

Civil Disobedience as Legal Ethics: The Cause-Lawyer and the Tension between Morality and “Lawyering Law”

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“[A]n individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.”¹

The “standard conception” of American legal ethics is not primarily concerned with lawyers’ ability to promote either substantive justice or systemic change.² Situations often arise in which a lawyer’s moral reasoning conflicts with the dictates of codified professional ethics. Instead of giving lawyers the tools to resolve such conflicts, systems of legal ethics often provide lawyers with a discourse of non-accountability and neutrality, allowing them to disclaim moral responsibility for the consequences of their actions as advocates.³ This Note investigates situations in which a lawyer’s moral reasoning diverges from codified professional ethics. This Note also provides moral (if not legal) justification for a lawyer’s expression of dissent in such situations, especially where the lawyer represents a vulnerable party in a grossly imbalanced power relationship.⁴

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¹ Martin Luther King, Jr., *Letter from a Birmingham Jail*, AFR. STUD. CENTER, UNIV. OF PENN., http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html, archived at <https://perma.cc/Z55C-UVDE> (last visited Mar. 26, 2016).

² The standard conception of legal ethics is based on three related principles: partisanship, neutrality, and non-accountability. See, e.g., Andrew Ayers, *The Lawyer’s Perspective: The Gap Between Individual Decisions and Collective Consequences in Legal Ethics*, 36 J. LEGAL PROF. 77, 89 (2011). These three principles are the starting point for most theories of legal ethics. See *id.*; see also W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 6, 29 (2010).

³ See Ayers, *supra* note 2, at 89. David Luban’s book, *LAWYERS AND JUSTICE*, discussed *infra*, describes and critiques this tendency within the legal profession. See David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392, 393 (1990) (describing Part I of Luban’s book as a “sustained attack” on the use of the “adversary system excuse” to justify morally objectionable behavior).

⁴ This Note employs a somewhat Foucauldian, relational understanding of power, as analyzed and elaborated upon by Duncan Kennedy:

In his seminal article on the regulation of the legal profession, David Wilkins insightfully notes that normative prescriptions about proper professional conduct vary depending on the power relationships between clients and their adversaries.⁵ Scholars have traditionally focused on the perceived failure of the standard conception of legal ethics to preserve space for moral reasoning in the face of power imbalances; numerous theorists of legal ethics have criticized the standard conception for promoting “literalistic adherence to what appears to be the letter of ethics codes” over more attentive moral deliberation.⁶ William H. Simon, for example, has argued that lawyers should respond to instances of gross power disparity by taking actions reasonably calculated to bring about the most substantively just solution or outcome.⁷ Simon’s “discretionary model”⁸ seems particularly useful in scenarios where a professional obligation, such as zealous advocacy, to a powerful client conflicts with a lawyer’s notions of morality or justice.⁹ It is less clear, however, how this theory might apply to conflicts between professional norms and personal morality when lawyers represent the weaker

It seems to me that power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens or reverses them [Power] is the moving substrate of force relations which, by virtue of their inequality, constantly engender states of power, but the latter are always local and unstable.

Duncan Kennedy, *The Stakes of Law, or Hale and Foucault*, 15 *LEGAL STUD. F.* 327, 352 (1991) (quoting MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 92–93 (1978)) [hereinafter *The Stakes of Law*]. From this perspective, power relationships pervade every aspect of social life and dictate the distribution of wealth and income. See *id.* at 352. In the legal realm, this Note refers to “vulnerable” parties to mean those with less “bargaining power,” which incorporates factors like wealth, resources, and bargaining skill, as determined by the background of legal rules. See *id.* at 331. For lawyers and their clients, power is deployed through “[n]egotiation in the shadow of the law”; thus, the more vulnerable parties are those placed at a bargaining disadvantage. *Id.* at 354.

⁵ See David B. Wilkins, *Who Should Regulate Lawyers?*, in *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 25, 40 (Susan D. Carle ed., 2005) (questioning the “assumption that a single enforcement structure will be appropriate for all lawyers in all contexts” and arguing that “[c]orporate clients are substantially different from individual consumers of legal services”); see also *Theories of Professional Regulation*, in *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 13, 16 (Susan D. Carle ed., 2005) (crediting Wilkins’ article with raising the question of whether “clients’ relative power” should “make a difference in the permissible conduct” of their lawyers) [hereinafter *Theories of Professional Regulation*].

⁶ Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 *IND. L. REV.* 21, 23 (2003).

⁷ William H. Simon, *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083, 1098 (1988); see also *id.* at 1083 (arguing lawyers’ “basic consideration” should be “whether assisting the client” in a particular course of action “would further justice”).

⁸ Levine, *supra* note 6, at 23 (citing WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998)).

⁹ See, e.g., Simon, *supra* note 7, at 1098–99 (applying ethical discretion model to hypothetical personal injury litigation where defense counsel realizes plaintiff’s counsel is negotiating under a clearly mistaken assumption about the law, which will result in a skewed settlement, and arguing that defense counsel should disclose the error to opposing counsel to ensure fairness in settlement).

party;¹⁰ relatedly, it is unclear whether Simon's theory of ethical discretion provides a morally satisfactory course of action for lawyers who view the law itself as substantively unjust, even assuming perfect procedures.¹¹

This Note builds upon Simon's theory of ethical discretion by exploring the relationship between personal morality and professional ethics in the context of "cause lawyering."¹² For the cause lawyer, moral and political commitments are inextricably entwined with the practice of law.¹³ Because political morality is constitutive of the cause lawyer's professional self-conception, conflicts between "professional ethics" and personal morality are particularly acute — a cause lawyer faced with such a conflict may feel morally compelled to spurn the code of professional ethics.¹⁴ For example, a death-penalty abolitionist cause lawyer might choose to privilege this moral commitment over her duties to her client, if the client "volunteers" for execution by refusing to exhaust his appeals.¹⁵ This Note proposes a philosophical justification for the cause lawyer's choice to privilege political morality over the code of legal ethics. This theory builds upon models such as Simon's theory of ethical discretion by justifying cause lawyers' occasional contravention of professional ethics in an effort to promote substantively just outcomes for less powerful clients.¹⁶

¹⁰ To use the example from Simon's article, imagine a personal injury lawsuit where plaintiff's counsel realizes that defense counsel is operating under a clearly erroneous assumption about the law, but that disclosure would be likely to reduce justice because the plaintiff will be able neither to settle the case for an amount sufficient to fully compensate his injuries nor to afford going to trial. Simon's theory requires lawyers to take responsibility for reaching a substantively just result where "procedural deficiencies" will otherwise lead to an unjust result. See *id.* at 1098–1100. Would Simon encourage the lawyer to exploit her opponents' mistake to gain a negotiating advantage in this situation? See also David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 428 (1990) (arguing that the institutional excuse of moral non-accountability for lawyers is harder to justify in civil suits where adversaries are "relatively evenly matched").

¹¹ See *infra* notes 121–122 and accompanying text.

¹² Cause lawyers are "activist lawyers who use the law as a means of creating social change in addition to a means of helping individual clients." Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1196–97 (2005).

¹³ AUSTIN SARAT & STUART SCHEINGOLD, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 2, 4 (2004) (describing moral and political commitments as defining attributes of cause lawyers and noting that cause lawyers are able to "harmonize personal conviction and professional life").

¹⁴ See *id.* at 9 (claiming cause lawyers "choos[e] to privilege their moral aspirations and political purposes even if doing so leads to violations of the profession's ethical code").

¹⁵ See, e.g., *infra* Section III.C (providing analysis of ethical challenges facing death penalty abolitionist cause lawyers where a client "volunteers"); Richards, *infra* note 133, at 127–31 (describing a California attorney's efforts to continue seeking relief in federal court on behalf of a capital defendant, despite his client's clearly expressed wishes to the contrary and an unequivocal judicial determination of client's competence).

¹⁶ Note that the term "cause lawyering" can encompass representation of powerful, entrenched interests (e.g., the National Rifle Association Civil Rights Defense Fund). See SARAT & SCHEINGOLD, *supra* note 13, at 5 (distinguishing "cause lawyer" from "public interest lawyer").

This argument makes a contribution to the scholarly discourse on professional ethics at the intersection of two bodies of literature: studies of cause lawyers, on the one hand, and legal ethics in general, on the other. By justifying a course of action that sometimes privileges personal political morality over the code of ethics, it adds to literature on the relationship between legal ethics and personal morality. Moreover, it supplements the literature on the ethics of cause lawyering, which tends to focus on scenarios in which a lawyer's devotion to a political or moral cause conflicts with her representation of an individual client.¹⁷ This Note instead addresses a broader set of ethical dilemmas: situations in which the mandates of an ethical code, including but not limited to the lawyer's duties to her client, conflict with the lawyer's commitment to a particular vision of social justice. Finally, this Note suggests reasons why a constrained exercise of civil disobedience by cause lawyers in the context of professional ethics might be normatively desirable as a means of enhancing democratic deliberation and fostering the political influence of marginalized client populations.

Part I puts forth a key assumption about the nature of "legal ethics": The codes of professional ethics are not prescriptions for ethics qua morals but rather a set of positive "laws of lawyering."¹⁸ This assumption about the nature of codes of professional ethics¹⁹ implies that lawyers may not be *morally* bound to adhere to these codes.²⁰ Part II outlines various theories about whether a general moral obligation to obey the law, including the positive "law of lawyering," actually exists. Although some legal philosophers defend a general moral duty to obey the law, Part II demonstrates that the duty to obey is often defeasible; many philosophers assume that civil disobedience can be morally justified in at least some situations. Assuming that there is some moral obligation to obey the law of lawyering, Part III applies the conceptions of civil disobedience developed in Part II to argue that the rules of professional ethics can be the proper subject of civil disobedience by the cause lawyer, when the ethics code conflicts with the lawyer's moral vision of social justice. Part III applies and defends this general theory of morally justified civil disobedience in the context of two potential ethical dilemmas faced by cause lawyers. Finally, Part IV explains the practical

¹⁷ See *id.* at 9; see also Stuart A. Scheingold, *Essay for the In-Print Symposium on the Myth of Moral Justice*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 47, 49 (2006).

¹⁸ See Robert P. Burns, *The Purposes of Legal Ethics and the Primacy of Practice*, 39 WM. & MARY L. REV. 327, 331 (1998). See generally Maynard E. Pirsig, *Book Review*, 7 N. ILL. U. L. REV. 133 (1987) (reviewing GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* (1985)).

¹⁹ Each state has its own set of ethical rules governing lawyers, which are "promulgated and enforced by the state's highest court under its 'inherent power' to make rules for its own operation." DAVID LUBAN, *LAWYERS AND JUSTICE* xxvii (1988). Every state except California has based its ethical code on one of two model codes promulgated by the American Bar Association ("ABA"). See *id.* The ABA's codes have no legal force unless adopted by the state's highest court (often with modifications). See *id.*

²⁰ See, e.g., William H. Simon, *Should Lawyers Obey the Law*, 38 WM. & MARY L. REV. 217, 253 (1996).

implications of this analysis for the practice of cause lawyering and the regulation of the legal profession.

I. "LAWYERING LAW": THE NATURE OF LEGAL ETHICS AND THE CAUSE LAWYER'S MORAL OBLIGATIONS

Although the terms legal ethics and professional ethics inherently connote moral authority, legal ethicists have long acknowledged and promoted the distinction between "common morality" and "role morality."²¹ The theory of role morality distinguishes between common "universal moral duties" that apply to all persons as moral agents and "special duties" that attach to a particular social role, such as that played by the lawyer.²² The standard conception of legal ethics holds that role morality must trump common morality when the two conflict; in fact, the lawyer can be morally required to take seemingly immoral actions because of her social role.²³ For example, role morality might require a lawyer to leverage her training and intellect to absolve a defendant-corporation of legal liability, despite believing herself that the corporation was negligent and thus should compensate the plaintiff (according to the lawyer's common morality).²⁴ Yet it is not immediately apparent why role morality should dominate over common morality. What is the source of the standard conception's claim to moral authority?

According to David Luban, professional duties originate from "the requirements of social institutions (such as our adversary system)"; the justifications for such social institutions, however, cannot be taken for granted and must be examined with some degree of skepticism.²⁵ For Luban, the moral value of professional duties under the standard conception is not absolute, but rather, contingent upon "the weighted product of the worth of the institution [i.e. the adversary system], the centrality of the professional role to that institution, and the importance to that role of a putative professional duty."²⁶ On this view, the moral authority of the standard conception of professional ethics is derivative of and contingent upon the effectiveness of the adversary

²¹ See, e.g., LUBAN, *supra* note 19, at xx. See also *id.* at xix ("The adjective qualifies the noun: the 'ethics' at work is not the ethics of private engagement but of institutional life, and the professional will engage in ethical deliberation by asking herself questions about what her profession and its institutions ought to be doing.").

²² See *id.* at xx.

²³ *Id.*

²⁴ Cf. *id.* (giving the example of a lawyer who gets a "guilty, violent criminal back on the street"). Perhaps defense counsel in the infamous Ford Pinto case experienced such a conflict, although some "people believe Ford was neither criminally nor civilly guilty of anything and acted completely reasonably in producing the Pinto," despite knowing that the gas tank was likely to rupture at speeds above 20 mph and that placing the gas tank in a different part of the car would be much safer. W. Michael Hoffman, *Case Study: The Ford Pinto*, in CORPORATE OBLIGATIONS AND RESPONSIBILITIES: EVERYTHING OLD IS NEW AGAIN 222, 226, 228 (1966).

²⁵ Luban, *supra* note 10, at 427.

²⁶ *Id.* Note that Luban argues that the institutional value of the adversary system varies with the relative power differential between the two parties. See note 10, *supra*.

system. The efficacy of the adversary system itself, however, is partially contingent upon the balance of power between the parties.²⁷ In fact, Luban argues that the complete partisanship and moral non-accountability of the standard conception are justified *only* where a lawyer represents the weaker party in situations of extreme power imbalance, with the criminal defense lawyer being the paradigm example.²⁸ Where lawyers represent either an extremely powerful party²⁹ or relatively equal parties,³⁰ the moral foundations of the standard conception, upon which modern codes of ethics are based, is thrown into question.

Luban therefore proposes an alternative vision of legal ethics that would hold lawyers accountable for the moral consequences of pursuing their clients' goals.³¹ He proposes a model of "moral activism," whereby lawyers would attempt to push the client towards a more just course of action.³² On this view, it is not only justified but also normatively desirable for the lawyer to exert moral influence over her client in the context of power imbalance. From this perspective, the standard conception alone is a morally unsatisfying model of legal ethics, even if it may have moral authority under certain circumstances. For the cause lawyer, whose common morality is inextricably tied to her self-conception as lawyer, it will matter whether the code of legal ethics binds not only as professional obligation but also as moral obligation.³³

In addition to inquiring into the roots of the standard conception's moral authority, one must also clarify precisely "what the Standard Conception is supposed to be a conception of."³⁴ Andrew Ayers offers three potential answers to this question. First, the standard conception might be a conception

²⁷ *Id.* at 427–28. In the criminal defense context, for example, where a relatively powerless defendant often confronts the entire apparatus of state power, the adversary system is justified by uniquely weighty political and moral considerations. *See id.*; LUBAN, *supra* note 19, at 148. These include the need to limit the power of the state over its citizens and to protect the rights of the accused against the state. LUBAN, *supra* note 19, at 60. Luban suggests that adversary advocacy is justified by similar logic in cases between a "powerless individual" and a "private megalith" in the civil context. *Id.* at 65. Critically, adversary advocacy, where "zealous advocacy" is pursued at the expense of a just result, is justified only as a "prophylactic, or preemptive, overprotection of the individual from powerful institutions (including the state, but also private institutions)." *Id.* at 65. Yet where power is relatively balanced between the two parties (and by logical extension, where a lawyer represents an exceedingly *powerful* party (e.g., the "private megalith"), the common justifications for the adversary system fail. Luban, *supra* note 10, at 428. These justifications include its effectiveness at uncovering the "truth," "its supposedly self-correcting character," its special solicitude for the attorney-client relationship, and its longstanding pedigree. *Id.*

²⁸ *See* note 27, *supra*.

²⁹ Luban groups the state and "large organizations such as business corporations or the mass media" under this umbrella. LUBAN, *supra* note 19, at 64; *see also*, Luban, *supra* note 10, at 428.

³⁰ Luban, *supra* note 10, at 428.

³¹ LUBAN, *supra* note 19, at 160.

³² *Id.*

³³ *See id.* at *xix* (claiming that, as a general matter, "the study of professional ethics" must consider both individual conscience *and* social institutions (emphasis added)).

³⁴ Ayers, *supra* note 2, at 90.

of the values undergirding the specific rules of lawyering law.³⁵ Second, the standard conception might embody the “informal social norms that constitute the role of lawyer” and the “basic expectations” that apply to this social role.³⁶ Finally, the standard conception might represent “a set of claims about practical reasoning” that defines “what sorts of considerations lawyers should recognize as reasons for action.”³⁷

The essence of Ayers’ argument is that legal ethicists have failed to provide a satisfactory account of why the standard conception’s role morality should trump common morality because they have not framed the problem in terms of practical reasoning.³⁸ He sketches two general scholarly orientations towards legal ethics: “the policy-maker’s perspective” and the “lawyer’s perspective.”³⁹ While the policymaker-as-legal-ethicist is concerned with the collective consequences of generally applicable rules,⁴⁰ the lawyer’s perspective focuses on “specific experiences and decisions faced by individual lawyers. . . .”⁴¹ For example, in deciding whether it would be morally permissible to allow lawyers to charge contingent fees, the policymaker’s perspective would focus upon whether allowing such a practice would have desirable consequences across the run of cases.⁴² The lawyer’s perspective, on the other hand, would ask whether a contingent fee arrangement would likely be morally desirable in a particular case, e.g., a contingent fee arrangement that allows a poor plaintiff with colorable claims to afford legal representation.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See id.* According to Ayers, “[p]ractical reasons are simply the reasons we have for choosing one option over another in any situation. They are reasons for doing or feeling something — any consideration that counts in favor of an action, emotion, commitment, or attitude.” *Id.* at 87. He argues that the proper role of the legal ethicist is to theorize practical reasons for justifying action that are in accordance with the standard conception. *See id.* at 91.

³⁹ *Id.* at 77.

⁴⁰ *See id.* at 77, 82. Ayers identifies scholars such as Alice Woolley and Bradley Wendel with the policy-maker’s perspective. According to Ayers, “Woolley argues that legal ethicists should treat their subject as a field of doctrinal analysis; their project should be to expound and criticize lawyering law in the same way that legal scholars in other areas expound and criticize other kinds of substantive law.” *Id.* at 83 (internal citations omitted). Wendel also explicitly rejects the “lawyer’s perspective” as defined by Ayers: “Unless one is prepared to argue that the obligations of a professional role should be modified to reduce immorality from a first-person perspective, what business is it of legal ethics that lawyers may feel their lives are not well-lived?” *Id.* at 85 (quoting W. Bradley Wendel, *Methodology and Perspective in the Theory of Lawyers’ Ethics: A Response to Professors Woolley and Markovits*, 60 U. TORONTO L.J. 1011, 1018 (2010)).

⁴¹ *Id.* at 81. Ayers identifies Daniel Markovits with the lawyer’s perspective: “The norms that form the core of adversary advocacy, according to Markovits, require lawyers to be guilty of ‘professional vices,’ which place a significant ethical burden on lawyers’ integrity. A system that is justified from the policy-maker’s perspective, Markovits argues, can still be ethically unappealing from the practitioner’s perspective.” *Id.* at 86 (quoting Daniel A. Markovits, *Legal Ethics from the Lawyer’s Point of View*, 15 YALE J.L. & HUMAN. 209, 223 (2003)).

⁴² *Id.* at 96.

Legal ethics, when considered from the point of view of the policymaker, is a corpus of positive law⁴³ designed to regulate lawyers and legal institutions.⁴⁴ This policy-based view of professional ethics as positive law aptly describes the prevailing orthodoxy in the practice of legal ethics.⁴⁵ While cause lawyers are subjects of regulation under positive lawyering law, the policymaker's perspective alone proves insufficient in scenarios that force them to choose between their personal moral goals and their lawyerly role morality.⁴⁶ For the cause lawyer, the lawyer's perspective is indispensable to a practically useful system of legal ethics. Personal morality for such lawyers is inseparable from professional practice.⁴⁷

Therefore, a worthwhile account of legal ethics for the cause lawyer necessarily accounts for their first-person, moral concerns about their ideological mission.⁴⁸ As a prescriptive matter, this Note theorizes legal ethics from the lawyer's perspective by justifying the choice of cause lawyers in certain circumstances to privilege common morality over the role morality normally required by the standard conception. As Ayers puts it, framing the analysis in terms of practical reasoning, ordinary morality is often a source of practical reasons *not* to adhere to the standard conception.⁴⁹ The argument here, however, also engages with scholars who operate from the policymaker's perspective, by descriptively adopting their assumptions about legal ethics; Part II assumes that legal ethics are a set of generally applicable rules that regulate the legal profession and are justified on policy grounds by their collective consequences. In other words, codes of legal ethics are mere

⁴³ *Id.* at 80–81 (associating rules and regulations under “law of lawyering” with the policy makers’ perspective); Serena Stier, *Legal Ethics: A Paradigm?*, in PROFESSIONAL ETHICS & SOCIAL RESPONSIBILITY 139, 148 (Daniel E. Wueste ed., 1994); W. BRADLEY WENDEL, ETHICS AND LAW: AN INTRODUCTION 17 (2014) (describing codes of ethics as “part of the domain of positive law, not ethics”). Serena Stier coined the term “Integrative Positivism” to refer to the principle that codes of legal ethics operate similarly to legislatively-promulgated positive laws; codes of ethics, however, are generally adopted by state supreme courts. *Id.*

⁴⁴ See Ayers, *supra* note 2, at 80. According to Stier, the principle of Integrative Positivism is unique to the legal profession; there is no “law of doctoring.” *Id.* at 148–49. Stier argues that it is normatively desirable for Integrative Positivism to remain unique to lawyering law. *Id.*

⁴⁵ See Daniel Markovits, *How (and How Not) to do Legal Ethics*, 23 GEO. J. LEGAL ETHICS 1041, 1041 (2010) (“Conventional legal ethicists deploy moral theory in order to develop regulative principles that might govern lawyers’ professional conduct. Indeed, being reform-minded, they typically seek even to cast these principles in forms that might be incorporated, as improvements, into the positive law governing lawyers.”).

⁴⁶ Cf. Ayers, *supra* note 2, at 80 (discussing practitioners’ relationship to “law of lawyering”).

⁴⁷ See SARAT & SCHEINGOLD, *supra* note 13, at 4.

⁴⁸ Cf. Ayers, *supra* note 2, at 86 (discussing Markovits’ view that legal ethics must account for the personal concerns of lawyers in general about integrity). Even if the laws of lawyering are morally justified from the perspective of society as a whole, they still lead to ethically problematic actions from the lawyer’s perspective. See *id.* Therefore, the lawyer’s perspective is distinctly significant and must also be accounted for in designing professional norms. See *id.*

⁴⁹ *Id.* at 94.

“lawyering law,” akin to other areas of positive law.⁵⁰ As Part II will demonstrate, if legal ethics is in fact nothing more than “lawyering law,” then this understanding of legal ethics will have implications for the degree to which cause lawyers are morally bound to adhere to codes of professional ethics.

II. LAWYERING LAW AND CIVIL DISOBEDIENCE: IS THERE A MORAL DUTY TO OBEY THE CODE OF ETHICS?

Whether citizens (in this case, lawyers) have a moral duty to obey the law is a basic and longstanding question in political philosophy.⁵¹ Part I established that legal ethics may be viewed as a set of positive laws governing lawyering. Therefore, when conflicts arise between a lawyer’s personal morality and lawyering law, legal ethics codes are morally binding on the lawyer only insofar as there is a general moral duty to obey the law. As William Simon has pointed out, the “answer to the question whether lawyers should obey the law turns out to depend on what we mean by law.”⁵² Under a Legal Positivist definition of law, which holds that the existence of a law is contingent upon social facts and not substantive moral validity,⁵³ it is difficult to justify a moral duty to obey the law.⁵⁴ In contrast, under a “Substantive”⁵⁵ conception of law, which rejects Positivism’s separation of law and morals, “an officially promulgated norm merits respect only by virtue of its substantive validity.”⁵⁶ The Substantive conception of law by definition imposes a *prima facie* moral duty to obey law, because it collapses the distinction between law and morals.⁵⁷ For this reason, however, the Substantive conception also seems inconsistent with the standard conception of legal eth-

⁵⁰ Cf. Ayers, *supra* note 2, at 84 (discussing Alice Woolley’s perspective); see also Markovits, *supra* note 45, at 1042; WENDEL, *supra* note 43, at 17; Stier, *supra* note 43, at 148.

⁵¹ See, e.g., CHRISTOPHER HEATH WELLMAN & A. JOHN SIMMONS, *IS THERE A DUTY TO OBEY THE LAW?* (2005) (arguing opposing sides of this debate).

⁵² Simon, *supra* note 20, at 253.

⁵³ See Leslie Green, *Legal Positivism*, STANFORD ENCYCLOPEDIA PHIL. (Jan. 3, 2003), <http://plato.stanford.edu/entries/legal-positivism>, archived at <https://perma.cc/MTQ3-QBCA>; see also Simon, *supra* note 20, at 220 (“Positivism is committed to differentiating legal from nonlegal norms and to doing so by virtue of a norm’s pedigree rather than its intrinsic content. A pedigree links a legal norm to a sovereign institution through jurisdictional criteria that specify institutional formalities.”).

⁵⁴ Simon, *supra* note 20, at 253; see also Joseph Raz, *The Obligation to Obey the Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 233, 235, 244 (1979) (arguing against a *prima facie* duty to obey the law, even in a just state); Green, *supra* note 53. Some scholars, such as Robert Paul Wolff, argue that no system of laws can ever morally bind a rational individual subject. See, e.g., Rex Martin, *Wolff’s Philosophical Anarchism*, 24 PHIL. Q. 140, 141 (1974).

⁵⁵ Simon uses this term to cover any non-Positivist conception of law, including natural law theory or Dworkinian interpretivism. Simon, *supra* note 20, at 223–24.

⁵⁶ Simon, *supra* note 20, at 224.

⁵⁷ See *id.*

ics, which insists on a separation between common morality and the dictates of legal ethics.⁵⁸

Whether one adopts a Positivist or Substantive definition of law, there are three possible philosophical positions on the nature of the duty to obey the law, according to Richard Wasserstrom, which together serve as a rough roadmap for this section:

- (1) One has an absolute obligation to obey the law; disobedience is never justified.
- (2) One has an obligation to obey the law[,] but this obligation can be overridden by conflicting obligations; disobedience can be justified, but only by the presence of outweighing circumstances.
- (3) One does not have a special obligation to obey the law, but it is in fact usually obligatory, on other grounds, to do so; disobedience to the law often does turn out to be unjustified.⁵⁹

Although a number of scholars defend the view that citizens are under a *general* moral duty to obey the law,⁶⁰ few would defend Wasserstrom's first position, which holds that disobedience is never justified.⁶¹ For the Legal Positivist, such a position is incomprehensible: "It cannot be the case that turning in a runaway slave in the pre-Civil War U.S. was *morally required*, or that harboring a Jew in Nazi Germany was *morally forbidden*."⁶² Promi-

⁵⁸ See *id.* at 220 ("Positivism has a strong affinity with the commitment of the Dominant View to categorical judgment.").

⁵⁹ Josephine Berces, *Is There an Obligation to Obey the Law*, SCRIBD. (Apr. 16, 2013), <http://www.scribd.com/doc/136186696/Is-There-an-Obligation-to-Obey-the-Law>, archived at <https://perma.cc/4FCD-6T7P> (citing Richard A. Wasserstrom, *The Obligation to Obey the Law*, in *THE DUTY TO OBEY THE LAW* 21 (William A. Edmundson ed., 1999)).

⁶⁰ See George C. Christie, *On the Moral Obligation to Obey the Law*, 39 DUKE L. J. 1311, 1315, 1336 (1990) (identifying several scholars who subscribe to this view and arguing that all arguments against a duty to obey fail); see also RONALD DWORKIN, *LAW'S EMPIRE* 206 (1986) (defending a moral duty to obey grounded in "associative obligation"); Leslie Green, *Legal Obligation and Authority*, STANFORD ENCYCLOPEDIA PHIL. (Dec. 29, 2003), <http://plato.stanford.edu/entries/legal-obligation>, archived at <https://perma.cc/MTQ3-QBCA> ("Political association, like family or friendship and other forms of association more local and intimate, is itself pregnant of obligation." (quoting DWORKIN, *supra*, at 206)).

⁶¹ Bradley Wendel makes an important argument that lawyers bear a special duty to obey lawyering law, adopting a position close to Wasserstrom's first category in this regard: "[E]xcept in cases where the law governing lawyers expressly permits the exercise of discretion on the basis of first-order moral considerations, lawyers should be prohibited from making reference to these values when deliberating about their actions in the course of representing clients." W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 364 (2004). In discussing unjust laws, Wendel adopts a perspective close to the Rawlsian position, discussed *infra*, asserting that even lawyers may challenge unjust laws, so long as the challenge is mounted overtly. *Id.* at 366. But Wendel completely denies the moral justifiability of (lawyerly) disobedience, arguing that lawyers must only advocate for change through "certain channels, such as legislation, administrative rulemaking, or the evolution of the common law." *Id.* at 401; see generally WENDEL, *supra* note 2, at 7 (arguing that "the norms associated with the lawyering role" and legal ethics "have significant moral weight, which are derived from a freestanding morality of public life").

⁶² See Berces, *supra* note 59, at 2. Of course, on a substantive view of the nature of law, patently unjust laws like the Fugitive Slave Laws or the Nazi Race Laws are not laws at all, but rather failed attempts at law. See Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short*

ment Legal Positivist Joseph Raz has adopted a strong version of this position, arguing that there is no moral obligation to obey the law, even in a society “with a good and just legal system”⁶³ Raz, along with philosophical anarchists like Robert Wolff,⁶⁴ falls into Wasserstrom’s third category.

On the other hand, scholars, such as George C. Christie, who defend some general moral duty to obey the law generally adopt a position closer to Wasserstrom’s second category, rather than the first category’s absolute duty to obey: “[T]o say that one has a moral obligation to obey the law does not mean that one must necessarily obey the law[.] . . . [I]t may be outweighed by other relevant moral considerations.”⁶⁵ This position on the duty to obey thus forces an inquiry into when such other moral concerns can justify disobedience of the law.⁶⁶

John Rawls’ *A Theory of Justice* embodies Wasserstrom’s second position as well. In his famous tome, Rawls developed perhaps the most influential and accepted account⁶⁷ of civil disobedience and its justifications, assuming a democratic and essentially just polity.⁶⁸ Rawls assumes that there is a general duty to comply with unjust laws, within certain limits, provided that such unjust laws arise under a “just constitution.”⁶⁹ He argues that in a reasonably just society governed by a democratic regime, citizens

Guide for the Perplexed, MICH. PUBLIC L. AND LEGAL THEORY WORKING PAPER SERIES 5 (2007) (describing Dworkin’s view that “legality is ultimately determined not by social facts alone, but by moral facts as well”). Compare generally Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958), with H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Although questions about the nature of law are inextricably tied to whether there exists a moral duty to obey, an inquiry into the validity of Legal Positivism is beyond the scope of this paper.

⁶³ Raz, *supra* note 54 at 245.

⁶⁴ See note 54, *supra*.

⁶⁵ Christie, *supra* note 60, at 1312.

⁶⁶ *Id.*

⁶⁷ Kimberley Brownlee, *Civil Disobedience*, STANFORD ENCYCLOPEDIA PHIL. (Dec. 20, 2013), <http://plato.stanford.edu/entries/civil-disobedience>, archived at <https://perma.cc/Z4QL-YHY4>.

⁶⁸ JOHN RAWLS, *A THEORY OF JUSTICE* 319 (1971).

⁶⁹ *Id.* at 308 (“The injustice of a law is not, in general, a sufficient reason for not adhering to it any more than the legal validity of legislation . . . is a sufficient reason for going along with it.”). Note that the Rawlsian definition of a “just constitution” is quite specific: first, a just constitution must satisfy the requirement of “equal liberty,” Rawls’ first “principle of justice.” *Id.* at 194, 326. The principle of equal liberty holds that “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar system of liberties for others.” *Id.* at 53. Translated into the realm of constitutional design, the equality liberty principle requires that all citizens have an equal right to participation in the political process. *Id.* at 194. The second precondition for a just constitution is that it embodies the system design most likely to result in a “just and effective system of legislation.” *Id.* A Rawlsian constitutional regime requires that a representative legislative body, selected for limited terms and accountable to the electorate, decides social policy according to a principle of majority rule. The outcomes of majoritarianism, however, are constrained by the equal liberty principle. See *id.* at 195; MIRIAM BANKOVSKY, *PERFECTING JUSTICE IN RAWLS, HABERMAS, AND HONNETH: A DECONSTRUCTIVE PERSPECTIVE* 75 (2012).

will be required to comply with some unjust laws “to the extent necessary to share equitably in the inevitable imperfections of a constitutional system.”⁷⁰

While a full explication of Rawls’ theory of justice is beyond the scope of this Note, it is important to clarify that his theory of justice as fairness holds that a just society must adopt two fundamental principles of justice. The first is the principle of equal liberty.⁷¹ The second principle consists of two components: a) the difference principle and b) fair equality of opportunity.⁷² The difference principle requires that any social inequality exists “to the greatest benefit of the least-advantaged members of society.”⁷³ Meanwhile, fair equality of opportunity requires that any social inequalities are “attached to offices and positions open to all under conditions of *fair equality of opportunity*.”⁷⁴ Yet even in Rawls’s ideal society, where lawmakers have embraced the two principles of justice, reasonable, well-intentioned people can and likely will put forward divergent answers to moral questions.⁷⁵

Presupposing that these differing conceptions of political morality do not transcend the bounds of the common baseline set by the two fundamental principles of justice, only majority rule can effectively mediate between these conflicting conceptions of justice in a pluralistic society.⁷⁶ Under a democratic regime, lawmakers must adopt majority rule and accept the concomitant risk that their moral opinions will not prevail in the interest of effective legislative procedures.⁷⁷ Rawls consequently cautions against general disobedience of unjust laws: “[W]e have a natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them”⁷⁸ Yet the duty to obey unjust laws is not absolute; where a law “exceed[s] certain bounds of injustice,” the presumptive duty to comply may be overcome and civil disobedience may be justified.⁷⁹

Rawls provides a relatively narrow definition of civil disobedience as a “public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”⁸⁰ He then proceeds to give an account of the limited circumstances under which civil disobedience can be defensible in a reasonably just society.⁸¹ As a preliminary matter, Rawls presumptively limits civil disobe-

⁷⁰ RAWLS, *supra* note 68, at 312.

⁷¹ See *supra* note 69 (defining the equal liberty principle).

⁷² See RAWLS, *supra* note 68, at 53; Leif Wanar, *John Rawls*, STANFORD ENCYCLOPEDIA PHIL. (Sept. 24, 2012), <http://plato.stanford.edu/entries/rawls>, archived at <https://perma.cc/H3GT-N677>.

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See RAWLS, *supra* note 68, at 194, 312.

⁷⁶ See *id.* at 312.

⁷⁷ See *id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 312, 319.

⁸⁰ *Id.* at 320.

⁸¹ *Id.* at 326.

dience to “serious violations” of the first principle of justice, the equal liberty principle, and to “blatant violations” of the principle of fair equality of opportunity.⁸² Rawls also places an exhaustion requirement on civil disobedience; the dissenter must have appealed to the majoritarian political process in good faith and sought relief under any other available legal procedures.⁸³ Third, Rawls expresses a concern about the potential for destructive chaos if every group with a potentially valid case for engaging civil disobedience chose to do so.⁸⁴ With this concern in mind, he argues that justified civil disobedience is limited to situations where a protester would agree that anyone subject to similar injustices would be entitled to similarly disobey.⁸⁵ Furthermore, the protester must believe that disobedience so generalized would have tolerable consequences.⁸⁶ Finally, Rawls counsels that even justified civil disobeyers should take account of prudential concerns about whether their actions will be effective.⁸⁷

Despite the wide influence of the Rawlsian account of civil disobedience, it is not universally accepted. Kimberley Brownlee, for example, offers an alternative perspective, raising numerous objections to Rawls’ definition of civil disobedience and his conditions for its justifiability.⁸⁸ Brownlee notes that the Rawlsian account is confined to reasonably just societies, which can credibly command some duty of fidelity to law from their citizens.⁸⁹ It is unclear, however, whether Rawls’ conception of civil disobedience can be sensibly applied to an unidealized, likely less than perfectly just society like ours.⁹⁰ In addition, Brownlee questions the Rawlsian insistence on publicity as an element of civil disobedience; publicity, she argues, can undermine the communicative intent of civil disobedience by allowing

⁸² *Id.*; see *supra* note 69 (defining the two principles of justice). According to Paul Voice, Rawls applies this presumption because violations of the first principle are most conspicuous and more urgent than other affronts to justice (because the first principle is more important). See PAUL VOICE, *RAWLS EXPLAINED: FROM FAIRNESS TO UTOPIA* 74 (2013). With respect to the difference principle, it is more difficult to definitively identify a situation as unjust, partially because this principle implicates “theoretical and speculative” beliefs. *Id.* The more obvious the violation and the more substantially it burdens citizens’ liberty, however, the stronger the justification for civil disobedience. See *id.*

⁸³ See *id.* at 327.

⁸⁴ *Id.* at 328.

⁸⁵ See RAWLS, *supra* note 68, at 328–29.

⁸⁶ See *id.*

⁸⁷ See RAWLS, *supra* note 68, at 330 (“[T]he exercise of the right to civil disobedience should, like any other right, be rationally framed to advance one’s end or the ends of those one wishes to assist.”).

⁸⁸ See Kimberlee Brownlee, *Conscientious Objection and Civil Disobedience*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 527, 529–30 (Andrei Marmor ed., 2012) (criticizing elements of Rawls’ definition of civil disobedience); see also *id.* at 534 (arguing that although Rawls’ conditions on justifiability seem “plausible at first glance,” many can “ultimately be rejected”).

⁸⁹ *Id.* at 529.

⁹⁰ *Id.*

opponents preemptively to frustrate any protest.⁹¹ Therefore, Brownlee argues that unanticipated, and even initially undisclosed, civil disobedience may better ensure that the act is successful and can still have communicative impact when acknowledged and explained later.⁹²

Brownlee also questions some of the assumptions underlying Rawls' preconditions for justified civil disobedience. First, Brownlee rejects Rawls' empirical claim that civil disobedience is necessarily "divisive" and likely to cause disorder⁹³ by encouraging more disobedience.⁹⁴ Even if these consequences did follow from acts of civil disobedience, Brownlee does not accept the Rawlsian assumption that such increased dissent would inevitably be negative.⁹⁵ She also casts doubt on the usefulness of Rawls' "prudential concerns" about the need to assess the expected effectiveness⁹⁶ of potential acts of civil disobedience: "Even when general success seems unlikely, civil disobedience may be defended for any reprieve from harm that it brings to victims of a bad law or policy."⁹⁷

Brownlee's own position on civil disobedience⁹⁸ focuses on the deeply

⁹¹ See *id.*; see also Brian Smart, *Defining Civil Disobedience*, in *CIVIL DISOBEDIENCE IN FOCUS* 189, 206 (Hugo Adam Bedau ed., 1991) ("[T]he requirement of fair notice might well frustrate the performance of the civil disobedience and prevent it from being made public . . ."). For instance, in 1930, Mohandas Gandhi announced his plans to civilly disobey Britain's Salt Acts, which prohibited Indians from collecting or selling salt. He led a 241-mile march to the coast of the Arabian Sea, where he and his followers planned to disobey the law by collecting crystallized sea salt left behind after high tide. The British authorities, however, attempted to foil his plan by "crushing the salt deposits into the mud." *Gandhi leads Civil Disobedience*, HISTORY.COM, <http://www.history.com/this-day-in-history/gandhi-leads-civil-disobedience>, archived at <https://perma.cc/TY2V-YW8Y> (last visited Mar. 26, 2016). While Gandhi still managed to symbolically defy the law by picking a small crystal of natural salt from the mud, this anecdote illustrates how publically announced civil disobedience can be preemptively frustrated by the authorities. For another example, see *O'Shea v. Littleton*, 414 U.S. 488 (1974), where plaintiffs alleged a pattern and practice of racial discrimination by state officials that was "carried out intentionally to deprive respondents and their class of the protections of the county criminal justice system and to deter them from engaging in their boycott and similar activities," *id.* at 492.

⁹² Brownlee, *supra* note 88, at 529.

⁹³ See *supra* notes 76–79 and accompanying text.

⁹⁴ Brownlee, *supra* note 88, at 534.

⁹⁵ *Id.*

⁹⁶ See *supra* note 87 and accompanying text.

⁹⁷ Brownlee, *supra* note 88, at 534.

⁹⁸ Brownlee also describes and critiques Joseph Raz's definition of civil disobedience, which is somewhat broader than Rawls'. See Brownlee, *supra* note 88, at 530–31. Raz defines civil disobedience as a "politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one's protest against, and dissociation from, a law or a public policy." *Id.* at 530 (quoting Raz, *supra* note 63, at 263). Raz, unlike Rawls, argues that there is no moral duty to obey the law, even in a reasonably just society. See *supra* note 63 and accompanying text. Raz also disagrees with Rawls that civil disobedience is "justified only as an action of last resort." See Raz, *supra* note 63, at 275. In fact, Raz suggests that civil disobedience may actually be a moral *obligation* where the alternative is to "give up any action in support of a just cause." *Id.* In her essay, Brownlee objects to Raz's failure to (1) consider breaches of law protesting the actions of nongovernmental institutions (e.g., private universities, trade unions); (2) recognize the inherently communicative aspect of civil disobedience, which must be "other-directed," not just "expressive"; and

held moral motives of its participants.⁹⁹ She offers two compelling arguments in favor of a moral *right* to conscientious disobedience. First, she anchors the moral right to civil disobedience in society's obligation to respect individual human dignity.¹⁰⁰ From this dignity-based perspective, the civil disobeyer possesses an inherent moral right to disassociate herself from laws she perceives as unjust and to communicate this disapproval to society at large. Second, Brownlee defends a right to civil disobedience on consequentialist grounds, as it contributes to democratic political deliberation by compelling defenders of the status quo to consider and justify their beliefs.¹⁰¹ This consequentialist argument dovetails with Brownlee's view about the relative merits of civil disobedience by the powerful and vulnerable members of society. Because of the intrinsic unfairness in the political power differential between majorities and minorities, she argues that the scope of political participation should include some form of constrained civil disobedience by disadvantaged minorities as a means to remedy the imbalance.¹⁰²

Finally, Brownlee discusses several scenarios "where conformity to formal norms" by institutional actors (such as judges in death penalty cases and intelligence officers using extreme interrogation techniques) "rightly elicits condemnation," highlighting the gap between law and morality that drives justified civil disobedience.¹⁰³ In discussing the moral burdens placed by society on institutional actors (including lawyers), Brownlee casts doubt on the ability of systems such as codified legal ethics to resolve individual moral dilemmas: "[W]hat morality requires of a person in morally difficult circumstances is not something to be mechanically determined by an examination of the person's office or position. An individual must on some occasions have the courage to rise above all that and obey the dictates of (good) conscience."¹⁰⁴ While her main point is that social institutions should be designed with a view toward minimizing "the genuine moral burdens" placed on actors and reducing the situations where civil disobedience is the only morally satisfying option,¹⁰⁵ her discussion of civil disobedience by institutional actors also has important implications for the interaction between civil disobedience and codified legal ethics for individual lawyers.

In sum, scholars have adopted a wide array of positions in the debate over whether citizens are under a general moral duty to obey the law. Some, including the positivist Raz and the philosophical-anarchist Wolff, reject any moral duty to obey the law. Even among those who defend a general obligation of obedience, Rawls and many others believe this obligation can be

(3) identify a particular feature that signifies or explains the *civility* of civil disobedience. Brownlee, *supra* note 88, at 530–31.

⁹⁹ Brownlee, *supra* note 88, at 531.

¹⁰⁰ *See id.* at 536.

¹⁰¹ *Id.* at 538.

¹⁰² *See id.* at 536.

¹⁰³ *Id.* at 534–35.

¹⁰⁴ *Id.* at 535 (citing JOEL FEINBERG, PROBLEMS AT THE ROOTS OF LAW 16 (2003)).

¹⁰⁵ *Id.* at 535.

overcome under certain circumstances and that civil disobedience can be morally justified. While Rawls offers a quite constrained vision of morally justified civil disobedience, Brownlee offers a persuasive critique of the Rawlsian position and an alternative conception of a much more robust moral right to civil disobedience, especially in less just, more realistic societies.

III. THE MORAL DILEMMAS OF THE CAUSE LAWYER: IS THE CODE OF ETHICS A JUSTIFIED SUBJECT OF CIVIL DISOBEDIENCE?

For the cause lawyer, morality and the practice of law are inseparable. The cause lawyer engages in the practice of law with a view toward directly promoting a moral vision of social change.¹⁰⁶ Many scholars have noted that this morally infused mode of practice inevitably conflicts with the positive law of lawyering, which is simply “not well-equipped” to address,¹⁰⁷ if not in irreconcilable conflict with,¹⁰⁸ cause lawyering. The most commonly cited ethical tension in cause lawyering is the conflict between a lawyer’s professional duties to her client and her moral commitment to the cause.¹⁰⁹ The potential for conflict, however, extends beyond the context of client-oriented duties; a lawyer’s moral commitments can also conflict, for example, with her professional duties to opposing counsel,¹¹⁰ or even to the court.¹¹¹ This Section considers examples of conflict between cause lawyers’ morality and the law of lawyering, and examines whether ethical rules can

¹⁰⁶ See Deborah J. Cantrell, *Lawyers, Loyalty, and Social Change*, 89 DENV. U. L. REV. 941, 941 n.1 (2011) (explaining that cause lawyers “commit to a particular kind of substantive work or a particular category of clients because the lawyer is committed to some broader set of social or political principles”); Etienne, *supra* note 12, at 1197 (describing cause lawyers as “passionately seeking to advance their political and moral visions through the representation of their clients”); SARAT & SCHEINGOLD, *supra* note 13, at 4 (identifying political or moral commitment as a defining feature of cause lawyers).

¹⁰⁷ Etienne, *supra* note 12, at 1196. See also LUBAN, *supra* note 19, at 317 (“[T]here will be times when [cause lawyers’] handling of tests cases serves, not the enlightened self-interest of the poor, but the political theories of the lawyers themselves.”) (quoting CHARLES WOLFRAM, *MODERN LEGAL ETHICS* (1986)); SARAT & SCHEINGOLD, *supra* note 13, at 9 (cause lawyers choose to privilege “moral aspirations and political purposes” even if it leads to “violations of the profession’s ethical code”).

¹⁰⁸ See Scheingold, *supra* note 17, at 49 (“Cause lawyering and moral justice are at odds with the ethical standards of the legal profession.”).

¹⁰⁹ See, e.g., Etienne, *supra* note 12, at 1197 (“The worry for the cause lawyer is that the pursuit of her ‘cause’ may at times conflict with the client’s interest.”). See also William B. Rubenstein, *Divided We Litigate: Addressing Disputes among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1625 (1997) (discussing “rules of professional ethics” in the context of civil rights litigation, with a special emphasis on “lesbian/gay civil rights”).

¹¹⁰ Cause lawyers’ moralism, unsurprisingly, often leads them to “identify strongly with their side of the issue and distrust — with a similar intensity — participants on the other side.” Cantrell, *supra* note 106, at 942. This tendency, which Cantrell terms “hyper-loyalty,” is probably augmented by the fact that cause lawyers engage opposing counsel against a backdrop of adversarial norms within the legal profession. See *id.*

¹¹¹ Cf. Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1179 (2003) (arguing that rules of profes-

be the proper subject of civil disobedience under the philosophical models discussed in Part II. This Section concludes that the cause lawyer may engage in civil disobedience against lawyering law under certain circumstances, especially when the cause lawyer is faced with an egregious power imbalance.¹¹²

While this approach does not alone make the code of ethics more responsive to cause lawyering, it has two anticipated benefits. First, civil disobedience will contribute both to democratic exchange by forcing proponents of the standard conception of legal ethics to “reflect upon and defend their views.”¹¹³ On a related note, it will also promote democratic discourse related to the lawyer’s moral position with respect to gay and lesbian civil rights, death penalty abolition, anti-abortion, and other causes. Second, the option of civil disobedience presents cause lawyers with a means, even if necessarily temporary and makeshift, to bridge the gap between “codified law” and the “non-codifiable morality” so central to their legal practice.¹¹⁴

A. *An Opposing Counsel’s Negotiating Error in Criminal Defense and Indigent Eviction Defense*¹¹⁵

Scholars have identified both criminal defense lawyers¹¹⁶ and poverty lawyers¹¹⁷ as examples of “cause lawyers”; practitioners in these areas often approach their work with an ideological fervor fueled by a moral vision of combating a system they consider to be fundamentally unjust. Imagine that in the course of plea negotiations on a charge of possession of crack cocaine with intent to distribute, the parties agree that the defendant will serve a

sional ethics actually create obligation to raise frivolous arguments in capital cases, even though there is a familiar ethical rule prohibiting frivolous arguments).

¹¹² Cf. Brownlee, *supra* note 88, at 536 (noting relationship between power imbalance and justification for civil disobedience); Luban, *supra* note 10, at 428 (describing interaction of legal ethics and power imbalance).

¹¹³ Cf. Brownlee, *supra* note 88, at 538.

¹¹⁴ Cf. *id.* at 534.

¹¹⁵ A seminar meeting of the Fellowship at Auschwitz for the Study of Professional Ethics (“FASPE”) in Summer 2015, in which the author participated, inspired this hypothetical dilemma. The law students and the faculty concluded that when an opposing counsel makes a typographical error in negotiating a settlement and is prepared to execute that settlement without realizing the error, the lawyer has an ethical duty to disclose this error before executing the settlement. Some students (including the author) expressed dissent, however, when the scenario was adjusted to represent a situation of extreme power imbalance, such as a criminal plea bargain or even a move-out agreement for an impoverished tenant of a corporate management company.

¹¹⁶ See, e.g., Etienne, *supra* note 12, at 1198 (outlining the argument that “many criminal defense lawyers are in fact cause lawyers”).

¹¹⁷ See, e.g., John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1928 (1999) (“In the quest for justice, representing the poor has generally attracted ‘cause lawyers.’”). See also SARAT & SCHEINGOLD, *supra* note 13, at 118 (identifying landlord-tenant conflict as a subject of “transformative-left” cause lawyering).

prison sentence of seven years.¹¹⁸ The prosecutor insists on drafting the agreement, and accidentally writes “7 months.” Alternatively, in an evictions proceeding,¹¹⁹ suppose that a plaintiff has accidentally drafted a move-out agreement giving the defendant-tenant “12” months to move instead of “2.” The prosecutor/plaintiff then signs the agreement and sends it to defense counsel, who immediately notices the error. In both situations, defense counsel is arguably obligated by the positive law of lawyering to disclose this error to the prosecutor/plaintiff.¹²⁰ Both cause lawyers, however, will likely feel an intense moral impulse to give their client a chance at a more just outcome (from their perspective). The criminal defense lawyer, for example, might view it as morally incumbent upon her to challenge a criminal justice system that she considers inherently unjust by signing on to the mistakenly low plea agreement.¹²¹ The practice of eviction defense is also often ideologically motivated. The poverty cause lawyer probably perceives her client as “synergistically and simultaneously, racially and economically subordinated within the spatially constrained and the opportunity-denying circumstances of ghetto and barrio life,”¹²² and she therefore might feel morally obligated to allow the client to have several extra months in her home, whereas strict obedience of lawyering law would require the lawyer to disclose her opponent’s drafting error.

B. Consensual Capital Punishment?: The Death-Penalty Abolitionist and the “Volunteering” Client

A second example of tension between the practice of cause lawyering and the ethical codes of the profession arises when the client’s goals diverge from the cause lawyer’s ideological mission. The standard conception of professional ethics obligates lawyers to zealously and effectively represent their clients, even if those clients are pursuing goals and values that the

¹¹⁸ See *Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS (Feb. 25, 2013), available at <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>, archived at <https://perma.cc/NG29-ZG9Z> (noting 10 year mandatory minimum for possession with intent to distribute of 280 grams of crack cocaine for first-time offender).

¹¹⁹ It is worth considering an example from the civil context as well, given the widely-shared position that the ethics of the defense lawyer are unique because the entire coercive power of the state is arrayed against the individual defendant. See, e.g., Freedman, *supra* note 111, at 1168 (noting “criminal defense is different from other types of advocacy”).

¹²⁰ See MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. (AM. BAR ASS’N 2015) (“A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”).

¹²¹ See, e.g., Etienne, *supra* note 12, at 1212 (explaining that criminal defense cause lawyers seek to reform aspects of the criminal justice system through their practice by objecting to practices such as “automatic detention for certain crimes or mandatory minimum sentences”). Cf. Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 730 (1991).

¹²² Calmore, *supra* note 117, at 1931.

lawyer finds repugnant.¹²³ To this end, legal ethical codes often explicitly provide that lawyers may represent clients without endorsing their values, interests, or goals, thus encouraging lawyers to market themselves as legal experts while putting aside any moral questions raised by their advocacy in each individual case.¹²⁴ This directly conflicts, however, with the cause lawyering model, which often privileges advocacy of a particular moral or political mission above the goals of the individual client.¹²⁵

The professional dilemma faced by the death penalty abolitionist lawyer whose client “volunteers”¹²⁶ for capital punishment presents a particularly challenging case. The dilemma of the capital volunteer arises when a client desires to “waive his appeals and to expedite his own execution.”¹²⁷ This scenario is no wooden ethical hypothetical. To the contrary, volunteering represents an intractable and recurring ethical conundrum for capital defense attorneys.¹²⁸ Since the Supreme Court effectively reinstated the death penalty in 1976,¹²⁹ at least 141 capital defendants have “volunteered” for execution.¹³⁰ In such situations, the Model Code of Ethics requires lawyers to “abide by the client’s decisions.”¹³¹ Consequently, for the death penalty “abolitionist” cause lawyer, who practices law with the explicit goal of eliminating capital punishment,¹³² the “volunteer” scenario presents an irreconcilable conflict with the dictates of professional ethics.¹³³

¹²³ See Scheingold, *supra* note 17, at 49–50.

¹²⁴ *Id.* at 50.

¹²⁵ See *id.*; SARAT & SCHEINGOLD, *supra* note 13, at 9.

¹²⁶ As J.C. Oleson has pointed out, the term “volunteer” is misleading, although it is the term most often used in the capital defense community to describe this scenario. J. C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 154 n.38 (2006). Perhaps a more accurate description of this scenario would be “a prisoner’s decision to end his appellate process,” given the seeming contradiction inherent in the idea of “consensual execution.” *Id.* (internal citations omitted).

¹²⁷ *Id.* Like Oleson, I intentionally use the male pronoun in discussing the example of the capital volunteer. See *id.* at 154 n.39 (“The gendered pronoun is warranted in this context: the overwhelming majority of death row inmates are male.”).

¹²⁸ *Id.* at 155 (describing capital volunteering as an ethical “Gordian Knot”).

¹²⁹ *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

¹³⁰ *Information on Defendants Who Were Executed Since 1976 and Designated as “Volunteers”*, DEATH PENALTY INFO. CTR. (Apr. 13, 2015), <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers>, archived at <https://perma.cc/Y65E-LEZ7> (providing list of 141 individuals “who continued to waive at least part of their ordinary appeals at time of execution”). See also Oleson, *supra* note 126, at 157 (“Contemporary volunteering is a worsening problem.”).

¹³¹ MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2015).

¹³² See Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 325 n.2 (1996) (defining “abolitionists” as “civil rights and criminal defense lawyers committed to the invalidation of the death penalty”).

¹³³ See Janill L. Richards, *A Lawyer’s Ethical Considerations When Her Client Elects Death: The Model Rules in the Capital Context*, 3 SAN DIEGO JUST. J. 127, 131 (1995) (characterizing any action in contravention of client’s wishes as arguably “opposed to the general mandate that a lawyer will follow the wishes of her client and will not substitute her own conception of what is in the client’s best interest”).

The cause lawyer might choose to engage in civil disobedience of the ethics code by acting in contravention of her client's express desire to accept the death penalty.¹³⁴ Before hypothesizing what such lawyerly civil disobedience might look like, it is important to note the difference between the case of the death penalty volunteer and that of the scrivener's error above. In the scrivener's error scenario, the lawyer's civil disobedience promotes her client's goals, while violating a positive law duty to opposing counsel. In the death penalty volunteer scenario, in contrast, the lawyer acts in direct contravention of her client's expressed wishes, thereby undeniably threatening the value of client autonomy at the core of client-centered legal practice.¹³⁵ As the Unabomber case,¹³⁶ where the defendant chose to plead guilty rather than allow his lawyers to mount a mental illness-based defense at trial,¹³⁷ starkly reminded the legal profession and society writ large, the autonomy of the criminal defendant must be carefully respected, as it is "the defendant who most immediately experiences the effects of a given criminal adjudication."¹³⁸

At the same time, there are other significant moral values that conflict with this commitment to defendant autonomy and that support morally justifiable civil disobedience in at least the particular case of the death penalty volunteer. Assuming that the client is mentally competent, it seems clear that the positive law of lawyering precludes her lawyer from attempting to frustrate the client's choice to submit to the death penalty.¹³⁹ Yet perhaps

¹³⁴ See *id.*

¹³⁵ See, e.g., Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370–71, 373 (2006) (noting the predominance of the client-centered approach to lawyering in legal education and exploring "the question of what respect for client autonomy might mean for the dilemmas of when or how forcefully to intervene in client decision-making").

¹³⁶ *United States v. Kaczynski*, 239 F.3d 1108, 1118 (9th Cir. 2001) (holding that neither the denial of defendant's *Faretta* request to represent himself nor the threat of presentation of a mental state defense with which defendant disagreed rendered his plea involuntary). Ted Kaczynski, known as the "Unabomber," killed three people and injured 23 others in between 1978 and 1995 in a bombing campaign conducting through U.S. mail. Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 420–21 (2000). See also Alston Chase, *Harvard and the Making of the Unabomber*, THE ATLANTIC (June 2000), <http://www.theatlantic.com/magazine/archive/2000/06/harvard-and-the-making-of-the-unabomber/378239>, archived at <https://perma.cc/7DXG-7VCM>. Kaczynski was called the "Unabomber" because he initially targeted universities and airlines. Mello, *supra*, at 421. He was apprehended after his anonymous 35,000-word manifesto decrying modern industrial society and technology was published in 1995 in the Washington Post and the New York Times, and his brother David alerted the police that he suspected Ted Kaczynski was behind the bombings. *Id.*

¹³⁷ See *Kaczynski*, 239 F.3d at 1121 (Reinhardt, J., dissenting) ("From the outset, however, Kaczynski made clear that a defense based on mental illness would be unacceptable to him, and his bitter opposition to the only defense that his lawyers believed might save his life created acute tension between counsel and client."); Mello, *supra* note 136, at 431.

¹³⁸ *Recent Case*, *United States v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2001), 115 HARV. L. REV. 1253, 1256 (2002). I am indebted to Professor David Luban for pointing out the relevance of this example.

¹³⁹ See, e.g., Richards, *supra* note 133, at 170.

civil disobedience of this positive law duty might be justified, especially in light of the unique conditions in the death penalty context,¹⁴⁰ including the irrevocability of the sentence and the profoundly coercive situation confronting a defendant who considers waiving his appeals.¹⁴¹ Ultimately the lawyer must consider for herself whether her deep, conscientious, political commitment to abolition of the death penalty and her concerns about the “systemic inequality and injustice” in the administration of the death penalty suffice to overcome her moral discomfort with acting in direct contravention of her client’s express wish to submit to capital punishment.¹⁴² Given the weight of the countervailing moral norm of client autonomy, perhaps especially in the criminal context,¹⁴³ the capital defense cause lawyer should carefully consider whether she truly feels morally compelled to disobey lawyering law in the death penalty volunteer context.

Assuming the death penalty cause lawyer decides to proceed with civil disobedience in this scenario, the question remains: what form would such civil disobedience take? First, the lawyer might decide to go beyond the bounds of ethically-permissible advice¹⁴⁴ by trying to actively persuade or even pressure her client to continue to file appeals; at the very least, this approach to civil disobedience would continue to actively involve the client in the decision making process, even if it clearly intrudes upon his auton-

¹⁴⁰ Cf. *id.* at 152–53 (arguing that broader conception of lawyers’ ability to engage in “protective measures” on behalf of their clients under the Model Rules should apply in death penalty volunteer scenarios, grounded in a presumption of incompetence, because “death is different”) (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)). Richards specifically points to the unique irrevocability, information asymmetry, mental health concerns, coercive circumstances, and potential for client vacillation in the capital punishment context. *Id.* at 155–61.

¹⁴¹ Justice Marshall, for instance, dissenting in *Lenhard v. Wolff*, 444 U.S. 807 (1979), noted that the capital defendant faced several institutional pressures, which combined to push him towards waiver of further appeals: (1) the allegedly inhumane conditions of his incarceration; (2) a feeling of hopelessness and a desire to minimize the time that his family suffered while his appeals were pending; and (3) an aversion to “begging” for “mercy” or “pity,” *id.* at 811 n.2. See also Richards, *supra* note 133, at 159.

¹⁴² Cf. Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 662 (2005) (noting that autonomy discourse in Supreme Court’s right to self-representation jurisprudence “mask[s] systemic inequality and injustice”); LUBAN, *supra* note 19, at 323 (arguing that the manipulation of a client by a lawyer can be justified in service of a “just and sufficiently weighty” political cause).

¹⁴³ See, e.g., *Faretta v. California*, 422 U.S. 806, 821 (1975) (establishing defendant’s right to self-representation); Christopher Slobogin, *Mental Illness and Self-Representation*: Faretta, Godinez, and Edwards, 7 OHIO ST. J. CRIM. L. 39, 394 (2009) (describing how autonomy value underlies the *Faretta* opinion). But see *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 163 (2000) (holding states are not constitutionally required to recognize the right to self-representation of a direct appeal from criminal conviction); Toone, *supra* note 142 at 622, 650, 656 (2005) (criticizing the idea, traceable to *Faretta*, that defendant autonomy should trump other societal values, such as fairness, order, efficiency, and accuracy, and arguing that the constraints of criminal process preclude the exercise of true autonomy by the criminal defendant).

¹⁴⁴ See *Rule 2.1 Advisor*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html, archived at <https://perma.cc/YH6S-3QGG> (last visited Mar. 27, 2016).

omy.¹⁴⁵ Second, the lawyer might argue that his client is choosing to forgo his appeals due to mental incompetence (although the client is in fact competent).¹⁴⁶ While the Ninth Circuit once attempted to reconcile such action with lawyering law by characterizing it as an attempt to “act[] in the best interests of his client,”¹⁴⁷ such circumvention of the express wishes of a client, even a client who desires to accept capital punishment, is more accurately described as civil disobedience of lawyering law.¹⁴⁸

C. Cause Lawyering, Civil Disobedience, and the Code of Ethics

The above examples, from the drafting errors of opposing counsel to the death penalty “volunteer,” concretely demonstrate the inherent “ethical tension between cause lawyering and mainstream professionalism.”¹⁴⁹ The normative question of how cause lawyers should respond when faced with such conflicts is vitally important, especially in light of the proliferation and (begrudged) acceptance of cause lawyering as a legitimate and even desirable component of the organized bar.¹⁵⁰ Given the inability of the standard conception of professional ethics to address these problems, the positive laws of lawyering represent a subject of morally justifiable civil disobedience in the context of cause lawyering.¹⁵¹

At the outset, even under a Rawlsian framework, many cause lawyers might justify their civil disobedience by asserting that the Rawlsian account is confined to reasonably just societies, a precondition that arguably is not satisfied in realistic modern societies.¹⁵² Or, lawyers could reject the restrictive Rawlsian framework altogether in favor of Brownlee’s more expansive

¹⁴⁵ Cf. Richards, *supra* note 133, at 167; LUBAN, *supra* note 19, at 323.

¹⁴⁶ Cf. *Mason By & Through Marson v. Vasquez*, 5 F.3d 1220, 1222 (9th Cir. 1993) (stating that, against his client’s wishes, an attorney “filed opposition papers and declarations from several mental health professionals stating that [the client] was suffering from mental illnesses that were affecting his decision to withdraw his petition”). See also Richards, *supra* note 133, at 128 (discussing attorney actions in *Mason*). As Richards notes, this might also involve a breach of the lawyer’s duty of confidentiality, if she relies on confidential communications to convince the judge that a competency hearing is necessary. Richards, *supra* note 133, at 144.

¹⁴⁷ *Mason*, 5 F.3d at 1223.

¹⁴⁸ Richards, *supra* note 133, at 131.

¹⁴⁹ Scheingold, *supra* note 17, at 52. See also Etienne, *supra* note 12, at 1196 (“The cause-motivated approach to lawyering contradicts the traditional view of those in the legal profession as rights-enforcers or as neutral advocates of their clients’ interests.”).

¹⁵⁰ See SARAT & SCHEINGOLD, *supra* note 13, at 25, 49 (discussing the “conditional and precarious” place of cause lawyers within the profession, despite “grudging recognition,” and noting how the profession was able to “capitaliz[e] on the luster of cause lawyering” to improve the reputation and social capital of the profession in general).

¹⁵¹ While this model of lawyering provides the cause lawyer with a morally justifiable course of action, it does not address the shortcomings in the code of ethics itself. Part IV will discuss the anticipated benefits of applying morally justified civil disobedience in this context, and it will engage with the possibility of revising the code of ethics to better accommodate the tension between cause lawyering and the standard conception of professional ethics. See *infra* Part IV.

¹⁵² See, e.g., *supra* notes 78–79 and accompanying text.

account of justified dissent, taking the position that there is a right to civil disobedience that protects human dignity and enables democratic discussion. Recall that Rawls posited a presumptive general duty to obey even *unjust* laws.¹⁵³ Only when a law “exceed[s] certain bounds of injustice” may the general moral duty to comply with the laws be suspended.¹⁵⁴ The generally applicable rules of professional ethics do not satisfy this high standard. Even if they did, the Rawlsian account further limits the circumstances where civil disobedience is morally justified.¹⁵⁵ Rawlsian civil disobedience must be “public,”¹⁵⁶ which renders it inapplicable to at least the failure to disclose drafting errors.¹⁵⁷ Moreover, it is unclear whether Rawls (in contrast to Raz and Brownlee, for instance) would morally approve of *indirect*, in addition to *direct*, civil disobedience.¹⁵⁸ Direct civil disobedience occurs when one breaches the law that is opposed (e.g., the lunch counter sit-ins during the civil rights movement).¹⁵⁹ Indirect civil disobedience, in contrast, refers to breaches of laws that are not themselves opposed but are disobeyed to convey objection to another law, norm, or policy.¹⁶⁰ A cause lawyer’s civil disobedience of the ethical code in the context of either the drafting error dilemma or the volunteer dilemma would exemplify indirect disobedience, which many contemporary philosophers agree is morally justifiable.¹⁶¹

Although civil disobedience in violation of the ethics code might be morally problematic from the Rawlsian perspective, it is justifiable under Brownlee’s approach. First of all, Brownlee rejects the Rawlsian insistence on publicity; therefore, in the drafting error dilemma, even initially covert civil disobedience can be morally justified, when the disobedience is later acknowledged and the rationale explained.¹⁶² The cause lawyer in the drafting error scenario could refuse to disclose the error to her opponent initially in order to ensure the success of her action.¹⁶³ Eventually, the cause lawyer must disclose her action to ensure that her civil disobedience serves its communicative goal of expressing, for instance, moral criticism of the power imbalances¹⁶⁴ inherent in the system of criminal justice plea-bargaining.¹⁶⁵

¹⁵³ See *supra* notes 69–70 and accompanying text.

¹⁵⁴ See *supra* note 79 and accompanying text.

¹⁵⁵ See *supra* notes 80–87 and accompanying text.

¹⁵⁶ See *supra* note 80 and accompanying text.

¹⁵⁷ See *supra* Section III.A.

¹⁵⁸ See Brownlee, *supra* note 88, at 7 (noting that Rawls’ conception does not “explicitly” or “consistently” recognize that “civil disobedience can be either direct or indirect”).

¹⁵⁹ *Id.*; see also Brownlee, *supra* note 67.

¹⁶⁰ Brownlee, *supra* note 88, at 7; Brownlee, *supra* note 67.

¹⁶¹ See Brownlee, *supra* note 159 (“There is more agreement amongst thinkers that civil disobedience can be either direct or indirect.”).

¹⁶² See *supra* note 91–92 and accompanying text.

¹⁶³ See *id.*

¹⁶⁴ See generally Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty>, archived at <https://perma.cc/GGD4-3XDR>.

The communicative value of this dissent provides the foundational core of the moral justifiability of civilly disobeying the ethics code.

The cause lawyer's civil disobedience of the ethics code in the drafting error dilemma and the volunteer dilemma is grounded in her conscientious commitment to social change.¹⁶⁶ From the cause lawyers' perspective, the value of insulating from moral criticism their choice of civil disobedience in these scenarios is rooted in human dignity; the system of legal ethics places "burdensome pressure" on the cause lawyer to act in contravention of her deeply held, conscientious convictions.¹⁶⁷ Assuming that the cause lawyers in these scenarios "are willing to risk being seen, and thus held to account, for their conscientious disobedience,"¹⁶⁸ there can be no reasonable doubt about the sincerity of their beliefs. Through an act of civil disobedience, the cause lawyers can simultaneously communicate "their concerns about perceived injustices in law or policy" and effectively dissociate themselves from perceived injustices in the legal system itself.¹⁶⁹ Civil disobedience in the drafting error dilemma and volunteer dilemma are thus morally justified by the communicative value of the lawyers' dissent and the dignitary value, from the lawyer's perspective, of creating moral space for her to dissociate herself from perceived, system-wide injustices.¹⁷⁰ As Kimberley Brownlee has noted, this concept of justified civil disobedience carves out an important moral space for dissent by institutional actors subject to formal professional norms. In the context of cause lawyering, morally challenging questions cannot be resolved by a value-neutral appeal to the positive law of lawyering, but they instead require lawyers to display courage and exercise independent moral judgment.¹⁷¹

¹⁶⁵ Cf. Brownlee, *supra* note 88, at 5 (noting that covert civil disobedience is "taken to be open and communicative when followed by an acknowledgment of the act and the reasons for taking it").

¹⁶⁶ See *supra* note 106 (collecting sources describing cause lawyers' conscientious commitment to promoting moral vision of social change); cf. Brownlee, *supra* note 88, at 8 (focusing moral inquiry on the conscientious motivations of civil disobedience); Minow, *supra* note 121, at 734 (stating the "basic argument justifies disobedience in the face of particular rules that seem to implicate individuals in immoral actions or coercion to violate their own beliefs").

¹⁶⁷ Cf. Brownlee, *supra* note 88, at 536.

¹⁶⁸ *Id.* at 537.

¹⁶⁹ *Id.* at 533.

¹⁷⁰ Cf. Minow, *supra* note 121, at 730 ("[T]he very effort to make legal arguments may require accepting assumptions and terms of debate that advocates most deeply wish to challenge.").

¹⁷¹ Brownlee, *supra* note 88, at 535 (citing JOEL FEINBERG, PROBLEMS AT THE ROOTS OF LAW 16 (2003)) ("[W]hat morality requires of a person in morally difficult circumstances is not something to be mechanically determined by an examination of the person's office or position."); cf. Simon, *supra* note 7, at 1083.

IV. IMPLICATIONS FOR LEGAL ETHICS AND PRACTICING CAUSE LAWYERS

This Note has argued that the positive law of lawyering inherently conflicts with the project of cause lawyering. In considering concrete examples of this conflict, this Note showed that civil disobedience of professional ethics can be *morally* justified. The question thus becomes what difference, if any, this makes for the way the legal profession conceptualizes and designs its normative system of professional responsibility, embodied by the codes of ethics. While the project of proposing systematic revisions to the model code of professional ethics is beyond the scope of this Note,¹⁷² this Section sketches some conclusions about the nature of professional ethics in the context of cause lawyering.

First, it is important to emphasize the narrowness of the claim, described above, about the moral justifiability of civil disobedience in the context of “lawyering law.” The argument is *not* that the organized bar should codify unconstrained lawyerly discretion, unbounded by any notion of client goals or interests, simply to accommodate the cause lawyers’ choice to privilege their moral convictions and political goals.¹⁷³ Instead, recognizing the value of Ayers’ concept of the “lawyer’s perspective,” the argument offers cause lawyers a moral framework through which to evaluate and morally justify, if necessary, their choice to privilege individual morality over role morality and substantive justice over the positive legal ethics codes.

Adopting the lawyer’s perspective is particularly important in the context of cause lawyering, given the prevalence of cause lawyers in the modern profession¹⁷⁴ and the seemingly irreconcilable tension between cause lawyering and the norms of professional ethics. Given that these cause lawyers often pursue their ideological missions at the expense of strict obedience to the code of ethics,¹⁷⁵ perhaps the ethics codes should be revised in a process of “reflective equilibrium,”¹⁷⁶ whereby the norms “on the books” are brought into line with the norms of the cause lawyers on the ground. By striving for coherence between the ideals of the ethical codes and the empiri-

¹⁷² As Sarat and Scheingold have described, the work of civil rights and poverty cause lawyers in the 1950s, 1960s, and 1970s “expanded definitions of professional responsibility.” SARAT & SCHEINGOLD, *supra* note 13, at 49. As a result, the modern bar has incorporated cause lawyering into its “definition of civic professionalism,” albeit to a limited extent. It is worth noting, however, that in the context of contemporary politics, the organized bar’s enthusiasm for cause lawyering is “waning,” and its “definition of what constitutes legitimate cause lawyering” is narrowing. SARAT & SCHEINGOLD, *supra* note 13, at 49–50.

¹⁷³ See Scheingold, *supra* note 17, at 50 (explaining that cause lawyers choose to privilege their moral aspirations and political purposes).

¹⁷⁴ See SARAT & SCHEINGOLD, *supra* note 13, at 48 (describing cause lawyers’ “foothold, however tenuous,” within legal profession); Scheingold, *supra* note 17, at 48 (“Even a cursory summary of the causes pursued by cause lawyers provides ample evidence that cause lawyers are indeed pursuing their moral muses.”).

¹⁷⁵ See Scheingold, *supra* note 17, at 50.

¹⁷⁶ See generally Norman Daniels, *Reflective Equilibrium*, STANFORD ENCYC. PHILOSOPHY (Jan. 12, 2011), <http://plato.stanford.edu/entries/reflective-equilibrium>, archived at <https://perma.cc/G284-CBN7>.

cal reality of cause lawyers' conduct contravening these codes, the profession might pragmatically encourage respect for the norms of professional ethics while demonstrating enhanced respect for the lawyer's perspective in rule-formulation. Perhaps, in light of these considerations, the ethical code should be adapted to promote moral deliberation in a limited set of hard cases, as Samuel Levine has suggested. Levine's "deliberative model" would avoid the need for open defiance of the ethics codes by replacing *optional* Model Rules (e.g., "a lawyer 'may' reveal confidential information in order to save a life") with "discretionary rules" (e.g., "the individual lawyer retains discretion not to disclose when such a decision is based on *demonstrable ethical deliberation*").¹⁷⁷

Second, given the political valence of the ethical dilemmas presented in this Note, a concern might arise that civil disobedience and ethical discretion represent an effort to free lawyers to pursue left-leaning causes. Yet this concern about political bias is somewhat of a red herring; as Ann Southworth has demonstrated, conservative and libertarian public interest groups have proliferated since the mid-1970s, "creat[ing] a vibrant, highly differentiated field of legal advocacy organizations modeled on liberal public interest law firms."¹⁷⁸ In 1968, for example, the National Right to Work Committee founded a Legal Defense Foundation to provide legal support in its mission to eliminate compulsory unionism.¹⁷⁹ A more difficult objection to both the discretionary model of professional ethics and the moral defense of civil disobedience by cause lawyers derives from a legitimate concern about democratic legitimacy: allowing cause lawyers to exercise unconstrained discretion to leverage the legal system in pursuit of personal morality (in a way that non-lawyers are simply cannot) appears elitist and antidemocratic.¹⁸⁰

These antidemocratic concerns, however, can be alleviated in two ways: (1) by constraining the situations under which the profession deems moral discretion and/or civil disobedience justified; and (2) by recognizing the democracy-enhancing consequences of civilly disobeying the ethical codes. First, cause lawyers should constrain civil disobedience of the ethics code to situations where they represent the more vulnerable party against

¹⁷⁷ Levine, *supra* note 6, at 52–53 (emphasis added).

¹⁷⁸ Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of Public Interest Law*, 52 UCLA L. REV. 1223, 1224 (2005) [hereinafter Southworth, *Conservative Lawyers*]; see generally ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008) [hereinafter SOUTHWORTH, LAWYERS OF THE RIGHT]; see also Scheingold, *supra* note 17, at 48 ("Included under the umbrella of cause lawyering are such polar ideological opposites as poverty and property rights lawyers, feminist and right-to-life lawyers . . .").

¹⁷⁹ Southworth, *Conservative Lawyers*, at 1241.

¹⁸⁰ See, e.g., SOUTHWORTH, LAWYERS OF THE RIGHT, at ix (describing "mistrust of lawyers and legal activism" as a "unifying grievance" of conservatives); see also Ayers, *supra* note 34, at 99–100 (noting scholarly concerns about an "oligarchy of lawyers" and substitution of "government of lawyers for a government of laws") (internal citations and quotation marks omitted).

background conditions of severe power imbalance, such as the poverty lawyer and the capital defense lawyer discussed above. Some legal ethicists have already recognized that the relative power of clients should affect the boundaries of permissible conduct on their behalf by lawyers.¹⁸¹ The normative value of civil disobedience in the face of such power imbalance is buttressed by Luban's insight into the moral justifications for the adversary system, which undergirds the entire system of professional responsibility. In the face of gross power differentials, the assumptions supporting our trust in the adversary system evaporate, emptying our commitment to the adversary system of any normative value.¹⁸² As Brownlee has argued, in situations of palpable power imbalance, civil disobedience can serve an important political function, helping to "rectif[y] the imbalance in meaningful avenues for political participation" between powerful majorities and vulnerable minorities.¹⁸³ The cause lawyers' civil disobedience thus serves the communicative function of drawing attention to the perceived systemic injustices faced by marginalized clients.

Second, both constrained civil disobedience and codified deliberative discretion¹⁸⁴ could serve an important democracy-enhancing function, despite the above-noted concerns about antidemocratic activist lawyering.¹⁸⁵ Even under a hypothetical Rawlsian regime that is reasonably just and democratic,¹⁸⁶ the political voices of "discrete and insular minorities" will be stifled.¹⁸⁷ With this seemingly perpetual problem in mind, the democracy-enhancing potential of civil disobedience, deliberative lawyerly discretion, and dissent generally are illuminated: "These practices contribute centrally to the democratic exchange of ideas by forcing the champions of dominant opinion to reflect upon and defend their views."¹⁸⁸ Thus, even though civil disobedience of lawyering laws is *indirect*, in that it challenges collateral injustices existing independent of the ethics code, democratic deliberation is still augmented in the process. Furthermore, "when their causes are well founded and their actions justified," the civilly disobedient cause lawyer "serv[es] society not only by questioning, but [also] by inhibiting departures from justice and correcting departures when they occur, thereby acting

¹⁸¹ *Theories of Professional Regulation*, *supra* note 5, at 16.

¹⁸² See *supra* notes 27–30 and accompanying text.

¹⁸³ Brownlee, *supra* note 88, at 536.

¹⁸⁴ See *supra* note 177 and accompanying text.

¹⁸⁵ Cf. Minow, *supra* note 121, at 741 ("The legitimacy of the system itself requires confrontation with disobedience defended by individuals who view compliance as immoral or by individuals seeking to persuade lawful officials to change.").

¹⁸⁶ See RAWLS, *supra* note 68, at 312; see also *supra* note 70 and accompanying text.

¹⁸⁷ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see also Brownlee, *supra* note 88, at 17 ("[E]ven in liberal regimes, persistent and vulnerable minorities are, by nature, less able than majorities to make their views heard . . ."). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (developing representation reinforcement theory of judicial review).

¹⁸⁸ See Brownlee, *supra* note 88, at 21.

as a stabilizing force within society.”¹⁸⁹ Of course, the question of which causes are well founded will be inevitably contentious.¹⁹⁰ The point is that dissenting voices, offering contested notions of the meaning of social justice, will improve the quality of democratic discourse.

V. CONCLUSION

The cause lawyer occupies a precarious and contentious position within the modern legal profession. Over time, the organized bar has grown less hostile to cause lawyers, as the legal establishment recognized cause lawyers’ instrumental value in convincing the general public that lawyers generally are “more than hired guns, using suspect means to defend often unsavory clients and profiting handsomely from doing so.”¹⁹¹ Yet cause lawyers, especially those representing “subversive” causes or “clients who are perceived as unworthy or dangerous” by the lay public, continue to face considerable professional obstacles and impediments, often including diminished status and pay.¹⁹² As Stuart Scheingold points out, the fact of the dogged persistence of cause lawyers in the face of such challenges represents “a tribute to their moral fervor, but it is also a product of the career sacrifices that they make”¹⁹³

This Note offers cause lawyers respite from one of these many professional impediments: the inability of codified legal ethics to respond effectively to the difficult ethical questions encountered by the cause lawyer. It provides cause lawyers with a moral framework through which to justify their contravention of “lawyering law,” despite the connotation of moral authority inherent in the “code of professional ethics.” In the course of developing a moral framework within the familiar concept of civil disobedience, this Note also suggests that cause lawyers’ dissent on behalf of marginalized and vulnerable clients is normatively desirable. Ultimately, the hope is that cause lawyering continues to provide the legal profession with an opportunity to embody “what conventional legal ethics den[ies]”: “the opportunity to harmonize personal conviction and professional life” in pursuit of moral justice.¹⁹⁴

¹⁸⁹ *Cf. id.* (citing RAWLS, *supra* note 68, at 383).

¹⁹⁰ Scheingold, *supra* note 17, at 48 (arguing that the “disparate cacophony of causes suggests just how contentious the pursuit of moral justice is likely to be”).

¹⁹¹ Scheingold, *supra* note 17, at 52.

¹⁹² *Id.* at 49, 52.

¹⁹³ *Id.* at 49.

¹⁹⁴ SARAT & SCHEINGOLD, *supra* note 13, at 4.