TWO CONCEPTS OF ROLE-MORALITY – IN SEARCH OF A NORMATIVE LANGUAGE OF LEGAL ETHICS

Michael Boulette


**Keywords.** Legal ethics, role-morality, United States Model Rules of Professional Conduct

**Abstract.** This article argues that, in light of the recent crisis in legal ethics, role-morality's continuing viability depends upon its ability to construct a normative language of legal ethics, a language capable of holding lawyers to account without devolving into ordinary moral critique.
Two Concepts of Role-Morality
In Search of a Normative Language of Legal Ethics

1. Introduction

All is not well in the legal profession. From the now infamous White House “torture memos” authored by the Office of Legal Counsel\(^1\) to lingering concerns over the role of Vinson & Elkins in the collapse of Enron,\(^2\) one of the last, great, self-regulating professions finds itself increasingly in need of moral defense. The question of “why?” or “what went wrong?” has increasingly plagued legal ethicists.\(^3\) And the age old problem of role-morality\(^4\) (can a good lawyer be a good person?)\(^5\) may be more important now than ever—particularly where good, or at least skilled, lawyers have shown a complete ethical failing.

In light of recent events, the question inevitably presents itself: can the bar continue to shield its members from ethical criticism on the grounds that “A lawyer’s representation of a client…does not constitute an endorsement of the client's political, economic, social or moral views or activities?”\(^6\) The question is particularly apt where a lawyer accepts her client's moral (or immoral) beliefs as her starting point and proceeds to reason backwards from her client's goals to what the law requires.\(^7\) Put another way, when a lawyer is willing to undermine the law for the sake of her client's political, economic, or moral objectives, can she plausibly deny moral responsibility for her actions? At what point does the zealous advocate simply become a zealot?

To phrase the question more generally, this article begins with a single question: can role-morality continue to be a viable doctrine in legal ethics where it

---

1 David Luban, Legal Ethics and Human Dignity, 162 (2007) (hereinafter "Human Dignity").
4 While role-morality has been thoroughly and previously defined in the legal literature, I will offer the following as my working definition of role-morality: the doctrine that a lawyer, when acting in his or her professional capacity, may not be held accountable on the basis of ordinary moral norms, but rather the unique nature of the practice of law requires a separate and distinct morality to advance its basic objectives (however conceived).
6 Model Rules of Professional Responsibility 1.2(b).
7 This was precisely the failing pointed out by Michael Hatfield. Professionalizing Moral Deference, 104 N.W. U. L. Rev. Colloquy 1 (2009).
shields lawyers from moral criticism so long as the lawyer’s behavior is at least arguably lawful? I will suggest that it can on the condition that legal ethics provides a language for criticizing lawyers that simultaneously respects the bounds of role-morality.

Role-morality, traditionally understood, has provided the theoretical underpinnings to Model Rule 1.2(b), freeing lawyers of responsibility for their client’s actions insofar as they avoid participating in fraudulent or criminal behavior and do not otherwise violate “the rules of professional conduct or other law.” Stephen Pepper—perhaps one of the most prominent supporters of role-morality—has presented an influential theoretical understanding of role-morality founded on the fundamental good of client autonomy.

However, as a preliminary matter, it is important to realize the present dilemma in which role-morality finds itself both as a matter of ethical theory and general intuition. Beyond the practical defects posed by torture memos and corporate fraud, Professor David Luban has offered compelling theoretical criticisms of role-morality for its tendency to marginalize—if not eliminate—a lawyer’s individual autonomy. According to Luban, insofar a lawyer’s retain their autonomy both in court and at home, they cannot shirk their primary responsibilities as moral agents who may be held to account for their actions whether private or professional.

Luban’s arguments are both persuasive and complex, and they deserve a good deal more attention than this essay will give them. Instead, I present Luban’s point, to note its appeal, particularly in an age when lawyers have used the law as a tool to legitimize torture and defraud millions of Americans. Regardless of the credentials or professional licensing, I would suggest that we (appropriately) feel justified in holding the lawyers in the Office of Legal Counsel morally responsible for their actions even assuming, arguendo, that they did not violate any law or rule of professional responsibility. However, in holding these lawyers morally accountable, we have undermined the central tenants of role-morality.

For some this may seem unproblematic. For too long, it might be argued, lawyers have hidden behind their bar membership cards and arguments for client autonomy to represent morally reprehensible causes and clients. Zealous advocacy has been used as a smoke screen to protect the interests of clients (who are too

8 Model Rules of Professional Responsibility 1.2(b); 1.2(d); 1.2 comment [5]; 1.16(a)(1).
9 The Lawyer’s Amoral Ethical Role, note 5 supra.
11 Id.
often unconcerned with the common good) while undermining the very purpose of the law. It is high time lawyers answer for their actions in the courtroom, the board room, and on Capitol Hill. Lawyers must be held to account not just to their state boards of professional responsibility, but to their friends, neighbors and the general public. To the extent lawyers provide a public good, it is the public to whom they must answer, not on the basis of their role as a lawyer, but as human beings subject to common ethical constraints.

I offer this vision of attorney accountability not to mock it or create a straw man, but to reflect the legitimate anger that comes of being betrayed by the men and women charged with managing our system of justice. When officers of the court make a mockery of the law (even while arguably abiding by it), anger is both a natural and appropriate reaction not to be dismissed lightly. Indeed, it is this sense of anger that I believe many of us share that this paper explicitly draws upon in rethinking how we hold lawyer’s to account for their professional actions.

Yet, in accepting the legitimacy of these feelings I hope to go a step further and suggest that role-morality, for all its perceived deficiencies, may continue to be a valuable doctrine in legal ethics. Accordingly, this paper begins with two premises, first that the extreme ethical failures of the past decade leave role-morality in need of some revision (as has been argued in the preceding paragraphs), and second that the nature of the American legal system and the requirements of justice make role-morality a doctrine worth preserving.

Proceeding from these two premises, I suggest that the continuing soundness of role-morality requires the introduction or expansion of a normative language for evaluating the professional conduct of lawyers, and, further, that this language must reach beyond the bare minimum of legal or professional regulation. The normative language I advocate must provide a means for holding lawyers to account without recourse to general moral reasons. By way of example, the normative language I suggest must provide us with a means condemning the legal behavior of certain members of the Office of Legal Counsel without slipping into the language of ordinary moral reasons. The first requirement reflects the felt-need to hold individuals to account for ethically repugnant behavior (discussed above), while the second requirement reflects the basic tenet of role-morality that lawyers, acting in their professional capacity should not be evaluated in general moral terms.

12 The term “normative language” will be more thoroughly defined in section two. For now, it may be enough to say that a normative language of legal ethics would include all the reasons lawyers give for the actions they take on behalf of their clients (including their selection of clients). That the language is normative means that it is a reason giving language, a language meant to justify behavior. That the language is one of legal ethics limits it to the norms of the legal profession rather than a variety of normative languages (e.g. religious normative languages, normative languages of common morality, etc.)
I believe the necessity of a normative language of this sort is fairly straightforward. To the extent that role-morality exempts lawyers from general moral criticism for their professional actions, we (meaning both lawyers and non-lawyers) must choose between imposing a legal or professional sanction in a particular instance, accepting the lawyer’s behavior as morally acceptable, or reverting to ordinary moral criticism (and therefore violating the basic requirements of role-morality). In the presence of this choice between sanctions, acquiescence, or the rejection of role-morality, there is an intuitive inclination either to expand the range of sanctionable behavior or else subject lawyers to the same moral criticism as private individuals (the latter approach favored by Professor Luban). I would suggest that neither of these outcomes is particularly desirable, and we therefore have good reason to remedy this suggested defect in role-morality theory.

Thus, the project becomes one of constructing a normative language capable of justifying the various actions lawyers take in their professional roles. However, the demands of role-morality require that the language not simply be common morality in disguise, but provide an analytically distinct vocabulary of normative criticism.

To this end, this paper will, in sections one and two, undertake a basic discussion of what my understanding of the requirements of role-morality more generally and a preliminary definition of what is meant by a normative language of legal ethics. In sections three and four I will then examine two concepts of role-morality, what I will term hard role-morality and soft role-morality, in an attempt to determine which is more conducive to the type of normative language I suggest is so important.

As representatives of each type of role-morality, the first view will be represented by Professor Stephen Pepper in his influential article, *The Lawyers Amoral Ethical Role*, and the second represented by Professor W. Bradley Wendell. This paper will sketch a brief theoretical outline of each concept of role-morality and the normative language each implies, while ultimately endorsing soft role-morality as the most conducive to the construction of a normative language of legal ethics.

An additional observation should be made before proceeding. First, this paper in seeking to enhance the cogency of at least some theories of role-morality, does not undertake an extensive defense of those theories. Thankfully, several gifted legal scholars have taken the continuing relevance of role-morality to heart, and offered a vigorous and compelling defense of the theory upon which this paper will explicitly build. Insofar as it is beyond the scope of this paper to offer yet another defense of role-morality, I will lean heavily on the work of other scholars to justify

13 *The Inevitability of Conscience* at 1440–1444, note 10 supra.
14 Here I am explicitly drawing on the distinction between hard and soft positivism.
the doctrine upon which I am working to expand. To the extent that this paper does not offer its own justification for role-morality, it may not satisfy the firmest skeptics. However, to the extent role-morality possess any merit, a project that seeks to build upon those strengths and identify areas for future development is surely worthwhile.

2. Understanding Role-Morality

Before continuing to the substance of my argument, I should offer a preliminary definition of role-morality and a more specific example of the problem I believe confronts it.

First, I understand role-morality as generally holding that a lawyer may not legitimately be held morally accountable for the actions she takes on behalf of her clients so long as they are within the bounds of the law and professional responsibility. At its base, accounts of role-morality accept (with varying permutations and commitments) that law serves some fundamental moral or political good requiring that its practitioners be exempted from certain moral constraints.\footnote{By way of example, See Rakesh K. Anand, The Role of the Lawyer in Modern American Democracy, 77 Fordham L. Rev. 1611, 1626 (2009) (arguing that where legal morality is not separate distinct from other forms of morality, people are subjected to the rule of men and not of law violating a central tenet of American democracy); Madeleine C. Petrara, Dangerous Identification: Confusing Lawyers with Their Clients, 19 J. Legal Prof. 179, 205-206 (1994) (arguing that providing legal services to the greatest number of people possible and ensuring the effectiveness of the adversarial system requires that lawyers be freed from moral criticisms for using legal means to advocate for their clients objectives); Clarence Darrow, The Story of My Life 75-76 (De Capo Press 1996) (1932) (justifying criminal defense as a means of promoting a more thorough understanding of the causes of crime); Katherine R. Kruse, 90 Minn. L. Rev. 389 (2005) (arguing that moral pluralism demands that lawyers not serve a moral screening function for access to the justice system, but that the Model Rules should permit a moral conflict of interest standard); Charles Fried, 85 Yale L. J. 1060, 1083-1085 (1976) (arguing that the nature of a lawyer’s relationship with their client gives the lawyer a duty of loyalty to the client that permits him or her to commit wrongs permitted by the rules of the legal system); W. Bradley Wendel, 93 Cornell L. Rev 1413 (arguing that the job of lawyering is to adjudicate competing moral claims and therefore the demands of political pluralism exempt a lawyer from critique based on ordinary moral norms).} Examples of role-morality are myriad, but an illustration may be helpful.

The local prosecutor has accused Jane of selling drugs to local elementary school children. The prosecutor’s star witness is a local elementary school teacher. While Jane’s defense lawyer, Sue, may be positive that all the facts support the school teacher’s testimony, she may nonetheless seek to undermine the testimony through harsh cross-examination. According to role-morality, Sue should be exempt from moral criticism, even if she would normally be held morally account-
able for making a truthful person appear untruthful outside of her professional capacity. Different accounts of role-morality offer different justifications for why Sue's behavior is morally blameworthy when she is acting as a private individual but not blameworthy when she is defending her client. However, each would agree that the behavior should not make Sue subject to moral critique.

Note that role-morality as outlined above is different from the position that Sue is capable of justifying her behavior because she is an attorney. Role-morality, as I understand it, does not hold that the Sue's behavior is morally justifiable but that it is simply immune from moral critique. It is not that Sue is capable of justifying her behavior by reference to other moral norms, but that, when she is behaving as a lawyer, she is no longer constrained by common moral standards. This distinction is necessarily a clumsy one insofar as some proponents of role-morality—including Professor Pepper—defend role-morality proper using standard moral language—in Pepper's case the language of individual autonomy. However, the distinction is an important one that cannot be overlooked.

The distinction may be understood as follows. Imagine Sue were confronted by her neighbor about her harsh interrogation of the elementary school teacher. Were Sue to defend her behavior on the basis of role-morality, the conversation might proceed as follows:

**Neighbor:** Sue, I was at trial the other day to watch you question the teacher. I know you've known her for many years and know she wouldn't lie. How could you question her like that and make her look like a liar.

**Sue:** Well, it's my job as an attorney to zealously defend my client. Whether or not I believe the teacher was telling the truth, it's my job to force the prosecutor to prove every aspect of her case. If I didn't cross-examine the teacher harshly I might have lost the case, failed by client, and breached by ethical obligations as a lawyer—though I likely wouldn't have been subject to professional sanctions.

**Neighbor:** Well I think that's a morally rotten thing you did. It's morally wrong to make a truthful person look untruthful.

**Sue:** Maybe it is, but in my role as a lawyer it is my duty to protect my client's autonomy by any legal means. So long as I am acting as a lawyer, my client's

---

16 *Id.*

17 This would be the position of Prof. Luban, who argues that one's role as a lawyer is one moral consideration among many. The Inevitability of Conscience, note 10 *supra* at 1440-1441.

18 The Lawyer's Amoral Ethical Role, note 5 *supra* at 616-617. I will use client autonomy as a stand-in for other normative values that could undergird legal ethics. Other values, such as those discussed by the authors in note <> *supra* could also be substituted.
autonomy is the only thing that concerns me, and other ethical considerations are
beside the point. So, you really shouldn't be criticizing me for being a bad person
so long as I wasn't a bad lawyer.

In contrast, if Sue's behavior was simply justifiable because she is a lawyer, the
conversation would look quite different.

Neighbor: Sue, I was at trial the other day to watch you question the teacher.
I know you've known her for many years and know she wouldn't lie. How could
you question her like that and make her look like a liar?

Sue: Well, you're right; it was a very hard decision. On the one hand, I'm an
attorney and it is my job to zealously defend my client to protect her autonomy.
But on the other hand, I am a person just like everyone else, and I think it's wrong
to make truthful people look like liars.

I have to say even as I was going to question the teacher that day I wasn't sure
what I would do until the last moment. I hemmed and hawed and struggled to
weigh my different moral commitments. But after balancing all my different
moral beliefs—that you shouldn't lie but that lawyers should also defend their cli-
ent's autonomy—I decided that my client's autonomy was more important in this
instance than the harm of making the teacher look like a liar.

Neighbor: But are there times when your client's autonomy wouldn't win
out? For instance if you knew where the dead bodies of three small children were
hidden, would you tell their parents to help ease their grief?

Sue: Well that is certainly an even harder case. I would have to say in that situ-
ation I would probably inform the parents even though it would violate my profes-
sional responsibilities as a lawyer and my obligations to protect my client's auton-
omy.

After all, I'm very religious and believe strongly that without a proper burial a
person cannot go to heaven. So in that case my commitments as a religious observ-
er would trump my commitments as a lawyer.

It's not that my client's autonomy isn't important, but in making a moral deci-
sion I have to weigh all the factors (the evil of causing someone to go to hell versus
the evil of violating my client's autonomy.) I can't just ignore my other moral com-
mitments because I happen to be working as a lawyer.

After all, being a lawyer is just one factor in my overall moral calculus, and
doesn't necessarily dictate the outcome even when I'm acting in my professional
capacity.
The primary difference in the two conversations is that, in the first conversation, Sue understands herself to be subject to different normative requirements when behaving as a lawyer than in other aspects of her life. In contrast, in the second conversation, where Sue attempts to justify her behavior on moral grounds, she remains subject to ordinary moral constraints regardless of whether or not she is acting in her professional capacity. In the second conversation, being a lawyer is just one moral consideration among the many that Sue must weigh, and there are instances in which her other moral commitments may trump her moral commitments as a lawyer.

To state the point somewhat more abstractly, in the first scenario Sue occupies a wholly different normative universe, governed by different norms. In the second scenario, Sue occupies the same normative universe (the normative universe of ordinary morality) in which being an attorney is simply one moral demand among many.19

As I understand it, Sue’s first explanation more accurately represents the claims of role-morality. Role-morality dictates that a lawyer operates under a wholly different set of normative requirements, and must be criticized in accordance with those requirements. The normative demands that accompany one’s role as a lawyer (e.g. protecting client autonomy) are not, as Sue argues, a subset of general moral considerations. Rather, the normative demands of legal ethics operate independently of moral demands and may not be subsumed or affected by them.

3. A Normative Language of Legal Ethics

It is also useful to offer a brief account of what I mean by a “normative language for holding lawyers to account,” or “a normative language of legal ethics.” In general normative reasons are justification giving reasons, reasons that give a “point or purpose” to one’s action.20 Normative reasons can be understood in contrast to purely explanatory reasons, or “reason-why” reasons.21 It is important to note that normative reasons may also be explanatory reasons insofar as they explain the

19 This latter approach is the approach favored by Luban and other critics of role-morality. Although it is not within the scope of this paper to answer this objection, it is important to notice the difference before proceeding. See The Inevitability of Conscience, note 10 supra at 1440-1441; Serena Stier, Legal Ethics: The Integrity Thesis, 52 Ohio St. L. J. 551, 604–605 (1991).
21 Id.
intention behind an action. However, normative reasons extend beyond explanatory reasons. Hence, “wood floats because it is less dense than water” is an explanatory reason, while “I give to the poor because they are in need and it is right to give to people in need,” is a normative reason. Although this second reason also has an explanatory aspect (it explains why I give to the poor), it is generally a justification-giving reason in the way that “wood floats because it is less dense than water,” is not.

Thus, when I use the phrase normative language, I mean a set of normative reasons that includes all and only those normative reasons appropriate to that set. For example, a normative language limited to the bounds of reality would not include a statement of the sort, “protecting unicorns is good,” because unicorns do not exist. However, it would include the statement (though we could debate its truth), “protecting endangered otters is good.” Thus, the normative language of ordinary morality—though likely difficult to pin down—would include all and only those reasons we give to justify our actions in day-to-day life. While I would not want to rest on the claim that there exists a single, common normative language of ordinary morality it may be useful to think of the phenomenon as unitary to avoid additional confusion.

In contrast, the normative language of legal ethics—at least according to a theory of role-morality—consists of all and only those reasons a lawyer may give to justify actions she takes in a professional capacity. To the extent that ordinary

---

22 I say that I would not want to base a great deal on my definition of the normative language of ordinary morality because there are undoubtedly a number of different languages of ordinary morality that may overlap at various times. Thus, a statement that would be true in the normative language of a practicing Muslim (e.g. “It is wrong to drink alcohol”) may not be true in the normative language of an atheist or a Christian. Thus the claim that there is a normative language of ordinary morality at all is a controversial one. I may do better to say there are normative languages of ordinary moralities. While this is a complicated and interesting issue, I do not believe the existence of one or many normative languages affects my argument in any way. As I understand it, role-morality requires that lawyers be subject to criticism only on the basis of legal norms (i.e. non moral norms). As such, the number of normative languages present in a society does nothing to change role-morality’s claim that a lawyer ought not be subject to any other normative language when acting in her professional capacity.

23 At first glance, it may seem that the Preamble to the Model Rules call this statement into questions. Model Rules of Professional Conduct Preamble [7], [9]. These sections explicitly reference personal conscience as relevant to legal ethics. It could therefore be argued that ordinary moral norms are incorporated into the normative language of legal ethics. I would suggest that these sections merely provide room for ethical discretion in lawyering (i.e. the ability of reasonable lawyers to reach different conclusions about what legal ethics require). This interpretation is supported by the language of [9] which reads, “Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved though the exercise of sensitive personal and moral judgment guided by the basic principles underlying these rules.” (emphasis added). Thus, the ability of a lawyer to be guided by personal conscience is not a permission to sneak personal moral commitments through the back
moral reasons do not justify actions taken in a lawyer’s professional capacity, they are not properly within the normative language of legal ethics.

Because the normative languages may have wholly different content, a statement of the sort “it is wrong to reveal a client’s secrets even to save another person’s life,” may be true in the normative language of legal ethics but false in the normative language of ordinary morality. Similarly, the proposition “it is wrong to make a truthful person appear untruthful” may generally be true in the normative language of ordinary morality without being true in the normative language of legal ethics. While I do not want to belabor the point, it is a central claim of role-morality that these two normative languages—legal ethics and ordinary morality—do not overlap, even if, in some situations, they dictate similar outcomes.

Significantly, just as the normative language of ordinary morality is not exhausted by legal prohibitions, neither will a legal normative language consist only of legal limitations and rules of professional responsibility. A normative language of legal ethics should, I suggest, be capable of accounting for instances in which a lawyer’s behavior may be blameworthy without necessarily being subject to legal sanctions or professional discipline.

The necessity of a language of legal ethics that extends above the basement of actionable behavior does not strike me as particularly controversial. Indeed, to the extent that a normative language of legal ethics is even meaningful, it should (and perhaps must) consist of something beyond behavior for which a lawyer is subject to punishment by the state or the bar. A normative language of legal ethics would certainly be impoverished—if not entirely meaningless—if it consisted of no more than a series of prohibitions and punishments.

However, this is precisely the dilemma that proponents of role-morality face. If an attorney may not be criticized in normal, moral language, how may we hold her to account when she engages in legal but abhorrent behavior? How can we address the torture lawyer in a way that both respects the distinct and important role lawyers play in our society while simultaneously holding a sincere and meaningful ethical debate? How do we avoid the triple bind of sanction, acquiesce, or a rejection of role-morality?

The remainder of this paper will address itself to precisely these questions through an examination of two different accounts of role-morality and the extent to which they permit of a normative language of legal ethics.

door of ethical deliberation, but the recognition that difficult cases may cause reasonable disagreement between lawyers as to the requirements of legal ethics. As such, we should not interpret brief references to personal conscience as a general rejection of role-morality or a co-mingling of moral and legal norms.
In the remaining two sections, I will divide role-morality into what I will term hard and soft role-morality. By hard role-morality I intend to denote a version of traditional role-morality that severely circumscribes the grounds upon which a lawyer may be subject to normative criticism. In contrast, an alternative theory of role-morality—what I will refer to as soft role-morality—maintains that lawyers are indeed exempt from moral criticism when acting in their professional roles. However, in place of typical moral criticism, lawyers become subject to other normative constraints above and beyond criminal and civil law or the rules of professional responsibility—although what these constraints are remains to be seen. In particular, I will examine hard and soft role-morality as found in the scholarship of Stephen Pepper and W. Bradley Wendel. I will attempt to offer a brief account of the foundations of each argument for role-morality and the normative language implied by each.

4. Hard Role-Morality

There may be no single better account of hard role-morality than Stephen Pepper’s 1986 essay, *The Lawyer’s Amoral Ethical Role*, “Once a lawyer has entered into the professional relationship with a client, the notion is that conduct by the lawyer in service to the client is judged by a different moral standard than the same conduct by a layperson,” as such:

[I]f such conduct by a lawyer is lawful, then it is morally justifiable, even if the same conduct by a layperson is morally unacceptable and even if the client’s goals or means are morally unacceptable. As long as what the lawyer and client do is lawful, it is the client who is morally accountable, not the lawyer.24

So long as the Office of Legal Counsel did not break any laws (admittedly an arguable proposition), they cannot be held morally accountable for their actions on behalf of the President.

Pepper bases his argument on three central premises. First, that the “law is a public good available to all.”25 Second that “liberty and autonomy are a moral good,” as reflected in “a societal commitment to the principal of individual

24 *The Lawyer’s Amoral Ethical Role*, note 5 *supra* at 614.
25 *Id.* at 616.
autonomy.” And third, “that in a highly legalized society such as ours, autonomy is often dependent on access to the law.”

The importance of autonomy and diversity to Pepper’s thinking cannot be stressed too heavily. For Pepper, autonomous decision making constitutes the ultimate moral good. Accordingly, the law reflects this emphasis on autonomy by serving two general purposes: 1) structuring a framework within which private individuals may structure their own affairs, and 2) defining and proscribing “conduct that is intolerable.” It would appear to be a necessary implication of Pepper’s understanding of the supremacy of autonomy that law makers should seek to maximize the first category while strictly limiting the second. However, his general theory of role-morality does not hang on this claim.

Accepting Pepper’s premises, if access to the law is required to ensure an individual is able to exercise her autonomy (premise 3), and autonomy is a moral good constrained only to the extent it is “intolerable,” understood as illegal, (premise 2) then, by implication, access to the law should be constrained only by the bounds of legality. Moreover, insofar as law is a public good intended for the use of all citizens (premise 1), no individual should be denied access to the law solely because their objectives are morally objectionable though not illegal. As a further, empirical observation, access to the law often requires the services of a lawyer. Hence, denying an individual legal representation is tantamount to denying her civic and moral rights of maximizing autonomy.

Putting the argument together:

1. Autonomy is a preferred moral good [P];
2. If an individual (let’s call her Jane) lives in a complex society and is to exercise her moral autonomy then she must have access to the law [P];
3. Therefore, Jane can only exercise a preferred moral good if she has access to the law [1,2];
4. Jane should be able to exercise a preferred moral good so long as it has not been criminalized [P];

Pepper would rephrase this premise to read that Jane can only access “first-class citizenship” if she has access to the law. While phrasing the argument in terms of first-class citizenship serves to emphasize the importance of the preferred moral good in question, I would like to avoid inserting more terms than absolutely necessary. I will therefore simply discuss preferred moral goods rather than primary citizenship in my discussion of Pepper.
5. Therefore, Jane should have access to the law so long as she is not pursuing criminal ends [3,4];
6. Access to the law requires a lawyer [P];
7. Therefore, Jane should have access to a lawyer so long as she is not pursuing criminal ends [5,6].

Taken together, the above argument establishes a right to legal representation derivable from a (maybe the) preferred moral good of autonomy. Given the strength of the moral good underlying the right to legal representation, the argument suggests, though perhaps falls short of requiring, an equally compelling moral good to justify denying legal representation.

Proceeding from these four premises, Pepper derives his prohibition on a lawyer morally evaluating her client’s objectives so as to deprive the client of the lawyer’s services. Consistent with his prior argument, Pepper posits two additional premises. First, the general premise (which I am imputing to Pepper), that no, non-legal, restraint should be imposed on a client’s access to the law (or a lawyer), and second that a lawyer refusing to undertake representation of clients whose objectives she has a moral disagreement with would constitute such a prohibited restraint. On the basis of these additional premises, we reach Pepper’s conclusion that a lawyer’s decision to morally screen clients constitutes an impermissible restriction on client autonomy.

However, it should be noted that the argument presented above limits itself to the conclusion that Jane should have access to a lawyer regardless of the lawyer’s moral opinion of Jane’s objectives. Pepper’s argument, to the extent I have presented it correctly, does not explain why the lawyer ought not to be held accountable for her actions on Jane’s behalf. The answer lies in the lawyer’s inability to deny Jane service. Insofar as, a lawyer may not refuse to represent Jane on the basis of Jane’s moral objectives—without impermissibly restricting Jane’s moral autonomy—that lawyer may not be held responsible for Jane’s objectives so long as they do not transgress the bounds of legality. Thus, Pepper’s hard role-morality morally immunizes Jane’s lawyer even where Jane seeks to undermine or circumvent the law.

However, Pepper’s theory of role-morality is far more extreme than his central argument would suggest. It should be observed that a lawyer also impermissibly restricts a client’s access to the law—and thereby her moral autonomy—by not

32 The Lawyer’s Amoral Ethical Role, note 5 supra at 617.
33 Id.
adopting an attitude of legal realism, advising her clients not just of what the law requires, but how the law is likely to be enforced. Jane's lawyer must not only advise her as to the legality of her proposed course of conduct—strictly speaking—but of the likelihood of enforcement. Pepper formulates his position as a rhetorical question:

Imagine, for example, a lawyer advising a couple for whom there are significant tax and economic advantages of living together unmarried, in a jurisdiction where fornication remains a crime on the books but is never prosecuted. Is it not deception to fail to inform them of the benefits, or to inform them, but to add that the benefits are not available because the conduct would be criminal, but then to say nothing further?

In short, the lawyer may not artificially restrict a client's autonomy by failing to advise her of the existence of a legal obligation that is unlikely to be enforced. Doing so would impermissibly restrict client autonomy by means of deception or other non-legal (not to be confused with illegal) methods.

Whether or not Pepper recognizes it, his argument as to a lawyer's duty to adopt the standpoint of a legal realist, and advise her client accordingly, has serious consequences for his central argument of a lawyer's moral immunity. It was an explicit requirement of Pepper's argument that the client's objectives (and therefore the lawyer's moral immunity) were to be confined within the grounds of legality. However, Pepper's insistence on an attitude of legal realism yields a far looser understanding of legality than his original argument seemed to imply. If an attorney is limited to the bounds of legality, but legality is—at least in part—dependent on enforcement, then a lawyer's moral immunity extends beyond legality strictly speaking and to a broader range of conduct that is illegal in theory but legal (meaning unenforced) in fact.

Professor Luban makes much of this narrow definition of legality in his response to Pepper's article. If legality is reducible to what is both legal and enforced then

34 See Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897), advising attorney's to understand the law as the "bad man…who cares only for the material consequences" of his actions.
35 The Lawyer's Amoral Ethical Role, note 5 supra at 625/
36 Id. at 627-628.
37 Id. at 629-630.
38 Id. at 629.
39 Id. at 617-618.
it may well be the case that a lawyer is required to inform her client that, although child pornography is illegal insofar as there are a number of federal laws against it, there are so many child pornography websites online that so long as she keeps her operation small she's unlikely to be prosecuted. Similarly, a lawyer may be required to advise a gang leader client living in a particularly lawless city that, although murder is against the law, if she chooses to murder a rival gang leader she is unlikely to be prosecuted because authorities do not tend to investigate gang murders particularly thoroughly.\textsuperscript{41} Although some of this conduct would arguably be permitted by the Model Rules,\textsuperscript{42} Pepper's argument appears to require the lawyer to offer this sort of advice or else impermissibly limit client autonomy. These are, as Luban notes, particularly strong conclusions that should give us pause before adopting Pepper's theories. In sum, the lawyer, according to Pepper, should be understood as an “amoral technician” who should—and arguably must—do everything possible to manipulate the law to provide her client with maximum autonomy.\textsuperscript{43} Additionally, the client, not the lawyer, is the proper unit of moral analysis. To the extent we find the objectives reprehensible, our moral critique should be directed towards the client, not the technician who makes the behavior possible. To take an example from Pepper: the mechanic is not morally responsible for fixing the bank robber’s getaway car, the bank robber is morally responsible for robbing the bank.\textsuperscript{44}

In the context of my present discussion, it remains to be seen what sort of normative language Pepper’s theory provides for holding a lawyer to account for the actions she takes on behalf of her clients. To the extent I understand Pepper correctly, the answer is both very little and a great deal. On the one hand, a lawyer may not be held to account for assisting her client with any objective within the bounds of legality. Moreover, legality should be narrowly construed to include only conduct that is both proscribed by law and likely to be enforced in the client’s case. Thus, a lawyer may be held accountable only where she actively assists a client in breaking a law for which the client is likely to be prosecuted. In these instances, and no others, may a lawyer be held morally accountable (in contrast to accountable under some other normative standards).

\textsuperscript{41} Id. This hypothetical has been borrowed directly from Luban.
\textsuperscript{42} “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” Model Rules of Professional Responsibility 1.2(d).
\textsuperscript{43} The Lawyer’s Amoral Ethical Role, note 5 supra at 626.
\textsuperscript{44} Id. at 624
On the other hand, a lawyer—as a necessary precondition to a client's exercise of moral autonomy—would arguably be morally accountable for refusing to assist a client in exercising her autonomy within the broad array of circumstances discussed above. Thus, the lawyer to the child pornographer or gang leader is not only immune from moral criticism for assisting her client, she may be subject to moral criticism for failing to do so. It may well be a consequence of Pepper's theory that the lawyer who does not counsel her client as to the likelihood of being convicted for child pornography or murder commits a moral wrong by impermissibly limiting the client's autonomy. In this sense, Pepper provides a great deal of room for critiquing a lawyer's behavior in representing her client.

It may come as no surprise that I find Pepper's normative language radically deficient. First, Pepper's solution violates one of the central premises of my project: to provide a normative language for holding lawyer's to account without recourse to moral reasons. Second—and a necessary implication of the first objection—Pepper's normative language is overly restrictive insofar as it imposes exceptional moral duties on lawyers to maximize client autonomy. And third, Pepper's normative language provides almost no means of critiquing lawyers—with the important exception of failing to maximize client morality—beyond the basement of illegality.

Generally, I find the first objection less problematic. Although my project is one of establishing a normative language for holding lawyer's to account without recourse to ordinary moral norms, where a lawyer assists her client in actively violating the law she arguably behaves outside her role as an attorney and thereby loses the profession immunity of role-morality. Thus, the fact that Pepper reverts to moral criticisms in direct instances of illegality does not strike me as necessarily fatal given that my project is to provide a language of normative critique beyond the bare requirements of the law and the rules of professional responsibility.

In addition, I am generally of the opinion that the most compelling cases requiring a normative language capable of holding lawyers to account exist where there is no legal recourse for punishing the offending lawyer. In these cases, we are confronted with the choice of accepting the lawyer's behavior, reverting to ordinary moral criticism, or expanding the scope of sanctionable behavior to prohibit the questionable conduct. Because my project is largely focused on instances in which we are confronted with one of these three choices, I do not find clear violations of the law particularly problematic.

My second objection—which I will not be able to fully develop here—goes to the heart of Pepper's argument and bears some similarity to Luban's critiques. Broadly stated, I reject Pepper's premise that autonomy can be a preeminent moral good that the law and the legal system are—as a matter of fact—committed to
maximizing in all situations. In line with a broad range of political philosophers, Isaiah Berlin in particular, \footnote{Isaiah Berlin, *The Proper Study of Mankind* 10–11 (Farrar, Straus and Giroux 1997) (1949).} I would argue that society—including our legal system—embraces a wide variety of values many of which cannot be fully realized at all times and at all places. To elevate individual autonomy to the status of a supreme moral good ignores the diversity of other goods we value as a society as well as the restrictions on autonomy that maximization of any one actor’s autonomy necessarily entails.

Moreover, as has been noted, Pepper’s account of role-morality yields normative language particularly vulnerable to the intrusion of ordinary morality. To the extent Pepper’s theory is based on the moral value of autonomy, a lawyer may be held to account for all instances in which she has failed to maximize that autonomy. Because Pepper characterizes autonomy as a moral good, a lawyer who fails to maximize client autonomy finds herself vulnerable to moral critique. Put another way, Pepper’s theory does not fully immunize an attorney from ordinary morality, but instead shields her from criticism in a single limited sense.

According to Pepper, a lawyer should not be held to account for the morality of her client’s objectives just as the car mechanic should not be held accountable for fixing the bank robber’s getaway car. However, the lawyer may be held accountable on the basis of *ordinary moral reasons* for failing to maximize client autonomy. Yet, holding the lawyer accountable for failing to maximize autonomy, we are treating her in a fundamentally different way than the car mechanic. We would certainly be justified in criticizing the car mechanic in ordinary moral terms for failing to diligently and competently fix our automobile. But we would not be justified in criticizing the car mechanic for refusing the cut the break lines on our ex-partner’s car. However, this appears to be precisely the position Pepper advocates in the context of lawyers. Not only is a lawyer subject to moral criticism for failing to maximize client autonomy by competently performing her role as a zealous advocate and officer of the court, she is subject to moral criticism for failing to advise her client of illegal behavior unlikely to be enforced. Thus, under Pepper’s theory of role-morality, an attorney is, in some cases, more subject to moral criticism than a non-lawyer. A normative language of legal ethics that leaves a lawyer more open to ordinary moral critique seems, *prima facie*, insufficient.

Lastly, my third critique of Pepper mirrors some preliminary remarks made in section one. Insofar as our project is finding an appropriate normative language of legal ethics, that language would be radically impoverished if it included no more than the basement prohibitions on illegal and professionally sanctionable behavior. Indeed, as has already been mentioned, many of the cases that most require a normative language of legal ethics are those in which no law has been broken but a lawyer’s behavior nonetheless strikes us as intuitively objectionable.
Against this argument, Pepper urges that "if the conduct is sufficiently 'bad,' it would seem that it ought to be made explicitly unlawful."46 This may well be true. However, Pepper himself limits law to the restriction of “intolerable” conduct, not simply conduct for which one ought to be held to account.47 Thus, just as in ordinary morality, there must exist some middle ground within which a lawyer should be subject to normative critique.

It may rightfully be objected that on this count I have caricatured Pepper’s position to some extent. When Pepper argues that a lawyer should not be morally held to account, he means that a lawyer ought not be held to account for legally pursuing a client’s potentially immoral objectives. This does not—at least not necessarily—imply that Pepper intends the same standard to apply for the means an attorney employs to pursue a client’s objectives. Perhaps some separate normative language of legal ethics controls the precise measures a lawyer may take on behalf of her client. I do not deny that this may be the case. However, I see no evidence for this position. Indeed, based upon the importance Pepper grants to maximizing client autonomy, it may well be argued that a lawyer may be morally blameworthy for failing to use any and all tactics available to her to accomplish this goal. Thus, once again, Pepper’s normative language is the language of sanctions not genuine normative dialogue.

In sum, my objection to the normative language of legal ethics implied by Pepper’s role-morality is two-fold: it is both too hard and not hard enough. Pepper’s account is too hard in that it speaks to nothing beyond the floor of behavior. Pepper makes room for no normative reasons that are not accompanied by formal sanction or punishment. Conversely, Pepper’s account is not hard enough because it leaves a lawyer open to a broad range of moral criticisms where she fails to maximize client autonomy even where the client’s ends seek to undermine the law. Thus, in light of the fact that Pepper’s account of role-morality cannot provide us with an adequate normative language of legal ethics, I would suggest that we have good reason to go in search of a more complete account of role-morality. As such, the following section will present what I have termed soft role-morality exemplified by the work of W. Bradley Wendel. The following section will present this account of role-morality and its accompanying normative language of legal ethics. The section will conclude by arguing in favor of this normative language.

46 The Lawyer’s Amoral Ethical Role, note 5 supra at 618.
47 Id. 617.
5. Soft Role-Morality

In contrast to Pepper’s emphasis individual autonomy as a preeminent moral good, Wendel’s argument for role-morality premises itself on the existence of moral pluralism. Ever drawing on the work of Isaiah Berlin, Wendell defines moral pluralism as:

[T]he claim that human experience, and the good and values associated with it, is sufficiently complex that one cannot reduce all of these ethical considerations to some higher-order synthesizing value that can be used to rank and prioritize competing values.

Wendel posits moral pluralism as a basic fact of political life. Given this enduring disagreement between citizens as to the weight that should be assigned to a particular good or value (or indeed whether something is a particular good or value at all), Wendel argues that it is the purpose of the legal system “…to provide an orderly framework for cooperation despite fundamental and persistent moral disagreement among citizens.”

In justifying a lawyer’s actions (and indeed the legal system as a whole) we must therefore look beyond the ordinary moral values that are precisely the subject of dispute:

When acting in a professional capacity, lawyers should not refer back to ordinary moral considerations because the whole point of the social institution of the legal system is to establish a basis for social solidarity, coexistence, and cooperation that standard apart from the contested moral positions take by individual citizens.

49 Id.
50 Id.
Correspondingly, in criticizing lawyers, we should make use of norms particular to the legal system, and not the moral issues in dispute. It is precisely because our legal system is intended to mediate competing moral concerns that lawyers must not be subject to moral critique. Were the opposite true, and lawyers were subject to ordinary moral critique, the law would be wholly unable to serve its purpose as a moral mediator. It is precisely because lawyers, as a part of the legal system, are charged with mediating moral disputes that they cannot be held accountable on the very questions they seek to answer.

Laying Wendel’s argument out more systematically, it might be summarized as follows:

1. Society is defined, at least in part, by moral pluralism understood as a persistent disagreement between citizens about how to rank competing moral values [P];
2. Society cannot exist without some degree of social cohesion [P];
3. If a society is morally plural and socially cohesive, then there must be some institution capable of mediating disputes over the ranking and priority of competing moral values [P];
4. X is a society that is both socially cohesive and morally plural [P];
5. X must have some system capable of mediating disputes over the ranking and priority of competing moral values [1,2,3,4];
6. The legal system is at least one such necessary mediating institution [P];
7. X must have a legal system [1,2,3,4,6];
8. A mediating institution cannot effectively mediate if it relies on the moral values it is responsible for mediating [P];
9. X must have a legal system that does not rely on the moral values it mediates [1,2,3,4,6,8];
10. If a mediating institution does not rely on moral values then it must rely only on freestanding values [P];
11. X must have a legal system that relies only on freestanding values [1,2,3,4,6,8,10];
12. If an institution relies only on freestanding values, then its official participants, when acting within that institution, may only be held accountable on the basis of those freestanding values [P];
13. The official participant’s of X’s legal system, when acting within X’s legal system, may only be held accountable on the basis of free standing values [1,2,3,4,6,8,10,12];
14. Lawyers are an official participant of X’s legal system [P];
15. Lawyers in X’s legal system may only be held accountable on the basis of free standing values [1,2,3,4,6,8,10,12,14].
While the argument necessarily takes longer to diagram than Peppers, a more formulaic examination of Wendel’s reasoning is useful in that it highlights two less obvious premises of his argument.

First, Wendel claims, in premise 3, that a morally pluralist society that is also sufficiently socially cohesive must have an institution for mediating moral value conflicts. This point is interesting largely in light of the subsequent premise: that the legal system is at least one such necessary mediating institution. This claim may well give us pause.

Arguably, the democratic method of popular elections and the legislative process serve as the paradigmatic mediating institution. Citizens are permitted to elect officials to represent their interests and those officials, in turn, reach—or attempt to reach—a consensus on difficult moral issues.

However, the legal system is less clearly a mediating institution in the pure sense. Certainly, cases before the United States Supreme Court that go directly to the question of certain core values (e.g. a fetus’s right to live versus a mother’s autonomy) would seem to qualify the legal system as a mediating institution. But what of the civil case between an assault victim and her assailant? Can an action for damages for an intentional tort genuinely be considered a matter of value mediation? Even less clear, imagine the attorney drafting a will or establishing a trust, or another attorney explaining to a client the advantages and disadvantages of forming a partnership versus a corporation. Do these instances qualify as mediating disputes between moral values? The examples are myriad, but the problem is the same: most lawyers most of the time do not seem to be engaged in the sort of value mediation that Wendell believes to be necessary for social cohesion.

In light of the foregoing examples, an additional problem arises. To the extent that the legal system is not entirely, or even generally, charged with mediating moral values, can role-morality that encompasses the entire legal profession be justified on the grounds that the legal system sometimes mediates moral disputes? If not, is the lawyer arguing a case before the Supreme Court immune from moral criticism while the lawyer drafting an unconscionable will or forming a corporation that intends to invest in third-world sweat shops is not? These are questions inherent in Wendel’s account of role-morality that, although they cannot be fully addressed here, are raised insofar as they go to the heart of the type of normative language Wendel’s theory implies.

Second, unlike Pepper’s arguments from the moral good of autonomy, Wendel argues that normative legal reasons are not reducible to moral reasons more

---

53 While I impute this premise to Wendel, it is a necessary step in his argument. Indeed, were one to remove this premise, the argument would have no obvious application to the legal system and therefore irrelevant to our current discussion.
generally. To make use of the obfuscating terms of political philosophy, the legal system—of which legal ethics is a part—is a "freestanding evaluative domain," that is related only indirectly with the domain of ordinary morality. Accordingly, although there may be a correlation between legal norms and ordinary morality—for example both may value individual autonomy—there is no causal connection between the two. The legal norm favoring individual autonomy is neither caused by nor derived from the ordinary moral value of autonomy.

It is here that Wendel most directly departs from Pepper. As discussed above, because individual autonomy is the preeminent moral good, a lawyer who fails to maximize that good is subject to moral critique. Moral requirements and corresponding moral accountability abounds. Indeed, role-morality itself is no more than short hand for general moral duties framed in the language of legal ethics. In contrast, under Wendel’s account of role morality, to the extent autonomy is a good that a lawyer may be held accountable for not respecting, it is a legal good that creates a corresponding normative, legal demand. Hence, in demanding—as premise 10 does—that a legal system be based on free standing values, we are prevented from making use of any other normative critiques. Legal norms are and must be our only basis for holding lawyers to account.

In light of these two observations, what is the normative language of legal ethics suggested by Wendel's soft role-morality? As should be evident from the observations above, the normative language should be connected to the laws general purpose of mediating moral disputes. Additionally, the language should be completely free standing and without reference to ordinary moral norms. Thankfully, Wendel has provided a thorough outline of the normative language that he believes accompanies his account of role-morality.

In his article, Professionalism as Interpretation, Wendel argues for a language of legal ethics based upon an "interpretive stance of professionalism," under which "a lawyer has an obligation to apply the law to her client's situation with due regard to the meaning of legal norms, not merely their formal expression." Wendel describes this interpretative attitude as imposing both positive and negative obligations. On the one hand, lawyers "must treat legal norms as precluding the moral and other reasons that would otherwise justify or require a different action in the circumstances,"—the inverse requirement of the central tenant of role-morality. On the other hand, lawyers should remain focused not simply on their client's inter-

---

54 The Morality of Politics, note 48 supra. at 1432
56 Id. at 1169.
57 Id.
est, but on the legitimacy on the law as an institution. Accordingly, lawyers are obliged to interpret the law in good faith and "with due regard to its meaning." This is not to say that lawyers must act as private-judges, assessing the value of their client's claims and dismissing those that violate the spirit of the law. To be sure "lawyers are not judges who are institutionally charged with the task of remaining impartial," but, Wendell notes, "[lawyers] are also not clients, who may be permitted to approach the law from a partisan and self-interested perspective. Lawyers must interpret the law with an eye to purpose, not just to text. While they have obligations to their clients, they also have obligations to the society whose laws they are interpreting and applying.

Even more broadly, given, as was noted above, that society requires law as a value-mediating institution, the law must be interpreted in a way "that ensures it will continue to have the capacity to coordinate social action against a background of persistent first-order normative disagreement." Drawing on premise 3 above, insofar as social cohesion and moral pluralism cannot coexist in the absence of an institution or various institutions charged with mediating value conflicts, lawyers who undermine the law's ability to perform its central function have violated a fundamental norm of legal ethics.

In sum, Wendel posits that lawyers have an ethical obligation not just to their clients, but to the law as a purposive and socially necessary institution. Insofar as lawyers undermine that institution with manipulative, client-centered legal interpretations, they have violated the basic normative demand of legal ethics. It is the legal system's purpose—along with the purpose of a particular legal text—that creates the normative requirements upon which a language of legal ethics can be founded. Thus, to the extent we wish to hold a lawyer to account without either imposing a sanction or subjecting her to moral critique, we should do so because she has ignored or neglected the purpose of the law (meaning both the purpose of the statute or case law being interpreted and the purpose of legal system more broadly).

58 Id.
59 Id.
60 Professionalism as Interpretation, note 55 supra. at 1177.
61 Id. at 1178.
62 Id. at 1185.
63 It should be noted that in his article, Wendel is speaking primarily of legal representation in transactional and counseling matters in the absence of the procedural constraints and neutral third party present in the context of litigation. Id. at 1172-1173. Accordingly, lawyers are subject to more stringent normative constraints when advising clients than when they are representing clients in court. Although I do not believe that Wendel's reasoning compels him to reach this conclusion, it is a pragmatic concession to the bar's tendency to emphasize zealous advocacy.
More specifically, however, several observations can be made about the normative demands made by this particular language of legal ethics. At its lowest ebb, it requires that, when counseling clients, a lawyer must offer a good faith interpretation of the legal text in question, informed both by the purpose of the particular legal text and the purpose of the legal system more generally. Read more broadly—indeed more broadly than Wendel intends—the normative language might subject all lawyers, whether in a litigation or transactional setting, to the legal norms of good faith, purpose-oriented interpretation.\(^64\) We might even go so far to derive from Wendel’s logic the general normative requirement that lawyers act only in ways that promote the substantive purpose of the law as a value mediating institution.

While the strength of the particular normative demands may be debated, it is the centrality of purpose as a normative requirement that cannot be ignored. Where a lawyer has violated the purpose of a law and/or the legal system, she may be held to account regardless of whether or not her behavior is legal.

Moreover, purpose satisfies the requirement—highlighted as premise10 of Wendel’s argument—that a normative language of legal ethics must be founded on freestanding values. Insofar as purpose refers only to the purpose of the legal system itself, the question of whether a lawyer has satisfied her normative legal obligations can be answered wholly without reference to ordinary moral norms. This is particularly evident where purpose, as a central criterion for a normative language, is compared with Pepper’s criterion of autonomy. While purpose refers back only to the values of the free-standing values of the legal system, Pepper’s emphasis on autonomy equivocates role-morality and ordinary morality by implicitly relying on moral values to justify a non-moral normative system (i.e. the system of legal ethics). Thus, not only does Wendel provide us with a richer language of legal ethics than does Pepper, his normative language also more strictly adheres to the central tenants of role-morality outlined in section one.

Taken together, and in light of the criteria outlined in the first half of this paper, Wendel’s normative language of legal ethics more directly reflects the type of normative language I believe is required. First, it provides a means of holding lawyers to account even where they have not violated the law or a rule of professional responsibility. Second, it upholds the central tenant of role-morality that lawyers, acting in their professional capacity, should not be held accountable on the basis of ordinary moral reasons. It would seem Wendel succeeds on both counts.

However, while admitting the strength of Wendel’s arguments, and the valuable foundation they have laid for a more developed normative language of legal ethics, Wendel’s theory cannot simply be accepted as the final work on the subject. Before

---

\(^64\) Professionalism as Interpretation, note 55 \textit{supra.} at at 1182.
concluding, it may be useful to briefly outline areas for future development in a fully coherent normative language.

As previously discussed, much of Wendel's argument depends upon purpose, both of a particular legal text and the legal system more broadly. Further, the purpose of the legal system more generally should be understood as mediating basic and persistent value conflicts among citizens in a pluralistic society. While this provides a useful normative criterion with which to hold lawyer's ethically accountable, Wendel's particular understanding of purpose may be in need of refinement.

Indeed, purpose as a foundation for a normative language of legal ethics faces criticism on three counts. First, even if Wendel's theory does provide a partial justification for role-morality, it does not immunize lawyers who are not directly engaged in mediating between conflicting values. Second, one can well imagine scenarios in which lawyers should intuitively be held to account even where they have not necessarily ignored the purpose of a law. Lastly, it is unclear that purpose—defined as both the purpose of a particular legal text and the purpose of the legal system—will always yield the same normative requirements, particularly where the lawmaker is despotic or corrupt.

Beginning with the first objection, the questions presented above as a response to Wendel's broader argument for role-morality remain unanswered. Does Wendel's vision of the legal system as a value-mediating institution accurately reflect the majority of the work lawyers do on behalf of their clients? It feels somewhat strained to say that drafting a will or articles of incorporation is a value-mediating enterprise. To the extent that estate planners or transactional lawyers are often not engaged in value-mediation, are they still protected from ordinary moral critique? Indeed, simple observation might lead one to believe that lawyers spend far more time engaged in mediation over money than over core values. However, Wendel's entire argument for role-morality premised itself on law as a value-mediating institution. If law is only a quasi-value-mediating institution, then, correspondingly, role-morality only grants quasi-immunity.

Second, we may feel dissatisfied with purpose as the central criterion of legal ethics insofar as it intuitively fails to capture the full range of blameworthy behavior. We may well feel disturbed by the lawyer who drafts the unconscionable will or incorporates a corporation that intends to legally exploit children overseas, but can we genuinely say that she has manipulated the purpose of the probate law or incorporation statutes? To the extent we value an individual's right to dispose of their property as they like after their death, the lawyer has not violated the purpose of the probate law. Similarly, a lawyer does not violate the purpose of the incorporation statutes by incorporating a business that will undertake a legal but immoral
objective. In discussing activities that violate the purpose of a particular law and the legal system more generally, Wendel mentions many of the paradigmatic cases upon which this paper has drawn: torture, corporate fraud, and tax shelters. However, these examples, compelling though they are, omit many of the instances in which lawyers intuitively appear to have behaved wrongly without violating the purpose of the law or the legal system. Even if purpose can provide a partial foundation, can it provide the entire foundation?

The third and final objection simply recognizes the political realities of many legal systems. Although it may well be the purpose of the legal system to mediate the competing goods that citizens value, a particular law may have a far less beneficial purpose. By way of example, upon what grounds would we hold a lawyer blameworthy or innocent for interpreting the Jim Crow laws or advising or representing clients pursuant to those laws? Certainly, the purpose of the legal system is to mediate between core values. Yet, the purpose of the Jim Crow laws was, at least in part, to exclude an entire race from participating in the broader moral dialogue or offering its conception of core values. Thus, the Southern lawyer may adhere to the purpose of the legal system and ignore the purpose of the law, or adhere to the purpose of the law and ignore the purpose of the legal system.

The dilemma is complicated by the fact that the answer is not simply one of personal conscience; the lawyer is charged with advising clients who may act in reliance upon the law. How should the lawyer advise the white business owner determining what facilities must be provided? The white entrepreneur deciding whether it is legally advisable to hire a multi-racial workforce? While it is tempting to answer that a lawyer should always favor the purpose of the legal system over the purpose of any given law, the choice is not always so clear, nor is it readily applicable to situations in which the lawyer may find herself.

Given these three objections, one may well wonder whether a normative language of legal ethics founded upon purpose is genuinely viable. I would suggest that it is, though further refinement of the theory is needed. However, it is also likely that our intuitions are in need of revision. Much of this paper has explicitly drawn on the intuitive need to hold lawyers to account when they engage in legal but ethically repugnant behavior. Indeed, the entire argument that role-morality is in need of a normative language of legal ethics hinged upon the felt-need to condemn the behavior of the Office of Legal Counsel while respecting the bounds

65 It should be noted that although these may be questions of client selection, Wendel does not differentiate the types of reasons a lawyer should employ in choosing clients and the types of reasons that govern a lawyer’s representation of that client. In both cases, the reasons are exclusively legal rather than moral. Institutional and Individual Justification in Legal Ethics at 1033, note 51 supra.

66 Professionalism as Interpretation, note 55 supra. at 1210-1232
of role-morality. While I still contend that such a language is necessary and that the felt-need I have described is a valid one, further development of a normative language of legal ethics may require us to reexamine our intuitions even as we improve the theory more generally. In sum, even as we continue to construct an appropriate normative language, it is likely that some realm of seemingly blame-worthy behavior will not be adequately accounted for. While this may provide the impetus to further refine our thinking, it may also challenge us to rethink our own intuitions about when and how a lawyer’s actions are truly blameworthy at all.

6. Conclusion

This article has argued that, in light of the recent crisis in legal ethics, role-morality’s continuing viability depends upon its ability to construct a normative language of legal ethics, a language capable of holding lawyers to account without devolving into ordinary moral critique. In an attempt to further the development of this normative language, this article examined two competing visions of role-morality the first (hard role-morality) represented by Stephen Pepper and the second (soft role-morality) by W. Bradley Wendell. While both theories of role-morality continue to create meaningful and productive discourse, this article ultimately favored soft role-morality as more conducive to the development of a normative language of legal ethics while noting that much work remains to be done.

Michael P. Boulette, J.D., A.B.
Kathleen M. Newman + Associates, P.A., Minneapolis, Minnesota, United States
Email: mboulette@kathynewmanlaw.com