1-1-2014


Amy Salyzyn

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol42/iss4/2

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
I. INTRODUCTION

Debates about the proper boundaries of a lawyer’s role are far from new. A fresh spin on this old debate, however, has emerged with the “positivist turn” in legal ethics theory. While in legal theory scholarship the label “positivism” carries various nuances and controversies, its use in the legal ethics context is, as a general matter, more straightforward and uniform. Broadly speaking, positivist accounts of legal ethics share a general view that the law owes its normative content to its ability to solve coordination problems and settle moral controversies. This view of the law, in turn, informs a particular view of the lawyer as governed in her actions by the legal entitlements at issue, as opposed to, for example, considerations of morality or justice writ at large.

scrutiny. Left underexplored, however, is the relationship between positivist accounts of legal ethics and the law governing lawyers. This Idea argues that the law governing lawyers gives rise to some interesting questions that those championing the positivist account have yet to directly address.

Because the positivist account grounds a theory of legal ethics in respect for the law, it seems safe to assume that the law governing lawyers is properly viewed as playing a central role in this account. Stated otherwise, the same “fidelity to law” that lawyers must exhibit when, for example, interpreting tax codes to advise clients on structuring financial transactions is presumably also required when a lawyer is interpreting how the rules of professional conduct apply to her situation. Both tax codes and rules of professional conduct set out legal entitlements, which, as noted earlier, bound the lawyering role under the positivist account.

What has not been given much, if any, attention is how the law governing lawyers is different from other types of law and how this difference may be consequential for the positivist account. The law governing lawyers does not simply have the status of law (and therefore, assumes a central role in the positivist account), it also addresses the same subject matter—the proper bounds of lawyer behavior—that legal ethics theory itself purports to address. As a consequence, two of the “typical” questions or challenges lobbed at positivist accounts of law—what to do when: (1) following the law leads to unpalatable outcomes; or (2) the law at issue contains moral terms—give rise to some outstanding questions in the case of positivist legal ethics theory. Below, some very preliminary thought is given to how these puzzles might be “solved.” Ultimately, however, the main goal of this Idea is to highlight these issues as ripe for further consideration and critique.


6. To be clear from the outset, it is not being suggested that those advancing positivist accounts of legal ethics have ignored the interaction between their accounts and the law governing lawyers. There are many examples in which this interaction is engaged. See, e.g., W. Bradley Wendel, Three Concepts of Roles, 48 SAN DIEGO L. REV. 547, 566-74 (2011) [hereinafter Wendel, Three Concepts]. Rather, the premise motivating this Idea is that there are certain “puzzles” that remain underexplored.

7. See infra Part III.
II. THE POSITIVIST TURN IN LEGAL ETHICS

Although those advancing positivist theories of legal ethics present their own unique accounts, all rely heavily on John Rawls's noted "fact of pluralism." As Daniel Markovits explains:

The fundamental problem of politics is that people come into conflict about how their collective affairs should be arranged. . . . These conflicts are, moreover, ineliminable. They are inevitable expressions of the competition for scarce resources and the fact that the diversity of human experience and the complexity of human reason make pluralism the natural state of ethical life.

In view of this unavoidable pluralism, the positivist theories argue that law has a valuable role to play in supporting provisional settlements that "make stability, coexistence, and cooperation possible in a pluralistic society." Presuming that the legal system supporting such provisional settlements can be described as legitimate, the legal system is seen as having normative value because it "represents the best we can do, as a society marked by deep and persistent disagreement, to embody equality in our relations with one another, and to act on the recognition of the inherent dignity of all persons." 2

Positivist legal ethics theorists have primarily used this account of the role of law to ground theories of legal ethics that see the lawyer's role as properly directed to "resolute" or "zealous" pursuit of client legal entitlements, and not independent assessments of the moral landscape of the situation. The positivist turn is a direct response to critiques of the "Standard Conception" of legal ethics which provides two principles to guide lawyers in acting for clients: (1) the Principle of Partisanship, which "specifies that the lawyer's sole allegiance is to the client;" and

---

8. DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 174 (2008) (citing JOHN RAWLS, POLITICAL LIBERALISM 36, 64, 144 (1993)).
9. Id. at 173-74.
10. WENDEL, supra note 1, at 10.
11. As played out by Wendel, the legitimacy of a legal system is best understood in relation to procedures that do "as well as possible at treating the views of all citizens as presumptively entitled to respect, consistent with the need to eventually resolve the dispute and settle on a common course of action, in the name of the community as a whole." Id. at 114. This account has been a major subject of criticism. Luban, supra note 5, at 679-80.
12. WENDEL, supra note 1, at 114.
13. Different authors have settled on different short-hand phrases or characterizations to describe the lawyer's role: Dare argues for a conception whereby the lawyer's proper role is to be "merely zealous" rather than "hyper-zealous," while Wendel contends that "fidelity to law" is at the center of the lawyer's professional obligations, and Woolley has referred to both "resolute" and "zealous" advocacy. DARE, supra note 2, at 7-8; WENDEL, supra note 1, at 168; WOOLLEY, supra note 2, at 22.
14. DARE, supra note 2, at 5; see also WENDEL, supra note 1, at 29.
(2) The Principle of Neutrality, which "states that the lawyer must remain professionally neutral with respect to the moral merits of the client." A third principle is also included in the Standard Conception—the Principle of Non-Accountability—which focuses not on providing guidance to lawyers on how to act, but on providing guidance to others on how to judge lawyers. So long as a lawyer pursues her client's legal entitlement through legal means, the Principle of Non-Accountability provides that a lawyer should not be judged on the basis of the morality of the client and/or the client's ends.

Critiques of the Standard Conception have emerged as a result of discomfort with detaching a lawyer's role from "ordinary" moral considerations, and the worry that the Standard Conception "amounts simply to an institutionalized immunity from the requirements of conscience." Acting on these concerns, William Simon has, for example, sought to stake out an alternative way rooted in the substantive value of justice. Simon adopts a Dworkinian perspective, arguing that a lawyer should adopt a "contextual" approach to ethical decision-making. Rather than be guided by zealous or resolute advocacy within the bounds of the law, Simon contends "that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice." By way of another example, David Luban has argued for a "morally activist" vision of lawyering whereby lawyers, among other things, share moral responsibility with their clients for the ends pursued.

Those advancing positivist accounts of legal ethics take a different view, rejecting a vision of the lawyering role that revolves around considerations of substantive justice or morality. Instead, they offer a distinct alternative (or modification) to the Standard Conception by arguing that the normative content of the law mandates that "the duties of lawyers must be oriented toward respect for the law itself, not ordinary moral considerations" or the "pursuit of clients' interests." At the heart of the argument that lawyers need to exhibit "fidelity to

15. DARE, supra note 2, at 8; see also WENDEL, supra note 1, at 29.
16. DARE, supra note 2, at 10; see also WENDEL, supra note 1, at 29-30.
17. DARE, supra note 2, at 10.
20. See id. at 9-10.
21. See id. at 9.
22. See LUBAN, supra note 18, at xxii.
23. WENDEL, supra note 1, at 88.
24. Id. at 2.
law” (to use Wendel’s term) is an understanding of law as having normative value in addressing the “fact of pluralism” as discussed earlier and the resulting need for lawyers to respect the settlement function that the law performs. As elaborated by Dare:

Lawyers who calibrate their professional efforts according to their own view of the good—or indeed according to any particular view of the good—not only ‘privilege’ the view they favour and disenfranchise the view of the client, they undercut the strategy by which we secure community between people profoundly divided by reasonable but incompatible views of the good. 25

So, what does the positivist account mean, in practical terms, for what a lawyer can or cannot do, from an ethical standpoint? For the sake of simplicity and clarity, the remainder of this Idea will focus on the positivist account offered by Wendel, acknowledging that there may be differences between what he and others, such as Dare, have to say about the issues raised. 26

In terms of what substantive positions a lawyer may take on behalf of a client, Wendel’s account may be understood as overlaying a “zone of reasonableness” over the range of all possible positions that could be taken on behalf of a client, outside of which a lawyer cannot act. 27 Stated another way, fidelity to law mandates that lawyers are entitled to act only within “a range of meanings that the law can reasonably be understood to bear,” and are forbidden from adopting positions outside this range “simply because it would be advantageous to their clients” to do so. 28 As examples of forbidden “out of range” positions, Wendel points to “relying on the ‘audit lottery’ to avoid having tax filing positions tested by the IRS” 29 or “inserting invalid provisions or extremely one-sided (and thus unlikely to be enforced) terms into standard-form contracts, knowing that many consumers will not challenge them in litigation.” 30 In these cases, Wendel argues, lawyers are acting wrongly insofar as they advocate or pursue substantive legal

25. DARE, supra note 2, at 74.
26. For example, it should be noted that in his book, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER’S ROLE, Dare identifies himself as being “inclined to side with exclusive positivism,” and identifies Wendel as differing from him in concluding that inclusive positivism best explains legal practice. Id. at 71.
27. WENDEL, supra note 1, at 53-54.
28. Id. at 54.
29. Id. at 64-65.
30. Id. at 65.
positions on behalf of clients that are clearly outside the "zone of reasonableness." 31

III. POSITIVIST ACCOUNTS OF LEGAL ETHICS AND THE LAW GOVERNING LAWYERS

But what happens when the relevant legal subject matter is not the range of substantive legal positions for one's client, but the law governing lawyers? How, if at all, does the analysis under the positivist account change when a lawyer is trying to decide, for example, how confidentiality or conflict rules apply to her representation of a client as opposed to advising a client on contents of tax filings or standard-form contracts? For his part, Wendel clarifies early in his book that his focus "is on what lawyers sometimes call 'ethics beyond the rules,' or 'real ethics,' not the regulation of the legal profession." 32 In other words, in referencing "ethics" he does not mean "the rules of professional conduct or other aspects of the law governing lawyers." 33

To the extent that positivist accounts ground a theory of legal ethics in respect for the law, however, they cannot avoid addressing the law governing lawyers. Indeed, both Wendel and Dare reference particular provisions of the law governing lawyers in numerous places in their books. Yet, there is little, if any, consideration, of how the law governing lawyers may give rise to distinct issues or questions within a positivist legal ethics theory as compared to the rest of the law (that is, law that does not directly speak to the boundaries or nature of the lawyering role).

At one level, the law governing lawyers—for example, rules governing client confidentiality or withdrawal from client representation—may be understood as particular instantiations of the settlement function of law that is highlighted in the positivist account. Individuals may reasonably disagree, for example, as to the circumstances under which a client's confidential information may be properly disclosed or a lawyer is entitled to "fire" a client. The purpose of professional codes for lawyers, it may be said, is to reach an authoritative, provisional settlement regarding this disagreement. Indeed, in an article written subsequent to his 2010 book, LAWYERS AND FIDELITY TO LAW, Wendel makes this very point, observing that "[t]he rules governing attorney confidentiality are among the most contentious aspects of the law of lawyering" and that "[t]he confidentiality rule and

31. Id. at 53, 64-65.
32. Id. at 19.
33. Id.
its exceptions represent a legitimate resolution of normative controversy
and, as such, should be respected by lawyers and citizens.”

At the same time, however, it would seem that there is a way in
which the law governing lawyers is conceptually distinct from other
doctrinal law when considered in the context of a positivist legal ethics
type. Beyond the (conceptually inconsequential) fact that the law
governing lawyers only applies to a certain type of citizen that plays the
specific role of “Lawyer,” this particular area of doctrinal law may be
seen as being constitutive of the very role of “Lawyer.” Stated
otherwise, the law governing lawyers does not represent any old
settlement of moral pluralism, but rather, specifically settles the question
(or, if one wants to be more qualified, a question) that legal ethics theory
itself seeks to address: how should a lawyer behave? If legal ethics
theories are “theories of action, not contemplation,” what does it mean
for a positivist legal ethics theory in cases where the law—the guiding
source of reasons for action under this theory—aims to answer the same
question (or questions) that the theory itself seeks to provide answers to?

A. Dealing with Unpalatable Consequences

To make this query less abstract, one can consider two types of
issues or categories of questions. First, what happens in circumstances
where strict adherence to the law governing lawyers—take, for example,
the rules of professional conduct—might result in a significant injustice?
Must the lawyer robotically follow the laws as written? Or is there an
escape valve?

This question, which has been previously considered by others in
various forms in response to positivist accounts of legal ethics, is dealt
with head on by Wendel, who is careful to acknowledge that “[n]o
sensible person believes that the role creates absolute demands that can
never be overridden.” Although he acknowledges the presence of an
escape valve, its nature and boundaries are not entirely clear.

34. See, e.g., Wendel, Three Concepts, supra note 6, at 565, 573-74.
35. Id. at 552. Here, I borrow from Wendel’s discussion of roles in Three Concepts,
particularly where he states that: “[f]ormal and informal norms—those that result from authoritative
lawmaking and those that arise more organically, out of conventional social behavior—both
constitute a professional role and regulate the activities of people acting in a professional capacity.”
Id. at 555.
36. Alice Woolley, The Problem of Disagreement in Legal Ethics Theory, 26 CAN. J. L.
37. See, e.g., Ayers, supra note 5, at 14-19; Luban, supra note 5, at 686-89.
38. Wendel, Three Concepts, supra note 6, at 554.
39. See, e.g., Ayers, supra note 5, at 14-16.
Wendel qualifies the settlement function that he ascribes to the law as only giving rise to "presumptive, not conclusive obligations" resulting in a legal system that "establish[es] very weighty reasons, which should be overridden only in extraordinary circumstances." The million-dollar question, of course, is what are these extraordinary circumstances? As Andrew B. Ayers has noted, Wendel appears to take different positions on this question in his 2010 book and in a subsequent article. In his 2010 book, Wendel focuses on extreme injustice as creating the escape valve, stating: "there may be circumstances in which an injustice is so patent, and the result mandated by the regular functioning of the legal system so intolerable, that no person could, in good conscience, believe that exhibiting fidelity to law is the right thing to do, all things considered." However, in his subsequent article, Wendel appears to define the escape valve in relation to cases where the law has failed to fulfill its settlement function: "[t]he claim here, by contrast, is that opting out of the role is permitted only when there has been a failure of the law to provide a basis for cooperating in the face of disagreement."

Both versions of the escape valve are open to critique. With respect to the "failure to fulfill settlement function" version, many, if not most, of the scenarios involving unpalatable consequences that legal ethics theorists worry about involve whether or not to violate clear, well-established rules: for example, whether to breach client confidentiality to prevent harm to others in the absence of an exception that allows a lawyer to do so. The tension inherent in these scenarios is not a lack of a legally-mandated basis upon which to act, but rather, a discomfort with what the law requires in the particular circumstances.

40. WENDEL, supra note 1, at 107.
41. Id. at 113; see also Ayers, supra note 5, at 14-15. Ayers notes that: "Wendel offers several versions of his maxim... each version seems to have different implications about how often the importance of promoting political legitimacy might be trumped by the importance of promoting some other value... Wendel asserts: [t]hat lawyers have "very weighty reasons [for fidelity to law], which should be overridden only in very extraordinary circumstances"; [t]hat lawyers have "either an exclusionary reason... or... a very weighty reason" for fidelity to law; [t]hat fidelity to law is "a prima facie obligation or something stronger, like a presumptive obligation"; and [t]hat fidelity to law is "a near-absolute obligation."

Ayers, supra note 5, at 14-15 (alterations in original) (footnotes omitted).
42. Ayers, supra note 5, at 18 n.78.
43. WENDEL, supra note 1, at 121.
44. Wendel, Three Concepts, supra note 6, at 573.
45. The Spaulding v. Zimmerman case discussed by Wendel and others to demonstrate tensions between the law governing lawyers and "ordinary morality" involves this question. See 116 N.W.2d 704, 709-10 (Minn. 1962); WENDEL, supra note 1, at 72-75.
46. As David Luban notes in referencing Spaulding: "What makes the case unnerving is that
An escape valve directed more generally to avoiding unjust or immoral outcomes also gives rise to issues. If the escape valve is framed in these terms, a tricky question emerges: what kinds of unjust or immoral outcomes allow for deviation from the presumptive rule of being faithful to the law? As Luban has pointed out, answering this question seems to require a lawyer to introduce moral considerations into her deliberative process/reasons for action—the very thing that the positivist account seeks to avoid.\textsuperscript{47} Luban states: “How can a person know whether the tough choice she now faces falls under the exclusionary presumption or counts as one of the exceptional cases when she should engage in first-order moral deliberation? The only way she can decide is by engaging in first-order moral deliberation.”\textsuperscript{48}

For his part, Wendel has cautioned against fixating on how legal ethics theory can accommodate extraordinary cases where fidelity to law is unpalatable. In responding to his critics, he notes that: “[r]ather than try to design a system of legal ethics around those extreme cases, however, I wrote this book to account for the nature of the good that lawyers do—most of the time.”\textsuperscript{49} At the end of the day, this may be the best—if somewhat unsatisfying—answer the positivist account can offer for those worried about what to do in cases where following the law leads to unacceptable results. One possibility is that this is simply an inherent limitation of crafting a theory of action (for example, legal ethics) from a theory of identification (for example, analytical jurisprudence as directed ultimately to the question “what is law?”).\textsuperscript{50}

Notwithstanding the discussion that has already occurred regarding the availability and definition of an escape valve within a positivist account of legal ethics, one interesting question has been given little attention: whether cases involving disobeying or undermining the law governing lawyers in order to avoid unpalatable consequences give rise to unique considerations? Is the answer to the question of when a lawyer may disregard the law different in cases where the law being subverted is part of the law governing lawyers (take, for example, the confidentiality provisions) as opposed to part of the “general law” (by which I mean all law that is not the law governing lawyers)—here we can

\textsuperscript{47.} Id. at 687.
\textsuperscript{48.} Id.
\textsuperscript{49.} W. Bradley Wendel, Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics, 90 TEx. L. REV. 727, 734 (2012).
\textsuperscript{50.} As Scott Shapiro observes: “[t]he legal philosopher’s job is to identify the proper method for determining the content of the law; the lawyer’s job is to put that method into practice.” SCOTT J. SHAPIRO, LEGALITY 31-32 (2011) (emphasis in original).
take Stephen Pepper’s example that involves a lawyer advising a client on a law prohibiting the hiring of undocumented workers)? 51 Stated otherwise, if respect for legal settlement is a paramount norm under the positivist account, is a lawyer’s disrespect for a settlement that directly speaks to how she should act materially different from a lawyer’s disrespect for a law that addresses something other than the legal boundaries of her conduct?

There is reason to think that there may be a difference if one considers jurisprudential accounts that take up the interaction between law and trust. Take, for example, Scott Shapiro’s “Planning Theory of Law” 52 which contends, among other things, that “attitudes of trust and distrust presupposed by the law are central to the choice of interpretative methodology.” 53 Shapiro writes:

The law manages trust through social planning. Legislators are supposed to identify those who are trustworthy and assign them tasks that take advantage of their trustworthiness; conversely, they are to identify those who are less reliable, plan out their behavior in greater detail, and deny them the ability to abuse or exploit their power. 54 If one thinks in terms of an “economy of trust” (to borrow a term from Shapiro), 55 one could argue that advising clients about law is squarely in the ambit of that which lawyers are trusted to do, while, in contrast, the law governing lawyers steps in when lawyers cannot be trusted how to act. On this basis, one could ground a case that lawyers are more constrained in deviating from their obligations under the law governing lawyers, as opposed to counseling or assisting clients in subverting the law, in the face of unjust consequences. This is, to be sure, a tentative analysis of the guidance a theory like Shapiro’s could offer to the question of how avoiding unpalatable consequences is best approached under the positivist account. This seems, at the very least, to be an issue worth more dedicated exploration.

B. The Law Governing Lawyers and Pockets of Discretion

A second set of puzzles emerges when one considers the interaction between the law governing lawyers and non-extreme cases. Putting aside cases in which lawyers must decide between following the mandates of the law governing lawyers and arriving at unpalatable

51. Pepper, supra note 5, at 693.
52. SHAPIRO, supra note 50, at 171.
53. Id. at 331.
54. Id. at 338.
55. Id. at 335.
results, what about more mundane instances where the law governing lawyers does not provide clear mandates for lawyers in terms of appropriate behavior?\textsuperscript{56}

When faced with unclear rules, how is a lawyer operating under the positivist account of legal ethics to govern herself? One way to approach this question is to consider it as analogous to the question of how one advises a client on how generally applicable law applies to their specific situation. As noted above, in suggesting or advancing substantive positions on behalf of clients, the fidelity to law approach mandates that lawyers are entitled to act only within "a range of meanings that the law can reasonably be understood to bear" and are forbidden from "adopt[ing] positions outside the range . . . simply because it would be advantageous to their clients if they did so."\textsuperscript{57} It would seem consistent to find that this guidance applies when a lawyer is interpreting the rules of professional conduct just as it does when a lawyer is interpreting a tax code.

Case closed? Maybe not. A number of legal ethics scholars have observed "that the fairest reading of the codes [of professional conduct] is that they include many rules permitting lawyers to exercise moral discretion."\textsuperscript{58} A commonly-cited example is the exception to client confidentiality under Rule 1.6 of the American Bar Association Model Rules of Professional Conduct, provides that: "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary... to prevent reasonably certain death or substantial bodily harm."\textsuperscript{59} The effect, if not the purpose, of the rule is to defer to the lawyer's judgment as to whether disclosure is required in the circumstances. As argued by Bruce Green and Fred

\footnotesize{\textsuperscript{56} As David Wilkins has noted:
There are, however, many obligations in the governing rules of professional conduct that are not clear. In some areas, such as the decision whether to enter into a specific lawyer-client relationship or to practice in a particular area of the law, lawyers are given complete discretion to act as they see fit. In other cases, the applicable rules are specifically cast in permissive terms. Finally, even in cases in which the relevant rules appear on their face to be mandatory, the presence of arguably conflicting rules or mitigating facts may still give the lawyer substantial freedom to advance more than one plausible account of what conduct is actually required under the circumstances of a particular case.


\textsuperscript{57} \textit{WENDEL, supra note 1}, at 54.


\textsuperscript{59} MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (emphasis added).}
Zacharias, "[t]he permissive future harm exceptions to attorney-client confidentiality typify ethics rules that can be explained on the basis of the drafters' belief that lawyers should be allowed to balance moral and systemic considerations through case-by-case decision-making."  

Recognizing that law and morality may be intertwined is, of course, far from fatal to a positivist account of law. Likewise, the recognition that the law governing lawyers permits lawyers to engage in moral deliberation is not, in and of itself, incompatible with a positivist account of legal ethics. However, the puzzle that these "pockets" of moral deliberation pose is not a matter of theoretical incoherence, but rather, one of guidance. Where the law governing lawyers directs lawyers to exercise moral discretion, either part of what being faithful to law means is engaging in moral deliberation or, alternatively, in such instances, the issue of being faithful to the law is simply not engaged because there is no applicable law to follow, and one needs to just do whatever morality requires.

The problem is that there is not much guidance under the fidelity to law account as to how to engage in either of these exercises. If we take legal ethics to involve theories of action, then we would seem to have a problem. I agree with Zacharias, who has written that where rules of professional conduct leave "moral choices to independent, unconstrained decision making by individual lawyers, it is especially important for ethics theorists and bar groups to highlight appropriate approaches to exercising discretion and to develop bases for peers and the community (i.e. the market) to judge lawyers' implementation of their integrity.

One possible response from a positivist perspective is to treat rules of professional conduct permitting moral deliberation as analogous to other areas of doctrinal law that incorporate moral terms and, on the

60.  Green & Zacharias, supra note 56, at 298. Elsewhere, Zacharias contends that this aspect of the confidentiality rule "appeals to common notions of morality, allowing lawyers to act just like ordinary ethical citizens in preventing harm." Zacharias, supra note 58, at 564.

61.  See, e.g., John Gardner, Legal Positivism: 5½ Myths, 46 AM. J. JURIS. 199, 222-23 (2001) (identifying "the jurisprudence student's favorite myth about legal positivism...[that] legal positivists believe: [that] there is no necessary connection between law and morality"). It is important to note that exactly what this intertwining looks like may differ between positivist accounts (and, in particular, between those who subscribe to inclusive versus those who fall into the exclusive positivist camp).

62.  WENDEL, supra note 1, at 122; see also Wendel, Three Concepts, supra note 6, at 566-74.

63.  I owe this point to Christopher Essert, who also noted that the first of these options maps on to an inclusive positivist perspective, while the second represents an exclusive positivist perspective.

64.  Important exceptions under Wendel's account are his discussions of morally-grounded client counseling and morally-motivated client selection. WENDEL, supra note 1, at 135-55.

65.  Zacharias, supra note 58, at 574-75.
basis of this analogy, point to interpretative practices as providing guidance to the lawyer. Wendel’s example of the “shock the conscience” test used in determining whether a police search is unreasonable is illustrative. He writes:

The legal standard incorporates a moral notion to flesh out the concept of an unreasonable search, but the rule is still positivistic in the sense that it can be identified using non-moral criteria. A present-day judge asked to rule on whether a police practice shocks the conscience would not be undertaking any freestanding moral evaluation using only her capacity as a deliberating moral agent. Rather, the judge would refer to numerous decisions interpreting the “shocks the conscience” test, which could probably be distilled into a series of principles or criteria that have the status of law since they are conventionally referred to in the justification of legal decisions. 66

But, when we are dealing with the type of discretionary pockets created by something like the future harm exception, it would seem that we are dealing with something more akin to an instance of “genuine discretion”67 where previous interpretative practices do not provide a (meaningful) empirical guide to action. If the law governing lawyers in such instances requires the lawyer to make ethical decisions based on extra-legal considerations, then one might be reasonably concerned that positivist legal ethics theory, with its focus on fidelity to law, gives little attention as to how a lawyer could or should engage with these extra-legal considerations. Again, if the domain of legal ethics theory is understood as consisting of theories of action—that is, accounts of what lawyers should do in practical terms—the failure to substantively engage with how a lawyer can tangibly incorporate moral or political reasons and values into her decision-making is a concerning limitation.

Any type of substantial consideration of how this issue could be addressed will have to wait for another day and forum. One wonders, though, if lessons might be derived from work in legal ethics theory that


67. DARE, supra note 2, at 67 (citing H.L.A. HART, THE CONCEPT OF LAW 254, 272-73 (2d ed. 1994)); see also Wendel, Legal Ethics, supra note 66, at 109. Note that the analogy here is imperfect insofar as Hart was referring to cases of first instance, where a judge is required to engage in lawmaking because there is no pre-existing law on the issue. DARE, supra note 2, at 67. It would appear that the issue that arises when a lawyer is faced with rules of professional conduct that allow for moral deliberation, is not that the rule has not been considered by another lawyer before, but rather, that the lawyer does not stand in the same relation to precedent as does a judge in the common law system. Stated otherwise, the rule of professional conduct does not require that the lawyer interpret a moral term or norm, but instead permits the lawyer to engage in moral deliberation.
looks to arm lawyers with “ethical reasoning tools,” rather than prescriptions for actions, such as Ayer’s recent article *What if Legal Ethics Can’t Be Reduced to a Maxim*, that considers in part, “the skills involved in integrating values: finding ways to accommodate multiple conflicting values, rather than simply choosing one over the others.”

IV. CONCLUSION

The analysis provided here canvasses a few types of puzzles that emerge when one considers the interaction of the law governing lawyers and positivist accounts of legal ethics. The hope is that this preliminary intervention contributes to the lively conversation in legal ethics scholarship about positivist accounts of legal ethics and their possible benefits and limitations. Although much has already been said, it seems to me that, in some ways, the conversation has only just begun.