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## Law's Ambition and the Reconstruction of Role Morality in Canada

David M. Tanovich  
*University of Windsor*

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*There is a growing disconnect and alienation between lawyers and the legal profession in Canada. One cause, which is the focus of the article, is philosophical in nature. There appears to be a disconnect between the role lawyers want to pursue (i.e., a facilitator of justice) and the role that they perceive the profession demands they play (i.e., a hired gun). The article argues that this perception is a mistaken one. Over the last fifteen years, we have been engaged in a process of role morality reconstruction. Under this reconstructed institutional role, an ethic of client-centred zealous advocacy has slowly begun to be replaced with a justice-seeking ethic that seeks to give effect to law's ambition. Part I of the article provides the basic foundations of this reconstruction thesis. In the first section, role morality is defined and defended as a beacon of ethical reflection. The next section attempts to trace the evolution of our understanding of the public interest. The final section of Part I provides the evidence of this reconstructed role morality by exploring statements from leading members of the profession, recent ethics jurisprudence and by examining equality and harm prevention principles in our codes of conduct. Like any large bureaucratic institution, the profession will inevitably be slow to respond to its new identity and the changing set of norms and values that go with that identity. The required institutional changes are beyond the scope of this article. However, Part II does address how lawyers can on an individual level give effect to this evolving role morality by adopting a pervasive justice-seeking ethic and by engaging in identity lawyering that is consistent with the interests of justice.*

*Au Canada, on constate que la dichotomie et l'aliénation entre les avocats et la profession juridique sont en croissance. Cet article avance que l'une des causes de cette dichotomie et de cette aliénation est d'ordre philosophique. Il semble exister une dichotomie entre le rôle que les avocats veulent jouer (intervenants qui favorisent l'application de la justice) et le rôle qu'ils croient que la profession leur impose (mercenaires au service de leurs clients). L'auteur de cet article allègue que cette perception est sans fondement. Depuis plus de quinze ans, nous avons été actifs dans un processus de reconstruction de la moralité. Dans ce rôle institutionnel reconstitué, une éthique de représentation partielle et sectaire axée sur le client a lentement cédé la place à une éthique de recherche de justice qui vise à réaliser l'ambition du droit. La première partie de l'article établit les bases de cette thèse de reconstruction. Dans la première section de cette partie, le rôle de moralité est défini et défendu en tant que modèle d'éthique. Dans la section suivante, l'auteur tente de tracer l'évolution de notre perspective de l'intérêt public. Dans la dernière section de la partie II, il donne la preuve de cette moralité reconstituée en examinant les témoignages de membres éminents de la profession, la jurisprudence récente sur l'éthique et les principes d'égalité et de prévention de préjudices dans nos codes de conduite. À l'instar de toute grande institution bureaucratique, la profession mettra inévitablement beaucoup de temps à réagir à cette nouvelle identité et aux normes et aux valeurs changeantes qui l'accompagnent. Les changements institutionnels requis vont au-delà de la portée de cet article. Toutefois, dans la partie II, l'auteur traite des façons dont les avocats peuvent, individuellement, donner suite à cette moralité en évolution en adoptant une éthique profonde de recherche de la justice et en pratiquant leur profession de manière conforme aux intérêts de la justice.*

## Introduction

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## Introduction

There is a growing disconnect and alienation between lawyers and the legal profession in this country. A 2004 survey, for example, discovered that "lawyers were more dissatisfied than other professionals" and that they perceived their work as generally "not particularly relevant to society as a whole."<sup>1</sup> Indeed, many recent graduates and more seasoned lawyers would likely agree with the following diagnosis provided by William Simon at the commencement of his ethics treatise *The Practice of Justice*

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1. See Chief Justice Roy McMurtry, "The Legal Profession and Public Service" presented at the Third Colloquium (Ottawa) (Law Society of Upper Canada, 2004) online: Law Society of Upper Canada <[http://www.lsuc.on.ca/news/pdf/third\\_colloquium\\_mcmurtry.pdf](http://www.lsuc.on.ca/news/pdf/third_colloquium_mcmurtry.pdf)> (date accessed: 10 February 2005). See also the discussion in Fiona M. Kay, Cristi Masuch & Paula Curry, *Diversity and Change: The Contemporary Legal Profession In Ontario* (Toronto: Law Society of Upper Canada, 2004) at 120 [*Diversity and Change*].

– “[n]o social role encourages such ambitious moral aspirations as the lawyer’s, and no social role so consistently disappoints the aspirations it encourages.”<sup>2</sup> Why is this happening? What is it about the law school and lawyering experiences that is creating such despair and discontent?

The etiology of this discontent is complex. Some of the problems are structural in nature. They include, for example, the presence of systemic biases in entry and mobility for groups traditionally excluded from the profession.<sup>3</sup> Other structural problems include: barriers to justice<sup>4</sup>; the commodification and corporatization of legal practice<sup>5</sup>; the lack of consistent and meaningful enforcement of ethical and regulatory prohibitions<sup>6</sup>; and finally, the failure of many law schools to provide an environment in which students can develop the necessary skills, judgment, and cultural competence to engage in an ethical and meaningful practice of law.<sup>7</sup>

Beyond structure, the profession suffers from chronic disrespect and a lack of public confidence in it.<sup>8</sup> As Justice Abella of the Supreme Court

2. See William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Mass.: Harvard University Press, 1998) at 1 [*The Practice of Justice*]. I owe a great debt to Professor Simon for providing me with the theory and tools to understand and embark upon this exploration of role morality in Canada.

3. See generally the discussion in *Diversity and Change*, *supra* note 1 at 1-11, 119-120; Fiona M. Kay, Cristi Masuch & Paula Curry, *Turning Points and Transitions: Women's Careers in the Legal Profession* (Toronto: Law Society of Upper Canada, 2004) 1-17, 106-111; Charles C. Smith, “Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession” presented at the Fourth Colloquium (Windsor) (Law Society of Upper Canada, 2005), online: Law Society of Upper Canada <[http://www.lsuc.on.ca/news/updates/define\\_prof.jsp](http://www.lsuc.on.ca/news/updates/define_prof.jsp)> ; Merrill Cooper, Joan Brockman & Irene Hoffart, *Final Report On Equity and Diversity in Alberta's Legal Profession* (Calgary: Law Society of Alberta, Jan. 2004) at i-iii (Executive Summary); Gerry Ferguson & Kuan Foo, *Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers* (Vancouver: Law Society of British Columbia, April 2000); Chris Tennant, “Discrimination in the Legal Profession, Codes of Professional Conduct and the Duty of Non-Discrimination” (1992) 15 Dal. L.J. 464 [*Duty of Non-Discrimination*].

4. See generally Richard Devlin, “Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession” (2002) 25 Dal. L.J. 335 at 351 [*Breach of Contract*].

5. See generally Gavin MacKenzie, “The Valentine’s Card In The Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession” (1994-1995) 33 Alta. L. Rev. 859 at 859-865 [*The Valentine’s Card In The Operating Room*].

6. See generally Harry W. Arthurs, “Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs” (1994-1995) 33 Alta. L. Rev. 800 [*Dead Parrot*].

7. For example, only Alberta, Manitoba, Western, New Brunswick and Dalhousie have mandatory ethics courses in Canada. See the discussion of mandatory ethics courses in Jocelyn Downie, “A Case For Compulsory Legal Ethics Education In Canadian Law Schools” (1997) 20 Dal. L.J. 244. See also the discussion of law school pedagogy and cultural competence in Rose Voyvodic, “Advancing The Justice Ethic Through Cultural Competence” presented at the Fourth Colloquium (Windsor: Law Society of Upper Canada, 2005), online: Law Society of Upper Canada <[http://www.lsuc.on.ca/news/pdf/fourth\\_colloquium\\_voyvodic.pdf](http://www.lsuc.on.ca/news/pdf/fourth_colloquium_voyvodic.pdf)> (date accessed: 18 April 2005) [*Advancing The Justice Ethic*].

8. See e.g., Michael Wilhelmson, “Public’s Perception Of B.C. Lawyers Fought To Be Slipping” *The Lawyers Weekly* (26 March 2004).

of Canada has observed "the intensity of the public's disaffection is now so palpable that it has started to affect the profession's own perception of its professionalism."<sup>9</sup> This lack of public respect has only been heightened with a number of highly publicized cases involving over-zealous conduct including the now infamous Ken Murray case.<sup>10</sup> As Kent Roach notes "[the case] has been something of a mini-Enron for the legal profession."<sup>11</sup> The same can be said with the growing systemic problem of prosecutorial zeal in criminal cases.<sup>12</sup>

The final cause, which is the focus of this article, is philosophical in nature. It concerns the role morality or *raison d'être* of the profession. In my opinion, there is a disconnect between the role lawyers want to pursue (*i.e.*, a facilitator of justice) and the role that they *perceive* the profession demands they play (*i.e.*, a zealous advocate). This disconnect is evident in a 1994 empirical study of lawyers in Ontario.<sup>13</sup> Forty-nine of the 154 lawyers whose interviews were analyzed by the researchers raised the issue of the lawyering role when discussing problems they had experienced in practice. Interestingly, all forty-nine lawyers started out

9. "Professionalism Revisited" (14 October 1999), online: Ontario Courts <[http://www.ontariocourts.on.ca/court\\_of\\_appeal/speeches/professionalism.htm](http://www.ontariocourts.on.ca/court_of_appeal/speeches/professionalism.htm)> (date accessed: 1 February 2005) [*Professionalism Revisited*].

10. Murray kept in his possession videotapes depicting his client's (Paul Bernardo) involvement in the rape and torture of his victims. While he did eventually disclose the tapes, the damage had already been done. As a result of Murray's conduct, Bernardo's accomplice, Karla Homolka, was able to secure a plea bargain that sent her to jail for only twelve years. Murray was charged with obstruction of justice and acquitted. See *R. v. Murray* (2000), 144 C.C.C. (3d) 322 (Ont. S.C.). Disciplinary charges against Murray were also eventually withdrawn. See the discussion of the Murray case in a forum at (2001) 50 U.N.B.L.J. 171-277 and (2003), 47 Crim. L. Q. 141-223.

11. "Ethics and Criminal Justice" (2003) 47 Crim. L. Q. 121 at 121. See also the discussion in Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 1-2 [*Ethics and Canadian Criminal Law*].

12. See, for example, the recent case involving Arnold Piragoff, one of Alberta's top Crown Attorneys. Piragoff was found liable for malicious prosecution and reprimanded by the Law Society of Alberta for his role in the Jason Dix prosecution. Dix was charged with two counts of first degree murder and spent 22 months in custody before his charges were eventually dismissed. Piragoff misled the court at Dix's bail hearing. As evidence that Dix posed a danger, Piragoff presented a letter, purportedly written by a police informant Dix had met in jail, which offered to kill Dix's girlfriend, a potential Crown witness. Piragoff was aware, however, that the letter had, in fact, been written by two RCMP officers, in conjunction with the informant, as a ploy to get Dix to confess. Indeed, during a break, an RCMP officer reminded him of this fact. Piragoff did nothing to correct the mistake and Dix was denied bail. See *Dix v. Canada* (A.G.), [2002] A.J. No. 784 (Q.B.). See also Paula Simons, "No Justice In Wrist Slap By Law Society: Prosecutor Deserved Sterner Sanctions" *Edmonton Journal* (21 May 2005) B1; Charles Rusnell "Dix Prosecutor Fined For Misleading Court: Actions A – Shade Short' Of Deliberate" *Edmonton Journal* (19 May 2005) A1.

13. See Margaret Ann Wilkinson, Christa Walker & Peter Mercer, "Testing Theory and Debunking Stereotypes: Lawyers' Views On The Practice Of Law" (2005) 18 Can. J.L. & Jur. 165 [*Testing Theory*]. See also, Peter Mercer, Margaret Ann Wilkinson, and Terra Strong, "The Practice of Ethical Precepts: Dissecting Decision-Making By Lawyers" (1996) 9 Can. J.L. & Jur. 141 at 153.

in the role of a counsellor applying an ethic of care.<sup>14</sup> In twenty-nine cases, that role at some point conflicted with the instructions of the client. Four lawyers resolved that conflict by substituting their own judgment for that of the client while another seven lawyers withdrew from the case. The remaining eighteen lawyers ultimately adopted a hired gun role even though ten of them continued to experience stress and internal conflict. In their conclusions, the authors of the study observed that

[a]lthough most lawyers, in the end, relinquished their decision-making to their clients', this transition from counselor to hired gun, *mandated by their professional obligations*, was one fraught with challenge for many lawyers. Lawyers resolved their problems in these areas, not by resort to official sources such as their code of conduct, but by resort to internal, informal sources of information such as mentors ...

Finally, this research amply demonstrates that ... lawyers are preoccupied with the constant tensions of specific solicitor-client relationships and the lawyer's overall obligations to society.<sup>15</sup>

But is this hired gun role now "mandated by [our] professional obligations"?

There is no question that historically, the philosophy of lawyering in Canada has largely been driven by principles of partisanship, zealous advocacy, and morally unaccountable representation within the bounds of the law.<sup>16</sup> It is an ethic that many trace back to Lord Brougham's speech in Queen Caroline's case<sup>17</sup>:

14. As the authors note, in this role "the lawyer must weigh competing and concurrent third party interests, as well as those of the client, in order to decide how to advise the client. The lawyer must consequently thoroughly weigh all available options and encourage the client to be thoughtful in making the ultimate decision" See *Testing Theory*, *supra* note 13 at 172 and 178.

15. *Supra* note 13 at 190 [emphasis added].

16. See John R. Cartwright, "An Address To Convocation By The Chief Justice of Canada" (1968) 2 *Gazette* 6 at 6-7; George Finlayson, "The Lawyer As A Professional" (1980) 14 *Gazette* 229 at 230, 235 [*Lawyer As A Professional*]; *Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.* (1991), 5 O.R. (3d) 65 at 69 (Ont. Ct. Gen. Div.); Marvin Joel Huberman, "Advocacy, War, and the Art of Strategy" (1992) 26 *Gazette* 122; Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 2001) at 1-9 - 1-10 [*Lawyers and Ethics*]; *R. v. Felderof* (2003), 180 C.C.C. (3d) 498 at 536 (Ont. C.A.); David Layton, "The Criminal Defence Lawyer's Role" (2004) 27 *Dal. L.J.* 379 at 381-382 [*The Criminal Defence Lawyer's Role*].

17. In 1820, King George IV of England wanted to remove his wife Caroline as Queen and to dissolve their marriage. In order to accomplish this task, a bill was entered in the House of Lords. The charge was that Caroline had committed adultery. The inquiry became, in effect, "The Trial of Queen Caroline." Henry Brougham, later Lord Chancellor, was chosen as her legal counsel. During the trial, he gave notice that he intended to prove that the King had previously married in secret. Many thought that proof of this might bring down the monarchy. In doing so, Brougham gave what is now one of the most famous speeches on role morality. The Bill was eventually withdrawn by the King. Caroline died shortly after King George's coronation. See online: <<http://www.loyno.edu/history/journal/Mouledoux.html>> (date accessed: 20 February 2005); William H. Simon, "'Thinking Like A Lawyer' About Ethical Questions" (1998) 27 *Hofstra L. Rev.* 1 at 4 [*Thinking Like A Lawyer* (1998)].

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.<sup>18</sup>

The lawyer's role was conceptually and morally simple—facilitate understanding of the available legal options and fearlessly protect the client's interests even at the expense of harm to innocent third parties. By using the law as the outer boundary of permissible conduct, the profession could simultaneously claim that lawyers acted honourably and as officers of the court.

It should be pointed out that some have suggested that this hired gun ideology of lawyering is of more recent vintage having only emerged in the 1960s and 1970s in the United States and perhaps much later in Canada.<sup>19</sup> Indeed, we can find expressions of role morality throughout the first half of the twentieth century in Canada, that appear to give more prominence to personal conscience than in the post-1960 era.<sup>20</sup> However, this so-called "golden age" of the profession may have simply engaged in a different kind of unaccountable and zealous representation. Given the profession's history of exclusion both in terms of entry and access to justice,<sup>21</sup> one is left to question whether these calls for reliance on personal morality were simply a means to further exclusion and maintain the dominance of the privileged. As Wesley Pue has noted:

18. As quoted in *R. v. Neil*, [2002] 3 S.C.R. 631 at para. 12.

19. See e.g., the discussion in *Ethics and Canadian Criminal Law*, *supra* note 11 at 3-5.

20. See e.g., W.B. Ferris, "The Call" (1949) 7 *Advocate* 137 at 140: "[n]o lawyer should allow his retainer by a client to interfere with that he considers his public duties and to do that which his conscience tells him he should do." See also the discussion in W. Wesley Pue, "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" (1991) 20 *Man. L.J.* 227 at 239 [*Becoming Ethical*].

21. See generally, Constance Backhouse, "Gender and Race In The Construction of 'Legal Professionalism': Historical Perspectives" (2003) online: Law Society of Upper Canada <[http://www.lsuc.on.ca/news/updates/define\\_prof.jsp#colloquium](http://www.lsuc.on.ca/news/updates/define_prof.jsp#colloquium)> (date accessed: 28 February 2005) [*Gender and Race*].

We do not know exactly how or why a code of professional ethics was first developed in Canada but we do know that it emerged from a professional culture which was xenophobic, elitist and generally aligned with capital interests against ordinary citizens.<sup>22</sup>

Leaving aside the exact moment in time when fearless allegiance to the client's interests took root in our role morality, let me return to the question posed earlier: does Brougham's speech still accurately capture our role morality *today*? Given public discontent, academic criticisms of the concept of role morality (discussed *infra*), and indeed the conduct of the lawyers in the study referred to earlier, it would appear that most perceive a lawyer in hired gun terms. This article argues that this perception is mistaken and that, over the last fifteen years, we have been engaged in an ongoing process of role morality reconstruction. Under this reconstructed institutional role, an ethic of client-centred zealous advocacy has slowly begun to be replaced with a justice-seeking ethic that seeks to give effect to law's ambition.

Part I of this article provides the basic foundations of this reconstruction thesis. The first section of Part I defines role morality and defends keeping it as the beacon of ethical reflection rather than jettisoning it in favour of an approach that relies on personal responsibility or morality as has been argued by many academics including Allan Hutchinson, Alvin Esau, and Donald Buckingham in Canada and David Luban in the United States.<sup>23</sup> The next section attempts to trace the evolution of our understanding of the public interest. As the legal profession has always attempted to ground

22. W. Wesley Pue, "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers" (1995) 33 Alta. L. Rev. 730 at 762-763 [*In Pursuit of Better Myth*]. Consequently, it may have been commonplace for lawyers in the first part of the twentieth century, for example, to refuse to vigorously represent (or represent at all), an individual perceived to be (or constructed as) a threat to the existing social, economic and political order and to rely on conscience or their own personal morality to justify that decision. On the other hand, these very same lawyers likely had no difficulty applying Brougham's exhortation for the wealthy client who wished, for example, to build a factory that would cause harmful emissions for a neighbouring low-income housing community. For example, Pue writes about a prominent lawyer in 1919 who, in a speech to members of the Canadian Bar Association about the dangers of so-called "scheming for business", made it "abundantly clear that the real problem with commercialized legal practice was that it permitted injured workers, the poor, maimed and injured, to recover damages from business enterprises!" See *Becoming Ethical*, *supra* note 20 at 231-232, 245-246.

23. See Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999) [*Legal Ethics and Professional Responsibility*]; Alvin A.J. Esau, "What Should We Teach? Three Approaches to Professional Responsibility" in Donald E. Buckingham *et al.*, eds., *Legal Ethics in Canada: Theory and Practice* (Toronto: Harcourt Brace, 1996) 178-191; Donald E. Buckingham, "Rules and Roles: Casting Off Legal Education's Moral Blinders For An Approach That Encourages Moral Development" (1996) 9 Can. J.L. & Jur. 111; Alice Woolley "Integrity in Zealousness: Comparing the Standard Conception of the Canadian and American Lawyer" (1996) 9 Can. J.L. & Jur. 61 [*Integrity in Zealousness*]; David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) [*Lawyers and Justice*].



itself in the public interest, how the profession conceives of the public interest will largely determine how it, and its members, should conduct themselves. The final section of Part I attempts to provide the evidence of this reconstructed role morality by exploring statements from leading members of the profession, recent ethics jurisprudence, and finally, by examining equality and harm prevention principles in our codes of conduct.<sup>24</sup>

Like any large and bureaucratic institution, the profession will inevitably be slow to respond to its new identity and the changing set of norms and values that go with that identity. Indeed, many parts of our codes of conduct remain inconsistent with a justice-seeking ethic. To fully give effect to legal practice as a means of securing justice rather than maximizing clients' goals, there will need to be structural change, strong leadership from the law societies and Canadian Bar Association, and a reorientation in law schools. These issues are beyond the scope of the paper. Part II does address, however, how lawyers can, *on an individual level*, give effect to this evolving role morality by adopting a pervasive justice-seeking ethic and engaging in identity lawyering that is consistent with the interests of justice.

## I. *Role morality, public interest and a justice-seeking ethic*

### 1. *What is role morality?*

Role morality is the set of norms, standards, and values that govern the conduct of individuals when acting as lawyers. It is the profession's

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24. The focus will be on Ontario, see *Rules of Professional Conduct*, online: Law Society of Upper Canada <[http://www.lsuc.on.ca/services/rulesprofcondpage\\_en.jsp](http://www.lsuc.on.ca/services/rulesprofcondpage_en.jsp)> (date accessed: 22 February 2005) [Ontario] and the Canadian Bar Association, *Code of Conduct*, online: Canadian Bar Association <<http://www.cba.org/CBA/activities/code/>> (date accessed: 25 February 2005) [CBA] as they have been very active in amending their codes.

“professional conscience.”<sup>25</sup> The foundations for role morality are not religious, spiritual or even utilitarian principles of good and evil or right and wrong. Instead, the foundations are largely normative involving role-differentiated and specific requirements. These norms and values come from expectations (*i.e.*, what role should lawyers play in our society) and from codes of conduct, jurisprudence, custom, and convention. The rationale for recognizing a distinct way of thinking and acting for individuals occupying the role of legal professional is perhaps best explained by many of the codes of conduct which contain the following exhortation: “a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice....”<sup>26</sup>

Using role morality as an ethical guide for lawyers has been given short shrift. For many, it is inappropriate because it gives effect to, and further entrenches, the excesses of the adversarial process, namely, zealous advocacy, partisanship and a “sporting theory of justice.” It is thus perceived to be a shield by which to protect lawyers from accountability and, therefore, as “amoral” lawyering.<sup>27</sup> As an alternative to role morality, we have seen the new ethics scholars like Luban and Hutchinson urge lawyers to take personal responsibility for the decisions they make and to rely on personal morality as their compass.<sup>28</sup> For example, in what he calls his “ethical call to arms,” Hutchinson exhorts:

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25. See *Rush v. Cavanaugh*, 2 Pa. 187; 1845 Pa. LEXIS 306 (1845) [*Rush*]. In *Rush*, the respondent, a lawyer, was hired by the appellant to prosecute a third party for forgery. At that time, individuals could retain lawyers to prosecute criminal cases. During the course of the prosecution, the lawyer became convinced of the accused’s innocence and dismissed the action against the wishes of his client. After he collected his fee, the client called him a “thief, robber, and cheat.” The lawyer launched an action for slander. As his justification, the client argued that the lawyer was obligated to follow his instructions. In rejecting this argument, Justice Gibson of the Pennsylvania Supreme Court held (at 189):

It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his *professional conscience*. He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he *violates it when he consciously presses for an unjust judgment*; much more so when he presses for the conviction of an innocent man [emphasis added].

*Rush* has been largely ignored in professional responsibility and ethics discussions in the United States. See Fred C. Zacharias & Bruce A. Green, “Reconceptualizing Advocacy Ethics” (2005) 74 Geo. Wash. L. Rev. 1.

26. See Rule 1.03(1)(b), *Ontario*, *supra* note 24.

27. See *e.g.*, the discussion in Randal N. Graham, “Moral Contexts” (2001) 50 U.N.B.L.J. 77 at 83-87.

28. Luban, for example, offers the following circumstances which would be prohibited under his moral activism approach: (1) the “inflict[ion] [of] morally unjustifiable damage on other people, especially innocent people”; (2) “deceit”; (3) “manipulations of morally defensible law to achieve outcomes that negate its generality or violate its spirit”; and (4) “the pursuit of substantively unjust results.” See *Lawyers and Justice*, *supra* note 23 at 157.

a fully ethical practice requires an independent sense of moral virtue that involves the lifelong development of personal moral character.... [I]t is about the development of a moral way of living and lawyering....

My most central recommendation is to urge lawyers to take personal responsibility for what they say and do in their professional capacities.... It is for each person to arrive at an informed and conscientious decision in accordance with his or her political and moral lights.<sup>29</sup>

Finally, many are critical of using role morality to foster ethical judgment because it is assumed that “there is little space for reflection or engagement [as] reference to the professional codes is intended to provide definitive and authoritative answers.”<sup>30</sup>

My response to these criticisms is fourfold. First, the criticisms are largely grounded in the traditional image of lawyer as the hired gun or the “honest” hired gun and do not necessarily hold true if one accepts the argument that we are in the midst of reconstructing role morality as the pursuit of justice.<sup>31</sup> As Hutchinson himself recognizes “[t]he argument that there is a strongly differentiated role morality that lawyers are to interpose between their personal and professional lives can only be justified by reference to the overall and deeper moral worth of the profession’s work generally.”<sup>32</sup> Second, while role morality may be amoral in the sense that it relies on role differentiation and legal values rather than common morality as its guide, the foundations of our legal system are largely built upon values such as truth and justice. Indeed, controversial moral issues such as abortion, same-sex marriage, or the exclusion of unconstitutionally obtained evidence have escaped the will of the moral (and likely political) majority because of the triumph of legal values such as dignity, equality, and procedural fairness. And so while we can all debate whether the statues outside the Supreme Court of Canada bearing the words “veritas” and “justitia” are more about law’s ambition than its practice, the ambition is nevertheless a moral one and role morality demands that lawyers give effect to that ambition in their conduct.

Third, asking lawyers to rely on their own morality is often too subjectivist and relativist to ensure that justice is served on a consistent

29. *Legal Ethics and Professional Responsibility*, *supra* note 23 at 47-49, 195.

30. *Supra* at note 23 at 39-40. Hutchinson is not alone in his criticism of using rules to promote ethical reflection. See e.g., *The Valentine’s Card In The Operating Room*, *supra* note 6 at 865-873; Margaret A. Wilkinson, Christa Walker & Peter Mercer, “Do Codes of Conduct Actually Shape Legal Practice?” (2000) 45 McGill L.J. 645; *Testing Theory*, *supra* note 13 at 190. See also the discussion of this issue in the context of the discrimination and sexual harassment rules in Joan Brockman, “The Use of Self-Regulation To Curb Discrimination and Sexual Harassment In the Legal Profession” (1997) 35 Osgoode Hall L.J. 209 [*The Use of Self-Regulation*].

31. This is defined *infra*.

32. *Legal Ethics and Professional Responsibility*, *supra* note 24 at 10.

basis. The attraction of a role differentiated guide to behaviour is that lawyers are taught to “think like lawyers” which, in theory, empowers them to determine what justice demands in any given situation.<sup>33</sup> As William Simon puts it:

[i]f the problem involves the reconciliation of competing legal values, lawyers know how to address it. The range of solutions and authorities and the modes of analysis and argument that lawyers habitually employ in their everyday work are available and appropriate for the central issues of legal ethics....

On the other hand, if the problem arises from claims of nonlegal values, then lawyers are likely to be uncertain how to deal with these claims collectively and individually. They have no common analytical and rhetorical tools for addressing them. The tools offered in popular culture for considering moral problems seem too formless and subjective; those offered by academic philosophy seem too abstract and multifarious.<sup>34</sup>

This link between ethical reflection and thinking like a lawyer has also been made by Christine Boyle and Marilyn MacCrimmon:

We say that to engage in legal reasoning is to be attentive to human rights, in the broadest sense—that legally-trained people, that is those who understand and are committed to the concept of the rule of law, reflect the investment society makes in insurance against tyranny and injustice. This can be expressed in terms, familiar to lawyers, of professional responsibility. For example, the Law Society of British Columbia, in its Canons of Legal Ethics, says that ‘it is a lawyer’s duty ... to serve the cause of justice.’ We take the view that the discipline of law requires attention to the very values, in particular such values as human dignity and equality, which form the basis of the criticism that individual laws or legal practices fail to live up to those values. In that the very essence of lawyering requires attention to such values it can be said that people who are not so attentive are doing something that is perhaps legalistic but not law.<sup>35</sup>

Moreover, asking lawyers to rely on justice to guide their conduct should also more easily enable them to defend behaviour that may be inconsistent with prevailing professional or legal norms. Lawyers will be more comfortable, given their training, to articulate a justice-based justification should they have to account for their conduct. Discipline tribunals and malpractice triers will be more receptive to justice-based as opposed to

33. See generally William H. Simon, “Thinking Like a Lawyer—About Ethics” (1999-2000) 38 Duq. L. Rev. 1015 [*Thinking Like A Lawyer (1999-2000)*].

34. *The Practice Of Justice*, *supra* note 2 at 18.

35. Christine Boyle & Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) 20 Windsor Y.B. Access Just. 55 at 59.

conscience-based defences. In addition, clients are more likely to listen and act when the dialogue concerns what justice demands in the situation as opposed to what the lawyer's moral compass will permit.

Finally, role morality is not solely about adhering to a rigid set of positivist rules or legal commands as has been suggested. Rather, it is about professional identity and a state of mind. It is not about asking each lawyer the question "what kind of a lawyer do I want to be" but rather, "what kind of a lawyer does the legal profession demand I be." In order to answer this question, each lawyer must ask herself what the substantive norms inherent in law demand in the particular situation, taking into account the purpose behind the legal command and the context in which it is operating. A reconstructed role morality requires considerable reflection and contextual thinking. It is about developing and actualizing a "sense" of justice.<sup>36</sup>

And so, while I agree with Hutchinson's call for lawyers to take responsibility for their actions, I part company in terms of what exactly lawyers are to take responsibility for. Under a reconstructed role morality, lawyers are required to take *professional* responsibility to ensure that their conduct promotes the cause of justice. Again, as we frequently see stated in codes of conduct, "[a] lawyer's responsibilities are greater than those of a private citizen."<sup>37</sup> That said, it is clear that we agree on what we see as the goal of legal ethics. As Hutchinson puts it "it is incumbent on the profession to ensure that the interests of justice are placed squarely and regularly at the forefront of professional concerns."<sup>38</sup> This is the very essence of law's ambition.

## 2. *The professional obligation of lawyers to act "in the public interest"*

As it has been argued that role morality is largely normative and its content is derived from thinking about the role lawyers should play in our society, it is now necessary to address the parameters of that role. It is beyond dispute that serving the interests of the public is the prevailing

36. The concept of a "sense" of justice can be found throughout moral and political theory. For a summary, see Markus Dirk Dubber, "Making Sense of the Sense of Justice" (2005) 53 Buff. L. Rev. 815.

37. See e.g., the Commentary to Rule 4.06(1) *Ontario*, *supra* note 24. Moreover, as David Wilkins has observed:

Lawyers are more than ordinary citizens; they have been given a monopoly by the state to occupy a position of trust both with respect to the interests of their clients and the public purposes of the legal framework. As a result, the kind of deliberation that may be appropriate in the realm of personal moral decision making will not always produce the social goods that society legitimately expects from a regime of professional ethics.

See "In Defense of Law and Morality: Why Lawyers Should Have A Prima Facie Duty To Obey The Law" (1996-1997) 38 Wm. & Mary L. Rev. 269 at 274 [*In Defense of Law and Morality*].

38. *Legal Ethics and Professional Responsibility*, *supra* note 23 at 10.

ideology and guiding principle of the profession.<sup>39</sup> The idea that Canadian lawyers are obligated to act in the “public interest” finds its most emphatic expression in the jurisprudential recognition of the utility of the self-regulating nature of the legal profession and in legislation that establishes the right of law societies to regulate.<sup>40</sup> So, for example, in *Pearlman v. Manitoba Law Society Judicial Committee*, the Supreme Court held that “the self-governing status of the professions, and of the legal profession in particular, was created in the public interest.”<sup>41</sup> Similarly, the preface to the Canadian Bar Association Code of Conduct states that:

The Code of Professional Conduct that follows is to be understood and applied in the light of its primary concern for the protection of the public interest. This principle is implicit in the legislative grants of self-government.... Inevitably, the practical application of the Code to the diverse situations that confront an active profession in a changing society will reveal gaps, ambiguities and apparent inconsistencies. In such cases, the principles of protection of the public interest will serve to guide the practitioner to the applicable principles of ethical conduct and the true intent of the Code.<sup>42</sup>

### 3. *Our evolving understanding of what is “in the public interest”*

As noted earlier, the ideology of lawyering in this country has historically been, generally speaking, one of client-centred zealotry. Its expression can be seen in Justice George Finlayson’s address to the 1980 call to the bar ceremony in Ontario:

We must have the ability to sit back and view a client’s problems dispassionately and be able to advise as to what would be in his or her best interests.... [The lawyer] is representing a person, and that person is entitled to be told what his circumstance is, not what he or you, his lawyer, would like it to be.

[o]ur duty is not to motivate the clients or to involve them in our concerns, but to deal with the problem of a particular client and to obtain the best possible result in representing the client, keeping in mind the client and nobody else.

[s]o long as you choose to practice law in the traditional sense—the representation of a client in any sphere—you must never forget that your duty is to that client alone....

39. See Frederick DeCoste, “Towards A Comprehensive Theory of Professional Responsibility” (2001) 50 U.N.B.L.J. 109 at 117.

40. See e.g., *The Legal Profession Act (British Columbia)*, S.B.C. 1998, c. 9, s. 3(a).

41. [1991] 2 S.C.R. 869 at 887 (as per Iacobucci J.).

42. *CBA*, *supra* note 24. With some modifications, the CBA Code of Conduct is used by law societies in Saskatchewan, Manitoba, Newfoundland, P.E.I., Northwest Territories, Yukon and Nunavut.

*If you confuse your social or political conscience with your duty to that client, you betray his trust; you betray us all.*<sup>43</sup>

It is curious how this ideology grew out of a profession that has defined itself in the public interest. Why were we (and why are we still in many respects) so willing to say to the client, "I am prepared to do your bidding whatever it may be and regardless of the harm that may accrue provided you can stay within the narrow bounds of the law"? It is far too simplistic to think that this ideology can be explained in terms of pure self-interest. Surely we have had to weave a far more complex myth to convince generations of well-meaning individuals to buy into this traditional role morality.

What is this myth? It would appear that the public interest justifications for this ideology of lawyering include the long-term promotion of access to justice, competent representation, and client autonomy.<sup>44</sup> The link to access is explained as follows. If lawyers are seen to be moral advisors to their client, then a lawyer who represents an unpopular or repugnant client will be viewed as endorsing the client's position. Role morality, therefore, protects the lawyer from being vilified in public. We recently saw an example of this when Stockwell Day suggested that a lawyer who defended an individual charged with possession of child pornography was personally in favour of child pornography.<sup>45</sup> As for competence, client loyalty manifested in strict confidentiality rules ensures, in theory, that there will not be a chilling effect on communication and a free flow of

43. *Lawyer As A Professional*, *supra* note 16 at 230, 235 [emphasis added].

44. See generally Monroe H. Freedman "How Lawyers Act In The Interests Of Justice" (2002) 70 *Fordham L. Rev.* 1717; Stephen L. Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities" (1986), 1986 *Am. B. Found. Res. J.* 613.

45. See "The Letter That Launched The Lorne Goddard Lawsuit" *The Edmonton Journal* (18 January 2001) A2.

information which is necessary for competent representation.<sup>46</sup> This chilling effect is seen to impact not only the quality of representation but also access. Individuals with problems may fear seeking legal help if they think that their lawyer will disclose their confidences. Moreover, some have argued that strict rules of confidentiality may, in fact, serve to protect the public from future harm. If clients feel that they can alert their lawyer as to their intentions, the lawyer may be in a position to dissuade them from so acting. In addition to these justifications, there has been the steadfast belief that the negative effects of zealousness will be checked by the adversarial nature of the adjudicative process. In theory, each side of a dispute is represented by competent counsel and a neutral umpire ensures that truth and justice are served.<sup>47</sup>

The problem with these justifications, however, is that they are largely illusory and without foundation. For example, the idea that criminal and civil disputes are resolved by means of an adversarial trial is largely a myth.<sup>48</sup> Most cases are settled well before trial either by way of settlement, mediation, or a guilty plea. For example, in criminal cases, where adversarialism is purportedly most vibrant, it is estimated

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46. As Justice Sopinka, for the majority, observed in *Macdonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1244 [*Macdonald Estate*]:

The legal profession has distinguished itself from other professions by the sanctity with which ... communications [between a lawyer and client] are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.

Similarly, in *Smith v. Jones* (1999), 132 C.C.C. (3d) 225 at 240 (S.C.C.) [*Smith v. Jones*], Justice Cory, for the majority, held:

Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.

See also the discussion in *City of Montreal v. Foster Wheeler Power Co.*, [2004] 1 S.C.R. 456 at 475-476.

47. As was observed in *R. v. Joannisse* (1995), 102 C.C.C. (3d) 35 at 57 (Ont. C.A.) [*Joannisse*], "[w]e place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of a criminal allegation is best determined by 'partisan advocacy on both sides of the case'...."

48. See the discussion of this myth in Gavin MacKenzie, "Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism" (1995) 29 *Gazette* 122 at 132-140.



that over ninety per cent of cases are resolved before trial.<sup>49</sup> And, even when criminal cases go to trial, many individuals are unrepresented. A 2002 Department of Justice funded study discovered shockingly high levels of unrepresentation in nine provincial court sites across Canada.<sup>50</sup> Other accused are under-represented either because of inadequate legal aid funding, over-reliance on over-worked duty counsel,<sup>51</sup> or incompetent representation.<sup>52</sup> For example, in one troubling Ontario case, a defence lawyer in Toronto candidly revealed that he did not “do jails” in response to a claim on appeal that he was ineffective because he did not interview his client, a young offender in custody, before the trial date.<sup>53</sup>

Returning to the justifications for zealousness, while autonomy is an important goal that the law seeks to enhance, no one has the right to harm another under the guise of self-realization.<sup>54</sup> Indeed, one of the central purposes of a legal system is to constrain autonomous action in the name of collective peace and security. And finally, there is no evidence that zealousness manifested in the strict maintenance of confidences has served to create greater access, promote competence or a just system. As Simon has pointed out, there is simply no evidence that the confidentiality rule has served to promote trust and a free exchange of information between the client and lawyer.<sup>55</sup> Nor is there any evidence that transactional

49. This includes guilty pleas and withdrawal of charges by the Crown. See Milica P. Piccinato, “Plea Bargaining” The International Corporation Group, online: Department of Justice <<http://canada.justice.gc.ca/en/ps/inter/plea2.html>> documenting a 1998 study in Ontario. See also the discussion in Joseph Di Luca, “Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada” (2005) 50 *Crim. L.Q.* 14 at 15. As DiLuca observes, “[w]e now operate in a system of guilty plea justice.”

50. See Robert G. Hann, Joan Nuffield, Colin Meredith & Mira Svoboda, “Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts Part 1: Overview Report” (September 2002), online: Department of Justice <<http://canada.justice.gc.ca/en/ps/rs/rep/rr03-LARS-2.pdf>>. For example, the authors provide the following general summary of their findings:

- [i]n some situations, depending on the jurisdiction and the stage at which plea was entered, well in excess of 50 percent of accused are convicted without the benefit of legal representation.
- [i]n some situations, depending on the jurisdiction and the type of offence, up to 30 percent of those convicted receive custodial sentences, again without benefit of legal representation.

51. *Ibid.*

52. See David M. Tanovich, “Charting The Constitutional Right of Effective Assistance of Counsel in Canada” (1994) 36 *Crim. L.Q.* 404; “Further Developments On Claims of Ineffectiveness of Counsel” (1995) 34 *C.R.* 32.

53. He also failed to interview a defence witness until the day of the trial. See *R. v. B.(L.C.)* (1996), 104 C.C.C. (3d) 353 (Ont. C.A.). The Court of Appeal ultimately concluded that this conduct did not constitute ineffective assistance of counsel.

54. See generally, David Luban, “Partisanship, Betrayal And Autonomy In The Lawyer-Client Relationship: A Reply To Stephen Ellmann” (1990) 90 *Colum. L. Rev.* 1004 at 1035-1043 [*Partisanship, Betrayal and Autonomy*].

55. *The Practice of Justice*, *supra* note 2 at 54-62. See also Fred Zacharias, “Rethinking Confidentiality” (1989) 74 *Iowa L. Rev.* 351 at 377-96.

lawyering requires the same level of confidentiality as litigation and yet the rule has applied with equal vigour in both contexts.<sup>56</sup> It is troubling that our system has been built on assumptions about confidentiality that have never been empirically tested. The recognition of the illusory nature of these justifications along with the realization of the harm and injustice caused by zealousness has played an important role in our rethinking of what lawyering "in the public interest" means.

There are a number of other factors that have emerged over the last fifteen years as well. The first and perhaps most important factor was the introduction of the *Charter* in 1982 and, in particular, section 15(1) and its guarantee of substantive equality. This equality guarantee has provided us with a powerful measuring stick that can be (and has been) used as a guiding principle by which to assess the impact of our behaviour as lawyers on clients, our colleagues, and other members of the public.<sup>57</sup> In conjunction with section 15(1), we have seen greater participation in the profession by traditionally excluded groups, particularly women, and this has had an impact on how we think about ethics and professionalism. As Rosemary Cairns Way notes:

The Honourable Bertha Wilson, in her capacity as chair of the Canadian Bar Association (C.B.A.) Task Force on Gender Inequality in the Legal Profession suggested that the influx of women had triggered a rethinking of the meaning of professionalism. For her, professionalism encompassed more than service to the client, it required a commitment to justice, and specifically to equality.<sup>58</sup>

Moreover, the last decade has seen a more diverse and representative group of individuals who are ultimately responsible for governance and the development of the codes of conduct.<sup>59</sup> We are also slowly beginning to recognize and give effect to a distinct legal culture in Canada which includes an Aboriginal legal tradition.<sup>60</sup> And finally, the recent recognition of the importance of pro bono work and the willingness of the Supreme

56. For a compelling argument on why the confidentiality rule should not apply with the same vigour in corporate law, see "Corporate Counsel and Confidentiality" (Chapter 10) in *Lawyers and Justice*, *supra* note 24.

57. See generally Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25 Dal. L.J. 27 ["Reconceptualizing Professional Responsibility"].

58. *Ibid.* at 32.

59. In Ontario, for example, some of these benchers are (and have included) Professor Constance Backhouse, Professor Joanne St. Louis who is African-Canadian, Mary Eberts, Tracey O'Donnell and Todd Ducharme both of whom are Aboriginal, Avvy Yao-Yao Go who is Asian, Beth Symes, Carol Curtis, Eleanor Cronk, and Vern Krishna who is South Asian.

60. We can see this influence, for example, in our thinking about restorative justice. In the context of sentencing, see *R. v. Gladue*, [1999] 1 S.C.R. 688. See also Larry Chartrand, "The Appropriateness Of The Lawyer As Advocate In Contemporary Aboriginal Justice Initiatives" (1994-1995) 33 Alta. L. Rev. 874.

Court to impose limits on the ability of lawyers to do harm has heightened our understanding of the importance of the relationship between lawyers and the public.<sup>61</sup>

What then is our current understanding of the obligation of lawyers to act “in the public interest”? I suggest that we have been moving towards a conception of public interest that requires lawyers to act in the pursuit of justice. Justice can be defined, for the purposes of the lawyering process, as the *correct resolution of legal disputes or problems in a fair, responsible, and non-discriminatory manner*.<sup>62</sup> This approach to justice has both procedural and substantive elements. The procedural component is the right to a fair and non-discriminatory process that is capable of producing the result demanded by the law. The substantive component involves assessing the merit of the legal claim as seen through the lens of the law properly interpreted. A proper interpretation is one that gives effect to the purpose behind the legal provision and which ensures that the provision is consistent with other substantive legal norms such as equality, fairness, and harm reduction. It is also one that pays special attention to our history of injustice.<sup>63</sup> Having defined justice in this fashion, the pursuit of justice requires the following minimum ethical obligations of lawyers:

- Do what you reasonably can to promote accessibility to legal representation<sup>64</sup>;
- Ensure that your competence extends beyond legal skills and knowledge to cultural sensitivity and understanding (*i.e.*, cultural competence)<sup>65</sup>;

61. See in particular, *R. v. Lytle* (2004), 180 C.C.C. (3d) 476 (S.C.C.) (prohibiting the putting of false suggestions to a witness on cross-examination) [*Lytle*]; *Smith v. Jones*, *supra* note 46 (recognizing an exception to confidentiality/privilege to prevent future harm).

62. This is consistent with Simon’s approach to both ethical reflection and the meaning of justice. As he writes, “[l]awyers should take those actions that, considering the relative circumstances of the particular case, seem likely to promote justice.” Simon defines justice as the “‘legal merits’ of the matter at hand.” See *The Practice of Justice*, *supra* note 2 at 10, 138.

63. See Alan Dershowitz, *Rights From Wrongs: A Secular Theory of the Origins of Rights* (New York: Basic Books, 2004) at 8-9.

64. See *Breach of Contract*, *supra* note 4 at 351 on the issue of mandatory pro bono obligations for lawyers. As for imposing a similar obligation on law professors and students, see Deborah L. Rhode, “The Professional Responsibilities of Professors” (2001) 51 J. Legal Educ. 158 at 162-164; Deborah L. Rhode, “The Professional Responsibilities of Professional Schools” (1999) 49 J. Legal Educ. 24 at 30-36; Deborah L. Rhode, “Cultures of Commitment: Pro Bono for Lawyers and Law Students” (1999) 67 Fordham L. Rev. 2415 at 2416-2417.

65. See *Advancing The Justice Ethic*, *supra* note 7. See also, Susan Bryant, “The Five Habits: Building Cross-Cultural Competence in Lawyers” (2001) 8 Clinical L. Rev. 33; Michelle S. Jacobs, “People From The Footnotes: The Missing Element In Client-Centered Counseling” (1997) 27 Golden Gate U. L. Rev. 345; Carwina Weng, “Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness” (2005) 11 Clinical L. Rev. 401; and, Carolyn C. Hartley & Carrie J. Petrucci, “Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration between Social Work and Law” (2004) 14 Wash. U.J.L. & Pol’y 133.

- Protect your client's right to a fair process and a result which is consistent with the legal merit of the claim;
- Generally avoid deceitful, obstructionist, or other conduct that will frustrate the ability of the process to produce the legally correct result;
- Do not engage in conduct that will have a discriminatory impact on third parties<sup>66</sup>;
- Protect your client's right to be free from discriminatory practices or conduct; and,
- Be responsible. Avoid and disclose conduct that will unjustifiably harm an innocent third party.<sup>67</sup>

Some may view this concept of a justice-seeking ethic as one of client betrayal as it will sometimes require the lawyer to refuse to follow the client's instructions, disclose confidential information to prevent harm, or assist an unrepresented litigant. However, as Simon notes, "[a] lawyer who limits the distance she will go for a client on the basis of norms of legal merit or justice does not deprive the client of anything he is entitled to; on the contrary, she simply insists on respecting the entitlements of others."<sup>68</sup> In many respects, this is no different than the limit on the zealous advocate to act within the bounds of the law. A justice-seeking ethic simply demands that lawyers engage in a reorientation of what the law demands in individual cases.

Nevertheless, one of the biggest challenges in actualizing this ethic will be for lawyers to learn how to deal with situations where their client will feel that they are being betrayed. There is no question that many lawyers will feel uncomfortable with having justice-based dialogues with those who are paying their fees. How would you explain to the client, for example, that their conduct is not prohibited under the law as currently interpreted by the courts, but that it is contrary to the law properly interpreted by you? This is not to say that a justice-seeking ethic will necessarily lead to a "race to the bottom" where the client will end the retainer and find their "hired gun" at another firm. As has been suggested:

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66. In many respects, this conception of a justice-seeking ethic mirrors Rosemary Cairns Way's equality-seeking ethic. See *Reconceptualizing Professional Responsibility*, *supra* note 57 at 46. See also the discussion in Esmeralda M.A. Thornhill, "Ethics in the Legal Profession: The Issue of Access" (1995) 33 Alta. L. Rev. 810.

67. The exhortation to act responsibly and do no harm are integral to Richard Devlin's reconstruction of legal ethics. See "Normative and Somewhere To Go? Reflections On Professional Responsibility" (1994-1995) 33 Alta. L. Rev. 924 at 933 [*Normative and Somewhere To Go*].

68. *The Practice of Justice*, *supra* note 2 at 50.

Clients might value high ethical standards in lawyers because they themselves have such standards and prefer to associate with people who share their views. They may value such high standards because they believe such standards are associated with an especially sophisticated type of legal judgment that is less likely to sacrifice the client's long-term interests to short-term gain. They may value them because association with lawyers with a reputation for high standards lends the client valuable status or credibility with third parties with whom the client has to deal.<sup>69</sup>

Even more challenging may be explaining your conduct to your firm. In other words, institutional forces will pose challenges for those committed to this style of discretionary lawyering.<sup>70</sup> It will, therefore, be important for the Canadian Bar Association and provincial law societies to play an active role in supporting lawyers committed to pursuing a justice-seeking ethic. This support can come in providing advice, setting standards and in intervening when a lawyer fears negative consequences from their firm.<sup>71</sup> It will also be important for law schools to instill an ethic of justice in future lawyers. There is great strength in numbers. Richard Devlin reminds us of one powerful American example of the ability of transformative lawyering to occur despite the so-called bottom line. In the 1980s, an élite Washington law firm (Covington & Burley) severed its retainer with an airline owned by the South African government after a student-led boycott.<sup>72</sup>

Having set out what I suggest is our evolving understanding of acting "in the public interest" (*i.e.*, in the interests of justice) and offering an explanation for why it is occurring, I end this section by marshalling the support for my thesis. I suggest that this reconstruction of our "role morality" can be seen in professional statements, jurisprudence, and in equality and harm reduction principles in our codes of conduct.

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69. See Robert Gordon & William H. Simon, "The Redemption of Professionalism" in Robert Nelson *et. al.*, eds., *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press, 1992) 230 at 245.

70. See a discussion of these issues in *Dead Parrot*, *supra* note 6 and Tanina Rostain, "Waking Up From Uneasy Dreams: Professional Context, Discretionary Judgment and *The Practice of Justice*" (1999) 51 *Stan. L. Rev.* 955.

71. Devlin offers some important insights into these issues in *Normative and Somewhere To Go*, *supra* note 67 at 940-941. See also Simon's response to a number of these issues in "The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on *The Practice of Justice*" (1999) 51 *Stan. L. Rev.* 991.

72. *Normative and Somewhere To Go*, *supra* note 67 at 938. See also the discussion in William H. Simon, "Ethical Discretion In Lawyering" (1988) 101 *Harv. L. Rev.* 1083 at 1130.

#### 4. *The evidence of reconstruction*

##### a. *Professional and jurisprudential developments*

In Ontario, the most important professional statement of this reconstructed role morality is the 1994 role statement of the Law Society of Upper Canada (LSUC). For the first time, we see an explicit link between the public interest and the pursuit of justice:

The Law Society of Upper Canada exists to govern the legal profession in the public interest by

- ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct, and
- upholding the independence, integrity and honour of the legal profession,

*for the purpose of advancing the cause of justice and the rule of law.*<sup>73</sup>

This statement was endorsed by Justice Abella in her 1999 address to the Law Society Benchers. As she put it:

[t]here are three basic values which merge in a good lawyer: a commitment to competence, which is about skills; a commitment to ethics, which is about decency; and a commitment to professionalism, which transfuses the public interest into the other two values....

...

To me, the Law Society got it right when it said in its 1994 Role Statement that the legal profession exists in the public interest to advance the cause of justice and the rule of law.<sup>74</sup>

In a later paper, Justice Abella stated that the essence of professionalism was “whether justice is seen as being done.”<sup>75</sup> Chief Justice McMurtry of the Ontario Court of Appeal has also recently observed:

I believe that in a changing world, the one thing that cannot change is our common pursuit of justice. That is and must remain the principal reason for the existence of the courts and the profession alike. They are bound

73. Adopted by Convocation, October 27, 1994 [emphasis added], see online: Law Society of Upper Canada <<http://www.lsuc.on.ca/conv/may2000/StrategicPlan.PDF>> at 6. There was apparently some resistance to this role statement because of its focus on protecting the public interest as opposed to the interest of lawyers. See Carole Curtis, “Alternative Visions Of The Legal Profession In Society: A Perspective On Ontario” (1994-1995) 33 Alta. L. Rev. 787 at 789.

74. *Professionalism Revisited*, *supra* note 9. See also Rosalie S. Abella, “Law, Literature, and Identity: Seeking Equality” (2000) 63 Sask. L. Rev. 1.

75. “Professionalism in the Justice System: The Divine Comedy of Roscoe Pound” (2002) 51 U.N.B.L.J. 3 at 5.

together by that pursuit.<sup>76</sup>

Similar sentiments have been echoed in Supreme Court of Canada jurisprudence. In *Smith v. Jones*, the Court recognized that in some cases the public interest will trump solicitor-client privilege and adopted a broad future harm exception that the Court recognized would apply to “all classifications of privileges and duties of confidentiality.”<sup>77</sup> In establishing the contours of the exception, the Court did not limit the trigger of the harm to criminal activity as was the traditional approach to future harm. Rather it extended the exception to any act that poses a risk of death or serious bodily harm including psychological harm that substantially interferes with the health or well-being of the innocent third party.<sup>78</sup>

Five years later, in *Lyttle*, the Supreme Court added its voice to a long-standing legal and ethical debate about whether a lawyer can cross-examine a truthful witness in order to create a misleading impression that the witness is either lying or mistaken.<sup>79</sup> The issue has been a classic example of the struggle in legal ethics between duty to the client, particularly in criminal cases, the prohibition on misleading the court, and protecting the public from harm. In this context, harm includes embarrassment and possibly trauma for the witness. Justices Major and Fish, for the Court, held:

we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, *provided that counsel has a good faith basis for putting the question.*

...

In this context, a “good faith basis” is a function of the information available to the cross-examiner, and his or her belief in its likely accuracy....

...

*In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. ...*

The purpose of the question must be consistent with the lawyer’s role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to

76. Online: Ontario Courts <[http://www.ontariocourts.on.ca/court\\_of\\_appeal/speeches/opening\\_speeches/coareport1999.htm](http://www.ontariocourts.on.ca/court_of_appeal/speeches/opening_speeches/coareport1999.htm)>.

77. *Smith v. Jones*, *supra* note 46 at 239 (para. 44). This is discussed *infra* in relation to the Ontario future harm exception.

78. *Smith v. Jones*, *supra* note 46 at 247-251.

79. See the discussion in *The Criminal Defence Lawyer’s Role*, *supra* note 16 at 389-391; *Legal Ethics and Professional Responsibility*, *supra* note 23 at 154, 156; “Cross-Examining The Truthful Witness” in *Ethics and Canadian Criminal Law*, *supra* note 11 at 59-65 where the authors suggest that such conduct is not necessarily ethical improper. See also *Lawyers and Ethics*, *supra* note 16 at 7.4.

*assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.*<sup>80</sup>

*Lyttle* stands as one of the first cases where the Court infused a legal rule with ethical principles.

#### b. *Codes of conduct*

Codes of conduct are “intended to express to the profession and to the public the high ethical ideals of the legal profession”<sup>81</sup> and thus are a good place to find the minimum standards of conduct and aspirations of the profession.<sup>82</sup> However, even in relation to minimum standards, the codes of conduct across this country are not consistent. This is hard to understand. Questions, for example, of harm prevention, discrimination, sexual harassment, the duty to report or the duty to rectify harm are not economic in nature and thus bear no relationship to geography or demographics. One can readily understand how the rules governing advertising or conflict of interest may be different in P.E.I. as compared to Ontario. But what can logically explain, for example, a more explicit expansive duty to prevent future harm in Ontario than say in British Columbia?<sup>83</sup> There is simply no principled justification.

Consequently, I would argue that a lawyer should be entitled to rely on any rule of professional conduct in Canada including the CBA Code when deciding whether a justice-seeking course of conduct is or is not permitted.

80. *Lyttle*, *supra* note 61 at paras. 43, 44, 47, 48 [emphasis added]. Some are likely to argue that *Lyttle* is not a complete answer to the ethical dilemma of cross-examining a truthful witness because the issue in the case involved the putting of false suggestions to a witness. See, for example, the discussion in *The Criminal Defence Lawyer's Role*, *supra* note 16 at 391-392. In some cases, truthful witnesses will be challenged with suggestions grounded in truthful facts such as a prior criminal record, prior inconsistent statement or evidence capable of constituting *animus* or some other motive to lie. However, the language in *Lyttle* does appear broad enough to support an assertion that counsel are prohibited from using cross-examination, even on truthful facts, in order to create a misleading impression. I will return to this issue again in the discussion of the cross-examination of sexual assault complainants and police officers in racial profiling cases.

81. Rule 1.03(d), *Ontario*, *supra* note 24.

82. As Justice Sopinka noted in *Macdonald Estate*, *supra* note 46 at 1244:

[a]n important statement of public policy with respect to the conduct of barrister and solicitor taken in the professional ethics codes of the governing bodies of the profession.... these rules must be taken as expressing the collective views of the profession as to the appropriate standards to which the profession should adhere....

...

A code of professional conduct is designed to serve as a guide to lawyers....

83. In British Columbia, future harm is restricted to criminal acts involving death or serious bodily harm. See Professional Conduct Handbook, “Confidential Information,” Chapter 5 (Rule 13), online: Law Society of British Columbia <[http://www.lawsociety.bc.ca/publications\\_forms/handbook/body\\_handbook\\_toc.html](http://www.lawsociety.bc.ca/publications_forms/handbook/body_handbook_toc.html)> [British Columbia]. In Ontario, future harm is linked to death, serious bodily harm and psychological harm regardless of the cause of the harm. See Rule 2.03(3), *Ontario*, *supra* note 24. This rule is discussed in more detail *infra* as well as my position that the scope of the future harm rule recognized in *Smith v. Jones* and codified in *Ontario* would now qualify under the “otherwise provided by law” exception to confidentiality.



I take this position notwithstanding the fact that some codes, like that in New Brunswick, specifically address the situation and state that “[s]ave as may be provided by law, in the event of a conflict of standards in matters involving the conduct of the lawyer the standards declared by this Code shall govern.”<sup>84</sup> While breaching the rules is *prima facie* a disciplinary infraction, there is a further requirement that the lawyer’s conduct “bring discredit upon the legal profession....”<sup>85</sup> It is hard to imagine that this latter standard would be met where a lawyer relied on a rule from another province, for example, that served to protect an innocent third party from serious bodily harm.

Other times, however, relying on the standards of another jurisdiction will not involve an explicit breach of the rules in the lawyer’s jurisdiction. Since the rules are minimum standards, they will often be silent on the issue confronting the lawyer. For example, there is very little guidance on what a lawyer should do after discovering that a client has committed perjury.<sup>86</sup> In Alberta, a lawyer must make some attempt at rectification unless it would involve revealing a confidence. The rules suggest, for example, that the lawyer could advise the trier of fact not to rely on that part of the testimony the lawyer knows to be false.<sup>87</sup> Presumably, Alberta is satisfied that this option does not, in theory, constitute a disclosure of confidential information. Based on this reasoning and precedent, there would be nothing to stop lawyers in provinces that are silent on the issue to adopt this course of action, and to use it in their attempts to dissuade the client from committing perjury.

In our codes of conduct, we can find powerful statements regarding equality and harm reduction that reveal the reconstruction I have been discussing. My point here is not to suggest that the codes have fully embraced this reconstructed role morality. One can still find exhortations

84. See “Application and Interpretation” at 7, online: Law Society of New Brunswick <<http://www.lawsociety-barreau.nb.ca/emain.asp?165>> [New Brunswick].

85. See “Professional Misconduct”, Rule 1.02, *Ontario*, *supra* note 24.

86. See *Ethics and Canadian Criminal Law*, *supra* note 11, Chapter 7 for a detailed discussion of the perjury dilemma.

87. See “The Lawyer as Advocate”, Chapter 10 (Rule 15), online: Law Society of Alberta <<http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm>> [Alberta].

consistent with the zealous advocate conception<sup>88</sup> and, as noted above, the codes are not consistent across the country. Instead, this discussion is meant to demonstrate that our role morality is under construction and moving towards a justice-seeking set of norms and, perhaps more importantly, to empower lawyers by providing them with the sources they can rely on to justify their conduct to themselves, their clients, their colleagues and ultimately the law society should the need arise.

### *Promoting equality*

All lawyers in Canada are now subject to code-based ethical obligations not to discriminate. In Nova Scotia, for example, Rule 24 of the Legal Ethics and Professional Conduct Handbook includes a note that states that lawyers have an ethical obligation to “become familiar with and understand section 15 of the *Canadian Charter of Rights and Freedoms*” and that a “lawyer should cultivate a knowledge and understanding of Canadian jurisprudence on the meaning of equality and discrimination and on adverse impact analysis....”<sup>89</sup> In Ontario, the interpretation rule (rule 1.03(1)(b)) specifically requires that the rules (and ultimately all conduct of lawyers) be interpreted in a manner that “recognize[s] ... the diversity of the Ontario community ... and [that] respect[s] human rights laws in force in Ontario.” In addition to this anti-discrimination interpretative aid, rule 5.04(1) demands that lawyers not engage in conduct that discriminates

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88. See e.g., the Commentary 2(h) to Chapter 1, “Integrity” (CBA) which asks lawyers to be absolutely frank in their dealings with the tribunal, fellow lawyers and other parties “subject always to not betraying the client’s cause ....” See online: Canadian Bar Association <<http://www.cba.org/CBA/resolutions/pdf/04-01-A.pdf>>. Another example is the duty of advocates to fearlessly ... ask every question, however distasteful, which they think will help their client’s case. See e.g., Rule 4.01(1), *Ontario*, *supra* note 24 and Chapter IX, *CBA*, *supra* note 24 Interestingly, New Brunswick has removed “distasteful” from the rule and have added a reasonableness requirement. The rule reads “... the lawyer shall ask every question, raise every issue and advance every argument that the lawyer thinks reasonably will assist the cause of the client....” See Rule (b), Chapter 8, *New Brunswick*, *supra* note 84.

89. Online: Nova Scotia Barristers’ Society <<http://www.nsbs.org/legalethics/chapter24.htm>>.

against *anyone* the lawyer interacts with in their professional capacity.<sup>90</sup> Rules 5.04(2) and (3) extend the rule to the provision of services and employment practices.<sup>91</sup> The commentaries to rules 5.04(1) and (3) clearly define discrimination so as to make it clear that the rule is directed not only at intentional discrimination but also systemic or adverse effects discrimination (*i.e.*, substantive equality):

An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly 'neutral' rule or policy creates an adverse effect on a group protected by rule 5.04, there is a duty to accommodate.

...

An employer should consider the effect of seemingly 'neutral' rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees ...

...

The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal

90. *Ontario*, *supra* note 24. Rule 5.04 came into force 1 November 2000. 5.04(1) reads:

A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Ontario Human Rights Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other members of the profession or any other person.

Rule 5.04 was preceded by Rule 28 which came into effect in September 1994. It tracked the wording of Rule 5.04(1) although the commentary to Rule 5.04(1) is far more extensive and places obligations on the lawyer that did not exist under Rule 28. This is discussed *infra*. Rule 28 was preceded by Rule 13, Commentary 5 which came into effect in January, 1990. Commentary 5 read:

The lawyer shall not discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, religion, creed, sex, sexual orientation, age, marital status, family status, or handicap in the employment of other lawyers or articulated students, or in dealings with other members of the profession or any other persons.

From 1974 -1990, there was an even more limited discrimination rule that read:

The lawyer shall not discriminate on the grounds of [enumerated grounds which expanded over the years] in the employment of other lawyers or articulated students, or in dealings with other members of the profession.

As can be seen, this latter conception did not cover discrimination of third parties including potential and existing clients. See generally, Darryl Robinson, "Ethical Evolution: The Development of the Professional Handbook of the Law Society of Upper Canada" (1995) 29 *Gazette* 162 at 190-191 and *Duty of Non-Discrimination*, *supra* note 3 at 517. I wish to thank Jim Varro for helping me clarify the history of Ontario's anti-discrimination rule.

91. *Ontario*, *supra* note 24. The Commentary to Rule 5.04(1) also provides that "[t]he right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant."

circumstances cited in rule 5.04.<sup>92</sup>

The Commentary to rule 5.04(1) further observes that it would not constitute discrimination should the differential treatment be designed to “relieve disadvantage.”<sup>93</sup> Another important provision of the anti-discrimination rule is the obligation in both Ontario and CBA Code for lawyers *to take reasonable steps to prevent discrimination*.<sup>94</sup> For example, Chapter XX of the CBA Code (Commentary 2) obliges lawyers “to take reasonable steps to prevent or stop discrimination by the lawyer’s partner, co-worker, or by any employee or agent” and that the failure to take such steps “also violates the duty of non-discrimination.”<sup>95</sup>

The impact of an anti-discrimination ethical rule can be seen, for example, in the context of criminal defence work where the zealous advocate paradigm is seen by many as appropriate given that the client is pitted against the powerful state. In this context, many defence lawyers have traditionally believed that they are not accountable for their behaviour even if it was discriminatory or otherwise harmful. Consider the following two examples involving jury selection and cross-examination.<sup>96</sup>

*Jury Selection.* On December 3, 1991, Constable Douglas Lines shot Royan Bagnaut, a young Black male, as he was being pursued in downtown Toronto for having allegedly stolen a purse with a knife. Lines repeatedly fired at Bagnaut striking him in the arm and chest. Lines would claim that he thought Bagnaut had a gun. No gun was ever found. A hunting knife was later discovered in the lining of Bagnaut’s jacket.<sup>97</sup> Lines was ultimately charged with criminal negligence causing bodily harm and related offences. In a pre-trial motion, the Crown attempted to prevent Lines’ lawyers from striking prospective jurors from the jury simply because of the colour of their skin. The Crown argued that this would violate the equality guarantee of section 15(1) of the *Charter*. In a criminal trial, the Crown and defence can remove a juror who would otherwise be on the jury by exercising one of their allotted peremptory challenges.<sup>98</sup> No reason has to be given by the

92. *Ontario*, *supra* note 24. Prior to 1994, there was no explicit recognition that the anti-discrimination rule embraced substantive rather than formal equality.

93. *Ontario*, *supra* note 24.

94. This obligation did not previously exist.

95. See Chapter XX B Non-Discrimination, online: Canadian Bar Association <<http://www.cba.org/CBA/resolutions/pdf/04-01-A.pdf>>. The amended Chapter XX was approved in August, 2004.

96. The absence of a discussion of the ethics and equality in these two contexts is discussed in some detail in *The Duty of Non-Discrimination*, *supra* note 3 at 481-482, 484-487.

97. See Wendy Darroch “Police Shooting Victim Stole Purse, Court Told” *Toronto Star* (8 May 1993) A19.

98. See the *Criminal Code*, R.S.C. 1985, c. C-46, s. 634(1) of. The number of challenges given to the parties depends on the seriousness of the offence. In this case, the Crown and defence would have been entitled to 12 challenges.

challenging party. The trial judge dismissed the Crown's motion. Justice Bruce Hawkins held that section 15(1) does not apply to the defence because it is not a state actor and that the adversarial process demands that the defence be entitled to use whatever weapons it has available. As the trial judge put it, "it is fanciful to suggest that in the selection of a jury [the accused] doffs his adversarial role and joins with the Crown in some sort of joint and concerted effort to empanel an independent and impartial tribunal."<sup>99</sup> According to a media report, at trial, the defence exercised seven of its allotted twelve challenges. Four of the seven challenges were used to exclude racialized jurors including at least one Black juror from the jury box. The jury that ultimately tried the case consisted of 11 White jurors and one Asian juror.<sup>100</sup> Lines was acquitted.<sup>101</sup>

And so, while section 15(1) may or may not prohibit the discriminatory exercise of peremptory challenges by the defence,<sup>102</sup> I would argue that anti-discrimination ethical rules clearly place a prohibition on the use of peremptory challenges in this fashion.<sup>103</sup> This context provides a good example of where the boundary that has often served to demarcate the ethical limits on behaviour (*i.e.*, the law) will not have caught up to the substantive norms inherent in law's ambition and how our reconstructed role morality can serve as a safety mechanism to preserve the system's integrity.

*Cross-Examining A Truthful Sexual Assault Complainant.*<sup>104</sup> On February 3, 1997, a 22-year-old university student was awakened in the middle of the night and sexually assaulted by a stranger. A set of footprints in the snow immediately below her unlocked kitchen window revealed how the perpetrator had broken into the apartment. The search for the rapist went cold until 2002 when the police were able to link a semen stain

99. See *R. v. Lines*, [1993] O.J. No. 3284 (Gen. Div.).

100. See Tracey Tyler "Should Juries Reflect Society's Racial Mix" *Toronto Star* (22 May 1993) D4.

101. See Wendy Darroch "Officer Cleared In Shooting Of Teen Suspect" *Toronto Star* (18 May 1993) A2; Tracey Tyler "Crown Appeal Dropped In Officer's Acquittal" *Toronto Star* (15 November 1994) A19.

102. In *R. v. Brown*, [1999] O.J. No. 4867 (Gen. Div.), the trial judge concluded that he had jurisdiction to control the discriminatory exercise of peremptory challenges by the defence. But see *R. v. Gayle* (2001), 154 C.C.C. (3d) 221 at 247-254 (Ont. C.A.) which did not address whether the limits it was placing on the ability of the Crown to use their peremptory challenges in a discriminatory fashion applied to the defence.

103. See also Laura I. Appleman, "Reports of Batson's Death Have Been Greatly Exaggerated: How The Batson Doctrine Enforces A Normative Framework Of Legal Ethics" (2005) 78 Temp. L. Rev. 607 for a further discussion of the transformative impact of an anti-discrimination ethical norm in jury selection. Under *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, the prosecutor and defence counsel are prohibited from exercising their peremptory challenges in a gender or racially biased manner.

104. All of the facts of this case and quotes from interviews come directly from Christie Blatchford "The Still, Sad Music Of Humanity" *Globe and Mail* (6 November 2004).

on the complainant's pajamas to one Philip Barlow. Over the course of a month long pre-trial hearing, Barlow challenged the admissibility of the DNA evidence. His motion failed. At trial, his defence suddenly became consent. Over a three day period, his lawyer vigorously cross-examined the complainant. According to a newspaper report, he suggested that she had consented, that she and Barlow had met at a bar and that she had brought him home. He even suggested that she concocted a break and enter story to "cover up a one-night stand of casual sex." Barlow did not testify. He was convicted and sentenced to six years imprisonment.

While it is unknown what Barlow said to his lawyer about his guilt or innocence, his lawyer had, at a minimum, constructive knowledge of his client's guilt given how ludicrous the defence was in the circumstances.<sup>105</sup> It was no more plausible than had it been suggested to the complainant that the rapist was Barlow's identical twin. In addition, Barlow's lawyer was aware that his client had been convicted in 1991 of breaking and entering and that in 1997, the year that this complainant was raped, he had pleaded guilty to trespass in exchange for the withdrawal of a more serious charge of prowling at night.<sup>106</sup> The complainant and defence lawyer were interviewed by *Globe and Mail* columnist, Christie Blatchford. Blatchford summarized the complainant's reaction to her brutal cross-examination as follows:

She was shocked by the minute parsing of what she'd told police right after the attack—she used 'straddling' and 'lying on me' interchangeably, for instance, and [the defence lawyer] suggested that the latter implied she was having consensual sex.

Meanwhile, Barlow's lawyer told Blatchford that:

he contested the DNA evidence on solid legal grounds, and a subsequent consent defence was not incompatible with that. What's more, he said, the prosecutor has a positive duty to prove the absence of consent, and the defence is entitled to make suggestions....

These comments suggest that he was working under the constraints of a client who had admitted his guilt as they are the classic ways in which many defence lawyers perceive their role in defending the guilty.

Surprisingly, Blatchford did not question the ethics of the lawyer's cross-examination and simply observed that "[t]he way ... [the defence was] conducted ... was perfectly proper and played by all Canada's legal

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105. For an interesting discussion of when a lawyer knows her client is guilty including circumstances other than when the client discloses his guilt, see *Ethics and Canadian Criminal Law*, *supra* note 11 at 37-51. The authors argue for an "irresistible knowledge of guilt" standard.

106. See *R. v. Barlow*, [2002] O.J. No. 5652 (S.C.J.).

rules.” Leaving aside the issue of the legality of the cross-examination under the “good faith” requirements from *Lyttle*, I would argue that, in the circumstances of this case where there was no “air of reality” to a consent defence, that the non-discrimination rule ethically barred defence counsel from conducting it. This was a three-day cross-examination that served to further the historical discrimination and disadvantage faced by women. It was humiliating, traumatizing and based on stereotypical assumptions.<sup>107</sup> The trauma of the cross-examination was particularly acute for the complainant in this case. As recounted by Blatchford, “because Mr. Barlow had said, ‘I know you guys’ before he left on the night in question, she’d always harboured the nagging suspicion that maybe they *had* crossed paths before.” And, so when Barlow’s lawyer suggested to her that they had met that night at a bar, “she believed he was actually giving her hard information, not questioning her.” The complainant responded “I did?” and then “burst into tears.”

### *Do no harm*

One of the most common themes expressed throughout professional codes of conduct in Canada is “do no harm” whether it be harm to your client, to the tribunal and its fact-finding mission, the profession, opposing counsel, or the public at large. This is very significant given that this is a fundamental element of a justice-seeking ethic. There are a number of “do no harm” exhortations that I want to highlight. The first is the interpretation rule in Ontario (rule 1.03(1)(b)) which states that:

A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to ... protect the dignity of individuals.<sup>108</sup>

The exhortation could not be any more explicit. Lawyers have an ethical obligation to ensure that their conduct does not harm the *dignity of individuals*.

The second is the adoption of the Supreme Court of Canada’s approach to “future harm” in *Smith v. Jones* in Ontario<sup>109</sup> and, more recently by

107. This position is advanced by David Luban. See *Lawyers and Justice*, *supra* note 23 at 150-152. Luban originally favoured a general rule barring cross-examination of all sexual assault complainants. He later slightly softened his position to cases where on any reasonable view of the facts there was no consent or where the client privately concedes that there was no consent. See *Partisanship, Betrayal and Autonomy*, *supra* note 54 at 1026-1035. See also Stephen Ellmann, “Lawyering For Justice in a Flawed Society” (1990) 90 Colum. L. Rev. 116 at 155-157; and the discussion in *The Criminal Defence Lawyer’s Role*, *supra* note 16 at 394-396.

108. *Ontario*, *supra* note 24.

109. See Rule 2.03(3), *Ontario*, *supra* note 24 which came into force 1 November 2000.

the Canadian Bar Association.<sup>110</sup> Historically, lawyers in Canada were prohibited from disclosing confidential information to prevent harm unless it involved future criminal conduct. This meant, for example, that a lawyer for the defendant in a torts case could not disclose the discovery that the plaintiff had a life-threatening injury or disease that had gone undiagnosed by the plaintiff's doctors.<sup>111</sup> Under the new Ontario and CBA rules, lawyers can now disclose confidential information where they have information that "there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being...." In addition, since *Smith v. Jones* recognized that the public safety exception applies to all "duties of confidentiality," lawyers in other provinces should now be able to disclose under similar circumstances under the "otherwise authorized by law" exception to confidentiality.<sup>112</sup>

In Ontario, there is a discretion to disclose future harm. It is mandatory under the CBA regime.<sup>113</sup> It is hard to imagine when it would be just not to exercise the discretion to disclose, but giving lawyers that discretion is consistent with the contextual approach to ethics set out *infra*. The danger with categorical rules even those created in the interests of justice is that circumstances will arise that were perhaps not contemplated by the drafters and which require some flexibility. The case of Marcel Tremblay provides us with one such case. Tremblay suffered from a fatal lung disease. He planned to take his own life to ensure that he could die with dignity and to spark a national debate on the issue of assisted-suicide.<sup>114</sup> As there is no criminal prohibition on suicide, there was no legal command that could deny him this right. He was concerned, however, with the possibility that his family members might be charged under the assisted-suicide provisions

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110. See Chapter IV - Confidential Information (Rule 2), online: Canadian Bar Association <<http://www.cba.org/CBA/resolutions/pdf/04-01-A-Annex1.pdf>>. The amendment was approved in August, 2004.

111. This is the classic dilemma from *Spaulding v. Zimmerman*, 116 N.W. 2d 704 (Minn. 1962) [*Spaulding*]. See the discussion of *Spaulding* and the different ethical issues raised by the case in Roger C. Crampton and Lori P. Knowles, "Professional Secrecy and Its Exceptions: *Spaulding v. Zimmerman* Revisited" (1998-1999) 83 Minn. L. Rev. 63.

112. Proulx and Layton come to a similar conclusion that *Smith v. Jones* established a "a public-safety exception to the common law duty of confidentiality. However, they go on to observe that "[c]ounsel outside of Ontario who relies on this reading of *Smith v. Jones* to justify disclosure has nonetheless probably breached the ethical dictates of his or her governing body." See *Ethics and Canadian Criminal Law*, *supra* note 11 at 233-239.

113. It is unclear whether there is a discretion under *Smith v. Jones*. See *Ethics and Canadian Criminal Law*, *supra* note 11 at 244-245.

114. See Joanne Laucius "Ottawa Man Kills Himself To Draw Attention To Cause" *The Gazette* (29 January 2005) A12.



of the Criminal Code, if they were present during his suicide.<sup>115</sup> Tremblay went to see Lawrence Greenspon, a well-known criminal lawyer in Ottawa for legal advice. Although Greenspon admitted that he had both moral and ethical difficulties with Tremblay's decision, he recognized that "[his] role [was] ... to advise Mr. Tremblay and his family about the possible implications of the law. It is certainly not for me to make any judgment about what he has chosen to do."<sup>116</sup> Suppose, however, that Tremblay had not wanted to publicize his plans in order to die in private without the intrusion of the state and further suppose that Greenspon was satisfied that Tremblay was mentally fit to make this decision.<sup>117</sup> Under a mandatory disclosure regime, Greenspon would have had to, in theory, ignore his client's request and notify the police.<sup>118</sup>

Returning to the *Smith v. Jones* conception of future harm which was explicitly adopted in Ontario, David Layton has argued that it is more narrow than the previous approach taken in Ontario. Under the previous exception, a lawyer could disclose confidential information "necessary to prevent a crime ... if the lawyer has reasonable grounds for believing that a crime is likely to be committed."<sup>119</sup> He takes this position primarily because a lawyer can now no longer disclose confidential information to prevent *any* crime (his emphasis). I disagree. By taking away the crime element of the exception, only non-violent crimes such as drug or property offences are not, in theory, covered by the exception although in many cases these crimes involve violence and so would trigger the exception. But more fundamentally, it is precisely by taking away the crime requirement and adding psychological harm to the mix, that the exception is much broader than its predecessor. While Layton would ultimately like to see a future harm exception not saddled with a crime or bodily harm limitation, I would argue that the *Smith v. Jones* approach is sufficiently broad enough

115. See the *Criminal Code*, *supra* note 98, s. 241, which reads:

Every one who (a) counsels a person to commit suicide, or (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

116. Aron Heller and Vito Pilioci "Ailing Kanata Man Plans To Die Tonight: Right-To-Die Advocate Announces His Suicide" *The Ottawa Citizen* (28 January 2005). See also Pauline Tam "Tremblay Case Raises Host Of Ethical Questions" *National Post* (29 January 2005) A8.

117. While Tremblay had already been seen by two psychiatrists before the police heard of his plan, they nevertheless insisted that he undergo a further psychiatric evaluation. See Jennifer Pritchett, Andrew Duffy & Joanne Laucius "Ailing Man 'Had Enough'" *The Ottawa Citizen* (29 January 2005) A1. It is this kind of coercive state activity that someone may wish to avoid.

118. Unless, of course, he was prepared to engage in nullification. Nullification is discussed further *infra*.

119. See "The Public Safety Exception: Confusing Confidentiality, Privilege and Ethics" (2001) 6 Can. Crim. L. Rev. 217 at 223, 233-238 [*The Public Safety Exception*].

to capture the kinds of harm that Layton and others are concerned about.<sup>120</sup> Consider, for example, the following chart of possible harmful conduct:

<i>Type Of Harm</i>	<i>Is Disclosure Permitted Under Current Ontario and CBA Future Harm Exception?</i>	<i>Is Disclosure Permitted Under Old Ontario and CBA Exceptions?</i>
Acts or Threats Of Violence	Yes	Yes
Existence Of An Undiagnosed Harmful Medical Condition	Yes	No
Client's Intention To Commit Suicide	Yes	No
Emotional and Psychological Abuse Of Child	Yes <sup>121</sup>	No
Defective Medical, Drug or Vehicle Product <sup>122</sup>	Yes	No

120. See the discussion in *Ethics and Canadian Criminal Law*, *supra* note 11 at 236-241.

121. I recognize that in its final report (28 April 2000) to Convocation, the Ontario Task Force did, in fact, recommend that the disclosure exception be broadened to include "... limited disclosure where a lawyer has reasonable grounds for believing that there is an imminent risk of substantial harm to the welfare or security of a child or other vulnerable person (Rule 2.03 (4)) and where a lawyer has reasonable grounds for believing that there is an imminent risk that a fraud that may cause substantial financial injury to another is likely to be committed (Rule 2.03 (5))." See online: Law Society of Upper Canada <<http://www.lsuc.on.ca/conv/apr2000/RulesTaskForce.PDF>>. Convocation ultimately voted against adding sections (4) and (5). See online: Law Society of Upper Canada <[http://www.lsuc.on.ca/conv/jun2000/special\\_convocation.pdf](http://www.lsuc.on.ca/conv/jun2000/special_convocation.pdf)>. Nevertheless, the emotional and psychological abuse of a child or indeed other conduct that could be said to create substantial harm to the welfare or security of a child would clearly trigger the psychological harm of the rule that was passed by Convocation.

122. For example, in the United States, secret settlements in cases involved defective tires (Firestone) and birth control device (Dalkon Shield) caused widespread devastation. In the case of Firestone, 150 individuals were ultimately killed with another 500 injured. In the case of Dalkon Shield, "the device was linked to 11 deaths, 209 miscarriages and countless cases of sterilization or birth defects." See Editorial - "When Secrets Can Be Deadly" *San Francisco Chronicle* (10 May 2005). To address the harm caused by non-disclosure clauses in civil settlements, there is legislation pending in California that would prohibit such clauses where there is a known public danger. See AB 1700, online: <[http://www.aroundthecapital.com/bills/AB\\_1700](http://www.aroundthecapital.com/bills/AB_1700)>.

Dangerous Environmental Hazard	Yes <sup>123</sup>	No
Wrongful Conviction	Yes, particularly if the individual were incarcerated	No
Economic Loss	Arguably where the victims are vulnerable (eg., the elderly) and the scope of the loss is significant	Yes

Another “do no harm” theme can be seen in the Ontario response to the Enron crisis and the *Sarbanes Oxley Act of 2002*. In Ontario, rules 2.02(5.1) and (5.2) require a lawyer to withdraw when she discovers intended or ongoing dishonest, fraudulent, criminal or illegal conduct occurring in the organization that retains her and when her attempts of dissuasion up the ladder of authority within the organization have failed.<sup>124</sup> There are similar requirements in Nova Scotia<sup>125</sup> and the CBA Code<sup>126</sup> although there is no mandatory withdrawal requirement in the latter.<sup>127</sup> A mandatory withdrawal obligation should serve as an important deterrent as it means that unless the company ceases and desists their illegal conduct, the company will be unable to secure legal advice. Indeed, it could be argued that withdrawal also requires notification to any new lawyer of the failure of the organization to cease and desist its unlawful conduct. If the purpose of the rule is to ensure that organizations are deprived of

123. Layton himself appears to recognize this kind of harm might fall under the Ontario exception. *The Public Safety Exception*, *supra* note 119 at page 236. As he observes:

But query the case of dangerous environmental hazards or faulty products manufactured by a client. Also query the situation where a huge fraud would devastate the financial security of thousands of individuals. Serious bodily harm might be implicated in the former case, and perhaps in the latter example under the rubric of “serious psychological harm that substantially interferes with health or well-being.”

124. The new rule was approved by Convocation 24 March 2005. See online: Law Society of Upper Canada <[http://www.lsuc.on.ca/services/contents/archive/rpc\\_archive\\_en.jsp](http://www.lsuc.on.ca/services/contents/archive/rpc_archive_en.jsp)> and <[http://www.lsuc.on.ca/news/pdf/convmar04\\_prc\\_report.pdf](http://www.lsuc.on.ca/news/pdf/convmar04_prc_report.pdf)>.

125. See “Honesty and Candour When Advising Clients” (Commentary 4.21 and 4.22) of the Nova Scotia Legal Ethics and Professional Conduct Handbook Chapter 4, online: Nova Scotia Barristers’ Society <<http://www.nsbs.org/legalethics/toc.htm>>.

126. See “Confidential Information” (Commentary 12) Chapter IV, online: Canadian Bar Association <<http://www.cba.org/CBA/resolutions/pdf/04-01-A-Annex1.pdf>>.

127. In other provinces, lawyers could go further and disclose the conduct, if it were criminal, under a future harm exception. For example, “Confidentiality” (Commentary 9), Chapter 5 of the New Brunswick Rules permits disclosure for crimes not involving violence. See *New Brunswick*, *supra* note 84.

legal advice when acting illegally, then any new lawyer must be apprised of the situation to ensure that they are not duped into representing the organization.

Before leaving this discussion of “do no harm,” it is worth pointing out that in 1993, the Law Society of Prince Edward Island added the following Commentary to Chapter IX - The Lawyer As Advocate of their Code of Professional conduct:

- 7A. In order to minimize the risk of domestic violence inherent in many family law matters, the lawyer as advocate in such proceedings, whether civil or criminal in nature, must avoid all unnecessary delays in the advancement or defence of an action from commencement through conclusion.<sup>128</sup>

### *Giving merit a chance*

All of the codes of conduct in Canada prohibit lawyers from engaging in conduct that would mislead the court and jeopardize the chances of a decision that reflects the legal merit of the dispute or claim. And so we see requirements that advocates not, for example: knowingly offer or rely on false evidence; misstate evidence, argument or the law; or deliberately refrain from informing the court of binding authority that the other party has not presented.<sup>129</sup> There are a number of other exhortations that are designed to prevent the frustration of the merit of the claim and are thus integral to a justice-seeking ethic. These include:

- avoiding sharp practice and not taking advantage of or act without fair warning upon slips or mistakes not going to the merits or involving the sacrifice of a client's rights.<sup>130</sup> In Alberta, the rule states that “[a] lawyer must not take advantage of a mistake on the part of another lawyer if to do so would obtain for the lawyer's client a benefit to which the client has no *bona fide* claim or entitlement”<sup>131</sup>;
- advising the court to not rely on testimony given in court (including the client's testimony) that you know is false<sup>132</sup>; and,
- disclosing to the court that material testimony given by a witness,

128. Online: Law Society of Prince Edward Island <[http://www.lspei.pe.ca/pdf/Chapter\\_IX\\_Commentary\\_7A.pdf](http://www.lspei.pe.ca/pdf/Chapter_IX_Commentary_7A.pdf)>.

129. See e.g., *Ontario*, *supra* note 24 Rule 4.01(2) and Chapter IX—Lawyer As Advocate (Commentary 2) *CBA*, *supra* note 24.

130. See *Ontario*, *supra* note 24 Rule 6.03(3). See also Chapter IX—Lawyer As Advocate (Commentary 7) *CBA*, *supra* note 24.

131. See Chapter 4—Relationship Of The Lawyer To Other Lawyers (Rule 3), *Alberta*, *supra* note 87.

132. See Chapter 10—Lawyer As Advocate (Rule 15), *Alberta*, *supra* note 87. Only Alberta and New Brunswick have such provisions although New Brunswick's rule is only triggered vis-à-vis material evidence.

including that of the client, is false.<sup>133</sup>

## II. *Actualization, empowerment, and motivation*

### 1. *Adopting a pervasive justice-seeking ethic*

Having identified a reconstructed role morality that takes the pursuit of justice as its guiding principle, all lawyers need to take the next step and adopt a pervasive justice-seeking ethic in all facets of their professional role. How is such an ethic actualized? The answer is, as Simon recognizes, the engagement of *contextual judgment*. It is a style of judgment that is concerned with substance over procedure and purpose over form.<sup>134</sup> As opposed to rule-based categorical thinking, contextual judgment involves discretionary decision-making. It requires an assessment of all of the relevant factors that impact on the justice of the relevant claim and/or proposed course(s) of action including interests other than those that relate to the client. Relevant factors include:

- the legal merit of the claim or conduct, defined in substantive terms. This includes assessing whether the anti-discrimination norm is engaged and/or whether history has taught us that enforcement of the positivist law will contribute to injustice;
- whether the anti-discrimination norm is engaged by the procedure or process involved;
- the nature of the work (*e.g.*, transactional or litigation; civil or criminal);
- the nature of the client (*e.g.*, individual or corporate entity; privileged or disadvantaged and marginalized);
- whether there is a power imbalance between the parties including whether all of the parties are represented by competent lawyers;
- whether there are any other factors that will impact on the ability of the process or procedure to produce the legally correct result; and,

133. See Chapter 9—Lawyer As Advocate (Rule 12), *New Brunswick*, *supra* note 84. The rule is discretionary as the lawyer can choose to withdraw or ask the court not to rely on the testimony.

134. *The Practice of Justice*, *supra* note 2 at 139-149.

- the nature and extent of the harm that has been or will be caused by the client.<sup>135</sup>

Contextual judgment is in no way foreign to lawyers in this country. Our common law is now largely governed by contextual principles such as reasonableness in criminal and tort law, the “best interests of the child” in family law, or the repute of the administration of justice in *Charter* litigation. In the law of evidence, for example, the Supreme Court has now rejected categorical reasoning in favour of a more flexible principled approach to admissibility.<sup>136</sup> Our statutes also require contextual decision-making. Consider, for example, section 276(3) of the *Criminal Code* which identifies the factors to be taken into account when determining the admissibility of a complainant’s prior sexual history under section 276(2):

- 276(3) In determining whether evidence is admissible under subsection (2), the judge ... shall take into account
- (a) the interests of justice, including the right of the accused to make full answer and defence;
  - (b) society’s interest in encouraging the reporting of sexual assault offences;
  - (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
  - (d) the need to remove from the fact-finding process any discriminatory belief or bias;

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135. *Thinking Like a Lawyer* (1998), *supra* note 17. To illustrate the importance of context, it is instructive to return to the trial of Queen Caroline. While many have used Lord Brougham’s speech as the justification for zealous protection of the client’s interests, Simon has correctly pointed out that properly placed in context, it is really more a vigorous defence of a client’s rights and ultimately of justice than interest:

Brougham’s threat [to disclose the King’s will and potentially bring down the monarchy] was based on a far more complex set of judgments than simply the Queen’s interests would be served by producing King George’s will. In the first place, Brougham believed that his client was factually innocent of the acts with which she was charged. In the second place, the secret marriage was centrally relevant to an important substantive defense: if George had been married previously, then his later marriage to Caroline was invalid, and she was legally incapable of adultery. In the third place, Brougham shared the popular view that, even if the charges had been true, this extraordinary prosecution would have been inappropriate given the King’s outrageous mistreatment of his wife from the beginning of their marriage.

See *Thinking Like a Lawyer* (1998), *supra* note 17 at 6-7.

136. See e.g., *R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.); *R. v. Handy* (2002), 164 C.C.C. (3d) 481 (S.C.C.).

- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law....<sup>137</sup>

We also see a recognition that lawyers regularly engage in complex judgments in the law on negligence and ineffective assistance of counsel.<sup>138</sup>

In some cases, contextual judgment will call for conduct that is inconsistent with the prevailing code of conduct or the positivist law. This could occur, for example, where the codes have not caught up to the demands of a justice-seeking ethic, the positivist law is unjust, or where there is no other way to ensure a just result. In order to empower lawyers to deal with this situation, Simon suggests that lawyers engage in what he calls *ad hoc* nullification. As he points out, there is already institutionalized nullification in the criminal justice system. The police do not enforce all laws and even when they discover a violation, they do not always lay a charge. Prosecutors sometimes dismiss charges because of the unconstitutional behaviour of the police. Judges sometimes refuse to strictly apply precedent in order to achieve a substantively just result and, in some cases, juries will refuse to convict a guilty person because of their dislike of the law or manner in which the evidence was obtained.

According to Simon, nullification should not be viewed as a recipe for lawlessness but rather a re-orientation of prevailing norms to ensure the actualization of the goals of the profession and to assist the pursuit of justice when procedures break down. As he puts it "the lawyer should defy the rule, not as an act of lawlessness, but as an act of principled commitment to legal values more fundamental than those that support the rule."<sup>139</sup> Nullification is a powerful means of individual empowerment and should provide some comfort to the radical lawyer who thinks that role morality, even as reconstructed in the interests of justice, may be too conservative for meaningful and transformative lawyering. There are different forms of nullification including refusing to represent certain kinds of cases (e.g., sexual assault cases or cases involving police officers charged with shooting racialized individuals) even if you were the last lawyer in town,

137. R.S.C. 1985, c. C-46.

138. See generally *Folland v. Reardon*, [2005] O.J. No. 216 at para. 44 (C.A.). See also *Joanisse*, *supra* note 47 at 61.

139. *The Practice of Justice*, *supra* note 2 at 164.

engaging in zealous advocacy that would otherwise not be permitted under a justice-seeking ethic, relying on ethical norms from other jurisdictions, wilful blindness (*e.g.*, not asking your client for admissions that would trigger a lawyer's obligation not to mislead the court), breaching the codes of conduct, or even breaking the law.

Although nullification occurs in the criminal justice system and zealous advocacy is itself often a recipe for nullification of the substantive norms inherent in law, it is a practice that is not generally accepted in the profession, particularly where the conduct involves violating the rule of law.<sup>140</sup> It will, therefore, require considerable courage and motivation. It is here where personal responsibility comes into play. A lawyer must take responsibility for the circumstances under which he or she would be prepared to engage in nullification. A lawyer must also be prepared to acknowledge their use of nullification and bar organizations must be prepared to openly address this issue, provide advice, and ultimately institutionalize it.<sup>141</sup>

My own view of criminal law advocacy is largely based on principles of nullification. It is well documented that the criminal justice system is inherently biased towards racialized groups.<sup>142</sup> And so, with respect to Black and Aboriginal accused, for example, racial profiling, biased decision-making in bail, verdicts and sentencing have led to an adversarial process that can no longer guarantee a result obtained in a non-discriminatory fashion. As a result, I believe that criminal defence

140. The concept of nullification is also problematic given that it could also be used by those seeking to subvert justice. In the United States, we have seen this in southern cases involving Black accused. See *In Defense of Law and Morality*, *supra* note 37 at 279-280. In Canada, we have also seen juries likely use unconscious nullification in cases involving White police officers charged with shooting young Black men. See Gabriella Pedicelli, *When Police Kill: Police Use of Force in Montreal and Toronto* (Montreal: Véhicule Press, 1998) at Chapter 4.

141. See *e.g.*, the discussion in Robert M. Palumbos, "Within Each Lawyer's Conscience A Touchstone: Law, Morality And Attorney Civil Disobedience" (2005) 153 U. Pa. L. Rev. 1057 at 1092-1096.

142. The number of Royal Commissions and inquiries documenting this are too numerous to be cited. They include: *Report Of The Commission Of Inquiry Into Matters Relating To The Death of Neil Stonechild* (October 2004), online: The Stonechild Inquiry <<http://www.stonechildinquiry.ca/finalreport/default.shtml>>; *Legacy Of Hope: An Agenda For Change*, Final Report From The Commission On First Nations and Metis Peoples And Justice Reform (June 2004), online: Justice Reform Commission <<http://www.justicereformcomm.sk.ca>>; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, December 1995); *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queen's Printer, 1989). See also, Clayton James Mosher, *Discrimination and Denial: Systemic Racism In Ontario's Legal and Criminal Justice Systems, 1892-1961* (Toronto: University of Toronto Press, 1998); Frances Henry, Carol Tator, Winston Mattis & Tim Rees, *The Colour of Democracy: Racism In Canadian Society* (Toronto: Nelson, 1998) at Chapters 5 & 6; *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.); *R. v. Borde* (2002), 172 C.C.C. (3d) 225 at 236 (Ont. C.A.); and *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont. C.A.).



lawyers have a substantial licence to engage in zealous advocacy when representing accused from racialized or other marginalized communities. The difficult question remains how far you are prepared to push the nullification envelope in the interests of justice. I provide one situation for reflection and debate.

*Misleading Cross-Examination.* Let us assume that you have an Aboriginal client who is charged with possession of a small pocket knife. On the night of your client's arrest, the police had been patrolling a so-called high crime area in Halifax and decided to stop and search your client. Your client admits that he was in possession of the knife but feels that he was targeted because he is Aboriginal. You agree and file a *Charter* application. It is dismissed. The case proceeds to trial. The arresting officer is the first witness. You suggest to the officer in cross-examination, that the only reason he stopped your client was because he was a young Aboriginal male. The officer denies the suggestion. You then suggest that the officer realized that his conduct might be later scrutinized and, so he concocted a story about finding a knife on your client. The suggestion is denied. Since the lawyer would not have a "good faith" basis to believe that the suggestion is true, the question would violate the legal and ethical rule set out in *Lyttle*. However, is it an appropriate case for nullification given the relevant social context?<sup>143</sup> What about if the client wanted to testify that he was not in possession of a knife that night? Would this form of nullification be ethical?

## 2. *Identity lawyering in the interests of justice*

I want to end this article with a discussion of a potential source of motivation for a justice-seeking ethic. In "Beyond Bleached-Out Professionalism", David Wilkins examines the "relationship between a lawyer's group-based identity and her professional role."<sup>144</sup> As he points out, the traditional approach to professionalism "requires lawyers to check their identities at the door when performing their professional roles.... [B]ecoming a lawyer means adopting a 'professional self' that supercedes all other aspects of

143. A very similar scenario is provided by David Layton in *The Criminal Defence Lawyer's Role*, *supra* note 16 at 400.

144. "Beyond 'Bleached Out' Professionalism: Defining Professional Responsibility for Real Professionals" in D.L. Rhode, ed., *Ethics In Practice: Lawyers' Roles, Responsibilities, and Regulations* (New York: Oxford University Press, 2000) at 209 [*Beyond Bleached Out Professionalism*]. The term "bleached-out professionalism" comes from S. Levinson, "Identifying The Jewish Lawyer: Reflections On The Construction of Professional Identity" (1992-1993) 14 Cardozo L. Rev. 1577.

the lawyer's identity."<sup>145</sup> Justice is colour, gender, or religion blind so the rhetoric goes and therefore, this part of the self is seen as irrelevant. As Wilkins observes:

It is not surprising that bleached out professionalism has become a core professional ideal. Norms such as neutrality, objectivity, and predictability are central to American legal culture. Lawyers are the gatekeepers through which citizens gain access to these important legal goods. If the law is to treat individuals equally, the argument goes, then lawyers must not allow their nonprofessional commitments to interfere with their professional obligation to give their clients unfettered access to all that the law has to offer. A professional ideology that treats a lawyer's nonprofessional identity as relevant to her professional conduct appears to threaten this important role.<sup>146</sup>

This formalized bleaching out occurred in Canada from 1876 to 1951 when Aboriginal lawyers had to give up their status of "Indian."<sup>147</sup> Today, it occurs more informally. Indeed, many traditionally excluded lawyers likely feel that they need to go great lengths to prove that their loyalty is to the profession.

Wilkins is rightly critical of this traditional conception of professionalism. As he argues, the problem is that by encouraging lawyers to not engage in identity lawyering (*i.e.* letting their non-professional self or group affiliations impact on their thinking process), we are perpetuating the systemic biases that exist in society and in the legal profession. This is certainly the case in Canada where there is now overwhelming evidence that justice is neither gender nor colour blind. "Bleached out professionalism" has and continues to be a powerful means of socialization that has ensured that the White middle class male heterosexual privilege that has historically guided the direction of the profession is not threatened by a more diverse group of lawyers.

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145. *Beyond Bleached Out Professionalism*, *supra* note 144 at 209. Wilkins further notes that: In addition to the benefits that bleached out professionalism offers to the consumers of legal services, it also appears to safeguard the interests of the women and men who become lawyers. ... This 'professional' status is particularly important for the profession's new entrants—Jews, women, blacks, and other racial and religious minorities—who, in their nonprofessional lives, have been subject to discrimination on the basis of certain aspects of their identities. These traditional outsiders have a powerful stake in being viewed as lawyers *simpliciter*; freed by their professional status from the pervasive weight of negative identity-specific stereotypes.

Finally, bleached out professionalism appears to uphold the legal system's core commitment to the fundamental equality of persons.

146. *Beyond Bleached Out Professionalism*, *supra* note 144 at 211.

147. See *Indian Act*, 1876, S.C. 1876, c. 18, s.86(1) as discussed in *Gender and Race*, *supra* note 21.

By bleaching out identity, we are losing an important voice that can identify inequality and other systemic problems in the legal profession which is a critical component of contextual thinking under a justice-seeking ethic. As Wilkins persuasively argues, contrary to popular belief, group consciousness doesn't make lawyers less neutral or objective - just the opposite in fact. Indeed, as he points out, feminist legal scholars have played an important role in advancing an alternative dispute resolution model.<sup>148</sup> In addition, since identity gives individuals special reasons for "caring about others who share their identity and to work together to advance the interests of their group" - we are losing a vital source of passion and commitment for the pursuit of social justice and a justice-seeking ethic.<sup>149</sup> Of course, as Wilkins notes, there is still a legitimate question—where do you draw the line? What aspects of one's non-professional self should be expressed in lawyering? I would argue that the focus should be on attributes that are relevant to group advancement, social justice, and fundamental fairness.<sup>150</sup>

### *Conclusion*

This article has attempted to demonstrate that the role morality of the legal profession in Canada has been evolving over the last fifteen years. With this reconstruction, the emphasis of lawyering is slowly shifting away from zealous pursuit of the client's cause within the bounds of the law to the pursuit of the cause of justice. That pursuit demands that lawyers engage in behaviour that will enhance a fair, other-regarding, and non-discriminatory process of problem-solving and that will protect the right of the client to obtain the remedy he or she is entitled to under the law properly interpreted.

There are likely to be many sceptics. Some will argue that I have failed to present sufficient evidence of a reconstruction. To them, I urge patience as this is a work in progress. Others, without denying the importance of

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148. *Beyond Bleached Out Professionalism*, *supra* note 144 at 218.

149. *Beyond Bleached Out Professionalism*, *supra* note 144 at 219-220, 223.

150. *Beyond Bleached Out Professionalism*, *supra* note 144 at 222-234. In the United States, the issue of identity lawyering has been particularly acute in the context of client selection. For example, the question has been raised as to whether a racialized lawyer should use identity consciousness to refuse to prosecute certain criminal offences because of systemic racism in the justice system. It is now commonly referred to as "the Darden dilemma" following the selection of Chris Darden, an African American, to prosecute O.J. Simpson and his subsequent attempts to exclude the audiotapes that exposed his main witness, Mark Furhman, as a racist. See K.B. Nunn, "'The Darden Dilemma': Should African Americans Prosecute Crimes?" (2000) 68 *Fordham L. Rev.* 1473. In the context of gender, see the discussion of the Nathanson case in the forum discussion at (1998) 20 *W. New Eng. L. Rev.* 23-142. Judith Nathanson, a well known Massachusetts divorce lawyer, was successfully sued by a male client for discrimination. Nathanson refused to represent men in divorce cases in her effort to bring out about systemic changes in family law.

the anti-discrimination and do no harm norms now incorporated in our codes, will view the reforms as nothing more than political window dressing designed to convince the public that self-regulation works and that the profession is motivated by the public interest. These sceptics will point to the impossibility of trying to institutionalize justice in a profession and economy that is so driven by the bottom line and where institutional culture, particularly elite law firm culture, too often defeats the best of intentions.<sup>151</sup>

These are valid concerns. Much of the reorientation and resistance will require structural changes including the re-thinking of self-regulation and law school pedagogy. It will require a commitment to interpreting and applying all of the rules in a manner consistent with a justice-seeking ethic. And finally, as I have said repeatedly throughout this piece, we will need stronger leadership from the Canadian Bar Association and law societies. However, before we move on to institutional reform, we need to have a set of meaningful and workable standards. Unfortunately, we have only had few attempts in Canada to set out systemically a coherent theory of ethical lawyering.<sup>152</sup> This article attempts to fill in the gap.

A final group of sceptics will argue that a justice-seeking ethic simply places too much emphasis on legal values and law's ambition. While there is no question that the law has often been corrupted in favour of the dominant groups by those interpreting and applying it, in my view, the law can be a powerful means of securing justice. The recognition of same-sex marriages, for example, would likely never have occurred without *Halpern* and other similar cases. Moreover, as I have tried to argue, a justice-seeking ethic does not rest solely on positivist law but rather asks lawyers to properly interpret the law by examining its consistency with

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151. For example, in her 1993-1994 study of lawyers in British Columbia, Joan Brockman found that 73% of women and 45% of men indicated that they thought that the anti-discrimination rule in British Columbia's code of conduct would not be effective or were not optimistic about its effectiveness. See *Use of Self-Regulation*, *supra* note 30 at 217. See also, Richard L. Abel & Philip S.C. Lewis, eds., *Lawyers & Society: The Common Law World* (Berkeley & Los Angeles: University of California Press, 1988). As Jerome Bickenbach notes:

Abel has argued that there is no empirical evidence that legal practitioners are, because of their professional status, able to rise above the profit motive in order to serve the public interest. Not only is the moral mandate of law blatant PR, none of the standard features of professionalism are actually manifested in practice.

See "The Redemption of the Moral Mandate of the Profession of Law" (1996) 9 Can. J. L. & Jur. 51 at 56.

152. These include the works of Allan C. Hutchinson (see *Legal Ethics and Professional Responsibility*, *supra* note 23; "Calgary and Everything After: A Postmodern Re-Vision Of Lawyering" (1994-1995) 33 Alta. L. Rev. 768); Rosemary Cairns Way (see *Reconceptualizing Professional Responsibility*, *supra* note 57); Richard Devlin (see *Normative and Somewhere To Go*, *supra* note 67) and Randal N.M. Graham, *Legal Ethics: Theories, Cases and Professional Responsibility* (Toronto: Emond Montgomery, 2004).

substantive legal norms including fairness, equality, and harm reduction and with special attention to our history of injustice.

This article has also had more modest ambitions. For those seeking a meaningful practice of law, I have tried to chart a course that will identify some basic obligations owed by lawyers in the pursuit of justice and how a justice-seeking ethic can be actualized. Perhaps more importantly, I have attempted to identify a course of redemption by pointing largely to code-based developments that can provide support, courage and ultimately justification for justice-seeking lawyers. There is no longer any excuse.