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

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

The “standard conception” of American legal ethics is not primarily concerned with lawyers’ ability to promote either substantive justice or systemic change. Situations often arise where a lawyers’ moral reasoning conflicts with the dictates of the codified professional ethics. Instead, legal ethics often provide lawyers with a discourse of nonaccountability and neutrality, allowing them to disclaim moral responsibility for the consequences of their actions as advocates. This paper investigates situations where a lawyers’ moral reasoning conflicts with the dictates of the codified professional ethics and provides moral (if not legal) justification for the expression of dissent in such situations, especially where the lawyer represents a vulnerable party.

In his seminal article on the regulation of the legal profession, David Wilkins correctly points out that the answer to questions about proper professional conduct necessarily vary depending on the power relationships between particular clients and their adversaries. Scholars have traditionally focused on the perceived failure of the “dominant model” of legal ethics to preserve space for moral reasoning in the face of power imbalances; numerous theorists of legal ethics have criticized the “dominant model” for promoting “literalistic adherence to what appears to be the letter of ethics.

2 The standard conception of legal ethics is based on three related principles: partisanship, neutrality, and nonaccountability. See, e.g., Ayers, The Lawyers’ Perspective, infra note 28, at 89. These three principles are the starting point for most theories of legal ethics. See id.; see also W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 6, 29 (2010).
3 See id. David Luban’s book, Lawyers and Justice, discussed infra, describes and critiques this tendency within the legal profession. See David Wasserman, Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation, 49 MD. L. REV. 392, 393 (1990) (describing Part I of Luban’s book as “sustained attack” on the use of “adversary system excuse” to justify morally objectionable behavior).
4 See David B Wilkins, Who Should Regulate Lawyers?, in LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 25, 40 (Susan D. Carle ed., 2005) (questioning the “assumption that a single enforcement structure will be appropriate for all lawyers in all contexts” and arguing that “[c]orporate clients are substantially different from individual consumers of legal services”); see also Theories of Professional Regulation, in LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 13, 16 (Susan D. Carle ed., 2005) (crediting Wilkins’ article with raising the question of whether “clients’ relative power” should “make a difference in the permissible conduct” of their lawyers) [hereinafter Theories of Professional Regulation].
5 Scholars use the term “dominant model” interchangeably with what Ayers and Luban call the Standard Conception.
codes” over “careful attention to ethical issues.”\textsuperscript{6} William H. Simon, for example, has argued that lawyers should respond to circumstances where there is an unusual degree of aggressiveness or vulnerability on the part of another party” by “taking reasonable action” to bring about the proper substantive solution.\textsuperscript{7} In other words, lawyers’ “basic consideration” should be “whether assisting the client” in a particular course of action “would further justice.”\textsuperscript{8} Simon’s “discretionary model”\textsuperscript{9} seems particularly useful in scenarios where a professional obligation, such as zealous advocacy, to a powerful client conflicts with a lawyer’s notions of morality or justice.\textsuperscript{10} It is less clear, however, how this theory might apply to conflicts between professional norms and personal morality when lawyers represent the weaker party.\textsuperscript{11}

This paper builds upon Simon’s theory of ethical discretion by considering how lawyers should respond to explicit conflicts between the “laws of lawyering” and the individual lawyers’ conceptions of morality or justice in the context of “cause lawyering.”\textsuperscript{12} For the cause lawyer, moral and political commitments are inextricably entwined with the practice of law.\textsuperscript{13} Because political morality is constitutive of the cause-lawyers professional self-conception, conflicts between “professional ethics” and practical ethics or personal morality are particularly acute—a cause lawyer faced with such a conflict will feel morally compelled to spurn the code of professional ethics.\textsuperscript{14} This paper seeks to theorize a philosophical justification for the cause lawyers’ choice to privilege political morality over the code of legal ethics; this theory will also supplement

\textsuperscript{6} Samuel J. Levine, Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation, 37 IND. L. REV. 21, 23 (2003).
\textsuperscript{8} Id. at 1083.
\textsuperscript{9} Levine, supra note 6, at 23 (citing William H. Simon, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS (1998)).
\textsuperscript{10} See, e.g., Simon, supra note 7, at 240 – 41 (applying ethical discretion model to hypothetical personal injury litigation where defense counsel realizes plaintiff’s counsel is negotiating under a clearly mistaken assumption about the law, which will result in a skewed settlement and arguing that defense counsel should disclose the error to opposing counsel to ensure fairness in settlement).
\textsuperscript{11} To use Simon’s example, imagine a personal injury lawsuit where plaintiff’s counsel realizes that defense counsel is operating under a clearly erroneous assumption about the law but that disclosure would be likely to reduce justice because the plaintiff will not be able to settle the case for an amount sufficient to fully compensate his injuries nor can the plaintiff afford to go to trial. ? Simon’s theory requires lawyers to take responsibility for reaching a substantively just result where “procedural deficiencies” will otherwise lead to an unjust result. See id. at 240–42. Would Simon encourage the lawyer to exploit her opponents’ mistake to gain a negotiating advantage in this situation? See also Luban, infra note 23, at 428 (arguing that the institutional excuse of moral nonaccountability for lawyers is harder to justify in civil suits where adversaries are “relatively evenly matched”). Relatedly, it is unclear whether Simon’s theory of ethical discretion provides a morally satisfactory course of action to cause lawyers who view the law itself as substantively unjust, even assuming perfect procedures. See notes 104 and 105 and accompanying text, infra.
\textsuperscript{12} Cause lawyers are “activist lawyers who use the law as a means of creating social change in addition to a means of helping individual clients.” Etienne, infra note 88, at 1198.
\textsuperscript{13} Austin Sarat & Stuart Scheingold, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 2, 4 (2004) (describing moral and political commitments as defining attributes of cause lawyers and noting that cause lawyers are able to “harmonize personal conviction and professional life.”)
\textsuperscript{14} See id. at 9 (claiming cause lawyers “choos[e] to privilege their moral aspirations and political purposes even if doing so leads to violations of the profession’s ethical code”).
models such as Simon’s ethical discretion by justifying cause lawyers’ occasional contravention of professional ethics in an effort to promote substantively just outcomes for less powerful clients.¹⁵

The paper argues that cause lawyers may engage in justifiable civil disobedience of the ethical code when they take action to promote their substantive moral vision of justice over the dictates of professional ethics. The argument proceeds in three parts. First, this theory hinges on an assumption about the nature of “legal ethics”: the codes of professional ethics are not prescriptions for ethics qua morals but rather are a set of positive “laws of lawyering.”¹⁶ This assumption about nature of codes of professional ethics¹⁷ has implications for the degree to which lawyers are morally bound to adhere to these codes.¹⁸ The second part of this paper outlines various theories about whether a general moral obligation to obey the law, including the “law of lawyering,” actually exists. Finally, assuming that there is some moral obligation to obey the law of lawyering, the paper argues that the rules of professional ethics can be the proper subject of civil disobedience by the cause lawyer when the ethics code conflicts with the lawyer’s moral cause or substantive vision of justice. The fourth section of the paper explores the implications of the moral argument for civil disobedience of ethics code on the regulation of the legal profession and for the practice of cause lawyering.

This argument makes a contribution to the scholarly discourse on professional at the intersection of two bodies of literature. It adds to literature on the relationship between legal ethics and personal morality by justifying a course of action that sometimes privileges personal political morality over the code of ethics. Moreover, it supplements the literature on the ethics of cause lawyering, which tends to focus on scenarios where a lawyers’ devotion to a political or moral cause conflicts with her representation of an individual client.¹⁹ This paper instead addresses a broader set of ethical dilemmas: situations where the mandates of an ethical code, including but not limited to the lawyers’ duties to her client, conflict with the lawyers’ vision of a substantively just outcome. Finally, the paper suggests reasons why a constrained exercise of civil disobedience by cause lawyers in the context of professional ethics might be normatively desirable as a means of enhancing democratic deliberation and fostering the political influence of marginalized client populations.

¹⁵ Note that the term “cause lawyering” can encompass representation of powerful, entrenched interests (e.g., NRA Civil Rights Defense Fund). See Sarat and Scheingold, supra note 13, at 5 (distinguishing “cause lawyer” from “public interest lawyer”).


¹⁷ Each state has its own set of ethical rules governing lawyers, which are “promulgated and enforced by the state’s highest court under its ‘inherent power’ to make rules for its own operation. DAVID LUBAN, LAWYERS AND JUSTICE xxvii (1988). Every state except California has based its ethical code on one of two model codes promulgated by the ABA. See id. The ABA’s codes have no legal force themselves until they are adopted by the state’s highest court (often with modifications). See id.


¹⁹ See Sarat & Scheingold, supra note 13, at 9; see also Stuart A. Scheingold, Essay for the In-Print Symposium on the Myth of Moral Justice, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 47, 49 (2006).
I. "Lawyering Law": The Nature of Legal Ethics and the Cause Lawyer’s Moral Obligations

Although the terms “legal ethics” or “professional ethics” inherently connote moral authority, legal ethicists have long acknowledged and actively promoted the distinction between “common morality” and “role morality.”20 The theory of role morality distinguishes between common “universal moral duties” that apply to all persons as moral agents and “special duties” that attach to particular social roles, such as the lawyer.21 The standard conception of legal ethics holds that role morality must trump common morality when the two conflict; in fact, the lawyer can be “morally required to do things that seem immoral” because of her social role.22 Yet it is not immediately apparent why role morality should so dominate over common morality: what is the source of the standard conception’s claim to moral authority?

According to David Luban, professional duties (the duties of role morality) originate from “the requirements of social institutions (such as our adversary system) the rationality of which must be appraised with a generous yet skeptical eye.”23 For Luban, “the weight of our professional obligations” under the standard conception is not absolute, but rather is “bounded above by the weighted product of the worth of the institution [i.e. the adversary system], the centrality of the professional role to that institution, and the importance to that role of a putative professional duty.”24 On this view, the moral authority of the standard conception of professional ethics is derivative of and contingent upon the effectiveness of the adversary system, which is itself contingent in part upon the relative power differential of the parties.25 The adversary system, and by extension the standard conception of professional ethics, assumes a relative balance of power between the parties—the consequentialist justifications for this system break down, however, in the face of gross power disparities. Luban thus argues for an alternative vision of legal ethics that would hold lawyers accountable for the “ends that their clients are pursuing” and would encourage “moral activism,” whereby lawyers would attempt to “influence” the client to adopt a more just course of action.26 From this perspective, the standard conception alone is a morally unsatisfying model of legal ethics, even if it may have moral authority under certain circumstances. For the cause lawyer, whose “common morality” is inextricably tied to her self-conception as lawyer, it will

20 See, e.g., Luban, supra note 17, at xx. See also id. at xix (“The adjective qualifies the noun: the ‘ethics’ at work is not the ethics of private engagement but of institutional life, and the professional will engage in ethical deliberation by asking herself questions about what her profession and its institutions ought to be doing.”)
21 See id.
22 Id.
24 Id. Note that Luban argues that the institutional value of the adversary system varies with the relative power differential between the two parties. See note 11, supra.
25 Id. at 427–28.
26 Luban, supra note 18, at 160.
matter whether or not the code of legal ethics binds not only as “professional obligation” but also as moral obligation.\textsuperscript{27}

In addition to inquiring into the roots of the standard conception’s moral authority, it is also important to clarify precisely “what the Standard Conception is supposed to be a conception of.”\textsuperscript{28} Andrew Ayers offers three potential answers to this question. First, the Standard Conception might be “a conception of lawyering law,” capturing the “deep values that are expressed in the specific rules and regulations governing lawyers’ behavior.”\textsuperscript{29} Second, the Standard Conception might embody the “informal social norms that constitute the role of lawyer” and the “basic expectations” that apply to this social role.\textsuperscript{30} Finally, Ayers suggests the Standard Conception might represent “a set of claims about practical reasoning,” which defines “what sorts of considerations lawyers should recognize as reasons for action.”\textsuperscript{31} Ayers’ basic argument is that legal ethicists have failed to provide a satisfactory account of why the Standard Conception’s “role morality” should trump “common morality” because they have not framed the problem in terms of practical reasoning.\textsuperscript{32} He sketches two general scholarly orientations towards legal ethics: “the policy-maker’s perspective” and the “lawyer’s perspective.”\textsuperscript{33} While the legal-ethicist-as-policy-maker is concerned with the collective consequences of generally applicable rules,\textsuperscript{34} the lawyer’s perspective focuses on “specific experiences and decisions faced by individual lawyers.”\textsuperscript{35}

Viewed from the policy-maker’s perspective, the field of legal ethics represents a corpus of positive law geared at regulating the practice of law.\textsuperscript{36} The conventional

\textsuperscript{27} See id. at xix (claiming that, as a general matter, “the study of professional ethics” must consider both individual conscience and social institutions”).

\textsuperscript{28} Andrew Ayers, The Lawyer’s Perspective: The Gape Between Individual Decisions and Collective Consequences in Legal Ethics, 36 J. LEGAL PROF. 77, 90 (2011).

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} Id. at 77.

\textsuperscript{34} Id. at 77, 82. Ayers identifies scholars such as Alice Woolley and Bradley Wendel with the policy-maker’s perspective. According to Ayers, “Woolley argues that legal ethicists should treat their subject as a field of doctrinal analysis; their project should be to expound and criticize lawyering law in the same way that legal scholars in other areas expound and criticize other kinds of substantive law.” Id. at 84 (internal citations omitted). Wendel also explicitly rejects the “lawyer’s perspective” as defined by Ayers: “Unless one is prepared to argue that the obligations of a professional role should be modified to reduce immorality from a first-person perspective, what business is it of legal ethics that lawyers may feel their lives are not well-lived?” Id. at 85; W. Bradley Wendel, Methodology and Perspective in the Theory of Lawyers’ Ethics: A Response to Professors Woolley and Markovits, 60 U. TORONTO L.J. 1011, 1018 (2010).

\textsuperscript{35} Id. at 81. Ayers identifies Daniel Markovitz with the lawyer’s perspective: “The norms that form the core of adversary advocacy, according to Markovits, require lawyers to be guilty of ‘professional vices,’ which place a significant ethical burden on lawyers’ integrity. A system that is justified from the policy-maker’s perspective, Markovits argues, can still be ethically unappealing from the practitioner’s perspective.” Id. at 86 (quoting Daniel A. Markovits, Legal Ethics from the Lawyer’s Point of View, 15 YALE J.L. & HUMAN. 209, 223 (2003)).

\textsuperscript{36} See Ayers, supra note 28, at 80–81 (associating rules and regulations under “law of lawyering” with the policy makers’ perspective); W. BRADLEY WENDEL, ETHICS AND LAW: AN INTRODUCTION 17 (describing codes of ethics as “domain of positive law, not ethics”); Serena Stier, Legal Ethics: A Paradigm?, in
For the cause lawyer, the lawyers’ perspective is indispensable to a practically useful system of legal ethics. Personal morality for such lawyers is inseparable from professional practice. Therefore, a worthwhile account of legal ethics for the cause lawyer “must take into account” their “first-personal concerns” about their ideological mission. As a prescriptive matter, this paper theorizes legal ethics from the lawyer’s perspective by justifying the choice of cause lawyers to privilege common morality over the standard conception of role morality in certain circumstances. This paper engages with scholars who operate from the policy-maker’s perspective, however, by descriptively adopting their assumptions about legal ethics; the next section assumes that legal ethics are a set of generally applicable rules, justified on policy grounds by their collective consequences, which regulate the legal profession. In other words, the paper treats legal ethics as “lawyering law” akin to other areas of substantive law. As the next section will demonstrate, if legal ethics is in fact nothing more than “lawyering law,” then this has implications for the degree to which cause lawyers are morally bound to adhere to codes of professional ethics.

II. Lawyering Law and Civil Disobedience: Is there a Moral Duty to Obey the Code of Ethics?

Whether citizens (and in this case, lawyers) have a moral duty to obey the law is a basic and longstanding question in political philosophy. Section I established that legal ethics may be viewed as a set of substantive laws governing lawyering. Therefore, when conflicts arise between a lawyer’s personal morality and lawyering law, legal ethics are morally binding on the lawyer only insofar as there is a general moral duty to obey the law. As William Simon has pointed out, the “answer to the question whether lawyers

37 See Daniel Markovits, How (and How Not) to do Legal Ethics, 23 GEO. J. LEGAL ETHICS 1041, 1041 (2010) (“Conventional legal ethicists deploy moral theory in order to develop regulative principles that might govern lawyers’ professional conduct. Indeed, being reform-minded, they typically seek even to cast these principles in forms that might be incorporated, as improvements, into the positive law governing lawyers.”). 38 Cf. Ayers, supra note 28, at 80 (discussing practitioners’ relationship to “law of lawyering.”).
39 Cf. id. (discussing Markovits’ view that legal ethics must account for the first-personal concerns of lawyers in general about integrity).
40 Cf. Wooley, supra note 34 (as cited by Ayers, The Lawyer’s Perspective, at 84).
41 See, e.g., Christopher Heath Wellman & A. John Simmons, Is THERE A DUTY TO OBEY THE LAW? (2005) (arguing opposing sides of this debate).
should obey the law turns out to depend on what we mean by law.” Under a Positivist definition of law, under which the “existence and content of law depends on social facts and not on its merits,” it is difficult to justify a moral duty to obey the law. In contrast, under a “Substantive” conception of law, which rejects Positivism’s separation of law and morals, “an officially promulgated norm merits respect only by virtue of its substantive validity.” The substantive conception of law by definition imposes a moral duty to obey law because it collapses the distinction law and morals. For this reason, however, the substantive conception also seems inconsistent with the “dominant view” or “standard conception” of legal ethics, which insists on a separation between common morality and the dictates of legal ethics. This Section will outline several philosophical positions on the moral duty to obey the law, each of which conceives of a moral duty of varying strength. Section III will then apply these philosophical models of obedience (and disobedience) to several scenarios of ethically-embroiled cause lawyering.

Richard Wasserstrom has identified three possible philosophical positions on the nature of the duty to obey the law, which serves as a rough roadmap for this section:

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

Although a number of scholars defend the view that citizens are under a general moral duty to obey the law, few would defend Wasserstrom’s first position, which

43 Leslie Green, Legal Positivism, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 3 2003), available at http://plato.stanford.edu/entries/legal-positivism/; see also Simon, supra note 42, at 220 (“Positivism is committed to differentiating legal from nonlegal norms and to doing so by virtue of a norm’s pedigree rather than its intrinsic content. A pedigree links a legal norm to a sovereign institution through jurisdictional criteria that specify institutional formalities.”)
44 Simon, supra note 42, at 253.
45 Simon uses this term to cover any non-Positivist conception of law, including natural law theory or Dworkinian interpretivism.
46 Simon, supra note 42, at 224.
47 Id.
48 See id. at 220 (“Positivism has a strong affinity with the commitment of the Dominant View to categorical judgment.”).
50 See George C. Christie, On the Moral Obligation to Obey the Law, 39 DUKE L.J. 1311, 1315, 1336 (1990) (identifying several scholars who subscribe to this view and arguing that all arguments against a duty to obey fail); see also Leslie Green, Legal Obligation and Authority, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 29, 2003), available at http://plato.stanford.edu/entries/legal-obligation/ (“Political association, like family or friendship and other forms of association more local and intimate, is itself
holds that disobedience is never justified. For the Legal Positivist, such a position is incomprehensible: “It cannot be the case that turning in a runaway slave in the pre-Civil War U.S. was morally required, or that harboring a Jew in Nazi Germany was morally forbidden.”

Joseph Raz, for example, has argued that there is no moral obligation to obey the law, even in a society “with a good and just legal system.” On the other hand, scholars who defend some general moral duty to obey the law, such as George C. Christie, generally adopt a position closer to Wasserstrom’s second category rather than the first category’s absolute duty to obey: “to say that one has a moral obligation to obey the law does not mean that one must necessarily obey the law . . . it may be outweighed by other relevant moral considerations.”

This position on the duty to obey thus forces an inquiry into when disobedience of the law can be justified by such “important countervailing moral obligations.”

In A Theory of Justice, John Rawls developed the most “widely accepted account” of civil disobedience and its justifications in a “more or less just democratic state.” Rawls assumes that there is a general duty to comply with unjust laws, within certain limits, provided that such unjust laws arise under a “just constitution.” Because the Rawlsian account of the duty to obey assumes a reasonably just society governed by a democratic regime, he argues citizens will be required to comply with some unjust laws.
“to the extent necessary to share equitably in the inevitable imperfections of a constitutional system.” He cautions against general disobedience of unjust laws: “we have a natural duty of civility not to invoke the faults of social arrangement as a too ready excuse for not complying with them . . . .” Yet the duty to obey unjust laws is not absolute: where a law “exceed[s] certain bounds of injustice,” the duty to comply may “cease to be binding in view of the right to defend one’s liberties and the duty to oppose injustice” through civil disobedience.

Rawls provides a relatively narrow definition of civil disobedience as a “public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bring about a change in the law or policies of the government.” He then proceeds to give an account of the limited circumstances under which civil disobedience can be justified in a reasonably just society. As a preliminary matter, Rawls argues for a “presumption in favor of restricting civil disobedience to serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity.” Rawls also places an exhaustion requirement on civil disobedience: the “normal appeals to the political majority [must] have already been made in good faith” and other “legal means of redress [must] have proved of no avail.” Third, Rawls expresses a concern about the potential for “serious disorder” if every “group with an equally sound case” for engaging civil disobedience chose to do so. With this concern in mind, he argues that justified civil disobedience is limited to situations where “the dissenter allows that anyone else subjected to similar injustices would have a right to disobey in a similar way (and only when such general disobedience would have acceptable consequences).” Finally, Rawls counsels that even justified civil disobeyers should take account of prudential concerns about whether their civil disobedience will be effective before engaging in such actions.

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59 Id. at 312.
60 Id.
61 Id. at 312, 319.
62 Id. at 319.
63 Id. at 326.
64 Id. at 326. While a full explication of Rawls’ theory of justice is beyond the scope of this paper, it is important to clarify that his theory holds that a just society must adopt two fundamental principles of justice. Under the first principle, “[e]ach person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.” The second principle states that social and economic inequalities must satisfy two conditions: a) the difference principle and b) fair equality of opportunity. The difference principle requires that any social inequality exists “to the greatest benefit of the least-advantaged members of society.” The equality of opportunity principle requires that any social inequalities are “attached to offices and positions open to all under conditions of fair equality of opportunity.” Leif Wanar, John Rawls, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 24, 2012), available at http://plato.stanford.edu/entries/rawls/#TwoGuilDeJusFai.
65 Id. at 327.
66 Id. at 328.
68 Rawls, supra note 57, at 330 (“[T]he exercise of civil disobedience should, like any other right, be rationally framed to advance one’s end or the ends of those one wishes to assist.”).
Despite the wide influence of the Rawlsian account of civil disobedience, it is not universally accepted. Kimberley Brownlee, for example, has raised numerous objections to Rawls’ definitional elements of civil disobedience and to his conditions of justifiability. Brownlee notes that the Rawlsian account is confined to reasonably just societies, which can credibly command some duty of fidelity to law from its citizens. It is unclear, however, whether Rawls’ conception of civil disobedience can be “applied, without radical alteration to less just, more realistic societies [such as ours].” In addition, Brownlee questions the Rawlsian insistence on publicity as an element of civil disobedience: publicity can undermine the communicative intent of civil disobedience by providing “political opponents and legal authorities with an opportunity to abort those communicative efforts.” Therefore, Brownlee argues that “unannounced (or initially covert) disobedience” may be better able to ensure that the act is successful and can still be “taken to be open and communicative when followed by an acknowledgment of the act and the reasons for taking it.”

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

Brownlee’s own position on civil disobedience focuses on the “conscientious

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69 See Kimberlee Brownlee, Conscientious Objection and Civil Disobedience, MANCHESTER SCHOOL OF SOCIAL SCIENCES 2, http://www.soci.al.com/medialibrary/politics/research/workingpapers/council/Brownlee-ConscientiousObjectionandCivilDisobedience.pdf [hereinafter Brownlee, Conscientious Objection and Civil Disobedience] (criticizing elements of Rawls’ definition of civil disobedience); see id. at 13 (arguing that although Rawls’ conditions on justifiability seem “plausible at first glance” many can “ultimately be rejected.”)

70 Id. at 5.

71 Id.

72 Id. For an example of how the publicity requirement can allow more powerful actors to preempt the communicative impact of civil disobedience, see O’Shea v. Littleton, 414 U.S. 488, 492 (1974), where plaintiffs alleged a pattern and practice of racial discrimination by state officials alleged “carried out intentionally to deprive respondents and their class of the protections of the county criminal justice system and to deter them from engaging in their boycott and similar activities.”

73 Id.

74 See text accompanying notes 62–64, supra.

75 See Brownlee, supra note 69, at 14.

76 Id.

77 See text accompanying notes 64, supra.

78 Id.

79 In this essay, Brownlee also describes and critiques Joseph Raz’s definition of civil disobedience, which is somewhat broader than Rawls’: Raz defines civil disobedience as a “politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one’s protest
motivations of its practitioners.” She offers two compelling arguments in favor of a moral right to conscientious disobedience. First, “[t]he most compelling ground for a moral right to conscientious disobedience is society’s duty to honor human dignity.” Under this “humanistic principle,” the civil disobeyer is “protected by a right of conscientious disobedience . . . when he is willing to be seen to dissociate himself from” a law he views as unjust, and “to bear the risks of communicating and defending that decision to his society.” Second, Brownlee defends a right to civil disobedience on consequentialist grounds, as such “practices contribute centrally to the democratic exchange of ideas by forcing the champions of dominant opinion to reflect upon and defend their views.” This consequentialist argument dovetails with Brownlee’s view about the relative merits of civil disobedience by the powerful and vulnerable members of society respectively. Because of the “inherent comparative unfairness” in the political power differential “between majorities and vulnerable minorities,” she argues that “the scope for participation should accommodate some suitably constrained civil disobedience by vulnerable minorities” as a means to remedy this imbalance.

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

against, and dissociation from, a law or a public policy.” Id. at 7 (quoting Raz, THE AUTHORITY OF LAW, at 264). Brownlee objects to Raz’s failure to 1) consider breaches of law protesting the actions of nongovernmental institutions (e.g. private universities, trade unions); 2) recognize the inherently communicative aspect of civil disobedience, which must be “other-directed” not just “expressive”; and 3) identify a particular feature that signifies or explains the civility of civil disobedience. Id. at 7–8. Raz, unlike Rawls, argues that there is no moral duty to obey the law, even in a reasonably just society. See text accompanying note 50. It is therefore unsurprising that Raz’s conception of civil disobedience is somewhat “broader” than Rawls’. Id. at 3. Raz, for example, disagrees with Rawls that civil disobedience is “justified only as an action of last resort.” See Raz, AUTHORITY OF LAW, at 275. In fact, Raz suggests that civil disobedience may actually be a moral obligation where the alternative is to “give up any action in support of a just cause.” Id.

80 Brownlee, supra note 69, at 8.
81 Id. at 17.
82 Id. at 18–19.
83 Id. at 21.
84 Id. at 17.
85 Id. at 14–15.
86 Id. at 15 (citing JOEL FEINBERG, PROBLEMS AT THE ROOTS OF LAW (2003)).
87 Id. at 16.
III. The Moral Dilemmas of the Cause Lawyer: Is the Code of Ethics a Justified Subject of Civil Disobedience?

For the cause lawyer, morality and the practice of law are inseparable. The cause lawyer engages in the practice of law with a view toward directly promoting a moral vision of social change. Many scholars have noted that this morally-infused mode of practice inevitably conflicts with the positive law of lawyering, which is simply “not well-equipped” to address cause lawyering, if not in irreconcilable conflict with cause lawyering. The most commonly cited ethical tension in cause lawyer is the conflict between professional duties to the client and the lawyer’s moral commitment to the cause. The potential for conflicts between the cause lawyers’ personal morality and the dictates of professional ethics, however, extend beyond the context of client-oriented duties; cause lawyering can also conflict, for example, with the lawyers’ duties to opposing counsel, or even to the court, under the professional ethics code. This section will consider certain examples of conflict between the cause lawyers’ morality and the law of lawyering and will consider whether the ethical rules can be the proper subject of civil disobedience under the philosophical models discussed in Section II.

88 See Margareth Etienne, The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers, 95 J. CRIM. L. AND CRIMINOLOGY 1195, 1997 (2005) (describing cause lawyers as “passionately seeking to advance their political and moral visions through the representation of their clients”); Sarat & Scheingold, supra note 13, at 4 (identifying political or moral commitment as a defining feature of cause lawyer); Deborah J. Cantrell, Lawyers, Loyalty, and Social Change, 89 DENV. U. L. REV. 941, 941 n.1 (2011) (cause lawyers “commit to a particular kind of substantive work or a particular category of clients because the lawyer is committed to some broader set of social or political principles.”).

89 Etienne, supra note 88, at 1196; see also Sarat & Scheingold, supra note 13, at 9 (cause lawyers choose to privilege “moral aspirations and political purposes” even if it leads to “violations of the profession’s ethical code”); Luban, supra note 17, at 317 (“[T]here will be times when [cause lawyers’] handling of tests cases serves, not the enlightened self-interest of the poor, but the political theories of the lawyers themselves.”).

90 See Scheingold, supra note 19, at 49 (“Cause lawyering and moral justice are at odds with the ethical standards of the legal profession.”).

91 See, e.g. Etienne, supra note 88, at 1196 (“The worry for the cause lawyer is that the pursuit of her “cause” may at times conflict with the client’s interest.”); see also William B. Rubenstein, Divided We Litigate: Addressing Disputes among Group Members and Lawyers in Civil Rights Campaigns, 106 YALE L. J. 1623, 1625 (discussing “dictates of professional ethics” in the context of civil rights litigation, with a special emphasis on “lesbian/gay civil rights”).

92 Cause lawyers’ moralism unsurprising often leads them to “identify strongly with their side of the issue and distrust with a similar intensity participants on the other side.” Cantrell, supra note 88, at 942. This tendency, which Cantrell terms “hyper loyalty,” is probably augmented by the fact that cause lawyers engage opposing counsel against the backdrop of the adversarial norms of the profession.


94 Cause lawyers’ moralism unsurprising often leads them to “identify strongly with their side of the issue and distrust with a similar intensity participants on the other side.” Cantrell, supra note 88, at 942. This tendency, which Cantrell terms “hyper loyalty,” is probably augmented by the fact that cause lawyers engage opposing counsel against the backdrop of the adversarial norms of the profession.
The Section concludes that the cause lawyer may engage in civil disobedience of lawyering law under certain circumstances, especially when the cause lawyer is faced with an egregious power imbalance. While this approach does not in itself make the code of ethics more responsive to cause lawyering, it has anticipated two benefits. First, civil disobedience will contribute both to democratic exchange by forcing the proponents of the Standard Conception of legal ethics to “reflect upon and defend their views.” On a related note, it will also have the secondary effect of promoting democratic discourse related to the cause lawyers’ moral position (e.g. gay/lesbian civil rights, death penalty abolition, pro-life, pro-choice, etc.). Second, the option of civil disobedience presents cause lawyers with a means, even if necessarily temporary and makeshift, to bridge the gap between “codified law” and the “non-codifiable morality” so central to their legal practice.

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

Scholars have identified both criminal defense lawyers and poverty lawyers as examples of “cause lawyers”: practitioners in these areas often approach their work with an ideological fervor fueled by a moral vision of combatting a fundamentally unjust system. Imagine that in the course of plea negotiations on a charge of possession of crack cocaine with intent to distribute, the parties agree that the defendant will serve a prison sentence of 7 years. The prosecutor insists on drafting the agreement, and accidentally writes “7 months.” Alternatively, in the civil context, imagine that plaintiff has accidentally drafted a move-out agreement to give the defendant-tenant 12 months to move instead of 2. The prosecutor/plaintiff then signs the agreement and sends it to defense counsel, who immediately notices the error. In both situations, defense counsel is arguably obligated by the positive law of lawyering to disclose this error to the

95 Cf. Brownlee, supra note 69, at 17; Luban, supra note 23, at 428.
97 Cf. id. at 14.
98 This hypothetical dilemma was inspired by a seminar meeting of the Fellowship at Auschwitz for the Study of Professional Ethics (FASPE) in Summer 2015, in which the author participated. The students and the faculty concluded that when an opposing counsel makes a typographical error in negotiating a settlement and is prepared to execute that settlement without realizing the error, the lawyer has an ethical duty to disclose this error before executing the settlement. There was some dissent, however, when the scenario was adjusted to represent a situation of extreme power imbalance, such as a criminal plea bargain or even a move-out agreement for an impoverished tenant of a corporate management company.
99 See, e.g., Etienne, supra note 88, at 1198 (outlining argument that “many criminal defense lawyers are in fact cause lawyers”).
100 See, e.g., John O. Calmore, A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty, 67 Fordham L. Rev. 1927, 1928 (1999) (“In the quest for justice, representing the poor has generally attracted ‘cause lawyers.’”); see also Scheingold & Sarat, supra note 13, at 118 (identifying landlord-tenant conflict as a subject of “transformative-left” cause lawyering).
102 It is worth considering an example from the civil context as well, given that the widely-shared position that the ethics of the defense lawyer are unique because the entire coercive power of the state is arrayed against the individual defendant. See, e.g., Freedman, supra note 93, at 1168 (noting “criminal defense is different from other types of advocacy.”)
prosecutor/plaintiff. Both the cause-defense lawyer and the cause-poverty lawyer, however, will likely feel an intense, moral impulse to give their client a chance at a more just outcome. The criminal defense lawyer, for example, might view it as morally incumbent upon her to challenge the inherent injustice in the structure of the criminal justice system. The practice of indigent eviction defense is also often ideologically motivated: the poverty cause lawyer perceives how her client as “synergistically and simultaneously, racially and economically subordinated within the spatially constrained and the opportunity-denying circumstances of ghetto and barrio life” and might therefore feel morally obligated to allow the client the chance for an extra several months in her home.

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

A second example of tension between the practice of cause lawyering and the ethical codes of the profession arises when the client’s goals diverge from the cause lawyer’s ideological mission. The dominant model of professional ethics obligates lawyers to “provide vigorous and skillful representation” to clients, even if the clients “values and behavior are reprehensible to the lawyer.” To this end, legal ethical codes often explicitly provide that lawyers may represent clients without endorsing their values, interests, or goals, encouraging lawyers to “market [their] legal expertise” while putting aside any of the “moral or political implications” of their advocacy in each individual case. This directly conflicts, however, with the cause lawyering model, which often privileges advocacy of a particular moral or political mission above the goals of the individual client.

The professional dilemma faced by the death penalty abolitionist lawyer whose client “volunteers” (“the volunteer dilemma”) for capital punishment throws into particularly stark relief the tensions that cause lawyers encounter when their cause conflicts with their individual client’s goals. The dilemma of the capital volunteer arises

103 See Comment to Rule 4.1, MODEL RULES OF PROFESSIONAL CONDUCT, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_others/comment_on_rule_4_1.html. (“A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”).
104 See, e.g., Etienne, supra note 88, at 1212 (criminal defense cause lawyers seek to reform aspects of criminal justice system through their practice, objecting to practices such as automatic detention for certain crimes or mandatory minimum sentences.”); cf. Minow, infra note 152, at 730.
105 Calmore, supra note 100, at 1931.
106 Scheingold, supra note 19, at 49–50.
107 Id. at 50.
108 Id.; Sarat & Scheingold, supra note 13, at 9.
109 As J.C. Oleson has pointed out, the term “volunteer” is misleading, although it is the term most often used in the capital defense community to describe this scenario. J. C. Oleson, Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution, 63 WASH. & LEE L. REV. 147, 154 n. 38 (2006). Perhaps a more accurate description of this scenario would be “a prisoner's decision to end his appellate process,” given the seemingly contradiction inherent in the idea of “consensual execution.” Id. (internal citations omitted).
when a client desires “to waive his appeals and to expedite his own execution.” This scenario is no wooden ethical hypothetical: volunteering represents an intractable and recurring ethical conundrum for capital defense attorneys. Since the Supreme Court effectively reinstated the Death Penalty in 1976, at least 141 capital defendants have “volunteered” for execution. In such situations, the Model Code of Ethics requires lawyers to “abide by the client’s decisions.” Consequently, for the death penalty “abolitionist” cause lawyer, who practices law to actualize her goal of eliminating capital punishment, the “volunteer” scenario presents an irreconcilable conflict with the dictates of professional ethics.

Before hypothesizing what such lawyerly civil disobedience might look like, it is important to note the difference between the case of the death penalty volunteer case and the scrivener’s error case above. In the scrivener’s error scenario, the lawyer’s civil disobedience promotes her client’s goals, while violating a positive law duty to opposing counsel. In the death penalty volunteer scenario, in contrast, the lawyer acts in direct contravention of her client’s expressed wishes, thereby undeniably threatening the value of client autonomy at the core of client-centered legal practice. As the Unabomber case, where the defendant chose to plead guilty rather than allow his lawyers to mount...

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110 Id. Like Oleson, I intentionally use the male pronoun in discussing the example of the capital volunteer. See id. at 154 n.39 (“The gendered pronoun is warranted in this context: the overwhelming majority of death row inmates are male.”).
111 Id. at 155 (describing the capital volunteering as ethical “Gordian Knot”).
113 Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers", DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers. (providing list of 141 individuals who “continued to waive at least part of their ordinary appeals” at time of execution); Oleson, supra note 109, at 157 (“Contemporary volunteering is a worsening problem.”).
116 See Janill L. Richards, A Lawyer’s Ethical Considerations When Her Client Elects Death: The Model Rules in the Capital Context, 3 SAN DIEGO JUST. J. 127, 131 (1995) (characterizing any action in contravention of client’s wishes as arguably “opposed to the general mandate that a lawyer will follow the wishes of her client and will not substitute her own conception of what is in the client's best interest.”).
118 United States v. Kaczynski, 239 F.3d 1108, 1118 (9th Cir. 2001) (holding that denial of defendant’s Faretta request to represent himself did not render his guilty plea involuntary nor did the threat of presentation of a mental state defense with which defendant disagreed render his plea involuntary). Ted Kaczynski, known as the “Unabomber,” killed three people and injured 23 others in between 1978 and 1995 in a bombing campaign conducting through U.S. mail. Michael Mello, The Non-Trial of the Century: Representations of the Unabomber, 24 VT. L. REV. 417, 420–21 (2000); see also Ollie Gillman, I think your brother's the Unabomber: Ted Kaczynski's sister-in-law and brother speak of the moment they realized they knew who the twisted mass murderer was, DAILYMAIL.COM (Feb. 11, 2016 11:12 AM),
a mental illness-based defense at trial, starkly reminded the legal profession and society writ large, the autonomy of the criminal defendant must be carefully respected, as it is “the defendant who most immediately experiences the effects of a given criminal adjudication.”

At the same time, there are other significant moral values that conflict with this strong notion of defendant autonomy and that support morally justifiable civil disobedience in at least the particular case of the death penalty volunteer. Assuming that the client is mentally competent, it seems clear that the positive law of lawyering precludes her from attempting to frustrate the client’s choice to submit to the death penalty. Yet perhaps civil disobedience of this positive law duty might be justified, especially in light of the unique conditions death penalty context, including the irrevocability and the profoundly coercive situation confronting a defendant who considers waiving his appeals. Ultimately the lawyer must consider for herself whether her deep, conscientious, political commitment to abolition of the death penalty and her concerns about the “systemic inequality and injustice” in the administration of the death penalty suffice to overcome her moral discomfort with acting in direct contravention of her client’s express wish to submit to capital punishment. Given the weight of the countervailing moral norm of client autonomy, perhaps especially in the criminal context, the capital defense cause lawyer should carefully consider whether

http://www.dailymail.co.uk/news/article-3442524/I-think-brother-s-Unabomber-Ted-Kaczynski-s-sister-law-brother-speak-moment-realized-knew-twisted-mass-murderer.html. Kaczynski was called the “Unabomber” because he initially target universities and airlines. Mello, supra, at 421. He was apprehended after his anonymous 35,000-word manifesto decrying modern industrial society and technology was published in 1995 in the Washington Post and the New York Times, and his brother David alerted the police that he suspected Ted Kaczynski was behind the bombings. Id.

See Mello, supra note 118, at 431; Kaczynski, 239 F.3d 1108, 1121 (9th Cir. 2001) (Reinhardt, J., dissenting) (“From the outset, however, Kaczynski made clear that a defense based on mental illness would be unacceptable to him, and his bitter opposition to the only defense that his lawyers believed might save his life created acute tension between counsel and client.”).

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

See, e.g., Richards, supra note 116, at 170.

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

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

Cf. Toone, infra note 125, at 662 (noting that autonomy discourse in Supreme Court’s right to self-representation jurisprudence “mask[s] systemic inequality and injustice.”); Luban, supra note 17, at 323 (arguing that manipulation of client but lawyer can by justified in service a of “just and sufficiently weighty” political cause).

she truly feels morally compelled to disobey lawyering law in the death penalty volunteer context.

Assuming the death penalty cause lawyer decides to proceed with civil disobedience in this scenario, the question remains: what form would such civil disobedience take? First, the lawyer might decide to go beyond the bounds of ethically-permissible advice by trying to actively persuade or even pressure her client to continue to file appeals; at the very least, this approach to civil disobedience would continue to actively involve the client in the decisionmaking process, even if it clearly intrudes upon his autonomy. Second, the lawyer might argue that his client is choosing to forgo his appeals due to mentally incompetence (although the client is in fact competent). While the Ninth Circuit once attempted to reconcile such action with lawyering law by characterizing it as an attempt to “act[] in the best interests of his client,” such circumvention of the express wishes of a client, even a client who desires to accept capital punishment, is more accurately described as civil disobedience of lawyering law.

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

The above examples, from the drafting errors of opposing counsel to the death penalty “volunteer,” concretely demonstrate the inherent “ethical tension between cause lawyering and mainstream professionalism.” The normative question of how cause lawyers should respond when faced with such conflicts is vitally important, especially in light of the proliferation and (begrudged) acceptance of cause lawyering as a legitimate and even desirable component of the organized bar. Given the inability of the

opinion). But see Robert E. Toone, The Incoherence of Defendant Autonomy, 83 N.C.L. REV. 621, 622, 650, 656 (2005) (criticizing the idea, traceable to Faretta, that defendant autonomy should trump other societal values, such as fairness, order, efficiency, and accuracy, and arguing that the constraints of criminal process preclude the exercise of true autonomy by the criminal defendant); Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 163 (2000) (holding states are not constitutionally required to recognize right to self-representation of direct appeal from criminal conviction). 126 See Rule 2.1, MODEL RULES OF PROFESSIONAL CONDUCT, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html.
127 Cf. Richards, supra note Error! Bookmark not defined., at 167; Luban, supra note 17, at 323.
128 Cf. Mason By & Through Marson v. Vasquez, 5 F.3d 1220, 1222 (9th Cir. 1993) (Against his client’s wishes, attorney “filed opposition papers and declarations from several mental health professionals stating that [client] was suffering from mental illnesses that were affecting his decision to withdraw his petition.”); see also Richards, supra note 116, at 128. As Richards notes, this might also involve a breach of the lawyer’s duty of confidentiality, if she relies on confidential communications to convince the judge that a competency hearing is necessary. Richards, supra note 116, at 144.
129 Mason, 5 F.3d at 1223.
130 Richards, supra note 116, at 131.
131 Scheingold, supra note 19, at 52; see also Etienne, supra note 88, at 1196 (“The cause-motivated approach to lawyering contradicts the traditional view of those in the legal profession as rights-enforcers or as neutral advocates of their clients’ interests.”).
132 See Sarat & Scheingold, supra note 13, at 25, (discussing “conditional and precarious” place of cause lawyers within the profession, despite “grudging acceptance”; noting how profession was able to “capitaliz[e] on the luster of cause lawyering” to improve the reputation and social capital of the profession generally).
dominant model of professional ethics to address these problems, this subsection argues that the positive laws of lawyering represent a subject of morally justifiable civil disobedience in the context of cause lawyering.\textsuperscript{133}

In order to morally justify cause lawyers’ civil disobedience of ethical codes, one must reject the restrictive Rawlsian framework in favor of Brownlee’s more expansive account of justified dissent. Recall that Rawls posited a presumptive general duty to obey even unjust laws.\textsuperscript{134} Only when a law “exceed[s] certain bounds of injustice” might the general moral duty to comply with the laws be suspended.\textsuperscript{135} The generally applicable rules of professional ethics certainly do not satisfy this high standard. Even if they did, the Rawlsian account further limits the circumstances where civil disobedience is morally justified.\textsuperscript{136} Moreover, Rawlsian civil disobedience must be “public,”\textsuperscript{137} which renders it inapplicable to at least the failure to disclose drafting errors (“drafting error dilemma”).\textsuperscript{138} Moreover, it is unclear whether Rawls (in contrast to Raz and Brownlee, for instance) would morally approve of indirect, in addition to direct, civil disobedience.\textsuperscript{139} Direct civil disobedience occurs when one breaches the very same law that is opposed (e.g., the lunch counter sit-ins during the civil rights movement).\textsuperscript{140} Indirect civil disobedience, in contrast, refers to breaches of laws, which \textit{ceteris paribus}, are not themselves opposed but are disobeyed in order to convey objection to another law, norm, or policy.\textsuperscript{141} Civil disobedience by cause lawyers of the ethical codes in the context of either the drafting error dilemma or the volunteer dilemma would exemplify indirect disobedience, which most contemporary philosophers agree is morally justifiable.\textsuperscript{142}

Although civil disobedience of the ethics code might be morally problematic from the Rawlsian perspective, it is justifiable under Brownlee’s approach. First of all, Brownlee rejects the Rawlsian insistence on publicity; therefore, in the drafting error dilemma, even initially covert civil disobedience can be morally justified, when the disobedience is later acknowledged and the rationale explained.\textsuperscript{143} The cause lawyer in the drafting error scenario could refuse to disclose the error of her opponent initially, in

\footnotesize{\textsuperscript{133} While this provides the cause lawyer with a morally justifiable course of action, it does not address the shortcomings in the code of ethics itself. The next Section will discuss the anticipated benefits of applying morally justified civil disobedience in this context, and will also engage with the possibility of revising the code of ethics to better accommodate the tension between cause lawyering and the standard conception of professional ethics.
\textsuperscript{134} See text accompanying notes 58–59, supra.
\textsuperscript{135} See text accompanying note 61, supra.
\textsuperscript{136} See text accompanying notes 62–68, supra.
\textsuperscript{137} See text accompanying note 62, supra.
\textsuperscript{138} See Section III.A, supra.
\textsuperscript{139} See Brownlee, supra note 69, at 7 (noting that Rawls’ conception does not “explicitly” or “consistently” recognize that “civil disobedience can be either direct or indirect.”).
\textsuperscript{140} Id.; see also Kimberlee Brownlee, \textit{Civil Disobedience}, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 20, 2013), http://plato.stanford.edu/entries/civil-disobedience/.
\textsuperscript{142} See Brownlee, supra note 140 (“There is more agreement amongst thinkers that civil disobedience can be either direct or indirect.”).
\textsuperscript{143} See text accompanying note 73, supra.}
order to ensure the success of her action. Eventually, the cause lawyer must disclose her action, in order to ensure that her civil disobedience serves its communicative goal: to express, for instance, moral criticism of the power imbalances inherent in the system of criminal justice plea-bargaining. The communicative value of this dissent provides the foundational core of the moral justifiability of civilly disobeying the ethics code.

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

IV. Implications for Legal Ethics and Practicing Cause Lawyers

144 See id.
146 Cf. id. (covert civil disobedience can still “taken to be open and communicative when followed by an acknowledgment of the act and the reasons for taking it.”).
147 See note 88, supra (collecting sources describing cause lawyers’ conscientious commitment to promoting moral vision of social change); cf. Brownlee, supra note 69, at 8 (focusing moral inquiry on the conscientious motivations of civil disobedience); Minow, infra note 152, at 734 (The “basic argument justifies disobedience in the face of particular rules that seem to implicate individuals in immoral actions or coercion to violate their own beliefs.”).
148 See text accompanying note 35 & n. 40, supra (defining the “lawyer’s perspective” in professional ethics and explaining its significance in designing system of professional ethics).
149 Id. at 17–18.
150 Id. at 12.
151 Cf. Martha L. Minow, Breaking the Law: Lawyers and Clients in Struggles for Social Change, 52 U. Pitt. L. REV. 723, 730 (1991) (“[T]he very effort to make legal arguments may require accepting assumptions and terms of debate that advocates most deeply wish to challenge.”)
152 Id. at 15 (citing JOEL FEINBERG, PROBLEMS AT THE ROOTS OF LAW (2003)) (“[W]hat morality requires of a person in morally difficult circumstances is not something to be mechanically determined by an examination of the person’s office or position.”); cf. William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1083 (1988).
This paper has argued that the positive law of lawyering inherently conflicts with the project of cause lawyering. In considering concrete examples of this conflict, the paper has argued that civil disobedience of professional ethics can be morally justified. The question thus becomes: what difference, if any, does this make for how the legal professional conceptualizes and designs its normative system of professional responsibility, embodied by the codes of ethics? While the project of proposing systematic revisions to the model code of professional ethics is beyond the scope of this paper,154 this section will sketch some conclusions about the nature of professional ethics in the context of cause lawyering.

First, it is important to emphasize the narrowness of the claim above about the moral justifiability of civil disobedience in the context of “lawyering law.” This paper does not argue that the organized bar should codify unconstrained lawyerly discretion, unbounded by any notion of client goals or interests, simply in order to accommodate the cause lawyers’ choice “to privilege their moral aspirations and political purposes.”155 Instead, recognizing the value of Ayers’ concept of the “lawyer’s perspective,” the argument offers cause lawyers a moral framework through which to evaluate and potentially to morally justify their choice to privilege individual morality over role morality and substantive justice over the positive law of lawyering.

Adopting the lawyer’s perspective is particularly important in the context of cause lawyering, given the prevalence of cause lawyers in the modern profession156 and the seemingly irreconcilable disconnect between cause lawyering and the norms of professional ethics. Given the reality that these cause lawyers often pursue their ideological missions at the expense of strict obedience to the code of ethics,157 perhaps the ethics codes should be revised in a process of “reflective equilibrium,”158 whereby the norms “on the books” are brought into line with the norms of the cause lawyers “on the ground.” By striving for coherence between the ideals of the ethical codes and the empirical reality of cause lawyers’ conduct contravening these codes, the profession might pragmatically encourage respect for the norms of professional ethics while simultaneously demonstrating enhanced respect for the “lawyer’s perspective” in policy-making. Perhaps, in light of these considerations, the ethical code should be adapted to promote moral deliberation in hard cases, as Samuel Levine has suggested. Levine’s “deliberative model” would avoid the need for open defiance of the ethics codes by replacing optional Model Rules (e.g., “a lawyer ‘may’ reveal confidential information in

154 As Sarat and Scheingold have described, the work of civil rights and poverty cause lawyers in the 1950s, 1960s, and 1970s “expanded definitions of professional responsibility.” As a result, the modern bar has incorporated cause lawyering into its “definition of civic professionalism,” albeit to a limited extent. It is worth noting, however, that in the context of contemporary politics, the organized bar’s enthusiasm for cause lawyering is “waning,” and its “definition of what constitutes legitimate cause lawyering” is narrowing. Sarat & Scheingold, supra note 13, at 49–50.
155 Scheingold, supra note 19, at 50.
156 See Sarat & Scheingold, supra note 13, at 48 (describing cause lawyers’ “foothold, however tenuous,” within legal profession); Scheingold, supra note 19, at 50 (“Even a cursory summary of the causes pursued by cause lawyers provides ample evidence that cause lawyers are indeed pursuing their moral muses.”)
157 See Scheingold, supra note 19, at 50.
order to save a life”) with a “discretionary rule” (“the individual lawyer retains discretion not to disclose when such a decision is based on demonstrable ethical deliberation”).

Second, given the political valence of the ethical dilemmas presented in this paper, a concern might arise that civil disobedience and ethical discretion represent an effort to free lawyers to pursue left-leaning causes. Yet this concern about political bias is somewhat of a red herring: as Ann Southworth has demonstrated, “conservative and libertarian legal advocacy groups have multiplied” since the mid-1970s, “crea[ting] a vibrant, highly differentiated field of conservative legal advocacy organizations modeled on liberal public interest law firms.” A further and more difficult objection to both the discretionary model of professional ethics and the moral defense of civil disobedience by cause lawyers implicates a legitimate concern about democratic legitimacy: allowing cause lawyers to exercise unconstrained discretion to leverage the law to advance personal views (in a way that non-lawyers simply cannot) appears elitist and antidemocratic.

These antidemocratic concerns, however, can be alleviated in two ways: (1) by constraining the situations under which the profession deems moral discretion and/or civil disobedience justified; and (2) by recognizing the democracy-enhancing consequences of civilly disobeying the ethical codes. First, cause lawyers should constrain civil disobedience of the ethics code to situations where they represent the more vulnerable party against background conditions of severe power imbalance. Legal ethicists have already recognized that “clients’ relative power” should “make a difference in the permissible conduct” of their lawyers. The normative value of civil disobedience in the face of such power imbalance is buttressed by Luban’s insight into the moral justifications for the adversary system, which undergirds the entire system of professional responsibility. In the face of gross power differentials, the assumptions supporting our trust in the adversary system evaporate, emptying our commitment to the adversary system of any normative value. As Brownlee has argued, in situations of palpable power imbalance, civil disobedience can serve an important political function, helping to “rectify the imbalance in meaningful avenues for political participation” between powerful majorities and vulnerable minorities. The cause lawyers’ civil disobedience thus serves the communicative function of drawing attention to the perceived systemic injustices faced by marginalized clients.

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159 Levine, supra note 6, at 52–53 (emphasis added).
160 Ann Southworth, Conservative Lawyers and the Contest over the Meaning of Public Interest Law, 2 UCLA L. Rev. 1223, 1223 (2005); see generally ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008). See also Scheingold, supra note 19, at 48 (“Included under the umbrella of cause lawyering are such polar ideological opposites as poverty and property rights lawyers, feminist and right-to-life lawyers . . . .”).
162 Theories of Professional Regulation, supra note 4, at 16.
163 See text accompanying notes 31–33, supra.
164 Brownlee, supra note 69, at 17.
Secondly, both constrained civil disobedience and the codified deliberative discretion\textsuperscript{165} could actually serve an important democracy-enhancing function, despite the above-noted concerns about antidemocratic activist lawyering\textsuperscript{166}. Even under a hypothetical, Rawlsian, “reasonably just” democratic regime,\textsuperscript{167} the political voices of “discrete and insular minorities” will be stifled.\textsuperscript{168} With this seemingly perpetual problem in mind, the democracy-enhancing potential of civil disobedience, deliberative lawyerly discretion, and dissent generally, are illuminated: “These practices contribute centrally to the democratic exchange of ideas by forcing the champions of dominant opinion to reflect upon and defend their views.”\textsuperscript{169} Thus, even though civil disobedience of lawyering laws is \textit{indirect}, in that it is intended to challenge collateral injustices existing independent of the ethics code, democratic deliberation is still augmented in the process. Furthermore, “when their causes are well founded and their actions justified,” the civilly disobedient cause lawyer “serv[es] society not only by questioning, but by inhibiting departures from justice and correcting departures when they occur, thereby acting as a stabilizing force within society.”\textsuperscript{170} Of course, the question of which causes are “well founded” will be inevitably contentious.\textsuperscript{171} The point is the dissenting voices, offering contested notions of the meaning of social justice, will improve the quality of democratic discourse.

\textbf{V. Conclusion}

The cause lawyer occupies a precarious and contentious position within the modern legal profession. Over time, the organized bar has grown “less hostile” to cause lawyers, recognizing their instrumental value in convincing the general public are “more than hired guns, using suspect means to defend often unsavory clients and profiting handsomely from doing so.”\textsuperscript{172} Yet cause lawyers, especially those representing “subversive” causes or “clients who are perceived as unworthy or dangerous” by the lay public, continue to face considerable professional obstacles and impediments, often including diminished status and pay.\textsuperscript{173} As Stuart Scheingold points out, the fact that the dogged persistence of cause lawyers in the face of such challenges represents “a tribute to

\textsuperscript{165} See text accompanying note 159, \textit{supra}.
\textsuperscript{166} Cf. Minow, \textit{supra} note 152, at 741 (“The legitimacy of the system itself requires confrontation with disobedience defended by individuals who view compliance as immoral or by individuals seeking to persuade lawful officials to change.”).
\textsuperscript{167} See text accompanying note 59; Rawls, \textit{supra} note 57, at 312.
\textsuperscript{168} United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938); \textit{see generally} JOHNF. HART ELY DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (developing representation reinforcement theory of judicial review). \textit{See also} Brownlee, \textit{supra} note 69, at 17 (“[E]ven in liberal regimes, persistent and vulnerable minorities are, by nature, less able than majorities to make their views heard . . . .”).
\textsuperscript{169} See Brownlee, \textit{supra} note 69, at 21.
\textsuperscript{170} Cf. Id. (citing RAWLS, supra note 57, at 383).
\textsuperscript{171} Scheingold, \textit{supra} note 19, at 48 (arguing the “disparate cacophony of causes suggests just how contentious the pursuit of moral justice is likely to be.”)
\textsuperscript{172} Scheingold, \textit{supra} note 19, at 52.
\textsuperscript{173} \textit{Id.} 49, 52.
their moral fervor, but it is also a product of the career sacrifices that they make...”

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

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174 Id. at 49.