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Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients

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ARTICLES

VIRTUE AND ADVICE: SOCRATIC PERSPECTIVES ON LAWYER INDEPENDENCE AND MORAL COUNSELING OF CLIENTS

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ABSTRACT

This Article examines the ethical and moral responsibilities of lawyers in their role as advisors to clients, with continual reference to the Greek philosopher Socrates. Although Socrates was not a lawyer, he was an "advisor," who lived a life committed to engaging in dialogue about virtue and its meaning and, at times, about the law and one's duties in relation to the law. According to Rule 2.1 of the ABA Model Rules of Professional Conduct, when representing clients and acting as advisors, lawyers are expected to "exercise independent professional judgment" and "render candid advice," which includes authority to counsel clients on moral considerations relevant to their legal situation. Socrates was a paradigm of "independence" and, although his speech was often bristling with irony, he was also persistently "candid" with his dialogue partners as they pursued the truth about moral questions. His life and teachings, and his courage in adhering to the principles that defined him, offer valuable insights for lawyers as they form their professional identities and serve as advisors to their clients.*

Part I of this Article will offer an overview and perspective on lawyers as independent advisors, first by closely examining Rule 2.1 and its meaning. It will then further explore moral independence in a legal context by reflecting on Socrates, with particular attention to his trial and its aftermath, but also considering Socrates as portrayed in the philosophy of Søren Kierkegaard. Part II will review several frameworks legal ethicists have developed to describe the relationship of advising lawyers and their clients, and propose the moral ideal of the "trustworthy neighbor" for lawyers serving clients in the advising role. Finally, Part III will consider some lessons derived from the teachings of Socrates for lawyer-advisors who are engaged in moral dialogue with their clients.

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* *See* SØREN KIERKEGAARD, THE CONCEPT OF IRONY, WITH CONTINUAL REFERENCE TO SOCRATES (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1989) (1843).

I. INTRODUCTION

> Socrates went around Athens telling law teachers and law students that their highest concern should be to be good people. He said their next and consequent concern should be to show the citizens of Athens how to be good people. For Socrates, as for virtually all of the giants of classical moral philosophy and much of Hebraic moral theology, ethical discussion is discussion about being good persons and helping others to be good persons. When moral philosophy talks about Aristotle's "man of practical wisdom," or when literature tells us about heroes in our culture, or when the religious tradition tells us about saints; when we talk about paragons, role models, professional exemplars . . . *it is the good person we are talking about*.[1]

1. THOMAS L. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 13–14 (1991) [hereinafter SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES] (footnote omitted). Shaffer uses the term "Hebraic" rather than "Judeo-Christian" to emphasize the "single theological ethical tradition" involved, as "[t]he ethics of Jesus are the ethics of the Jews." *Id.* at 13 n.1.

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> The lawyer is not simply a technician; nor is she a moral arbiter. *As legal advisers, lawyers are partners in a dialogue that is brimming with moral significance, whether they acknowledge the significance or not*. Ignoring the potential for interpersonal moral engagement in the course of an attorney's work comes at a significant cost. To the extent that an attorney approaches the client as a bundle of legal interests to be maximized, the client's true interests may often remain out of view and unprotected.[2]

In the Preamble, the ABA Model Rules of Professional Conduct ("Rules") declare "a lawyer is . . . guided by personal conscience."[3] An evocative remnant of the more insistently aspirational 1908 ABA Canons of Professional Ethics,[4] the declarative "is" suggests the active exercise of conscience in representing clients not only is something a lawyer may do or should do,[5] but also is essential to what it means *to be* "a lawyer." As manifested in the formation, reformation, and preservation of a person's character, personal conscience is a core element of the lawyer's properly developed professional identity.[6] And because conscience is personal to the lawyer, rather than a normative standard enforced within the legal community, it is a wellspring of independence for a lawyer willing to take a moral stand, even when others will not.

The Rules establish boundary-point standards of conduct for lawyers, but also leave ample room for the lawyer to ask and decide, in first-personal terms: Who am I, and who will I become, as a person and as a professional?[7] And how am I—and how should I be—im-

2. ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE 11–12 (2013) [hereinafter VISCHER, MORALITY OF LEGAL PRACTICE] (emphasis added).

3. MODEL RULES OF PROF'L CONDUCT Preamble 7 (2013).

4. CANONS OF PROF'L ETHICS Canon 15 (1908) (stating that a lawyer "must obey his own conscience and not that of the client"); *see also id.* Canon 32 (stating that a lawyer "advances the honor of his profession and the best interests of his client when he renders service and gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law").

5. *Cf., e.g.*, MODEL RULES OF PROF'L CONDUCT Preamble 4–6 (2013) (describing actions a lawyer "should" take relating to a variety of professional responsibilities).

6. *See, e.g.*, Robert K. Vischer, *Professional Identity and the Contours of Prudence*, 4 U. ST. THOMAS L.J. 46, 61 (2006) (observing that "lawyers who bring conscience to bear on their professional identities can help expand and enrich the common good by challenging the presumptions of the governing legal paradigm, whether by critically engaging the substance of the positive law or the objectives that the client wishes to pursue through the positive law").

7. *See* Michael S. McGinniss, *Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community*, 87 N.D. L. REV. 19, 45–50 (2011); *see also* ANTHONY RUDD, KIERKEGAARD AND THE LIMITS OF THE ETHICAL 59 (1993) [hereinafter RUDD, LIMITS OF THE ETHICAL] ("The fundamental question in ethics is: How shall I live? But this is a question that is necessarily asked from the first personal standpoint, that is, from the standpoint not of an abstract subject, but of a real individual person . . . .").

pacting the lives of my clients and others through my words and actions as a professional? In grappling with these questions at the beginning and throughout the course of a professional life, the deciding lawyer may be guided by moral principles based on religious convictions, philosophical reflections, or a combination of the two.[8] Ideally, the lawyer's deliberation about those principles and how they apply in the lawyer's practice will constitute an ongoing process of subjective[9] self-definition, developing the meaning of the terms through which to understand individual professional identity and the relational obligations to clients and others.[10]

The Greek philosopher Socrates,[11] as portrayed in the writings of his student Plato,[12] relished the search for understanding—including

8. *See* Bruce A. Green, *The Role of Personal Values in Professional Decision-making*, 11 GEO. J. LEGAL ETHICS 19, 26 (1997) (observing that "because of the porous nature of the professional norms [such as the Rules], one's general philosophical approach to the practice of law may be determined by one's personal moral or religious understandings"); *see also, e.g.*, THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT (1981) [hereinafter SHAFFER, ON BEING A CHRISTIAN AND A LAWYER]; VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2; Samuel J. Levine, *Reflections on the Practice of Law as a Religious Calling, From a Perspective of Jewish Law and Ethics*, 32 PEPP. L. REV. 411 (2005).

9. *See infra* Part II.C.3 (discussing the concept of "subjectivity" as developed in the works of Søren Kierkegaard) and Part II.C (discussing Robert K. Vischer's treatment of lawyers and clients as moral subjects); *see also* McGinniss, *supra* note 7, at 41–42, 44 (on Kierkegaard's ethics of decision, including concepts of "subjective knowledge" and "passionate reason").

10. Psychologist Robert Kegan has identified five stages of "professional ethical identity development," the fourth of which is the "self-defining professional." Verna E. Monson & Neil W. Hamilton, *Entering Law Students' Conceptions of Ethical Professional Identity and the Role of the Lawyer in Society*, 35 J. LEGAL PROF. 385, 388 (2011) (citing ROBERT KEGAN, IN OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE (1994); ROBERT KEGAN & LISA LAHEY, IMMUNITY TO CHANGE: HOW TO OVERCOME IT AND UNLOCK THE POTENTIAL IN YOURSELF AND YOUR ORGANIZATION (2009)). This fourth stage is "[c]haracterized by self-reflection, the ability to hold opposing ideas, and respect diversity of thought or ideology. Has identified key elements of life purpose or values. Can *independently* judge the influences from close others or authorities, and adhere to one's inner values and ways of making sense of one's experiences." *Id.* (emphasis added). Kegan regards achievement of this fourth stage—also called the "Self-Authoring Mind"—as being "essential for success in demanding professional roles or occupations." *Id.* The fifth and final stage, which Kegan calls the "Humanist," is "[c]haracterized by recognition of the limits of self-defined values and commitments. Can transform the self to become more fully present and open to others, resulting in more authentic, effective relationships. Stage 5 individuals recognize the *interdependence* of all persons and systems." *Id.* at 388 (emphasis added). This Article will consider the significance for lawyers to be found in reconciling aspects of independence and interdependence in the moral counseling of clients. *See infra* Part III.C.

11. Socrates was born in 470 B.C. and died in 399 B.C. PAUL JOHNSON, SOCRATES: A MAN FOR OUR TIMES 7, 154 (2011).

12. Socrates himself "wrote nothing," and "his life and ideas are known to us through direct accounts" either by his contemporaries (specifically, the playwright Aristophanes) or his pupils Xenophon and Plato. Louis-André Dorion, *The Rise and Fall of the Socratic Problem*, *in* THE CAMBRIDGE COMPANION TO SOCRATES 1, 1 (Donald R. Morrison ed., 2011). The "Socratic problem" is "the historical and meth-

of one's self—through the defining of words and the concepts the words express.[13] He regularly engaged in spirited dialogues with his fellow Athenians to explore the meaning of word-concepts such as "justice,"[14] "wisdom,"[15] "courage,"[16] and "temperance."[17] These word-concepts exemplify the qualities of character and principles of ethical life that may be broadly described as "virtues."[18]

In the *Nichomachean Ethics*, Plato's student Aristotle further examines the nature of the virtues, seeking to answer the question: "[W]hat is the good life for man?"[19] For Aristotle, the ultimate "telos," or supreme good, for human beings is *eudaimonia*, which is often translated from the Greek as "flourishing."[20] In Aristotle's moral philosophy, the virtues are "qualities the possession of which will enable an individual to achieve *eudaimonia* and the lack of which will frustrate his movement toward that *telos*."[21] Among the moral virtues Aris-

odological problem that historians confront when they attempt to reconstruct the philosophical Socrates." *Id.* For purposes of this Article, I will generally rely on Plato's account of the teachings of Socrates. *But cf. infra* note 311 (citing scholars skeptical of Plato's account of Socrates in various dialogues).

13. *See generally* THE COLLECTED DIALOGUES OF PLATO (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1961). All page numbers to Plato's dialogues in this Article refer to THE COLLECTED DIALOGUES OF PLATO. For ease of reference to other volumes and translations, I have also provided parallel citations to the standard Stephanus pagination.

14. *See* PLATO, *Republic*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 575, 580 (331c-e) (Edith Hamilton & Huntington Cairns eds., Paul Shorey trans., Princeton Univ. Press 1961) [hereinafter *Republic*].

15. *See* PLATO, *Socrates' Defense (Apology)*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 3, 7–9 (20e-23c) (Edith Hamilton & Huntington Cairns eds., Hugh Tredennick trans., Princeton Univ. Press 1961) [hereinafter *Apology*].

16. *See* PLATO, *Laches*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 123, 134 (190d-e) (Edith Hamilton & Huntington Cairns eds., Benjamin Jowett trans., Princeton Univ. Press 1961).

17. *See* PLATO, *Charmides*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 308 (Edith Hamilton & Huntington Cairns eds., Benjamin Jowett trans., Princeton Univ. Press 1961).

18. In the dialogue *Meno*, Socrates examines the questions of what "virtue" is, and whether it can be taught. *See* PLATO, *Meno*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 353, 354–55 (Edith Hamilton & Huntington Cairns eds., W. K. C. Guthrie trans., Princeton Univ. Press 1961) [hereinafter *Meno*].

19. JONATHAN LEAR, ARISTOTLE: THE DESIRE TO UNDERSTAND 154 (1988). For additional discussion of Aristotle's "virtue ethics," including their further development by Thomas Aquinas and contemporary applications, see McGinniss, *supra* note 7, at 30–34.

20. *See* McGinniss, *supra* note 7, at 31; ALASDAIR MACINTYRE, A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY 59 (2d ed. 1998); *see also* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 644 n.49 (2006) (identifying other possible translations of *eudaimonia* as "happiness" or "becoming an excellent human being").

21. ALASDAIR MACINTYRE, AFTER VIRTUE 148 (3d ed. 2007).

totle identifies are justice, courage, and honesty,[22] and among the intellectual virtues is *phronēsis*, usually translated as "practical wisdom."[23] Despite their significant differences,[24] for both Socrates and Aristotle the purpose of ethical inquiry is to understand goodness, so that one is able to become a good person and to act as a good person should.[25]

Although Socrates was not a lawyer, he was an "advisor," about virtue and its meaning and, at times, about the law and one's duties in relation to the law.[26] According to Rule 2.1, when representing clients and acting as advisors, lawyers are expected to "exercise independent professional judgment" and "render candid advice."[27] Socrates was a paradigm of "independence" and, although his speech was often bristling with irony,[28] he was also persistently "candid" with his dialogue partners as they pursued the truth about moral questions.[29] His life and teachings, and his courage in adhering to the principles that defined him, offer valuable insights for lawyers as they form their professional identities and serve as advisors to their clients.

Part I of this Article will offer an overview and perspective on lawyers as independent advisors, first by closely examining Rule 2.1 and its meaning. It will then further explore moral independence in a legal context by reflecting on Socrates, with particular attention to his trial and its aftermath, but also considering Socrates as portrayed in the philosophy of Søren Kierkegaard. Part II will review several frameworks legal ethicists have developed to describe the relationship of advising lawyers and their clients, and propose the moral ideal of the "trustworthy neighbor" for lawyers serving clients in the advising role. Finally, Part III will consider some lessons derived from the

22. *See* Cassidy, *supra* note 20, at 647–49 (summarizing Aristotle's account of the virtues of "justice," "courage," and "honesty").

23. *Id.* at 649 (citing ARISTOTLE, NICHOMACHEAN ETHICS, bk. VI, ch. 5, at 179–80 (Christopher Rowe trans., Oxford Univ. Press 2002)).

24. *See, e.g.*, ANTHONY RUDD, SELF, NARRATIVE, & VALUE: A KIERKEGAARDIAN APPROACH 34–35 (2012) [hereinafter RUDD, SELF, NARRATIVE, & VALUE] (comparing and contrasting Plato's concepts of virtue and ethical teleology with Aristotle's).

25. *Id.* at 29 (noting that "the main Greek philosophical traditions insisted that, as rational beings, it is part of our nature to realize our *telos* through our own conscious recognition of what is good, and by developing our characters accordingly").

26. *See, e.g.*, *infra* Part II.C.2 (discussing *Crito*).

27. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2013).

28. *See generally* GREGORY VLASTOS, SOCRATES: IRONIST AND MORAL PHILOSOPHER 21–44 (1991) [hereinafter VLASTOS, SOCRATES: IRONIST AND MORAL PHILOSOPHER] (explaining and providing examples of the use of irony in the Socratic dialogues).

29. "[F]rankness" (candor) is one of the three Socratic conditions for genuine dialogue on matters of consequence, along with "knowledge" (intelligence) and "good will." *See* PLATO, *Gorgias*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 229, 269 (478a) (Edith Hamilton & Huntington Cairns eds., W. D. Woodhead trans., Princeton Univ. Press 1961) [hereinafter *Gorgias*]; *see also infra* Part IV.C (discussing Socratic candor).

teachings of Socrates for lawyer-advisors who are engaged in moral dialogue with their clients.

II. Lawyers as Independent Advisors

Professional independence has long been an important and versatile theme for understanding the role of lawyers in society,[30] and as such it has been the subject of much scholarly discussion and analysis.[31] In the Rules, the words "independent" or "independence" appear in five contexts relating to the professional work of an individual lawyer.[32] Three of these are found in Rule 1.8(f), on a lawyer accepting compensation for representing a client from someone other than the client;[33] the comments to Rule 1.7 on concurrent conflicts of interest;[34] and the heading ("Professional Independence of a Lawyer") and comments to Rule 5.4, concerning limitations on a lawyer's relationships with non-lawyers.[35]

The fourth reference to "independence" occurs in the comment on Rule 1.2(b) ("Independence from a Client's Views or Activities").[36] Rule 1.2(b) is a non-directive "rule" explaining the "scope" of a lawyer's relationship with clients, stating "[a] lawyer's representation of a

30. *See generally* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1 (1988). Gordon's seminal work on lawyer independence offers several "types" of independence as examples: (1) corporate independence, i.e., "the bar's freedom to regulate its own practices, and its freedom from outside regulation"; (2) working independence, i.e., "a large degree of discretion, of autonomy from outside direction, in determining the conditions of one's work"; and (3) political independence, i.e., the ability "to assert and pursue client interests free of external controls, especially controls imposed by state officials," and, as a limitation on client loyalty, the idea that "a part of the lawyer's professional persona must be set aside for dedication to public purposes." *Id.* at 6–7, 10, 13.

31. *See, e.g.*, Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 Conn. L. Rev. 1, 5 (2009) (drawing on identity theory from social psychology to explain "why certain situations may prompt lawyers to deviate from a neutral perspective more often than others and how that lack of neutrality prevents the lawyers from offering fully independent advice to their clients").

32. *Cf., e.g.*, Model Rules of Prof'l Conduct R. 1.8(h) (2013) (addressing the need for the involvement of, or advice about the involvement of, "independent legal counsel" for a client concerning legal malpractice issues).

33. *Id.* R. 1.8(f) (providing "[a] lawyer shall not accept compensation for representing a client from one other than the client unless," among other limitations, "there is no interference with the lawyer's *independence* of professional judgment or with the client-lawyer relationship") (emphasis added).

34. *See, e.g.*, *id.* R. 1.7, cmt. 8 (observing that the "critical questions" in deciding whether disclosure of a concurrent conflict of interest and consent are required "are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client").

35. *Id.* R. 5.4; *see generally* Lawrence J. Fox, *Old Wine in New Bottles: Preserving Professional Independence*, 72 Temp. L. Rev. 971 (1999) (discussing the significance of a lawyer's independence under Rule 5.4 in preserving and upholding the "core values" of the legal profession).

36. Model Rules of Prof'l Conduct R. 1.2 cmt. 5 (2013).

client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[37] Closely related to Rule 1.2(b)'s distancing of lawyers from their clients is a legal ethics concept variously described as the "moral independence theory"[38] or the principle of "nonaccountability."[39] A deep-seated yet controversial precept of our legal system, this principle asserts lawyers "are not morally accountable for who their clients are, what their clients have done, or what [they] will do for their clients as long as it is within the bounds of the law."[40] In this sense, the lawyer is deemed to be morally independent *from* the client. Although this Rule is not a focus of this Article, the principle of nonaccountability, including its shortcomings, has important implications for lawyers acting in the advising role.[41]

The fifth Rules reference to an individual lawyer's "independence" is found in Rule 2.1 ("Advisor"), which addresses a lawyer's professional responsibilities in advising clients. Specifically, in its first sentence, it provides that "[i]n representing a client, a lawyer shall exercise *independent* professional judgment and render *candid* advice."[42] In its second sentence, it provides that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as *moral*, economic, social and political factors, that may be relevant to the client's situation."[43] Thus, as expressed in this Rule, the advising lawyer's independence and candor are mandatory ("shall"), but the lawyer's counseling on moral considerations is discretionary ("may").

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37. *Id.* R. 1.2(b).

38. *See* Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 507–08 (1994) (describing the "moral independence" theory as the principle that "[a]lthough lawyers' actions may assist clients' conduct or assist clients in escaping consequences of their conduct, the clients are the only ones responsible").

39. *See* Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U. L. REV. 275, 276 (2011).

40. *Id.* at 276–77; *see also* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 674 (1978) (arguing that "whatever the validity of the Principle of Nonaccountability for advocates, its legitimacy rests on the particular structures and functions of the adversary system, and that the circumstances of nonadvocate lawyers require a different predicate for analysis of their professionalism and accountability"); McMorrow & Scheuer, *supra* note 39, at 308 ("With each client a lawyer represents, the lawyer must determine whether the justification for nonaccountability applies to his or her client's representation and must be able to respond with a forceful argument for the representation when questioned.").

41. *See infra* Part III.A (discussing the "standard conception of the lawyer's role"). This Article will develop a distinct concept of "moral independence," which, instead of being based on an (alleged) freedom *from* moral responsibility, will describe a quality of a lawyer who is willing to act on moral principle in the advising role in serving the client. *See infra* Parts II.C & III.C.

42. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2013) (emphasis added).

43. *Id.*

A. *Lawyers Must Be Independent from Whom, and Why?*

As a lawyer's independence in the exercise of "professional judgment" and rendering of "candid advice" is mandatory under Rule 2.1, it is critically important to ask these questions: When acting as an advisor, *from whom* must a lawyer be independent under the Rule, and *why*?

Kevin H. Michels has closely examined the text and history of Rule 2.1 and considered its operation in relation to the Rules as a whole,[44] including Rule 1.2, which addresses the scope of representation and allocation of authority between client and lawyer.[45] Lawyers must "abide by the client's decisions concerning the objectives of the representation,"[46] and must "reasonably consult" with the client about the "means" to be employed in achieving them.[47] These obligations, along with other duties set out in the Rules, create what is in most substantive respects a "principal-agent relationship" between the client (principal) and the lawyer (agent).[48] The pervasiveness of these agency principles has led some courts, relying on Rule 2.1, to conflate its requirements with the duty of loyalty (e.g., to avoid conflicts of interest when providing legal advice),[49] or, by focusing on the "candid advice" provision, to narrowly interpret the Rule as merely "designed to ensure that the client receives the best possible advice with respect to her options before making a decision."[50]

These agency-based interpretations of Rule 2.1 are ultimately unpersuasive. As Michels observes, the loyalty and quality-of-representation concerns are already addressed in other Rule provisions, making Rule 2.1 redundant if the agency approach is correct.[51] What

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44. *See* Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85 (2010).

45. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2013).

46. *Id.* R. 1.2(a).

47. *Id.* R. 1.4(a)(2).

48. *See* Michels, *supra* note 44, at 92–96 (discussing the "principal-agent relationship" between client and lawyer under the Rules and the common law, and the "client-autonomy vision" that "characterizes much of the law governing lawyers"). In carrying out these duties, these Rules do reserve some authority to the lawyer, including, with reasonable consultation, the authority to exercise some discretion as to the specific means employed to accomplish the client's objectives. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a), 1.4(a)(2) (2013); McGinniss, *supra* note 7, at 25–27 (discussing the interrelationship between a lawyer's "authority" and "agency" in representing a client, and the "temptations" accompanying them).

49. *See* Michels, *supra* note 44, at 99 & n.73 (citing, *e.g.*, Scheffler v. Adams & Reese, LLP, 950 So. 2d 641, 651 (La. 2007)). Writing in 2010, Michels also notes that "the lawyer-independence language of Rule 2.1 has been cited in fewer than forty reported decisions in the state and federal courts, often as dicta or as additional authority rather than as the central theory in the case." *Id.* at 97 n.61.

50. *Id.* at 97–98 (citing, *e.g.*, *In re* Count Liberty, LLC, 370 B.R. 259, 281–83 (Bankr. C.D. Cal. 2007)).

51. *Id.* at 98–99 (noting that Rules 1.1 and 1.4 already require competent representation and reasonable communication with clients, and Rules 1.7 and 1.8 govern

these flawed interpretations have in common is a failure to recognize that the Rule's standard of "*independent* professional judgment,"[52] and the "candid advice" expected to flow from it, constitute a "*departure*" from the otherwise prevalent "agency conception of lawyering."[53] In essence, the Rule requires the lawyer to exercise professional judgment independently *from* the client, and to render candid advice *to* the client based on that judgment. In this respect, the role adopted by the advising lawyer under the Rule is one of a verbal safeguard standing between the client and the potential impact of the client's actions on third-party or societal interests, and speaking out as necessary and proper to protect interests beyond the client's alone.[54]

Additional support for this understanding of "independence" is found in the work of David Luban,[55] who has explained how effectively Rule 2.1 works in tandem with Rule 1.6's protections of confidential information relating to representation of a client.[56] According to Luban, Rule 2.1 resolves a longstanding problem in legal ethics, which is justifying confidentiality in light of its social costs.[57] Rule 1.6 encourages a client to "seek legal assistance and to communicate fully and frankly with the lawyer," and receiving this information provides the lawyer with the opportunity "to advise the client to refrain from wrongful conduct."[58] The conditions imposed by Rule 2.1 are de-

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conflicts of interest, and observing that "[t]he care that attended the drafting of the *Model Rules* makes redundancy unlikely").

52. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2013) (emphasis added).

53. Michels, *supra* note 44, at 97, 99–100.

54. *See id.* at 99–100 ("If we are to identify the core interest served by Rule 2.1, we need to look beyond client interests—the preoccupation of the agency conception of lawyering."); *see also* Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1330 (2006) ("As gatekeepers in imperfect legal processes, lawyers have obligations that transcend those owed to any particular client. Honesty, trust, and fairness are collective goods; neither legal nor market systems can function effectively if lawyers assume no social responsibility for the consequences of their counseling role.").

55. *See generally* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 153–57 (2007).

56. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (providing, with exceptions, that "[a] lawyer shall not reveal information relating to the representation of a client"); *see* Michels, *supra* note 44, at 100 (citing LUBAN, *supra* note 55, at 154).

57. Michels, *supra* note 44, at 100–01 (citing LUBAN, *supra* note 55, at 156). As Luban explains, confidentiality "is a good bet for society *only* because we can count on lawyers to give good advice on compliance (and on clients to take that advice). If the lawyer doesn't give independent, candid advice, this entire argument, and indeed the whole edifice of confidentiality, comes tumbling down." LUBAN, *supra* note 55, at 156.

58. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2013). Michels states he is confining his understanding of the "wrongful conduct" Rule 2.1 "seeks to prevent to 'criminal or fraudulent'" conduct. Michels, *supra* note 44, at 102 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.2(d)). Although this approach is a defensible one for purposes of Rule 2.1's disciplinary enforcement, *see id.* at 128–30, from the perspective of legal ethics and morally responsible lawyering, "wrongful conduct" should be understood more broadly to include actions or inactions of a client that are lawful but are nevertheless questionable for other reasons. *See also infra* Part II.B.2 (dis-

signed to ensure that the lawyer *actually* does this, and does so accurately and thoroughly, thereby making it more likely the client will *actually* refrain from the conduct in question.[59] Under this conception of Rule 2.1, the advising lawyer bears the responsibility to communicate to the client not only for the client's sake, but also for the sake of the law and the public interest. In dynamic tension with Rule 1.2(b), Rule 2.1 expresses a principle of accountability.[60] As Luban has put it, "[w]ithout independence and candor, the rules would do little more than screen conspiracies, or permit clients and lawyers to play responsibility games—the client insisting that the lawyer had approved his actions and the lawyer insisting that he was simply doing what the client asked."[61]

B. *The Fruits of Independence in the Advising Role*

With an understanding that Rule 2.1 insists on a lawyer's exercising independence *from* the client, and does so in order to create a public-interest-based departure from the agency-based relations of lawyer and client, it becomes clear the lawyer may face substantial challenges in ethically fulfilling the advising role.[62] Advising decisions may create moments of great risk for all involved: lawyer, client, and society.[63]

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cussing the value of a robust conception of "candor" in relation to non-legal considerations, including moral ones).

59. Michels, *supra* note 44, at 101.

60. *See supra* notes 36–41 and accompanying text (discussing Rule 1.2(b) and the principle of nonaccountability).

61. LUBAN, *supra* note 55, at 155. Luban, in support of his concept of "moral activism" for lawyers, has gone so far as to compare a lawyer's ethical duty of independence in advising clients to a judge's ethical duty of impartiality in adjudication: "[T]he rules of ethics require lawyers to offer independent, candid advice, not advocacy for a position. . . . In other words, lawyers in the advisor's role lie under the same obligation of impartiality that judges do." *Id.* at 154. Luban is skeptical, however, that practicing lawyers usually live up to the demanding standards he has described: "The Nightmare vision of legal advice . . . is not one of cynical lawyers making their clients cynical. Rather, it is the suspicion that candid, independent advice is often, or always, an illusion." *Id.* at 158.

62. *See* Michels, *supra* note 44, at 112–14 (describing a variety of factors that "can conspire to undermine the attorney's exercise of independent professional judgment," including the economic pressures to create and maintain relationships with clients, and the lawyer's professional identification with the client); *see also* Robertson, *supra* note 31, at 1 (analyzing the "cognitive biases arising from partisan kinship between lawyer and client"). Eli Wald has observed that "[c]lient-centered loyalty supports a professional ideology that calls for pushing the legal envelope on behalf of clients, thus generating a professional ethos of lawyers' identification with clients." Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 942–43 (2009). Such identification "in turn makes it less likely that lawyers will attempt to engage in the kind of moral dialogue and counseling [that may serve as] a check on loyalty to clients." *Id.*; *see infra* Part III.A (discussing "client-centered representation" as a model for lawyers in the advising role).

63. As Luban has put it, "[t]he lawyer-client conversation is a morally fraught moment in which the legitimacy of the legal system is, at least in microcosm, up for grabs." LUBAN, *supra* note 55, at 158.

If the advising lawyer does exercise independence and overcomes the temptation to remain silent when speech is needed, how should we best understand the fruits of this independence: namely, the qualities of "professional judgment" and "candid advice"? And is a lawyer's independence from the client reconcilable with a respect for the client's own independence and moral autonomy? If so, how is this to be accomplished? This Article now turns to these questions.

1. Professional Judgment

The ethical floor for the "professional judgment" mandated by Rule 2.1 requires a foundation of adequate information (for it to be "professional"), as well as an "interpretation of the facts" the lawyer has obtained and an "analysis of the legal significance of those facts."[64] But the exercise of professional judgment is "neither a matter of simply applying general rules to particular cases nor a matter of mere intuition."[65] Rather, it may be described, at least in part, as "a process of bringing coherence to conflicting values within the framework of general rules and with sensitivity to highly contextualized facts and circumstances."[66]

How does a good lawyer proceed in meeting and exceeding these fundamental professional norms? In his landmark 1993 book, *The Lost Lawyer: Failing Ideals of the Legal Profession*, Anthony Kronman describes a good lawyer's exercise of professional judgment in advising clients as a kind of "cooperative deliberation,"[67] which combines elements of third-personal and first-personal moral reflection:

> It is from the perspective of the client's own interests that [the lawyer's] judgment must be assessed. To do this, a lawyer needs to place himself in the client's position by provisionally accepting his ends and then imaginatively considering the consequences of pursuing them, *with the same combination of sympathy and detachment the lawyer would employ if he were deliberating on his own account*. The kind of deliberation that is required in such cases might be termed "third personal," for it takes as its starting point not the ends of the person deliberating, but someone else's . . . .[68]
>
> . . .
>
> The lawyer's third-personal deliberations yield an *independent judgment* concerning the soundness of the client's decision, a judgment that is in principle distinguishable both from the client's de-

64. Michels, *supra* note 44, at 116.

65. Gerald Postema, *Moral Responsibility in Legal Ethics*, 55 N.Y.U. L. REV. 63, 68 (1980).

66. Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250, 250 (2011).

67. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 130 (1993).

68. *Id.* (emphasis added).

> clared views and the conclusion the lawyer would reach starting from his own personal values instead (though obviously in any given case these judgments may coincide). Of course, the lawyer's third-personal judgment is open to revision as the client presents new facts and elaborates his objectives. And by the same token, the client may change his own mind when he hears what his lawyer has to say.[69]

The effective exercise of professional judgment in day-to-day practice requires a lawyer to make discretionary assessments, and to decide how to advise clients based on those assessments.[70] A fundamentally important but often controversial aspect of this discretion is the lawyer's professional judgment that moral guidance—from the perspective of the lawyer's conscience—should be consciously incorporated into the advice given to a client. As Robert K. Vischer has observed, the moral dimension of legal decision making and advice exists, whether it is brought to the fore or remains in the background:

> Beyond the sense of personal incoherence it spawns, the resistance to bringing lawyers' own moral convictions into the attorney-client dialogue is especially problematic given that such convictions are often part of that dialogue, whether acknowledged by the attorney or not. Whenever an attorney makes sense of her client's stated intentions, she utilizes an interpretive judgment that is shaped by the attorney's own moral experience, and this same experience, in turn, helps form whatever response the attorney offers to the client. . . . While the amorality of legal advice is a fiction, it is not a

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69. *Id.* (emphasis added); *see also* Tania Rostain, *The Company We Keep: Kronman's The Lost Lawyer and the Development of Moral Imagination in the Practice of Law*, 21 LAW & SOC. INQUIRY 1017, 1027–28 (1996) (comparing the "dominant instrumentalist conception" of legal counseling with Kronman's view that "[t]o counsel a client well, a lawyer must 'have some understanding of what the ends in question mean to the client and why they are important to him'—an understanding that requires the exercise of moral imagination") (quoting KRONMAN, *supra* note 67, at 133).

70. Against longstanding criticisms that professional codes have been too indeterminate to provide adequate guidance to lawyers in their ethical decision making, William H. Simon has powerfully defended the importance of discretion for lawyers in representing clients:

> Many widely held views of moral life and professional judgment include as a defining feature the willingness to wrestle with the difficulties of applying general norms to particular circumstances. For centuries much of the attraction and dignity of the professional life has been associated with the challenge of such complex judgments. Were the issues of legal ethics ever reduced to a matter of unreflective rule-following, many would cease to regard them as issues of ethics at all.

William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1131–32 (1988); *see also* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1329–30 (1995) ("When lawyers rely on inflexible rules instead of making judgments concerning the appropriateness of different courses of conduct in light of all the relevant interests, they risk losing the very independence that role-differentiation theory seeks to maximize.").

> harmless fiction because it facilitates the tendency of clients to equate legality with permissibility.[71]

Stated differently, there are at least two moral compasses at hand in every client-lawyer dialogue: whether they are being actively consulted depends on the decisions made by the two persons participating in the conversation. For the lawyer, this decision often starts with an "independent professional judgment" as to the kind of person he or she will be in the practice of law.[72]

2. Candid Advice

Following the exercise of "professional judgment," what does it mean then to "render candid advice"? At a minimum, it means the lawyer's legal assessment must be communicated to the client accurately, even if it is not one the lawyer believes the client wants to hear.[73] The legal assessment should include both a conclusion and, to the extent necessary and proper for the type of advice, an explanation of how the lawyer reached the conclusion.[74] But if Rule 2.1 contemplates nothing more than competence and accuracy in communicating such legal conclusions and explanations to the client, it would not add anything of substance to the norms of professional conduct already set out in other rules.[75] What further effect does the "candor" standard have?

First, rendering "candid advice" requires more than literal truthfulness (i.e., not misstating the law); rather, it reflects professional expectations of frankness, genuineness, and completeness.[76] Second, the text of Rule 2.1 following the "candid advice" provision suggests what the substance of a lawyer's frank, genuine, and complete advice might include: "In rendering advice, a lawyer may refer not only to law but to other considerations[,] such as moral, economic, social, and political

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71. ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 274 (2010).

72. *See* McGinniss, *supra* note 7, at 45 ("A deciding lawyer, confronting an ethically and morally challenging circumstance in the practice of law, should begin with a search of his own personhood and his will to become and remain a person of virtuous character.").

73. Michels, *supra* note 44, at 119–20; *see* MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (2013) (providing "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client").

74. Michels, *supra* note 44, at 120.

75. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013) (providing "[a] lawyer shall provide competent representation to a client"); *id.* R. 1.4(b) (providing "[a] lawyer shall explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); *id.* R. 8.4(c) (prohibiting a lawyer from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation").

76. *See, e.g.*, 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 23.2 (3d ed. 2009) (noting Rule 2.1 prohibits a lawyer from "play[ing] sycophant" to a client who wants to "have her own preconceptions confirmed rather than seek genuine advice").

factors, that may be relevant to the client's situation."[77] Although facially this standard seems purely discretionary, the comments to the Rule suggest there are circumstances when advice on non-legal considerations may be required:

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. . . . *Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.*
>
> A client may expressly or impliedly ask the lawyer for purely technical advice. . . . When such a request is made by a client inexperienced in legal matter, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.[78]

But regardless of whether there are any liability consequences for a lawyer who declines to render non-legal advice to a client, the lawyer may still have failed to meet the ideals of independence and candor in the advising role. This is especially true for a lawyer's advice on moral considerations, as "client representation is, at its heart, a moral activity."[79] Although rendering candid advice on moral considerations presents a host of challenges for the advising lawyer, including the risk of exerting undue influence or dominating the client's decision making, an engaged moral dialogue is ultimately a professional service to the client.[80] As Vischer notes, "allowing clients to make fully in-

77. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2013); *see also id.* Scope 16 (acknowledging the Rules do not "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules").

78. *Id.* R. 2.1 cmts. 2–3 (emphasis added). Pointing to these Rule comments, the drafting history of this Rule and its predecessor in the Model Code of Professional Responsibility, the law of fiduciary duty, and the rise of the "professionalism" movement as broadening the understanding of what it means to be "professional," Larry O. Natt Gantt II has offered a powerful argument that "despite the innocuous, permissive language in Rule 2.1, attorneys may be required to discuss nonlegal considerations with their clients in certain instances." Larry O. Natt Gantt, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 368, 371–84 (2005).

79. Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 984–85 (1995).

80. Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 270 (2006). Vischer offers the following words of caution and encouragement for lawyers giving "candid advice" on moral considerations:

> [A]ttorneys cannot take it upon themselves to self-translate outside the dialogue; they cannot unilaterally attempt to put their own moral claims into the language of the client's moral claims. Moral claims must be raised from the perspective of the claims' holder. By translating her own moral perspective apart from the client, the attorney purports to speak for the client on

formed decisions based on all aspects of their attorneys' counsel represents an enhancement of client autonomy, not a threat."[81]

Rendering candid advice to a client as to moral considerations is often neither an easy decision nor a simple undertaking. Having the willingness to do it generally requires the virtue of courage,[82] and understanding what should be said (or not be said) always requires the virtue of practical wisdom.[83] At its heart, rendering such advice also requires a lawyer to exercise a distinctive quality of moral independence, based on the personal character and professional identity the lawyer has formed before the conversation with the client ever takes place. As an exemplar of such a quality, this Article will now consider Socrates of Athens.

C. *The Trial of Socrates: Moral Independence in a Legal Context*

Socratic independence is moral independence.[84] It is constituted by "self-knowledge," which means "thinking for oneself and acting on one's own behalf."[85] It involves "being accountable for what one thinks, says and does, so that one is prepared to justify it, stand by it, and where one comes to see it as wrong to accept blame and punishment."[86] It is closely related to the virtue of integrity.[87] For Socrates, "self-knowledge" is attained through reflection "on the values to

> moral questions, presuming to share the client's moral perspective, a proposition that can only be confirmed through authentic moral engagement.
>
> But with mutual engagement impractical, the attorney must content herself with facilitating the client's engagement of the attorney's moral claims and perceptions. *She does so by presenting them with openness and candor, not in an effort to sway, but to inform.* It bears repeating that there is no viable choice whether or not to introduce the attorney's morality as it is already present and operative. There is, however, a choice between acknowledged morality and unwritten, unexamined morality.

Id. at 269–70 (footnote omitted) (emphasis added); *see also* Morgan & Tuttle, *supra* note 79, at 993 ("Full moral engagement depends on having an objective, external standard rather than solely a subjective ground for morality. The lawyer should relate to the client, not just as an integrated other but as someone whose integrity rests on moral grounds to which the client is also subject.").

81. Vischer, *supra* note 80, at 270; *see also* Larry O. Natt Gantt, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship*, 16 REGENT U. L. REV. 233, 239 (2004) [hereinafter Gantt, *Integration as Integrity*] ("Including moral considerations in [a lawyer's] candid advice will not disrupt client autonomy if it enhances the client's ability to make fully informed decisions."); *see generally* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 46 (1998) (describing an understanding of autonomy as "critical, self-conscious reflection on one's moral principles").

82. *See supra* note 16 and accompanying text.

83. *See supra* note 23 and accompanying text.

84. *See* DANA VILLA, SOCRATIC CITIZENSHIP 41 (2001) ("Socrates attests to the thinking individual's relative moral independence, to the right to think and judge for oneself.").

85. ILHAM DILMAN, MORALITY AND THE INNER LIFE: A STUDY IN PLATO'S *GORGIAS* 189 (1978).

86. *Id.*

which one has given one's heart and which determine the disposition of one's will."[88] He also believed that this process of self-examination is best undertaken through repeated engagements in moral dialogue.[89] Ultimately, Socrates' moral independence was put to the test by the laws of Athens, and his response is instructive for lawyers who will exercise their own moral independence today.

1. Apology

At the age of seventy, Socrates was "put on trial for his life."[90] In a recent biography, Paul Johnson has observed that "[t]he trial and death of Socrates constitute one of the great moral events of antiquity, indeed of history. . . ."[91] The *Apology* is an account of Socrates' spirited self-defense, both against formal legal charges—that he was "guilty of corrupting the minds of the young" and believed in a divinity other than the gods of the Athenian state[92]—and against longstanding attacks on his character.[93] A lifetime filled with dialogue, reflection, and growth in self-knowledge prepared Socrates to meet the challenge of his trial.

The forum and atmosphere were daunting enough. Socrates "had to speak, in the open, to a jury of 500 members, enlarged by a crowd of onlookers composed of his friends and the merely curious, those with

87. *See, e.g.*, George Kateb, *Socratic Integrity*, *in* NOMOS XL: INTEGRITY AND CONSCIENCE, YEARBOOK OF THE AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY 77, 77 (Ian Shapiro & Robert Adams eds., 1998) (describing one aspect of integrity as "a person's ability to remain steadfast to a commitment through thick and thin, overcoming internal and external obstacles, and devoting his or her whole life to that commitment or defining one's identity by reference to it"; "Integrity may . . . include standing alone for the sake of some commitment . . . and refusing to go along with others or be incorporated in their plans or deeds. Thus, one remains whole by refusing to be included in an objectionable larger whole."); McGinniss, *supra* note 7, at 46–48 (describing integrity as a "unifying virtue for the practice of law").

88. DILMAN, *supra* note 85, at 188.

89. *See* Christopher Rowe, *Self-Examination*, *in* THE CAMBRIDGE COMPANION TO SOCRATES 201, 206 (Donald R. Morrison ed., 2011) (stating that for Socrates, "[s]elf-examination is an extension of the examination of others, or vice-versa—and it will be *self*-examination just to the extent that it is an examination of how one stands, oneself, in relation to knowledge").

90. DANIEL R. COQUILLETTE, R. MICHAEL CASSIDY, & JUDITH A. MCMORROW, LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY 3 (2d ed. 2010).

91. JOHNSON, *supra* note 11, at 152.

92. *Apology*, *supra* note 15, at 10 (24b); *see* R. E. ALLEN, SOCRATES AND LEGAL OBLIGATION 18 (1980) (providing historical background on the indictment against Socrates, and opining that "the charges of irreligion . . . probably had a procedural rather than a substantive effect," allowing use of a "writ of impiety"; "The heart of the charge against him . . . was corrupting the youth.").

93. "[W]hat did my critics say in attacking my character? I must read out their affidavit, so to speak, as though they were my legal accusers: Socrates is guilty of criminal meddling, in that he inquires into things below the earth and in the sky, and makes the weaker argument defeat the stronger, and teaches others to follow his example." *Apology*, *supra* note 15, at 5 (19b-c).

nothing better to do."[94] At the same time, though believing in his innocence of the charges, Socrates "accepted his trial as a perfectly valid expression of Athenian law and democracy."[95] In his character, he was a "curious mixture of genuine humility and obstinate pride"; though "[h]e never made claims for himself as to knowledge or virtue," he deeply believed in justice—and he would therefore "not be unjust to himself" in his own defense.[96] Johnson explains Socrates' strategy of self-representation:

> His best strategy, and one that a professional advocate would certainly have recommended, was to bring forward a succession of witnesses of impeccable character to testify, first, to his observation of the outward forms of Athenian religion and, second, to his having instructed them in ways that had led to their strong affection for virtuous civic principles. This would not have been difficult to do. But Socrates would not do it. It was against his principles in that it gave a misleading view of what he had been trying to do in his life for the best part of half a century.[97]

Thus, in his steadfast commitment to his beliefs and principles, including the virtue of truthfulness, Socrates argues with passionate independence, even when it is contrary to the interest of self-preservation.[98] He will not present witnesses, as to either his character or his conduct. In representing himself, his tactical choice is to present to his friends and neighbors the very self of Socrates and to trust in justice. His defense, as his life, is a moral argument.

As his trial draws to a close, Socrates denies that there is any conflict between a person acting virtuously and avoiding harm.[99] Even when the votes of the jurors have been counted[100] and he has been deemed guilty of violating the law, he declines to argue for a mitigating sentence of imprisonment or exile: this is because who he is (a philosopher) and his calling (to philosophize)[101] are bound up with his independence in walking the streets of Athens and speaking to his neighbors.[102] He then proclaims courageously to the jury of his fellow

94. JOHNSON, *supra* note 11, at 157.
95. *Id.* at 156.
96. *Id.*
97. *Id.* at 159.
98. *See* TERENCE IRWIN, PLATO'S ETHICS 44–45 (1995).
99. *Id.* at 45.
100. The vote of the 501 jurors (*dikasts*) was 280 for conviction, and 221 against. COQUILLETTE ET AL., *supra* note 90, at 27.
101. At several times in the course of his defense, Socrates alludes to his divine calling to philosophize, and his commitment to obey the commands of God. *See, e.g.*, *Apology*, *supra* note 15, at 15 (29d) ("I owe greater obedience to God than to you, and so long as I draw breath and have my faculties, I shall never stop practicing philosophy and exhorting you and elucidating the truth for everyone I meet.").
102. *See id.* at 23 (37e-38a) (explaining that he could not "spend the rest of [his] life minding [his] own business," because "discussing goodness and all the other subjects about which you hear me talking and examining both myself and others is really the best thing a man can do, and . . . life without this sort of examination is not worth

citizens, as they are poised to sentence him to death, that "nothing can harm a good man either in life or after death."[103] As Terence Irwin has noted, for Socrates, "[i]f nothing can harm him, then his justice cannot harm him."[104]

2. Crito

Nearly a month after his trial and while in prison awaiting his execution, Socrates receives a visit from his friend Crito, from whom Plato's dialogue receives its name.[105] Crito seeks to persuade Socrates to cooperate with a plan to rescue him from prison before the sentence is carried out.[106] If the Socratic problem in the *Apology* is best described as one of argument (namely, "How I should I defend my life and my very self before a jury of my fellow citizens?"), his problem in the *Crito* is one of action.[107] Will Socrates escape, or will he obey the law, even if that means he will be put to death? In deciding upon his course of action, Socrates must examine his conscience, and he does this through two modes of dialogue: the first with Crito, and the second (in Crito's presence) between himself and a personified "Laws of Athens."[108]

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living"). Reflecting the importance freedom of movement held for Socrates, earlier in the trial, he offers an animated metaphor in describing his call of philosophical independence in relation to the state:

> It is literally true, even if it sounds rather comical, that God has specially appointed me to this city, as though it were a large thoroughbred horse which because of its great size is inclined to be lazy and needs the stimulation of some stinging fly. It seems to me that God has attached me to this city to perform the office of such a fly, and all day long I never cease to settle here, there, and everywhere, rousing, persuading, reproving every one of you.

Apology, *supra* note 15, at 16–17 (30e-31a). Martin Luther King Jr. alludes to this passage in his *Letter from a Birmingham Jail*, written to fellow Christian ministers skeptical of his morally independent decisions and actions in challenging segregation:

> Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could shake off the bondage of myths and half-truths and rise to the realm of creative analysis and objective appraisal, so must we see the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.

Martin Luther King Jr., *Letter from a Birmingham Jail*, CHRISTIAN CENTURY June 12, 1963, *reprinted in* ETHICS: THE ESSENTIAL WRITINGS 358, 361 (Gordon Marino ed., Modern Library 2010).

103. *Apology, supra* note 15, at 25 (41c-d).

104. IRWIN, *supra* note 98, at 45.

105. PLATO, *Crito*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 27, 27 (43a) (Edith Hamilton & Huntington Cairns eds., Hugh Tredennick trans., Princeton Univ. Press 1961) [hereinafter *Crito*].

106. *Id.* at 30–31 (45a-47a).

107. *See* A.D. WOOZLEY, LAW AND OBEDIENCE: THE ARGUMENTS OF PLATO'S *Crito* 6 (1979).

108. *See Crito*, *supra* note 105.

To persuade Socrates to escape, Crito "claims that it would be both harmful and unjust, and therefore shameful, for Socrates to stay in prison."[109] But Socrates, exercising moral independence, declines Crito's implied invitation to understand what is "just and unjust" by reference to the "opinion of the many,"[110] who would understand his reasons for fleeing an unjust verdict both for his own sake and his children's.[111] Socrates reaffirms the steadfast commitment to justice he expressed in the *Apology,* as well as his firm belief he cannot be harmed by acting justly.[112] A human being's foremost concern should be moral: what is truly important is not simply to live, but to "live well."[113] Socrates then declares that "living well, living finely, and living justly are the same."[114] As Terence Irwin has observed, "[t]his claim explains why the good person cannot be harmed; he cannot be harmed if he cannot be deprived of happiness, and if he lives justly he is happy."[115]

Socrates' independence in the *Crito* consists of his willingness to live, and die, with allegiance to the moral convictions and principles that made him Socrates. He believes injustice is always wrong, and just as much so when it involves retaliation for another injustice.[116] Thus, despite the personal injustice Athens has done to him under its laws, Socrates refuses to will an injustice in return and refuses his consent to Crito's plan to effect his escape.[117]

But notably, for Socrates, moral independence is not an expression of radical individualism.[118] Socrates exercises his independence, not only by acting in accordance with his conscience and in obedience to his understanding of God's will, but also by acting for the sake of his allegiance to Athens.[119] In the personified voice of the "Laws of Ath-

109. IRWIN, *supra* note 98, at 45; *see Crito*, *supra* note 105, at 30–31 (46a).

110. *Crito*, *supra* note 105, at 32 (47c-d).

111. *See id.* at 30 (45c-d).

112. IRWIN, *supra* note 98, at 45.

113. *Crito*, *supra* note 105, at 33 (48b3-6).

114. IRWIN, *supra* note 98, at 45 (citing *Crito* 48b8-9).

115. *See id.*; *see also* ALLEN, *supra* note 92, at 70 ("Whether or not Socrates should escape has nothing to do with what most people think, but solely with whether it is right or wrong, just or unjust. That question must be settled by *logoi*, arguments, accounts, reasoned conclusions.").

116. *See Crito*, *supra* note 105, at 34 (49b-d); *see also* JOHNSON, *supra* note 11, at 172–73 (observing that "[t]he governing principle of [Socrates'] life was that a wrong could never justify another wrong in response").

117. *See* JOHNSON, *supra* note 11, at 173 (stating that Socrates "thought his conviction was mistaken and his sentence unjust," but also believed that "to seek to evade it by bribery [of the jailer] and corruption would be an even greater wrong," being "greater in that he knew it to be unjust").

118. *See* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 964 n.4 (1987) [hereinafter Shaffer, *Radical Individualism*] (asserting that "Socrates' and Aristotle's ethics of character are as incompatible with the ethics of radical individualism as religious ethics").

119. *See* JOHNSON, *supra* note 11, at 172 (noting that for Socrates, "[o]bedience to God came before any law, however righteous," but that Socrates regarded this as

ens," Socrates asks himself a series of questions directed at the sources of his duty of allegiance and obedience.[120] These questions call to mind (1) Socrates' indebtedness to his country for protecting his ancestors, his parents, and himself;[121] (2) his implied agreement to abide by its rule of law, and the decisions of its tribunals, through his own decision to remain a citizen living within the country's borders;[122] and (3) the harm it would do to respect for the rule of law were Socrates to "commit this breach of faith and stain [his] conscience."[123] As Paul Johnson eloquently describes, Socrates was profoundly loyal to Athens, his homeland:

> He regarded Athens as the best place on earth to live, and it had always provided him with the perfect setting for his mission in life. He loved its people, with all their faults, its streets and trades, its public places. Its government was always imperfect, often grievously remiss, and sometimes monstrous. But it was his city, which he had fought for, and to which he belonged inextricably. Everyone, even or especially philosophers, had to accept the rule of law of the place where they lived.[124]

Thus, following a lifetime of studious self-examination and engaged moral dialogue seeking to know what virtue is and how to live virtuously, Socrates holds himself accountable for what he has learned, and for what he believes, by submitting himself to the most strenuous claims of conscience, loyalty, and justice.

3. Kierkegaard on Socrates

Søren Kierkegaard, philosophizing and writing in nineteenth-century Denmark, "perceived his own situation as strongly analogous to

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being a reason "merely to accept the consequences, even death, of obeying a higher law," rather than as a reason to "defy law").

120. *See Crito*, *supra* note 105, at 35–39 (50a-54d).

121. *Id.* at 35–36 (50c-51d).

122. *Id.* at 36–38 (51d-53a).

123. *Id.* at 38 (53a); *see also id.* at 35 (50a-b) ("Can you deny that by this act which you are contemplating you intend, so far as you have the power, to destroy us, the laws, and the whole state as well?"). As R. E. Allen has observed:

> [The Laws of Athens] allow that the particular verdict under which Socrates lies condemned may well be unjust, in that he is innocent of the charge of which he was found guilty. . . . But it will be found that [the implied] agreement [to abide by the rule of law and judicial decisions] is not used to provide an independent reason for refusing to escape. Rather, it establishes the authority of law over Socrates as a citizen. The wrongfulness of escape will be found to consist, not in breach of agreement, but in the fact that such breach implies injury to the legal order, the Laws of Athens, by denial of its authority. In short, the wrongfulness of escape derives from the primacy of justice.

ALLEN, *supra* note 92, at 75–76.

124. JOHNSON, *supra* note 11, at 172–73.

that of Socrates in ancient Greece."[125] He made Socrates a prominent figure in several of his major writings,[126] including his 1843 dissertation entitled *The Concept of Irony, with Continual Reference to Socrates*.[127] In this work, Kierkegaard offers an assessment of Socrates and the relation of his thought to the well-known injunction of the Oracle of Delphi to "know yourself":[128]

> It is customary to characterize Socrates' position also with the well-known phrase: . . . [Know yourself]. . . . Now it is certainly true that the phrase . . . can designate subjectivity in its fullness, inwardness in its utterly infinite wealth, but for Socrates this self-knowledge was not so copious; it actually contained nothing more than the separating, the singling out, of what later became the object of knowledge. The phrase 'know yourself' means: separate yourself from the other.[129]

Thus, Kierkegaard views Socratic "self-knowledge" as involving an element of ironic detachment, or "separation," exhibited in the dialogues when Socrates "placed individuals under his dialectical vacuum pump," and "pumped away the atmospheric air they were accustomed to breathing, and left them standing there."[130] In this early work, Kierkegaard portrays Socrates as a thoroughgoing ironist, not only when engaged in his customary dialogue with partners, but also when Socrates is on trial defending his own life.[131] But as C. Stephen Evans has observed, in subsequent works Kierkegaard portrays Socrates more three-dimensionally, "not merely as an ironist but as an ethicist using irony as his incognito."[132]

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125. C. STEPHEN EVANS, KIERKEGAARD: AN INTRODUCTION 39 (2009) [hereinafter EVANS, KIERKEGAARD: AN INTRODUCTION].

126. *See, e.g.*, SØREN KIERKEGAARD, PHILOSOPHICAL FRAGMENTS (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1985) (1844) [hereinafter KIERKEGAARD, PHILOSOPHICAL FRAGMENTS]; *see also* SØREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT TO PHILOSOPHICAL FRAGMENTS (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1992) (1846) [hereinafter KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT].

127. SØREN KIERKEGAARD, THE CONCEPT OF IRONY, WITH CONTINUAL REFERENCE TO SOCRATES (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1989) (1843) [hereinafter KIERKEGAARD, THE CONCEPT OF IRONY].

128. *See* PLATO, *Phaedrus*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 475, 478 (230a) (Edith Hamilton & Huntington Cairns eds., R. Hackforth trans., Princeton Univ. Press 1961) (Socrates: "I can't as yet 'know myself,' as the inscription at Delphi enjoins, and so long as that ignorance remains it seems to me ridiculous to inquire into extraneous matters.").

129. KIERKEGAARD, THE CONCEPT OF IRONY, *supra* note 127, at 177.

130. *Id.* at 178.

131. In *The Concept of Irony*, Kierkegaard goes so far as to assert that "[t]he whole *Apology* in its totality is an ironic work." *Id.* at 37. He suggests "most of the accusations boil down to a nothing—not to a nothing in the usual sense of the word, but to a nothing that Socrates simply passes off as the content of his life, which again is irony." *Id.* He describes Socrates' argument as "not really contain[ing] any defense at all but [as] in part a legpulling of his accusers and in part a genial chat with his judges." *Id.*

132. C. STEPHEN EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT: THE RELIGIOUS PHILOSOPHY OF JOHANNES CLIMACUS 193 (1999) [hereinafter EVANS,

As further developed in Kierkegaard's philosophy, "self-knowledge" does not truly "designate subjectivity *in its fullness*."[133] Instead, self-knowledge is only part of the process of *becoming* a self,[134] with the properly formed self being a synthesis of passion and reflection.[135] Becoming a self also involves *becoming* a "subject,"[136] and a person whose life expresses "subjectivity."[137] Becoming subjective is the "highest task assigned to a human being."[138] Kierkegaardian "subjectivity" requires a substantial degree of self-assertive moral independence, a willingness to commit to values[139] and principles forming the basis for one's existence, and then to take responsibility as a self by deciding and acting in accordance with those values and principles.[140] In Socrates, Kierkegaard found not only a classical precursor on the path to Christianity,[141] but also a paradigm for subjectivity for his

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KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT]; *see* KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT, *supra* note 126, at 503 (in the voice of pseudonym Johannes Climacus, expounding that an ethicist such as Socrates "uses irony as his incognito" and as "the unity of ethical passion," accentuating the first-personal demands of ethical requirements).

133. *See* KIERKEGAARD, THE CONCEPT OF IRONY, *supra* note 127, at 177 (emphasis added).

134. *See* RUDD, SELF, NARRATIVE, & VALUE, *supra* note 24, at 42 (observing that "Kierkegaardian selfhood . . . is not an all-or-nothing matter; one has more or less of it as one approaches or recedes from the ideal").

135. *See* Robert C. Roberts, *Existence, Emotion, and Virtue: Classical Themes in Kierkegaard*, *in* THE CAMBRIDGE COMPANION TO KIERKEGAARD 177, 182 (Alastair Hannay & Gordon D. Marino eds., 1998) ("[Kierkegaard's] basic position is that the mature self is a proper synthesis of passion and reflection. Passion without reflection is immature, unformed, chaotic, and childish 'immediacy,' and reflection without passion is . . . personal emptiness.").

136. *See* EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT, *supra* note 132, at 37 (stating for Kierkegaard, "[e]xistence is the process of becoming a subject").

137. Although he often used the terms "subjectivity" and "inwardness" somewhat interchangeably, *see id.* at 39, Kierkegaard also insisted that "[s]ubjectivity demands outward expression." *Id.* at 284.

138. KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT, *supra* note 126, at 129.

139. As Evans has noted, for Kierkegaard "[v]alues can only be recognized and actualized in subjectivity" (i.e., with passion). EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT, *supra* note 132, at 69. Nevertheless, "[t]he fact that values are only realized in and through passion does not entail that values are reducible to human passions" or "merely subjective preferences." *Id.* at 69–70. To believe so is to "ignore the possibility that human emotions and attitudes . . . in themselves could be warranted or unwarranted, profound or trivial, in tune with the nature of reality or out of tune, 'true' or 'false.'" *Id.* at 70 (citing C. S. Lewis).

140. RUDD, SELF, NARRATIVE, & VALUE, *supra* note 24, at 14 (observing that for Kierkegaard "what is ethically important about self-knowledge" is "its connection with the taking of responsibility for oneself"); EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT, *supra* note 132, at 38 (becoming "subjective" for Kierkegaard means "[o]ne must seize responsibility for one's own life by consciously recognizing who one is and choosing to become the person one should be").

141. SØREN KIERKEGAARD, THE SICKNESS UNTO DEATH: A CHRISTIAN PSYCHOLOGICAL EXPOSITION FOR UPBUILDING AND AWAKENING 87–96 (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1980) (1849) [hereinafter KIERKEGAARD, THE SICKNESS UNTO DEATH] (relating and contrasting Socratic concepts and

time, who lived with the passion and commitment[142] to seek after the truth to the best of his understanding, and then to courageously defend that truth.[143]

It is important to emphasize Kierkegaard insists that the properly formed self must be relational[144] and not isolated or solipsistic, and that the nature and quality of the self's commitments must withstand substantive moral scrutiny.[145] Anthony Rudd has recently described Kierkegaard's "account of the self" in Platonic terms, as reflecting a

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principles to those of Christianity); *cf.* JOHNSON, *supra* note 11, at 187–88 (explaining how Socrates' "notions of life and death, body and soul," and his example "gave clarity and power to the Greek world's reception of Christianity and so made it more fruitful").

142. *See* Edward F. Mooney, *Introduction: A Socratic and Christian Care for the Self*, *in* ETHICS, LOVE, AND FAITH IN KIERKEGAARD 1, 6 (Edward F. Mooney ed., 2008) (examining Kierkegaard's affinity with Socrates, whom he saw as a "filter against thoughtlessness and a paragon of those passions necessary for a fully moral and religious life").

143. The Socratic principle, as Kierkegaard explains in the voice of pseudonym Johannes Climacus, is that "subjectivity is truth." *See* KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT, *supra* note 126, at 204 ("The thesis that subjectivity . . . is truth contains the Socratic wisdom, the underlying merit of which is to have paid attention to the essential meaning of existing, of the knower's being an existing person. That is why, in his ignorance, Socrates was in the truth in the highest sense within paganism."); *see also* EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT, *supra* note 132, at 115–35 (discussing "Truth and Subjectivity"). The Christian principle, in contrast, is that "subjectivity is untruth." As Evans explains:

> The thesis that subjectivity is the truth lies within the sphere of immanence [rather than transcendence]. . . . It is a thesis that lies within the realm mastered by Socrates. . . . Having explained this thesis, Climacus then goes on to ask if there is a view that is distinctively different, a view that requires still more inwardness. This he finds in the thesis that subjectivity is untruth, the assumption that the individual is *not* capable of doing the truth or being in the truth, but must acquire the capability. . . . The Christian principle that subjectivity is untruth, when combined with the claim that subjectivity is the truth, provides a 'higher' view, Climacus thinks. But it is higher because it affords a deeper *subjectivity*, so in a sense it takes over and deepens the immanent principle.

EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT, *supra* note 132, at 133–34 (citing KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT, *supra* note 126); *see also* RUDD, LIMITS OF THE ETHICAL, *supra* note 7, at 159 (explaining that although "Kierkegaard insists that truth is subjectivity in order to turn us away from the wholly misleading attitude of objectivism," he also insists that "subjectivity is untruth"; "[A]s a fallen creature, a sinner, wholly alienated from God, I am unable to relate to Him even through the most passionate subjectivity, for there is, from the start, a corruption, an 'untruth' within me.") (citing KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT, *supra* note 126, at 185).

144. RUDD, SELF, NARRATIVE, & VALUE, *supra* note 24, at 43 ("Kierkegaard claims that it is only by properly relating to something other than itself that the self can relate properly to itself."). Kierkegaard also states that the self will be in "despair," which is the "sickness unto death," unless it properly relates itself to "that which established the entire relation" (i.e., God). KIERKEGAARD, THE SICKNESS UNTO DEATH, *supra* note 141, at 13; *see also* RUDD, SELF, NARRATIVE, & VALUE, *supra* note 24, at 46 (noting for Kierkegaard this "need for God" is "ultimately for God as understood in Christianity").

145. RUDD, SELF, NARRATIVE, & VALUE, *supra* note 24, at 46.

teleological commitment to relate one's self to "the Good."[146] Rudd offers a broad description of "the Good" as "an objective, normative standard (or perhaps coherent set of standards) to which we need to relate in order to achieve harmony within ourselves."[147] As Rudd acknowledges, this is a "more metaphysically modest understanding of the Good than Kierkegaard's own ultimate one," which is grounded in Christianity.[148] Rudd then posits that for Kierkegaard, "to give a shape to one's life" a properly formed self not only must commit to a "guiding sense of the Good" and to "authoritative criteria" for making choices, but also must "commit to projects and relationships."[149]

How might these principles offer a moral vision and inspiration for the advising lawyer? As a starting point, one might say that the Kierkegaardian lawyer is a subject: an independent person who is purposeful (*telos*) and relational, and one who has formed a good character and a well-developed and coherent personal and professional identity. As a moral counselor, the Kierkegaardian lawyer will relate to the client not only objectively (through legal analysis detached from what it means to be an existing person), but also subjectively—i.e., as one subject to another.[150]

III. Lawyers as Moral Counselors

This Article has offered a legal account of lawyer "independence" and "candor" in the advising of clients under Rule 2.1, and an ethical and moral[151] account of "independence" from the perspective of Socrates (and his philosophical descendant Kierkegaard). Now the stage is set for examining how a twenty-first-century lawyer should proceed in fulfilling not merely the requirements, but the ideals of service in the advising role. In particular, what moral obligations—and freedoms—exist for a lawyer when serving clients as an advisor, and how

146. *Id.* at 45.

147. *Id.* at 46.

148. *Id.* As Rudd explains, "Kierkegaard . . . follows Plato in seeing the Good as 'Eternal' and distinct from particular goods," and that "following a long tradition of Christian (and, for that matter, Jewish and Islamic) Platonism," he goes on to identify the "Good with God." Rudd, Self, Narrative, & Value, *supra* note 24, at 45; *see also* Evans, Kierkegaard's Fragments and Postscript, *supra* note 132, at 134–35 (expressing his view that "Climacus' whole discussion of truth and subjectivity is implicitly a commentary on John 14:6: 'I am the way, the truth, and the life.' There Jesus did not merely claim to bring men the truth, but to *be* the truth.").

149. Rudd notes that Kierkegaard insists "very strongly that what commitment to the Good means concretely will differ for each individual." Rudd, Self, Narrative, & Value, *supra* note 24, at 47 (citing Søren Kierkegaard, Upbuilding Discourses in Various Spirits 93–94, 122–48 (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1993) (1843)). He also emphasizes that "for Kierkegaard as for Plato, one makes [a] commitment to the Good just because it is good; not because it is a means to one's ends." *Id.*

150. *See infra* Part III.C ("The Lawyer as Trustworthy Neighbor").

151. *See* Shaffer, *Radical Individualism*, *supra* note 118, at 965 ("Ethics properly defined is thinking about morals.").

does a lawyer's "independence" promote human flourishing in the client-lawyer relationship? This examination will proceed by first examining legal ethics' "standard conception of the lawyer's role"; by then considering the "friendship" analogy for client-lawyer relations, as seen through the eyes of several legal ethics scholars; and finally, by proposing the ideal of the "trustworthy neighbor" for a lawyer serving clients as an advisor, especially in the context of moral issues relating to the representation.

A. *The Standard Conception of the Lawyer's Role*

According to legal ethics' "standard conception of the lawyer's role," the relationship between lawyer and client is governed by three basic principles: (1) partisanship, (2) neutrality, and (3) nonaccountability.[152] As Tim Dare has explained, the principle of partisanship "specifies that the lawyer's sole allegiance is to the client. Within, but all the way up to, the limits of the law, the lawyer is committed to the aggressive and single-minded pursuit of the client's objectives."[153] The principle of neutrality "states that the lawyer must remain professionally neutral with respect to the moral merits of the client or the client's objectives."[154] Finally, as previously described,[155] the principle of nonaccountability—which Dare calls "the core idea" of the standard conception—"purports to exempt lawyers from the normal moral practice of judging someone to have acted immorally if they have knowingly and deliberately helped another to act immorally."[156]

As applied to the advising role, the standard conception denotes a lawyer (1) has a positive duty to provide information and explanations to the client about all legally available means to promote their interests; (2) after providing such advice, has a positive duty to follow through on the client's directions to pursue ends or use means the lawyer believes immoral, provided they are lawful; and (3) having done so, the lawyer's actions are not to be judged by the immorality of either the means or the ends, as a non-lawyer's would be.[157] Under this role-differentiated[158] approach to lawyering, William H. Simon

152. TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 5–11 (2009); *see also* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 7–9 (1998) (calling the standard conception "the Dominant View," the "core principle [of which] is this: the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim").

153. DARE, *supra* note 152, at 5.

154. *Id.* at 8.

155. *See supra* notes 38–41 and accompanying text.

156. DARE, *supra* note 152, at 10.

157. *Id.* at 12.

158. *Id.* Dare emphasizes that "[t]his conception of the lawyer's role relies upon a broader picture of the structure of ethical obligation, according to which such obligation may be 'role-differentiated.'" *Id.* Because, "the idea goes, [ethical obligations] attach primarily to social roles," a person acting in the social role of "lawyer" is "quite

has observed "the only ethical duty distinctive to the lawyer's role is loyalty to the client," and "[l]egal ethics impose no responsibility to third parties or the public different from that of the minimal compliance with the law that is required of everyone."[159]

Over the course of several decades, criticism of the standard conception has been both steady and emphatic.[160] David Luban, who advocates an alternative conception he describes as "moral activism,"[161] has said "[t]he central question raised by the standard conception is why lawyers get a free pass from morality in a pastime that is far from victimless."[162] Moreover, he notes that because lawyers do their work "through speech and persuasion," their "moral faculties are fully engaged in a way that seems uniquely hard to square with non-accountability."[163] Luban and others have closely studied the "adversary system excuse" generally presented in support of the principles of partisanship and neutrality, and found it wanting.[164] But it has proved

literally subject to different moral standards" than others who act in different roles. *Id.* at 12–13; *see also* William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987 (2010).

159. SIMON, *supra* note 152, at 8. Simon contrasts "the Dominant View" with "the Public Interest View," the basic principle of which is that "law should be applied in accordance with its purposes, and litigation should be conducted so as to promote informed resolution on the substantive merits." *Id.* As an alternative to either of these approaches, he proposes what he calls "the Contextual View," the basic principle of which is that "the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice." *Id.* at 9. *But cf.* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 44–48 (2010) (criticizing Simon's "Contextual View" as essentially a "moral critique" of the standard conception, and advocating his own variation as a legal ethics obligating a lawyer "to act on the basis of clients' legal entitlements, not her clients' interests or her own views about what substantive justice requires"); William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709 (2012) (responding to Wendel's critique); W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727 (2012) (responding to Simon).

160. *Cf.* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1543 (1984) (acknowledging the force of the critique of the standard conception, but insisting it is "really only one, and never a completely dominant, strand of thought in a vague and sometimes contradictory field").

161. LUBAN, *supra* note 55, at 11–12 (declaring that lawyers cannot avoid moral accountability and, thus, should accept moral responsibility for their practice of law). *But cf.* Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 394–95 (1992) ("[T]he recognition that the lawyer's loyalty obligation has moral weight is important," as it "suggests, for example, that David Luban creates a false dichotomy when he asserts that moral obligations take precedence over professional obligations. Luban fails to recognize that strictly professional obligations can entail moral obligations, particularly the moral obligation of loyal service to the client.").

162. David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 674–75 (2012) (book review).

163. *Id.* at 675 (citing Postema, *supra* note 65, at 73, 76; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 14 (1975–1976)).

164. *See, e.g.*, David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 83–118 (David Luban ed., 1983) (introducing the phrase "adversary system excuse" and explaining its insufficiency as a moral justification for lawyer conduct); SIMON, *supra* note 152, at 130–44 (criticizing

even more difficult to identify and defend alternatives to the standard conception that are both theoretically sound and practically feasible.[165]

The standard conception of the lawyer's role has significantly impacted scholarly discussions of models for the advising and counseling of clients.[166] Among those generally advocated today,[167] the one most closely aligned with the standard conception is the traditional client-counseling model known as "client-centered representation."[168] Emanating from "a belief in the autonomy, intelligence, dignity, and basic morality of the individual client," its advocates have argued these client attributes are best promoted if the lawyer "maintain[s] an appearance of neutrality and refrain[s] from providing direct advice."[169]

In its early versions (i.e., from the 1970s through the 1990s), the "client-centered" model typically involved several elements, including lawyers (1) helping to "identify problems from a client's perspective";

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the adversary system excuse as inadequate); *see also* LUBAN, *supra* note 55, at 19–64 (revising his 1983 essay).

165. *See, e.g.*, Postema, *supra* note 65, at 81–83 (reconceiving the lawyer's role as a "recourse role," such that it has built into it the recourse of breaking role when required by other moral principles); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 5 (2008) (arguing that the virtue of "fidelity," distinct from client loyalty insofar as it "involves more than merely partisan partiality in favor of clients over others," is an attribute that offers lawyers "their best hope for ethical vindication of their professional lives"); *cf.* Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 6–7 (2003) (contending the lawyer's role is founded in notions of service to the client, with moral neutrality as to the client's attributes, rather than identification with the client).

166. *See, e.g.*, Morgan & Tuttle, *supra* note 79, at 986–98 (contrasting "two competing paradigms to describe the moral activity of legal representation that we call 'the amoral instrument' and 'the ethical counselor,'" with the former paradigm being based on the standard conception of the lawyer's advising role).

167. A good example of a longstanding but no longer defended approach is the "authoritarian model," which is premised on the following assumptions: (1) lawyers "give adequate and effective service" and "are able to be disinterested and make objective decisions"; (2) "[t]he solutions to legal problems are primarily technical," and "[o]rdinarily, there is a correct solution to a legal problem"; and (3) "[l]awyers are experts in the technical information that is needed to arrive at the correct conclusion." ROBERT F. COCHRAN, JR., JOHN M.A. DIPPA, & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 2–3 (2d ed. 2006) (citing DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 2, 169 (1974)) [hereinafter COCHRAN ET AL., A COLLABORATIVE APPROACH]. Although some lawyers do engage in such "authoritarian" advising, *see id*. at 2, client-counseling scholars have generally rejected it as a model. *See, e.g.*, *id.* at 3–4 (arguing the "authoritarian" approach is inconsistent with "client dignity" and the value and benefits of "client control," including the "opportunity to be good, to make moral choices, and to grow in moral understanding").

168. *See generally* DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977) (coining the phrase and introducing it as a model). The Binder and Price version of the "client-centered" approach was updated in 1991. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991).

169. COCHRAN ET AL., A COLLABORATIVE APPROACH, *supra* note 167, at 5 (quoting BINDER & PRICE, *supra* note 168).

(2) actively involving the client "in the process of exploring potential solutions" and identifying "the likely consequences to the client of each option"; (3) "expand[ing] their view of the client's 'case' to include nonlegal aspects"; and (4) "accept[ing] the client's values and giv[ing] advice based on them."[170] Prominent advocates for this approach argued that "[b]ecause client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to *provide a client with maximum satisfaction*."[171] This last point of emphasis has made the "client-centered" model susceptible to criticism as encouraging lawyers to "steer clients toward self-centered decision making," focusing on "consequences to the client" to the detriment of considering consequences "to all people that might be affected by the client's decision."[172] Moreover, the emphasis on lawyer neutrality in providing advice has been criticized as an overcorrection for the shortcomings of the "authoritarian" approach to client counseling.[173]

Over the course of the last decade, Katherine R. Kruse has written several articles defending and refining various aspects of "client-centered representation," especially in the advising role.[174] Significantly, she has defended the model against charges that it promotes client selfishness by arguing a client's "interests" should be understood broadly by the lawyer to include the consequences client decisions may have on others whose well-being is valued by the client.[175]

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170. *Id.* at 4–5 (citing BINDER & PRICE, *supra* note 168).

171. *Id.* at 5 (quoting BINDER & PRICE, *supra* note 168, at 261) (emphasis in original).

172. *Id.* at 5. In addition, in its heavy focus on consequences and maximizing satisfaction, the moral philosophy underlying the "client-centered" counseling model is rooted in utilitarianism. *Id.* at 174 (noting that "[d]ecision making under the client-centered model is a matter of cost-benefit analysis," and considers only "Consequences *to the Client*," while "ignoring the importance of other people"); *see also* McGinniss, *supra* note 7, at 33 (discussing consequentialism and utilitarianism as approaches to legal ethics).

173. *See* COCHRAN ET AL., A COLLABORATIVE APPROACH, *supra* note 167, at 5; *see also supra* note 167 (describing the "authoritarian" approach to client counseling).

174. *See* Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 586–94 (2011) [hereinafter Kruse, *Engaged Client-Centered Representation*]; Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 127–34 (2010) [hereinafter Kruse, *Beyond Cardboard Clients*]; *see also* Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 391, 411–21 (2005) [hereinafter Kruse, *Challenge of Moral Pluralism*] (arguing "the traditional model"—i.e., the standard conception of client-lawyer relations—and "client-centered lawyering" are better suited than alternative "social justice" models to address the challenges of a morally pluralistic society).

175. *See* Kruse, *Engaged Client-Centered Representation*, *supra* note 174, at 588 (describing "engaged client-centered representation" as "a process of value clarification that includes techniques of active listening and probing beneath the surface of a client's stated wishes to ensure that what the client says he wants is consistent with the client's other values," such as "relationships with others"); Kruse, *Beyond Cardboard Clients*, *supra* note 174, at 132–33 ("Legal interest-based counseling, however, serves

Kruse's account of client-centered representation acknowledges that clients "do not arrive with static and pre-determined objectives to which the lawyers can simply defer."[176] She further recognizes that these objectives may change in the course of the representation, shaped by clients' "evolving desires about what they want"[177] as well as "the information about the law and available legal options that their lawyers explain to them."[178] Nevertheless, Kruse expressly disapproves of any "moral give-and-take" between lawyers and clients that seeks to do more than help clients clarify and articulate their *own* values in the context of the legal situation.[179] Under her approach, lawyers engage in moral advising as a matter of process, and should refrain from acting out of concern for their clients' character changing for the better or worse as a result of the legal situation.[180]

In her writings, Kruse has strongly criticized what she calls "social justice" models of client-lawyer relations, in which lawyers are variously conceived of (and their ethical duties explained in light of) their statuses as "moral agents,"[181] "jurisprudents,"[182] or "friends."[183] One element these conceptions have in common, Kruse observes, is an endorsement of a more positive and proactive role for the lawyer's moral values when representing clients.[184] This Article will focus on the third of these conceptions—the lawyer as "friend"—as a foundation for suggesting another choice of moral ideal—the lawyer as "trustworthy neighbor."

B. *The Friendship Analogy for Client-Lawyer Relations*

In recent decades, scholars have discerned analogous relationships between lawyers' duties to clients and the obligations of one friend to

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the actualization of the client's life goals only indirectly. Legal interests are not good in themselves; they are merely the channels by which clients can use the law to pursue and protect what they value in life."). Kruse makes a critical distinction between the "legal objectification" of clients (referring to lawyers' tendency to "issue-spot" their clients as they would the facts on a law school exam), and a "three-dimensional" view of the client as a whole person, with the lawyer "helping clients articulate and actualize their values through the law." *Id.* at 103.

176. Kruse, *Engaged Client-Centered Representation*, *supra* note 174, at 587.

177. *Id.* (quoting STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 7 (2009)).

178. *Id.* (citing ELLMANN ET AL., *supra* note 177, at 6–7, 23).

179. *See id.* at 589.

180. *See id.* Kruse does encourage lawyers to "prob[e] beneath the surface of the client's stated wishes to ensure that what the client says he wants is consistent with the client's other values and to ensure that the decisions made by the client in the moment will stand the test of time as the client's situation changes." Kruse, *Engaged Client-Centered Representation*, *supra* note 174, at 588.

181. *See* Kruse, *Challenge of Moral Pluralism*, *supra* note 174, at 421–22 (discussing Luban).

182. *See id.* at 421, 426–33 (discussing Simon).

183. *Id.* at 421, 433–40; *see infra* Part III.B (discussing the friendship analogy as employed in the work of Fried, Kronman, Shaffer, and Cochran).

184. Kruse, *Challenge of Moral Pluralism*, *supra* note 174, at 421.

another. This friendship analogy has been relied upon for a variety of purposes, such as seeking to resolve the ethical tensions for lawyers existing under the standard conception of the lawyer's role; guiding lawyers in giving advice to clients; or criticizing the morality of the standard conception.

1. Fried and Kronman

"Can a good lawyer be a good person?"[185] In a much-discussed 1976 article[186] and in subsequent scholarship,[187] Charles Fried has posed this fundamental ethical question[188] to set the stage for his vigorous defense of the "moral status of the traditional conception of the professional."[189] He answers the question "yes" by analogizing client-lawyer relations to friendship.[190] In particular, Fried describes the lawyer as "a friend [to the client] in regard to the legal system," who "enters into a personal relation" with the client and not only acts in the client's interests, but also "adopts [those interests] as his own."[191] In doing so, the lawyer accepts an obligation to ensure "the client's autonomy within the law,"[192] which is a morally worthy endeavor within our "generally just and decent" legal order.[193]

According to Fried, when acting in legal friendship, the lawyer "may work the system for his client even if the system then works injustice."[194] Provided the lawyer does not "engage his own person in doing personal harm to another" (e.g., by lying, cheating, humiliating, or similarly abusive behavior), Fried asserts the lawyer is not morally culpable for any wrongs done to others by the client either directly or through the legal system as used to advantage by the client.[195] Fried sees the moral independence of lawyers as being reflected by their

185. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976) [hereinafter Fried, *The Lawyer as Friend*].

186. *Id.*

187. CHARLES FRIED, RIGHT AND WRONG 189–93 (1978) [hereinafter FRIED, RIGHT AND WRONG] (chapter entitled "Doing Harm in a Justifiable Role").

188. *See* Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 312 n.5 (1990) ("This, of course, is the question that is truly at the heart of the moral inquiry into the ethics of lawyers."); *see also* Thomas L. Shaffer, *Christian Lawyer Stories and American Legal Ethics*, 33 MERCER L. REV. 877, 880 (1982) (considering the good lawyer/good person question through an analysis of the character of Atticus Finch in the screenplay of the 1962 film *To Kill a Mockingbird*); McGinniss, *supra* note 7, at 24–25.

189. Fried, *The Lawyer as Friend*, *supra* note 185, at 1065.

190. *Id.* at 1071.

191. *Id.*; *see also* FRIED, RIGHT AND WRONG, *supra* note 187, at 180 ("I believe the analogy to friendship is illuminating because, as in the case of friendship, an ultimate legal and moral discretion to enter into these relations and show loyalty within them must be allowed.").

192. Fried, *The Lawyer as Friend*, *supra* note 185, at 1073.

193. FRIED, RIGHT AND WRONG, *supra* note 187, at 192–93.

194. *Id.*

195. Fried, *The Lawyer as Friend*, *supra* note 185, at 1082–86.

freedoms in the selection of practice and of clients: "The lawyer's liberty—moral liberty—to take up what kind of practice he chooses and to take up or decline what clients he will is an aspect of the moral liberty of self to enter into personal relations freely."[196] With regard to lawyers in the advising role, even though Fried adheres to the principle of nonaccountability,[197] he insists lawyers may (and should) freely counsel clients about moral issues relating to the representation:

> [I]t is no part of my argument to hold that a lawyer must assume that the client is not a decent, moral person, has no desire to fulfill his moral obligations, and is asking only what is the minimum that he must do to stay within the law. On the contrary, to assume this about anyone is itself a form of immorality because it is a form of disrespect between persons. . . . It would be absurd to contend that the lawyer must abstain from giving advice that takes account of the client's moral duties and his presumed desire to fulfill them. Indeed, in these situations the lawyer experiences the very special satisfaction of assisting the client not only to realize his autonomy within the law, but also to realize his status as a moral being.[198]

In *The Lost Lawyer*,[199] Anthony Kronman develops his own version of a friendship analogy for client-lawyer relations, but with substantial differences from Fried as to both the meaning and the purpose of the analogy.[200] Kronman contends that a lawyer's ability to combine sympathy and detachment as an advisor is analogous to friendship, as friends "often exercise a large degree of independent judgment in assessing each other's interests," and "[w]hat makes such independence possible is the ability of friends to exercise greater detachment when reflecting on each other's needs than they are often able to achieve when reflecting on their own."[201] According to Kronman, the good

196. *Id.* at 1078. The friendship analogy serves as support for Fried's client selection thesis because there is a "picture of purely discretionary choice implicit in the notion of friendship." *Id.* According to Fried, "the individual lawyer does a morally worthy thing whomever he serves and, moreover, is bound to follow through once he has begun to serve." *Id.*

197. *See supra* notes 36–41, 156 and accompanying text.

198. Fried, *The Lawyer as Friend*, *supra* note 185, at 1088.

199. KRONMAN, *supra* note 67; *see also* discussion *supra* note 68 and accompanying text (addressing Kronman's view of sympathy and detachment in the exercise of professional judgment).

200. KRONMAN, *supra* note 67, at 131–32.

201. *Id.* In elaborating on what it means for a lawyer to combine "sympathy and detachment," Kronman points to Aristotle's ethics:

> To put the point in Aristotelian terms, friendship exists in a mean between sympathy and detachment, and requires their combination in third-personal deliberation. The same is true of the lawyer's relation to impetuous clients, and this is why in such cases his role may be properly analogized to that of a friend (not, as some have claimed [citing Fried] because he is prepared to stand by his client no matter what, uncritically making the client's cause his own).

Id. at 132.

lawyer will deliberate well, exhibiting the virtue of "practical wisdom" in advising clients about the ends to be achieved in the representation and the means by which they are to be achieved:

> In all these cases—of impetuosity, conflict, vagueness, and self-doubt—lawyers must regularly do something that the narrow view ignores. They must deliberate, for and with their clients, about the wisdom of their clients' ends, as opposed simply to supplying them with the legal means for realizing their desires. . . . To perform this part of his job competently, a lawyer needs more than technical knowledge. He needs practical wisdom as well. And to have this he must possess certain traits of character, for it is in these that practical wisdom consists.[202]

Fried and Kronman have each acknowledged the shortcomings of the friendship analogy for client-lawyer relations, including the lack of reciprocity as to duties and interests and the typical arrangement for compensation for legal services to clients.[203] Moreover, Fried's more extensive reliance on the analogy as moral justification for a lawyer's actions on behalf of clients has elicited substantial criticism, not only as to the reasonableness of the analogy,[204] but also as to the harms to other persons[205] and to society[206] it may be construed to justify.

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202. *Id.* at 133–34. A lawyer's cultivation and exercise of the virtue of practical wisdom is a professional goal that Kronman calls the "lawyer-statesman" ideal. *Id.* at 16–17 ("The ideal of the lawyer-statesman was an ideal of character. This meant that as one moved toward it, one became not just an accomplished technician but a distinctive and estimable type of human being—a person of practical wisdom."). Robert F. Cochran, Jr. has criticized Kronman's "notion of practical wisdom" because, unlike Aristotle, "he isolates [it] from the other virtues." Robert F. Cochran, Jr., *Lawyers and Virtues*, 71 NOTRE DAME L. REV. 707, 718 (1996) (book review). As Cochran points out, in Aristotle's virtue ethics, "practical wisdom is the ability to put moral virtues to good use." *Id.*

203. FRIED, RIGHT AND WRONG, *supra* note 187, at 179 ("Professional relations are one-sided in ways that friendship should not be, since the client owes no reciprocal loyalty to his doctor or lawyer."); KRONMAN, *supra* note 67, at 132 ("The lawyer-client relation . . . is not reciprocal—the client is not expected to take an interest in his lawyer's affairs, as the lawyer is in his—nor do friends generally pay each other for their advice.").

204. *See, e.g.*, Edward A. Dauer & Arthur Allen Leff, *Correspondence, The Lawyer as Friend*, 86 YALE L.J. 573, 579 (1977) (suggesting that, in Fried's analysis, "[a] lawyer is a person who . . . 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'?"); GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 180 (1993) ("Fried forgets the elements of time and interwoven identity that bind friends together and makes friendship plausible.").

205. For example, Michael K. McChrystal has argued "[t]he celebration of autonomy suggested by [Fried's] argument reflects a moral priority that is unjustifiable, particularly when it permits one to willfully harm another for purely selfish reasons by conduct that Fried asserts is itself morally wrongful." McChrystal, *supra* note 161, at 394. Although McChrystal does "allow that personal autonomy within the limits of the law is a positive moral value," he emphasizes that this allowance "is a far cry from assigning it the highest moral value, more valuable even than life itself." *Id.* "[D]espite its shortcomings," he concludes, "Fried's analysis . . . is valuable in identi-

2. Shaffer and Cochran

Over the past several decades, Thomas L. Shaffer[207] and Robert F. Cochran, Jr.[208] have published joint[209] and individual scholarship in which they have sought to deepen legal ethics' understanding of the meaning of "relationship" between client and lawyer. In doing so, they have relied extensively on the traditional Aristotelian concept of friendship as being a collaboration in the good.[210] In the 2009 second edition of their highly influential law school textbook *Lawyers, Clients, and Moral Responsibility*, Shaffer and Cochran explain the framework for the ideals they are promoting, as well as the framework's limitations as applied to contemporary law practice:

> The model we advance for the lawyer who is concerned with the goodness of the client is the lawyer as friend. . . . We are not suggesting that the lawyer can become a friend to every client. We use friendship as a metaphor. . . . Our argument is that the lawyer should raise moral issues with the client in the way that good friends deal with moral issues, neither ignoring them nor imposing their values on the friend, but raising them as matters for discussion. . . . In [twentieth-century Jewish philosopher] Martin Buber's terms, a friend treats the other as a "thou" rather than an "it."[211]

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fying the client's dignity and autonomy under the law as one source of the lawyer's moral obligation to be loyal." *Id.*

206. FLETCHER, *supra* note 204, at 180 (criticizing what he describes as Fried's "model of voluntary contract" for client selection and relations, and asserting "if lawyers are merely selling their services, they have no more claim to be a calling or profession than do butchers, bakers, and candlestick makers").

207. *See, e.g.*, Thomas L. Shaffer, *A Lesson from Trollope for Counselors at Law*, 35 WASH. & LEE L. REV. 727, 733–35 (1978) (introducing the friendship analogy); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 329–30 (1987) [hereinafter Shaffer, *Legal Ethics and the Good Client*]; Thomas L. Shaffer, *"Technical" Defenses: Ethics, Morals, and the Lawyer as Friend*, 14 CLINICAL L. REV. 337, 337, 350–53 (2007) [hereinafter Shaffer, *"Technical" Defenses*].

208. *See, e.g.*, Robert F. Cochran, Jr., *Enlightenment Liberalism, Lawyers, and the Future of Lawyer-Client Relations*, 33 CAMPBELL L. REV. 685, 690–91 (2011) [hereinafter Cochran, *The Future of Lawyer-Client Relations*]; Robert F. Cochran, Jr., *The Rule of Law(yers)*, 65 MO. L. REV. 571, 593–94 (2000) (book review); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 333–34 (1998); *see also* COCHRAN ET AL., A COLLABORATIVE APPROACH, *supra* note 165, at 8.

209. *See, e.g.*, THOMAS L. SHAFFER, & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (2d ed. 2009) [hereinafter SHAFFER & COCHRAN, MORAL RESPONSIBILITY].

210. *See, e.g.*, *id.* at 46–47; *see also* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 115 (3d ed. 2008) (contrasting the "traditional idea of friendship," in which the friends' "useful[ness] to one another" and shared "commitment to the good" are prominent, with our contemporary emphasis on friends being persons who "enjoy one another's company").

211. SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 46–47; *see* MARTIN BUBER, I AND THOU 15 (Ronald Gregor Smith trans., 2d ed., Charles Scribner's Sons 1958) (1923) (explaining the nature of an "I-Thou" relationship is "mutual," because "[m]y *Thou* affects me, as I affect it"). As Shaffer has acknowledged, however, Buber "despaired of *professional* relationships. He thought it was all

Shaffer has long advocated an "ethics of care" for lawyers as their basic orientation in "talking with a client about what is to be done."[212] According to Shaffer, an ethics of care "denies that lawyer and client are moral islands," but instead admits that "the law-office conversation is moral and that those who speak to one another in law offices are interdependent and at risk."[213] It also "aspires to moral discourse as an exercise of love," and "make[s] conscience" relevant as the lawyer and client "influence one another."[214]

Cochran, writing with others[215] as well as in his individually authored work,[216] has relied upon elements of the friendship analogy in advocating a "collaborative approach" to advising clients.[217] The goal of this approach is for the client to "control decisions," but for the lawyer to "structure the process and provide advice in a manner that is likely to yield wise decisions."[218] Directing attention to Kronman's friendship analogy in *The Lost Lawyer* (i.e., balancing sympathy and detachment as a friend might),[219] Cochran highlights the importance of "practical wisdom" in advising clients, and further emphasizes that the collaborative counseling endeavor is "not merely a matter of *the lawyer* exercising practical reason," but also "a matter of enabling *the client* to exercise practical reason."[220]

Shaffer and Cochran have acknowledged that among the reasons "moral discourse may be difficult is the potential difference in moral values between lawyer and client," even when they may adhere to similar religious traditions or share a common cultural background.[221]

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but impossible for a professional in the modern world to look at his client and see a Thou rather than an It," because "the sides are too unequal. The situation is not only difficult, Buber said—it is *tragic*." Shaffer, *Legal Ethics and the Good Client*, *supra* note 207, at 319–20 (citing MARTIN BUBER, THE KNOWLEDGE OF MAN: A PHILOSOPHY OF THE INTERHUMAN 171–72 (Maurice Friedman ed., Maurice Friedman & Ronald Gregor Smith trans., 1965)).

212. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER, *supra* note 8, at 21–22. Shaffer contrasts the "ethics of care" orientation with two alternatives: (1) *role orientation*, which is governed by "an idea about the function in society of the legal profession, and the function of a lawyer in the profession"; and (2) *moral isolation*, which is governed by "the idea that the law-office conversation is one in which moral positions are asserted and either accepted or rejected." *Id.*

213. *Id.* at 22.

214. *Id.*

215. COCHRAN ET AL., A COLLABORATIVE APPROACH, *supra* note 167, at 6–9.

216. Cochran, *The Future of Lawyer-Client Relations*, *supra* note 208, at 690–91.

217. *See* COCHRAN ET AL., A COLLABORATIVE APPROACH, *supra* note 167, at 6–9.

218. *Id.* at 6.

219. *Id.*; *see supra* Part III.B.1 (discussing Kronman's friendship analogy).

220. COCHRAN ET AL., A COLLABORATIVE APPROACH, *supra* note 167, at 7.

221. SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 52. Noting that "[e]ven among the vast majority of those within North America who identify themselves as Jewish or Christian, there are differences in belief about moral and social values," they point out that nevertheless "there is more commonality in America than this perception [of difference] suggests—enough, we believe, for moral discourse between lawyers and the clients to be possible and fruitful." *Id.* at 52 (citing C.S. LEWIS, THE ABOLITION OF MAN 95–121 (1947) and JOHN FINNIS, NATURAL LAW

To meet this challenge, they suggest lawyers should seek with their clients to identify areas of moral common ground—such as the moral values of "justice," "mercy," and "truthfulness."[222] They urge lawyers to see their differences in moral values with their clients not merely as obstacles, but as opportunities:

> To the extent that lawyer and client share moral values, there is a greater likelihood of understanding. We find it easiest to discuss moral problems with those with whom we share a common tradition—the lawyer and client can point to common norms and exemplars. But moral insight often comes from conversation with someone who sees a problem from a different point of view. Diversity in values creates problems, but it also creates opportunities.[223]

Cochran has also observed raising moral concerns with a client may often proceed simply by asking questions—such as "What will be [the] effect on other people?" or "What would be fair?"—calling on clients "to draw on their own sources of moral values."[224]

From the time it was introduced, Shaffer and Cochran's "lawyer as friend" model for client-lawyer relations has elicited vigorous scholarly criticism. Shortly after the 1994 release of the first edition of *Lawyers, Clients, and Moral Responsibility*, Jack L. Sammons published an article offering a sympathetic but pointed rejoinder to the friendship analogy.[225] In his article, Sammons criticizes Shaffer and Cochran's reliance on Aristotle, whose teleological account of friendship depends heavily on a shared morality[226] too uncommon in our "society of strangers"[227] for their model to succeed consistently in contemporary law practice.[228]

AND NATURAL RIGHTS 83–84 (1980) as "cataloguing many moral values that are shared by different cultures").

222. *Id.* at 52–53.

223. *Id.*; *see also* Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 315 (2000) (observing that "our religious and other moral traditions provide far more than 'personal' values," as "[t]hey draw on memories, stories, virtues, and rules that have their source beyond living memory; they have evolved over long periods of time, based on the wisdom of many that have gone before").

224. Cochran, *The Future of Lawyer-Client Relations*, *supra* note 208, at 692.

225. *See* Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L.J. 1 (1995).

226. *See id.* at 22 ("For Aristotle, the sharing of moral values between character-friends is not a chance event and it is not a matter of just living in the same communities. Character-friends can share moral values because both were morally formed in a polis whose primary business is moral formation.").

227. *Id.* at 11, 27, 40. Sammons alludes to Alasdair MacIntyre's assessment of American culture in AFTER VIRTUE, which Shaffer and Cochran acknowledge without dispute. *See* SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 47 (citing ALASDAIR MACINTYRE, AFTER VIRTUE 156 (2d ed. 1984)).

228. *See* Sammons, *supra* note 225, at 20–27. As Sammons explains, "To attempt moral counseling of strangers as if they were not so, as if any friendships with them based on shared morals were possible, is surely to court moral failure." *Id.* at 27.

For Sammons, when a lawyer relates to this client who comes "as [a] stranger,"[229] the "relevant integrity" for the lawyer is found in adopting the role of "rhetorician," as "one who is called upon to speak persuasively for another within the legal culture."[230] To prepare to "*represent*" the client to others, as a story, the "rhetorician" lawyer should explore with the client "who she is and what it means to be who she is in this dispute in these communities with these values."[231] In this process, "the rhetorician discovers and creates—creates because the conversation will change the client—who the client is and what is to be said for her," because the client must see the dispute "as rhetorical."[232] Importantly to Sammons, it is the client—not the lawyer—who is "the source of whatever wisdom the lawyer as rhetorician will speak."[233] Such a lawyer will explore the client's "connection with others, as Shaffer and Cochran would have them do for goodness's sake."[234] Ultimately, however, the purpose of such conversations is not to "move" clients to what the lawyer believes to be "moral commonalities" shared between them, as with friends; instead, the purpose is principally a pragmatic one: the lawyer "cannot speak persuasively for [the client] in any other way."[235]

More recently, Katherine R. Kruse has argued that in a morally pluralistic society, the "lawyer as friend" model poses unacceptable risks that advising lawyers will "impose" their moral values on clients,[236] and may impair both the availability and, in some cases, the quality of legal representation.[237] Shaffer and Cochran responded to Sammons'[238] and Kruse's[239] critiques, seeking to clarify and refine their moral counseling model to address the concerns expressed. For exam-

229. *Id.* at 44.

230. *Id.* In fact, Sammons goes so far as to say that "speaking persuasively for strangers is the most legitimate source of the morals we bring to moral counseling." *Id.* at 44–45.

231. *Id.* at 49, 51.

232. *Id.* at 49.

233. *Id.*

234. *Id.* at 50.

235. *Id.*

236. *See* Kruse, *Beyond Cardboard Clients*, *supra* note 174, at 137–38.

237. *See* Kruse, *Challenge of Moral Pluralism*, *supra* note 174, at 434–41; *see also* Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 504–05 (2011) ("When a lawyer takes on the goal of morally educating the client or making the client a better person through moral conversation, the problems of lack of moral expertise, risk of moral overreaching, and threat to rule-of-law values arise.").

238. Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, 18 U. ARK. LITTLE ROCK L.J. 69, 69–70 (1995) [hereinafter Shaffer & Cochran, *Reply to Professor Sammons*]. To Sammons' Aristotelian critique, they respond in part by underscoring their use of friendship as an "analogy" seeking to capture "the combination of moral responsibility, respect for client dignity, and moral discourse that should be part of the lawyer-client relationship." *Id.* at 70.

239. *See* SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 40–41, 45, 63, 91–92.

ple, to respond to concerns about risks of domination and imposition, they have recently emphasized that when the lawyer has reason to believe there are substantial differences with the client on moral values, it becomes most critical to make "the moral values *of the client* the focus of the discourse."[240] Nevertheless, legal ethics has continued the search for new word-concepts, other than "friendship," to express a morally engaged vision of a lawyer's role as an advisor to clients. In the next section, this Article will depict an ideal for the advising lawyer to serve as a "trustworthy neighbor" to the client.

C. *The Lawyer as Trustworthy Neighbor*

In many respects, Sammons' portrait of the "lawyer as rhetorician" is an appealing one. Here, the lawyer listens to the client and seeks to understand the client, in the fullness of human character and concerns (including moral values), and prepares to "speak" the client to others.[241] Yet the lawyer begins as, and remains to the very end, a "stranger" to the client whose story is told.[242] In Martin Buber's expression, relationally the client remains an "It," not a "Thou," to the lawyer.[243] According to Sammons, the advising lawyer should influence the client only to the extent the lawyer helps the client see the legal situation in rhetorical terms (i.e., as the client's story).[244] The lawyer may exhibit technical skill as a rhetorician in learning the client's story and telling it, but the moral relationship remains essentially detached and objective, not sympathetic and subjective.[245] For those seeking a deeper vision of what it means professionally and personally to relate to another human being as an advisor on the law, I suggest a more subjective ideal—that of the lawyer as a "trustworthy neighbor"—to be more meaningful and, in the possibilities for the exercise of virtue it creates, more fruitful.

1. Trustworthy

The concept of "trustworthiness" on which I will rely is well introduced by Robert K. Vischer's discussion of trust in *Martin Luther King Jr. and the Morality of Legal Practice: Lessons in Love and Jus-*

240. *See id.* at 57.

241. Sammons, *supra* note 225, at 49.

242. *Id.* at 7. Sammons also uses the expression "rank stranger," alluding to the gospel song "Rank Strangers to Me," originally recorded by Albert E. Brumley and covered by Bob Dylan. SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 7 n.28 (citing BOB DYLAN, DOWN IN THE GROOVE (Columbia Records, 1988)).

243. *See supra* note 211 and accompanying text.

244. *See* Sammons, *supra* note 225, at 52 ("The way good lawyers, as rhetoricians, move their clients in their disputes . . . is toward seeing their disputes with a rhetorical eye.").

245. As Shaffer and Cochran express it in their reply to Sammons, for the lawyer as rhetorician "morals come into the conversation as a matter of technique." Shaffer & Cochran, *Reply to Professor Sammons*, *supra* note 238, at 82.

tice.[246] "Trust," Vischer observes, "as a willingness to make one's self vulnerable to another, is relational."[247] However, contemporary trends such as globalization, the disaggregation of legal services, and economic and sociological shifts in law firm culture, have placed relational trust with clients under increasing pressure.[248] The net effect of these trends has been to move the legal profession in a significant way "from a paradigm of 'trusting in' to 'trusting that.'"[249] That is, rather than offering to clients as the lawyer's distinctive professional service a "thickness" of relationship allowing them to trust "in" a lawyer, the new paradigm marginalizes "noneconomic values" and asks clients "only to trust 'that' a lawyer will not act contrary to the client's interests in a specific scenario."[250] While recognizing the obstacles presented by the multiple external forces impinging on them and their clients, lawyers should embrace a renewed ethos of subjectively deepening (i.e., "thickening") their advising relationships with clients where and when they can.[251] Only then is a genuine "trust in" relationship, with its good fruits, made possible:

> The client must trust that the attorney has the client's best interests at heart, and that widening the conversation to encompass considerations beyond the narrowly technical need not invariably function as an entryway for the attorney's self-interest. The attorney must trust the client enough to listen authentically, to step beyond her own assumptions long enough to encounter the client as a moral subject, and to question whether her own perspective accurately reflects the client's best interests. A "thick" attorney-client relationship requires mutual trust because approaching the other as a subject requires mutual vulnerability.[252]

As preparation for establishing "trust in" relationships with clients,[253] a lawyer must form a professional identity that embraces a

246. VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2, at 103–40.

247. *Id.* at 107.

248. *See id.* at 108–31.

249. *Id.* at 132.

250. *Id.*; *see also* Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1725–26 (2006) (referring to "trust that" trust as "trust as prediction," as compared with "trust in" trust in a person, and noting that a lawyer's violation of "trust that" standards are generally enforced by various forms of positive law, such as ethics codes and civil and criminal liability).

251. *See* VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2, at 133.

252. *Id.*

253. Although institutional clients may present special challenges for the lawyer engaged in moral counseling, *see, e.g.*, *id.* at 115–18, there is always a "real human relationship" involved, "whether the client is an actual person or an organization managed by, and created to serve the interests of, actual persons." *Id.* at 148; *see also* SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 57–61 (discussing challenges lawyers who represent corporations and lawyers who practice in law firms may face when engaged in moral counseling).

first-personal understanding of the self as a moral "subject."[254] In light of the prevalence and influence of self-and-other objectifying ideology in the legal profession, including the standard conception of the lawyer's role[255] and the principle of nonaccountability,[256] making this leap of understanding may not be an easy task. But only then is the lawyer best equipped to receive second-personal knowledge[257] of the client as a fellow moral "subject," and to relate to (and care for) the client as such.[258]

It is also essential for the advising lawyer to exhibit a virtuous character recognizable by clients and others as "trustworthy." Trustworthiness is an essentially "subjective" human quality, distinct in character from other more objective, largely technique-oriented attributes of a good lawyer, such as competence and diligence, or even dependability and reliability.[259] Moreover, because life in the profession creates numerous occasions for a lawyer to experience temptations and pressures to depart from virtue, the lawyer's exercise of moral independence is vital to the quality of trustworthiness. Finally, there is an important role that the legal profession as a whole may fulfill in promoting clients' willingness to recognize and accept their own lawyer as trustworthy, by shaping expectations through the messages it communicates about professional role and identity.[260]

The fruits of a client-lawyer advising relationship grounded in personal trust spring from the prospect of mutuality, whereby two morally independent subjects become, as Thomas L. Shaffer has said,

254. *See* VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2, at 28; *see also supra* Part II.C.3 (discussing Kierkegaardian "subjectivity").

255. *See supra* Part III.A.

256. *See supra* notes 36–41, 156 and accompanying text.

257. Anthony Rudd describes "second-personal knowledge" as involving "recognizing the other as someone who has a unique first-personal perspective of his or her own," so that "the first-personal remains crucial." RUDD, SELF, NARRATIVE, & VALUE, *supra* note 24, at 52; *see also id.* at 55 ("An important part of getting to know another person is getting to learn what interests that person, what *matters* to him or her. . . . [I]f you want to know someone, you need to know what he or she takes as a reason for doing something.").

258. *See supra* Part III.B.2 (discussing Shaffer's "ethics of care").

259. Writing about business ethics, Michael Josephson has described trustworthiness as "the crown jewel of personal ethics," and opined "[t]o be worthy of trust is among the highest achievements of a good life." Michael Josephson, *Trustworthiness and Integrity: What It Takes and Why It's So Hard*, BUS. ETHICS & LEADERSHIP (Jan. 7, 2011), http://josephsoninstitute.org/business/blog/2011/01/trustworthiness-and-integrity-what-it-takes-and-why-it%E2%80%99s-so-hard/. Trustworthiness consists of "four major qualities: integrity, honesty, promise-keeping, and loyalty." *Id.* Its subjectivity is reflected not only by its personal value and impact (as trust makes "meaningful human connection" and causes "great pain" when betrayed), but also by its being intertwined with one's whole life. *See id.* As Josephson notes, "The moral duty enshrined by the concept of trust is not to be trusted by another (that is someone else's decision) or to trust another (although this act of faith is often critical to meaningful intimate relationships). Rather, the ethical obligation is *to live one's life so as to be worthy of trust*." *Id.* (emphasis added).

260. *See* VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2, at 145–46.

"interdependent and at risk."[261] The lawyer and client are willing to "depend on" and "influence" each other.[262] As in the friendship model, the lawyer aspires to "*care* for the client and to be cared for" by the client.[263] The existence of personal trust makes authentic moral conversation possible, with the client exercising the freedom to engage and learn from the lawyer as one who has at heart the client's *best* interests, which is best understood as embracing the client's "good."[264] For lawyers, the concept of authenticity involves "living consistently with one's deepest values and core beliefs"[265] (i.e., being "true to" one's self), but also implies the quality of candor (i.e., manifesting the truth about one's self in communications with others). A client who "trusts in" a lawyer, and in the lawyer's commitment to serve the client's good,[266] will be more inclined to be fully candid in communicating with the lawyer, including on matters of moral concern, as one human subject to another.[267]

2. Neighbor

On the basis of what moral principle might an advising lawyer find the inspiration to develop subject-to-subject professional relationships characterized by personal trust and an ethics of care? As a source of

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261. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER, *supra* note 8, at 22.

262. *Id.*

263. *Id.*

264. Although Shaffer advocates the "lawyer as friend" moral counseling model, he has explained client autonomy in a manner consistent with my proposed ideal of the lawyer as "trustworthy neighbor":

> [T]he goal of autonomy does not preclude deep moral conversation. This is to say that there is a difference between freedom and isolation. The aspiration to autonomy assumes moral conversation because it assumes that moral decisions are important and that none of us makes his moral decisions alone. Autonomy (etymologically rule-of-self) assumes a certain amount of independence, but it is not an ethics of isolation. As Gerald Dworkin puts it, autonomy is independence *plus* authenticity.

Id. at 25; *see* Gerald Dworkin, *Autonomy and Behavior Control*, HASTINGS CENTER REPORT, Feb. 1976, at 23, 24 ("[A]utonomy = authenticity + independence. The autonomous person is one who does *his own* thing. So we need characterizations of what it is for a motivation to be *his*, and what it is for it to be his *own*. The first is what I shall call authenticity; the second, independence.").

265. Daisy Hurst Floyd, *The Authentic Lawyer: Merging the Personal and the Professional*, *in* ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER 19, 20 (Paul A. Haskins ed., 2013).

266. *See* DWORKIN, *supra* note 81, at 47 ("It is only through a more adequate understanding of notions such as tradition, authority, commitment, and loyalty, and of the forms of human community in which these have their roots, that we shall be able to develop a conception of autonomy free from paradox and worthy of admiration.").

267. The lawyer as "trustworthy neighbor" will not lose sight of the "lived" subjectivity of the client. *See* SHAFFER, ON BEING A CHRISTIAN AND A LAWYER, *supra* note 8, at 25 ("The risk of openness is a risk involving the person of the client, and acceptance of the principle (and of the fact) that even in 'representation' it is not only an argument or interest being asserted, but a person and a relationship being not asserted, but *lived*.") (emphasis added).

wisdom in this search, Vischer looks to the Christian faith and moral philosophy of Martin Luther King Jr.[268] The recognition of human dignity was an "animating value" for King's ministry, and Vischer cites many public statements and writings of King establishing that the Biblical principle of *agape*—sacrificial love[269]—was the "vehicle" by which the value of human dignity operated in King's everyday work.[270]

A lawyer who loves is more than a rhetorician, and "cares about the client in a way that does not presume to equate the client's well-being with the maximization of her independence and autonomy."[271] Agapic love is based upon a commitment to the well-being of another, without regard to one's own emotions, preferences, or interests.[272] It calls for lawyers to think and act in accordance with their "social nature" by embracing their human "accountability to the good of the client."[273] This "good of the client" includes a commitment by the lawyer to refrain from, purposely or not, becoming the occasion for the client to experience avoidable deformation of moral character through the actions taken to address the client's legal situation.[274] The lawyer following this path will aspire to recognize, and love, the client as a "neighbor."[275] In engaging the client as a "neighbor," and as a "subject,"[276] the lawyer should also encourage the client to see the persons with whom they have disputes in a similar light.[277] In practice, this means the lawyer should not lose sight of the client's

268. *See* VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2.

269. "*Agape* is the term used in the Bible to denote sacrificial love, in contrast to *phileo*, which focuses more on the lover's feelings for another, rather than on how the lover can meet the other's needs." *Id.* at 83 (citing *John* 21:15–17 (NIV)).

270. *Id.* at 81.

271. *Id.* at 81–82.

272. *Id.* at 82–91.

273. *Id.* at 28.

274. *See* SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 46 (stating a lawyer concerned with client goodness will be "concerned with the person the client is becoming as the client is, inevitably, influencing and being influenced by the lawyer"); *see also* JOSEPH G. ALLEGRETTI, THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE 97 (1996) (stating "the lawyer has a *personal* moral obligation not to let a lawsuit degenerate into bitterness and revenge," and "[i]f she refuses to play petty games of harassment . . . and declines to project all the evil in the world upon her opponent, then her client will be more likely to accept something less than the complete and utter destruction of the other party").

275. *See Matthew* 22:39 (ESV) ("You shall love your neighbor as yourself."); *see also* MICHAEL P. SCHUTT, REDEEMING LAW: CHRISTIAN CALLING AND THE LEGAL PROFESSION 53 (2007) (discussing how the Christian lawyer can serve as an instrument of God's love to "neighbor clients").

276. As with trustworthiness, a lawyer's knowing the other-client as "subject" and "neighbor" requires first knowing one's self as a "subject." *See* VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2, at 28 (observing "a lawyer who aspires to agape will need to rediscover—or discover for the first time—her own status as a moral subject").

277. *Id.* at 166–67.

being within the "human community,"[278] and should promote and reinforce this understanding with the client.

Writing in his own voice,[279] in *Works of Love*[280] Søren Kierkegaard offers deliberations and discourses on the Christian concept of *agape* as the love of one's "neighbor."[281] For Kierkegaard, the distinctive character of neighbor love is that rather than being founded on one's preferences or inclinations, it is commanded and, at the same time, is a "matter of conscience."[282] Moreover, as C. Stephen Evans explains, Kierkegaard's *Works of Love*[283] contrasts Socratic concepts of moral independence with the dynamic relationship of independence and interdependence found in neighbor love:

> The major difference between the Socratic and Christian maieutic[284] in *Works of Love* revolves around the concept of "neighbor love," the distinctively Christian kind of love. When Socrates has helped the other, he can take a certain ironic satisfaction in observing the other stand alone—with his help. *This satisfaction is bound up with Socrates' own independence.* The Christian maieuticist, on the other hand, is bound to the one helped in a way Socrates was not. For the Christian both the one who is helped as well as he

278. *Id.* at 167.

279. For an excellent discussion of Kierkegaard's use of pseudonyms in some of his works and not others, and the reasons for these decisions, see EVANS, KIERKEGAARD: AN INTRODUCTION, *supra* note 125, at 24–45.

280. SØREN KIERKEGAARD, WORKS OF LOVE (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1995) (1847) [hereinafter KIERKEGAARD, WORKS OF LOVE].

281. *See id.* at 44–90 (three chapters on aspects of Christian "neighbor love," and the instruction "You Shall Love the Neighbor").

282. *See* M. Jamie Ferreira, "*The Problematic Agapeistic Ideal—Again*," in ETHICS, LOVE, AND FAITH IN KIERKEGAARD 92, 102–03 (Edward F. Mooney ed., 2008) (citing KIERKEGAARD, WORKS OF LOVE, *supra* note 280, at 140). Ferreira explains how Kierkegaard "describes the commanded love of neighbor as one in which we affirm the other's distinctiveness, help the other to be independent, forgive and seek reconciliation—all because we acknowledge the other as equal in created 'kinship.'" *Id.* at 102 (footnote omitted). "Loving the other's distinctiveness, for example, is explained by Kierkegaard by contrast with the domineering and controlling attitudes that do not respect the other as an equal before God." *Id.*

283. *See* KIERKEGAARD, WORKS OF LOVE, *supra* note 280, at 276–79.

284. In reference to Socrates, the "maieutic" ideal is "the view that each person has the truth within and it is the task of the communicator to be a 'midwife' who helps the other give birth to his or her own truth." EVANS, KIERKEGAARD: AN INTRODUCTION, *supra* note 125, at 43. Kierkegaard is also committed to this ideal, at least with respect to what he calls "ethical communication," with the use of indirect communication (including pseudonyms), because it "deeply respects the autonomy of human persons and their responsibility as individuals to grasp the truth, at least the truth about life, for themselves." *Id.* at 43–44; *see also infra* Part IV.B (discussing Socratic recollection). On the other hand, with respect to "ethical-religious communication" and Christianity, Kierkegaard insists "direct-indirect" communication is needed, combining indirect means (such as his pseudonymous writings) for promoting the recipient's "capability" (the condition for receiving truth) with a direct "witness or testimony about Christ" (e.g., the non-pseudonymous religious discourses). EVANS, KIERKEGAARD: AN INTRODUCTION, *supra* note 125, at 45.

> himself stand alone—with God's help. *The helper and the one helped are independent of each other but totally dependent on God.* In thus sharing a total dependence on God's love they are bound together in a way. This binding does not compromise their independence of each other.[285]

Socratic independence, with its ethical ideal of self-knowledge and individual virtue, and Christian independence, with its spiritual ideal of mutual dependence on God,[286] share an essential feature: an understanding that moral character is an eternal good with a value that exists beyond material calculation.[287] Whether following a Socratic or a Christian path, lawyers should aspire to an ethic of care that deeply values moral goodness,[288] both within themselves and, as their words and conduct may have an influence upon them, within their "neighbor" clients.[289] Self-known as a trustworthy neighbor, the lawyer un-

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285. EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT, *supra* note 132, at 109–10 (emphases added); *see also* C. STEPHEN EVANS, *Who is the Other in The Sickness Unto Death?*, *in* KIERKEGAARD ON FAITH AND THE SELF: COLLECTED ESSAYS 263, 274 (2006) ("In neighbor love, God is always present as the 'third' or 'middle-term.'").

286. *See* C. STEPHEN EVANS, KIERKEGAARD'S ETHIC OF LOVE: DIVINE COMMANDS & MORAL OBLIGATIONS 151–52 (2004) [hereinafter EVANS, KIERKEGAARD'S ETHIC OF LOVE] (discussing Kierkegaard's understanding of Christian autonomy and independence through mutual dependence on God). For Kierkegaard, another important "[p]art of the independence given by neighbour-love consists in the freedom from the need for reciprocation," and thus "protects against the unhealthy kind of dependence on another." *Id.*

287. "[Kierkegaard's pseudonymous author Johannes] Climacus, like Socrates, sees moral goodness as 'the pearl of great price,' a good for which all other goods, including even such significant goods as health and length of life, must be sacrificed if necessary." *Id.* at 102; *see also Matthew* 13:45–46 (ESV) (Jesus' Parable of the Pearl).

288. In terms resonant with meaning for lawyers, virtue ethics, and the advising of clients, Evans explains a deciding self's focus on "moral goodness" (i.e., virtue) is not a form of selfishness:

> The ethical agent can and should have a concern for the well-being of others. However, *in estimating how others might be helped, the development of moral character is again the preeminent factor.* There are strict limits on our ability to help another person develop such character, since ultimately a person's character is formed by his or her own choices. . . . However, within those limits it is still true that *the highest thing one person can do for another is encourage the development of character.*

EVANS, KIERKEGAARD'S ETHIC OF LOVE, *supra* note 286, at 102 (emphases added); *see also* McGinniss, *supra* note 7, at 46 (explaining why first-personal ethical decision making, as a component of virtue ethics for lawyers, is "neither selfish nor self-centered").

289. Kierkegaard emphasizes that Christian love of neighbor "makes no distinctions" and "loves all equally." KIERKEGAARD, WORKS OF LOVE, *supra* note 280, at 60, 269–73. Does this mean the lawyer's special relationship with the client does not justify the lawyer preferring (or caring for) the client's good more than the good of other persons? In discussing the challenge posed for Kierkegaard's "no distinctions" concept of neighbor love by the existence of "special relations," such as marriage and friendship, Evans helpfully suggests that Kierkegaard "means that we must not 'make distinctions' in the sense that we exclude some people from the scope of our moral concern." EVANS, KIERKEGAARD'S ETHIC OF LOVE, *supra* note 286, at 205–06. "But

derstands relations with the client not as friendship, but instead in a way that is both more accessible in our "society of strangers" and more protective of and receptive to the client's own moral independence. The lawyer loves and respects the client as a neighbor in need who should be served in a manner worthy of trust, and who possesses an essential dignity and personality deserving of the lawyer's devotion of time, energy, and counsel.

Vischer poignantly describes King's understanding of *agape* and love of neighbor in terms resonant for lawyers and their moral responsibilities in advising clients:

> We act as subjects in willing love toward the neighbor based on our personal recognition and response to her worth and her needs. We also acknowledge the neighbor as a subject, not as an object. . . . If the object of our love is a subject in her own right, our love must not be paternalistic or infantilizing; it must reflect an authentic and respectful human encounter. In loving his neighbor—friend or foe, black or white—King was a subject, investing himself in the neighbor in order to see the world through the neighbor's eyes, but insisting that the neighbor expand her view to encompass a truer, less isolated vision of her own well-being.[290]

Lawyers, too, should invest themselves in their clients, subject-to-subject and neighbor-to-neighbor, and seek their clients' good in the pursuit of justice.[291]

IV. SOCRATES AND MORAL DIALOGUE: SOME LESSONS FOR LAWYERS

Socrates was a philosopher, and did not practice or profess expertise about the positive law. And he lived in a world far removed from our own in both time and culture. But along with his exhibiting the quality of moral independence, the study of Socrates also offers the lawyers of today intriguing insights into moral dialogue with clients. This is not meant to suggest that lawyers adopt with clients Socrates' predominant *method* of philosophical inquiry, known as "elenchus"[292]

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loving my neighbour in this sense does not mean that there are not also special relations that provide a basis for treating some individuals differently from others, even if I must try to love all of them." *Id.* at 206; *see also* M. JAMIE FERREIRA, LOVE'S GRATEFUL STRIVING: A COMMENTARY ON KIERKEGAARD'S WORKS OF LOVE 53–64 (2008).

290. *See* VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2, at 90–91.

291. *See id.* at 309 (noting that King "practice[ed] love in the service of justice," and lived for others "not in some sense of noble self-denial, but in the stark recognition that 'the self cannot be self without other selves' ") (quoting Martin Luther King Jr., "Where Do We Go from Here?," *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING JR. 245, 252 (James M. Washington ed., 1986)).

292. "In its standard form [elenchus] is a type of adversative argument in which Socrates refutes a thesis p, defended by the interlocutor as his personal belief, by eliciting from him additional premises, say {q,r}, whose conjunction entails the nega-

(though it is noteworthy that some of the elenchus "rules" might have valuable application to client-lawyer dialogue).[293] Instead, this Article proposes that certain attributes of Socrates' thought and character, as reflected in his dialogues, may be helpful for effectively reaching across the divide between lawyer and client and promoting fruitful moral conversations.

A. *Socratic Ignorance: Lawyer Modesty in Moral Dialogue with a Client*

Socrates is well-known for his frequent claims to be ignorant of the truth, and lacking in wisdom.[294] In defending himself at trial, he proclaims to the jury, "I am only too conscious that I have no claim to wisdom, great or small."[295] Significantly, however, Socrates also believes recognizing his own limitations is itself a crucial form of moral knowledge: in describing his relationship with one of his dialogue partners, he reflects that "[i]t is only too likely that neither of us has any knowledge to boast of, but . . . it seems that I am wiser than he is to this small extent, that I do not think that I know what I do not know."[296] In this vein, Socrates interprets the words attributed to the

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tion of p." VLASTOS, SOCRATES: IRONIST AND MORAL PHILOSOPHER, *supra* note 28, at 266. "The refutation is accomplished by 'peirastic' argument: the refutand p, proposed and defended by the interlocutor, is refuted out of his own mouth: p is shown to be inconsistent with propositions in his own belief-system." *Id.* at 266 (footnote omitted).

293. "[T]here are rules dictating what the participants in the [elenchus] inquiry can and cannot do: (1) the respondent cannot hide behind hypotheticals, (2) *the questioner cannot force the respondent to accept something he does not really believe*, [and] (3) the respondent has the freedom to make whatever modifications he wishes provided that he remains consistent with himself." KENNETH SEESKIN, DIALOGUE AND DISCOVERY: A STUDY IN SOCRATIC METHOD 37 (1987) (emphasis added). For lawyer-questioners and client-respondents, the second and emphasized rule resonates with the importance a lawyer should place on a client's intellectual and moral freedom.

294. In describing his role as one who lacks knowledge, but could lead others to the truth, Socrates invoked images of childbirth, with him serving as the "midwife":

> Heaven constrains me to serve as a midwife, but has debarred me from giving birth. So of myself I have no sort of wisdom, nor has any discovery ever been born to me as the child of my soul. Those who frequent my company at first appear, some of them, quite unintelligent, but, as we go further with our discussions, all who are favored by heaven make progress at a rate that seems surprising to others as well as to themselves, although it is clear that they have never learned anything from me. The many admirable truths they bring to birth have been discovered by themselves from within. But the delivery is heaven's work and mine.

PLATO, *Theatetus*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 845, 855 (150c-d) (Edith Hamilton & Huntington Cairns eds., F. M. Cornford trans., Princeton Univ. Press 1961).

295. *Apology*, *supra* note 15, at 3, 7 (21b).

296. *Id.* at 8 (21d). For an argument that Socrates' disavowal of knowledge is sincere, but also that paradoxically Socrates claimed to possess some types of moral knowledge, leading to an uncertainty/certainty categorization that promotes genuine dialogue, see Daniel A. Grano, The Means of Ignorance: Genuine Dialogue and a

oracle of Delphi (asserting that Socrates was "the wisest man in the world")[297] as based upon Socrates' realization that "in respect of wisdom he is really worthless."[298] In this realization, he is (ironically) truly wise.[299]

Despite these Socratic assertions of ignorance, scholars have long pointed to other evidence indicating his claims of limitation were not absolute in nature.[300] For the purposes of this Article and for what lawyers engaged in moral dialogue can learn from Socrates, it is not necessary to resolve that debate. What is most significant for the advising lawyer is Socrates' example of modesty as to his possession of moral knowledge, combined with a persistent dedication to pursuing such knowledge in conversation with his dialogue partners. For lawyers, Socratic ignorance ultimately pertains more to mindset than to method.[301]

In the *Gorgias*, Socrates asks, "[W]hat kind of a man am I? One of those who would gladly be refuted if anything I say is not true, and would gladly refute another who says what is not true, but would be no less happy to be refuted myself than to refute, for I consider that a

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Rhetoric of Virtue 102-34 (Aug. 2003) (unpublished Ph.D. dissertation, Louisiana State Univ.), *available at* http://etd.lsu.edu/docs/available/etd-0528103-095224/unrestricted/Grano_dis.pdf.

297. *Apology*, *supra* note 15, at 3, 7 (21a).

298. *Id.* at 9 (23b).

299. According to Socrates, "real wisdom is the property of God." *Id.* at 9 (23a). As Paul Johnson has said, "Socrates believed in God. It was precisely because he believed in God that he devoted his life to philosophy, which to him was about the human desire to carry out divine purposes." JOHNSON, *supra* note 11, at 106.

300. For example, Richard Bett concludes that through his claims of ignorance Socrates did not "take himself to lack all ethical knowledge," but rather to lack a "systematic understanding" of the definitions of ethical properties and qualities, such as justice and courage. Richard Bett, *Socratic Ignorance*, *in* THE CAMBRIDGE COMPANION TO SOCRATES 215, 220–24 (Donald R. Morrison ed., 2011). As Gregory Vlastos further explains:

> To resolve the paradox [of Socrates' "disavowal of knowledge"] we need only suppose that he is making a dual use of his words for knowing. When declaring that he knows absolutely nothing he is referring to that very strong sense in which philosophers had used them before and would go on using them long after—where one says one knows only when one is claiming certainty. This would leave him free to admit that he does have moral knowledge in a radically weaker sense . . . .

GREGORY VLASTOS, SOCRATIC STUDIES 49 (1994) [hereinafter VLASTOS, SOCRATIC STUDIES].

301. The "Socratic method" has a venerable, though recently controversial, pedigree in the traditions of American legal education. In assessing its pedagogical merits and limitations, the concept of Socratic ignorance has also received some attention from scholars. For example, Thomas D. Eisele describes the first lesson of Socratic teaching as *disillusion*, meaning that "[y]ou don't know what you think you know." THOMAS D. EISELE, BITTER KNOWLEDGE: LEARNING SOCRATIC LESSONS OF DISILLUSION AND RENEWAL 16 (2009). The second lesson involves leading a law student through a process of *renewal*, which is a realization that "[y]ou know more (or other) than what you think (you know)." *Id.*; *see infra* Part IV.B (discussing Socratic recollection).

greater benefit . . . ."[302] Like Socrates, a good advising lawyer should be a fully engaged, flexible, and modest participant in moral dialogue with a client, always prepared to learn and to be changed for the better.[303] Similar to law teachers in classroom discussions with students, when lawyers converse with their clients, they should be prepared to question their own premises and assumptions, adjust their point of view, and carefully attend to competing values.[304]

But for a lawyer exercising moral independence and personal conscience, such questions and adjustments and balancing also have limits. A lawyer may encounter circumstances where, after the dialogue has taken place, the client insists upon a course of action the lawyer steadfastly believes to be immoral, such that the lawyer should withdraw from representing the client.[305] These situations should, however, occur very infrequently.[306] With modesty as to their own certainty in knowledge and insight into the moral issues involved, advising lawyers should give the client the benefit of the doubt when deciding whether to proceed with representation, rather than withdraw.[307]

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302. *Gorgias*, *supra* note 29, at 241 (458a).

303. *See* VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2, at 93 ("If the lawyer and client are both subjects, they will act as partners in a moral dialogue, remaining open to the possibility that their partner in the endeavor may actually teach them something.").

304. *See* James R. Beattie, Jr., *Socratic Ignorance: Once More Into the Cave*, 105 W. VA. L. REV. 471, 476, 483 (2003). As advisors, lawyers educate their clients about the law, and learn from them as well. *See generally* Kimberlee K. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 CLINICAL L. REV. 359 (1998). Exercising good teaching and learning skills benefits lawyers in moral dialogue with clients.

305. *See* SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 63 ("When the lawyer believes that the client wants her to do something that is wrong, the moral thing for a lawyer to do is what Sir Thomas More did—refuse, decline, withdraw."); *see also* ROBERT BOLT, A MAN FOR ALL SEASONS (1962) (play about the life and death of sixteenth-century lawyer Sir Thomas More); MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2013) (permitting a lawyer to terminate representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

306. As Shaffer and Cochran have observed, "Difficult moral issues—the kind that often arise in the law office—are likely to be issues over which reasonable people could differ." Shaffer & Cochran, *Reply to Professor Sammons*, *supra* note 238, at 76. In most cases, where "[g]ood people might resolve them in different ways, . . . the conscientious lawyer (though she might have decided differently than did the client) will support and work for the client." *Id.* at 77; *see also* SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 62 (explaining "[a] factor that weighs in favor of the lawyer continuing to represent the client is that the lawyer's role in speaking for the client . . . empowers the client and helps the community, in the person of judges and juries, determine a proper result").

307. Shaffer and Cochran, invoking the example of Sir Thomas More withdrawing from his role as lawyer for King Henry VIII on grounds of moral conscience, have emphasized "how radically unusual such a course was for More, [and] how earnestly he avoided it." SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 63.

B. *Socratic Recollection: A Stirring of the Conscience*

In the *Meno*, Socrates claims "seeking and learning are in fact nothing but recollection."[308] As Gregory Vlastos explains, Socrates "teaches saying he is not teaching. What he says is what he means if to teach is to impart to a learner truth already known to oneself."[309] Or, in the words of C. Stephen Evans, "Socrates as teacher is only the 'occasion' for the learner's own self-conscious realization."[310] Although the nuances of Socrates' (or Plato's)[311] theory of recollection are complex,[312] its essence is straightforward for providing helpful guidance for lawyers in their moral dialogue with clients. In providing advice and counseling, the lawyer may become *the occasion* for the client's self-conscious realization about how to resolve a moral question.

Socratic recollection has drawn attention in recent years from scholars writing about law teaching and pedagogy.[313] For example, in *Bitter Knowledge: Learning Socratic Lessons of Disillusion and Renewal*,

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308. *Meno*, *supra* note 18, at 364 (81d); *see also Republic*, *supra* note 14, at 750 (518b-c) ("[E]ducation is not in reality what some people proclaim it to be in their professions. What they aver is that they can put true knowledge into a soul that does not possess it, as if they were inserting vision into blind eyes.").

309. VLASTOS, SOCRATIC STUDIES, *supra* note 300, at 65. Kierkegaard, in the voice of pseudonym Johannes Climacus, devoted considerable attention to Socratic recollection, and its relation to Christianity:

> Here we encounter the difficulty that Socrates calls attention to in the *Meno* . . . : a person cannot possibly seek what he knows, and, just as impossibly, he cannot seek what he does not know, for what he knows he cannot seek, since he knows it, and what he does not know he cannot seek, because, after all, he does not even know what he is supposed to seek. Socrates thinks through the difficulty by means [of the principle] that all learning and seeking are but recollecting. Thus the ignorant person merely needs to be reminded in order, by himself, to call to mind what he knows. *The truth is not introduced to him but was in him*.

KIERKEGAARD, PHILOSOPHICAL FRAGMENTS, *supra* note 126, at 9 (emphasis added) (footnotes omitted); *cf.* RUDD, LIMITS OF THE ETHICAL, *supra* note 7, at 159 (noting that for Kierkegaard, "Socrates is merely the occasion by which the learner is brought to realize the truth that is within him, whereas Christ brings from outside us the truth that we do not have").

310. EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT, *supra* note 132, at 109.

311. Prominent classical scholars have voiced doubts it was Socrates, rather than Plato, who adhered to "a grandiose metaphysical theory of 'separately existing' Forms and of a separable soul which learns by 'recollecting' pieces of its pre-natal fund of knowledge." VLASTOS, SOCRATES: IRONIST AND MORAL PHILOSOPHER, *supra* note 28, at 48; s*ee also* JOHNSON, *supra* note 11, at 93–97 (citing Vlastos for "ten key ways in which the real Socrates differed from the artificial creation labeled Socrates who increasingly figures in Plato's works," including the *Republic*).

312. *See generally* EISELE, *supra* note 301, at 111–22; Rowe, *supra* note 89, at 202–03; SEESKIN, *supra* note 293, at 107–10 (discussing Socrates' theory of recollection).

313. *See, e.g.*, Beattie, *supra* note 304, at 476 ("What teachers can do for their students is to get them to recognize explicitly what they already know implicitly. Rather than transferring information to our students, we should elicit information from them; information, which in some significant sense, they already possess.").

Thomas D. Eisele applies Socrates' claim about recollection to the law school classroom, "understanding it as a figure of speech meant to capture the sense and extent to which our knowledge of any matter comes from the human activity of reconstructing or recapturing it from our own experience."[314] Socrates' invitation "to recollect something that we already know—in the sense that we are already familiar with it, although we do not yet understand it—is a call to make ourselves aware of something. We are not yet as conscious as we should be."[315] In essence, Socrates' theory of recollection conceives of human beings as knowers "in need of coming to our senses."[316]

In a lawyer's advising relationship with a client, it may be the lawyer's conscience[317] that must first be awakened, so as to recognize and grasp the moral issue to discuss with the client.[318] Or the recognition of the moral issue may begin with the stirring of the client's conscience, awakened to the point that the client seeks the lawyer's counsel as to how the moral issue should be addressed. However the moral conversation is initiated, for its outcome to be fruitful the advising lawyer should understand the need to help the client "recollect" the values and convictions that form the client's identity independent of the legal situation. This recollection may result in an adherence to those values and convictions, or in changes to the client's moral perspective through the process of dialogue with the lawyer and, perhaps, also with other persons the client trusts. Whatever the outcome may be, the client will have been afforded the best opportunity to make a conscious choice about how to apply moral values to the law. But if this dialogue does not take place, these clients risk becoming disengaged from who they were, are, or aspire to be as moral subjects,[319] free of the legal dispute (or potential one) now weighing upon them and influencing their decisions about how they will live. Although a lawyer can assist a client in this process of recollection—for example, by asking good questions and thoughtfully exploring moral values as relevant—the lawyer should also remember that it is the client who must recall.[320]

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314. EISELE, *supra* note 301, at 113.

315. *Id.* at 115.

316. *Id.*

317. *See supra* notes 3–5 and accompanying text (discussing the Rules' preamble on "personal conscience").

318. *See* SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 67–68, 72–78 (identifying "moral sensitivity"—i.e., "recognizing the moral issues"—as one of four elements of a framework for moral discourse between lawyers and clients, along with "client engagement," "moral judgment," and "moral motivation").

319. *See supra* notes 253–58 and accompanying text (discussing lawyers and clients as moral subjects).

320. *Cf.* EVANS, KIERKEGAARD'S FRAGMENTS AND POSTSCRIPT, *supra* note 132, at 103 ("[T]he true communicator recognizes the necessity to distance himself from the receiver, to help the receiver to grasp the truth on his own.").

C. *Socratic Candor and Care: Truth and Justice in the Client-Lawyer Relationship*

The Socrates we meet in Plato's dialogues is a candid conversationalist, though prone to cloaking his candor in a guise of irony.[321] The special quality of Socrates' candor is revealed in his frankness about his own limitations,[322] in his genuineness in thirsting for truth,[323] and in his persistent desire for completeness in understanding the word-concepts whose meaning is at stake in the dialogues.[324] Socrates also insists on reciprocity of candor from his dialogue partners.[325]

It is, moreover, essential of Socrates that the guise of irony and the sharp wit he displays in the dialogues do not detract from his care for the good of those who join with him in conversation.[326] He cares for them as fellow subjects, selves, and souls,[327] who join with him to seek

321. *See supra* note 28 (Vlastos on Socratic irony) and notes 127–32 (Kierkegaard, and his interpreter Evans, on Socratic irony). Vlastos strongly criticizes Kierkegaard's suggestion in *The Concept of Irony* that Socrates "allows himself deceit as a debating tactic," and is "the anti-sophist who by ironies of sophistry tricks sophists into truth." VLASTOS, SOCRATES: IRONIST AND MORAL PHILOSOPHER, *supra* note 28, at 42–43. Vlastos cites Socrates' statement in the *Gorgias* about being "refuted," *supra* note 302 and accompanying text, and asks: "[I]f Socrates would rather lose than win the argument when the truth is on the other side, what could he stand to gain by slipping in a false premise or a sophistical inference?" VLASTOS, SOCRATES: IRONIST AND MORAL PHILOSOPHER, *supra* note 28, at 43.

322. *See supra* Part IV.A (discussing Socratic ignorance).

323. To Socrates, dialogue "was a conversation in which people discover one another, and each discovers himself, and each seeks the true and the good." SHAFFER, ON BEING A CHRISTIAN AND A LAWYER, *supra* note 8, at 30.

324. *See supra* notes 14–17 and accompanying text (discussing Socrates and his exploration of the meaning of word-concepts such as "justice," "wisdom," "courage," and "temperance").

325. *See supra* note 29 (citing the *Gorgias* and identifying "frankness" (candor) as one of the three Socratic conditions for genuine dialogue on matters of consequence); *see also* Rowe, *supra* note 89, at 203–04 (describing as a "feature of Socratic conversation, the demand that the interlocutor should always say what he thinks"); VLASTOS, SOCRATIC STUDIES, *supra* note 300, at 7 (describing this as the "say what you believe" requirement).

326. In the *Apology*, Socrates reminds his fellow Athenians how he has shown his care through conversation: "[I] spend all my time going about trying to persuade you . . . to make your first and chief concern not for your bodies nor for your possessions, but for the highest welfare of your souls . . . ." *Apology*, *supra* note 15, at 16 (29e-30b). Eisele has called attention to Socrates' understanding the value of conversation as a means of caring for one's self as well:

> In the *Protagoras*, we see Socrates argue for treating conversation as the preferred way to care philosophically for our soul, or our self. Food for the soul—which I take to include self-knowledge as well as knowledge of others and of the world—is to be gained by means of conversing with people and examining them, asking them who they are and what they can teach us, what we can learn from them.

EISELE, *supra* note 301, at 195–96. *See generally* PLATO, *Protagoras*, *reprinted in* THE COLLECTED DIALOGUES OF PLATO 308 (Edith Hamilton & Huntington Cairns eds., W. C. Guthrie trans., Princeton Univ. Press 1961) [hereinafter *Protagoras*].

327. *See Protagoras*, *supra* note 326, at 313 (313c) (asked by Hippocrates, "[W]hat is it that nourishes a soul?," Socrates replies, "What it learns. . . ."); *see also* Mooney,

knowledge of virtue.[328] And as Socrates regards justice as the highest of the virtues,[329] seeking knowledge of justice is the greatest of tasks, and being just is the greatest of ends.[330]

So, too, for clients and their lawyers, candor and care should be the means and the motivation for eliciting an engaged moral dialogue relating to the client's legal situation. Candor allows the moral issues to be discussed openly, rather than remaining veiled and affecting the decisions and conduct of either person without the knowledge of the other.[331] Dialogue undertaken in a spirit of care does not impose the lawyer's view of the moral issues on the client,[332] nor does it impose the client's view on the lawyer.[333] Rather, dialogue holds the promise of making both lawyer and client interdependent and open to beneficial influence[334] in the mutual pursuit of what is truly the client's best in the legal situation, which includes placing emphasis on the question, "What is just?"[335] A dialogue in a spirit of care also preserves for

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supra note 142, at 5 ("Socrates addresses individuals in their specific need, blindness, evasion, and confusion.").

328. *See Meno*, *supra* note 18, at 371–84 (86a-100c) (in which Socrates inquires after the question, "What is virtue?").

329. *See supra* Part II.C.1 & II.C.2 (discussing "justice" in the *Apology* and the *Crito*); *see also* VLASTOS, SOCRATES: IRONIST AND MORAL PHILOSOPHER, *supra* note 28, at 209–13 (discussing Socrates' principle of the "Sovereignty of Virtue," and the primary of "justice" as the measure of decision). Vlastos explains this Socratic principle in terms of our perception of the good: "Whenever we must choose between exclusive and exhaustive alternatives which we have come to perceive as, respectively, just and unjust or, more generally, as virtuous and vicious, this very perception of them should decide our choice. . . ." VLASTOS, SOCRATES: IRONIST AND MORAL PHILOSOPHER, *supra* note 28, at 210–11. For Socrates, "[v]irtue being the sovereign good in our domain of value, its claim upon us is always final." *Id.* at 211.

330. *See* JOHNSON, *supra* note 11, at 176 ("The supreme lesson of Socrates' life . . . is that doing justice according to the best of your knowledge gives you a degree of courage that no inbred or trained valor could possibly equal.").

331. "A lawyer who offers moral advice is no more compromising client autonomy than one who offers purely legal advice. In fact, a lawyer who thinks about such concerns but does not discuss them may, perhaps even unconsciously, manipulate his client's actions more problematically than a lawyer who fosters an open dialogue." Gantt, *Integration as Integrity*, *supra* note 81, at 239–40 (citing Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 248–49 (1990)).

332. "Agape does not impose, but it cannot shirk from proposing a course of conduct that reflects cognizance of the client's nature and extralegal commitments." VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2, at 295.

333. *See* SHAFFER & COCHRAN, MORAL RESPONSIBILITY, *supra* note 209, at 28–29 (explaining "[h]ired gun lawyers . . . play a role, a role that controls their moral choices" and "run the risk that their moral sensitivity will atrophy").

334. "Moral discourse in professional relationships does not require that either party consciously change; it is possible for two people to discuss an issue of conscience, and to discuss it deeply, even though neither of them comes to change his mind . . . . However, the assumption of moral discourse is that each of the discoursers is *open* to change." SHAFFER, ON BEING A CHRISTIAN AND A LAWYER, *supra* note 8, at 28.

335. "Justice asks, Have you done right by this person?" VISCHER, MORALITY OF LEGAL PRACTICE, *supra* note 2, at 297. The question "What is just?" is not an ab-

both lawyer and client their subjective moral independence, consisting of their freedom to live as their best selves with integrity and in a manner consistent with their own good conscience.

V. CONCLUSION

Rule 2.1 establishes professional norms for legal advice, including the exercise of independent judgment and expectations of candor, but it also leaves room for the lawyer to exercise moral independence in deciding the substance of the advice to be rendered. A lawyer's candid advice on moral considerations invites clients to engage in first-personal examination of their identity and values, and of how decisions made in the course of legal representation flow from and are impacted by that identity and those values. Ideally, but almost paradoxically, the client should make this self-examination both independently of *and* interdependently with the legal situation and the persons involved in it, including the advising lawyer. The legal situation is the occasion for the self-examination: but it does not define the client as a person. Nor do merely the decisions the client makes provide such definition.[336] Rather, it is the moral self that is formed before, during, and after the representation that defines the client as a person. As the lawyer provides legal advice and engages the client from a moral perspective, the lawyer has the occasion to exercise independence *from* the client, but also *for* the client, and the client's good.

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stract inquiry, but instead considers the client's specific circumstances, including the client's poverty. *See, e.g.*, Shaffer, "*Technical" Defenses*, *supra* note 207, at 347 (suggesting that "in cases where the client has been taken advantage of—especially in cases where the client's economic class has been taken advantage of—the lawyer's moral advice may involve encouraging the client to stand up for himself").

336. *See* SHAFFER, AMERICAN LAWYERS & THEIR COMMUNITIES, *supra* note 1, at 16–17 ("Deep down, *a person is not just a chooser*. There are things about persons . . . that are more interesting than the choices they make, or the sum of all the choices they have made.").