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Utility, Rights, and Relativity: A Preliminary Look at Lawyers in Hard Cases*

ANDREW PHANG BOON LEONG

PROLOGUE

The following article was written several years ago; its objective (as the opening paragraphs suggest) was to set forth, in as simple a form as possible, the basic philosophical as well as ethical dilemmas and issues confronting lawyers. The audience initially targeted comprised practitioners. The manuscript has, however, stayed on the shelf, gathering dust. I can think of no clear reason for this. Perhaps it was because of the preachiness inherent within the purpose. Perhaps it was because it did not really add anything remarkably new to the literature on the subject – a great stumbling block to writers, despite the avowed purpose of the piece which I have just briefly described. Perhaps it was because I could not, owing to a great number of other commitments, muster

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* I would like to express my deep appreciation to the numerous persons who read drafts of the instant piece; in particular, I would like especially to thank Messrs. Richard Tur and Tan Yock Lin for their perceptive comments and suggestions. I remain solely responsible, however, for the views presented in this article.

sufficient time and energy to outline an alternative theory, which was the intended (and presumably more interesting) instalment; and I still have not. Whatever the reasons, however, it has become clearer and clearer that the seemingly great uninterest in the lawyer's role (both amongst practitioners and students alike) has not abated with the passage of time. The possible reasons for this are probably explicable (at least in so far as Singapore is concerned) on the basis of developments in the wider socio-legal context.[1] However, *even if* practical reasons precluded a systematic consideration of the problem (reasons, the reader will notice, I fully (albeit reluctantly) accept for no other reason than that they are, at present at least, a fact of everyday legal life), the almost complete absence of discussion is distressing, to say the least. What exactly *do* lawyers consider their role to be, both generally as well as in the Singapore context? Despite the apparently general reluctance to consider theoretical issues, can we really argue that, as lawyers, we have the wherewithal to cope with ethical issues without knowing – at least in their essence – what the various (at least most common) theories of lawyering are? Thus – with great reluctance – I have dusted the manuscript, feeling (for better or worse) that, simple though the piece may be, at least students might be persuaded to read (and more importantly) reflect upon an account of these theories – at least in this, a journal written, in large part, by and for themselves. There is a special reason for this course of action: despite what may have been anecdotally been told me concerning general student apathy, I do not believe that this is so, and that the particular uninterest referred to here may be due, in the main, to a relative lack of access to the necessary materials. But even if this is not the case, I feel it even more imperative, then, that all that can possibly be done should be done to combat such apathy – and not merely in the jurisprudence course where this topic is discussed. Although

1 See, below, n 3.

there is always much literature concerning the lawyering process, the basic theories and issues do not appear to have changed in any fundamental or radical fashion. Updating has thus been minimal; indeed, I felt that the layering on, as it were, of more peripheral observations prompted by such secondary literature at this point would have merely served to have detracted from the basic informative thrust of the piece which, despite the length of certain footnotes, still reads, in its main text, fairly straightforwardly. Indeed, unless minded to do so, the reader is urged to focus, in the main at least, on the main text. It should, finally, be noted that I have added an 'Epilogue' in which certain points are clarified and/or elaborated upon.

I. INTRODUCTION

To the practitioner, theory and concepts are of minimal, if any, use, save as embodied within technical rules of law that may be utilized in the furtherance of his client's case. Theory per se belongs, according to this view, to the rarefied atmosphere of academic gymnastics – to be sampled but rarely, and then only as one might view a curiosity; it is an experience that has little, if any, impact on the practicalities of everyday legal life. Unfortunately, a similar malaise appears to have afflicted, in varying degrees, the student body as well.[2] I put, perhaps, the case rather too strongly, although I do believe that much truth remains, even if one provides for the element of exaggeration contained therein. It may well be that there are indeed good reasons for this uninterest in theory.[3] It may, on the other hand, well be the case

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2 See, generally, Phang, "Legal Theory in the Law School Curriculum: Myth, Reality, and the Singapore Context", (1991) 6 Conn J Int'l Law 345.

3 See, generally, Phang, *ibid*, and, by the same author, *The Development of Singapore Law – Historical and Socio-Legal Perspectives* (1990), at Chapter 3 with regard to students and practitioners, respectively. For interesting broader American perspectives *vis-a-vis* legal ethics, see Geoffrey C Hazard, Jr,

that the approach toward *practice itself* needs to be changed. I do not propose, in this piece at least, to open Pandora's Box. It will suffice for the present to argue that *some* theory *is* in fact useful *some* of the time. There may, in other words, be occasions when theoretical arguments as well as concepts may not only be useful but may, in fact, also be *necessary* if one is to make any useful headway *vis-a-vis* the problems concerned. This is, with respect, one such occasion. And it is in this spirit that the present article is offered to both students as well as practitioners.

In this article, I want to discuss what the role of a lawyer is in a 'hard case'[4] – a situation I define as being one where he (ie, the lawyer) is confronted with the alternative of either providing the court with the truth or proceeding in some other fashion *vis-a-vis* the legal process that is *detrimental* to his (or her; for grammatical convenience only, I refer henceforth to the lawyer as "he") client's interests, or acting wholly in the client's interests, even if it means that some other party or the court itself would be adversely affected. The paradigm example would be the situation where the client either pursues or proposes to pursue what the lawyer considers to be an immoral[5] (yet legal) course of action – a

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"The Future of Legal Ethics", (1991) 100 Yale LJ 1239. And for a succinct and useful theoretical overview, see Joram Graf Haber & Bernard H Baumrin, "The Moral Obligations of Lawyers", (1988) 1 Canadian Journal of Law and Jurisprudence 105.

4 The concept of a 'hard case' here is somewhat different from that utilized by Ronald Dworkin: see, especially, Chapter 4 of his book, *Taking Rights Seriously* (1978). It should, however, be noted that Dworkin himself has apparently done away with the distinction between 'hard' and 'easy' cases: see, eg, his later work, *Law's Empire* (1986), at pp 266 and 354. For this blurring of the lines, as it were, between 'hard cases' on the one hand and 'easy cases' on the other in the context of the present article, see, below, the main text.

5 There are, of course, problems of what constitutes "immorality" (or its correlative "morality"). This is due, in no small part, to the problem of relativity or subjectivity of values which is discussed below: see, below, Part IV.

course of action that does *not* bring into operation any of the exceptions to client confidentiality.[6] How is the lawyer to decide? Are there any principles that may provide guidance to the lawyer? It is my view that this is a largely neglected problem in the local context, at least insofar as *public* discussion and debate[7] are concerned. And this is so despite the fact that it generates, by its very essence, issues that (if not of frequent occurrence) at least raise, or ought raise, deeply problematic and personal questions in the mind of the lawyer concerned. Without the benefit of empirical evidence, there are several possibilities that might account for this absence of public discussion.[8] It should, at this juncture, also be noted that any *theory* claiming to justify a lawyer's actions ought to be *simultaneously* applicable to 'easy cases' as well. In such 'easy cases', however, the need for a theoretical justification would (in my view at least) not be *perceived* as requiring any *conscious* justification as such.

The present piece is an attempt to *initiate* the process of questioning and understanding. It is a sort of preliminary excursion

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6 See, generally, (in the Singapore context) ss 128 to 131 of the Evidence Act, Cap 97, 1990 Edn; and *Practice Directions and Rulings issued by the Law Society of Singapore* (1989), especially at pp 19 to 20. As the present article does not deal with specific provisions as such, I shall not deal with these various provisions which may merit a separate article. For a good general *theoretical* discussion of confidentiality, see Bruce M Landesman, "Confidentiality and the Lawyer-Client Relationship" in Chapter 8 of *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Edited by David Luban, 1983) – although not every reader might agree with the resultant propositions advanced.

7 This is especially so insofar as the local law journals are concerned. Though see Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (1991) and Richard H S Tur, "Conflict of Interests and Lawyers' Ethics", (1993) 5 SAcLJ 35.

8 See, generally, above, n 3. And *cf* Richard Wasserstrom on the psychological benefits deriving from reliance on roles: see his essay, "Roles and Morality" in Chapter 1 of Luban, above, n 6, at p 29.

that makes no claim whatsoever to originality. It seeks to canvass a few theoretical possibilities suggested by jurists that might be of particular interest to practitioners as well as students who have sat back and thought about their roles in hard cases. Whether these possibilities are, to the reader, mere clever rationalizations or whether they may, on the other hand, in fact form a sound foundation for either the justification of one's actions in the real legal world or construction of other (either related or even radical) alternatives, is, of course, in the final analysis, the reader's choice. My own views will, doubtless, be apparent from the discussion that follows; but, this is the least important purpose of the instant essay. At the expense of anticipating the concluding portion of the piece, it ought to be pointed out that I have indeed no clear suggestion or solution. That is why I have termed this a preliminary step in an (hopefully) ongoing process. If, however, it will but generate a *heightened* awareness and consciousness, it would have been well worth the effort.

Before, however, proceeding to consider the various theoretical alternatives proper, a brief look at one situation which might illustrate what an 'hard case' is may be appropriate; this concerns the vexed problem as to what a lawyer ought to do in the case of client perjury. There is, to the best of my knowledge, very little authority on this point in Singapore, and what authority there is follows, in fact, the English position.[9] And the English position, although fairly clear with regard to how the lawyer ought

9 See, eg, *Yee Chang & Co Ltd v N V Koninklikje Paketvaart Maatchappij* [1958] MLJ 131, where the learned judge, Whyatt CJ cites, *inter alia,* from the judgment of Lord Wright in the English case of *Myers v Elman* [1940] AC 282. It ought, however, to be noted that *Yee Chang & Co Ltd* was not concerned with a situation of client perjury as such, although the general principle adopted therein (pertaining to what has to be done when the client obstructs the interests of justice) would, it is submitted, apply to perjurious clients as well.

to act, contains little, if any, reasoning;[10] the position for barristers and solicitors alike (in England) appears to be that though aiding future client perjury is prohibited, past perjury cannot be revealed to the Court without the client's consent although, if consent is denied, the lawyer cannot take any further part in the case[11] – this last point, however (and as we shall see in a

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10 See *The Guide to the Professional Conduct of Solicitors* (issued by the Law Society, 1990), especially at paragraph 14.08; Sir William Boulton, *A Guide to Conduct and Etiquette at the Bar* (6th Edn, 1975), at p 77; Sir Thomas Lund, *Guide to the Professional Conduct and Etiquette of Solicitors* (1960), at pp 106 to 107; and *Code of Conduct for the Bar of England and Wales,* at paragraph 137.

11 See, above, nn 9 and 10. It would appear that withdrawal would follow *a fortiori* for *future* client perjury. It ought also to be noted that the discussion here as to the lawyer's course of action relates to past perjury during the case itself, and does *not* apply to the situation where the lawyer concerned is *defending the client on a charge of perjury,* for the permissibility of defending a person known to be guilty constitutes a well-established principle (see, eg, s 128, illustration (a) of the Evidence Act, Cap 97, 1990 Edn; and see *Mohamed Syedol Ariffin v Yeoh Ooi Gark* [1916] 2 AC 575, at p 581 where the Judicial Committee of the Privy Council endorsed the usefulness of illustrations in the construction of the then Evidence Ordinance; in the Australian context, see *Tuckiar v The King* (1934) 52 CLR 335, at p 341), though it ought to be pointed out that such an ostensibly well-established principle does in fact pose difficult moral issues; as Geoffrey C Hazard, Jr puts it in his book, *Ethics in the Practice of Law* (1978), at p 29: "How can one who is under judgment ask for full and fair consideration of his cause and at the same time obstruct efforts to find out what that cause really is?" There are, of course, many counterarguments that are frequently canvassed, amongst which is, first, the fact that one cannot know with any reasonable degree of certainty whether the client committed the crime in question, especially since he may have confessed for other reasons, eg, to protect a third party. Further, the principle that one does not judge one's client and, indeed, is forbidden to express an opinion on his cause is deeply engrained within, if not the rules, then at least the tradition of the profession (see, eg, in the American context, Model Code EC 7-24, DR 7-106(C)(4); Model Rule 3.4(e)). In any event, the client is to be convicted only through the proper legal processes which, *inter alia,* entitles him to the best legal efforts of counsel and a whole array of procedural

moment), raising, in substance, the issue of 'whistle-blowing'. That the lawyer cannot aid and abet the client in the commission of perjury on the witness stand is clear enough, not least because he will himself be guilty of a criminal offence which will not only subject him to normal criminal sanctions[12] but may also render him liable to (quite probable) disciplinary action.[13] Is the lawyer concerned duty-bound, on the other hand, to actually inform the Court of his client's intended or previous deception? It would

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as well as constitutional safeguards. See, generally, David Mellinkoff, *The Conscience of a Lawyer* (1973); Mark M Orkin, "Defence of One Known to be Guilty", (1958-59) 1 Crim LQ 170; Showell Rogers, "The Ethics of Advocacy", (1899) 15 LQR 259; Hugh Pattison Macmillan, "The Ethics of Advocacy" in *Jurisprudence in Action: A Pleader's Anthology* (1953), p 303. For a relatively more recent piece that also focuses upon sociological and political reasons as well as the egotism of the lawyer, see Barbara Allen Babcock, "Defending the Guilty", (1983-84) 32 Clev St L Rev 175, especially at p 178; the same author goes on to assess the realities of criminal practice (especially as to why someone might plead guilty to a lesser crime to avoid the worse evils of a delayed criminal justice system and she pertinently points out that defending a guilty person is no different in principle from representing a "bad" person in a civil case. Above all, her reference to Clarance Darrow perhaps indicates the human and moral complexity of the issues involved, for each lawyer is really an amalgam (in different proportions, to be sure) of many qualities that bear upon whether and, if so, how one should set about defending the guilty. For an interesting religious viewpoint, see Thomas L Shaffer, "Serving the Guilty", (1980) Loy L Rev 71. Of course, actually defending a guilty person in practice poses further practical as well as moral problems. See, eg, *Code of Conduct for the Bar of England and Wales,* paragraph 149 read with Annex 13 and *The Guide to the Professional Conduct of Solicitors* (issued by the Law Society (UK), 1990), paragraph 14.14, where, *inter alia,* the barrister is not allowed to set up an affirmative case. In the 'heat of battle' in the courtroom, this may perhaps be easier said than done.

12 See especially ss 191 to 193 of the Penal Code, Cap 224, Statutes of the Republic of Singapore, 1985 (Rev Ed) read with the relevant provisions relating to abetment (which are contained in Chapter V of the Code itself).

13 See, generally, Part VII of the Legal Profession Act, Cap 161, Statutes of the Republic of Singapore, 1990 Ed, and, especially, s 80(2)(a) of the same.

appear that the lawyer is not only exempt from such a duty but is probably also under a positive ethical duty *not* to disclose such information, lest he breaches the ethical duty of *confidentiality*.[14] This probably explains the guidance offered to the lawyer as just mentioned, unless one argues that the exception to confidentiality applies insofar as a lawyer is not bound to keep the confidences of a client that are made to him in furtherance of a fraud of crime.[15] It is, however, submitted that this exception might not be applicable in the final analysis, at least insofar as the perjury itself is concerned, simply because, first, in a situation of *past* client perjury, the communication concerned is *not* made "in *furtherance* of" a fraud or crime as the perjury has, of necessity, *already* been perpetrated; and, secondly, in a situation of *future* client perjury, the communication in question is likewise *not* made "in *furtherance* of" a fraud or crime as the fraud or crime has *not,* as yet, *come into existence.* However, it could equally well be argued that there has, indeed, been a "furtherance" of perjury: in the situation of *past* perjury, the communication concerned, if not disclosed, would, in a sense, result in a "furtherance" of the

14 As to which see, generally, ss 128 to 131 of the Evidence Act, Cap 97 Statutes of the Republic of Singapore, 1990 Ed; and *Practice Directions and Rulings issued by the Law Society of Singapore* (1989), especially at pp 19 to 20. The *ethical* duties as such are contained in the latter, although there is very close similarity in the substance of both. See, also, Tan, above, n 7, at Chapter 7 which does not, however, deal with the ethical issues as such (see *ibid,* at p vii).

15 See, especially, the sixth exception mentioned in the *Practice Directions and Rulings issued by the Law Society of Singapore* (1989), at p 20; and proviso (a) to s 128(1) of the Evidence Act, Cap 97, 1990 Ed. It should be noted that the language in both these provisions is somewhat different; the former refers to fraud or crime whereas the latter refers to the furtherance of "any illegal purpose". There would, of course, be a large overlap between the two concepts utilized, although, if a choice had to be made, it would have, it is submitted, to be made in favour of the former which, as already mentioned, contains the *ethical* principles to be applied: see, above, n 14.

perjury already committed; in the situation of *future* perjury, the communication, if not disclosed, would aid the client in the perpetration of the perjury. It could also be argued that such a communication does not really come within the legitimate purview of the lawyer's employment in any event. However, even if it is concluded that a communication with regard to client perjury is not privileged, there remains the question we began with: is there a *positive ethical duty* on the *lawyer's* part to *volunteer disclosure*? It should be noted, in this regard, that the ethical duty contained within the *Practice Directions* issued by the Law Society of Singapore refers to the concept of "privilege", thus suggesting that whilst the lawyer is compellable with regard to the disclosure of the communication in question, he is not under a positive duty to volunteer such a communication. It is submitted that the situation is still rather unclear, and it would thus appear that the lawyer may be in a situation where he would be *justified* in standing by in silence in spite of the fact that his client has either already deceived or will deceive the Court – a thoroughly unsatisfactory position. The lawyer, to be sure, may choose to reveal the truth to the Court, risking, of course, the imposition of sanctions upon him for possible (even probable) breach of the duty of confidentiality.[16] He may, on the other hand, seek, in the situation of past client perjury, to steer a 'middle course' which has, in essence, been outlined by the 'English solution' mentioned above, ie, to discharge himself from the case concerned. He would, however, by declining to act any further for the client, actually be at least hinting to the Court that there is something amiss with his client's case, which is tantamount to 'whistle-blowing', and the client's fate would of course be 'sealed' were the Court to inquire any further, such inquiry being quite possible from a practical point of view. Even if the Court were to refrain from

16 See, above, n 14. See, also, the Australian decision of *Tuckiar v The King*, above, n 11, at p 341.

further questioning on the hypothesis that the lawyer could be requesting a discharge for any one of a number of *other* reasons, it is submitted that if the lawyer were to refrain from divulging the *actual reasons* themselves, the Court would probably be unfavourably disposed toward the client. It is therefore submitted that this is a really 'hard case' for the lawyer.[17]

This particular problem has probably generated, in the American context at least, arguably the most literature ever written on any single aspect of professional responsibility.[18] It is submitted,

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17 Though 'easy cases' are not thereby outside the purview of the instant article: see the text above. And *cf*, in the local context, the *Practice Directions and Rulings issued by the Law Society of Singapore* (1989), at pp 4 to 5 ("Obtaining Discharge from Proceedings" and "Discharging from Acting Further"), although it would appear that only the rather narrower situation of the lawyer discharging himself for non-payment of fees is covered.

18 The literature is enormous, and this article cannot even pretend to begin to be exhaustive. For a sampling of the literature, see Norman Lefstein, "The Criminal Defendant who Proposes Perjury: Rethinking The Defense Lawyer's Dilemma", (1978) 6 Hofstra L Rev 665; Monroe Freedman, "Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions", (1966) 64 Mich L Rev 1469; and, by the same author, *Lawyers' Ethics in an Adversary System* (1975) (the author has also written a more recent book, *Understanding Lawyers' Ethics* (1990) which was not available at the time of writing, but which has been described by one writer as "a thoughtfully expanded and updated version" of his earlier book: see Teresa Stanton Collett, "Understanding Freedman's Ethics", (1991) 33 Ariz L Rev 455); and, more recently (again by the same author), "Client Confidences and Client Perjury: Some Unanswered Questions", (1988) 136 U Pa L Rev 1939; Charles W Wolfram, "Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System", (1980) Am Bar Found Research J 964, at pp 979 to 980; and, by the same author, "Client Perjury", (1977) 50 S Cal L Rev 809; Robert P Lawry, "Lying, Confidentiality, and the Adversary System of Justice", (1977) Utah L Rev 653; William H Erickson, "The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client", (1981) 59 Denver LJ 75; Randall Sampson, "Client Perjury; Truth, Autonomy, and the Criminal Defense Lawyer", (1981) 9 Am J Crim L 387; Terence F MacCarthy & Kathy Morris Meija, "The

however, that as with the 'English solution' described above, the various 'compromises' suggested all mandate, *in effect,* either 'blowingthewhistle' on the client or keeping his confidences. The lawyer *cannot,* in other words, feel satisfied that he has secured equality and fairness for *all* concerned.

To illustrate, we return, once again, to the 'English solution' of withdrawal.[19] Even in its modified (American) form,[20] such a proposed solution has been criticized (as is evident from the critique above) as giving the lawyer an 'exit' which, however, amounts, in effect, to'whistle-blowing'and thus as an affirmation of the rights of 'others' in disregard of the client's.[21]

Other ingenious solutions have been suggested in the American context. Take, for example, the suggested utilization of the Advisory Council concept;[22] under this system, once trial is imminent

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Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and a Hard Place", (1984) 75 J Crim L & Criminol 1197; Brent R Appel, "The Limited Impact of *Nix v Whiteside* on Attorney-Client Relations", (1988) 136 U Pa L Rev 1913; and David Luban, *Lawyers and Justice: An Ethical Study* (1988), at pp 197 to 201.

19 See the discussion above. And, in the American context, see Model Code EC 2-32, DR 2-110; Model Rule 1.16 insofar as withdrawal is concerned; and with regard to perjury, see the Model Code (DR 7-102) and the Model Rules (Rule 3.3). Model Rule 3.3 (the latest provision) would, in fact, appear to mandate disclosure (although insofar as disclosure is concerned extreme caution is apparently required and only if "a firm factual basis" exists: see, eg, *US ex rel Wilcox v Johnson* 555 F 2d 115 (1977) and *US v Long* 857 F 2d 436 (1988); see, also, Andrew L Kaufman, *Problems in Professional Responsibility* (3rd Edn, 1989), at pp 191 to 194). And see, now, ABA Formal Opinion 87-353 (April 20, 1987).

20 See the ABA Standards for Criminal Justice, Chapter 4, The Defense Function, Standard 4-7.7 which was withdrawn and has not, apparently, been revived as yet. *Contra* Model Rule 3.3, Comment 11.

21 See, eg, Barry R Vickrey, "Tell It Only to the Judge: Disclosure of Client Confidences under the ABA Model Rules of Professional Conduct", (1984) 60 NDL Rev 261, at pp 270 to 271.

22 See Erickson, above, n 18. And see the ABA Standards for Criminal Justice, Chapter 4, The Defense Function, Standard 4-1.4.

or has commenced, the lawyer would still have to make a motion to withdraw.[23] It is submitted that the same problems would arise as enunciated above. Though defence counsel "cannot specify the reasons for his motion, but should request a brief recess to present the ethical dilemma to the Advisory Council",[24] both judge and jury[25] are unlikely to be oblivious to the less savoury implications.

An approach that was taken in the American decision, *People* v *Schultheis*,[26] is similar. In that case, it was held that where the lawyer was unable to dissuade his client from committing perjury, he should request permission to withdraw, stating only that "he has an irreconcilable conflict with his client",[27] which "may mean a conflict of interest, a conflict of personality, a conflict as to trial strategy, or a conflict regarding the presentation of false evidence";[28] if the motion to withdraw is denied, however, the lawyer must continue to serve as defence counsel. It is submitted that even the rubric of "irreconcilable conflict" will at least imply to both judge and jury that the client has a weak case. The same result obtains, it is submitted, with "a requirement that the attorney inform the court that the attorney knows of no factual basis for the testimony of the accused, or of such parts as the attorney knows to be perjurious".[29] The end result is, in the final analysis,

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23 See Erickson, above, n 18 at p 90.

24 *Ibid.*

25 Not in Singapore, though, which never had the jury for civil cases, whilst jury trial for criminal cases was abolished in 1970: see, generally (as to the latter), Andrew Phang Boon Leong, "Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution", (1983) 25 Mal LR 50.

26 638 P 2d 8 (1981).

27 *Ibid*, at p 14; but *cf Tuckiar* v *The King*, above, n 11.

28 See above, n 27, at p 14. *Cf*, also, MacCarthy & Meija, above, n 18, at pp 1219 to 1220.

29 Wolfram, "Client Perjury", above, n 18, at p 853, but only suggested in the criminal context; he advocates, as a basic solution, mandatory withdrawal.

the same, ie, that the lawyer is faced with a moral dilemma to which there is no easy answer.

II. THE ARGUMENT FROM UTILITARIANISM

I begin with what I consider to be the weakest of the various possible theories and (without wanting to appear to trivialize the argument therein) desire, nevertheless, to dispose of it forthwith. The general point to be made is that this argument, that is based on the doctrine of utilitarianism, is *far too general as well as vague and unrealistic* to form a firm basis upon which the lawyer may deal with the 'hard case' referred to in the preceding Part. There are many varieties of utilitarianism;[30] and there are even more ways in which the very theory itself has been criticized, regardless of the particular form taken.[31] It is my contention that it is immaterial, for the purposes of the present article at least, to review as well as comment upon these various issues posed by the theory itself. Whether, for example, utilitarianism takes the classical Benthamite form that advocates the application of the 'felicific calculus', or the more modern (and somewhat more trendy) 'dress' of law and economics, is not crucial. What *is* crucial is the fact that it is highly unlikely, even impossible, that a lawyer would either consciously or subconsciously rely upon any form of the utilitarian doctrine to work out his line of action

30 See, eg, J W Harris, *Legal Philosophies* (1980), Chapter 4; N E Simmonds, *Central Issues in Jurisprudence – Justice, Law and Rights* (1986), Chapter 1; and J J C Smart and Bernard Williams, *Utilitarianism – for and against* (1973). The various works on utilitarianism are far too numerous to enumerate here, although these three works do give an adequate overview. For good (albeit more varied and specialized) perspectives, reference may also be made to the following collections of essays: *Utilitarianism and Beyond* (Edited by Amartya Sen & Bernard Williams, 1982); *The Limits of Utilitarianism* (Edited by Harlan B Miller & William H Williams, 1982); and Frey, below, n 41.

31 See, generally, the works cited at n 30, above.

or approach in a 'hard case' simply because of the *very nature* of the doctrine itself. The doctrine requires the consideration of factors that are totally unconnected with a realistic solution to the case at hand. It is, for example, wholly unrealistic to expect the lawyer concerned to decide on his course of action based on whether or not the decision made maximizes the welfare of the community as a whole. In fact, this classical formulation of the utilitarian doctrine meets with one, it is submitted, fatal objection right at the threshold, *viz*, that it is *inherently unsuitable* to be utilized in the context at hand; or, to put it another way, the doctrine in its classical form is intended to deal, rather, with *broad political policies* and their implementation rather than with the much more specific issues confronting the individual lawyer in the 'hard case'. It is, of course, true that one may argue that a lawyer *may* in fact act in such a fashion. I am prepared to concede the *possibility* of such an eventuality, although it is, in my view, highly *improbable and unrealistic*. So, also, is, for example, the argument that utilizes the approach of the law and economics movement. It is, again, true that a lawyer *might* possibly base his course of action upon principles of economic efficiency, although it is submitted that this is also improbable, at least insofar as it forms either the sole or main basis for the lawyer's decision.

One further point needs to be considered: can it not be argued that *organized* bodies (such as the Law Society) *can*, in fact, utilize utilitarian criteria in the formulation of policies, which policies would then guide the actions of *individual* lawyers? This is not an unattractive argument although it is submitted that such an argument is, in the final analysis, unpersuasive. Various professional legal bodies do, indeed, promulgate codes of conduct for their respective members. However, as I point out in the Epilogue, such codes are mere starting-points. Such codes cannot obviously provide uniquely correct answers to every situation since they are necessarily framed at a relatively general level; this is, *a fortiori*, the situation for 'hard cases'. More importantly, perhaps, individual

lawyers will very likely differ in their respective responses to the guidance sought to be provided by such codes. I deal, in fact, with this particular point both in the next paragraph as well as in Parts IV, V, and the Epilogue.

It is also submitted that the very approach of utilitarianism is inapposite for one other very fundamental reason, *viz*, that what is involved in a 'hard case' insofar as the lawyer is concerned, is a situation that involves, or at least ought to involve, complex moral issues that cannot be solved by any one single conception of the good. This is, however, exactly what utilitarianism advocates – which is also why philosophers such as Rawls argue, instead, for a framework that will avoid such substantive moral questions,[32] and why others (such as Finnis) argue that utilitarianism is "senseless".[33] This is not, however, to argue that utilitarianism has no value whatsoever. It can, for example, be utilized to critique *other* theories, although attempts in such a direction need not necessarily meet with unmitigated success.[34] It should also be acknowledged that any theory propounding a *substantive* good would be equally vulnerable to the critique just made – a point that the reader should bear in mind and which, incidentally, is consistent with the thesis centring on the

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32 See, especially, Rawls's recent articles as follows: "Justice as Fairness: Political not Metaphysical", (1985) 14 Philosophy & Public Affairs 223; "The Idea of an Overlapping Consensus", (1987) 7 OJLS 1; "The Priority of Right and Ideas of the Good", (1988) 17 Philosophy & Public Affairs 251; and "The Domain of the Political and Overlapping Consensus", (1989) 64 NYUL Rev 233.

33 See John Finnis, *Natural Law and Natural Rights* (1980), especially at pp 112 to 113.

34 I refer, in particular, to Fried's thesis (including his response to the utilitarian critique), as to which, see, below, Part III. In fact, Fried's own response may be utilized *in addition* to the present critique of utilitarianism, although, as will be seen, I am not prepared to embrace it in an unreserved fashion. For a very brief description of, and comment upon, this response, see, below, nn 69 to 72, and the accompanying main text.

subjectivity or relativity of values briefly considered in Part IV below. I want, now, to consider a second broad class of theories that are traditionally perceived to be the very antithesis of utilitarianism; this is the category of theories that are premised upon *individual rights.* I want, in particular, to focus upon one specific theory, *viz,* that propounded by Charles Fried.

III. THE FRIED THESIS' – THE LAWYER AS THE CLIENT'S 'LEGAL FRIEND'

The next theory that I wish to consider in rather more detail is, as just mentioned, propounded by the jurist, Charles Fried, who is also well-known for his theoretical work on the law of contract.[35] The thesis concerned occurs in a fairly famous article,[36] the substance of which is reproduced as part of a separate Chapter which is, in turn, part of a larger work on moral philosophy.[37]

Fried's thesis may be simply stated. Utilizing, in part at least, the analogy of friendship,[38] he argues that so long as the lawyer concerned acts within the framework of a reasonably just legal system, "[i]t is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's

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35 See Charles Fried, *Contract as Promise* (1981).

36 Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation", (1976) 85 Yale LJ 1060.

37 See Chapter 7 of Fried's book *Right and Wrong* (1978), entitled "Rights and Rotes". This part of the article will focus on the specifically legal aspects only (for obvious reasons), and will thus utilize Fried's Yale Law Journal article: see, above, n 36.

38 See, eg, Fried, above, n 36, at p 1071, where he argues that the lawyer is "a limited-purpose friend. A lawyer is a friend in regard to the legal system. He is someone who enters into a personal relation with you – not an abstract relation as under the concept of justice. That means that like a friend he acts in your interests, not his own; or rather he adopts your interests as his own."

interests – that it is right that a professional put the interests of his client above some idea, however valid, of the collective interest".[39] The thesis is novel because, if nothing else, it turns

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39 See, *ibid*, at p 1066. Fried's thesis is consonant with, and is in fact a strong theoretical candidate justifying, the common law adversary system. A detailed survey and critique of the adversary system is, of course, outside the purview of the present article, though it ought to be noted that it has not been accepted unreservedly. See, eg, Sir Richard Eggleston, "What is Wrong with the Adversary System?", (1975) 49 Aust LJ 428. And the most outspoken critic of the functioning of the adversary system in recent years has been Judge Marvin E Frankel, who in his extrajudicial capacity, has continuously bemoaned what he has termed the "Adam Smith System of Adjudication" (he uses this term in "From Private Fights Toward Public Justice", (1976) 51 NYUL Rev 516) and has called repeatedly for a greater pursuit of truth: see, generally, "The Search for Truth: An Umpireal View", (1975) 123 U Pa L Rev 1031; "The Adversary Judge", (1976) 54 Texas L Rev 465 (which canvasses the problems from a purely adjudicative perspective where he asserts, *inter alia*, that the judge himself is inexorably drawn into the fray); *Partisan Justice* (1980), especially at pp 63 to 69, 73 to 86; "The Search for Truth Continued: More Disclosure, Less Privilege", (1982) 54 U Colo L Rev 51 (where he, amongst other suggestions, advocates a warning for the client, as to which see, also, in the context of client perjury, Norman Lefstein, above, n 18; his basic thesis is an argument for "a requirement of full disclosure of relevant evidence, whether literally demanded or not, in civil cases" (at p 65)). As to the argument that "truth" is too subjective or fluid a concept, Frankel, quite reasonably I think, observes in *Partisan Justice* at p 73 thus: "For our purposes, truth may be taken to embrace (1) accurate accounts by competent people of what they genuinely believe they recall from sensory experience – things seen, heard, smelled, etc, and (2) honest production of papers and objects relevant to legal controversies. You may be wrong when you "genuinely believe" you saw your neighbor's cat yesterday. But if you do believe it and you say so, you're telling the "truth" as defined here." See, also, "The Adversary Judge", above, at p 480, n 40.

Needless to say, Frankel's views have not gone unchallenged, especially by Monroe Freedman whose near-absolute adherence to the principle of confidentiality and client loyalty is probably the most extreme position in this category: see "Judge Frankel's Search for Truth", (1975) 123 U Pa L Rev 1060, and, for a flavour of his general perspective, "Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions", above, n 18; *Lawyer's Ethics in an Adversary System,* above, n 18; "Are the Model

the whole conventional perspective of the tension between client and 'others' on its head, so to speak. If we accept Fried's thesis, it would mean that the angst that lawyers may (at least sometimes)

Rules Unconstitutional?", (1981) 35 U Miami L Rev 685; "The Model Rules' Radical Assault on Tradition", (1982) 68 ABAJ 428; "Personal Responsibility in a Professional System", (1978) 27 Cath U L Rev 191; and "Ethical Ends and Ethical Means", (1991) 41 J Leg Ed 55. Freedman relies, in the main, on the value of human dignity and autonomy in general and constitutional rights in particular (especially the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to the effective assistance of counsel; on these constitutional issues, see, generally, Note, "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement", (1977) 91 Harv L Rev 464 and David E Seidelson, "The Attorney-Client Privilege and Client's Constitutional Rights", (1978) 6 Hofstra L Rev 693, the former of which is of a more jurisprudential turn and the latter of which delivers a powerful critique of *In re January 1976 Grand Jury*, 534 F 2d 719 (1976)). See, also, in similar vein, Charles P Curtis, "The Ethics of Advocacy", (1951) 4 Stan L Rev 3 (*contra* Henry S Drinker, "Some Remarks on Mr Curtis' "The Ethics of Advocacy"", (1952) 4 Stan L Rev 349).

Freedman's own extreme views, however, have been subject to much criticism. John Noonan, Jr, for example, quite perceptively observes in his book review entitled "Professional Ethics or Professional Responsibility?", (1977) 29 Stan L Rev 363, at pp 369 to 370: "The purposes of the law of criminal trials are both to determine guilt and to preserve the dignity of the accused. ... Dean Freedman writes as though only the purpose relating to dignity is important. ... There are only human beings with human morality. If they put aside their human morals they become monsters. Generals, politicians and, according to Curtis and Freedman, lawyers have often believed that their professions require them to do what they could not justify otherwise. Their roles do not dispense them from the requirements of humanity."

See, also, John T Noonan, Jr, "The Purposes of Advocacy and the Limits of Confidentiality", (1966) 64 Mich L Rev 1485; and, by the same author, "Other People's Morals: The Lawyer's Conscience", below, n 62. Reference may also be made to William H Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics", (1978) Wis L Rev 29.

Less extreme critiques of Frankel include Albert W Alschuler, "The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?", (1981) 52 U Colo L Rev 349 (where he argues, in the main, that the rights of a client should not be coldly balanced against

feel is wholly unnecessary since, at bottom, loyalty to the client ought to be the guiding principle. And (so it turns out) the 'hard case' is not so hard after all, for acting wholly and unflinchingly

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the utilitarian pursuit of truth); William T Pizzi, "Judge Frankel and the Adversary System", (1981) 52 U Colo L Rev 357 (who suggests, *inter alia,* not a change in the ethical rules but, rather, an adoption of better trial procedures, particularly those from civil law countries – in similar vein, see Albert W Alschuler, "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System", (1983) 50 U Chi L Rev 931, at p 969 onwards); Albert W Alschuler, "The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel", (1982) 54 U Colo L Rev 67. H Richard Uviller, "The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea", (1975) 123 U Pa L Rev 1067 and C Edward Cain, "The Attorney's Obligation of Confidentiality – Its Effect on the Ascertainment of Truth in an Adversary System of Justice", (1978-79) 3 Glendale L Rev 81 are even more 'courteous' critiques.

The answer, I think, lies, as always, somewhere between Frankel's and Freedman's extreme views; Frankel's views should, however, not be summarily dismissed, if only because he expressly articulates what lawyers, understandably, have appeared eager to avoid – that the adversary system *does* contain a number of defects which stem, in the main, from the fact that the practice and the ideal often diverge to a great extent; the 'clashing' of views often distorts the truth, but without confidentiality, no information would be forthcoming in the first place (as to this latter point which is often not recognized, see Alschuler, "The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?", above, at p 351 and J Michael Callan & Harris David, "Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System", (1976) 29 Rutgers L Rev 332, at p 395); but *cf* Ted Schneyer, "Moral Philosophy's Standard Misconception of Legal Ethics", (1984) Wis L Rev 1529 which brings an entirely different (and interesting) perspective to bear on the traditional perception centring on fierce and unflinching client loyalty (see, also, by the same author, "Some Sympathy for the Hired Gun", (1991) 41 J Leg Ed 11, which also contains some constructive proposals).

I would not, however, advocate an actual 'revolution', *viz,* an abandonment of the adversary system altogether. This would not only be too extreme, if not impractical, a step but would also be dangerous in view of the fact that the only really viable alternative, the European inquisitorial system, has been subject to quite contrasting viewpoints: see Abraham S Goldstein & Martin Marcus, "The Myth of Judicial Supervision in Three "Inquisitorial"

in the client's interest is not only the legal but also the *moral* thing to do.[40] What, then, *is* the good that the lawyer accomplishes when he acts unreservedly on behalf of his client? The answer

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Systems: France, Italy, and Germany", (1977) 87 Yale LJ 240, and, by the same authors, "Comment on Continental Criminal Procedure", (1978) 87 Yale LJ 1570; John H Langbein & Lloyd L Weinreb, "Continental Criminal Procedure: "Myth" and Reality", (1978) 87 Yale LJ 1549; and Geoffrey C Hazard, Jr, above, n 11, at Chapter 9. Further, experiments appear to endorse the adversary system as an effective means of combatting bias: see John Thibaut, Laurens Walker, & E Allan Lind, "Adversary Presentation and Bias in Legal Decisionmaking", (1972) 86 Harv L Rev 386 and, by the same authors, "A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking", (1976) 62 Va L Rev 271 – though one must bear in mind the late Robert J Kutak's perceptive observation that the adversary system "is an individualistic system ofjudicial process for an individualistic society": see his essay, "The Adversary System and the Practice of Law" in Luban, above, n 6, at Chapter 7, p 174. For a local (ie, Singaporean) perspective, see David Marshall, "Facets of the Accusatorial & Inquisitorial Systems", [1979] 1 MLJ xxix.

The latest theoretical work, whilst generally critical of the adversary system, supports, on balance, retention of the system. David Luban, eg, argues that the adversary system is only justified *pragmatically,* inasmuch as no existing rivals are demonstrably better or may even be worse, and that even if alternative systems were slightly better, the human costs would not justify replacement of the existent (adversary) system; he proceeds to argue that such a justification is too thin to sustain an argument justifying a lawyer's nonaccountability: see David Luban, "The Adversary System Excuse" in Luban, above, n 6, at Chapter 4. See, also, by the same author, *Lawyers and Justice: An Ethical Study,* above, n 18, at Chapters 4 and 5 (where the argument in the earlier work is expanded, albeit modified in parts), as well as his observation, *ibid,* at p 154 ("The problem is that pragmatic arguments do not really praise institutions; they merely give reasons for not burying them. Since their force is more inertial than moral, they create sufficient counterweights to resolve dilemmas in favor of role obligations. An excuse based on institutions justified pragmatically is simply a "good soldier" argument, with little more to be said."). See, also, a good comprehensive (albeit critical) overview by Raymond A Belliotti, "Our Adversary System: In Search of a Foundation", (1988) 1 Canadian Journal of Law and Jurisprudence 19. *Cf,* however, Stephen L Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities", (1986)

given is, again, fairly straightforward, and is premised, in large part, upon the client's ignorance of the basic knowledge as well as intricacies of the legal system in general and its rules and principles in particular. It is interesting to note that Fried has, in another article,[41] asserted that lawyers do, in fact, possess skills that are unique and indispensable; in his words:[42]

> So what is it that lawyers and judges know that philosophers and economists do not? The answer is simple: the law. They are the masters of "the artificial Reason of the law." There really is a distinct and special subject matter for our profession. And there is a distinct method ... It is the method of analogy and precedent. Analogy and precedent are the stuff of the law because they are the only form of reasoning left to the law when general philosophical structures and deductive reasoning give out, overwhelmed by the mass of particular details.

And, to quote him, yet again:[43]

> The law's rationality is a rationality apart. Is that a scandal? Why? We can teach it and students can learn it. We can recognize

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Am Bar Found Research J 613 (where the author also points, most significantly, it is submitted, to the problems of legitimacy engendered by American Realism; and see, with regard to this point, the Epilogue, below).

40 See, eg, Fried, above, n 36, at p 1066, where the author states thus: "I maintain that the traditional conception of the professional role expresses a *morally valid* conception of human conduct and human relationships, that one who acts according to that conception is to that extent *a good person.*" (emphasis mine).

41 See Charles Fried, "The Artificial Reason of the Law or: What Lawyers Know", (1981) 60 Texas L Rev 35. A later version of this essay also appears as "Rights and the Common Law" in Chapter 11 of *Utility and Rights* (Edited by R G Frey, 1984); all references, however, will be to the former version.

42 *Ibid*, at p 57.

43 *Ibid*, at p 58.

> better and worse examples of it. When we say of a judge or lawyer that he is learned in the law, we assume that there is a body of knowledge to be learned in, and that such learning increases wisdom, judgment, and justice.

The assertion embodied in the quotations just cited raises a yet further (and different) point that I shall not be dealing with in this article, *viz,* whether or not lawyers do in fact perform a unique and indispensable function in society at large. This is, in any event, the established view, although the point is, I think, at least debatable, especially in the light of recent (more radical) perspectives.[44] Assuming that Fried is indeed correct, we can, it is submitted, proceed to the next step of his argument, *viz*, that given the complexities of the legal system, the lawyer acts as the client's "legal friend" by guiding him through the 'legal maze':[45]

> The lawyer *acts morally because* he *helps to preserve and express the autonomy of his client vis-a-vis the legal system.*

This argument is, in substance, the antithesis of the one advanced in the previous Part; it has to do with the preservation and expression of *individual rights*, here, *legal* rights. There is much to be said for this argument. I am not, in other words, denying that the lawyer actually does good by utilizing his expertise to aid his otherwise helpless client.[46] What ought to be noted, however,

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44 See, eg, the views of the Critical Legal Studies Movement. For a good, recent overview, see Mark Kelman, *A Guide to Critical Legal Studies* (1987).

45 See Fried, above, n 36, at p 1074 (emphasis added).

46 Though *cf* David Luban, "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann", (1990) 90 Colum L Rev 1004, at p 1037 (emphasis in the original text): "*I see no intrinsic value to autonomy.* Rather, the importance of autonomy derives from other values with which it is intimately bound." It might, however, be argued that such a proposition might lead to infinite regress. Further, any attempt to bring such regress to a halt would, it is submitted, entail probably insurmountable problems of justification.

is that the client is not served in a vacuum. As Alan Goldman points out:[47]

> ... the domain of individual prerogative must be limited by that same domain as it is staked out for other individuals. ... The domain of individual autonomy is adequately protected precisely by the recognition of moral rights; but in order for it to remain intact for each individual, each must also accept at least negative rights of others as constraints upon his actions.

The real situation, therefore, is one of *balancing* the rights of the client against those of *other* individuals who may be affected by the lawyer's and/or client's decisions.[48] Indeed, to assert the client's rights in disregard of the rights of others may result simply in selfishness which, in my view, is *not* "moral" (even given the

47 See Alan H Goldman, *The Moral Foundations of Professional Ethics* (1980), at p 127. See, also, *ibid*, at p 154, and Collett, above, n 18, at p 464. Though *cf* Alan H Goldman, "Legal Reasoning as a Model for Moral Reasoning", (1989) 8 Law and Philosophy 131, which suggests that the author would not be overly averse toward a theory that tended toward positivism. It is admitted, however, that this conclusion cannot be unambiguously obtained from a reading of the piece itself and, clearly, more discussion as well as analysis are required in this regard.

48 Edward A Dauer and Arthur Allen Leff in "Correspondence: The Lawyer as Friend", (1977) 86 Yale LJ 573, at p 575, n 11, appear to characterize such balancing as "quasiutilitarian props" – a point which Fried, in a reply in (1977) 86 Yale LJ 584 (at p 586), rather vehemently disaffirms. I think that Dauer and Leff go too far on this point which is well-answered by Deryck Beyleveld and Roger Brownsword, "The Practical Difference between Natural-Law Theory and Legal Positivism", (1985) 5 OJLS 1, at p 7, n 14, where they argue thus: "The traditional categorization of ethical positions into deontological and teleological theories has supported some serious misunderstandings. One is that ethical theories either take account of consequences and nothing but consequences or else they take no account whatsoever of consequences. Another is that all consequential theories are utilitarian. ... We stand firmly on the deontological side of the traditional divide . .. but where basic rights or duties conflict we look to the consequences of giving effect to one set of rights (or duties) as against a conflicting set. This does *not* let utilitarianism in through the back-door..."

complexity of the meaning of the term, as will be seen below). It may, of course, be argued that Fried does draw a distinction between "wrongs that a reasonably just legal system permits to be worked by its rules and wrongs which the lawyer personally commits".[49] Fried draws this distinction when dealing with the possible objection centring around the charge that although a lawyer may not do anything that is strictly illegal, what he is asked (by his client) to effect involves what seems to him to involve immoral means; this dilemma is "[i]llustrated by the lawyer who is asked to press the unfair claim, to humiliate a witness, to participate in a distasteful or dishonorable scheme".[50] The reader will recall that this critique that Fried deals with illustrates exactly the problem that is sought to be dealt with in the present article, ie, how the lawyer is to deal with a 'hard case'.[51] Fried himself admits that this *is* a difficult problem that cannot be solved by the mere assertion of his thesis, because "[h]ere we have a specific victim as well as a specific beneficiary. The relation to the person whom we deceive or abuse is just as concrete and human, just as personal, as to the friend whom we help."[52] Having, however, recognized the problem of competing rights, as it were, Fried does not, in my view at least, really provide a viable solution as such to the problem at hand. I shall briefly state why this is so.

It ought to be observed that Fried's argument vindicating the commission of "institutional" wrongs may be criticized on at least four related counts.[53]

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49 Fried, above, n 36 at p 1084.

50 *Ibid*, at p 1082.

51 On what is a 'hard case', see, above, Part I.

52 Fried, above, n 36, at p 1082.

53 Though see Alan Donagan, "Justifying Legal Practice in the Adversary System" in Luban, above, n 6, at Chapter 5, pp 138 to 139, where he argues that Fried's argument is supportable only where such a wrong "[fails] to

First, it is rather artificial to distinguish between "institutional" wrongs on the one hand and "personal" ones on the other. One writer, for example, observes thus:[54]

> However, in the absence of some independent principle by which to distinguish between personal and institutional wrongs, Fried seriously begs the very question at issue. ... it does not follow that only the system may be blamed, or that the only possible action is to seek institutional reform. It is a mistake to insist that either the system is to blame or the individual is to blame. It is possible that moral criticism of both is appropriate. ... The lawyer is not the instrument of the institution; rather the institution is the instrument of the client and the client engages the lawyer to make use of the instrument.

Secondly – and this is, as already mentioned, a related point – Fried's argument appears[55] to ignore the very pertinent fact that the lawyer *himself* is a moral being and that, therefore, however convinced Fried may be of the fact that helping the client in effecting "institutional" wrongs is itself moral,[56] there will be not a few lawyers as well as writers who may beg to disagree.[57]

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redress or punish wrongs already done", but *not* where such a wrong would "[introduce] wrongs where there were none before". It is submitted, however, that whilst such a distinction may be persuasive from the standpoint of degree, it does not advance the argument from the quite different standpoint of general principle.

54 See Gerald J Postema, "Moral Responsibility in Professional Ethics", (1980) 55 NYUL Rev 63, at pp 87 to 89.

55 See, above, n 49, and the accompanying main text.

56 I cannot help but compare this approach with that adopted by Lon Fuller in his analysis of the morality of law – which, I submit, does not appear to be morality as we know it: see, generally, his 1963 Storrs Lectures on Jurisprudence delivered at Yale Law School, *The Morality of Law* (Revised Edn, 1969). See also, Postema, above, n 54, at p 86, where Fried is said to have confused moral rights with legal rights.

57 Despite Fried's reply to Dauer and Leff, above, n 48, the latter correspondence of which will figure in the discussion that follows; Fried basically reaffirms the position taken in his article, as to which see above n 36.

Even Fried himself ostensibly has his limits as the following (rather cryptic) passage from his article appears to suggest:[58]

> But if you are the last lawyer in town, is there a moral obligation to help the finance company foreclose on the widow's refrigerator? If the client pursues the foreclosure in order to establish a legal right of some significance, I do not flinch from the conclusion that the lawyer is bound to urge this right. So also if the finance company cannot foreclose because of an ideological boycott by the local bar. But if all the other lawyers happen to be on vacation and the case means no more to the finance company than the resale value of one more used refrigerator, common sense says the lawyer can say no. One should be able to distinguish between establishing a legal right and being a cog in a routine, repetitive business operation, part of which just happens to play itself out in court.

In point of fact, the actual process whereby the moral dilemmas concerned are worked out is a constantly shifting one, requiring the rough (or, perhaps more often, delicate) balancing of various relevant factors.[59]

Thirdly, Fried's vindication of the lawyer *vis-a-vis* "institutional" wrongs smacks (to put it crudely) of a 'pass the buck' approach. This, of course, links to the previous point, *viz,* the fact that the lawyer is himself a moral being; if this indeed be the case, it is at least arguable whether the average lawyer would feel *morally* justified by relying upon Fried's argument. The doubts are probably

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58 See Fried, above, n 36, at pp 1086 to 1087, although it is admitted that the situation here is an *extreme* one, to say the least; the lawyer concerned is "the *last* lawyer in town", and the issue is whether, as the passage quoted itself states, "a *moral obligation*" may be imposed upon him *regardless* of his own moral predilections. One gets the impression, however, that Fried is attempting to extricate himself from his own moral preferences via the skilful use of the term "legal right".

59 See Andrew Kaufman, Book Review of Goldman, *The Moral Foundations of Professional Ethics* (above, n 47) in (1981) 94 Harv L Rev 1504.

accentuated by the fact that not all lawyers perceive themselves as (again, to put it crudely) 'hired guns' – which is what Fried appears to suggest in, for example, the following passage:[60]

> ... the wrong is wholly institutional; it is a wrong which does not exist and has no meaning outside the legal framework. The only thing preventing the client from doing this for himself is his lack of knowledge of the law or his lack of authority *to operate the levers of the law in official proceedings.* It is to supply that lack of knowledge or of formal capacity that the lawyer is in general authorized to act; *and the levers he pulls are all legal levers.*

It may, of course, be argued that the concept of the lawyer as a 'hired gun' is only being advocated with regard to acts that can be done only by lawyers, and does not apply to pure legal advice as such. This, however, is, in my view, immaterial, simply because the area covered does in fact embrace much of a lawyer's daily work in any event.

Fourthly – and this is another important and related issue – an overindulgence in an attitude of "I'm doing it for my client" may itself have pernicious effects on the lawyer's own moral framework.[61] John Noonan, I think, puts the point both aptly

60 See Fried, above, n 36, at p 1085 (emphasis mine). There are, of course, other possible ways of describing the lawyer and his function – eg, the lawyer as hero, although perceptions may differ as to whether or not a particular lawyer should be characterized as such in a given situation. In other words, a lawyer who may appear as hero to one person may appear as a 'hired gun' to another. It is submitted that in the general scenario presently considered, the lawyer would probably be perceived as a 'hired gun', although (again) the problem of subjectivity of values precludes a conclusive answer. On the problem of the subjectivity of values generally, see, below, Part IV.

61 See, also, Thomas L Shaffer, "The Legal Ethics of the Two Kingdoms", (1983) 17 Val U L Rev 1, who addresses what he finds in the adversary ethic to be a distortion of the Lutheran conception of the two kingdoms ethic. He states (at pp 37 to 38): "We tend in institutions to suppress our best

and succinctly when describing what he terms "the *carapace effect*":[62]

> While I understand the attractiveness and even inescapability of the catch phrase, "I'm doing it for my client," I also see the phrase functioning as a kind of carapace. This phrase functions as a defense against various moral claims, a defense against empathy with someone else's feelings, a defense against responsibility. If a lawyer can utter this incantation and take it seriously enough, responsibility and the feelings accompanying it are shifted to the client.

My own view is that the legal profession in Singapore can ill afford yet another 'incentive' to encourage a march away from its ideals.[63] Restoring and maintaining a professional utility, honour and image require moral sensitivity and not cowardice, still less, cynicism.

And this brings me to a point that was by no means missed by one of the most devastating critiques of Fried's thesis, ie, the critique levelled by Dauer and Leff.[64] It is to the effect that

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discoveries about human nature. People in institutions tend to take all human insight, all principles, and turn them into ways of insuring the institution's survival. Our life in institutions seems to be a life in which the noblest work of God is always, finally, made subject to the noblest work of man. ... Institutions tend to turn the noblest work of God into a tangible commodity and then to invent noble reasons for having done so."

62 See John Noonan, Jr, "Other People's Morals: The Lawyer's Conscience", (1981) 48 Tenn L Rev 227, at p 230. See, also, Postema, above, n 54; Goldman, *The Moral Foundations of Professional Ethics,* above, n 47, at p 153; Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues", (1975) 5 Human Rights 1; Charles Frankel, "Book Review, The Code of Professional Responsibility", (1976) 43 U Chi L Rev 874.

63 See, eg, Chief Justice Wee Chong Jin, "The Legal Profession in Singapore – Past, Present and Future", [1980] 2 MLJ lviii, especially at pp lx, lxii (1980 Braddell Memorial Lecture); the address by the Prime Minister at the Annual Dinner of the Law Society, 1977, [1977] 1 MLJ lxvii, especially at p lxix; and Phang, above, n 3, at Chapter 3.

64 See Dauer and Leff, above, n 48.

service to the client is by no means limited to helping the client maintain his autonomy *vis-a-vis* the legal system. The motivation (even the dominant motivation) may be quite different, and may be summed up in the phrase "monetary payment". I am not proposing that lawyers work for little or no payment, but it is an undeniable fact that payment *does,* in the *normal* course of events, provide a not insignificant quantum of motivation for the lawyer. I must agree with Dauer and Leff that Fried's concept of "legal friendship" is substantially undermined by this fact; these two academics, in fact, put the point rather more strongly:[65]

> Thus the normal mode of the attorney-client relationship may better be described as follows: A lawyer is a person who, without expecting any reciprocal activity or inclination thereto, will attempt to forward or protect the interests of a client, within the rules of a legal system, so long as he is paid a sufficient amount to do so, and so long as doing so does not inflict any material unforeseen personal costs. That's "friendship"?

Even more strongly put is William Simon's oft-quoted remark that "Fried has described the classical notion, not of friendship, but of prostitution".[66]

The point is, as just mentioned, perhaps put a little too strongly. What is clear, however, is the fact that Fried's thesis, by de-emphasizing the issue of monetary payment,[67] undermines itself, not least because it neglects a very real fact of legal life. It has, however, to be mentioned, in possible defence of Fried on this point, that what Fried is, in fact, positing is a *normative* proposition, although the critic might well retort that what such a proposition is prescribing is wholly unrealistic and, consequently, unpersuasive.

65 *Ibid,* at p 579.

66 Simon, above, n 39, at p 108.

67 There is some reference though: see Fried, above, n 36, at pp 1074 and 1075.

What has the discussion in the present Part been all about? It has attempted to both state as well as evaluate Fried's thesis which attempts, in turn, to justify (in *moral* terms) the lawyer's role in terms of loyalty to his client. It has sought to demonstrate that this thesis is, in the final analysis, unpersuasive. Our problem, however, remains, for we have not yet ascertained a proper theoretical basis for both the description and justification of a lawyer's role in a 'hard case'. Nor does the unpersuasiveness of Fried's thesis imply that a lawyer's loyalty to the client is misconceived; what it *has* meant, however, is that *there is, as yet, no persuasive theory that supports such a stance*. It is therefore necessary to move along to other possibilities, but before proceeding, one final point might be mentioned for the sake of completeness. It might be recalled that, in dismissing the utilitarian justification *vis-a-vis* the lawyer's role, I did mention that utilitarianism could nevertheless be used to *critique* various *other* theories.[68] Fried's thesis provides one possibility for critique, and indeed the author himself argues against such a critique to the effect that a "good" lawyer would not focus upon his client if to do so would not conduce to the greatest good of the greatest number.[69] Fried argues that utilitarianism would thereby limit the lawyer's individuality and autonomy, without which he would be unable to even begin to be able to help others.[70] I do not wish to pronounce on the persuasiveness (or otherwise) of Fried's reply, since it has to do with a rather difficult, even intractable, dilemma, *viz*, the reconciliation of individual rights and utilitarianism – a task which has thus far defied any persuasive resolution[71] and which may, in any

68 See, generally, above, Part II.

69 This is, of course, but an extremely crude approximation of the utilitarian doctrine.

70 See, generally, Fried, above, n 36, especially at pp 1061 to 1064; and 1067 to 1071. And see also the critique of utilitarianism in Part II, above.

71 See, eg, Dworkin, *Taking Rights Seriously*, above, n 4, especially at Chapters 9 and 12; and, by the same author, *A Matter of Principle* (1985), at

event, be impossible to accomplish owing to the unique historical development of both these concepts.[72]

Before concluding our discussion of Fried's thesis, however, an important general point remains to be considered. It may be argued that Fried's thesis in general and his stress on "institutional" wrongs in particular imply a positivistic stance – an argument which Fried would, presumably, vehemently deny; after all, is not the aiding of the client in the preservation as well as expression of his individual rights not itself a moral enterprise, as Fried would argue? It is submitted, however, that the broad framework upon which Fried justifies a client's right to act in ways that are otherwise immoral (*viz*, the concept of an "institutional" wrong) is, in effect, the utilization of a positivistic mode of justification. Fried, in other words, assumes that "institutional" wrongs, being sanctioned by the institution (here a "reasonably just legal system"), need not be further justified, ie, the commission of such wrongs is justified because the legal rules of the system allow it, *regardless* of the moral content of such rules. It should be observed such an explanation does not, ironically, resolve the problem of justification. Fried could, conceivably, utilize the 'traditional' positivistic strategy and simply argue that the *legal* rules are justified by the system itself, much as Hart and Kelsen would rely on the rule of recognition and the grundnorm, respectively.[73] But, could it not be argued on behalf of Fried that he does not, in fact, eschew considerations of morality because

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Chapter 17. See, also, H L A Hart, "Between Utility and Rights", (1979) 79 Colum L Rev 828, especially at pp 836 to 846 (the same article may also be found in *The Idea of Freedom* (Edited by Alan Ryan, 1979), at pp 77 to 98 and as Essay 9 in H L A Hart, *Essays in Jurisprudence and Philosophy* (1983)).

72 See Alasdair MacIntyre, *After Virtue* (2nd Edn, 1984).

73 See, generally, H L A Hart, *The Concept of Law* (1961) and Hans Kelsen, *The Pure Theory of Law* (Trans. Knight, 1967). See, also, Simon, above, n 39, at pp 39 to 61.

such a legal system must, in the first instance, be a "reasonably just" one? It is conceded that this would meet the critique of positivism just mentioned, but would not, however, account for the problem of justification. How, in other words, would one be able to ascertain that the legal system concerned is a "reasonably just" one to begin with? Fried appears, with respect, to have no ready answer. If, however, he chooses to merely assert the "reasonably just" status of the legal system without more, he runs the risk of being criticized for adopting what is, in effect, an implicitly positivistic approach, for such a choice would entail, in substance, a justification of the allegedly "reasonably just" status of the legal system in question by reference to *itself* – an approach rife with circularity and question-begging. One might also note that by referring to a "reasonably just" legal system, Fried acknowledges, implicitly at least, the need for balancing the multifarious moral factors which, in turn, would tend to militate against any claim to *objective* morality. The issue of relativity is, of course, a large one that takes us far beyond the boundaries of lawyers' ethics, but (as we shall see) cannot be entirely ignored.[74] Finally, and as a related point, it should be noted that a theory of rights cannot, without more, surmount the extremely problematic call for justification. This does not obviously preclude the strategy of rational as well as pragmatic persuasion; but this would be an entirely different matter altogether, and would, indeed, be a strategy that would be potentially useful to utilitarians and rights theorists alike – indeed, to just about any jurist of any persuasion.

IV. MORALS, ALTERNATIVES, AND THE RELATIVITY OF VALUES

Is there, then, no theory that can guide the lawyer in the 'hard case'? Alan Goldman, a philosopher by training, embarks upon

74 See below, Part IV.

an alternative route in an attempt to fill this void. He argues against the "principle of full advocacy" (which mandates an 'all for the client' approach) and advocates, instead, the "principle of moral right". Aiding the client in immoral acts is anathema to Goldman who argues that a lawyer should be required "to aid his clients in achieving all and only that to which they have moral rights".[75] The problem with this approach, however, is that are no criteria for the ascertainment of whether or not a particular right is "moral". To put it more starkly, each lawyer and his client(s) would have their own views of what constitutes a "moral" right. There may be overlaps, to be sure, but the countless permutations which will be generated by this subjectivity of values or moral relativity[76] as it interacts with the shifting factual situations will, I submit, render any attempt at constructing coherent criteria to identify the various "moral" rights an exercise in imponderables – a result that even Goldman, in a rather cryptic aside, appears to admit.[77] This, however, is only a tentative view. I am not utterly

75 Goldman, *The Moral Foundations of Professional Ethics*, above, n 47, at p 138.

76 See, eg, Roberto Managabeira Unger, *Knowledge and Politics* (1975), at Chapter 2. Goldman, *The Moral Foundations ofProfessional Ethics*, above, n 47, tackles the problem of moral relativity (especially at pp 8 to 20), but, it is respectfully submitted, without too much success. It is interesting and perhaps significant to note that morality is often *assumed* as a premise for further discussion: see, eg, the following accounts by Murray L Schwartz, "The Professionalism and Accountability of Lawyers", (1978) 66 Calif L Rev 669, "The Zeal of the Civil Advocate", (1983) Am Bar Found Research J 543; and "The Zeal of the Civil Advocate" in Luban, above, n 8, at Chapter 6.

77 See Goldman, *The Moral Foundations ofProfessional Ethics*, above, n 47, at p 145, where he states: "This is not to say that lawyers will agree on the precise specification of moral rights. I suspect that there would be at least as much disagreement in this area as over questions of legal right. But it is precisely that diversity that renders lawyers' independent judgments and behavior based upon them a constructive input into the social system, rather than a collective univocal restraint upon clients, amounting to a de facto separate government."

convinced that the problem of the subjectivity (of values) is an insuperable one. Various jurists and philosophers have, in fact, attempted to posit frameworks which will not only achieve the necessary consensus on 'basics', as it were, but will also accommodate the liberal ideal of individualism.[78] The persuasiveness (or otherwise) of these various attempts is too large and abstract a topic to delve into in the present article, although a good and succinct summary of the philosophical premises involved may be found in an issue of the *New York Review of Books*.[79] For the present, at least, it would appear that these various theories of the right (as opposed to more variegated conceptions of the good) cannot, without further evaluation as just mentioned, provide any tangible answers to the specific problem that confronts us now. There is, in my view, at least one powerful reason for this. Whatever their individual merits, these various theories are, by their very natures as just mentioned, more concerned with procedural as opposed to substantive moral values or conceptions of the good.[80] This is the case because the dilemma confronting

78 See, eg, John Rawls, *A Theory of Justice* (1971), and, by the same author, the articles cited at n 32, above. And see (what is in my view at least) a similar methodology in Robert Nozick, *Anarchy, State, and Utopia*, Part III; Lon Fuller, *The Morality of Law*, above, n 56; and even H L A Hart's "minimum content of Natural Law" in his book *The Concept of Law*, above, n 73, especially at pp 186 *et seq*.

79 See T M Scanlon, "Down from Liberalism", *The New York Review of Books*, April 28, 1988, p 28. See, also, above, n 78.

80 One possibility that might result in the requisite consensus, although itself a conception of the good, might well lie in the *religious* context. There are, however, problems even in such a situation; there must, eg, apparently be only one religion, for a plurality of religions might merely transfer the existing problem into another (yet no less perplexing) context. Whether or not the 'glue' of religion can supply the necessary consensus in Singapore itself is perhaps doubtful in view of the pluralistic nature of Singaporean society itself. There are, however, other 'routes' toward a Singaporean consensus that cannot be explored within the more limited scope of the instant

the lawyer is a *substantively moral* one and thus involves differing conceptions of the *good* – which is precisely what these theories (positing procedural frameworks) attempt assiduously to avoid.

If we acknowledge the problems that the subjectivity of moral values generates, any attempt to construct a viable theory of guidance for the lawyer in a 'hard case' is, at the present time at least, doomed to failure. As we have just seen, for example, Goldman's "principle of moral right" is subject to this objection, and so, it is submitted, would any theory based on *moral* grounds. Could a theory, then, be posited on *other*, *non*-moral, premises? It would appear not simply because (and to reiterate a point made at several points in the present essay) the *lawyer himself* is *an individual moral being* and he will thus *inevitably*, either consciously or otherwise,[81] bring his own values to bear upon

essay; these include the construction of a national identity, with the attendant problem of the apparent conflict between Eastern values on the one hand and Western ones on the other. What seems clear, however, is that *secular* conceptions of the good (eg utilitarianism) have much more difficulty in gaining the requisite consensus, and are, in any event, probably that much more difficult to apply in the local context, unless some account is taken of local conditions that would more often than not, however, militate against the shared acceptance of the conception itself.

81 Extreme situations often bring such moral considerations to the forefront of the lawyer's consciousness: see, eg, the *Leo Frank* and *Beige* cases (Andrew L Kaufman, above, n 19, at pp 214 to 216, 221 to 226). In the latter case, the New York Supreme Court, Appellate Division, Fourth Department, was able to 'have its cake and eat it', as it were, by affirming the trial court's decision in favour of the attorney-client privilege but commenting adversely on the lawyer's moral conduct, without actually having to decide the ethical questions which it stated were not at issue in the case: *People v Belge*, 376 NYS 2d 771 (1975). On a further appeal, the New York Court of Appeals affirmed on a jurisdictional point: 390 NYS 2d 867 (1976). The opinion of the Committee on Professional Ethics of the New York State Bar Association was, it is submitted, equally ambiguous, though it was written before but only released after all court proceedings relating to the matter were concluded. See *Opinions: Committee on Professional Ethics: New York State Bar Association, Nos 477-515, December 1977 – December 1979* (issued June

his attempts to resolve various ethical problems. In this sense, therefore, I go, perhaps, a stage further than Postema who advocates the integration of role duties with the lawyer's sense of moral responsibility in what he terms a "recourse role conception".[82] It is my contention that quite apart from Postema's argument, the practice is in fact what he advocates. I am, however, assuming that the lawyer concerned is one who is of good faith – who, in other words, is concerned about the moral problems he discerns and who is willing solve them as best he can, applying his own moral values in the process. I concede that a lawyer may in fact act out of bad faith, in which case he will exploit fully the "carapace effect"[83] which Noonan refers to for his own ends. I am *not*, in other words, arguing that the lawyer's own moral values will *necessarily* be good, let alone desirable – one man's morality may well be another's immorality, which is exactly what the concept of subjectivity or relativity of values entails. But, even in this instance, it is the inevitable effect of the natural application of the lawyer's own (here, bad) values that produces undesirable results. In addition, I think that it is hardly likely that the adversary ethic centred around client loyalty[84] could, in itself, engender such undesirable results in any substantial fashion. It may admittedly encourage bad tendencies as Noonan and others point out, but it is by no means ever a factor independent of the lawyer's own moral values.

1980), Opinion No 479 (2/28/78). See, also, Monroe H Freedman, "Where the Bodies are Buried: The Adversary System and the Obligation of Confidentiality", (1974) 10 Crim Law Bull 979; and *Lawyers' Ethics in an Adversary System*, above, n 18, at Chapter 1.

82 Postema, above, n 54, at pp 81 to 83. See, also, by the same author, below, n 97.

83 See, above, n 62.

84 See, above, n 39.

V. CONCLUSION

Is there, then, no guidance that may be offered to the lawyer in a 'hard case', given, as I have argued, the weakness in existing theories and, more importantly perhaps, the problem centring on the relativity or subjectivity of values?

It might be possible to offer some relief by utilizing the relevant ethical codes as a sort of attempted rallying point, a springboard from which a separate body of professional, as distinct from purely moral, values might be promulgated. The very promulgation of an ethical code, it might be argued, implies the statement of what are perceived to be the values peculiar to the legal profession itself. The problem, however, is that it is entirely possible to argue that there is no real distinction between professional values on the one hand and moral values on the other,[85] and if this be the case, then we are faced, once again, with the problem of the subjectivity of moral values. The code would, in other words, suffer from the lack of an adequate consensus.

The fact, however, remains that the ethical code does represent some effort at *concretized guidance*, and can be constantly revised to meet changing circumstances over time.[86] Whatever its perceived defects, however, it does provide some tangible form of guidance for the lawyer concerned. On the one hand, the stickler to rules will adhere as closely as possible to the ethical rules, whilst at the other extreme, the rebel will flout every rule at every opportunity. The majority will of course fall somewhere in-between. Given the fact, however, that each lawyer will inevitably bring his own moral values to bear upon the various problems as I have argued above, the presence of ethical rules

85 A less extreme argument would be that there is at least some overlap to be found. And see, below, the Epilogue.

86 Although except in the clearest cases, the argument centring around the lack of adequate consensus might well negate (to even a large extent) the utility of such revisions.

at least constitutes not only some (if imperfect) guidance but also lets the lawyer concerned know what stakes are involved – especially if he is contemplating breaking the rules. To this end, therefore, a clear delineation of the rules themselves is imperative in order that even this imperfect guidance be not transformed into an even more horrendous beast, *viz*, a source of confusion which would exacerbate the existing turmoil and confusion. This, of course, assumes that there is some point to the clear delineation of rules.[87] And I admit that the 'rule-breaker' may not always be wrong;[88] on the contrary, he may in fact provide the necessary impetus toward an ultimately more enlightened result.

Even if, however, we accept the role that ethical codes have to play, the fact remains that their role *is* still a relatively *limited* one. To state that there is therefore no easy or 'one right' answer[89] may appear to, and indeed does, state the obvious – particularly in the light of the discussion in the present article. It is my view, however, that there *is* a point to the entire exercise. As mentioned right at the outset of the instant piece, the *first step* is for one (here, the lawyer) to be *conscious* that there *are* in fact problematic issues that *cannot help but arise* from an *inevitable interaction* between one's moral framework and the moral issues arising from the situation at hand.[90] And it is wrong for one to avoid such

87 Critical legal scholars, eg, might beg to differ: see, eg, Allan C Hutchinson & Patrick J Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought", (1984) 36 Stan L Rev 199; Roberto Managabeira Unger, "The Critical Legal Studies Movement", (1983) 96 Harv L Rev 561 (reproduced as a monograph by Harvard University Press in 1986); and Mark Kelman, above, n 44. And see, below, the Epilogue.

88 I use the word ("wrong"), however, in a guarded fashion, having regard to the problem pertaining to the subjectivity or relativity of values.

89 But *cf* the work of Ronald Dworkin: see, generally, his books: *Taking Rights Seriously*, above, n 4; *A Matter of Principle*, above, n 71; and *Law's Empire*, above, n 4, in the context of the adjudicative process.

90 See, also, Geoffrey C Hazard, Jr, "Ethical Opportunity in the Practice of Law", (1990) 27 San Diego L Rev 127.

issues, though one might conceivably do so as a result of (for example) the need for peace of mind (or even sanity). However, a blatant indifference or (worse) deliberate choice to ignore such moral issues not only divorces the practice of law from its wider societal context, significance and value but also leads to a broader and perhaps more serious result, reminiscent of Noonan's "carapace effect" described above;[91] in other words, a lawyer who adopts such a course of action would be gradually desensitized and, in the most extreme cases, even become dehumanized. Thus, although there may be no real viable theory, consequently resulting in constant *ad hoc* balancing of moral principles and values, it is submitted that the *best possible* result in the situation at hand can be achieved by *sensitizing* oneself to the moral issues involved, and, perhaps, even *evaluating* them.[92] The lawyer who takes the trouble to read the present piece might say, "But, of course. That's what's being done all the time." I do not dispute that, although I do have some doubts as to whether a substantial number of lawyers have actually *consciously* been aware that they were *in fact* considering such issues as they were making their respective decisions. It is, further, all too easy to fall back upon the "I'm doing it for my client" banner. Perhaps one day even that slogan will not avail the lawyer simply because he is himself a moral being and therefore has his own individual limits. But perhaps one day, too, there will be a viable theory which he may usefully consider.

EPILOGUE

Having stressed the importance of the *individual* lawyer's morality, I would like to deal in a little more detail with a topic that has

91 See, above, n 62.

92 See, also, Bernard Williams, "Professional Morality and Its Dispositions" in Luban, above, n 6, at Chapter 11, especially at pp 266 to 267.

generated a not insignificant amount of controversy and which has only been briefly alluded to thus far – whether or not there is a distinction between role (here, lawyer's) morality on the one hand and general (or common or universalistic) morality on the other. Not a few writers have argued that there should be no distinction, ie, that there is (and ought to be) no difference between role and universalistic or common morality.[93] Others, on the other hand, have maintained that there is a distinct niche occupied by a role morality.[94] Insofar as this latter point is concerned, an important (yet somewhat subtle) distinction should be noted: it might be argued that a focus on a *role* morality smacks of positivism; however, whilst attractive at first blush and, indeed, persuasive from a superficial perspective, it is submitted that this need not necessarily be the case, for there can, conceivably, be a role or institutional *morality* that is separate and distinct from the institutional *rules* that constitute the positive mainstay

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93 See, eg, Wasserstrom, above, at nn 8 and 62 (the former reference, however, being more of an issue-raising nature); and Luban, above, n 18, at Chapters 6 and 7.

94 See, eg, Susan Wolf, "Ethics, Legal Ethics, and the Ethics of Law" in Luban, above, n 6, at Chapter 2; Virginia Held, "The Division of Moral Labor and the Role of the Lawyer" in *ibid*, at Chapter 3 (who puts forward a very powerful argument that basically rests on the premise that the respective role moralities are distinct from so-called "ordinary" morality, the former *stemming*, as it were, from the latter as a *result* of the *different contexts* concerned, which argument results, quite logically, in a distinction between the two moralities but eschewing any conclusion that there is a *conflict* between the same); and Williams, above, n 92 (where an (arguably) even more interesting argument is made to the effect that a role or professional morality that is separate and distinct from a community morality would not be one at all since professionals belong to that community and their morality must be acceptable when measured against community standards of morality; however, he does locate conflict insofar as the *justifying standards* for professional morality, which are *part* of the *general or community* morality, may not be identical with what the author terms "the professional dispositions").

of the system itself. This is not, of course, to state that there remain no problems, Indeed, it might well be argued that problems of relativity militate against the justification of such a morality in the first instance, which justification cannot (as we have already seen with regard to Fried's concept of "institutional" wrongs) be justified by mere reference back to the rules of the institution, much less the institution itself. Leaving aside, however, this potential problem of relativity for the moment at least, it is submitted that Williams's integration[95] of both role and common morality is most persuasive, for it appears to best describe what goes on in everyday legal life – with reference, in particular, to the perceptions of both lawyer and layperson alike. It is true that many lawyers as well as laypersons perceive there to be a role morality, and this is wholly consistent with the perception of the law as a separate and distinct discipline;[96] indeed, it may be said that many laypersons actually perceive such role morality to be amoral, thus giving rise to the popular skepticism regarding lawyers. Williams is, it is submitted, correct in pointing to *common* morality as a *background standard* against which the lawyer's *role* morality is *assessed*, and it is precisely this that engenders the skepticism just mentioned. It would therefore appear that neither of the protagonists is entirely correct: whilst it is true that there is a distinction in practice between role morality and common morality, it is also true that both *interact* in a fashion that cannot ascribe primacy to either. Indeed, it is precisely this interaction that generates the tensions inherent in individual lawyers who do reflect upon ethical issues. The real danger, it is submitted, is in relying merely upon the concept of role morality in order to conveniently evade the ethical issues concerned.

Turning to a slightly different but not unrelated point, I now realize that the reference to the ethical code in the 'Conclusion'

95 See, above, n 94.

96 On the implications *vis-a-vis* positivism, see the discussion above.

generates problems of its own. On a strictly pragmatic level, I do not resile from the proposition that the ethical code provides at least some form of concrete guidance for the lawyer. I now recognize, however, that adherence to the ethical code without more connotes a positivism which does not conduce to the moral flexibility and reflection so imperative to – and indeed inevitable in – lawyers and law student alike. It needs, I think, to be made clearer that the ethical code is the beginning and not the end of the ethical odyssey. It is, indeed, a starting-point that the lawyer can choose to ignore, provided he is prepared for any adverse consequences that might ensue. However, I should also stress that just as I do not consider positivism to be a theory writ in normative stone, this view applies to all other theories as well. This is not, however, a call to ethical chaos and disorder but, rather, a warning against too pat a reductionist reliance on any one theory. The lawyer's own moral beliefs will have to be balanced against as well as applied to the situation at hand – and this is what I believe happens in practice. Such a reliance on balancing is, admittedly, a theory of sorts, although it does not suffer from the rigidity that afflicts other theories. Indeed, the proposition centring on balancing is not unique and constitutes, it is submitted, the foundational substance of a number of other views and suggestions by leading writers in the field.[97] I would only indicate

97 See, eg, Gerald J Postema, "Self-Image, Integrity, and Professional Responsibility" in Luban, above, n 6, at Chapter 13 (advocating what he terms the "integration strategy"); and, by the same author, above, n 54; William H Simon, "Ethical Discretion in Lawyering", (1988) 101 Harv L Rev 1083 (elaborating on Simon, above, n 39, at pp 130 to 144; see, also, by the same author, "The Trouble With Legal Ethics", (1991) 41 J Leg Ed 65); Andrew L Kaufman, "A Commentary on Pepper's "The Lawyer's Amoral Ethical Role"", (1986) Am Bar Found Research J 651 at p 655; and, by the same author, above, n 59 (though *cf* Stephen L Pepper, "A Rejoinder to Professors Kaufman and Luban", (1986) Am Bar Found Research J 657, especially at p 658); and Luban, above, n 18, especially at pp 125 to 147 (and *cf* Stephen Ellmann, "Lawyering for Justice in a Flawed Democracy", (1990) 90 Colum L Rev 116 with Luban, above, n 46).

that these suggestions are far more fluid and ambiguous than the respective authors would have us believe. What, then, of Pepper's point to the effect that not adopting any particular theoretical framework would lead to a "mush" and that a model has to be adopted as a starting-point for further reflection?[98] I think that there is, in substance, no difference between Pepper's view and mine. I believe that any lawyer or student who is personally committed toward an ethical sensitivity would necessarily have, at least implicitly, a model of sorts, which might then need to be revised in the light of subsequent reflection. The real danger – at the expense of repetition – is not to be ethically sensitive at all, in which case the presence or absence of a model is all but irrelevant. However, the fact is that each individual's preferred model would probably be different, any overlaps being purely fortuitous. What may, however, contribute to ethical *in*sensitivity is skepticism with the law as a whole, and this is where American Realism and (nowadays) Critical Legal Studies[99] have been now perceived as fostering an unnecessary skepticism that undermines ethical belief in the law and which would, *a fortiori*, wholly disable any form of ethical thinking about the law. There have, indeed, been vigorous attempts to counteract the perceived deleterious effects of American Realism.[100] Although it is submitted that much more theoretical as well as empirical work remains to be done, I would just venture some very rough and ready preliminary observations and thoughts. First, whilst American Realism did indeed fail to

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98 See Pepper, above, n 97, at p 658, responding to Kaufman, above, n 97.

99 For an analogous controversy with regard to radical law teachers, see Phang, above, n 2, at pp 373 to 381, and the literature cited therein. Put very simply, both American Realism and Critical Legal Studies argue against the objective nature of the law as well as its application, thus encouraging, *inter alia*, skepticism toward the law and a possible consequent undermining of the perceived legitimacy of the same.

100 See, eg, Luban, above, n 18, at pp 18 to 30.

propound a positive normative theory, the constructive thrust of Critical Legal Studies[101] is still in the process of formulating a theory devoid (either paradoxically or contradictorily, depending on one's view) of constraints. I do not personally believe that such a project can in fact succeed, simply because it is impossible to formulate a theory nuanced enough to surmount, *inter alia*, problems of justification. However, I do believe the *spirit* behind such a project, indeed behind most theories, to be admirable and to provide – in the interim period at least – the courage and commitment required. Put simply (albeit a little crudely), what is generated is hope – more specifically and importantly, the willingness to soldier on, despite the bleak prospects of ever obtaining a perfect theory and hence solution. It is this spirit of engagement that should lead all lawyers and students to reflect on the law and legal system, regardless of their individual beliefs, and to determine to balance, as best they can, the various factors in an effort to effect the best outcome they can at any given point in time. As already alluded to at the outset of the present article, I still hope, in the not too distant future, to put forward a theory of my own. I do not, however, believe that I can surmount the problem of justification (and this is where my pessimism lies), but it will – if and when it materializes – hopefully be perceived by some at least as a (or at least as a candidate for consideration as a) plausible starting-point for personal reflection.

101 To be found principally in the work of Roberto Mangabeira Linger: see "The Critical Legal Studies Movement", above, n 87; *Passion – An Essay on Personality* (1984); and his massive three-volume work, *Politics, a Work in Constructive Social Theory* (1987).