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**WHAT IS A LAWYER?
A RECONSTRUCTION OF THE LAWYER AS AN OFFICER OF THE
COURT**

DEBORAH M. HUSSEY FREELAND*

ABSTRACT

This paper engages with the central question in legal ethics concerning the lawyer's role, analyzing this fundamental question in terms of professional identity. Literature in this debate frames the lawyer either as a professional who exists entirely to serve her client (the "standard conception"), or as a professional whose primary duties are to the legal system. I reposit and examine the lawyer's professional identity as an officer of the court—an identity marginalized by those who favor the standard conception—noting that "standard conception" was coined to draw attention to a supplanting threat to legal professionalism. Providing a uniquely detailed examination of U.S. Supreme Court jurisprudence and of U.S. judicial system structure and function, this investigation yields strong and consistent evidence that the lawyer's identity as an officer of the court is the actual, legal standard conception of the lawyer, as well as the defining basis of her identity—her sine qua non.

Viewing the formation of the lawyer's professional identity as an instance of the formation of an identity generally, in terms of its interpellation, socialization, and potential suspension or destruction, and examining the nature of that identity in terms of its performance, suggests that the lawyer's

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This work is dedicated to my students, and to all emergent lawyers: may your actions become an honest and fair profession.

role as court officer gives rise to, encompasses and circumscribes her role as a client advocate: a court creates a lawyer to exercise her independent professional judgment in translating between public and private realms, assisting in the formation of binding connections between the two in accordance with the rule of law. This observation reconciles a popular conception of the lawyer with her legal conception, usefully reframing an entrenched debate in legal ethics.

This novel theoretical approach further suggests that the lawyer's identity and professional actions can be understood as links in chains of softly dialectical synthetic acts that reify the private individual in publicly intelligible forms. Though this analysis may sound abstract, theorizing the lawyer's professional identity is a practical endeavor that considers how procedural justice and the rule of law are effected in substantial part through the lawyer's professional performance from day to day, and offers to lawyers and law students an understanding of the lawyer's roles and functions in the administration of justice that affirms their sense of duty to the courts and helps them to protect themselves from subversion.

INTRODUCTION

Aspiring lawyers, seasoned practitioners, and scholars urgently debate the meaning of life—as a lawyer. What does it mean to be a lawyer, and what should a lawyer do? Use her professional skills to get all she can for her client? Does she have any meaningful obligation to serve justice or the court in her work for a client, or are gestures in those directions merely rhetorical flourishes that do not and should not really affect her practice?

This analysis encounters images of the lawyer in two frames, foregrounding her duties as either a creature of the court or a tool of the client. Some commentators attempt to resolve conflicts between the lawyer's roles in these frames by arguing that only one frame holds the true or realistic picture of the lawyer. Some trace the notion of a lawyer as a professional having public duties to the incipience of the profession and emphasize that a lawyer has a duty to serve justice (while also advocating for her client); others argue that a lawyer is simply an agent of the client, owing no real duties to whatever justice may be, or to her profession, other than those of client advocacy.

Examining the creation and regulation of the lawyer yields a perspective that encompasses the *either* and the *or*, showing how the officer and the advocate coextend. There are ties among the individual and the collective, the private and the public, the might-makes-right and the rule of law. Individual lawyers are fully enmeshed in both roles. A lawyer may feel quandered by perceived conflicts of interest between her duties of service to the court and of client advocacy; the debating bodies of literature feel for the lawyer caught in role strain between these two nets, and worry her ties to one frame or the other.

The following analysis relieves the lawyer of neither, but finds a realm of harmony among their ostensible divergences.

I approach these questions by considering what lawyers are, examining how they are made by whom, and to what end. A lawyer is commonly described as an officer of the court, though the significance of her status as such is contested. A lawyer is also described as an advocate for her client, though some courts question whether “zealous” advocacy is ethical advocacy. When these descriptions are thought to conflict, the former role is often relegated to a rhetorical or aspirational realm, while the latter seems undeniable. However, unmooring the lawyer’s representation of the client from the functions of the court of justice undermines the public’s fundamental interest in the rule of law.

In legal historical and common law discussions of the lawyer’s functions, I find support for the hypothesis that it matters that the lawyer is an officer of the court. To assess the extent to which these discussions indicate either a merely aspirational or a fully realized role for the lawyer, I consider how someone becomes a lawyer and how a lawyer is related to a court. To complement these legal and structural analyses, I draw from theories of identity formation, Hegelian dialectics, and reification to explore what lawyers are. I find that the lawyer manifests, performs and persists *as* an officer of the court: if the lawyer had not been appointed by the court to assist in its administration of justice, she would not be a lawyer, and she would not be present to re-present her client as a party to a legal action. The lawyer’s duties of representation run to the court and to the client—and the latter depend from the former. The lawyer’s professional identity as an officer of the court matters to the individual lawyer who may be troubled by perceiving herself narrowly as a zealous advocate, and matters as well to the efforts of our judicial system in effecting the rule of law.

I. HOW DO LAWYERS HAPPEN?

A. *Legal History*

While a comprehensive history of the lawyer’s role lies beyond the scope of this paper, it is useful to examine relevant aspects of English law that persist in our inheritance. A most influential source, William Blackstone’s *Commentaries on the Laws of England* is cited heavily by U.S. courts seeking legal historical information.¹ According to Blackstone, lawyers who represent parties in court:

1. For example, Westlaw searches identify 373 citations to Blackstone’s *Commentaries on the Laws of England* in the opinions of the U.S. Supreme Court (256 in majority or leading opinions), and 5,382 such citations in federal and state courts (4,505 in majority or lead opinions). See also Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 1–17 (1996) (offering a history of Blackstone’s influence on U.S. law, and collecting citations).

are admitted to the execution of their office by the superior courts . . . and *are in all points officers of the respective courts in which they are admitted*: and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practise as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court²

That is, the court creates the lawyer, who is its officer. Further, this office affords to the lawyer privileges *only* as she is subject to the court's discipline. The court creates the lawyer through its acts of admitting a person to the bar and binding her to its service through her sworn oath: without the court's acts, no one can act as a lawyer—thus, no one can represent a party before it.

Blackstone indicates not only that lawyers are officers of the court, but moreover, that the lawyer's role as the court's officer is her *sine qua non*. Blackstone's description of the lawyer maps with fidelity onto modern U.S. lawyers, as discussed below. At a minimum, relevant legal history supports the hypothesis that a lawyer is an officer of the court, even as she is also a client advocate.

B. Court Authority: *The Lawyer Is an Officer of the Court*, Sui Generis

To find the most authoritative contours of the common-law meaning of "officer of the court," I analyze instances of its use in the opinions of the U.S. Supreme Court. I find that while different aspects of its meaning are emphasized in different contexts, a fundamentally consistent definition is clearly identifiable. This observation is helpful in sorting out confusion in the literature about what it means for a lawyer to be an officer of the court.

A lawyer is clearly an "officer of the court," as is demonstrated by the Court's use of the term in a variety of contexts.³ There are also other genres of

2. WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 26 (1769) (italics added).

3. See, e.g., *Moran v. Burbine*, 475 U.S. 412, 424 (1986) ("[W]hile we share respondent's distaste for the deliberate misleading of an officer of the court, reading *Miranda* to forbid police deception of an attorney 'would cut [the decision] completely loose from its own explicitly stated rationale.'" (emphasis retained) (quoting *Beckwith v. United States*, 425 U.S. 341, 345 (1976))); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 466 (1983) (Burger, C.J., dissenting) ("[A]ttorneys for the Justice Department are officers of the court bound to high ethical standards."), *superseded by statute on other grounds*; *Morris v. Slappy*, 461 U.S. 1, 12 (1983) ("In the face of the unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and 'ready' for trial, it was far from an abuse of discretion to deny a continuance."); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring) ("As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the *fair administration of justice*." (emphasis added)); *Mayer v. Chicago*, 404 U.S. 189, 199–200 (1971) (Burger, C.J., concurring) (referring to "the duty of counsel as officers of the court to seek only what [transcripts are] needed"); *Spevack v. Klein*, 385 U.S. 511, 520

officer of the court. For example, judicial officers exercise discretion to decide the common law, while administrative officers do not.⁴ The lawyer is neither of these.⁵ Instead, the lawyer exercises independent professional discretion in providing counsel⁶ to a client, *within* bounds set by the court. The lawyer is a special kind of officer, functioning not within the legislative or executive realms but the judicial, and then not as a judge or administrator, but in a unique sense. Accordingly, when the Court distinguishes a lawyer from a political officer or from an administrative or ministerial officer of the court, the Court does not divest the lawyer of her office, but simply indicates what *kind* of officer she is.

For example, the Court notes that a prosecutor requires immunity from liability under 42 U.S.C. § 1983 when functioning “as ‘an officer of the court,’”⁷ so that she may exercise her professional judgment in performing her

(1967) (Fortas, J., concurring) (“The special responsibilities that [petitioner attorney] assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights.”); *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 107 (1963) (Goldberg, J., concurring) (“Committee members are usually unpaid and serve in fulfillment of their obligation to the profession and as officers of the court.”); *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 405 (1950) (“[T]he relation between the obligations of membership in the bar and service required by the state in time of war . . . and the strong interest which every state court has in the persons who become officers of the court were thought sufficient to justify the state action.”); *Fisher v. Pace*, 336 U.S. 155, 161 (1949) (“[T]he relationship of the petitioner [a lawyer] as an officer of the court must not be lost sight of.”); *Clark v. United States*, 289 U.S. 1, 12 (1933) (“A talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints.”); *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (“Attorneys are officers of the court, and are bound to render service when required by such an appointment.”); *Lamb v. Schmitt*, 285 U.S. 222, 226 (1932) (“Nor can it be doubted that the petitioner here, notwithstanding his presence as an attorney and officer of the court in the conduct of the principal cause, was not immune from the service of process”); *Holmes v. Conway*, 241 U.S. 624, 631 (1916) (holding that, “[c]onsidering Holmes’ position as an officer of the court” and other factors, he had received due process); *Ex parte Terry*, 128 U.S. 289, 305–06 (1888) (identifying the petitioner as “an attorney, and, therefore, an officer of the court”); *Ex parte Robinson*, 86 U.S. 505, 512–13 (1873) (“The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court”).

4. *See, e.g., Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436–37 & n.11 (1993) (distinguishing judges from court reporters, and noting that “[a] court stenographer, notwithstanding the fact that he is an officer of the court, by the very nature of his work performs no judicial function. His duties are purely ministerial and administrative; he has no power of decision.” (citation omitted)).

5. *Cammer v. United States*, 350 U.S. 399, 405 (1956) (“Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges.”).

6. Oxford English Dictionary Online, counsel, n., I.1.a (2d ed. 1989) (“Interchange of opinions on a matter of procedure[.]”).

7. *Van de Kamp v. Goldstein*, 128 S. Ct. 855, 861–62 (2009).

“basic trial advocacy duties”⁸ independently of the threat of a retaliatory lawsuit from a criminal defendant.⁹ The Court thus identifies the prosecutor as an officer of the court with a basic duty to advocate for the State—her advocacy duties inhere in her role as an officer of the court, and are distinguishable from other administrative duties she may have that are deemed functionally not to pertain to that role.¹⁰ Her role as an officer of the court affords the prosecutor immunity to support her advocacy function—which *flows from* and does not relieve her of her primary duty to uphold the law and protect the integrity of the judicial process.¹¹

In a contrasting example, the Court regards the public defender differently from the prosecutor in informative respects. In *Ferri v. Ackerman* the Court defines another contour of the lawyer’s role as an officer of the court: a lawyer appointed pursuant to the Criminal Justice Act by a federal court to represent an indigent criminal defendant was deemed *not* to be entitled to absolute immunity from a malpractice suit by the defendant.¹² Though both are federal officers, the pivotal difference between the prosecutor (who represents the state) and the public defender (who represents a client against the state) is that to perform her duties of representation *as an officer of the court*, the public defender must be able “to act independently of the Government and oppose it

8. *Id.* at 863.

9. *Id.* at 859 (“Over a half-century ago Chief Judge Learned Hand explained that a prosecutor’s absolute immunity reflects ‘a balance’ of ‘evils.’ ‘[I]t has been thought in the end better,’ he said, ‘to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.’” (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949))).

10. *Id.* at 861–862; *see also* *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976):

We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. . . . At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

Notably, drawing a line between these functions does not negate the officer-of-the-court function. *See also* *Buckley v. Fitzsimmons*, 509 U.S. 259, 273–74 (1993) (applying the functional test of *Imbler* to distinguish the prosecutor-as-investigator from the prosecutor as advocate-*and*-officer of the court); *Johnson v. Rex*, 474 U.S. 967, 967 (1985) (Burger, C.J., dissenting from denial of *certiorari*) (“Here the prosecutor was acting as an officer of the court in ensuring compliance with the *Miranda* requirements . . .”).

11. *See, e.g.*, *United States v. Hasting*, 461 U.S. 499, 522 (1983) (Brennan, J., concurring in part and dissenting in part):

It is difficult to imagine that a series of intentional violations of defendants’ constitutional rights by Government prosecutors who are officers of the court charged with upholding the law would not have a considerable detrimental effect on the integrity of the process and call for judicial action designed to restore order and integrity to the process.

12. 444 U.S. 193 (1979).

in adversary litigation.”¹³ The Court held that because the lawyer had been appointed to represent a party adverse to the state, the primary rationale for granting immunity to judges and prosecutors who need “the maximum ability to deal fearlessly and impartially with the public at large”¹⁴ did not apply to her: while immunity from liability to a criminal defendant “for certain claims arising out of the performance of their official duties”¹⁵ helps the judge and prosecutor perform their official functions, such immunity from suit by a client criminal defendant would not help appointed defense counsel perform her official function as a court officer entrusted with representing the accused.

Even as it distinguishes her from “other federal officers[,]”¹⁶ the Court explicitly recognizes and treats defense counsel as a “federal officer”¹⁷ and officer of the court:

There is, however, a marked difference between the nature of counsel’s responsibilities and those of **other** officers of the court. As public servants, the prosecutor and the judge represent the interest of society as a whole. . . .

. . . [The] duty [of appointed counsel] is not to the public at large, **except in that general way**. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.¹⁸

By ignoring the bolded language, one could mistakenly read *Ferri* to state that defense counsel is *not* an officer of the court, and owes duties only to the undivided interests of her client. Instead—even in this limit of representing the private criminal defendant against the public—the Court maintains the lawyer’s foundational duty to the public as an officer of the court. Then, *given* that duty, her principal responsibility as a public defender is to represent criminal defendants against the state.

Similarly, a public defender is not deemed to be a state actor in certain respects, because her duty to the state to assist in providing a fair trial to the criminally accused requires her to advocate a position that is adverse to the state. For example, in *Georgia v. McCollum* the Court relies on *Polk County v. Dodson* in distinguishing an officer of the court from a state actor under 42 U.S.C. § 1983.¹⁹ In *Dodson* Chief Justice Burger emphasizes that, “[t]he

13. *Id.* at 204.

14. *Id.* at 203.

15. *Id.* at 202.

16. *Id.*

17. *Ferri*, 444 U.S. at 202.

18. *Id.* at 202–04 (emphasis added) (footnote omitted).

19. 505 U.S. 42, 64 (1992) (“[U]nder color of state law’ for purposes of 42 U.S.C. § 1983 . . . ‘a lawyer representing a client is not, by virtue of being an officer of the court, a state actor[.]’ (O’Connor, J., dissenting) (emphasis added to limiting language) (quoting *Polk Cnty. v.*

advocate, as an officer of the court which issued the commission to practice, owes an obligation to the court to repudiate any external effort to direct how the obligations to the client are to be carried out,²⁰ including efforts made by the lawyer's employer. At the time of his writing, a showing of state employment ordinarily would suffice to establish that the employee was a state actor; for the public defender, however, the Court required not only state employment but also a functional analysis to determine whether the public defender was acting under color of state law.²¹

In *Dodson* the Chief Justice peels the onion of the lawyer's duties, which run first to the court that commissioned her as its officer, in turn to represent the accused client against the state—and emphasizes that this duty-structure is independent of the lawyer's source of compensation. This point has at least as much force when the client is not adverse to the state: the lawyer is an officer of the court who serves the court by representing a client before it, regardless of whether and how much the client pays the lawyer for the service of representation.²² To the extent that the “standard conception” of the lawyer relies on the client's payment for the lawyer's legal services, the standard conception is insupportable.²³

Dodson, 454 U.S. 312, 318 (1981) (explaining that “a defense lawyer characteristically opposes the designated representatives of the State[.]” because the “system assumes that adversarial testing will ultimately advance the public interest in truth and fairness”)). On the latter point, see also *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973) (“[T]he duty of the lawyer, *subject to his role as an ‘officer of the court,’* is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State.” (emphasis added)).

20. 454 U.S. at 327 (Burger, C.J., concurring).

21. *McCullum*, 505 U.S. at 54.

22. See, e.g., *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 453 (1990) (Blackmun, J., concurring in part and dissenting in part) (“Attorneys are not merely participants in a competitive market for legal services; they are officers of the court.”); *People ex rel. Karlin v. Culkun*, 162 N.E. 487, 489 (1928) (citation omitted):

“Membership in the bar is a privilege burdened with conditions.” The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.

Chief Judge Cardozo's description of the lawyer as an instrument in the administration of justice who does not manifest exclusively as a businessperson has been quoted by the U.S. Supreme Court in *Theard v. United States*, 354 U.S. 278, 281 (1957), *In re Snyder*, 472 U.S. 634, 644 (1985), and *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 310 (1989) (holding that a lawyer could not be compelled to represent an indigent client *pro bono* exclusively on the basis of permissive, not mandatory, statutory authority: “We emphasize that our decision today is limited to interpreting § 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel On the contrary . . .”).

23. See also *infra* Part II.B.

In *Griffiths* the Court makes a similar distinction in considering the Constitutionality of a state's requiring citizenship for admission to its bar: though lawyers are officers of the court, they are not therefore *political* officers; thus, a bar applicant may be required to take the oath of office in good faith, but may not be required to be a citizen of the state.²⁴ The *Griffiths* Court opines that "the duty of the lawyer, **subject to his role as an 'officer of the court,'** is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State."²⁵ This description of the lawyer is vulnerable to misinterpretation: a citation that elides or simply ignores the bolded language strips the lawyer of her primary professional identity as an officer of the court, rendering her *merely* an agent of her client.

Instead, the distinctions articulated by the Court between a lawyer and a state official are actually distinctions between a lawyer *qua* officer of the court, and an elected official—rather than denials that the lawyer holds any kind of office. For some Justices, even this distinction hems the lawyer's role too high:

I am unwilling to accept what seems to me a denigration of the posture and role of a lawyer as an "officer of the court." . . . In the common-law tradition the lawyer becomes the attorney—the agent—for [the] client *only* by virtue of his having been *first* invested with power by the State, usually by a court.²⁶

Distinction between the officer of the court and the political officer may strengthen the independence and credibility of the judiciary by separating the judicial from the other branches of government: the affirmation that the lawyer is a court officer indicates that the lawyer clearly serves the state by assisting the judiciary in the administration of justice, though she does not directly determine state policy. Chief Justice Burger and then-Justice Rehnquist resisted this distinction precisely because it may signal to some that a lawyer is not an officer at all, despite the Court's care to explain that this is not the case:

The concept of a lawyer as an officer of the court and hence part of the official mechanism of justice in the sense of other court officers, including the judge, albeit with different duties, is not unique in our system but it is a significant feature of the lawyer's role in the common law. This concept has sustained some erosion over the years at the hands of cynics who view the lawyer much as the "hired gun" of the Old West. In less flamboyant terms the

24. See, e.g., *Griffiths*, 413 U.S. at 729 ("Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy."); *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 283 (1985) ("Because, under *Griffiths*, a lawyer is not an 'officer' of the State in any *political* sense, there is no reason for New Hampshire to exclude from its bar nonresidents." (emphasis added) (footnote omitted)).

25. 413 U.S. at 724 n.14 (emphasis added).

26. *Id.* at 730–31 (Burger, C.J., dissenting) (emphasis added).

lawyer in his relation to the client came to be called a “mouthpiece” in the gangland parlance of the 1930’s.²⁷

Chief Justice Burger later dissented from the Court’s admission to practice before it several lawyers who had conducted themselves unprofessionally, out of concern that the Court was failing in its duty to uphold the integrity of judicial proceedings:

“Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of *judicial* power. . . .”

. . . [I]t is not a proper exercise of this Court’s judicial power merely to “rubber stamp” applications for admission.²⁸

Chief Justice Burger’s view in *Patterson v. General Motors Corp.* recalls that of Justice Field in *Ex parte Garland*,²⁹ which was influenced by Judge Selden’s analysis in *In re Cooper*.³⁰ *Cooper* reviewed the history of those who represent clients before a court over several hundred years; Judge Selden noted that “attorneys [are] a class of public officers”³¹—and “not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature.”³² Thus, though distinctions between the officer of the court and other kinds of public officer have arisen in various contexts over time, they have not unmoored the lawyer from her role as an officer of the court in Supreme Court jurisprudence.³³

The contexts in which these distinctions have placed the most pressure on the lawyer’s role as a subject of the court are—as in the context of the public defender adverse to the state—those in which the lawyer’s ability to exercise her independent professional judgment most requires protection. The record in

27. *Id.* at 731.

28. *Patterson v. General Motors Corp.*, 1981 U.S. Lexis 246, at *4 (May 18, 1981) (Burger, C.J., dissenting) (emphasis added) (quoting *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378–79 (1867)); see also *In re Caplinger*, 1981 U.S. LEXIS 247, at *6 (May 18, 1981) (Burger, C.J., dissenting) (“Attorneys are officers of the court appointed to assist the court in the administration of justice.” (quoting *In re Monaghan*, 222 A.2d 665, 676 (Vt. 1966) (Holden, C.J., dissenting))); *In re Brose*, 1983 U.S. Lexis 166, at *9 (June 20, 1983) (Burger, C.J., dissenting) (“Of course an attorney is required to advocate zealously the interests of the client, but there are limits to that advocacy. An attorney is an officer of the court . . .”).

29. 71 U.S. (4 Wall.) at 378–79.

30. 22 N.Y. 67 (1860).

31. *Id.* at 90.

32. *Id.* at 84.

33. See, e.g., *Garland*, 71 U.S. (4 Wall.) at 378 (“Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order”); *Gertz v. Robert Welch*, 418 U.S. 323, 351 (1974) (“Respondent’s suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the ‘public official’ category [in First Amendment law] beyond all recognition. We decline to follow it.”).

Cammer v. United States showed that a lawyer had worked methodically and resourcefully to ensure that he was using appropriate means to test a grand jury for bias against his client.³⁴ The district court nonetheless held him in contempt for doing so, citing a statute that granted a court discretionary power to punish the “[m]isbehavior of any of its officers in their official transactions.”³⁵ The Court noted that lawyers are officers of the court, but that a lawyer is not a conventional kind of officer.³⁶ The Court emphasized that the lawyer is (also) engaged in a profession in which she makes her own decisions and runs her own business, to illustrate that lawyers need a space in which to exercise their professional judgment without fear of retribution from an unruly judge.³⁷ The *Cammer* Court was working very carefully to protect the lawyer’s ability to exercise her independent professional judgment from the judge’s power to hold the lawyer in contempt without due process; to protect lawyers from this kind of arbitrary exercise of judicial power, the Court distinguished lawyers *as* officers of the court from other kinds of court officers to whom the statute would apply. Thus, *Cammer* held narrowly that “a lawyer is not the kind of ‘officer’ who can be summarily tried for contempt under 18 U.S.C. § 401(2)”³⁸—*Cammer* did *not* hold that a lawyer is a businessperson rather than a court officer.

Indeed, Justice Reed concurred separately “solely on the ground that the circumstances leading to the enactment of this statute dictate the Court’s otherwise unique reading of the term ‘officers of the court.’”³⁹ Although the Court has taken great care to preserve the lawyer’s identity as an officer of the court in distinguishing her from other kinds of officers, language like that in *Cammer* is vulnerable to chop-logic—to out-of-context quotation to prop the contrary assertion that a lawyer is not an officer of the court.

Like the Supreme Court, state courts regard lawyers as their officers, especially in providing for their appointment, regulation and dismissal—processes by which the court invests the lawyer with a duty-bound office,

34. 350 U.S. 399, 400 (1956).

35. 18 U.S.C. § 401(2) (2006).

36. *Cammer*, 350 U.S. at 405.

37. *Id.* at 405–407. *Cammer* recites the horror story of a Judge Peck who summarily had held an attorney in contempt after the attorney had published a criticism of one of the judge’s opinions; the judge later narrowly escaped impeachment, and the Contempt Act of 1831 was passed to prevent more such abuses of lawyers by judges. Accordingly, this emphasis was made to protect lawyers from “subject[ion] to summary trials by judges without the safeguards of juries and regular court procedure.” *Id.* at 406–407.

38. *Id.* at 407–08.

39. *Id.* at 408 (Reed, J., concurring).

defines the officer's functions, and suspends and removes a malfunctioning lawyer from that office.⁴⁰

From this analysis of court authority, it is reasonable to infer that a lawyer is indeed an officer of the court, and that this office carries meaningful duties in the administration of justice. Courts have the power to confer or rescind the office of lawyer, and to enforce the lawyer's obedience. In a sense, the Court constitutes the lawyer, creating a person's identity *as* a lawyer subject to its power.

C. Structural Analysis

Even if neither legal history nor common law were to identify lawyers as the court's officers, one could determine whether they were in effect, by comparing what it means to be an officer with the lawyer's relationship to the court. An apposite definition of "officer" is: "an appointed or elected functionary in the administration of local government, a public corporation, institution, etc., and in early use esp[ecially] in the administration of law or justice."⁴¹ By definition from the Oxford English Dictionary (which itself offers a historical record, tracing and archiving the etymology of the language) it is appropriate to refer to an appointed functionary in the administration of law or justice as an "officer." The same source defines "court" as an assembly in which justice is administered.⁴² The judge clearly falls within these definitions: he is an appointed (or elected) functionary in the administration of justice in a court—the highest officer of his court.⁴³

40. See, e.g., *About Us*, ST. BAR OF CALIFORNIA, <http://www.calbar.ca.gov/AboutUs.aspx> ("All State Bar members are officers of the court.") (last visited May 20, 2012); *Officer of the Court*, NORTH CAROLINA CT. SYS., <http://testweb.nccourts.org/Courts/CRS/Councils/Professionalism/Officer.asp> (last visited May 20, 2012). In Indiana a lawyer who has been suspended may be reinstated when, *inter alia*, she "can safely be recommended . . . to aid in the administration of justice as a member of the bar and an officer of the Courts." INDIANA RULES OF COURT: RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS 23 § 4(b)(7) (2012), available at http://www.in.gov/judiciary/rules/ad_dis/index.html.

41. Oxford English Dictionary Online, officer, n., 1.b (Draft Revision, Dec. 2008). This source is cited for linguistic evidence of social or discursive structures—of the valences among terms that describe aspects of these structures.

42. Oxford English Dictionary Online, court, n., IV.11.a (2d ed. 1989) ("An assembly of judges or other persons legally appointed and acting as a tribunal to hear and determine any cause, civil, ecclesiastical, military, or naval. Justice was in early times administered in assemblies held by the sovereign personally . . . then by judges who followed the king as officers of his court . . .").

43. *Id.*; see also Oxford English Dictionary Online, judge, n., 1.a (2d ed. 1989) ("A public officer appointed to administer the law; one who has authority to hear and try causes in a court of justice."); Oxford English Dictionary Online, judicature, n., 1 (2d ed. 1989) ("The action of judging; administration of justice by duly constituted courts; judicial process. Often in phr[ase]: 'court of judicature.[']").

A person who wishes to become a lawyer⁴⁴ must apply to the bar⁴⁵ for a license to practice law. Typically, she applies to the highest court in the state for admission to the legal profession. The court will consent only if the applicant meets its criteria for legal competence and the moral character necessary to the profession.⁴⁶ The criterion of legal competence is usually met with educational credentials and a passing score on an examination of legal knowledge and analysis administered by the bar.⁴⁷ Criteria relating to moral character⁴⁸ are typically met by an investigation of the applicant's background and an examination on the rules of professional conduct.⁴⁹ Though the court

44. Oxford English Dictionary Online, lawyer, n., 1.a (2d ed. 1989) (“a member of the legal profession”).

45. “Bar” means “court.” Oxford English Dictionary Online, bar, n., III.22.a (2d ed. 1989) (“The barrier or wooden rail marking off the immediate precinct of the judge’s seat, at which prisoners are stationed for arraignment, trial, or sentence.”); *see also* III.23.a (“This barrier, as the place at which all the business of the court was transacted, soon became synonymous with: Court . . .”).

46. *See, e.g.*, RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND (2009), available at <http://www.courts.state.md.us/ble/pdfs/baradmissionrules.pdf>; RULES FOR ADMISSION TO THE BAR – MINNESOTA 5 (2011), available at https://www.revisor.leg.state.mn.us/court_rules/rule.php?type=pr&subtype=admi&id=5; FLORIDA RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR 1-14.2 (2011), available at <http://www.floridabarexam.org/public/main.nsf/rules.html>; *Overview*, COLORADO SUP. CT., BOARD OF L. EXAMINERS, http://www.colradosupremecourt.com/BLE/ble_home.htm (last visited May 20, 2012).

47. *See, e.g.*, NAT’L CONFERENCE OF BAR EXAMINERS & AM. BAR ASS’N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 1–13 (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_comp_guide_for_web.authcheckdam.pdf; *Description and Grading of the California Bar Examination*, ST. B. OF CALIFORNIA, COMMITTEE OF B. EXAMINERS/OFF. OF ADMISSIONS, <http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=wriqbATHUwY%3D&tabid=270> (last visited May 20, 2012); *Admission Requirements*, ST. B. OF NEVADA, <http://www.nvbar.org/content/admission-requirements> (last visited May 20, 2012); *Washington Bar Exam Information and Application*, WASHINGTON ST. B. ASS’N, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Bar-Exam-Admissions/Application-and-Exam-Information> (last visited May 20, 2012).

48. *See, e.g.*, *Statement on Moral Character Requirement for Admission to Practice Law in California*, ST. B. OF CALIFORNIA, <http://admissions.calbar.ca.gov/MoralCharacter/Statement.aspx> (last visited May 20, 2012); Kathryn L. Allen & Jerome Braun, *Admission to the Bar—Character and Fitness Considerations*, OFF. OF B. ADMISSIONS FOR THE ST. OF GEORGIA, <http://www.gabaradmissions.org/pages/braun.php> (last visited May 20, 2012).

49. *See, e.g.*, *State Board of Law Examiners*, MARYLAND JUDICIARY, <http://www.courts.state.md.us/ble/index.html> (last visited May 20, 2012); *The State Bar of California: What Does It Do? How Does It Work?*, ST. B. OF CALIFORNIA, <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=SQpY73pa3F4%3D&tabid=212> (last visited May 20, 2012); *Overview*, NEW YORK ST. SUP. CT., COMMITTEE ON CHARACTER & FITNESS, <http://www.nycourts.gov/courts/ad1/Committees&Programs/CFC/index.shtml> (last visited May 20, 2012); *What Are the Responsibilities of the Character and Fitness Committee?*, ST. OF VERMONT JUDICIARY, <http://www.vermontjudiciary.org/Lists/1-FAQs/DispForm.aspx?ID=289> (last visited May 20, 2012).

may rely on a dedicated institution for processing applications,⁵⁰ the court itself retains the authority to determine whether to appoint the applicant to an office of the court.⁵¹ If the court decides to admit the applicant, the court binds the applicant to itself with her oath, for example, to support the Constitution of the United States and that of the court's state, and to "serve, protect, foster and promote the fair and impartial administration of justice."⁵² Were the court to decline to take this action, the applicant would not become a lawyer. Only through the consent of the state is a lawyer born.

Rhetorically, the metaphor of birth for the transformation of a layperson into a professional evokes an image of the appearance of a distinct being. This metaphor does more than simply offer an image: it focuses our attention on the physical and symbolic processes that create a lawyer where before there was none. The Socratic method of pedagogy entails "assisting a person to become fully conscious of ideas previously latent in the mind."⁵³ Similarly, the appearance of this distinct being is achieved through an analogous Socratic process in which something latent is realized, or becomes real. The Socratic process is assisted: it requires someone to act as a midwife, or have a "maieutic" function.⁵⁴

50. For example, the "State Bar of California is an administrative arm of the California Supreme Court[.]" which deals directly with bar admissions on behalf of the court. ST. B. OF CALIFORNIA, <http://www.calbar.ca.gov/> (last visited May 20, 2012); see also *The State Bar of California: What Does It Do? How Does It Work?*, supra note 49; *About the Bar*, VIRGINIA ST. B.: AN AGENCY OF THE SUPREME COURT OF VIRGINIA, <http://www.vsb.org/site/about> (last visited May 20, 2012); *About the WSBA: Governance*, WASHINGTON ST. B. ASS'N, <http://www.wsba.org/About-WSBA/Governance> (last visited May 20, 2012) ("The WSBA is an administrative arm of the Washington State Supreme Court.").

51. See, e.g., *State Board of Law Examiners*, supra note 49; *About Us*, supra note 40 ("All State Bar members are officers of the court."); INDIANA RULES OF COURT: RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS 3 § 1 (2012), available at http://www.in.gov/judiciary/rules/ad_dis/index.html.

52. *NJCOP [New Jersey Commission on Professionalism] Principles and Pledge[:]* *The Lawyer's Pledge*, NEW JERSEY ST. B. ASS'N, <http://www.njsba.com/resources/njcop/njcop-principle-prof.html> (last visited May 20, 2012); see also George H. Hathaway, *Plain Language[:]* *A Plain English Lawyer's Oath*, ST. B. OF MICHIGAN, http://www.michbar.org/generalinfo/plain_english/columns/142.cfm (last visited May 20, 2012); Arkansas Supreme Court, *Oath* ("I will endeavor always to advance the cause of justice . . .") (available from the Clerk of the Arkansas Supreme Court and Court of Appeals (on file with the author)); ALASKA BAR RULES 5 § 3 (2012), available at <http://www.courts.alaska.gov/bar.htm> (affirmation to "strive to improve both the law and the administration of justice."). See generally Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3 (2009).

53. Oxford English Dictionary Online, maieutic, adj. and n., A.adj. (Draft Revision Sept. 2008) ("Relating to or designating the Socratic process, or other similar method, of assisting a person to become fully conscious of ideas previously latent in the mind.").

54. *Id.*

The metaphor of birth also engages Hegel's description of dialectical reasoning. For Hegel, the dialectical process of syllogism mediates and unifies extremes or opposites to produce a higher-order truth; further, latent within these opposites is their unity.⁵⁵ Describing Hegel's concept of truth-production through unification in Fichte's terms,⁵⁶ in this dialectical process a thesis and its antithesis are merged into a higher truth, or synthesis. To adapt these terms to the creation of a lawyer, I first propose a softer dialectic relationship that relaxes the requirement of opposition: this relationship exists between complements that need not be opposites. The dialectical unification of these complements produces a synthesis that is a new entity, which may (but need not) be regarded as a "truth." The production of the new entity (such as a lawyer), or (professional) identity, can involve a maieutic function, either actually or figuratively. The maieutic function can consist of the acts of a person (such as a judge) or institution (such as a court) that assist in the realization or materialization of something (such as an applicant to the bar) in a new form.

I refer to the creation of the lawyer as her *materialization* as a professional: of course, she existed as a person before her transformation into a member of the legal profession, but she did not exist *as* a lawyer, or *in the form of* a lawyer, with all of a lawyer's abilities and responsibilities. Pertinently, as a layperson she could not advocate for or represent others in litigation—she did not materialize as a lawyer in court. I use "materialization" to refer to the process of her mattering⁵⁷—or bodying forth—as a lawyer.

If the result of this birth is a lawyer, the moment of birth is that of taking the lawyer's oath. The moment of swearing the oath is transformative: the layperson undertakes to manifest the law *through* her own actions, at once becoming a lawyer and in turn dedicating herself to the maieutic work of making the rule of law a reality. *In and through performing this act* she becomes a lawyer: the Constitution constitutes her as its servant. She is knit and bound by it, as she was not a moment before. The performative act of swearing the oath of the legal profession is a speech act that produces the lawyer as an officer of the court. The judge giving the oath of this office is engaged in a maieutic process that bodies the lawyer forth as the court's officer.

55. GEORG WILHELM FRIEDRICH HEGEL, *THE SCIENCE OF LOGIC* 588–90 (George di Giovanni ed. and trans., 2010).

56. JOHANN GOTTLIEB FICHTE, *Review of Aenesidemus*, in FICHTE, *EARLY PHILOSOPHICAL WRITINGS* (D. Breazeale ed. and trans., 1988).

57. Judith Butler usefully defines "matter" as to "materialize, and to mean," in discussing intelligibility. JUDITH BUTLER, *BODIES THAT MATTER* 32 (1993). I borrow these terms for my analysis of the transformation of something that does not appear or read properly in our judicial processes, into something that does.

Before her birth into the legal profession, the applicant prepared and was prepared for it through a process comprising her legal education in substance, analysis and ethics, her moral character assessment, and her passing a bar examination. Through these interactions the legal profession interpellates⁵⁸ her, or calls her, to be a lawyer, conceiving of her as a potential lawyer. I use “interpellation” to point to the way in which a person or an institution can call something forth, giving rise to or engendering it through rhetorical and other acts which signal that the interpellated subject would be recognized or legible in the discourse⁵⁹ (here, in the legal profession). When the subject responds to interpellation with acts that are appropriate to the discursive realm of the interpellation, her responses manifest, or matter in that realm. Meanwhile, acts that are inappropriate to the discursive realm fail to materialize in it: they do not matter; they are meaningless. Behaviors that negate the interpellation may be legible in the discourse: they may matter in a negative sense, and in return they interpellate discouragement or sanction from the structure that attempts to call the subject forth. The process of interpellation that prepares one to materialize as a lawyer is a process of socialization into the legal profession.

Interpellation is an act of subject-formation in that it conceives of a subject, calling or inviting the subject to form. Maieusis is an act of subject-formation in that it denotes the actual appearance of the subject in a discursive realm, the realization of the latent hope of interpellation. The discursive realm of the legal profession, and the laity that is its supplement, can be understood to be in a dialectical relationship that synthesizes the lawyer. The mechanisms of this production include the invitation (the question of identity) that interpellates the lawyer from the laity, the swearing of the oath (the answer) that unites the layperson and the discursive realm, and the swearing judge’s maieutic work that transforms the applicant into a lawyer, moving her into the discursive realm of the law, making her a real legal actor. This dialectical mechanism works properly to form a lawyer when it conforms to the ethics of the legal discourse; that is, discursive ethics attend interpellation and maieusis, subject-formation and performance.

58. LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 85, 117–20 (Ben Brewster trans., 1971). Althusser used this term to discuss ideology and the formation of a subject. I find this term useful for examining the general problem of the creation of an identity within a discursive structure.

59. Deborah M. Hussey Freeland, *Maieusis Through a Gated Membrane: “Getting the Science Right” in Public Decisionmaking*, 26 *STAN. ENVTL. L.J.* 373, 386–87 (2007).

Thus, a person can only materialize *as a lawyer* if a court appoints⁶⁰ her to the bar as a functionary⁶¹ in the administration of law or justice.⁶² The court's elaborate provisions for a person's application and potential admission to practice demonstrate that the court views those whom they appoint to the legal profession—lawyers—as officers of the court, sworn to the administration of justice from the moment of their formation.

The presence of the lawyer is therefore a materialization of the court's power. The lawyer is a subject *of* the court's power to form its officers, which begins with the court's acts of admission. The lawyer is also subject *to* this power, which subtends the officer persistently through the term of her service (this term may extend throughout her life, but only while it is afforded by the court). The court has various means of directing its officers' professional conduct. When a lawyer appears in court as an advocate, the lawyer's conduct is subject to rules (such as the Federal Rules of Civil Procedure, federal or state rules of court, local rules, and the standing orders of the presiding judge), regulations to which the lawyer's performance must conform. The rules shape her demeanor and dress—her actions and costume on the court stage. Though her speech may be her own improvisation, her privilege to speak is constrained by the responsibilities to the court that she assumes in order to appear and act on stage. The lawyer may incur the court's contempt. Where the law and rules do not explicitly address a court's need to regulate its officers' conduct, the court has inherent powers to sanction and otherwise rein that conduct.

The court not only makes its officers, but also disciplines them. To discipline is to “train to habits of order and subordination.”⁶³ The court (optionally through its bar association) may require every officer to keep her legal education current through documented, accredited, substantive study.⁶⁴ The court may provide a hotline to assist its officers who are uncertain as to what would be the most ethically appropriate course of action in a given situation.⁶⁵ If a lawyer's performance is compromised by psychological or

60. Admission is synonymous with appointment. Oxford English Dictionary Online, admission, 2 (2d ed. 1989) (“Reception or acceptance into an office or position; appointment, institution.”).

61. Oxford English Dictionary Online, functionary, n. (2d ed. 1989) (“One invested with a function; one who has certain functions or duties to perform; an official.”).

62. The administration of justice is a function of the court. *See supra* note 42 and accompanying text.

63. Oxford English Dictionary Online, discipline, v., 1.a. (2d ed. 1989).

64. *See, e.g.,* NAT'L CONFERENCE OF BAR EXAMINERS & AM. BAR ASS'N, *supra* note 47, at 45–46; *The State Bar of California: What Does It Do? How Does It Work?*, *supra* note 49; WISCONSIN SUPREME COURT RULES 31(2011), available at <http://www.wicourts.gov/sc/scrule/DisplayDocument.html?content=html&seqNo=36666>.

65. *See, e.g.,* *The State Bar of California: What Does It Do? How Does It Work?*, *supra* note 49; *Grievance and Ethics Information*, ST. B. OF TEXAS, http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/HTMLDisplay.cfm&Conte

other problems, the court may offer confidential, rehabilitative support.⁶⁶ The court acts to assure that its officers' conduct conforms to the professional ethics described in legal education, in the rules of courts and bar associations at all levels, and in the bar's moral character requirements. In a sense the court is always calling forth and forming its officers.

Discipline "form[s]" its subject "to proper conduct and action."⁶⁷ The legal profession serves the essential public function of upholding the rule of law, and public trust has afforded the profession some privileges of self-regulation.⁶⁸ The court may invite and analyze complaints from the public, attempt to reshape troubled attorney-client relationships, and temporarily inactivate or even permanently remove lawyers from office if the court deems that action appropriate after reviewing the lawyer's conduct.⁶⁹ Officers of the court also socialize themselves *qua* officers, for example, through the activities of the American Bar Association and other voluntary professional associations.⁷⁰

ntID=15697 (last visited May 20, 2012); *The Utah State Bar's Office of Professional Conduct's ("OPC") Ethics Hotline for Attorneys*, OFF. OF PROF. CONDUCT, UTAH ST. B., http://www.utahbar.org/opc/opc_ethics_hotline.html (last visited May 20, 2012); *Answering Your Questions About Legal Ethics*, VIRGINIA ST. B., http://www.vsb.org/profguides/FAQ_leos/LegalEthicsFAQs.html (last visited May 20, 2012).

66. See, e.g., *The State Bar of California: What Does It Do? How Does It Work?*, *supra* note 49; *Guide to the Colorado Attorney Assistance Program (CAAP)*, COLORADO SUP. CT., <http://www.coloradosupremecourt.com/Registration/CAAP.htm> (last visited May 20, 2012); Betty M. Shaw, *Psychological Fitness: Dealing with Mental Health Issues*, MINNESOTA LAW. PROF. BOARD, <http://lprb.mncourts.gov/articles/Articles/Psychological%20Fitness-%20Dealing%20With%20Mental%20Health%20Issues.pdf> (last visited May 20, 2012); *History and Purpose of NHLAP*, NEW HAMPSHIRE LAW. ASSISTANCE PROGRAM, <http://www.lapnh.org/history.html> (last visited May 20, 2012).

67. Oxford English Dictionary Online, discipline, n., 3.a (2d ed. 1989). Like legal education, professional discipline is part of the process of socialization and identity formation of a lawyer. See Oxford English Dictionary Online, socialize, v., 2 (Draft Revision Jun. 2010) ("to instil in (a person) the values and norms of his or her society or group.").

68. Geoffrey Hazard analyzes lawyers' diminishing self-regulation and increasing regulation by the courts in Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991). Viewing lawyers as the court's officers suggests that the court's regulation of lawyers should be regarded as a form of self-regulation. Nonetheless, the legalization of professional norms transforms questions of professionalism that had been addressed informally among lawyers into more generic questions of legal liability.

69. *The State Bar of California: What Does It Do? How Does It Work?*, *supra* note 49 (noting that The State Bar of California has a dedicated State Bar Court for disciplinary hearings); *Attorney Discipline System*, NEW HAMPSHIRE JUD. BRANCH, <http://www.courts.state.nh.us/committees/attydiscip/index.htm> (last visited May 20, 2012); *Missouri's Lawyer Discipline System*, MISSOURI B., http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Brochures_and_Booklets/Client_Resource_Guide/discipline.pdf (last visited May 20, 2012).

70. For evidence of peer socialization, see, e.g., *Association Goals*, AM. B. ASS'N, http://www.americanbar.org/utility/about_the_aba/association_goals.html (last visited May 20,

This analysis of the lawyer's relationship to the court indicates that lawyers are *de facto* officers of the court. The court creates and shapes lawyers; lawyers are always already creatures of the court.

II. WHY DO LAWYERS HAPPEN?

We have seen how the court⁷¹ invites a layperson to apply to the legal profession, how an applicant is appointed to assist the court in its administration of justice, and how an applicant becomes an officer of the court by swearing the lawyer's oath. In other words, the court interpellates the lawyer, calling forth the formation of that subject, and a layperson learns to respond in the terms of the legal discourse. This question and answer, or thesis and antithesis, are synthesized in the maieutic moment of the judge's administering and the applicant's taking the lawyer's oath of office: a lawyer is born.

This Part moves from the lawyer's structural situation—the embeddedness of her professional identity in the legal system—to the examination of her function in that system.

A. *Why Does the Court Create Lawyers?*

What does it mean for a private person to materialize as a lawyer? To come into the world of law is to cross a threshold into a realm that is distinct from the ordinary world of the private citizen. Law can be thought of as an institution or a discursive realm defined—shaped and bounded—by legal standards, rules, ethics, and norms within which actions proper to the law materialize. “Professional” actions are those appropriate to the discursive realm. The professional acts of the lawyer enact the discourse, in a sense forming it, presenting and re-presenting it as a stage-actor performs a play: the text of the play comes to life through her actions before the audience. The lawyer is an integral part of the discursive structure of law; the rule of law is realized in part through her professional performance, and not through that of the judge acting alone.

2012); *Ethics Opinions*, FLORIDA B., <http://www.floridabar.org/tfb/TFBETOpin.nsf/EthicsIndex?OpenForm> (last visited May 20, 2012); *Ethics Committee*, BOSTON B. ASS'N, <http://www.bostonbar.org/sc/ethics/index.htm> (last visited May 20, 2012); *Ethics Opinions*, LOS ANGELES COUNTY B. ASS'N, PROF. RESP. & ETHICS COMMITTEE, <http://www.lacba.org/showpage.cfm?pageid=427> (last visited May 20, 2012).

71. “The court” may be used generally to refer to the judicial system, or in any specific instance, to refer to a particular court that performs this function. It is occasionally debated whether a lawyer is an officer of the court or is *instead* an officer of the legal system. A lawyer is both an officer of the specific court(s) before which she is admitted to practice, and an officer of the judicial system of which the court is a part (and clearly, the judicial system is part of the legal system more generally).

The discursive realm of the court is one in which only certain kinds of statements can be made, only at particular times, only in specific ways, and only by particular people acting in given capacities. This discursive realm is not as fully scripted as that of a play on a stage, yet the comparison is useful. The judge directs the action, the advocating lawyers (those who lend their voices) are the actors cast in speaking roles, and the parties are the characters (those whom the lawyers represent); the script has some passages explicitly set by law, while others are improvisations that must meet criteria known to the actors and director. The parties and the fact-finders in some respects map into a critical audience, although as in some plays, they may be called upon to express themselves directly within given constraints.

As in the theatre, the script defines various boundaries within which the action will take place. The court's script is more an elaborate set of stage directions than a text to be spoken; as an officer of the court, the lawyer has both procedural and substantive responsibilities in her role as a professional actor on the court stage. Through her performance, the script comes alive: without her action, law would remain abstract, rules in books, unrealized, un-lived, immaterial.

When this professional legal actor acts as an advocate in court, she plays a dual role: as a professional, she always acts according to the law, rules, ethics and norms that define legal discourse; meanwhile, within those bounds, she manifests the legal interests of the party whom she represents. The characters' substantive speeches are planned and rehearsed but ultimately improvised by the actors, who resemble more the classical soloists of old and jazz musicians of today than they do actors reciting Shakespeare word for word. While the lawyer has room to exercise her professional judgment to decide what to say on behalf of her client as she presents his claim to the judge (and how to say it), "professional" means that she performs these representative actions always within the constraints set by her role as the court's officer. To assist the court in the administration of justice, she must be honest with the judge and not mislead him in reporting facts to the court and rehearsing legal arguments about the facts for the court. The court requires her to manifest the rules of procedure, evidence, lawyering, and substantive law in good faith, and not to manipulate them to benefit her client at the expense of the integrity of the law: she must play fair, and not demean her profession.

Though they may seem abstract, a lawyer can detect boundaries encompassing the court and the legal profession in her ordinary experience. She acknowledges these boundaries, implicitly or consciously, when she uses her legal skills and status ethically (rather than arbitrarily), and when she speaks professionally (rather than casually). For example, she respects the boundary when she would like to recount a privileged story about a client—but instead says something else, and when she senses an opportunity to prevail as an advocate by asserting something in bad faith—but then does not. If in

either instance, she proceeds when she should refrain, (it is to be hoped that) she senses her transgression of the boundary.

Behavior falling within these boundaries ties into the warp-lines that support and subtend the legal profession. The mesh of our laws supports our social fabric entire; from the courts emanate fine threads of law to mend specific flaws. To realize individual rights and to fashion legal remedies, the officers of courts follow layers of procedural rules, within which their actions are fully enmeshed.

A judge and his court are so closely identified that “court” has become his metonym. A private person who happens also to be a judge is of course a human being and a citizen like any other—but in his office he is also, both symbolically and effectively, something else as well: an instance of the state, appointed to administer the law in each case brought for trial in a court of justice. The court is both the judge’s court and the state’s court: both the professional domain of the judge and an institution of government. As a person vested with the state’s authority, the judge serves the state by bodying forth the rule of law.

Thus, the presiding judge has a maieutic function: in writing his opinion the judge treats the opposed parties, resolving their dispute by incorporating their theses in synthesizing a new stretch of common law. This synthesis is bound by a maieutic ethic: the judge is to bracket his personal, political commitments and strive professionally to find, channel, or produce the law in accordance with the procedural and substantive rules that shape legal discourse. In the formalist limit, the same law would result from the judge’s act of dialectical synthesis regardless of the personal identity of the writing judge. While this limit may describe a professional ideal, legal realists note that different judges may synthesize different threads of law—despite striving to work properly the decisionmaking mechanisms appropriate to the discourse. It is the judge’s strife that manifests his professionalism, his performance of a speech act (writing his opinion) in accordance with the maieutic ethic of representation, of re-presenting the law on the matter in his hands.

The state channels formidable power to the court to fulfill its charge of applying the law and ruling justly. The court, in turn, appoints lawyers to represent parties (*inter alia*): to manifest properly private persons whose interests are to appear for judgment. The lawyer’s acts of representation are examined more closely below. Clearly, lawyers are subject to the judge’s explicit and inherent powers and are thus lower officers of the court than is the judge. If a judge is the heart and mind of the court, then the lawyers who bring the parties before him are its right and left hands.

The courts are faculties of the state that reach out in the form of their lawyers to engage with and act upon individuals who seek remedies. The

duties that attend the lawyer's office⁷² include actions that constitute the state's engagement with individual petitioners who would move the court. These duties are essential to the American adversarial system of justice. Even if the history and design of our judicial system were not already to require the lawyer to act as an officer of the court, we would need to appoint the lawyer as such to provide and delimit the actions that manifest her clients in the system. Indeed, when a lawyer who has not been admitted to practice before a foreign state court seeks to represent a party before that court, she will only be admitted for a particular performance of representation, subject to the *pro hac vice* rules of the foreign court:

[O]ne of the principal purposes of the *pro hac vice* rules is to assure that, if a [state court's] lawyer is not to be present . . . the lawyer admitted *pro hac vice* will be there. As such, he is an officer of [that state's] Court, subject to control of the Court to **ensure the integrity** of the proceeding.⁷³

Here again, we see that the lawyer is not only an officer of the court, but that the officer is subject to the court's power for the purpose of ensuring the integrity of the litigation process. As a legal actor, the lawyer has both procedural and substantive duties in the administration of justice, and is bound to play fair. A properly socialized, disciplined lawyer can detect the ethical boundaries of her profession, and identifying with the discourse, has internalized its professional boundaries as her own.

Even if the lawyer's role as an officer of the court were not well established in the history of our profession, it would be straightforward to infer it from both her structural situation and the functions she serves within the institutions that call the lawyer forth and shape her behavior. Further, if the lawyer's role as an officer of the court were not to exist, the court would need to create it to assist the judge in the adversarial process of justice that we use to reweave the rifts in our social order.

B. *Weaving the Social Fabric*

While in the United States federal legal system the legislature writes the laws to which all persons within the state's power are subject, the courts interpret and apply the laws to specific persons' matters. In fashioning

72. Oxford English Dictionary Online, duty, n., 1.a (2d ed. 1989) ("The action and conduct due to a superior . . ."); Oxford English Dictionary Online, office, n., 2.a ("A position or post to which certain duties are attached, esp[ecially] one of a more or less public character; a position of trust, authority, or service under constituted authority; a post in the administration of government, the public service, the direction of a corporation, company, society, etc."). These duties attach the lawyer through the oath sworn by each applicant as she crosses the threshold of the profession of law, as discussed *supra* Part I.C.

73. *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 56 (Del. 1994) (emphasis added).

individual remedies from general laws, the court to some extent also makes law. In drawing the threads of the law spun by the legislature to determine how they bind particular people, the court often must spin a few threads of its own.

The legislative machine weaves the social fabric on a grand scale, through the collaboration of lawmakers who represent the collective public (and who are lobbied by representatives from specific groups). The legislators who work the mechanisms of the legislative machine are themselves the products of maieutic processes. A political candidate becomes a legislator through a series of call and response, invitation and acceptance: the candidate is called to run by a vacancy in the institutional structure of the legislature, and his running in turn interpellates voters; their election in turn invites him to office, to which his taking the oath of office is an answer—in that maieutic moment, a legislator is born. The legislator's constituents constitute him as their representative in government: he is their reification, their manifestation as an actor in a legislative discourse; they are the material of which he (as a legislator) consists. His election not only renders him the site of reified members of the public, but it also makes him a public servant as a member of the government. Thus, the professional acts of a Senator or Congressman are governmental actions, as well as actions on behalf of his public constituents who cannot otherwise reach the mechanisms of the legislative realm.

Legislators who are the products of election processes in turn complement each other as they produce statutory law. While the laws they synthesize on our behalf bind each of us, by necessity they are writ large: its scope encompassing the political will of large numbers to govern the work of large numbers, the statute is coarse cloth. A legislator performs at least two orders of maieutic acts. The first involves representing or channeling his constituents' interests as he negotiates and drafts legislation, translating his most honest understanding of their needs and will into a text that is appropriate for transformation into the language of a statute. The second is his vote, the speech act that transforms a bill into law, enacting it as a statute—a text that will in turn be read to inform social ordering, and be interpreted in the maieutic work of a judge.

I see in Hegel's discussion of the syllogistic process a crochet that traces a chain of syntheses involving various kinds of syllogism (for example, the syllogism of existence, the syllogisms of reflection, and the syllogism of necessity) in which "[t]he different genera of the syllogism exhibit instead the stages in the repletion or concretion"⁷⁴ of their mediating terms. That is, each "syllogism is full of content,"⁷⁵ and at the maieutic moment at which a new

74. HEGEL, *supra* note 55, at 624 (italics omitted).

75. *Id.* at 617 (italics omitted).

thread is pulled through a dialectical loop (“the completion of the syllogism”⁷⁶) the mediation sublates itself: the posited mediation has been realized or concretized—the interpellation has been answered through a maieutic act that posits a new site of interpellation. In the discourse of the law, this weaving, this “movement is the sublation of this mediation”⁷⁷ into the next order of mediation that produces the fabric of social order. For example, an extant government interpellates a new legislator from the general public through its established mechanisms of election; the process of election culminates in the maieutic moment in which a member of the public takes the oath of office, crossing into the realm of the government, creating a new extant government and reifying his constituents therein, a unification that sublates an electorate into one representative. This newly produced government actor then participates in a different genre of production, that of synthesizing new law from potential manifestations in the legislative process. This legislative production process culminates in the maieutic moment of the enactment of a new statute, a new hard-twisted thread in the statute-cloth.

Working within these warp and weft, the court must interlace fine filaments of legal discourse to weave out the social fabric. In that they work at the level of the individual, individual courts more resemble cottages of industry than factories—though collectively, their structure entails review of the filaments they produce for uniformity with parallel filaments, and for conformity to the pattern delineated in the Constitution and by the legislature. In these cottages the sublime rule of law materializes. Thus, the court is the law’s best room: it is sacred to the rule of law, and one enters the court at the utmost of care. The bar—the demarcation that distinguishes this realm of legal industry is so crucial to the function of the legal profession that it has become synecdochic for the court; the boundary between the court and that which is not properly before it is of central importance in the administration of justice. “The bar” meant literally “the railing or ‘bar’ in a courtroom [that] separat[es] spectators from lawyers and the judge.”⁷⁸ This boundary between the court and the laity protects the integrity of the court. Accordingly, petitions to mend gaps or rents in the social fabric must be brought properly (as specified by layers of rules of procedure) for the mechanisms of the court to act upon them.

Put another way, the best room houses the machinery that spins out the rule of law; accordingly, it must be kept free of inappropriate matter that would gum up the mechanisms, of inappropriate actions that would derange the delicate instruments of social order. The boundary that encompasses the court must be selectively permeable: it must allow in only information and action that are appropriate to the court, and keep out that which would misguide it.

76. *Id.* at 623.

77. *Id.* at 624.

78. *The State Bar of California: What Does It Do? How Does It Work?*, *supra* note 49.

The gatekeepers at this boundary between the court and those who seek legal action are the lawyers. Thus, the lawyers are professionally bound to bring before the court only those parties whose claims are legally and ethically appropriate for judicial action, and to present those claims only in ways that make them fit for entry into the best room. To the extent that the gatekeeping lawyer fails in these functions, the integrity of the court is imperiled: the rule of law remains immaterial, as it does not materialize in the work of the court.

The judge at the court's center issues his officers to meet those who would appear before him. These officers are produced by the court to work at its boundary, to engage those who seek remedies and help them materialize properly before the court as parties to a legal action. Through these liminal figures, individuals who seek rights are realized by the state; like heroes at a frontier, lawyers encounter someone who has unrealized rights and brings them into the material, performing boundary-work between public and private, law and non-law. In the structure of the court, the lawyers *are* the bar—protecting the integrity of the court's decisions by ensuring that they are properly founded, and thus protecting the integrity of the common law. These officers are bound to maintain the court's integrity in both specified and general ways.⁷⁹ Necessarily responsible to the indispensable, foundational, and thus primary functions of the court of justice, lawyers owe a duty **to the court** to represent before it a private person as a party, translating the former into the latter. A translator assisting a witness in testifying before the court must take "an oath or affirmation to make a true translation."⁸⁰ This legal requirement signals and supports the fact-finder's epistemological reliance on the witness' testimony, which is itself made under duty and oath to testify truthfully.⁸¹ *A fortiori*, the lawyer who represents or translates private concerns into public pleadings acts under duty and oath to make a true translation: to represent the party honestly without misleading the finder of fact.⁸² A lawyer whose

79. For example, lawyers must maintain the integrity of the profession, MODEL RULES OF PROF'L. CONDUCT PART 8 (2010), and maintain candor toward the court, *id.* R. 3.3.

80. FED. R. EVID. 604.

81. FED. R. EVID. 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.").

82. This duty extends beyond simply avoiding misstatements of fact or law, to avoiding expediency, deceit, trickery, or artfulness. *See, e.g.*, CAL. BUS. & PROF. CODE § 6068 (West Supp. 2012); *The Lawyer's Oath*, MISSOURI B., http://members.mobar.org/pdfs/publications/annual_report/oath.pdf (last visited May 20, 2012); *Lawyer[']s Oath*, ST. B. OF MICHIGAN, <http://www.michbar.org/generalinfo/lawyersoath.cfm> (last visited May 20, 2012); SOUTH CAROLINA JUDICIAL DEP'T RULES 402(k)(3), Oath of Office for Attorneys ("I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, *and* will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law[.]") (emphasis added), *available at* <http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=402&subRuleID=&ruleType=APP>.

performance fails in these duties engages in mis-representation, failing in the very purpose for which the court created her.

So, the Constitution provides for the judge, the judge appoints the lawyer to assist him in the administration of justice, and the lawyer represents the party before the court. Legal representation is a complex function that operates on a layperson to render him as a specific legal subject. The lawyer performs this function for the court and for her client, and in doing so is engaged in maieutic acts: she must bracket her personal interests, both in assuring the integrity of the legal process and in manifesting the client's position subject to it. The officer surveys the person's self-described situation through the lenses of her legal training to identify aspects that could materialize as facts under a law. Using her professional judgment, the officer operates upon the layperson's story, laying hands upon it, forming it into a proper disposition for the judge's action. By petitioning, the officer pleads for the party so that the decisionmaker, the heart and mind of the court, may dispose of the case as lawfully and justly as he is able. The client would not appear properly before the court but for the professional maieutic work of the lawyer,⁸³ who herself could not appear in court but for the operation of the court's authority, which in turn flows from the Constitution. This tracing up the stream of crocheted pregnant mediations finds the Constitution itself the product of a maieutic process: by ratifying the Constitution, the representatives of several states consummated the dialectical relationship in which their contradictions were merged, sublating the states to create a new union.

The lawyer's work in representation involves translating and coding the client's situation into a legally operable form, and the court's operation interprets a private grievance in terms of social meaning. The new social meaning has public import, regulating relationships between people (whether individual or organized: natural persons, corporations and states) and allocating responsibility for their actions. For example, what is commonly known about the dispute between Roe and Wade is not the detail of the parties' personal situations, but the meaning of the court's action upon their situations for the rights of all American women.

83. It is possible for a person to represent himself before the court as a *pro se* litigant. Representation is still expected; that is, the person is to translate his situation into matter appropriate for the judge to act upon, though the judge himself may try to reach out and assist him with that complex task. Self-representation is deemed inadvisable, to the point where a court may require and appoint a lawyer to represent the would-be *pro se* litigant as a party if it deems the person's own representation inadequate to the matter at hand. See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33–34 (1981) (declining to appoint counsel in a case of termination of parental rights, but noting that doing so may be “[a]wise public policy,” and that at the time, “33 States and the District of Columbia provide[d] statutorily for the appointment of counsel” in these cases).

In sum, the lawyer assists the court in representational, translational boundary work, as both a gatekeeper at and a channel through a boundary that separates the private from the public while connecting them in procedurally prescribed ways. Through her maieutic work to present a layperson's cause, only particular aspects of his private concern will materialize in the public realm of law, and those, only in prescribed forms. The private is shaped and thus limited by its manifestation in the public realm, for the benefit of the public's interest in the rule of law. The major task that the lawyer does for the court in representing a party is translating and transforming a private matter into the public realm, rendering a personal grievance into a proper subject for collective social action in accordance with the rule of law.

C. *Harmony or Discord*

The translational work of the lawyer entails its own ethics, of fidelity both to the client's meaning and to the integrity of the target language. The lawyer must avoid substituting her personal meaning for that of the client, but also must use the court's language according to its own syntax, grammar and semantics. The lawyer's act of translation engages her professional judgment,⁸⁴ which is to work in the lacunae between the client's matter and the court's action to effect a proper representation of the private party to the public.

1. The Term "Standard Conception" Was Coined To Refer to Professional Identity Trouble.

Being on the frontier between the court and the private party, the lawyer is a liminal figure in both realms. She attains this marginal status in performing a function essential to the administration of justice, but its liminality has confused analysts: though her situation makes it impossible to account for her exclusively within only one or the other realm, many analysts attempt to locate her in one realm while ignoring or distorting her manifestation in the other. Then, the situation of the lawyer is framed as though the lawyer were only *either* a court officer *or* an agent of the client—and since the client pays the lawyer, the court-officer picture evanesces, leaving only the "standard conception" (a term that Gerald Postema introduced to refer to a professional

84. The exercise of professional judgment contemplated by the Model Rules of Professional Conduct requires the lawyer to be honest with the client, and may "involve[] unpleasant facts and alternatives that a client may be disinclined to confront." MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (2010). As Wendel puts it, "Professionalism . . . instructs lawyers not to participate in the hocus-pocus of turning dogs into ducks, and is therefore a principle for regulating the exercise of interpretive judgment." W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1171 (2005).

identity that, “far from encouraging the development and preservation of a mature sense of responsibility, . . . tends seriously to undermine it.”⁸⁵):

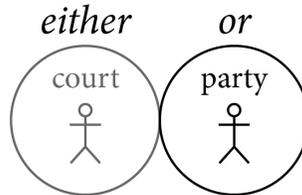


Figure 1

The Standard Conception

The archetypal statement of a lawyer’s professional identity as the agent of a client is Lord Brougham’s *Speech in Defence of Queen Caroline*, in which he asserted that a lawyer knows “but one person in the world, THAT CLIENT AND NONE OTHER,” and that to save that client, “he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client’s protection.”⁸⁶ His client, Queen Caroline, had been charged with treason; to save her from being dethroned, he was threatening to reveal the king’s marriage to another (which disqualified the king from his throne).⁸⁷ Brougham’s statement was not simply a disquisition on the lawyer’s role, but a performative speech act threatening his king on behalf of his queen in a situation that could devolve into a civil war—and even this extreme statement showed care for the opposing party and for the public, in that he did not simply reveal the harmful information to which he alluded. Although the circumstances of this utterance that Brougham himself described as “anything

85. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 74 (1980). See *supra* Part I.B. regarding the necessary independence of the lawyer’s professional judgment from the identity of her employer.

86. Henry Lord Brougham, *Speech in the Case of Queen Caroline*, in 1 SPEECHES OF HENRY LORD BROUGHAM: UPON QUESTIONS RELATING TO PUBLIC RIGHTS, DUTIES, AND INTERESTS 103, 105 (1838).

87. *Id.* at 88–90. Brougham himself identified this statement as a threat: “The real truth is, that the statement was anything rather than a deliberate and well-considered opinion. It was a menace, and it was addressed chiefly to George IV, but also to wiser men” Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 4 (1951) (quoting Letter from Lord Brougham to William Forsyth[] (1859), in ELLIOT E. CHEATHAM, CASES AND OTHER MATERIALS ON THE LEGAL PROFESSION 227 (1938)). Forsyth wrote in an annotation to the letter that Brougham likely agreed with the view articulated by the Lord Chief Justice Cockburn in their presence, “that the arms which an advocate wields he ought to use as a warrior, not as an assassin. . . . He ought to know how to reconcile the interests of his clients with the eternal interests of Truth and Justice.” LETTERS FROM LORD BROUGHAM TO WILLIAM FORSYTH, 41 (Wm. Forsyth ed., 1872).

rather than a deliberate and well-considered opinion”⁸⁸ were unusually strained, and despite its obvious ulterior meaning, Brougham’s statement has been taken up as a banner by those who would frame the lawyer *merely* as a client’s agent.⁸⁹ This rhetorical veil over a grave substantive threat has floated across the sea and the centuries, touching a page now and again, its relict traces themselves contested⁹⁰—the slipping of a thread in the social fabric.

A lawyer’s tunnel-visioned focus on her status as a client’s agent can allow her to forget that she is available to the client *only* as an officer of the court. If her zeal for the client is not balanced by her duties to the court, she risks disserving the client by malfunctioning as a court officer. Overzeal backfire is a genre of malpractice,⁹¹ the most aggravated symptoms of which include misrepresentation and the capture of legal procedures for improper purposes.⁹² Some jurisdictions have been troubled by the potential for lawyers willfully to misinterpret “zeal” in client representation, and therefore have dropped the term from their professional codes.⁹³ Even Massachusetts and the District of

88. See Fred C. Zacharias & Bruce A. Green, “*Anything Rather Than a Deliberate and Well-Considered Opinion*”—Henry Lord Brougham, *Written by Himself*, 19 GEO. J. LEGAL ETHICS 1221, 1222 (2006) (quoting Letter from Lord Brougham to William Forsyth (1859), in WILLIAM FORSYTH, *THE HISTORY OF LAWYERS ANCIENT AND MODERN* 380 n.1 (1875)).

89. See, e.g., Hazard, *supra* note 68, at 1244 (describing Brougham’s statement as “the classic vindication of the lawyer’s partisan role”); DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 7, 257 n.11 (2008).

90. See, e.g., Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213 (2006); Zacharias & Green, *supra* note 88; Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 25 (2005) (reporting mid-to-late-nineteenth century debates such as that noted in *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845) (“It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his professional conscience.”)); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 124 (1995) (“The inescapable reality is that every lawyer is at the center of a web” of relationships.).

91. Leubsdorf, *supra* note 90, at 120 (“[I]mprudent overzealousness [is] likely to backfire against the client.”).

92. *Id.* at 127–28 (“The main exceptions in tort law to the rule of lawyer nonliability to opposing litigants are intentional misrepresentation and the use of inappropriate process for an improper purpose.” (footnote omitted)).

93. See, e.g., ME. RULES OF PROF’L CONDUCT R. 1.3 Reporter’s Notes (2008), available at http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_oversers_bar_rules&id=87826&v=article (“The Task Force determined that the term ‘zeal’ was often used as a cover for a lawyer’s inappropriate behavior. Moreover, the Task Force thought the term was not needed to describe a lawyer’s ethical duties. Accordingly, the Task Force recommended its deletion.”); OHIO RULES OF PROF’L CONDUCT R. 1.3, Comparison to ABA Model Rules of Professional Conduct (2007) available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf> (“Zealous advocacy is often invoked as an excuse for unprofessional behavior.”); *Comparison of Newly Adopted Washington Rules of Professional Conduct with ABA Model Rules*, AM. B. ASS’N (Aug. 2006), <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/washington.pdf> (“replaces ‘zealously’ with ‘conscientiously and ardently’”);

Columbia, which affirmatively call for a lawyer to represent a client “zealously,” qualify the urge for zeal with, “within the bounds of the law.”⁹⁴ Anita Bernstein calls this qualification a “prissy tag-along caution”⁹⁵ though she nonetheless suggests that it be retained.⁹⁶ Bernstein’s thesis is that a lawyer’s practice “is marred at least as much by a shortage as a surplus of zeal in advocacy on behalf of clients[.]”⁹⁷ Ultimately, however, Bernstein is one of many commentators who see zealous advocacy as part of the lawyer’s professional identity—but take care to distinguish “zeal” as a favored quality from “zealotry” or excessive zeal, a disparagement.⁹⁸ Determining how to make this distinction between zeal and excessive zeal requires the lawyer to exercise her professional judgment, and is part of the lawyer’s work in crafting her professional identity.

2. Discord: The Double Bind

The lawyer drawing this boundary might experience her situation as a convergence of conflicting interests.⁹⁹ She has been called forth by the court to serve as its officer, and thus is bound to serve in the administration of

STATE BAR OF ARIZ., REPORT OF THE TASK FORCE ON PROFESSIONALISM 15 (Mar. 21, 2005), available at <http://www.azbar.org/media/64636/professionalism%20task%20force.pdf> (listing “zeal” as a “cause[] of unprofessional behavior”); Arthur J. Lachman & Peter R. Jarvis, *Zeal in Client Representation - FAQs*, 2005 PROF. LAW. 81, 83–84 (summarizing as of 2005, but noting that the District of Columbia and Massachusetts both added “zealously” to their adopted versions of Model Rule 1.3). Model Rule 1.3 is titled “Diligence,” and provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” MODEL RULES OF PROF’L CONDUCT R. 1.3 (2010).

94. MASS. RULES OF PROF’L CONDUCT R. 1.3 (2011), available at <http://www.mass.gov/obcbbbo/rpc1.htm#Rule%201.3>; D.C. RULES OF PROF’L CONDUCT R. 1.3 (2007), available at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/rule_one/rule01_03.cfm.

95. Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1166 (2006).

96. *Id.* at 1189.

97. *Id.*, though Bernstein also notes that, “Zealous advocacy does not comport with the lawyer as transportation vehicle or lunch counter, passively meeting the felt needs of a customer and exercising no discretion.” *Id.* at 1197.

98. See, e.g., 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 6.2, at 6-4 (3d ed., Supp. 2003) (“[L]awyers have never had a special dispensation to aid a client’s cause through unethical or unlawful means, and Model Rule 1.3 hardly provides one. To the contrary, zealous representation must be *within* the bounds of the law in order to pass muster”); Lachman & Jarvis, *supra* note 93, at 81 (“Nowhere in any ethical rule or commentary is it even suggested that ‘zealotry,’ as opposed to ‘zeal,’ is an appropriate standard of lawyer conduct.”).

99. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 12 (1988) (“The real dispute” is about how and how much lawyers “should consider attending to the [legal] framework’s integrity as one of their professional responsibilities. This is obviously an important dispute.”).

justice. She also has been retained by her client to plead on his behalf, to advocate for his cause (arguably, zealously), and thus is bound to protect his confidences and to act as his agent in representing him to the court. As we have seen, this perceived conflict ostensibly may be resolved by denying a troubling source of obligation—ignoring the interpellations of one of her discursive situations so that the lawyer is left with only one identity that matters. This is how the “standard conception” of the lawyer comes about.

When her manifestation within one of her professional realms is forgotten, the lawyer’s professional identity begins to dis-integrate. To prevent this, it becomes all the more important to focus on the lawyer’s evanescent embodiment. But even when both situations of the lawyer are acknowledged, there nonetheless remains the idea of a double bind that pulls the lawyer into either one realm or the other:

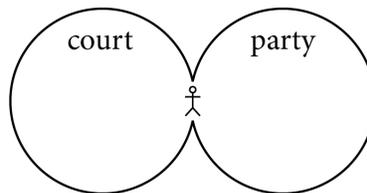


Figure 2

The Double-Bind

The professional identity crisis over whether a lawyer is primarily a zealous advocate or an officer of the court is pervasive, manifesting in other legal contexts as well in litigation: lawyers who hold licenses but do not appear in court nonetheless remain subject to the court’s regulation (and sometimes also to that of other administrative bodies), and legal counseling occurs with an awareness of the law and the potential for litigation, regulation and sanctions. For example, transactional lawyers are subject to rules of fairness and ethics in negotiation, and their transactions are subject to the securities laws. The lawyer has affirmative duties to decline to sign and file with the Securities Exchange Commission a client corporation’s misleading public disclosures,¹⁰⁰ much as a litigator has affirmative duties to sign and file with the court only papers that are submitted for proper purposes, warranted by law and supported by evidence.¹⁰¹ Additionally, the Sarbanes-Oxley Act of 2002¹⁰² required the Securities Exchange Commission to issue rules that, like the various courts’ rules of professional conduct, articulate aspects of a minimum standard for the professional conduct of a lawyer practicing before the agency. The rules were

100. 17 C.F.R. § 240.10b-5 (2011).

101. FED. R. CIV. P. 11(b).

102. 15 U.S.C. § 7245 (2006).

to require the lawyer to report “evidence of a material violation of securities law” by a corporate client to the client’s chief legal counsel or CEO, and if the officer “does not appropriately respond to the evidence[,]” then to the board of directors.¹⁰³ In articulating the duty of a lawyer representing an issuer before the SEC to make these reports, the promulgated rules further establish that by making such a report, “an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney’s representation of an issuer,”¹⁰⁴ and that without the client’s consent, the lawyer “may reveal to the Commission . . . confidential information related to the representation to the extent the attorney reasonably believes necessary” to prevent or rectify a client’s violation of the law under certain circumstances, or to prevent the client from committing or suborning perjury, or from “committing any act . . . that is likely to perpetrate a fraud upon the Commission[.]”¹⁰⁵

Lawyers who counsel a client in other contexts also socialize the client to the legal system. For example, in the patent context the lawyer’s duties as an officer of the court may require her to counsel the client against filing a patent application to cover an obvious “invention” (the obvious is not legally patentable,¹⁰⁶ so applying for a patent on the obvious either wastes legal resources if the application properly fails, or diverts the patent system from its Constitutional goals if the application improperly succeeds). Or, in the context of community lawyering, the lawyer’s duties as an officer of the court may require her to counsel the client to negotiate rather than to litigate—to avoid seeking judicial resources when Constitutional goals would be better served by other means.¹⁰⁷

103. *Id.*

104. 17 C.F.R. § 205.3(b)(1).

105. *Id.* § 205.3(d)(2).

106. 35 U.S.C. § 103(a).

107. Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer’s Duty To Work for the Common Good*, 47 STAN. L. REV. 901, 932 (1995) (arguing that not only community lawyers, but any lawyer with a case involving race relations “can counsel clients in the interest of racial harmony”):

Lawyers also have heightened access to the power structure, including the power to shape both policy and law. Lawyers’ ability to win legal rights for racial and ethnic minorities, as well as their involvement when the legal interests of these groups clash, give them the capability to create positive and negative effects. Lawyers can either defuse racial and ethnic tension and build bridges between communities or intensify social divisions depending on how they handle each case. Lawyers must be aware of this potential and think through the consequences of their lawyering choices as well as the choices of their clients.

Id. at 931.

These examples all demonstrate that the lawyer is not only an officer of the court when she is engaged in litigation—she is always already an officer of the court, and acts as such whenever she performs as a professional.

Though these obligations are characteristic of the lawyer's pressing duties as an officer of the court, commentators who perceived that the transactional lawyer's duty to report evidence indicated not only a counseling but moreover a gatekeeping role for the lawyer controverted the latter role: some objected to its interference with the lawyer's role as a client advocate, while others viewed it as a matter of course for the lawyer as an officer of the court.¹⁰⁸

3. Harmony: The Coherence of the Lawyer's Professional Identity

The lawyer is in a double bind: the officer of the court representing a client is enmeshed in a dual role, and may experience role strain¹⁰⁹ if these ties diverge. However, the lawyer's dual enmeshment problem eases in light of the present discussion. It is clear that the lawyer would not even be present to represent the client were the court not creating and maintaining her. Thus, the lawyer's original, persistent and primary duty is to the court, to function as its officer in the administration of justice; any other roles depend upon—hang upon, are subordinate to—her role as the court's functionary. In other words, the lawyer's role as the client's representative exists **to help the court** function in its administration of justice, so that the representative functions that the lawyer performs **to help the client** are circumscribed and subtended by her role as an officer of the court.

108. See, e.g., Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1388-89 nn.2-5 (2004) (collecting citations); *id.* at 1389 (arguing the "simple, and ultimately uncontroversial, point [that] lawyers are gatekeepers and always have been" (footnote omitted)); Wendel, *supra* note 84, at 1179 & n.38 ("The services of gatekeepers, such as transactional lawyers and auditing firms, signal to the market that the client's representations are fair and accurate.") (collecting citations); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003); Rutherford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers To Act As Gatekeepers*, 56 RUTGERS L. REV. 9 (2003).

Some criticism of the lawyer's gatekeeping role is leveled at its purported conflation of the lawyer's function with that of the judge. In another context, William Simon succinctly articulates a distinction between the lawyer and the judge as gatekeepers. See William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987, 1000 (2010) ("The lawyer's role, of course, is different from the judge's. The judge's decisions are typically dispositive; the lawyer's are typically facilitative.").

The gatekeeping role of the government lawyer similarly has been debated. See Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991) (collecting citations).

109. William J. Goode, *A Theory of Role Strain*, 25 AM. SOC. REV. 483 (1960) (The difficulty of fulfilling the demands of multiple roles results in the subject's role-bargaining—reducing her overall role strain by allocating her efforts to perform well among all of her role relationships. Thus, she will perform better in some roles at the expense of others.).

The lawyer both works within the court and directly engages the private party in a critical, interstitial realm that contacts the public and private spheres. In this interstice the lawyer must exercise her independent professional judgment¹¹⁰ to effect a proper translational connection between the two.¹¹¹ The Supreme Court has recognized this professional realm in which the lawyer's roles converge, and explicitly relied on her functions of promoting justice in the court and the legal system as its basis for creating the work-product doctrine in *Hickman v. Taylor*.¹¹²

This interstitial realm is also the "empty stage" at the core of the lawyer's job as envisioned by Robert Gordon.¹¹³ The stage is empty in that the exercise of professional judgment is necessarily "incompletely specified, or underdetermined by rules and standards"¹¹⁴; the coarse statute cloth must be elaborated by the common law, and so the lawyer draws thread for the judge. At the edge of the law, where rules fall silent, the lawyer searches her professional soul for the ethics and norms of her formative socialization, and as she decides how to perform her job, she further forms herself as a lawyer.

The disharmony of the double-bind can be resolved: as the role-structure diagrammed in Figure 3 is realized, the lawyer's professional identity coheres.

110. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2010) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." (emphasis added)). Note also the professional judgments required by FED. R. CIV. P. 11. See also Postema, *supra* note 85, at 68.

111. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29, 112 ("[T]he task for which the lawyer's role was created in the first place, [is] the reconciliation of public and private ends.").

112. 329 U.S. 495, 510–11 (1947):

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

113. Gordon, *supra* note 99, at 8.

114. Wendel, *supra* note 84, at 1195; see also Deborah L. Rhode, *Ethics in Counseling*, in Robert F. Cochran, Jr., et al., *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 608 (2003) (footnote omitted):

As officers of the court and gatekeepers in imperfect regulatory 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 lack a basic sense of social responsibility for the consequences of their professional acts.

To Simon's observation that there is no consensus about where to draw line between the lawyer as advocate and as officer of the court, I respond that such a consensus would crowd the empty stage on which this line-drawing is part of the lawyer's boundary work.

The dual roles of the lawyer as both an officer of the court and counsel render her a specific kind of court officer who translates between the realms of the court and the private party, and thus exists simultaneously in both.

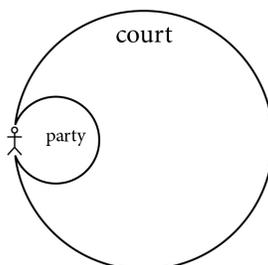


Figure 3

Role-Coherence and Integrity of Identity for the Lawyer

Consider the coherence of the lawyer's roles as she assists the court in weaving the social fabric: her client's thread pulls toward his private interests. As he becomes wrapped up in his private concerns, his focus foregrounds his side of the story that will be performed for the judge; he backgrounds his interests in the rule of law as a member of the public, relying (implicitly or consciously) on the integrity of the justice system to attend to his public interests.

Part of the lawyer's work in translating her client's interests into claims before the court is to screen appropriate matter for judicial consideration from inappropriate matter. The screens that the lawyer applies comprise laws, rules, ethics, norms and any other professional expectations that contribute to procedural integrity (*i.e.*, following the procedures meticulously) and fairness (*e.g.*, scrupulously avoiding mis-representation to the court, and dealing fairly with the other side)—Constitutional values that the lawyer has sworn to uphold. Indeed, the court's procedural integrity flows from our Constitutional commitment to "fair play and substantial justice,"¹¹⁵ so that the lawyer's sworn duty to uphold the Constitution entails duties to adhere firmly to established judicial procedures and to conform to legal ethics as she presents the client to the court.¹¹⁶ Through the lawyer's professional performance that conforms to the maieutic ethic, the client manifests as a party with justiciable claims.

115. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 116 (1987).

116. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 2 (2010) ("This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.").

If the lawyer uncritically lends her skillful hands and—with her feet firmly anchored in the court—simply pulls for her client, the social fabric will strain. If this is what lawyers should do, then we must multiply these strains (or combine them with a power law) across all of the diverging interests of clients, and the social fabric will tangle about arbitrary, irreconcilable lines. Reciting the fact that the client pays the lawyer for her services, some imagine the lawyer to be primarily or exclusively an agent who is trained to work the legal system to obtain benefits for her private client. But the lawyer's fee, which is required by law to be reasonable,¹¹⁷ is properly for the lawyer to perform her *dual* role as an officer of the court representing the client professionally—the lawyer's performance is to conform to the rules, ethics, morals, norms, and other standards that sustain the rule of law. That the fee is not to be unreasonably high signals that it is not to include a bribe to throw the game in the client's favor.

The lawyer's commitment to the Constitution (to the rule of law) is a commitment to restrain and direct the exercise of arbitrary power.¹¹⁸ This commitment entails helping the judge to reconcile the client's thread with the broader social fabric, harmonizing individual interests with the law of the land. To administer justice is to weave out gaps in the law and to mend rent fabric. This work looks not only to the threads at hand, but to the pattern that will persist beyond any particular client or matter.

Though the judge does the knitting, the lawyer is not free to run with a yarn, unraveling the court's work. The dispute before the judge is framed in terms of two opposed sides, each of whose evidence and arguments are to be equally well represented. The material facts presented to the court should be as accurate and complete as reasonably possible, save for those submerged by ethically asserted privileges, which are narrowly construed precisely because they obscure material facts from the court's view. The lawyer is committed to ensuring that the court has what it needs to resolve the dispute fairly. If the lawyer fails in this commitment, she is subject to sanction.¹¹⁹

4. The Big Picture

Thinking through the lawyer's structural position and functions with respect to the court and the legal system results in an understanding of her

117. See, e.g., *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010); MODEL RULES OF PROF'L CONDUCT R. 1.5 (2010).

118. Oxford English Dictionary Online, rule, n., 4.c (2d ed. 1989) ("rule of law: . . . (b) with *the*: a doctrine, deriving from theories of natural law, that in order to control the exercise of arbitrary power, the latter must be subordinated to impartial and well-defined principles of law; (c) with *the*: spec. in English law, the concept that the day-to-day exercise of executive power must conform to general principles as administered by the ordinary courts.").

119. See, e.g., FED. R. CIV. P. 26(g); FED. R. CIV. P. 37.

discursive situation (identity), and also her role-structure, that can be diagrammed as in Fig. 3 and further contextualized as in Fig. 4.

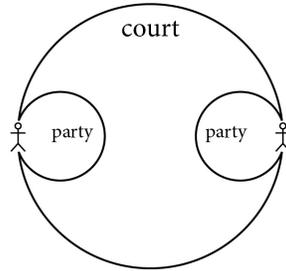


Figure 4

Ordering the Lawyers' Roles

In her service *to the court*, the lawyer extends from the court to the client, sifting the situation presented to her for issues that are proper for treatment by the court, and translating those issues for expression to the court in a form that assists (and does not thwart) the court's operation. The process of legal representation is thus selective in those aspects of the client that will manifest in court, and the means and ends of their manifestation are limited, specified, and shaped by legal, ethical and normative requirements. The officer of the court renders the party presentable to the court, and her rendition must conform to its requisites.

In her service *to the client*, the lawyer counsels the client as to how his situation maps into the law. She may advise the client as to the legality of various possible courses of action, but may only assist the client in those that conform to the law and legal ethics.¹²⁰ The court provides the lawyer's privilege to represent a client before it subject to the duties discussed above; thus, only within the realm bounded by those layers of duty is the lawyer permitted to advocate for the client to the best of her professional skill. Only through the lawyer's manifestation as an officer of the court may the client's manifestation as a party before the court be realized.

Thus, in our adversary system of justice, the lawyer's duty to manifest client interests before the court is a service performed for both the court and the client. Individual client interests may be represented as threads in the fabric; the work of social ordering under the law is to assure that their manifestation in it is harmonious: that the result of litigation is fair to the instant parties, and that it does not distort of the fabric of justice when it is generalized to all those similarly situated. This work is not merely abstract, but is actually accomplished by professionals—keepers of the cloth—including

120. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2010).

lawyers who represent client interests to the court and subject them to its decisions. This work does not merely preserve the law, because the law is dynamic: the fabric billows and ripples in social currents—but wherever its line is drawn, it bears the sway. This work preserves the rule of law by manifesting it ever over in new ties around each new conflict, aligning private interests with the public’s interests in the rule of law.

III. FORGETTING WHY WE ARE HERE

Nonetheless, some commentators dismiss the enabling dimension of the lawyer, or subordinate it to the lawyer’s role as the client’s advocate.¹²¹ For example, James Cohen argues that the term “officer of the court” is “mostly rhetoric, caused by self-love and self-promotion”¹²²—the costume of a charlatan, rather than the dress of a professional.

Cohen asserts that scholarship in legal ethics has ignored agency law (though he cites several counterexamples)¹²³ and that applying its framework reveals that the lawyer is an agent of the client. He claims that to accept the argument that the idea that “the lawyer’s duty to seek justice is superior to the obligation of loyalty and zealous advocacy on behalf of the client” entails a “profound[] *change* [in] the attorney’s role from that of agent for a client to that of agent for ‘justice.’”¹²⁴ Cohen’s attempt to dismiss the officer of the court with a wave of the wand of agency law fails illustratively, modeling an extreme view of the standard conception.

Cohen asserts that a lawyer owes “virtually no significant duty” to the court that both overrides her duty to the client and is distinct from the duties of

121. See, e.g., Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court,”* 48 BUFF. L. REV. 349 (2000) (and citations therein).

122. Cohen, *supra* note 121, at 360:

In fact, the notion that the attorney has a meaningful and distinct role as an “officer of the court” is largely an illusion caused by self-love and self-promotion. “Careful analysis of the role of the lawyer within the adversarial legal system reveals the characterization to be vacuous and unduly self-laudatory. It confuses lawyers and misleads the public.” The perpetuation of the lawyer role as an “officer of the court” by the profession is tantamount to a charade.

(footnotes omitted) (quoting Eugene R. Gaetke, *Lawyers As Officers of the Court*, 42 VAND. L. REV. 39, 39 (1989) and citing same at 44–45). As discussed *infra*, Gaetke offered a heavily pruned image of the lawyer’s responsibilities as a court officer to argue that the court should *require more* of lawyers, or else lawyers should give up the title—put up or shut up, as it were. Cohen selects only the truncated picture, and then argues that it is complete.

123. See, e.g., Cohen, *supra* note 121, at 388; see also Wendel, *supra* note 84, at 1168 (“[A] lawyer is not simply an agent of her client (although the lawyer-client relationship is obviously governed by the law of agency).”).

124. Cohen, *supra* note 121, at 349–50 (emphasis added).

non-lawyers to obey the law.¹²⁵ The refrain of this argument is that a lawyer owes to the court “no substantive duty to seek justice[.]”¹²⁶

Acknowledging that the lawyer’s role as the client’s agent is limited in that the lawyer is to obey only the client’s *lawful* instructions, Cohen then asserts that because everyone is bound by the law, lawyers owe no distinctive duties to the court. Cohen apparently adopts this approach from an article in which Eugene Gaetke defines the lawyer’s duties as a court officer artificially narrowly to exclude all of the officer’s duties that apply also to “laymen participating in the legal process.”¹²⁷ For example, Gaetke notes that under Canon 7 of the American Bar Association Model Code of Professional Responsibility—which requires a lawyer to “represent a client zealously within the bounds of the law”¹²⁸—a lawyer cannot unlawfully conceal evidence or information, cannot knowingly use perjured testimony or make or use false evidence or statements, and can neither assist a client in illegal or fraudulent conduct nor knowingly engage in it. Gaetke does not regard these as a lawyer’s duties as an officer of the court because they apply to non-lawyers as well.

This analytical move is a misstep, in that the Code does not simply reproduce all of the law that applies to everyone. Instead, it emphasizes those aspects of the law that bind the lawyer in particular *qua* officer of the court:

Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.¹²⁹

Precisely *because* the lawyer is an officer of the court on whom the judge and the public rely for her function in the administration of justice, “A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation,” nor “[e]ngage in conduct that is prejudicial to *the administration of justice*.”¹³⁰ As Geoffrey Hazard notes, it is “the norm of candor to the court on which the legitimacy of the advocate’s role depends.”¹³¹ Further, a lawyer could be disciplined for unprofessional conduct without having violated the law.

These and the other requirements that Gaetke’s analysis dismisses are articulated in the Code’s Disciplinary Rules, which he focuses on because they

125. *Id.* at 408.

126. *Id.* at 405 & *passim* (e.g., 349–52, 355–88, 409).

127. Gaetke, *supra* note 122, at 49.

128. MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1983).

129. MODEL CODE OF PROF’L RESPONSIBILITY EC 1-5 (1983).

130. MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(a)(4), (5) (1983) (*italics added*). A lawyer’s compliance with the Disciplinary Rules is mandatory.

131. Hazard, *supra* note 68, at 1261.

represent *minimal* standards for a lawyer's conduct.¹³² Gaetke ignores the Code's recommendations and goals for lawyer conduct, further cutting the lawyer's identity as an officer of the court too close by including in its definition only the court's requirements that "*compel[]* conduct by a lawyer that *subordinates* the interests of the client *and the lawyer* to those of the judicial system or the public[.]"¹³³ This attempt to exclude from the lawyer's official duties all of those that do not subordinate lawyer and client interests to judicial or public interests misconceives the role of the lawyer, rather absurdly relieving the officer of the court of all but a few of a long list of explicitly enumerated duties. Gaetke implicitly frames the lawyer's relation to the judicial system as in Fig. 2 rather than in Fig. 3, then draws a vertical center-line through Fig. 2 and cabins the client and lawyer together on a "private" side that stands in opposition to the court on the "public" side. The overpruning effects of this analysis that belittle the Code reveal Fig. 2 as a Picassoesque vision of the officer of the court. A more empirical view of the Code as evidence of the lawyer's duties¹³⁴ supports the view of Fig. 3.

Ironically, Gaetke's goal in interpreting the lawyer's role as an officer of the court so narrowly is to argue for its expansion. He challenges the legal profession to use it or lose it—to require lawyers on pain of disciplinary action: to provide representation *pro bono*; to alert the court to adverse facts as well as adverse law, to information that protects the innocent, and to lawyer misconduct; and thus to "give meaning to the role of officer of the court."¹³⁵ However a lawyer may feel about the proposed expansion of the duties of the officer of the court, Gaetke need not have artificially narrowed her role to offer them; this strategic choice suggests that he thought his argument insufficiently forceful otherwise. Unfortunately, this rhetorical move clouds our vision of the lawyer as an officer of the court, attenuating her manifestation as such, subordinating and helping us to forget her professional identity.¹³⁶ Gaetke's strategy backfires, contributing to the evanescence of the officer-of-the-court

132. Gaetke, *supra* note 122, at n.61. *But see* MODEL CODE OF PROF'L RESPONSIBILITY, Preliminary Statement (1983) ("The Code is designed to be adopted by appropriate agencies *both* as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules." (emphasis added)).

133. Gaetke, *supra* note 122, at 49 (emphasis added).

134. Hazard, *supra* note 68, at 1250 (regarding the American Bar Association's 1908 Canons, which preceded the Code: "[T]he Canons functioned not as enforceable legal standards but only as evidence of such standards.").

135. Gaetke, *supra* note 122, at 91.

136. For example, Cohen cites Gaetke in support of his statement that the lawyer as an officer of the court is illusory, *see* Cohen, *supra* note 121; Deborah Rhode cites Gaetke's limiting characterization of the lawyer's duties in recommending that the bar "give greater practical content to professional aspirations," Deborah L. Rhode, *The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 668, 708, 736 (1994).

role that he tries to strengthen, instead leaving us with the troubling “standard conception” of Fig. 1.

Taking Gaetke’s overpruning analysis further, Cohen identifies but “one duty” of the lawyer that is inconsistent with his thesis: a litigating lawyer must cite legal authority that is directly adverse to his client’s position.¹³⁷ He downplays the importance of this clear and significant example of a lawyer’s duty to the court, which in his view, conflicts with her duty to the client: “even if one concludes that this is a special obligation to the court not imposed on non-lawyers and inconsistent with the duty of loyalty to the client, its practical consequences are few.”¹³⁸ From this dismissively framed admission, he immediately concludes that:

In the end, the one duty to the court imposed on lawyers inconsistent with the duty of loyalty to the client is the duty under the Rules to cite directly adverse authority. The characterization officer of the court is based on little more than self-serving rhetoric and does not include a substantive duty to seek justice that is at odds with the duty of loyalty and zealous advocacy. A lawyer does not owe the court any duty of consequence greater than [that of] the non-lawyer.¹³⁹

From the admission that lawyers must perform a duty to the court that (as he sees it) is inconsistent with her duty to the client, it does not follow that the lawyer is not meaningfully an officer of the court—quite the contrary. This duty is significant, and fits well within the role-structure discussed above: the lawyer’s primary duties are to uphold the Constitution as an officer of the court of justice that admitted her; her duties **to the court** may include representing a client in litigation (re-presenting or translating the client’s concerns into the pleadings and motions of a party before the court); and her professional work serves first the court and accordingly the client, to whom she owes duties concerning the quality of her representation. Her duties to the client are circumscribed by her duties to the court, as depicted in Fig. 3.

Viewing the lawyer as the client’s agent, Cohen concludes that she is nothing else. But Hazard sees the lawyer as an agent of the client without making this mistake. Though Hazard goes so far as to say that without the client there is no lawyer,¹⁴⁰ he nonetheless recognizes that lawyers effect or

137. Cohen, *supra* note 121, at 387.

138. *Id.* (footnote omitted). Cohen further remarks in a footnote that arguably, “this rule is bad and should be disregarded,” because a lawyer need not disclose facts that are adverse to the client’s position, “which—if the goal were really justice-seeking as opposed to judicial face-saving—might also be required.” *Id.* at 387 n.198.

139. *Id.* at 387.

140. Geoffrey C. Hazard, Jr., *Law Practice and the Limits of Moral Philosophy*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION* 75, 79–80 (Deborah L. Rhode ed., 2000) (“The distinctive feature of a ‘lawyer’ is that agency is definitional in the role. To speak of a lawyer without a client . . . does not describe a lawyer.”).

realize¹⁴¹ procedure: “Lawyers as advocates effectuate the right to be heard by providing the judge with plausible alternatives concerning the law and the facts. (An advocate who provides an *implausible* alternative has failed in her *preliminary* responsibility to refrain from ‘frivolous’ contentions . . .).”¹⁴² Hazard’s description is consistent with Fig. 3: through her actions in representing the client in court, the lawyer manifests due process values in accordance with her preliminary or prior responsibilities to the court. But read in light of Fig. 3, “preliminary” indicates that the court—not the client—is the *sine qua non* of the lawyer: the hands of the court are always already open to represent the client, even when the hands are idle because no client is yet engaged.

Hazard finds the application of moral (or ethical¹⁴³) philosophy to the practice of law troubled in that moral philosophy works in universals, while legal practice is situational. Accordingly, he discusses Hilary Putnam’s concern that it may be unreasonable for a person striving to perform ethically to make the Kantian calculation of what the effects of her actions would be if they were multiplied across those similarly (but not identically) situated.¹⁴⁴ Putnam offers the example of someone choosing whether to care for an aging parent or to enlist in the army in wartime to point out that a significant part of the difficulty of this choice inheres in its being a choice of identity: the choice does not simply flow from, but will determine who, the chooser is.¹⁴⁵ As Hazard interprets this concern:

His observation that the actor needs to decide who he “*is*” refers, I think, to the existentialist proposition that a course of action chosen, as distinct from merely hypothesized, effects a transformation of the actor himself. Hence, in choosing a course of action the actor is redefining himself.¹⁴⁶

Consider further the lawyer’s professional choices in relation to her identity. The lawyer is critically situated within the structure of legal discourse, at a point where it meets a private person who would appear before a court. In choosing to become a lawyer, a person identifies herself with and through the court. In choosing to take on a client, the lawyer identifies herself as the client’s representative. As William Simon points out,

Even where they think of themselves as merely providing information for clients to integrate into their own decisions, lawyers influence clients by

141. Oxford English Dictionary Online, effectuate, v. (Draft Revision, Dec. 2008).

142. Hazard, *supra* note 140, at 81–82 (emphasis on “implausible” retained; emphasis on “preliminary” added).

143. *Id.* at 91 n.1.

144. *Id.* at 78.

145. HILARY PUTNAM, RENEWING PHILOSOPHY 190–91 (1992).

146. Hazard, *supra* note 140, at 78 (italics retained).

making judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt.¹⁴⁷

Further, “in this process the lawyer inescapably exercises power over the client[,]” the responsibilities of which can be “emotionally overwhelming.”¹⁴⁸

In a sense, *by* realizing procedure through her professional performance, the lawyer continues the court’s work of manifesting herself as its officer. Here again we see the maieutic logic of the Hegelian crochet, the chain of syntheses in which one maieutic moment begets another: the applicant to the bar swears the lawyer’s oath and becomes a lawyer; the lawyer effects procedure, making representations to the court under her certification¹⁴⁹ and through them materializes the client properly before the court.¹⁵⁰ A lawyer choosing to act professionally identifies herself as an officer of the court, whereas one who fails to act professionally disowns the court. In realizing procedure, the lawyer has choices to make: she exercises her professional judgment to determine how to act as an officer of the court upon her client’s matter—how to *be* a lawyer.

David Luban explores how the stakes for a lawyer’s self-concept can be high when she exercises her professional judgment, and how her judgment can be shaped and compromised by the supervisors and colleagues with whom she practices:

Every litigation associate goes through a rite of passage: she finds a document that seemingly lies squarely within the scope of a legitimate discovery request, but her supervisor tells her to devise an argument for excluding it. . . . It is the moment when withholding information despite an

147. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION*, *supra* note 140, at 165, 168–69.

148. *Id.* at 175.

149. Federal Rule of Civil Procedure 11(b) requires a lawyer making representations to the court to certify that the representations are not “presented for any improper purpose,” FED. R. CIV. P. 11(b)(1), that their “legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law[.]” FED. R. CIV. P. 11(b)(2), that their factual contentions have or will likely have evidentiary support, FED. R. CIV. P. 11(b)(3), and that any “denials of factual contentions are warranted on the evidence or . . . reasonably based on belief or a lack of information,” FED. R. CIV. P. 11(b)(4). This Rule requires representations to the court to have a basis in empiricism and reason, and not to be arbitrary.

150. “Certification” is synonymous with “oath”: *see* Oxford English Dictionary Online, *certify*, v., 1 (2d ed. 1989); Oxford English Dictionary Online, *attest*, v., 1.b (2d ed. 1989). *See also* *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978) (“[A]ttorneys are officers of the court, and ‘when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.’” (citation omitted)).

adversary's legitimate request starts to feel like zealous advocacy rather than deception.¹⁵¹

Luban is describing a socialization process in which a new lawyer's sense of the boundary that identifies her with the court¹⁵² is confounded; eventually she may lose her ability to realize when she is transgressing that boundary. Thus, she begins to identify too closely with the client (or with the law firm that has been captured by the client), and to forget her identity with the court that deems her its officer.

Hazard points out the philosophical significance of the situationalism of law practice. Luban then presses on to its psychological significance for the lawyer: "Cognitive dissonance theory teaches that when our actions conflict with our self-concept, our beliefs and attitudes change until the conflict is removed."¹⁵³ Analyzing the Milgram experiments on wrongful obedience¹⁵⁴ and the situation in *Berkey v. Eastman Kodak Co.*¹⁵⁵, Luban suggests that there is a slippery slope from zealous advocacy to deception that is paved with good intentions: a lawyer senses how to perform ethically, but is expected by her supervisors and colleagues to stretch the bounds of ethical behavior ("[L]ike any other piece of elastic, the no-deception principle loses its grip if it is stretched too often"¹⁵⁶). As she tries to meet their expectations and reconcile them with her understanding of professional performance—in the process of her socialization as a practicing lawyer—that understanding is compromised: she reduces the cognitive dissonance between that understanding and her action by changing the understanding until the conflict is removed. "In other words, our judgment gets corrupted because only by corrupting our judgment can we continue to think well of ourselves. Conscience must be seduced into flattering our self-image."¹⁵⁷

This is an individual lawyer's psychological path into the troubled standard conception of Fig. 1: the lawyer's identity as an officer of the court evanesces through her actions that are dissonant or inconsistent with it, and she forgets whence she came to practice. In such situations the identity of the lawyer as a zealous advocate is unduly self-laudatory and confusing to the lawyer: it

151. David J. Luban, *The Ethics of Wrongful Obedience*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION*, *supra* note 140, at 94, 106.

152. Described *supra* Part II.A.

153. Luban, *supra* note 151, at 102.

154. *Id.* at 97 (summarizing Stanley Milgram's findings thus: "Two out of three people you pass in the street would electrocute you if a laboratory technician ordered them to.").

155. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 444 U.S. 1093 (1980). In the course of this litigation, a prominent lawyer representing Kodak lied and committed perjury to conceal documents that he later produced. The lawyer's associate incredulously witnessed his supervisor's perjury, but did not report it to the court.

156. Luban, *supra* note 151, at 106.

157. *Id.* at 110–11.

compromises her integrity as a court officer. The lawyer's professional judgment must be independent of such corruption, for the court and the rule of law rely upon it. As Luban suggests, such independence is possible.¹⁵⁸

The view that frames lawyers as agents of autonomous clients relieves the lawyer of responsibilities that (Simon notes) can be emotionally overwhelming—it situates the lawyer as a Milgram compliant (per Luban) who need not answer for harm that she channels from the client to the judicial system in obeying the client. For example, in describing the findings of the *Ethics: Beyond the Rules* Task Force of the American Bar Association, Gordon reports that in interviews, large-firm litigators made comments such as: “If clients are going to lie to me, they are going to lie to me; am I going to try to be a mind-reader? . . . I would hope they would be honest with me; it’s not my responsibility to guide them to decision.”¹⁵⁹ At a minimum, this comment forgets or ignores the mandates of Federal Rule of Civil Procedure 11(b) and *Business Guides v. Chromatic Communications Enterprises*,¹⁶⁰ which require a lawyer to certify that to the best of her knowledge *after* conducting a reasonable inquiry, representations to the court have evidentiary support. Forgotten as well are the mandates of the Code’s Disciplinary Rule on lawyer misconduct: “A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”¹⁶¹ Gordon’s description of the interview process displays cognitive-dissonance reduction at work:

While speaking in this “official” mode, our lawyer-informants treated the actual stories we used of ethically problematic conduct (usually involving suppression or concealment of relevant evidence in discovery) by large-firm lawyers as either not really raising ethical problems at all or else as isolated examples of lawyers being “stupid,” that is, failing to take adequate account of the downside risks to themselves and to their clients of rule violations.¹⁶²

Here, we see professional socialization resulting in the evanescence of the lawyer’s identity as an officer of the court. Similarly finessing the court officer’s ethical commitments, Cohen states that “agency law forbids agents from engaging in conduct that is illegal, *unethical*, *immoral*, or *against public policy*,”¹⁶³—but in four sentences he limits unethical conduct to that which conflicts with the lawyer’s fiduciary duties to the client, and collapses immoral

158. *Id.* at 116 (“There is no reason to believe that corruption of judgment is inevitable . . . in the adversary system. . . . Perhaps the best protection is understanding the illusions themselves, their pervasiveness, the insidious way they work on us.” (internal citation omitted)).

159. Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.* 709, 711 (1998) (ellipsis in original).

160. 498 U.S. 533 (1991).

161. MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(a)(4) (1983).

162. Gordon, *supra* note 159, at 711.

163. Cohen, *supra* note 121, at 402 (emphasis added).

conduct and that which contravenes public policy into a single category, sweeping them under the rug of “criminal, or quasi-criminal . . . conduct involving alcohol, gambling, and prostitution.”¹⁶⁴

Even when we focus on the lawyer as the client’s agent, the legal limitations on that agency role are too numerous and substantial simply to collapse into the realm of legal limitations on the behavior of all citizens. For example, the agent with multiple principals is no stranger to agency law: even when a court explicitly appoints a fiduciary, such as a bankruptcy trustee for a corporation, or a guardian for a ward of the state, those agents also may be viewed as agents of the court. Further, a trustee may have equivalent obligations to various family members; a corporate director may have hierarchized obligations to shareholders, prioritizing common shareholders over preferred shareholders. A lawyer’s agency duties to her client neither foreclose nor subordinate her duties to the court of justice.¹⁶⁵

At a minimum, the structure of Cohen’s own description of agency law indicates that moral limitations on the lawyer’s role complement and are distinct from the other three sets of limitations mentioned. Public policy limitations on the lawyer’s role as the client’s agent include those entailed in the public’s interest in fair play and substantial justice in the workings of its judiciary—in the rule of law. Cohen limits the duties of an officer of the court to “process obligations” that he claims are consistent with her client-advocacy duties,¹⁶⁶ while asserting that being an officer of the court involves no substantive duty to seek justice. Squinting at the lawyer through this narrow view of agency law, Cohen misses the connection between a lawyer’s procedural obligations and the public’s constitutionally guaranteed interests in fairness and justice.¹⁶⁷

Gordon describes the lawyer as an agent of the client, but unlike Cohen, recognizes that lawyers must be “agents of the common framework of institutions, customs, and norms within which their client’s interests must be

164. *Id.* at 402–03 (emphasis added) (footnotes omitted):

Unethical conduct seems limited to misrepresentations, self-dealing or other behavior conflicting with the agent’s fiduciary duties. Immoral conduct and conduct that is against public policy seem limited to behavior sanctioned by criminal, or quasi criminal, statutes or regulations. These terms apply to conduct involving alcohol, gambling, and prostitution. None of this conduct is the object of serious interest to those advocating that the lawyer’s role should include a substantive duty to seek justice.

165. See, e.g., Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1199 (2006) (“Foremost, zeal coexists with many other duties, not just the duty to obey the law, and zeal does not override these obligations.”).

166. Cohen, *supra* note 121, at 350. Later, Cohen admits that the lawyer’s role as the court’s officer entails substantive duties as well, and then immediately reduces those to the function of screening meritless claims. *Id.* at 358–59 & n.30.

167. U.S. CONST. Amend. V & XIV.

pursued if the premises underlying all these individual exercises of freedom are to be made good.”¹⁶⁸ Gordon points out that lawyers are and must be “curators of the public framework[.]”¹⁶⁹ since they are “in a unique position both to ensure that [framework] arrangements are carried into effect and to sabotage them,”¹⁷⁰—a position of public trust. In parallel, Deborah Hensler and Judith Resnik argue that “because lawyers are specially situated actors within the justice system, their norms of professionalism must internalize law’s commitment to equal treatment”¹⁷¹; therefore, they would “includ[e], as a professional obligation” in addition to those of an officer of the court, “advocacy for and insistence on the practice of equality.”¹⁷² Bill Ong Hing argues for the lawyer’s duty to “work[.] for the common good,”¹⁷³ finding this duty to be consistent with her “obligation to the legal system in [her] capacity as an officer of the court” as articulated by the American Bar Association Commission on Professionalism.¹⁷⁴ Yet, for Hensler and Resnik the term “officer[.] of the court” “no longer suffices.”¹⁷⁵ For Gordon, the terms “ethics”¹⁷⁶ and “officer of the court”¹⁷⁷ have lost their abilities to refer to the lawyer’s responsibilities to “carry out the public framework-regarding aims of the legal system[.]”¹⁷⁸ so he refers to these as the lawyer’s “public responsibilities[.]”¹⁷⁹

However, as discussed above, as an officer of the court the lawyer is an integral part of our judicial framework that critically connects with someone who would be heard by the court and translates that person’s call into matter appropriate for legal action. Thus, though strained in a discursive tug-of-war, the term “officer of the court” nonetheless refers to the public responsibilities that Gordon describes as well as to the function of the lawyer-as-advocate that Hazard describes. Moreover, the lawyer’s function as a client-connector and

168. Robert W. Gordon, *Why Lawyers Can’t Just Be Hired Guns*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION*, *supra* note 140, at 42, 44–45.

169. *Id.* at 47.

170. *Id.* at 45.

171. Deborah R. Hensler & Judith Resnik, *Contested Identities*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION*, *supra* note 140, at 240, 242.

172. *Id.* at 255.

173. Hing, *supra* note 107, at 904.

174. *Id.* at 924 n.126 (quoting ABA COMM’N ON PROFESSIONALISM, “IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, 112 F.R.D. 243, 279–80 (1986)).

175. Hensler & Resnik, *supra* note 171, at 255.

176. Gordon, *supra* note 168, at 43 (“‘Ethics’ has come to mean either . . . the detailed technical rules in the professional-ethics codes; or, . . . a strictly personal morality” that “people just have or don’t have[.]”).

177. *Id.* at 45 (implying that the term “officer of the court” is now merely “ritualistic”).

178. *Id.*

179. *Id.* at 43.

translator for the court, when regarded in light of the unequal distribution of legal services, further implies that the bar already has an obligation to be socially diverse. If a diverse bar could better effect the administration of justice, then the concept of the officer of the court already embraces the unrealized professional obligations identified by Hensler and Resnik. But from Cohen's straitened perspective, it is difficult to see the lawyer as an officer of the court. Amalia Kessler argues that the discourse of adversarial ideology obscures our heritage from equity procedure.¹⁸⁰ This discourse also obscures the established dimensions of the lawyer's function as a court officer, and hinders the lawyer from more fully realizing her professional identity.

The view of the lawyer as an agent for representation in court rests comfortably within the realm of the lawyer's duties to the court, neither exceeding nor superseding them. Missing the connection between a lawyer's duties to the court and to the client leads to the unnecessary conclusion that the "[i]mposition of duties that clash with the duty of loyalty to client—in effect agency duties to the court or justice—would dramatically redefine the agency concept and lawyer role."¹⁸¹ Instead, the lawyer's role as an officer of the court comprises and indeed provides for her role as the party's advocate.

Interestingly, Cohen's article is constructed more like a piece of advocacy than scholarship: statements dismissing the lawyer's duty to the court of justice are sarcastically worded; contradicting or limiting evidence and opinion are downplayed, parenthesized, and pushed into footnotes; and weighty conclusions depend from a worn narrative thread. Perhaps this choice of genre, which brackets opposing argument, reveals a great sympathy for the advocating lawyer and a wish to relieve her of the strain of the professional double-bind. However, while energetic denial of the lawyer's identity as an officer of the court reduces cognitive dissonance from the underperformance of the lawyer's procedural role, it also damages both lawyers' own and the public's understandings of the legal profession. Effectively rationalizing the lawyer-as-mouthpiece condemned by Chief Justice Burger,¹⁸² this denial forgets that the role of an officer of the court is essential—not optional—to the lawyer. A lawyer who does not act as an officer of the court does not act as a lawyer, but merely passes herself off as one, rendering representation before

180. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1184 (2005):

Our ability to deploy inquisitorial procedure as a remedy for the excesses of the adversarial has been stymied, however, by an unnecessary, adversarial ideology, based on a false reading of our own history. As a result, instead of self-consciously and systematically reflecting on the structure and nature of inquisitorial procedure, we have engaged in ad hoc and often confused tinkering.

181. Cohen, *supra* note 121, at 404.

182. *See supra* Part I.B.

the court a charade. In arguing from his conclusion, Cohen substitutes ideology for ethics.

Cohen also expresses concern that recognition of the officer's duties in the administration of justice will allow "moral activists . . . to substitute their views of morality in place of the law."¹⁸³ But moral substitution does not follow from the observation that these duties exist. This concern parallels concerns over judicial activism, that unless judges behave as ideal legal formalists—mechanical shuttles weaving legal discourse according to a fully predetermined program—judges will effect tyranny. But we have no robot-judges: our best hope for just adjudication relies on human judges to exercise their judgment, to weigh the equities of the cases before them. We rely on their professionalism,¹⁸⁴ which seems more likely to be fair and just than a machine would be—especially since a machine would have to be programmed *by someone* with not only legislation and common law, but with institutional historical knowledge, and with relative weights for applying balancing tests to specific constellations of facts—that is, *with values* to use in the calculations of holding. The moral function of a judge seems inevitable, however legitimately we may fear its abuses. The layered structure of our judiciary is designed to some extent to rein the operation of a loose-thread individual's values in place of the public values reflected in the legal designs of our social fabric: appellate review, some ability for a party to choose a different judge, impeachment procedures, and codes of professional conduct for judges—the public's legal, ethical, and normative professional expectations for judges—converge to shape our efforts to establish and administer justice pursuant to our Constitution.

Similarly, robot lawyers do not assist our judges. Instead, we rely on the lawyer's professional judgment to protect the integrity of the adversarial system of justice. Like judges, lawyers are bound by prescriptive and proscriptive rules, ethics and norms to perform not as agents of their own (nor of any individual's) personal value systems, but as officers of the court. That is, the public relies upon lawyers to perform their professional duties according to the system of laws and values that provides for and directs the court to establish justice.¹⁸⁵ The lawyer is present because she swore to "serve, protect,

183. Cohen, *supra* note 121, at 409. Cohen further suggests that lawyers subject to scruples of conscience can't stand the heat and should get out of the kitchen. *Id.*:

For those moral activists who are uncomfortable with the tension that exists when there is a difference between what the law allows and their morality and values the answer is urging law reform or another occupation. The answer is not for moral activists to deny clients access to the law, or worse, to substitute their views of morality in place of the law.

184. See, e.g., Sandra Day O'Connor, *Fair & Independent Courts*, DAEDALUS, Fall 2008, at 8; Stephen Breyer, *Serving America's Best Interests*, DAEDALUS, Fall 2008, at 139.

185. U.S. CONST. Preamble (we establish our Constitution in part to "establish Justice"); see also Oxford English Dictionary Online, justice, n., II.5.a (2d ed. 1989) ("The administration of

foster and promote the fair and impartial administration of justice,”¹⁸⁶ and is bound by her oath to uphold the Constitution. The lawyer’s ability to keep her oath, to be as good as her word, is central to her professional identity and integrity. The view that lawyers have “no substantive duty to seek justice”¹⁸⁷ urges that Constitutional, historical, and structural manifestations of our courts do not matter.

As the myopic view of the lawyer as a mere client-advocate ostensibly frees her from the double-bind, it unmoors her from the very legal institutions that formed her to assist in their function. Relying on the professionalism of individual judges and lawyers in our adversary system of justice may give us pause, but relaxing their professional constraints should send us reeling. Cohen expresses concern that if the lawyer were meaningfully an officer of the court, she might “substitute [her] own views of morality in place of the law”¹⁸⁸—but the court’s officer is to use her *professional* judgment to represent the client—to embody the values of the court of justice in our legal system according to her oath, rather than to abuse her office to promote her own or her client’s private agenda. If the lawyer forgets her functions as an officer of the court—if we render the lawyer as an empty vessel for the client—then our real concern becomes the unchecked flow of the client’s own purposes into the court, without the professional representation that the court appointed the lawyer to perform. Cohen’s argument would deprive the lawyer of professional agency, relieving her of the responsibility to exercise professional judgment as an officer of the court.

Norman Spaulding describes a situation that similarly troubles the lawyer’s representation to the court, in which there is “[i]ntense identification between lawyer and client” or “thick professional identity.”¹⁸⁹ Spaulding suggests that “much in the way of contemporary professional misconduct and malaise[,]” such as “role confusion [and] lawlessness [*inter alia*]” is attributable to a normative shift towards a thickening professional identity for the lawyer.¹⁹⁰ In terms of my analysis, this normative shift places the lawyer more completely in the realm of the client’s interests, straining her identity as the court’s officer. However, the lawyer is not merely a passive screen between private interests and the court, but is instead an active functionary of the court who shapes a client’s situation into a legally meaningful form appropriate for the court’s

law, or the forms and processes attending it; judicial proceedings; in early use, Legal proceedings of any kind[.]”).

186. See *supra* note 52 and accompanying text.

187. Cohen, *supra* note 121, at 405 & *passim* (e.g., 349–52, 355–88, 409).

188. *Id.* at 409.

189. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 7 (2003).

190. *Id.*

recognition and action. This means that the lawyer has a thick professional identity with respect to the court, and accordingly should have a thin professional identity with respect to the client. This thin identity with the client also protects the lawyer's personal identity, allowing the lawyer to represent the client competently even when she does not personally value his cause, and protects the lawyer's integrity as an officer of the court.¹⁹¹ When the lawyer acts as Cohen's unmoored client-agent, or as Spaulding's too-thickly-client-identified lawyer, the client manifests before the court improperly, and the integrity of the court's weave is compromised—the social fabric weakens.

Further, the standard conception is symptomatic of “our current procedural ailments” that Kessler traces to our “Failure to recall . . . the quasi-inquisitorial nature of our equity tradition”: this tradition valued due process as a check on arbitrary state action, and for its truth-seeking function that promoted justice by ensuring that meritorious claims would prevail.¹⁹² The adversary system of justice depends on a neutral decisionmaker to decide who has what right, based on presentations of honest (and not misleading) legal arguments¹⁹³ supported by accurate (and not false or misleading) facts¹⁹⁴. The rule of law is promoted over arbitrary decisionmaking by the court's empirical reach through its lawyers into the realm of the client. The lawyer is present to effect this reach—not to misdirect it.

Spaulding's discussion of the potentially “thin professional identity” of the lawyer, in which she performs competently for the client regardless of whether she personally approves of the client's cause, provides another response to Cohen's concern about the lawyer's improper use of the client's cause. Though Spaulding emphasizes the lawyer's duties to the client in his discussion, this aspect of the lawyer's role survives the shift to the framework of Fig. 3, in which the lawyer is first and always the officer of the court, having duties both to the court and to the client to manifest the client before it as fully as possible (*i.e.*, with a thin professional identity) *subject* to the rules of the

191. See Gordon, *supra* note 99, at 13 (“[A]lthough lawyers' services and technical skills are for sale, their personal and political convictions are not, for they each have a core identity that must be exempt from commodification. The loyalty purchased by the client is limited, because a part of the lawyer's professional persona must be set aside for dedication to public purposes.”); John T. Noonan, Jr., Propter Honoris Respectum: *The Lawyer Who Overidentifies with His Client*, 76 NOTRE DAME L. REV. 827, 841 (2001) (The lawyer “must attend to a plurality of goods—the good of the client, the good of the courts, the good of the lawyer's partners, and even in degree the good of the other parties. . . . To serve professionally the persons embodying these purposes, a lawyer cannot . . . contract his or her identity to the client's.”).

192. Kessler, *supra* note 180, at 1251.

193. See, e.g., FED. R. CIV. P. 11(b)(2).

194. See, e.g., FED. R. CIV. P. 11(b)(3)–(4).

circumscribing realm—the constraints of law, legal ethics, and professional norms to which the lawyer’s professional performance must conform.

The discourses of adversarial ideology and the standard conception make us forget why we are here, obscuring the lawyer’s professional identity. But the lawyer’s professional identity as an officer of the court is essential to the rule of law: we rely on it to ensure that the power of our courts protects not only private parties, but also our shared interest in the rule of law.

IV. WHY ALWAYS THE FIGHTING?

I have shown that the standard conception of the lawyer as exclusively or primarily the client’s agent is historically, legally, structurally, and functionally false; that it can result from backfiring rhetorical framing; and that it can result in psychologically untenable professional socialization. Clearly, lawyers have substantial duties in the administration of justice as officers of the court. Why, then, do some advocate for client advocacy to the point where the officer of the court fails to matter? How is the profound oath that forms lawyers to the profession rendered as lip-service, as if members of the bar had entered the legal profession with their fingers crossed behind their backs?

This occurs when attempts to remind lawyers of their roles as officers of the court—to weave the structure of adversarial system closer to the pattern that it was designed to embody—are framed instead as attempts to dispense with it and its values of autonomy. However, if autonomy were the primary value of the adversary system of justice, it would be no system at all, but a free-for-all realm of might-makes-right. This re-framing might favor those who perceive a deprivation of power from the just operation of law, even when the reallocation of power in particular cases would result in a stronger social fabric for all. As litigation becomes more complex, the court relies all the more on the fair representations of its officers, and it becomes ever more important to the public that the lawyer embody an officer of the court as she represents a party before it.¹⁹⁵

It is also clear that the adversary system is not an end in itself; rather, it is a means for serving justice. It is supposed that through the equally skilled legal representation of only two opposed sides, the truth of a matter will emerge so

195. Judge Rubin’s argument that as factual complexity increases so does our reliance on the lawyer’s professionalism is even more timely now than when he made it. Judge Alvin B. Rubin, *Trial by Jury in Complex Civil Cases: Voice of Liberty or Verdict by Confusion?*, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 101 (1982):

Recognizing this, the Advisory Committee on the Federal Rules of Civil Procedure is proposing changes to impose higher standards on counsel and to encourage judges to impose sanctions on counsel who abuse the judicial process. The American Bar Association is considering changes in its Code of Professional Responsibility to require greater fidelity to the cause of justice in counsel’s conduct of litigation.

that the judge may treat it.¹⁹⁶ Prioritizing the adversarial aspects of our justice system subordinates its *raison d'être*, brushing aside the purposes that it exists to serve. Setting the scale of the debate at the level of the individual lawyer leaves the profession that creates, sustains and commits the lawyer out of the picture—so that the lawyer appears only to serve client interests.

A. *Reconstruction of the Lawyer's Professional Identity*

The present analysis begins with the hypothesis that a lawyer is meaningfully an officer of the court, and finds evidence for the lawyer's professional identity as such in legal history and common law, and in the structure and function of the current judicial system. This analysis focuses on the formation of the lawyer's professional identity as an instance of the formation of an identity generally, in terms of its interpellation, socialization, and potential suspension or destruction, and examines the nature of that identity in terms of its performance. Professional performance is the play of professional identity: the lawyer's professional performance entails the exercise of independent professional judgment to translate between the public and private realms, assisting in the formation of binding connections between the two in accordance with the rule of law. Professional judgment extends beyond idiosyncratic personal judgment in that it is socialized to the norms of the legal profession, some of which have been articulated in terms of professional canons, considerations, rules and opinions. The lawyer's professional conscience is at the core of her professional identity as an officer of the court, which is vital to the administration of justice.

This theory of the lawyer's professional identity further suggests that the lawyer's identity and professional actions can be understood as links in chains of softly dialectical synthetic acts that form new discursive entities through the application of a maieutic logic that reifies the private individual in publicly intelligible and material forms. Though this view may sound abstract, theorizing the lawyer's professional identity is a practical endeavor,¹⁹⁷ in that it considers how procedural justice and the rule of law are effected in substantial part through the lawyer's professional performance. This approach to

196. Note that even if the lawyers representing the two sides were perfectly professional officers of the court striving to put before the judge the best arguments based solely on honest representations, the flattening of a complex situation onto only two opposed sides itself may impede the court's development of a more accurate and complete factual picture of the matter. As does increasing factual complexity, factual distortion that inherently arises from the bilateral structure of the adversarial system places all the more weight on the lawyers' professionalism as the court's officers.

197. Wendel, *supra* note 84, at 1198. Lawyers have long sought clear guidance as to "how to reconcile a lawyer's obligations to the court with his obligations to his client" so that they would know how to behave professionally; see Curtis, *supra* note 87, at 11.

theorizing the lawyer's identity and ethics complements others' analyses in interesting ways.

B. Identity Theory and Legal Ethics

1. Purposivism

Simon describes purposivism as an "interrupted tradition" premised on the idea that "legal rules and institutions should be elaborated and applied to effectuate their purposes."¹⁹⁸ He notes that the professional ethic that purposivism implies "strives to directly connect the lawyer's service to individual clients to the values that underlie applicable legal norms."¹⁹⁹ The idea of professionalism to which purposivism contributes "proposed a conception of work that united self-assertion with social commitment and service to private interest with respect for public norms."²⁰⁰ Simon further describes a purposivist approach to resolving ambiguities about the lawyer's role by "asking what lawyer conduct would best vindicate the relevant substantive norms and would best promote fair adjudication of the dispute" in a way that contemplates the lawyer's exercise both of "ordinary morality"²⁰¹ and of a faculty that resembles the "professional conscience" discussed by Fred Zacharias and Bruce Green.²⁰² Simon notes that, "To a surprising extent, recent academic theorizing about professional responsibility fails to engage this tradition and often ignores it completely,"²⁰³ and urges that this perspective "deserves more consideration than much recent academic professional responsibility discourse has given it."²⁰⁴

The present functional analysis of the lawyer's role harmonizes with Simon's call, finding the lawyer engaged in the process of elaborating legal rules and institutions as simultaneously an officer of the court and a client representative, embodying and crafting connections between the public institution of law and the private party. The lawyer's professional identity emerges in the exercise of her independent professional judgment as she contributes to the construction of law at a nexus between these realms, crafting arguments and counterarguments to help in extending the general law to specific cases. The lawyer's professional performance requires her to decide which of her choices would best meet not only the letter but also the goals of the law, including her Constitutional commitment to fair play and substantial

198. Simon, *supra* note 108, at 1007.

199. *Id.* at 1008.

200. *Id.*

201. *Id.* at 1009.

202. Zacharias & Green, *supra* note 90.

203. Simon, *supra* note 108, at 1008.

204. *Id.* at 1009.

justice; this ethic that governs her professional performance may provide a point of contact between the present theory and the purposivism that Simon describes.

The lawyer's professional conscience that Zacharias and Green describe is neither the lawyer's personal (and thus potentially arbitrary or idiosyncratic) conscience, nor that of her client assumed by the lawyer in her professional role as a client-agent; instead, the lawyer's professional conscience arises from her duties to the court and its legal system function of effecting justice.²⁰⁵ It is tempting to map this conscience onto the officer of the court here described, but the reconstructed lawyer is not a divided self: the lawyer represents her client *as* an officer of the court. Since the lawyer cannot be a client-agent without first and always being an officer of the court, the professional conscience of the reconstructed lawyer necessarily, fully governs her performance of both roles. The lawyer herself embodies a site of translation between the client and the court; the lawyer's professionalism in translation entails ethical advocacy, which includes the duty to make true translations and is informed by the exercise of a conscience that has been socialized, formed and disciplined, as that of an officer of the court.

2. Independent Professional Judgment

The present analysis examines the question of the lawyer's professional identity—its formation and function in the legal system—and finds a coherent professional subject to legal ethics. The question of this identity is contested in that some commentators focus on only one of its aspects, while others indicate that the lawyer is something more: this is the question whether the lawyer is simply a client's "mouthpiece"²⁰⁶ or is instead an integral part of the administration of justice with professional duties to the court.

Under the present analysis, the "something more" is everything: the assertion of the lawyer-as-mouthpiece so oversimplifies the lawyer's role that it misses her basic functions as a discerning translator contributing to social order. While in contrast, Wendel points out that there is more to the lawyer than her agency for the client, his "more" is narrower and potentially points in a different direction: Wendel argues that in interpreting the law, the lawyer has a professional obligation to remain beyond the role of client-agent and consider legal norms ("public norms regulating the understanding of legal texts") as

205. Zacharias & Green, *supra* note 90.

206. Monroe H. Freedman & Abbe Smith, *Review: Markovits: A Modern Legal Ethics: Adversary Ethics in a Democratic Age*, 108 MICH. L. REV. 925, 937 (2010) (reviewing MARKOVITS, *supra* note 89) ("Let us say it plainly: a lawyer *is* a mouthpiece in the sense that one of the lawyer's most important functions is to speak for the client's interest in the most persuasive way possible." (citation omitted)).

well as the letter of the law.²⁰⁷ Thus, Wendel allows for the lawyer's exercise of professional judgment, and constrains that judgment by legal norms of textual interpretation. However, the ethics of translation, representation and interpretation inherent in the lawyer's identity as an officer of the court apply not only to construing the law for the client but to all of the lawyer's professional acts, and thus are not exhausted by the legal interpretive norms that Wendel describes. Further, Wendel identifies the basis of these norms as the standards of "an interpretive community that is constituted by fidelity to law,"²⁰⁸ though of course a law may be unjust, and we may make many moves in trying to define and identify a community that is faithful only to just laws, and perhaps agree only on a set of counterexamples. This problem underscores the importance of the lawyer's exercise of judgment that is both professional—socialized to the legal profession as described here—and independent, allowing the lawyer to have a critical professional perspective on the law as well. Judges sit simultaneously in law and equity, and lawyers must be able to advise them in both registers.

In his analysis of a crisis in legal ethics, Hazard notes that the question of ethics reaches into the question of the lawyer's professional identity within the social system.²⁰⁹ Also pointing from legal ethics to professional identity, Alice Woolley and W. Bradley Wendel offer a psychological approach to legal ethics that reframes questions about what a lawyer should do in terms of how or who (what kind of person) a lawyer should be.²¹⁰ Emphasizing that a lawyer in a law firm experiences socialization pressures from other members of the firm,²¹¹ Woolley and Wendel liken to Hercules "the ethical actor inherent"²¹² in Simon's theory, concluding that "Simon's lawyer is, in a word, a maverick"²¹³—primarily because she is expected to exercise independent professional judgment.²¹⁴ Similarly, "Luban's lawyer must . . . have a degree

207. Wendel, *supra* note 84, at 1191.

208. *Id.*

209. Hazard, *supra* note 68, at 1240 ("My root question is . . . Who is 'we' when it is said 'We lawyers . . .?'").

210. Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 *GEO. J. LEGAL ETHICS* 1065 (2010).

211. *Id.* at 1083 ("This [independence] is a remarkable feat given the findings of social psychologists, who have shown that individuals acting in groups tend to take cues from those around them when interpreting ambiguous situations.").

212. *Id.* at 1074.

213. *Id.* at 1083.

214. *See, e.g., id.* at 1082 (italics omitted):

Simon grants no leeway to the lawyer, refusing to condone reliance on the client or anyone else (including the judgments about justice embodied in legal norms), instead making the rendering of such jurisprudential judgments the heart of the lawyer's ethical obligation. . . .

of independence of thought, and a disregard for the fact that her opinions will be unpopular in the institutional and professional context within which she works.”²¹⁵ Stressing the importance of a lawyer’s ability to work within an institutional structure, Woolley and Wendel then ask whether it is desirable and realistic for lawyers to be people like Simon’s lawyer and Luban’s lawyer; determining that these ideal lawyers “cannot function easily within an institution[,]” they suggest that their analysis is “seriously problematic for both theories.”²¹⁶

The officer of the court that I describe is interpellated by the court primarily to exercise her independent professional judgment²¹⁷—to determine on Gordon’s empty stage how she will professionally represent a party before the court. While her ability maieutically to represent her client’s interests requires her to bracket her personal interests—to use what Daniel Markovits describes as her “negative capability”²¹⁸—she is nonetheless required to manifest the client’s position subject to the integrity of the legal process.²¹⁹ The court and thereby the public relies on her independence from (or thin identity with) the client to realize our best efforts in the administration of justice. A lawyer whose identity is monopolized by the client’s interests is a Trojan horse: a tool used to undermine the public justice system for the relatively exclusive benefit of the private party. Another way of expressing this is to say that a properly functioning lawyer is only secondarily interpellated by her client, while primarily interpellated by the court. A law firm that socializes, or calls forth, a lawyer to identify and act primarily as a lever for its clients misinterpellates the lawyer, sirening her to forget her professional identity as a court officer.

In response to Woolley and Wendel, Luban suggests that regarding as unrealistic or dysfunctional the exercise of independent professional and moral

Most significantly, Simon’s lawyer is not relieved of the obligation of deciding what justice requires by the fact that the law permits something.

215. *Id.* at 1089.

216. Woolley & Wendel, *supra* note 210, at 1097.

217. That the court relies on the lawyer’s independence is clear, particularly since the Court states as much in its description of the duties of the public defender as a court officer. *See supra* Part I.B.

218. MARKOVITS, *supra* note 89, at 11 (italics retained):

[L]awyers, like poets, are specialists in what I call (following Keats) *negative capability*: that is, in the capacity to speak not in one’s own voice but rather, effacing one’s private judgments, faithfully and authentically to render the subjectivity of another—in the case of lawyers by giving voice to clients who would otherwise remain inarticulate.

219. Otherwise, the court officer is subject to private capture: by “identifying with particular types of clients or causes [she] always represent[s],” she “threatens to confuse negative capability with positive commitment to their side.” David Luban, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*, 120 ETHICS 864, 868 (2010) (reviewing MARKOVITS, *supra* note 89).

judgment by a lawyer in a law firm is more appropriately a critique of the law firm than of a theory of legal ethics.²²⁰ I would add that not only should a law firm value its lawyers' independent judgment, but that a firm's failure to do so obstructs the function of the legal system. Interestingly, Woolley and Wendel note that "[l]aw firms, corporations, and government are institutions within which lawyers work, but the legal system itself is an institution within which lawyers are intended to function, and the operation of which lawyers are intended to foster and protect."²²¹ In that case, framing the lawyer fully within her role as an officer of the court affords her some psychological comfort after all: fulfilling her (primary) duties to the public *requires* her to act and to be like a Simonian and Lubanian lawyer—and thus to function *well* within our legal system.

Both Hazard and Russell Pearce note the impact of the client as a business entity on the lawyer's professional identity. Hazard has analyzed Tocqueville's reading of American lawyers as aristocrats, and described lawyers as elites whose "role was actualized in our society by linking the legal profession to the courts, on one end, and to business enterprise on the other end."²²² Hazard theorized a crisis in lawyers' ethics and identity as an attack from the left on their ties to business, and from the right on lawyers' elitism. Pearce also sees the lawyer as an elite, who performs a "governing class" role that has been thinning along the lines of a "Business-Profession" dichotomy as lawyers regard themselves either as hired guns or as public servants.²²³ Pearce notes, however, that the dichotomy could be abandoned by lawyers' identifying thickly with the governing class role.

The governing class role may be analogized in some respects to the officer-of-the-court role; to the extent that the analogy holds, the lawyer's thick identity with that originary role is appropriate. Like Spaulding, I see the necessity to the lawyer's function of her thin identification with her client²²⁴—but unlike Spaulding, I see the necessity arising neither directly nor primarily (but instead, indirectly and secondarily) from the norm of client service. I perceive that her identity and function as an officer of the court is the lawyer's *sine qua non*, and maintain that the lawyer requires a thicker professional identity with the court than with the client to function effectively in the administration of justice.

220. David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101, 1112–13 (2010).

221. Woolley & Wendel, *supra* note 210, at 1097.

222. Hazard, *supra* note 68, at 1278.

223. Russell G. Pearce, *Lawyers As America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001).

224. Spaulding, *supra* note 189, at 7.

3. Functional Analysis and Reconstruction of the Lawyer's Professional Identity

The understanding of the lawyer that results from the present analysis regards her function as a client counselor and representative as integral but logically subordinate to her ordinary and overarching function as an officer of the court. Debates about whether the lawyer is primarily a client advocate or court officer thus are not chicken-or-egg debates that are doomed to spin eternally: the strained argument that the lawyer is nothing but an agent of the client results from an artificially narrow view of the lawyer. Related arguments that the term "officer of the court" is empty are themselves hollow, as seen in an example provided by Robert Martineau. Martineau argues that the title "officer of the court" is used by courts as a mere excuse for the courts' dependence upon and regulation of the lawyer, and that such use is "dangerous" because "the label will soon become a substitute for the necessary functional analysis."²²⁵ This paper presents the necessary functional analysis, which shows that the title has a substantive meaning that is fundamental to the lawyer's professional identity and is essential to the lawyer's function in the administration of justice.

The closest methodological approach to that of this paper is the reconstructive analysis of the lawyer's role provided by Daniel Markovits in *A Modern Legal Ethics*, which parallels the present analysis in intriguing ways. First, Markovits attributes to lawyers in their professional functions the vices of ordinary lying and cheating, finding these vices to result not from excessive zeal, but instead to be "deeply ingrained in the genetic structure of adversary advocacy."²²⁶ So, rather than pose hypothetical dilemmas in legal ethics and consider how the law of lawyering might be developed better to manage them, Markovits engages in an interpretive reconstruction of the adversary system and the lawyer's function within it. His analysis essentially regards these lawyerly vices as symptoms of the lawyer's proper professional functions, which he describes in terms of the proposed lawyerly virtues of negative capability and fidelity. He suggests that the lawyer's self-understanding in terms of these virtues opens the possibility of her maintaining personal integrity while functioning as a legal professional, and of a felicitous conclusion to the story of legal ethics—though in the end, he diagnoses the lawyer's professional situation as one of tragic villainy, for modern society does not afford to lawyers the cultural resources needed to sustain their integrity.

225. Robert J. Martineau, *The Attorney As an Officer of the Court: Time to Take the Gown off the Bar*, 35 S.C. L. REV. 541, 572 (1983).

226. MARKOVITS, *supra* note 89, at 2.

My approach similarly has not been to pose hypotheticals to the law of lawyering, but instead to engage in an interpretive reconstruction of the lawyer's professional identity. It is helpful to compare our analyses more closely, for despite interesting resonances between them, their conclusions diverge.

i. Divergent Reconstructions

Both the present analysis and Markovits' explore how the judge and the lawyer relate, noting the structural separation and functional division of labor between the lawyer and the judge. Whereas Markovits emphasizes a moral division of labor and its importance to the political legitimacy of the legal process, I focus on its epistemological aspects. As Markovits states, "the forms of adjudication that [his argument] describes will fall short of producing justice[.]"²²⁷ Nonetheless, to the extent that the administration of justice is a real or even ostensible purpose of the legal process, the truth-values of the factual and argumentative statements on which adjudication is based matter. But Markovits passes over the epistemological aspects of this division of labor. For example, in noting that his ethical analysis applies to inquisitorial systems as well, he mentions that the German system of adjudication shares with that of the U.S. a structural separation between advocate and tribunal: "*outside the realm of fact-gathering*, German civil procedure is about as adversarial as our own."²²⁸ However, this distinguishing characteristic between the role-based duties of U.S. and German lawyers has important consequences for the lawyer's integrity: that the latter are responsible for arguing in an adversarial way, but *not* for gathering facts adversarially, shifts fundamental epistemological work across the divide from the lawyer to the judge. This shift simplifies the lawyer's functions, rendering the structure of the German legal system better able to promote the lawyer's professional integrity in that lawyers have little opportunity and less incentive to mis-represent facts. Judicial integrity then becomes more directly subject to the burden of developing complete and accurate facts, and the judge's lack of bias in favor of a party becomes even more crucial to the rule of law.

Considering the epistemological aspects of the division of labor between the judge and the lawyer foregrounds the significance of lying and cheating as particularly vicious acts for a lawyer. The soundness of a judicial opinion depends on the quality of the facts on which the opinion is based; thus, its justification is vitiated when a lawyer places before the fact-finder evidence that is inaccurate or is crafted to lead the fact-finder's judgment astray. Yet according to Markovits, "Unlike juries and judges, adversary lawyers should

227. *Id.* at 177.

228. *Id.* at 15 (emphasis added) (quoting John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 841 (1985)).

not pursue a true account of the facts of a case Instead, they should try aggressively to manipulate both the facts and the law to suit their clients' purposes. . . . In short, lawyers must lie."²²⁹

This interpretation of the lawyer's function ignores how deeply her work affects the epistemic basis of adjudication, which contributes both to its legitimacy and to its possibility of justice. Discerning the lawyer's function as an officer of the court compels the realization that a lawyer is duty-bound to strive to develop a true account of the facts of a case, and *a fortiori* that the lawyer must *not* manipulate facts to lower their truth-value—for in doing so, the lawyer manipulates the fact-finder away from the possibility of producing a legitimate and just opinion. All actors in the legal system have a duty *not* to undermine the epistemological basis of justice (the administration of which is the court's *raison d'être*): lawyers, parties, judges, court reporters—must not lie.

The legal system²³⁰ relies on judges to make well informed, reasonable and impartial decisions, rather than arbitrary rulings. The judge relies on the lawyer to call his attention to facts concerning her client that are neither false nor misleading, and then to make the best argument for her party that she can on the basis of those facts. Yet under Markovits' description, lawyers "should strive disproportionately and at times *almost* exclusively to promote their clients' interests. This requires lawyers to . . . employ delaying tactics, file strategically motivated claims, or exploit a law's form to thwart its substantive purposes. In short, lawyers must cheat."²³¹ The "almost" suggests that Markovits senses the boundaries of the lawyer's professional duty, marked in part by her Rule 11 certifications that she is not making a representation to the court "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," and that her legal arguments are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."²³² Of course, Markovits is aware of Rule 11, and reasonably reads it to leave open the possibility for a lawyer to make a legal argument that she "believe[s] will (and should) lose."²³³ But to function in the administration of justice, the court must be able to rely on the lawyer's representations that "to the best of [her] knowledge, information, and belief, formed after an inquiry reasonable under

229. *Id.* at 3.

230. I use the term "court" both in the literal sense discussed *supra* Part I.C.—the lawyer is an officer appointed by the court to practice before it—and by synecdoche to refer to the legal system: a court is an organ of the legal system. A lawyer is an officer of the court, and is thus a functionary of the legal system.

231. MARKOVITS, *supra* note 89, at 3–4 (italics added).

232. FED. R. CIV. P. 11(b).

233. MARKOVITS, *supra* note 89, at 60.

the circumstances,”²³⁴ her arguments are supported by evidence (not lies) and presented for proper purposes (not to cheat). The lawyer’s good-faith belief that her representations comply with Rule 11 indicates not only a duty not to throw the game (or engage in manifest injustice), but also an epistemological duty not to bias or *unfairly* persuade the judge: a lawyer must not cheat.

Markovits sees virtues in the lawyer that could accommodate the purported institutional needs to lie and cheat within an integrated professional identity: negative capability, and fidelity. Comparing the lawyer’s maieutic functions that I describe with Markovits’ lawyerly virtues shows how both of our analyses can go farther than Markovits pressed.

I earlier described the maieutic ethic as a professional ethic that “requires the professional to serve as a faithful translator, speaking for those whose voices have been unintelligible and thus have not mattered”²³⁵ in a professional system.

Markovits analogously adapts the term “negative capability” from Keats’ description of a poet’s function:²³⁶ negative capability is a capacity “for assisting persons who cannot themselves speak in a way that engages the authoritative institutions of government to state their claims in an undistorted and yet effective fashion.”²³⁷ Negative capability entails self-effacement: as the poet “maintain[s] ‘no identity’ of [her] own, and (through this self-effacement) . . . work[s] continually as a medium, ‘filling some other body—The Sun, the Moon, the Sea . . .’ and rendering this ordinarily mute body articulate,” so does the lawyer “enable[] her otherwise inarticulate clients to speak through her.”²³⁸

I have described maieusis as boundary work that requires one to bracket one’s personal interests, and so to exercise one’s independent professional judgment in: preventing improper material from crossing the boundary, acting on information from one side of the boundary so that it may pass to the other side in a proper form, and “allow[ing] information to cross the boundary with high *fidelity*.”²³⁹

Similarly, to accompany negative capability, Markovits sees another distinctively lawyerly virtue associated with this capacity to give voice to the voiceless in high *fidelity*. Lawyerly fidelity involves more than merely partisan partiality in favor of clients over others; it also includes the capacity accurately to identify and to articulate clients’ points of view, including even

234. FED. R. CIV. P. 11(b).

235. Hussey Freeland, *supra* note 59, at 471.

236. MARKOVITS, *supra* note 89, at 11.

237. *Id.* at 5.

238. *Id.* at 93 (footnote omitted) (quoting JOHN KEATS, *Letter to Richard Woodhouse*, 27 Oct. 1818, in *LETTERS OF JOHN KEATS* 157, 157 (Robert Gittings ed., 1970)).

239. Hussey Freeland, *supra* note 59, at 381 (emphasis added); *see also supra* Part II.A.

in clients who are themselves inarticulate (and to do so without distortion from the lawyers' own views of what their clients deserve or ought to prefer).²⁴⁰

Markovits' negative capability corresponds to the bracketing (or effacement) that allows one to act as a medium or channel for something other than oneself, and Markovits' fidelity corresponds to the professional duty to represent the other without distortion. However, he does not extend the virtues of his analysis to the lawyer's identity or functions with respect to the court. When we think of a lawyer as a client-advocate it follows that the lawyer must not replace the client's interests with her own—but this is only part of the story. The lawyer is not a mere mouthpiece for the client; instead, the lawyer performs the representation in a dual role: that of an officer of the court who translates the client into a party to a legal action. As a maieutic actor on behalf of the legal system, the lawyer's boundary work further entails screening improper material (whether false, misleading or simply irrelevant) from the court, and translating the client's material interests into matter appropriate for legal action. On the empty stage of the lawyer's negative capability, she crafts the engagement of the public legal system with the private client, and only out of fidelity to the former is she available to the latter.

Even within the narrower view of the lawyer, the assertion that the lawyer *lies* on behalf of her client is an assertion that she fails in her Markovitsian fidelity, for if she were to make a false statement, she would distort and misrepresent the client. If in her professional judgment she determines to be false a proposition that her client would make to the court, then she must not make it. Further, the assertion that *the lawyer* lies is an assertion that she fails in her negative capability—for by definition, to lie she must assert something that *she believes* to be false. Professionally, she is bound to assert the screening beliefs reflected in Rule 11: that in good faith and after diligence she believes her propositions to be supported by evidence, warranted by law, and neither false nor misleading. It would be unprofessional to press further personally to endorse as true or to repudiate as false a proposition that she believes to be not-false-and-perhaps-true, for such endorsement or repudiation would overstep

240. MARKOVITS, *supra* note 89, at 5 (italics retained). Although he describes negative capability as a distinctively lawyerly virtue, Markovits adapts it from a description of a poet's ability. I have described maieusis more generally:

As when a professional actor speaks for a represented character, maieutic ethics govern professional performance in theatre and other fields. For example, a judge must allow the law to work through him while withholding personal bias to the extent possible, and an attorney in litigation must speak for his client and also as an officer the court. Maieusis may occur even when the ideas that are to be communicated are one's own, as when a professional fiction writer strives to place his pen in the service of a character, or a nonfiction writer to diarize faithfully.

Hussey Freeland, *supra* note 59, at 383 n.14.

her role in the epistemological division of labor, usurping the fact-finder's office in assigning to the proposition a truth-value.

The vices that Markovits contextualizes in virtue map into my analysis either beyond the reach of the officer of the court, or as symptoms of her maieutic performance. I have used the work of the actor to describe maieutic performance more generally:

[R]epresentation of [the actor] in a professional role signals to the audience that she is not about to speak as a private person, but as a representative of something else. Were a professional actor named "Ian Holm" to portray Hamlet, he would be understood not to be lying to his audience by saying, "This is I, Hamlet the Dane," but to be representing the truth of the character portrayed.²⁴¹

The context of the actor's performance alerts her audience that they are to recognize that she is playing a role, and that her role morality as an actor not only allows but requires her to make statements that re-present the character. Similarly, the context of the lawyer's performance (especially identifying herself as the client's counsel) signals to those who see her performance that they are not to assume that she believes that what she is saying is true, nor that she personally favors the arguments she puts forward on behalf of her client. Instead, her audience is to recognize that she is playing a role, performing professionally the representation of her client as a party to a legal action, and that her role morality not only allows but requires her to put forward facts that favor the client (but *not* frauds, misrepresentations, etc.) and to argue from them as best she can—all *within* the duties binding her ordinary role as an officer of the court. The lawyer performs dual roles simultaneously, and the audience—especially the judge or jury—should and must be able to rely on her performing both roles harmoniously—else we cannot rely on the integrity of the legal system, which depends on the proper function of each court.

Markovits addresses arguments that liken lawyers to actors in an effort to controvert his diagnosis that lawyers lie and cheat. He characterizes these arguments as having two elements: that lawyers' statements do not assert what they say, and that lawyers personally are dissociated from their statements.

To the first element, he replies that "whereas actors' statements promote only the suspension of disbelief, lawyers' statements promote false belief,"²⁴² and that promoting false belief is closer to the ordinary vice of lying. However, the epistemological expectations of the audience for the actor and the lawyer diverge. The lawyer's audience is more actively engaged in the epistemological work of the performance—not lowering its epistemological standards to let fictional ideas play on its mind as the actor's audience does,

241. Hussey Freeland, *supra* note 59, at 383 (footnotes omitted) (quoting WILLIAM SHAKESPEARE, *HAMLET*, act 5, sc. 1).

242. MARKOVITS, *supra* note 89, at 38.

but instead scrutinizing the performance to determine what should materialize as the knowledge upon which a judicial decision will be based. Fact-finders are on notice to resist being gulled by the lawyer's attempts to persuade them, whether the lawyer is acting in good or bad faith (for this will likely be unknown to the fact-finder), and thus the lawyer's audience resists the miscarriage of justice that occurs when a party deceives or cheats the public. While the suspension of disbelief is the "voluntary withholding of scepticism"²⁴³ on the part of the actor's audience, the lawyer's audience—in particular, the judge and jury—can serve as responsible fact-finders only by engaging their *heightened* skepticism while listening to the opposed arguments.

This is to say that their complementary audiences meet actors and lawyers at different rhetorical points: Sir Ian's audience knows (or is reasonably expected to know) that he is not Hamlet the Dane, and yet Sir Ian need suffer no conscience for having lied to the audience; meanwhile, the judge and jury know (and are not only reasonably expected but professionally relied upon to know) that the lawyer is performing the speech of the party without necessarily claiming that his propositions are true. The more skillfully the fact-finder fulfills the epistemological rigors of his juridical role, the more comfortably the lawyer can expect that she will be understood to be conveying the party's account (which to the best of her knowledge and belief, may or may not be true) rather than to be promoting in them a false belief. Indeed, actually or constructively knowingly promoting false belief in the fact-finder is antithetical to the lawyer's function as an officer of the court: "the actor's misrepresentation . . . is an act that does not conform to the maieutic ethic."²⁴⁴

Ironically, Markovits asserts that promoting false belief "is an essential part of the adversary legal process, whose claims to function as a truth-generating mechanism require that courts treat lawyers' statements as serious propositions, in the sense of being open to believing what they assert."²⁴⁵ But the audience's openness to belief must be accompanied by its heightened—not relaxed—skepticism if the legal process can have any fair or legitimate claim to function as a truth-generating mechanism. While the fact-finder must be open-minded, he must not be credulous, for forming facts under too low an epistemological standard contributes to the arbitrariness of the resulting decisionmaking and undermines the epistemological bases of the rule of law.²⁴⁶

243. Oxford English Dictionary Online, suspension n., I.3.b (2d ed. 1989).

244. Hussey Freeland, *supra* note 59, at 390.

245. MARKOVITS, *supra* note 89, at 38.

246. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 7 (2007), available at <http://www.uscourts.gov/uscourts/FederalCourts/Jury/trialhandbook.pdf> ("[T]he jury should maintain its objectivity

In other words, the fact-finder has a duty to apply its faculties of honesty, intelligence, integrity and good judgment to weighing the evidence itself,²⁴⁷ putting that evidence to the test by applying the requisite standard of proof while disregarding statements by the lawyer that are not supported by such proof.²⁴⁸

The second element of the lawyer-as-actor analogy that Markovits sees is finely similar to the first: the former focuses on what a lawyer's *statement* asserts, and the latter emphasizes what the *lawyer* asserts through her statement. Markovits claims that "lawyers have far less *role-distance* [from their statements] than [do] actors," because unlike actors, lawyers cannot "comfortably step out of their roles to speak in their own voices and denounce the characters that they play."²⁴⁹ Of course, it would be unprofessional for an actor to do this as well—unless doing so were part of the play, part of the professional performance itself—but Markovits urges that the lawyer is to pretend (ironically) to be sincere in representing the client, so to lend credibility to her client's cause. While acknowledging that the lawyer is prohibited from personally vouching for her client as demonstrated in MRPC 3.4(e), he argues that "it is quite possible to lie even without vouching, simply by employing other means in the service of an intent to deceive."²⁵⁰ However, the Rule does not tolerate even an allusion—neither a covert nor hinted suggestion—from the lawyer of "any matter that . . . will not be supported by admissible evidence."²⁵¹

So, if the lawyer does not believe that an argument that she advances on behalf of her client has evidentiary support, either because the evidence is misleading or is false (in which case it is not admissible, and cannot properly

and base its verdict strictly upon the testimony and exhibits received in evidence at trial."); *id.* at 12–13.

247. *Id.* at 13 ("There is no more valuable work that the average citizen can perform in support of our Government than the full and honest discharge of jury duty. The effectiveness of the democratic system itself is largely measured by the integrity, the intelligence, and the general quality of citizenship of the jurors who serve in our courts."); see also *id.* at 12 regarding the impropriety of arbitrary fact-finding ("It would be dishonest for a judge to decide a case by tossing a coin. It would be just as dishonest for a juror to do so.").

248. *Id.* at 10 ("The opening and closing statements of the lawyers are not evidence. A juror should disregard any statements made by a lawyer in argument that have not been proved by the evidence.").

249. MARKOVITS, *supra* note 89, at 38 (italics retained).

250. *Id.* at 39.

251. MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (2010):

A lawyer shall not: . . . (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused[.]

serve as the basis of any argument), then she violates the Rule simply by stating it—let alone by pretending to believe it as she states it. The lawyer's epistemological relation to her statement before the court must be that she believes that the statement might be true; she poses a proposition, the truth of which is to be determined by the fact-finder in accordance with the adversary system's epistemological division of labor. This is not to say that the statement is actually neither true nor false until the fact-finder declares it to be one or the other; instead, it means that the lawyer has investigated the statement and believes that it is not false and might be true, and that the fact-finder will consider it in light of other statements before him in determining the statement's epistemological status within the legal system.

Markovits fairly characterizes as a lie a lawyer's apparent sincerity even as she disbelieves what she states to the fact-finder, and he describes this feigned sincerity as a practical necessity, "a literal demand on the lawyer,"²⁵² a "stragem . . . that is probably an inevitable feature of every adversary legal practice,"²⁵³ for if the audience knows that the lawyer does not believe her statement, then the lawyer has failed to be persuasive.²⁵⁴ But a lawyer's perceived practical need to win a case for her client is not an official and *a fortiori* not her sole nor overriding duty: the lawyer's duty to represent a party before the court is not an unbounded duty to succeed in convincing the fact-finder to favor her client—not a duty to mislead the fact-finder, to misrepresent the party in order to win.²⁵⁵ To conceive of the lawyer's professional duty only as a duty to win for the client is to mistake her professional identity, to forget that the lawyer who represents a client is simultaneously performing two roles: professionally, she performs as an officer of the court as she represents the party.

We can assess how Markovits' characterization of the lawyer-as-actor argument fares in light of the epistemological division of labor between advocate and tribunal, and of the lawyer's situation as an actor who performs in nested maieutic roles. The first element is that like actors' statements, "lawyers' statements do not assert anything, and certainly do not assert what they literally say[.]"²⁵⁶ As an officer of the court, the lawyer representing a party before the court makes a statement to the court on behalf of the party. This statement cannot be a judgment about the client, for if it were, then the adversarial division of labor would be violated. Instead, the lawyer's statement is a proposition put forth for consideration by the court: it proposes a way of

252. MARKOVITS, *supra* note 89, at 38.

253. *Id.* at 263 n.56.

254. *Id.*

255. Ellen Pansky, *Remedy: Communication and Diligence*, 52 EMORY L.J. 1277, 1283 (2003).

256. MARKOVITS, *supra* note 89, at 38.

viewing the matter in issue, which the court will consider seriously as it performs its part in the division of epistemological labor. The court's part is to "find" the facts considering all the evidence before it: to assign truth-values to the lawyers' propositions. The lawyer does not determine the truth-value of her own statement—does not assert that her statement is true. Before making her statement to the court, however, she will have screened its content to assure that the statement is not false or misleading. In this way, she acts as a filter on behalf of the court, preventing inappropriate matter from distracting the fact-finder, while also acting as a portal for the client that translates his experience into matter appropriate for legal action. Thus the fact of her statement certifies only that there is (or is reasonably expected to be) evidentiary support for its content, and not that she believes the content to be true. Hence, the statement proposes, but does not assert, its content.

The second element is that like actors, lawyers personally are dissociated from their statements. To remain an officer of the court, the lawyer must maintain a professional detachment from the client—otherwise the lawyer becomes the client, and does not professionally represent him as a party. This dissociation relies not only on the lawyer's epistemological agnosticism regarding the truth-value of her statements to the court, but also on the court's recognition that she is lending her voice to another. The audience's professionalism²⁵⁷ entails an *a priori* understanding and expectation that the lawyer will represent someone else, and the formalism of the court proceedings further signals to the audience the need for its professionalism.

ii. Harmonies and Dissonances

Contrasting with its theme that a lawyer's ordinary lying and cheating arise inevitably from the structure of the adversary system, Markovits' treatment of professional detachment harmonizes for a moment with mine in explaining both the lawyer's partisanship and the limits of that partisanship: "Most generally, fidelity and negative capability condemn forms of lying that help clients to *misrepresent* rather than to *express* themselves and forms of cheating that *close off* rather than *open up* the judicial process."²⁵⁸ This statement wholly applies to the maieutic ethic.

Markovits offers his lawyerly virtues as a hope that might sustain the lawyer's personal integrity, for "professional ethics requires lawyers to betray their own senses of truth and justice in ways that contravene the ethic of self-

257. Professionalism poses a distinction between one's acting *as* an institutional entity (*e.g.*, in the role of a judge, juror or lawyer), and one's acting simply as a private person. Since one person is both an institutional entity and a private person, professionalism entails one's awareness that this distinction is called for and one's commitment and ability to realize it in practice.

258. MARKOVITS, *supra* note 89, at 95 (italics retained).

assertion that dominates ordinary morality[.]”²⁵⁹ But my analysis of the lawyer’s dual roles and the role hierarchy in which she functions shows that the lawyer-as-actor analogy is not so facile, and thus remains useful: the nested structure of her roles harmonizes her identity, not only affording her the possibility of integrity but requiring it of her if she is to function ethically as a person and as a vital organ of the legal system. The lawyer’s underlying and limiting identity as an officer of the court, if realized (as it should be), can do much to *prevent* the lawyer from betraying her own sense of truth and justice—not personally through self-assertion—but professionally through the assertion that she is always already a court officer.

Markovits and Charles Curtis both have identified lying²⁶⁰ and cheating²⁶¹ as vices necessary to the lawyer. Both tie these vices to a division of labor between the lawyer and the judge: for Markovits this division is moral and gives rise to the lawyerly vices, whereas for Curtis the division tracks an ostensibly neat division between fact and law.²⁶² Both sense limits to these vices,²⁶³ and both preserve a space for the lawyer’s exercise of professional (not personal moral) judgment. Curtis describes the lawyer’s stoic detachment that allows her to provide objective counsel;²⁶⁴ this detachment resonates with the maieutic bracketing and the locus of independent professional judgment that I describe, Gordon’s empty stage, Spaulding’s thin professional identity, and Markovits’ negative capability. Interestingly, both Curtis and Markovits “[c]ompare the lawyer with the poet”²⁶⁵; in Curtis’ view, the lawyer’s zeal and identity with the client require that “you suspend both belief and disbelief” just as “[i]f you read poetry as poetry.”²⁶⁶

259. *Id.* at 5.

260. Curtis, *supra* note 87, at 8 (“He must lie . . . beyond the point where he could permissibly lie for himself.”).

261. *Id.* at 9 (“A lawyer is required to be disingenuous. He is required to make statements as well as arguments which he does not believe in.”).

262. In Curtis’ analysis responsibility for fact rests with the lawyer, while that for law belongs to the judge, and thus a lawyer may hide unfavorable factual information from the judge but not unfavorable law. *Id.* at 11 (“The court has priority over the client in matters of law and the client has a priority over the court in matters of fact.”); *see also id.* at 10. This distinction is facile, most obviously when the judge is the fact-finder.

263. *Id.* at 7 (“I take it that it is inadmissible to lie to the court.”). Yet Curtis also assumes that despite the lawyer’s ability to hide unfavorable facts, in court “[t]he whole has been shaken out into the sun[.]” *Id.* at 12.

For Markovits, the lawyerly virtues in a sense limit the vices. *See supra* note 258 and accompanying text.

264. Curtis, *supra* note 87, at 18 (“The full discharge of a lawyer’s duty to his client requires him to withhold something.”); *see also id.* at 18–20.

265. *Id.* at 23.

266. *Id.* at 21.

Curtis senses but is ultimately confused by the primacy of the lawyer's role as an officer of the court. Citing Lord Brougham and describing the lawyer's devotion to her client as "entire," Curtis yet asks, "How far must a lawyer accompany his client and turn his back on the court?"²⁶⁷ Here he struggles with the duality of the lawyer's professional identity, lapsing into the idea that the lawyer must *either* be her client's advocate *or* an officer of the court. Although he argues that lawyers must lie, for a moment he realizes that a lawyer cannot lie to the court, because "[a] lawyer's duty to his client cannot rise higher than its source, which is the court"²⁶⁸. Even though he notes that it is the court who requires her to advocate, he sees this duality of professional identity as "paradoxical"²⁶⁹. The identity structure here presented resolves the apparent paradox: the lawyer's professional identities are nested, with the fundamental identity as an officer of the court constraining the subsequent identity as a legal representative of the client.

Without the limits flowing from the lawyer's function as an officer of the court in the structure of the adversarial legal system, lawyers' unbridled actions as mere client agents cannot sustain their commitments to their professional roles, and instead capture their official power for an incomplete set of private interests, undermining the possibility of justice—and further undermining the legitimacy of the legal system by failing to justify courts' reliance on lawyers. Thus, I maintain that the lawyer's identity as an officer of the court IS her distinctively lawyerly virtue, which entails the *maieusis* of the commitments and values of the legal system through her professional performance.

C. *Reconstruction As an Answer to the Problem of Responsibility*

Gerald Postema raised the concern that a lawyer's thick identification with her role would render her irresponsible, and thus threaten her integrity. He referred to the problematic role that he had in mind as the "standard conception" of the lawyer as a partisan whose "sole allegiance is to the client . . . [*w*]ithin, but all the way *up to*, the limits of the law,"²⁷⁰ and as a neutral with respect to the lawyer's own opinion of the client's morality. He framed the problem with the standard conception as a "problem of responsibility"²⁷¹; by identifying too thickly with this role, the lawyer finds herself in the situation where Markovits meets her:

[T]he lawyer is under great temptation to refuse to accept responsibility for his professional actions and their consequences. Moreover, except when his

267. *Id.* at 5.

268. *Id.* at 7.

269. *Id.* at 3.

270. Postema, *supra* note 85, at 73 (italics retained).

271. *Id.* at 74.

beliefs coincide with those of his client, he lives with a recurring dilemma: he must engage in activities, make arguments, and present positions which he himself does not endorse or embrace. The lawyer's integrity is put into question by the mere exercise of the duties of his profession.²⁷²

To prevent the lawyer's disintegration, Postema contemplates "forging a concrete alternative conception"²⁷³ of the lawyer's role, which he sees as a formidable task.

My analysis frames the problem of responsibility as a problem of professional identity: how is the lawyer situated in the legal system, and what is her function there? This approach identifies an already present concrete alternative conception of the lawyer that preserves her integrity: her identity as an officer of the court.

The officer-of-the-court analysis provides an "integrity-preserving role-based redescription" for the lawyer that Markovits calls for, but one that does not necessarily rely on the "authoritative insular[ity]"²⁷⁴ of the lawyer's role from which modernity objects her. So, where Markovits sees that "as lawyers are called on"—that is, interpellated by courts—"to integrate clients into a process of adjudication that would otherwise be alien, they are denied the cultural resources needed to shoulder the ethical burdens that arise on answering this call. These burdens threaten to dis-integrate the lawyers themselves"²⁷⁵—I see instead a more felicitous outcome for the lawyer who shoulders the ethical responsibilities of the officer of the court whom she becomes in answering the court's interpellation.

The decisions to focus on the individual lawyer and adversariness *per se* are errors of scale in this debate. Framing the lawyer as an advocate only—ignoring her manifestation by, for, and subject to the court—is a failure to appreciate the full tapestry of our Constitutionally provided social order, marginalizing the lawyer's duties to the judicial powers²⁷⁶ provided by the Constitution. The bar is both the court and the legal profession of which the lawyer is a member, and the client has not only individual, private interests but a public interest in the rule of law. When we survey the design of our social order, we perceive the lawyer not as a mere tool of the client, but as an articulate instrument in the administration of justice.

272. *Id.* at 77.

273. *Id.* at 82.

274. MARKOVITS, *supra* note 89, at 243.

275. *Id.* at 13.

276. U.S. CONST. art. III, § 1; Oxford English Dictionary Online, judicial, adj. and n., 1 (2d ed. 1989) ("Of or belonging to judgement in a court of law, or to a judge in relation to this function; pertaining to the administration of justice.").

