AN ETHICALLY RISKY PROFESSION?

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ABSTRACT

Traditional accounts of legal ethics put lawyers in a difficult position. They require lawyers to take on surprisingly high risks of wrongdoing when they navigate the narrow passage between differing demands of legal ethics. And this occurs even if we accept the standard conception of legal ethics on its own terms while disregarding possible clashes with external norms. According to the standard conception of lawyers' ethical responsibilities, lawyers should "zealously" advocate for their clients—further their clients' interests right up to the limits of the law. Under this view, a lawyer might violate ethical obligations to their client if they decline to take effective, legally permissible steps out of moral squeamishness or because they're inclined to be generous with adversaries. But these same traditional views take lawyers to be ethically obligated to not violate the law. On the standard conception, lawyers must approach that line for their clients, but not cross it. And both a lawyer's duties to the client and their duties to obey the law are treated as moral obligations. According to standard accounts of professional ethics, when a lawyer falls short of these duties, it is a moral failing.

Navigating these two requirements—finding the line but not crossing it—seems to require a very high level of clarity about both the law and the legally relevant facts. And that clarity may be difficult to achieve in ordinary legal practice. Real life involves uncertainty about the law and legally relevant facts, often with too little time to resolve it. But the structure of lawyers' obligations means that when they face uncertainty, they may not be able to use one approach that's common in day-to-day life: avoid a questionable activity just in case it's morally wrong and opt for an alternative that's clearly morally permissible. For a lawyer, there may not be an alternative that is clearly morally permissible. Instead, this avoidance strategy would often mean a lawyer either errs in the direction of violating

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an obligation to a client or errs in the direction of violating obligations to the law. If standard accounts of lawyers' ethical obligations are correct, then we are asking lawyers to assume an unusually high risk of moral wrongdoing. And it may be unfair to lawyers to expect them to take this on. In other areas, our legal system provides standards for what it takes to move from one way of handling an ambiguous circumstance to another—"proof beyond a reasonable doubt" or a "preponderance of the evidence," for example. These are messy and imperfect. But lawyers are left with even less guidance—the equivalent of telling a jury to "be sure to get it right" and saying very little about what to do when it's unclear what "right" involves.

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INTRODUCTION

According to the standard conception of lawyers' ethical responsibilities, lawyers should "zealously" advocate for their clients—further their clients' interests right up to the limits of the law.[1] Under this view, a lawyer might violate their ethical obligations to the client if they decline to take effective, legally permissible steps out of moral squeamishness or because they are inclined to be generous with adversaries. But these same traditional views take lawyers to be ethically obligated not to violate the law. On the standard conception, lawyers must approach that line for their clients, but not cross it. And both a lawyer's duties to the client and their duties to obey the law are treated as moral obligations. When a lawyer fails to fulfill these duties, the lapse is not only seen as a violation of a law or a professional code but as a moral or ethical failing (I will use the terms interchangeably).

Navigating these two requirements seems to require a very high level of clarity about both the law and the legally relevant facts—clarity that may be difficult to achieve in ordinary legal practice. Real life involves uncertainty about the law and legally relevant facts, often with too little time to resolve it. And the structure of lawyers' obligations means that when they face uncertainty, they can't use one approach that's common in day-to-day life: avoid a questionable activity *just in case* it's morally wrong and opt for an alternative that's clearly morally permissible. For a lawyer, there may not be an alternative that is clearly morally permissible. Instead, this avoidance strategy would often mean a lawyer either errs in the direction of violating an obligation to a client or errs in the direction of violating obligations to the law.

If standard accounts of lawyers' obligations are correct, then we are asking lawyers to take on an unusually high risk of moral wrongdoing.[2] In many instances, they take on moral obligations that can only be satisfied if they are unrealistically reliable in their assessments of laws and facts. And, when faced with deciding under those conditions, lawyers may not be able to use common risk mitigation strategies because they don't have a "morally

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1. *See e.g.,* MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 53, 114 (4th ed. 2010); Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 11 AM. BAR FOUND. RSCH. J. 614 (1986); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976).

2. It is worth distinguishing this from the concept of "moral hazard" that often arises in discussions of principal-agent relationships. "Moral hazard" refers to the possibility that agents will not be motivated to act as their principals would want and instead behave in ways that further their own interests or priorities. These problems of poorly incentivized agents, though the focus of discussions of moral hazard, are largely orthogonal to the risks I'm concerned with here—the risk that agents will be acting wrongly because they have prioritized their client over the law (or vice versa) where the opposite was required.

safe" direction to err in upon recognizing their uncertainty. This is a problem that arises if we accept the standard conception of legal ethics on its own terms—not a problem resulting from a clash with external norms.

What's puzzling is how little guidance we give lawyers for navigating this predicament. In other areas, our legal system provides standards for what it takes to move from one way of handling an ambiguous circumstance to another—"proof beyond a reasonable doubt" or a "preponderance of the evidence," for example. These are messy and imperfect. But lawyers are left with even less guidance—the equivalent of telling a jury to "be sure to get it right" and saying very little about what to do when it's unclear what "right" involves.

It is significant that our legal system puts lawyers in this position. Routinely taking on a greater risk of moral wrongdoing will typically result in more wrongdoing, all else being equal. And, in the absence of better guidance, some lawyers seem to suppose that zealous advocacy up to the limits of the law can include any behavior that they might conceivably argue to be within the limits of the law.[3] (For simplicity, I will use "law" to talk about both laws and the court rules that take on a similar status in the standard conception.) But it's not clear that the justifications usually given for the adversary system or zealous advocacy can support this extension of the limits.

Finally, even if we assume that the standard picture of legal ethics is correct, and set aside worries about violating other moral obligations, this need for precision can make it very difficult for lawyers to avoid risks of moral wrongdoing, at least in some practice areas. Their efforts to avoid violating some ethical standards may simply generate higher risks of violating other ethical standards. And navigating this dynamic may place an unreasonable burden on lawyers. Much is made of whether norms of zealous advocacy let complicit lawyers off the hook—and this is worthy of concern. But we also need to ask if the same norms are asking too much of lawyers, particularly in a profession with worrying levels of stress and burnout. At a minimum, we must rethink the guidance we provide to lawyers. We can't assume precision is possible and need to give better advice about navigating uncertainty. But these difficulties may also give us new reasons to worry about the standard conceptions of lawyers' ethical responsibilities as a whole.

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3. For discussion of this phenomenon, see David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 GEO. J. LEGAL ETHICS 275 (2020).

I. LAWYERS' PREDICAMENT

Widely held views of lawyering ethics take lawyers to have an obligation of professional ethics to advocate for their clients right up to the limits of the law (or, perhaps, the limits of the law, as modified by a small number of additional moral restrictions at the extremes).[4] And the American Bar Association's Model Rules of Professional Conduct ("Model Rules"), adopted as court rules in most U.S. jurisdictions, reflect a similar understanding of lawyers' ethical responsibilities, though the zealousness it describes is slightly less extreme in some respects.[5] Legal ethics scholars often raise doubts or suggest revisions of the standard conception of lawyers' ethical responsibilities.[6] But, although concerns may be raised in academic circles, ideals of zealous advocacy have maintained a firm hold on the profession, including its ethical training and ethical discourse. Bradley Wendel, before advocating for a somewhat revised version of the standard conception, draws on scholarship and practice to characterize one of the standard conception's core commitments: "[t]he lawyer's job is to zealously protect the client's interest, using means that are not unlawful."[7] "Ask any gathering of lawyers about the ethics of their profession," he remarks, "and you will hear all about the obligation of 'zealous advocacy'. . . .[s]ometimes lawyers will actually complete the little maxim, '. . . within the bounds of the law'. . . ."[8] Along these lines, Monroe Freedman and Abbe Smith argue that "once the lawyer has chosen to accept responsibility to represent a client . . . the zealousness of that representation *cannot be tempered by the lawyer's moral judgments of the client or of the client's cause* [emphasis added]."[9]

Under this standard conception, being an agent for a clients' interests means that—beyond the limits that the law imposes—lawyers shouldn't interpose their own moral judgments of a clients' goals (or of the most effective means of achieving them). And in a similar vein, Stephen L. Pepper makes the case that

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4. *See e.g.,* FREEDMAN & SMITH, *supra* note 1, at 53, 114; Pepper, *supra* note 1; Fried, *supra* note 1.

5. For discussion of zealous advocacy (and its limits), see MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (Am. Bar Ass'n 2020).

6. *See, e.g.,* David Luban, *The Adversary System Excuse*, in LEGAL ETHICS AND HUMAN DIGNITY, at 38-77 (2007); Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

7. W. Bradley Wendel, LAWYERS AND FIDELITY TO LAW, at 8 (2010).

8. *Id*.

9. MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 53 (citing Sylvia Law, *Afterward: The Purpose of Professional Education*, in LOOKING AT LAW SCHOOL, at 213-214 (Stephen Gillers ed. 1977)).

> [i]f law is a public good, access to which increases autonomy, then equality of access is important. For access to the law to be filtered unequally through the disparate moral views of each individual's lawyer does not appear to be justifiable. Even given the current and perhaps permanent fact of unequal access to the law, it does not make sense to compound that inequality with another. If access to a lawyer is achieved . . . should the extent of that access depend upon individual lawyer conscience? The values of autonomy and equality suggest that it should not; the client's conscience should be superior to the lawyer's.[10]

My focus won't be the specifics of these author's positions. Instead, I'll be offering a more general analysis of the core commitments of the standard conception of legal ethics that are suggested in the passages above (to varying degrees) and in the Model Rules. I'll be examining, that is, the claim that a lawyer ought to zealously advocate for clients' interests up to the limits of the law.

A variety of reasons, including Pepper's, are given in support of the standard conception: that the adversary system best protects individual rights and human dignity;[11] that being a lawyer involves adopting a particular role morality or becoming a special-purpose friend;[12] that the rule of law is very valuable, and zealous advocacy plays an important role in maintaining it;[13] that if reasonable people in a pluralistic society can disagree about morality and the public good, then we shouldn't allow lawyers to unilaterally opt not to zealously advocate for some client goals;[14] and others. Crucially, these are arguments that claim that lawyers have moral or ethical—not only legal—obligations to behave in this way.[15]

There are a number of important, fundamental doubts that might be had about these accounts of lawyering ethics, and many have been raised well elsewhere.[16] I'm sympathetic to some of these concerns, but here, I want to explore a problem that arises if we *do* accept the American adversary system and the standard conception of lawyering ethics. The standard conception seems to call for lawyers to have an unusually high level of moral precision

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10. Pepper, *supra* note 1, at 618.
11. FREEDMAN & SMITH, *supra* note 1, at 18-21.
12. Fried, *supra* note 1.
13. ALICE WOOLLEY, UNDERSTANDING LAWYERS' ETHICS IN CANADA, 33-35 (2d. ed., 2016).
14. Katherine Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. OF LEGAL ETHICS 121 (2010).
15. *See e.g.,* FREEDMAN & SMITH, *supra* note 1, at 49-50.
16. *Supra* note 6.

and, as a result, to take on an unusually high risk of wrongdoing. And falling short of this precision may not just mean a mild or trivial departure from moral requirements. As I discuss in Section II, when lawyers must choose between two radically different courses of action, failing to locate the line may mean that they take a dramatically different path from the one that is required—revealing a client's secrets when they shouldn't, for example.

So, acting ethically seems to require a lot of precision from lawyers. Yet, lawyers can't count on landing precisely at the limits of the law. The requirements of the law are often notoriously murky, and even if lawyers could clarify points of vagueness with greater examination, legal practice rarely allows the luxury of time for an exhaustive investigation. In fact, devoting large amounts of time to ensuring that one has a perfectly accurate picture of the legal limits of permitted advocacy could ultimately be costly to clients (either directly, if they are billed for the time, or indirectly, if it slows their legal proceedings). And these costs can themselves violate lawyers' duties to their clients (though whether they ultimately do so will depend upon the particulars of a given situation).[17]

Likewise, even if we suppose that the state of the applicable law is always clear, relevant facts—facts that help determine whether the law permits an action—may still be murky. For example, the Model Rules require (controversially) that a lawyer who comes to know that she has presented false information must disclose this to the court.[18] But whether a particular discovery amounts to "coming to know" this may be difficult to discern, even if we suppose the requirement, itself, is clear. (For example, newly discovered documents may disprove earlier claims when interpreted in the most natural way, but not on all readings.)

Some measure of uncertainty will arise anytime people have to determine if a course of action satisfies an ethical standard, in both law and ordinary life. This is true whether the standard is e.g., a directive to maximize utility or the criteria provided by laws and court rules. But in ordinary life, high precision isn't required. Outside of legal practice, there are techniques that people can use to reduce their risk of violating a standard that don't require landing on it precisely. They might hedge their bets by choosing actions that seem to clearly comply with the standard and avoid those cases that seem unclear (as well as engage in additional research or reflection to get a clearer picture of what might fall within the standard).

Under the standard conception, lawyers face ethical requirements with a

17. *See e.g.,* MODEL RULES OF PROF'L CONDUCT R. 1.3(Am. Bar Ass'n); MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 3 (Am. Bar Ass'n 2020).

18. *See,* MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 1 (Am. Bar Ass'n 2020)

distinctive structure:

(i) They have two obligations that can pull in opposite directions (the obligation to follow laws and court rules and the obligation to zealously advocate for their clients, up to the limits of the law).

(ii) Neither obligation is flexible nor discretionary.

(iii) These aren't brutely conflicting obligations because one ends precisely where the other begins.

When pushing up to the limits of the law is in the client's interest, it looks like the lawyer must reach that line precisely. The lawyer will not have a "morally safe" direction to err in. Being extra zealous "just in case" risks violating the lawyer's obligations to the law and the courts. Conversely, steering clear of any legal grey areas or potential legal violations "just in case" risks violating the lawyer's obligations to the client. To highlight this tension, consider the contrast between two situations—one unconnected to lawyers' work and one facing a lawyer:

(a) Amy is selling a desk chair on Craigslist. It has a few minor quirks (wheels that sometimes stick and so on), but no major defects. She wants to make sure she acts ethically and wonders whether the quirks are significant enough to warrant disclosure to potential buyers.

(b) Ella is a litigator who came across an opinion that might work against her client's case. She is required to "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[19] But she's not sure whether this case is really "directly adverse to the position of [her] client" or is only a case that's tangentially relevant and might be used to develop a (kind of circuitous) argument against them. The opposing council seems not to have noticed the old opinion. She wonders whether she should disclose the relevant passages of the opinion to the court.

For Amy, there is a simple option: she can go ahead and disclose the chair's quirks. That is a morally safe option because, even if the disclosure is not ethically required (e.g., because the quirks were so minor), it wouldn't involve doing anything wrong. But Ella's situation is much tougher. When she faces this uncertainty about whether to disclose, there is not a similar, morally safe option. If disclosure isn't required, it might be wrong—because her obligations to work zealously in favor of her client's interests start immediately wherever her obligations to the tribunal end.[20] So, an

19. MODEL RULES OF PROF'L CONDUCT R.3.3 (Am. Bar Ass'n 2020).

20. Of course, it is possible that, given the specifics of the situation, disclosure would be beneficial to her client. But I take there to be at least as many cases when this wouldn't be true.

obligation to zealously advocate up to the limits of the law means there will not be a gap where Ella can find a morally safe option.

This structure isn't exclusive to lawyers' obligations. Similar problems will arise, at least to some extent, in other principal-agent relationships (though they will not be my focus here). And occasionally, ordinary life will serve up situations with some of the same features. Someone who discovers her college roommate cheated on a test, for example, might be torn between competing values. On the one hand, she considers turning in her roommate, out of concern for fairness. On the other hand, she considers remaining silent, out of concern for the well-being of her roommate, who would be at risk of losing her scholarship and being forced to drop out of college. Like the lawyers facing quandaries, the person with a cheating roommate also lacks a "morally safe" direction to err in. But, it is worth noting two features of situations like these. First, although ordinary life sometimes involves difficult-to-navigate tensions between competing ethical considerations (as with the cheating roommate), it is more unusual to find situations in ordinary life with a structure identical to the one facing lawyers—the nature of the problem is typically a bit different. In the cheating roommate case, for example, there is nothing built into her obligations of fairness or her obligations to her roommate that stipulates that one obligation ends where the other begins. There is nothing analogous to the requirement to go up to the limit of the law but not cross it. Second, dilemmas involving competing values, with no morally safe option, don't tend to be the day-to-day fare of our ethical decision-making. These are the kinds of cases that keep us awake at night and that we remember when we think back over time. Encountering them persistently as part of daily life would mark a significant, and troubling, shift. But that is precisely the situation facing some lawyers.

Of course, this dilemma will not impact all lawyers equally. It arises from a structure that professional responsibility norms create for most lawyers: a requirement to further their clients' interests up to the limits of the law, while also not violating those limits. But, not all clients are likely to have interests that benefit from squeezing up against this line. For example, these concerns may not weigh heavily on a real estate attorney whose day-to-day practice focuses on reviewing deeds and mortgage documents for clients purchasing homes. Although tensions between their clients' interests and fidelity to the law could arise for these lawyers, the circumstances might feel more like unusual dilemmas (as when private individuals face fraught decisions about competing values) and less like persistent parts of ordinary practice.[21] And some lawyers (e.g., prosecutors)

21. For discussion of contextual differences across legal practice, and the ways in which this

do not encounter this structure at all (though related difficulties may arise).[22] Nevertheless, some lawyers, including many litigators and defense attorneys, will routinely find themselves having to determine where the line is between necessary zealous advocacy and violation of laws and court rules. And they will need to figure out what to do when the location of that line seems uncertain. We owe them better guidance for those dilemmas.

Some cases may be dramatic. There is an established dispute in the legal ethics literature concerning tensions between client confidentiality and requirements of candor to the court that arises when a client plans to commit perjury.[23] In such a case, the facts confronting a lawyer may make it genuinely ambiguous whether anticipated testimony would constitute perjury and whether they should allow their client to testify. But a similar tension requiring high levels of precision can also arise in more mundane and routine circumstances. Consider Ella's dilemma above concerning the disclosure of adverse precedent or a commonplace decision about whether to file a potentially frivolous counterclaim. Perhaps a suit has been filed against a lawyer's client, and it would be strategically beneficial to file a counterclaim, but the lawyer needs to decide if there are non-frivolous grounds for a counterclaim. Filing a frivolous counterclaim would typically be a violation of their duties to the court.[24] But if a non-frivolous counterclaim is available, and filing it would help their client, then a lawyer's failure to do so would also be a failure to live up to their duties to the client. So, it looks like the lawyer does not have a simple, morally safe option—they need to determine precisely where the line is between claims that are frivolous and those that are not.

One response to these circumstances is to resolve every potential ambiguity in the client's favor—even if it involves some contortions. David Luban discusses the example of potentially frivolous counterclaims:

> A partner in a major litigation firm once explained to me that the first thing she does when defending a lawsuit is file a counter-claim—a warning shot letting the other side know they are now in a war. I asked: doesn't there have to be a non-frivolous basis for the counter-claim? She smiled at my naiveté. In her world there is always enough ammo for a counter-claim—that is why they are a major litigation

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should impact ethical responsibilities, see Alexander A. Guerrero, *Lawyers, Context, and Legitimacy: A New Theory of Legal Ethics*, 25 GEO. J. LEGAL ETHICS 107 (2012).

22. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2020).

23. FREEDMAN & SMITH, *supra* note 1.

24. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2020).

firm.[25]

Luban, himself, argues against this type of "hyperzeal"[26] and rejects what he calls the "Principle of Pro-Client Interpretation"—the principle that "unclear rules regulating the fiduciary relationship should be read in the way most favorable to the beneficiary."[27] But he takes the standard conception, and professional responsibility norms as they currently are, to require hyperzeal.

To the extent that the *status quo* lends itself to hyperzeal, I take that to be reason enough to establish clearer, alternative guidance. As I discuss below, justifications for zealous advocacy may not be sufficient to justify consistently erring in the client's favor when precise lines are hard to locate. And if we ask lawyers to try to locate precise lines unguided, then different lawyers will reach different conclusions about how to navigate ambiguity. In practice, this dynamic undermines equity. Instead, we need to provide lawyers with better guidance, if we want to keep the standard conception at all. While there is no erasing blurry lines from the law, other areas of our legal system contemplate the impossibility of "getting it right" every time and articulate (admittedly messy) burdens of proof to distribute the risk of error. Legal ethics needs to recognize that lawyers won't always find the precise limits of the law and tell them how to manage the risk of mistakes.

II. AN ETHICALLY RISKY PROFESSION?

I want to turn now to why the difficulty of satisfying the standard conception of legal ethics matters—because the stakes are higher than a frustratingly demanding professional requirement. The standard conception of legal ethics is not just a claim about professional norms. It is a claim about the requirements of morality. If we take it seriously, then setting lawyers up to fail to satisfy the standard conception means setting them up for moral failings.

Of course, the challenges of acting morally in the face of uncertainty are, to some extent, a problem about morality in general, not one specific to legal ethics. As I've discussed elsewhere, uncertainty is a central feature of moral life, and one we are unlikely to resolve anytime soon.[28] Because of that

25. David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 GEO. J. LEGAL ETHICS 275, 279 (2020).

26. *Id*. at 279; For discussion of the distinction between hyperzeal and zeal, see Tim Dare, *Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers*, 7 LEGAL ETHICS 24 (2004).

27. Luban, *supra* note 25, at 284.

28. *See* Chelsea Rosenthal, *What Decision Theory Can't Tell Us About Moral Uncertainty*, 178 PHILOSOPHICAL STUDIES 3085 (2021); Chelsea Rosenthal, Ethics for Fallible People (2019) (Ph.D. dissertation, New York University).

uncertainty, we'll sometimes get things morally wrong despite our best intentions. And when we're unsure which paths are morally acceptable, we will frequently have no choice but to run some risks of moral wrongdoing. However, the difficulty facing lawyers is distinctively acute.[29]

Ordinarily, people can (and often should) take steps to, at least, reduce our risk of moral wrongdoing. But as I've suggested, one of the most straightforward avenues for risk reduction will be less available to lawyers. In daily life, we can often err in the direction of being more forthcoming or more generous—being morally good doesn't usually require us to locate the moral minimum precisely.[30] Lawyers, though, when faced with uncertainty about the line between helping their clients and violating the law, can't simply "hedge their bets" and err in the direction they know to be morally "safe," because (at least sometimes) there is no morally safe direction. There is only one direction that risks lapses in their obligations to their clients and another that risks lapses in their obligations to the law. So, lawyers have less access to a central mechanism for reducing their risk of moral wrongdoing and take on greater risk as a result.

Strikingly, this problem arises if we accept the standard conception of legal ethics on its own terms and explore what follows. It is not a problem about conflicts between the standard conception and competing accounts of morality (though I'll suggest, below, that encountering this problem may have implications for how we think about the standard conception going forward).

One natural worry at this stage might be that, even if lawyers risk moral wrongdoing, the wrongs in question will typically be trivial—wrongdoing that's hard to identify precisely because it's minor and only barely crosses an ethical line. But that seems to be a mistake. In many cases, the risk is not a risk of doing something that is similar to—but not quite the same—as a morally right act. Instead, lawyers will sometimes need to decide between two very different courses of action, while uncertain which one is morally appropriate. For example, a lawyer might find themselves uncertain whether their circumstances fall within the scope of a client confidentiality exception and so be unsure whether to reveal client information. But revealing information that shouldn't be revealed isn't unimportant or almost the same as keeping it confidential. And the circumstances involved need not be

29. Parallel problems may arise in some principal-agent relationships that share structural similarities (such as those between trustees and beneficiaries), but my focus will be primarily on the specifics of cases involving lawyers and clients.

30. *See* Chelsea Rosenthal, Disappearing Moral Responsibilities: Searching for Principals' Moral Responsibilities After They Delegate to Agents (in progress manuscript) (on file with author).

borderline cases as a substantive matter—only the lawyer's information needs to be unclear, not the facts on the ground. Sometimes, circumstances will be difficult for lawyers to distinguish based on the information they can access, even though the situation may be quite clear-cut when one has greater access to the relevant facts. For example, if it is unclear whether a client has duped their lawyer into making a false statement that now must be corrected,[31] that doesn't mean the client "almost" duped their attorney or that it is a borderline case. It simply means the lawyer's information is limited (the client may have done nothing wrong).

And how the risks of wrongdoing are distributed is, itself, morally weighty[32]—it matters, for example, when lawyers should run a greater risk of wronging a client and when they should opt to run a greater risk of violating the law. I've argued elsewhere that running an excessive risk of morally wronging someone can, itself, be morally wrong, even if the risk works out well and no first-order wrong occurs.[33] In part, this is because risking wronging someone involves treating them with disrespect. (An instructive parallel, here, may be the disrespectful behavior of a healthcare proxy who makes a good medical decision for an unconscious friend, but who made the decision by flipping a coin, rather than listening to the doctor's detailed description of the friend's medical circumstances.) In this sense, taking inappropriate risks of mistreating a client or an opposing party may, itself, be morally bad.

Our legal system is built, in part, on the assumption that these considerations of how to distribute risks of being wronged are also centrally important at the level of institutional design. Norms of due process can be seen as concerned with how the legal system distributes risks of wronging (among other factors). Phrases like "better for ten guilty men go free, than one innocent man be imprisoned"[34] begin from a recognition that no legal system will accurately determine guilt and innocence in every case. Precision is not possible there. Instead, in light of this reality, it offers a claim about what direction the system is designed to err in, and to what extent. In this sense, burdens of proof create established institutional practices for distributing the risk of errors. Current burdens of proof do this quite imperfectly and introduce plenty of ambiguities of their own. But it would be unreasonable to try to get by entirely without burdens of proof in

31. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2020).

32. *See* RENÉE JORGENSEN, REWRITING RIGHTS (forthcoming) (on file with author).

33. *See* Rosenthal, *What Decision Theory Can't Tell Us About Moral Uncertainty*, *supra* note 28; Rosenthal, Ethics for Fallible People, *supra* note 28; see also Chelsea Rosenthal, Trying to Be Moral, Morally (in progress manuscript) (on file with author).

34. For a history of this phrase, see Alexander Volokh, *n Guilty Men*, 146 UNIVERSITY OF PENNSYLVANIA L. REV. 173 (1997).

our civil and criminal trials. Imagine telling juries to be sure to get a decision right without guidance for the inevitable ambiguities. But the situation that we leave lawyers in is too much like this. If we take seriously not only potential wrongs in particular cases, but questions of fairness and structural justice involved in distributing risks of wronging, then we need to develop guidance for how lawyers should distribute their inevitable risks of wrongdoing as well (risks of being wronged that are imposed on clients, opposing parties, or courts, for example). My suggestion is not that the guidance we give lawyers should look like the burdens of proof we use in trials, but rather that we need to begin a conversation about what proper guidance could look like if we want to retain some version of the standard conception.

In the discussion below, I suggest three, more specific reasons that this is a problem worthy of our concern. First, and most straightforwardly, when lawyers are forced to take more of these risks, there will be more moral wrongdoing averaged across time and people (holding all else equal). If the standard conception is right about lawyers' obligations, we should be concerned that they are set up to have difficulty reliably fulfilling those obligations and may fulfill them less often as a result.

Second, the need for precision and the absence of clear guidance places a troubling burden on lawyers. Being unable to live up to your own moral standards imposes a psychological toll, and law is a field with notoriously high rates of burnout.[35] It is already well-recognized that the standard conception often clashes with ordinary morality in ways that can generate this effect.[36] But, the tensions internal to the standard conception provide at least an initial reason to think that lawyers may not escape the psychological costs of feeling unable to avoid wrongdoing, even if they can wholeheartedly embrace the standard conception (though, ultimately, the extent of these costs is a partly empirical matter). Apart from any high-stakes, dramatic cases, day-to-day legal work can present lawyers with morally difficult circumstances that may create a psychological burden. Emerging psychological research on moral trauma already provides some indication that experiences in which you transgress your own moral beliefs in serious ways may result in psychological trauma.[37] We should be cautious

35. *See* Krystia Reed, Brian H. Bornstein, *A Stressful Profession: The Experience of Attorneys in* STRESS, TRAUMA, AND WELLBEING IN THE LEGAL SYSTEM 217, 223 (Monica K. Miller & Brian H. Bornstein eds., 2013).

36. *Id*. at 232-233.

37. For a review of this literature, see Brandon J. Griffin, et al., *Moral Injury: An Integrative Review*, 32 JOURNAL OF TRAUMATIC STRESS 350, 350-62 (2019).

about the conclusions we draw from this, as much of this work is focused on particularly high-stakes or violent contexts, especially in war. However, there is also research examining moral trauma among workers in other settings, including those working in child protection services.[38] But potential connections between legal work and moral trauma (or perhaps more mundane, but related, psychological tolls), merit further research.

While there is certainly no panacea for moral uncertainty in ordinary life (and the inevitability of error can be taxing), we often have options that allow us to cut back on our moral self-doubt at least a little bit. We may be able to retreat, much of the time, into moral territories whose defensibility we're more confident in, "hedging our bets" to avoid having to identify some moral lines precisely, and steering clear of some moral grey areas. My concern is that whenever lawyers wonder how far to push for their client is "too far," they are left without many of these tools. Even if the standard conception incorporates some desirable structural features, there can be a human toll.

Finally, lawyers may navigate this predicament by re-interpreting moral norms to be more tractable and rationalizing practices that some (though, importantly, not all) clients expect. Without clear guidance about what direction to "err" in when all options carry significant risks of wrongdoing, some lawyers simply adopt the approach of always favoring their clients in the face of uncertainty or ambiguity, as I discussed above in the case of potentially frivolous counterclaims. If an action that's helpful to their client *might* be legally permissible, that is enough to justify it in their view. But it's far from obvious that the values underlying the standard conception can support this extension.

Take, for example, Pepper's justification for the standard conception: that norms of zealous advocacy are needed out of concern for equality—and allowing individual lawyers to act as gatekeepers inspired by their consciences would only introduce additional inequalities in clients' efforts to access justice. The standard conception may be able to reduce this problem by removing lawyers' opportunities to exercise discretion in deciding how zealously to press their client's interests, but doing this doesn't seem to require allowing lawyers to bend ambiguous laws in service of their clients. And in any case, when we leave open how lawyers should handle uncertainty, this creates another type of inequality. Some clients will be advantaged when they have lawyers who view all ambiguity as an occasion to favor their client's priorities, while other clients will be

38. *See* Wendy Haight, et al., *Moral Injury Among Child Protection Professionals: Implications for the Ethical Treatment and Retention of Workers*, 82 CHILD AND YOUTH SERVICES REVIEW 27 (2017).

disadvantaged when working with lawyers who opt to be sure they're following the law if its dictates are unclear. And who has access to the first type of advocacy can track other metrics of privilege, making the problem especially pressing.

Similarly, if the standard conception is valuable because it avoids transforming lawyers into unaccountable *ad hoc* judges and juries, lawyers are just left with a different kind of unaccountable power by a system that doesn't provide more specific guidance for this uncertainty. If we hope to avoid this *ad hoc* handling of the inevitable uncertainty facing lawyers, it will be important to offer them better guidance as a substitute—not simply a requirement to precisely locate the line between their obligations to clients and the law, but instructions about what to do when facing the inevitable uncertainty about where that line is.

CONCLUSION

I have suggested that, if we take the standard conception of legal ethics at face value, lawyers are often left without a central tool for reducing the risk of moral wrongdoing—the opportunity to "hedge their bets" when uncertain and retreat away from moral grey areas. If they are unable to locate the limits of the law with great precision, sometimes lawyers will only have the options of erring in the direction of violating the law or erring in the direction of violating their responsibilities to their clients. This, in turn, forces lawyers to take greater risks of moral wrongdoing, with potential costs to their clients, themselves, and others.

Ultimately, the biggest lessons here may be structural. There are important questions to ask about the calls people make when faced with hard choices, but in the long run, we should set up norms and institutions so that lawyers are forced to make fewer hard choices and fewer moral compromises. At the very least, this means reducing the risks of moral wrongdoing that lawyers need to take on or providing them with clearer guidance for navigating the inevitable uncertainties they will face. But this may also put pressure on the standard conception more generally and give us another reason to explore which aspects of it are worth retaining. While the standard conception is sometimes seen as asking too little of lawyers (and this may be true in some respects), it also asks impossibly much: it requires lawyers to resolve thorny legal and factual issues precisely, without the opportunity to err on the side of caution when uncertain. And, if we accept the standard conception, failures to achieve this won't only be professional shortcomings, they will be moral failings, as well.