, due to these interconnected impediments, none of the available moral theories has ever been able to capture the public's heart or gain extensive support within the legal community. This has resulted in a dangerously growing trend to avoid an informed and tolerant debate regarding the moral essence of lawyering, and instead place judgment on lawyers (either favorably or unfavorably) on the basis of haphazard impulses and demagogic assertions.

Against this background, the purpose of this essay is not to offer yet another distinctive theory regarding the moral essence of the lawyer's role, but rather to develop a consensual macro theory; one that acknowledges diversity but nevertheless provides a preliminary neutral, pragmatic and coherent analytical infrastructure upon which each individual can build his own ideological sub-theory in a thoughtful, calculated, and tolerant manner. Since the common denominator of all available theories is the presupposition of the lawyer as an agent whose function is to enhance the client's autonomy, Part III of this essay

choose his clients, inevitably reflects on his private morals and assigns moral responsibility to the societal outcomes of the representation. See, e.g., Freedman, Must You Be the Devil's Advocate?, supra note 2, at 632; Note, The New Public Interest Lawyer, 79 Yale L.J. 1069, 1120, 1144 (1970).

As I shall argue in the following chapters, this essay upholds the notion of a dichotomy between the lawyer's professional and private spheres of life. It contends that the choice of clients ought to be perceived as a morally-neutral professional decision which cannot reflect on the lawyer's private morals. The lawyer, as a professional, does not (and cannot) represent the client's deeds or beliefs; he only represents the client's rights and liberties under the law. Hence, the choice of clients may symbolize nothing more than the lawyer's commitment to ensure access to legal services to all the people in need, regardless of the nature of their personality or individual characteristics and causes. See, e.g., Fortas, supra note 2, at 1002; Michael E. Tigar, Setting the Record Straight on the Defense of John Demjanjuk, LEGAL TIMES, (September 6, 1993) in Nathan M. Crystal, PROFESSIONAL RESPONSIBILITY – PROBLEMS OF PRACTICE AND THE PROFESSION 634, 636-637 (1996).
asserts that the focal point of such a consensual macro theory should be the conception of the lawyer as a mere representative of the client's rights and liberties under the law, rather than of the client as a person – that is, the conception that although the action of representation essentially compels the lawyer to "become one" with the client, it is in fact not unification with the client as a person, but rather with the client's rights and liberties under the law. Only such publically accepted macro theory, which does not aspire to impose a singular explanation for performing the action of representation, and has an analytical framework that explicitly supports a dichotomy between professional morality and personal and common morality, can provide adequate solution to many of the ethical dilemmas that occupy the profession nowadays; prominent of which is the problem of uninformed criticism and vilification of lawyers who carry out the complex task of representing unpopular clients or causes.

II. PROMINENT THEORIES OF LEGAL ETHICS REGARDING THE ESSENCE OF THE ACTION OF REPRESENTATION

A. Advocacy in an Adversary System

The philosophical premise of the adversarial theory of representation is both client-centered and process-oriented.9 The lawyer is perceived as an agent whose function is to keenly maximize the client's autonomy under the law and consequently, guarantee the revelation of legal truth. To the extent the roles of both parties to the conflict – through their lawyers –

are not fully played, the court's ability to reveal the truth respectively decreases.\textsuperscript{10}

In order to fully play out this role, a lawyer must exhibit a categorical readiness to act on an absolute moral belief that his role mandates keen partisanship and an unconditional commitment to an aggressive and zealous pursuit of the client's objectives, within the boundaries of law and ethics.\textsuperscript{11} It is based on this analytical presupposition that the lawyer is exempt from moral responsibility for the societal consequences of his professional activities.\textsuperscript{12}

The adversarial theory of representation promotes the notion of equal and skilled representation across the board and assigns special importance to the representation of those who are unpopular and indigent. It urges lawyers to not lightly seek to decline representation of unpopular clients; and once the lawyer-client relationship has been contracted, to vigorously (but in a legal and ethical manner) pursue the client's objectives with no regard to personal or communal moral values. Despite the adversarial theory's decisive ideological narrative, it ultimately fails to create a moral dichotomy between the lawyer as a professional and the lawyer as a private person. Its practical failure is evident in everyday life, as illustrated when lawyers representing unpopular clients or causes are often subjected to harsh criticism, even by the most ardent adherents to the adversarial model, who perceive the moral distinction between actor and principal as artificial and unreal.\textsuperscript{13} This perception greatly hin-

\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} See, for example, Professor Monroe Freedman's position regarding the moral accountability entailed in the clients selection process: Freedman, \textit{Must You Be the Devil's Advocate?}, supra note 2; Monroe H. Freedman, \textit{The Morality of Lawyering}, \textit{Legal Times} (September 20, 1993) in Nathan M. Crystal, \textit{– Problems of Practice and the Profession} 637 (1996). Professor Freedman, as noted, is a strong proponent of the adversarial model. \textit{See supra} note 9.
ders the *de-facto* implementation of the notion of equal representation for all. In certain countries which generally adhere to the adversarial theory of representation, such as the State of Israel, the rules of legal ethics simply award lawyers with full normative discretion to choose between prospective clients with no instructional guidance whatsoever as to its proper implementation.\(^{14}\) In contrast, other countries possess more comprehensive codes of conduct, which do take great pains (at least in the narrative aspect) in order to emphasize the special importance of representing unpopular clients and causes as a means of ensuring equal access to legal services. In the United States, for example, the ABA Model Rules of Professional Conduct as well as the ABA Model Code of Professional Responsibility state that while the lawyer is ordinarily at liberty to choose between prospective clients, he is nonetheless expected to exercise thoughtful discretion and not lightly decline proffered employment from unpopular people who are prone to experience significant difficulties in attaining competent representation.\(^{15}\) Similarly, in England the Solicitors Code of Conduct (2007) granted solicitors the liberty to choose clients but nonetheless stated that it is impermissible to decline proffered employment on the grounds that the nature of the case or the conduct and beliefs of the prospective clients are unacceptable to the solicitor or to any section of the public. However, the 2011 revised Code of Conduct has adopted an “outcomes-focused” approach which stripped out a lot of the detail of the previous Code. The new Code now grants solicitors the liberty to choose their clients with no significant instructional guidance.\(^{16}\) The Barristers’

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\(^{14}\) See *Regulations of the Israel Bar Association (Professional Ethics)* art. 12 (1986).

\(^{15}\) See *Model Rules of Prof’l Conduct* R. 1.2 (2012), cmt. 5; and R. 6.2 cmt.1; *Model Code of Professional Responsibility* EC 2-26 – EC 2-29 (1980).

\(^{16}\) Solicitors Regulation Authority Code of Conduct, Rules 2.01(1) and 11.04(1) (2007); *Solicitors Regulation Authority Code of Conduct*, ch. 1, *Solicitors Regulation Authority Handbook* (2011), available at www.sra.org.uk/solicitors/handbook/pdfcentre.page. For a detailed descrip-
Code of Conduct is significantly more extreme in that regard, since it actually imposes obligation on Barristers to represent all comers.\footnote{See Code of Conduct of the Bar of England and Wales, rules 601-602 (2004), available at: www.barstandardsboard.org.uk/standardsandguidance/codeofconduct; see also infra notes 21-23.}

At the end of the day, the inconsistent implementation of the adversarial theory of representation leads us to the inevitable conclusion that it ultimately fails to create a viable and realistic moral dichotomy between the lawyer as a professional and the lawyer as a private person. This failure stems from an \textit{analytical inconsistency}, which involves two of the underlying arguments of the theory: the argument in favor of moral nonaccountability\footnote{The principle of "moral nonaccountability" relieves the lawyer from responsibility to the negative outcomes that may ensue from his decision to represent an unpopular client or cause. According to this principle, the public has no valid ground to criticize the lawyer or demand that he attempts to justify his choice of clients or causes. This principle has been eloquently described by Professor Murray Schwartz: see Schwartz, supra note 2, at 673-674 ("The advocate might well reply to the 'how-can-you-defend-him' question: I represent him because the system demands that I do so... You may not hold me substantively, professionally, or morally accountable for that behavior... the concept of moral nonaccountability is equivalent to the filing of a demurrer, rather than an answer, to the charge of immorality. In effect, as long as the charge does not allege a violation of the established constraints upon professional behavior, the lawyer is beyond reproof for acting on behalf of the client.").} is supposed to somehow co-exist with the argument that lawyers ought to be free to pick and choose their clients as they please, given the intimacy accorded to the action of legal representation. The latter argument, however, stands in direct logical contradiction to the former, and hence undermines the formation of a compelling dichotomy between the lawyer's professional and private spheres of life.

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Discretion to choose between prospective clients – i.e., to choose with whom to enter into an intimate relationship – inherently expresses personal moral choice, which indicates the values of the choosing lawyer, and thus cannot co-exist with the presumption of moral nonaccountability. A professional who truly perceives himself as an agent, whose function is to maximize client’s autonomy within the adversary system, ought to possess an intrinsic moral obligation to accept every prospective client who is in need for his services, unless objective limitations (time, resources, conflict of interest, etc.) prevent him from doing so. He may not decline one potential client and accept another merely due to personal preferences, since this creates a de-facto hierarchy between people whose rights are more or less important to the lawyer; and thus imposes moral accountability.

Indeed, for this reason some common law countries do impose on lawyers a disciplinary duty of representation, known as the “Cab-Rank Rule”. In England, for example, Barristers are obligated to represent every prospective client in any legal field in which they profess to practice. The duty of representation, however, has a number of broad exceptions which either mandate or allow the Barrister to deny proffered employment for various reasons, such as insufficient time, improper fee, etc. In practice, the “Cab-Rank Rule” has been proven ineffective due to its broad exceptions, which can be used in an excessive and

20 When objective limitations exist, the process of client selection ought to be conducted either chronologically (‘first come, first served’ basis) or strategically (accepting only clients whose cases bring about fundamental issues with a wide potential effect). See Pannick, supra note 19; Madeleine C. Petrara, Dangerous Identification: Confusing Lawyers with Their Clients, 19 J. Legal Prof. 179, 185-190 (1995).
manipulative manner by Barristers who uphold the lawyer's freedom to choose which clients to represent. This, of course, creates in England a de-facto dilemma of moral accountability, which is similar in its essence to the dilemma which de-jure exists in the United States and Israel.23

Both the Model Rules and Model Code also provide a striking example to the above-mentioned analytical failure, when on the one hand they explicitly adopt the conception of moral nonaccountability24 and encourage lawyers to demonstrate professional responsibility by representing unpopular clients or causes;25 but also concurrently acknowledge the fact that lawyers may find the client or the cause so repugnant as to be likely to impair their ability to competently represent the client.26 This normative connection between the professional and private spheres proves once again that even adherence to the adversarial theory of representation cannot realistically result in complete isolation of the intimate action of representation from the private moral spheres of the lawyer.

24 Model Rules of Prof'l Conduct, supra note 15, R. 1.2(b); ABA Model Code of Prof'l Responsibility, supra note 15, EC 7-17.
26 Model Rules of Prof'l Conduct, supra note 15, R. 6.2 cmt. 2 (“For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if . . . representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship.”); ABA Model Code of Prof'l Responsibility, supra note 15, EC 2-30 (“[a] lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client.”).
B. A Lawyer’s "Mind-Set, Heart-Set, Soul-Set"

As one can understand from its name, the philosophical stance of this theory – which was offered by Professor Barbara Allen Babcock – is one of personality. At its core stands the notion that representation of unpopular clients or causes is a task not meant for everybody. Only a special class of lawyers, with a peculiar “mind-set, heart-set, soul-set,” is capable of reaching such a high degree of devotion and selflessness, that enables reconciliation of role with self.27

While a lawyer’s choice to represent popular or normative clients or causes is not morally questionable, his decision to represent unpopular clients is bound to spur a powerful moral clash between professional norms on the one hand, and individual and societal norms on the other hand. It is a moral clash that imposes on the lawyer substantial difficulties in both a professional and personal mode; and thus not everyone is equipped to deal with it. Under this theory, only lawyers whose mind,


heart, and soul are unconditionally and selflessly devoted to the ultimate goal of the legal profession – that is, enhancement of client’s autonomy – are apt to take on the unrewarding task of representing the reprehensible.29

The ‘lawyer’s personality’ theory, like the ‘adversarial theory of representation’, is founded on an analytical framework that impedes the possibility of creating moral dichotomy between the lawyer as a professional and the lawyer as a private person. Its underlying assumption, that the choice of clients testifies on the lawyer’s personality, utterly destroys the possibility of creating moral detachment between the professional and the personal. Endorsement of the conception of the lawyer-client relationship as one, which involves interaction between the sphere of duty and the private spheres of life, inherently suggests an intense involvement of personal moral values in the professional process of client selection. Thus, instead of reinforcing the desired notion of the choice of clients as a moral-

29 Professor Babcock identifies five major reasons that generally motivate lawyers who have been endowed with such a peculiar “mind-set, heart-set, soul set”: (1) the garbage collector’s reason (someone must do the dirty work in order to secure the proper functioning of the legal system); (2) the legalistic or positivist’s reason (neither the lawyer or the judge or jury can know the factual truth; they can only know the legal truth, which is best revealed after the roles of the lawyers from both sides have been fully played); (3) the political activist’s reason (many evil-doers are themselves victims of grave injustices, and therefore there is poetic justice in awarding them adequate representation once they stand on the other side of the barricade); (4) the social worker’s reason (the man-in-trouble, who often belongs to a disadvantaged underclass, perceives the lawyer as a savior who comes to his rescue, and thus displays greater willingness to overcome feelings of anger and alienation towards society); (5) the egotist’s reason (although representing the abhorrent people of society does not produce the most good, it nonetheless proves most challenging and provides the most excitement). It would be noted that these reasons are neither exhaustive nor accumulative or alternative in nature. Rather, they are an eclectic array of possible ideological motivations for representing unpopular clients and causes. Each individual may choose the reason or the amalgam of reasons which best describe his ideological perception. See Babcock, Defending the Guilty, supra note 27, at 177-79; Babcock, The Duty to Defend, supra note 27, at 1518.
neutral decision, the ‘lawyer’s personality’ theory establishes an opposite notion of client selection as an expression of one’s personality. The latter imposes on the lawyer moral and public accountability for his choice of clients, and hence exposes him to public criticism; albeit the fact that the theory’s stated goal is to prevent, or at least mitigate, such criticism.

C. The Lawyer as Friend

Over thirty years ago Professor Charles Fried offered a somewhat subversive, but incisive theory, which equated the moral foundations of the lawyer-client relationship to that of friendship. Professor Fried suggested that the lawyer is to be perceived as a professional who, by virtue of the lawyer-client relationship, fulfills the role of the client’s friend. Professor Fried further explained that this friendship is a limited-purpose friendship, applicable solely to the legal sphere. His theory rests on the premise that the lawyer, as a “legal friend”, enters into a personal relation with the client, adopts his interests as if they were his own, and thus expresses an intense identification with the client’s goals; similar to that of a natural friend.

Professor Fried openly acknowledged the inherent difficulties of his theory, but strongly maintained that the true moral foun-
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The foundations of the lawyer's role lie in the analogy to natural friendship. Hence follows the conclusion that the lawyer has moral liberty to choose his clients - i.e., his friends - as he pleases, and not according to the utilitarian-communitarian approach, which focuses on where the greatest need for his particular legal talent lies. Similarly, follows the conclusion that within the boundaries of law and ethics, the lawyer is morally entitled (though not always obligated) to further the interests of the client even through means which are not consonant with the public interest.

At the core of Professor Fried's theory is the assumption that the lawyer's role is designed to enhance client's autonomy. However, it does so through an analytical framework that not only impedes the possibility of creating moral dichotomy between the lawyer as a professional and the lawyer as a private person, but in fact firmly and explicitly establishes the lawyer-client relationship as one which relies on a personal relation of friendship. Perceiving the action of representation as a form of friendship indicates the existence of an inherent correlation between the moral choices of the lawyer as a professional and his moral choices as a private person. Specifically, it indicates that the choice of clients parallels the choice of friends, and that the choice of means parallels the manner one chooses to treat his friends. The fact that the lawyer-client friendship is limited in scope to the purview of the legal sphere cannot by itself suffice to create a genuine moral detachment between the professional and the personal since all of Professor Fried's moral-operative conclusions with regard to legal friendship are directly and un-

Discussion, which focuses on the ideological macro-framework, rather than on the particular micro-complexities within it.

33 Fried, supra note 30, at 1078.
34 Id. at 1080-1087.
35 Id. at 1077.
36 See also Postema, supra note 5, at 81 (indicating the fact that the impersonalism and moral detachment characteristic of the lawyer's role are not found in relations between friends).
equivocally derived from natural friendship.\textsuperscript{37} The ‘lawyer as friend’ theory firmly reinforces the notion that the lawyer (as a role agent) favors his chosen clients, just like he favors his chosen friends (as a private person). This notion of selective favoring undermines the possibility to establish a viable separation between the lawyer’s professional and private spheres of life.\textsuperscript{38} The failure to establish a genuine analytical moral detachment not only thwarts the theory’s core-purpose of immunizing the lawyer from public scrutiny due to choices of clients and means; but ironically, exposes the lawyer to such scrutiny even more.

### III. THE ESSENCE OF REPRESENTATION: FORMING A CONSENSUAL MACRO CONCEPTION OF THE LAWYER’S ROLE IN SOCIETY

A consensual agreement regarding the exact moral essence of the lawyer’s role in a pluralistic-democratic society can, and perhaps should, never be achieved. In the context of client selection, as well as in various contexts throughout the lawyer-client relationship, the action of representation often spurs a triple-layered moral clash,\textsuperscript{39} which ultimately prevents the formation of such a consensus: the first layer – role morality – comprises of the lawyer’s responsibility toward the client to provide diligent and zealous representation within the bounds of the law; the second layer – personal morality – comprises of the lawyer’s responsibility toward himself, since enhancement of client’s autonomy surely cannot come at the expense of the denial of it to the lawyer; and the third layer – common morality – comprises of the lawyer’s responsibility toward society and the court, since many of the decisions in his professional capacity may well af-

\textsuperscript{37} For a similar criticism, see Postema, \textit{Id.}; Edward A. Dauer & Arthur Allen Leff, \textit{Correspondence - The Lawyer as a Friend}, 86 \textit{Yale L.J.} 573, 576 (1977).

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} For a general discussion of this clash, see Luban, \textit{supra} note 4; see also Wasserstrom, \textit{supra} note 9.
fect collective good, as well as the manner society perceives his designated role as an officer of the court.

Within the framework of this triple-layered clash, the organized bar as well as the individual lawyer are often required to provide feasible solutions to hardly solvable moral dilemmas. Additionally, because the canons of professional responsibility usually provide only minimal guidance, the individual lawyer possesses an overwhelmingly broad discretion to deal with the dilemmas.\(^{40}\) It is not surprising, then, that every legal theory of moral philosophy has aspired to fulfill the normative void by producing the one ultimate analytical explanation of the essence of the lawyer’s role.

Though profound and ingenious, none of these theories has ever gained wide public support because they are perceived as portraying the lawyer-client relationship in implausible concepts. Indeed, all theories share an identical common denominator, which ironically is also their common infirmity: an uncompromised aspiration to form an ultimate conception of the moral essence of the lawyer’s role. However, reaching a consensus as to the morality of the lawyer as a role agent is neither possible nor desired in multi-cultural societies, in light of the exceptional nature of the action of representation, which puts the lawyer in a unique and intimate stance and essentially compels him to “become one” with the chosen client.

\(^{40}\) William H. Simon, *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083, 1131-1133 (1988); Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 *NOTRE DAME J. L. ETHICS & PUB. POL’Y* 75 (2000). In Israel, the problem of minimal ethical guidance is particularly remarkable, since the rules of professional responsibility are not based on a coherent and organized philosophical infrastructure. Hence, the code of professional ethics either completely disregards certain vital issues or regulates them in a flawed manner. For example, in a sharp contrast to the American and English codes, the Israeli code does not even include comments or rules of instructional guidance, but is only comprised of brief disciplinary rules. As a result, the Israeli lawyer is particularly prone to experience great difficulties when faced with the need to thoughtfully handle with complicated ethical dilemmas.
Lawyering, by its nature, often entails making complex moral decisions. While certain professionals may use the ‘lawyer as friend’ theory as a guide, others may adhere to the ‘lawyer's personality’ theory, or the ‘adversarial theory of representation’, or any other moral theory for that matter. One way or another, role agents are first and foremost autonomous and minded human beings, and hence every professional decision they make is subjectively and ideologically motivated. Even an informed resolution to deny all principled theories and base every decision on earthy ad hoc considerations of self-interest (money, publicity, reputation, etc.) is an equally ideological-motivated decision (though generally not highly acclaimed).

It is therefore evident that the prevalent aspiration to form a consensual conception of role morality is objectively impractical. Plurality of opinions shall always exist in the field of legal ethics. How can it not, when accommodation between competing moral values of role, self, and community is so frequently required within the framework of such an intimate relationship?

Nevertheless, the absence of a consensual moral theory of lawyering is not to be construed as leaving the decisions concerning the dilemmas arising from the triple-layered moral clash solely to the realm of haphazard individual discretion. Although the theories vary from one another to a lesser or greater degree,

41 See also Crystal, supra note 40 (arguing that there is no one correct philosophy of lawyering. Therefore, instead of wrongly trying to mandate a choice among different philosophies, the Bar ought to allow lawyers to either adopt an existing philosophy or craft their own methodical philosophy of lawyering).

42 See also W. Bradley Wendel, Value Pluralism in Legal Ethics, 78 WASH. U. L.Q. 113 (2000) (contending that monism in legal ethics analysis is unwarranted and noting the beneficial nature of pluralism); Robert J. Condlin, “What's Love Got to Do With It?” – “It's Not Like They're Your Friends for Christ's Sake”: The Complicated Relationship Between Lawyer and Client, 82 NEB. L. REV. 211, 306 (2003) (arguing that it is difficult, if not impossible, to understand lawyer-client relations, in all of their complexity, within the boundaries of a single, all-encompassing, theory).

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they are all founded on the elementary perception that the function of the lawyer as an agent is to enhance client’s autonomy.

Relying on that basic characteristic, each theory attempts to decode the ultimate moral justification (legal friendship, peculiar personality, adversary advocacy, etc.) for performing that exceptional function. However, as noted above, by doing so it inevitably destroys – either deliberately or inadvertently – the analytical dichotomy between the lawyer’s professional and private spheres of life, and thus critically impairs its ability to provide publically acceptable solutions to the many ethical dilemmas encountered by the lawyer.

The consensus around the fundamental perception that the lawyer is an agent who enhances the client’s autonomy should therefore be the focal point of a macro theory of lawyering. This would shift the focus from debating the merits of various sub-theories whose goal is to promote particular justifications for performing the action of legal representation, to the action of representation itself.

Under such a macro theory, it would be well established that enhancement of client’s autonomy means that the lawyer is, in effect, an extension of the legal personality of the client. Additionally, though the action of representation essentially compels the lawyer to “become one” with the client, it is not unification with the client as a person, but rather with the client’s rights and liberties under the law. Hence, for example, a lawyer’s choice to represent the unpopular ‘citizen x’, who is accused of a heinous murder, expresses endorsement of x’s rights and liberties (x’s legal personality), but not of x as a person (x’s moral personality). So is the lawyer’s decision to represent the well-liked ‘citizen y’, who has fallen victim to an outrageous injustice; or any other individual-in-need for that matter.

The lawyer’s decision to represent a certain client would always be perceived as a decision which is based on his capacity as

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43 Postema, supra note 5, at 77; Simon, supra note 5, at 42.
a legal practitioner, and hence the endorsement entailed in the
selection process only extends to the chosen client’s legal per-
sonality: that is, endorsement of the client’s rights to due process
and lawful treatment by law-enforcement authorities, and ac-
knowledgement of the importance of aiding all individuals to
overcome procedural and bureaucratic obstacles in order to be
able to effectively realize their privileges under the law.

Endorsement of the client’s moral personality may well exist
also, but it cannot be logically deduced from the selection pro-
cess in any way since the personal spheres of life lie outside the
purview of the lawyer’s designated role. Both a lawyer who en-
dorses the client’s moral personality and a lawyer who resents or
is apathetic to the client’s moral personality fulfill an identical
professional function as role agents; however, while the latter
limits his involvement with the client solely to the professional
sphere, the former also becomes the client’s personal friend (not
a legal friend) in a way that is entirely disconnected from his
professional role. In other words, in those cases where the
choice of clients is also accompanied by the lawyer’s endorse-
ment of the client’s moral personality, then the lawyer crosses
the professional boundary into the personal spheres of life. And
though this cross of boundaries does not constitute a breach of
the ethical code of conduct, it illuminates the clear-cut separa-
tion between the professional and private spheres.

Therefore, according to the macro theory of representation,
there is no valid logical basis for criticizing the lawyer due to his
choice of clients; rather, public criticism may only be aimed at
the person (who so happens to be a legal practitioner) due to his
personal choice of friends. And the validity of such criticism is,
of course, not derived from the professional sphere but rather
solely from the personal and societal ones, since it is in no way
different from criticism that any of us may be exposed to from
family members or friends who do not approve of our personal
choices in life. Drawing such a clear-cut distinction between the
lawyer’s professional and private capacities ensures a pragmatic
public conception of neutrality; and more importantly, it ensures public understanding of the need to demonstrate civic responsibility, tolerance, and restraint similar to those that we have become accustomed to grant one another in everyday life.

CONCLUSION

This essay has sought to advance a consensual moral conception of lawyering as representation of rights and liberties, rather than of people. Forming such a consensual macro conception has vital importance both institutionally and practically.

From an institutional level, it is consonant with all sub-theories because it avoids the futile effort to find one ultimate justification for performing the action of representation, and instead concentrates on developing a basic ethical infrastructure, which directly ensues from the moral essence of the action of representation itself.

From a practical standpoint, this conception guarantees a coherent and clear-cut analytical dichotomy between the lawyer as a professional and the lawyer as a private person, and thus provides a workable ethical framework for resolving the various ethical dilemmas that are constantly entailed in lawyering.

The general starting point in each case is, therefore, the advancement of a neutral conception of the moral essence of lawyering; a conception that acknowledges multi-cultural diversity and accordingly does not aspire to impose one particular justification for performing the action of representation. It is a conception that allows infusion of individual-tailored justifications, but nonetheless ensures that the incorporation of such justifications will be done thoughtfully and after careful consideration of the lawyer's role as a representative of rights and liberties, rather than of people. The advantage of developing a simplified and pragmatic macro theory of lawyering lies in its ability to provide a neutral, fundamental infrastructure upon which each individual will be then able to build his own ideological concep-
tion in a thoughtful, calculated, and tolerant manner; rather than as a result of haphazard impulses or ephemeral demagogic trends.

I argue that an important aspect missing from the public discourse on legal ethics nowadays is not profound theories or incisive moral observations; those are found in abundance. Rather, what is missing is a widespread willingness of professionals and laymen alike to be comparatively acquainted with prevalent theories, assimilate their principles, and being able to draw thoughtful insights and conclusions.

A publically accepted macro theory could certainly facilitate the development of an informed discussion, and thus encourage all those who wish to take part in the dialogue to demonstrate civic responsibility and thoughtfully decide whether or not to adopt sub-theories that support criticism of lawyers due to the personal (rather than legal) identity of their chosen clients. The responsibility to act on calculated reason, as is well known, weakens the power of the demagogue and strengthens the communal respect toward the professional choices that each of us makes.