

Wasserstrom considers two classes of moral criticism the professional role of the lawyer may open her up to:

1. "The lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind." (p. 1) This is a worry about "the lawyer's stance toward the world at large."
2. "The lawyer-client relationship ... is morally objectionable because it is a relationship in which the lawyer dominates and in which the lawyer typically, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion." (p. 1) This is a worry about the relationship between the lawyer and the client.

Wasserstrom characterizes the moral thorniness of the lawyer's position to her *role as a professional*: it reflects the lawyer's peculiar "role-differentiated behavior":

- "It is in the nature of role-differentiated behavior that it often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts – and especially various moral considerations – that would otherwise be relevant if not decisive." (p. 3)
- "Role-differentiated behavior often alters, if not eliminates, the significance of those moral considerations that would obtain, were it not for the presence of the role." (p. 4)

Wasserstrom's other examples:

- The *parent*, who is morally permitted – perhaps even morally obligated – to give more weight to the interests of his or her own children than to those of other children – even needier children.
  - *Do you think this fairly characterizes the role of the parent?*
- The *scientist*, whose role is to "expand the limits of human knowledge," without consideration of the ends to which that knowledge will be put (e.g., research into atomic theory).
  - *Do you think this fairly characterizes the role of the scientist?*
- *What are some other possible examples of role-differentiated behavior?*
  - The judge? The policeman? The doctor? The friend? The psychiatrist? The priest?
- Many of *these* examples of role-differentiated behavior (though perhaps not in the case of the scientist, judge, or policeman) have something in common. The special, role-related duties and permissions reflect the special relationships these agents, in their roles, stand in to particular persons, and the special responsibilities they have towards those persons: their children, clients, patients, friends, parishoners.

- Wasserstrom: “the professional *qua* professional has a client or a patient whose interests must be represented, attended to, or looked after by the professional. And that means that the role of the professional (like that of the parent) is to prefer in a variety of ways the interests of the client or patient over those of individuals generally.” (p. 5)

Wasserstrom argues that the burden of proof should fall on the proponent of *role-differentiated behavior* to establish that such behavior is desirable. (Arguments to this purpose must presumably be offered from *outside* of the role in question...)

*This may all be starting to sound a bit familiar. It’s worth considering some parallels the questions we’re considering here and questions we’ve discussed in this class before:*

- Compare Rawls’ account of *punishment* in “Two Concepts of Rules” – that was an attempt to explain how we might appeal to the justification of a practice governed by certain rules (e.g. the practice of punishing only those we believe guilty, keeping a promise, regardless of consequences) to justify a particular action falling under it, which might otherwise look morally *unjustified* (e.g. letting an innocent person go free although doing so will result in riots leading to more innocent deaths; keeping a promise although breaking it would lead to more overall utility).
- Compare also some of the issues we discussed in relation to the *obligation to obey the law*: *Dworkin*, of course, saw the obligation to obey very much in role-differentiated terms – we have an obligation to obey the laws of our society – even when, absent the law, performing the action it required might be optional, or even wrong – because we stand in a particular associative relation to other members of our society. *Raz* didn’t see the obligation in those terms, but also described cases in which the presence of a law might give us a reason to perform an action which, absent the law mandating it, we might have no reason to perform; remember *Raz*’s category of “exclusionary reasons”? Those are very relevant again here.
- Now we’re considering whether the lawyer may have reasons to perform certain actions (offer certain arguments, challenge certain witnesses, promote certain ends, etc.) which she would have no reason to perform (or reason not to perform) if she occupied a different role.
- In the case of the lawyer, as in Rawls’ arguments, the presence of such special reasons will be justified by appeal to the beneficial broader effects of admitting them – the value of the *practice* or the *profession* that admits of such reasons...

### *Role-differentiated behavior and the role of the lawyer*

Wasserstrom: When an attorney-client relationship exists, the lawyer may often be permitted or even required to do things which s/he would not be permitted to do were it not for that relationship, e.g.:

- “Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or

the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is in essence an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with who the relationship of client is established.” (pp. 5-6) Examples:

- A lawyer, once she or he agrees to represent a client charged with a crime, is obligated to do his or her best to defend that client at trial, regardless of the lawyer’s belief in the client’s innocence.
  - *Two questions: if lawyers agree to take a trial, are they then obligated to provide the best defense? V. are lawyers morally justified in taking on the defense of a person they believe to be guilty?*
    - *Other examples: we may need, e.g., CIA interrogators, but should we want to become them?*
  - *Also – there are circumstances under which lawyers can withdraw from a case or turn down a case that is assigned to them... what are they?*
- A lawyer may be required (or permitted), in the course of defending a client, to make use of practices and procedures that are themselves morally objectionable and that the lawyer would disapprove of were she not charged with providing her client with the best defense she can, e.g.:
  - Defending a client the lawyer believes to be guilty
  - Wasserstrom’s example: insisting the accuser in a rape case undergo a psychiatric examination (no longer permitted by law, but was at the time Wasserstrom wrote the article)
  - Other examples: ruthless cross-examination of accuser in a rape trial designed to throw doubt on her testimony (e.g. by questioning her about her sexual history)
- Examples of role-differentiated morality are perhaps even more prevalent (and problematic) outside the *criminal* law:
  - Estate law – helping a client draw up a will that excludes her children from inheriting because they are anti-war activists
  - Tax law – helping a wealthy client take advantage of an exclusive tax loop-hole the lawyer disapproves of
  - Corporate law – drawing up the articles of incorporation for a company that markets a harmful but not illegal product (guns? Cigarettes? Legal pornography?)
  - *Spaulding v. Zimmerman*
  - John Yoo’s torture memos
- Again, we should differentiate between the moral reasons a lawyer has to *take* a case, and the reasons she has once she’s *taken* the case...

### *Defending the lawyer’s role-differentiated moral obligations*

- The argument from the value of the system:
  - Wasserstrom: “It is good ... that the lawyer’s behavior and concomitant point of view are role-differentiated because the lawyer *qua* lawyer participates in

a complex institution which functions well only if the individuals adhere to their institutional roles.” (p. 9)

- Compare, again, with Rawls’ “utilitarian” defense of retributive punishment by appeal to the utility-value of the *practice* of desert-based punishment.
- This secures *legal justice*: the amoral role of the lawyer “guarantees every criminal defendant ... his or her day in court;” otherwise, “the private judgment of individual lawyers would in effect be substituted for the public, institutional judgment of the judge and jury.” (p. 10)
- It secures *the effectiveness of the system*: “The adversary system ... is simply a better method than any other that has been established by which to determine the legally relevant facts in any given case. It is certainly a better method than the exercise of private judgment by any particular individual.” (p. 10)
  - *But: is it better than an adversary system governed by slightly different rules?*
  - *These kinds of arguments, as Wasserstrom notes, can get off the ground only if we have a very high degree of confidence in the institutions themselves...*
- In non-criminal cases, the complaint of the lawyer should be with the law and not with the client.
  - *Why?*
- Any other system would be undemocratic: “If lawyers were to substitute their own private views of what ought to be legally permissible and impermissible for those of the legislature, this would constitute a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers.” (pp. 10-11)
- Wasserstrom thinks these considerations are sufficient to justify role-differentiated behavior of the criminal defense lawyer: “Because a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrongdoing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused—without regard, so to speak, for the merits. This coupled with the fact that it is an adversarial proceeding succeeds, I think, in justifying the amorality of the criminal defense counsel.” (p. 12)
- But he’s skeptical that these special circumstances apply more broadly to the many other examples of role-differentiated behavior among lawyers.
  - *What do you think? Is there a defense, based on the value of the system, for the kind of amoral (immoral?) behavior often required by the practice of various kinds of civil law?*
- Other difficulties presented by the role-differentiated behavior of lawyers:
  - “[I]t is clear that there are definite character traits that the professional such as the lawyer must take on if the system is to work. What is less clear is that they are admirable ones.” (p. 13) He mentions competitiveness, aggressiveness, pragmatism, and ruthlessness.

- That is, even if it's best that we have such lawyers, because of the value of the system, can lawyers occupying these roles still be virtuous?
- Wasserstrom clearly also worries about the possible *corrupting* effects of the legal profession (the Watergate example): a gradual wearing down of sensitivity to moral boundaries...
- Wasserstrom also argues that the role-differentiated behavior of lawyers puts their "integrity" into question in a way that the role-differentiated behavior of most other professions does not. That's because a lawyer acts as an *agent* and *spokesman* for his clients in a way that a doctor, for example, does not act as an agent. A doctor must put her patient's interests first, but she needn't act as an extension of her patient's will, as a lawyer does:
  - The lawyer must aim to explain, persuade and convince others that the client's cause should prevail, whether or not she believes this. This arguably involves the lawyer in hypocrisy.
  - She also becomes an active part in a project she may not believe in – this may compromise her integrity.

*Wasserstrom's second concern: moral problems in the lawyer-client relationship*

Wasserstrom also argues that the professional role of lawyers puts them in danger of forming morally problematic relations with their clients: paternalistic relations in which they take themselves to be the best judges of their clients interests even beyond the area of their expertise, and in which they prevent their clients from making informed judgments about their own cases (legalese). (Consider *Spaulding* again...)

This is familiar also from our dealings with professionals of other sorts (e.g., doctors). Should and can anything be done to correct it?

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24.235J / 17.021J Philosophy of Law  
Spring 2012

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