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HARD QUESTIONS AND INNOCENT CLIENTS: THE NORMATIVE FRAMEWORK OF THE THREE HARDEST QUESTIONS, AND THE PLEA BARGAINING PROBLEM

Alice Woolley*

I. INTRODUCTION

In almost any area of legal counseling and advocacy, the lawyer may be faced with the dilemma of either betraying the confidential communications of his client or participating to some extent in the purposeful deception of the court.1

What makes an ethical question “hard”? In his classic article, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, Monroe Freedman began by suggesting that a hard ethical question arises where a lawyer must choose between betraying his client’s confidences and deceiving the court.2 As that article and Freedman’s other academic work make clear, however, the conflict between confidentiality and candor is only one source of hard questions. In Freedman’s scholarship, a “hard” question arises where any answer to that question permits a lawyer to pursue a moral value but also requires another moral value to be sacrificed.3 The question is hard because it places moral values in irreducible conflict. The lawyer has no

* Faculty of Law, University of Calgary. The author would like to thank Susan Fortney and Bruce Green for their invitation to participate in this commemoration of Monroe Freedman’s Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions; Abbe Smith for inspiring this Article both by her representation of Patsy Kelly Jarrett in her 2008 book, Case of a Lifetime: A Criminal Defense Lawyer’s Story, and thoughtful discussion of that representation; and, of course, the inimitable Monroe Freedman, for his scholarship, inspiration, and friendship.

2. Id.
3. See, e.g., id.
unambiguous response, morally speaking; whatever she chooses, she will do both right and wrong.

Critics of *The Three Hardest Questions* do not focus on this aspect of Freedman’s analysis. Rather, they focus on his position that a lawyer acts ethically when she discredits truthful witnesses, presents perjured testimony, and provides advice that prompts her client to lie, arguing that Freedman promoted lawyer wrongdoing, and in particular deception of the court. In doing so, however, they miss Freedman’s broader point, which was not about identifying the correct answer to a series of hard questions. It was about what makes a question hard and the conscientious and situation-specific approach lawyers must take in deciding what to do when faced with one. As Freedman noted, immorality does not arise from making a choice in response to a moral dilemma, otherwise “the human condition would be one of guilt without realistic free will.” Rather, “the only immorality lies in failing to address and to resolve the moral conflict in a conscientious and responsible manner.”

This Article develops Freedman’s analysis of hard questions in legal ethics. Relying on his broader scholarship, this Article identifies the moral norms in conflict in hard questions, the nature of the conflict between those norms that makes questions hard, and how lawyers ought to decide hard questions. Below, this Article argues that in Freedman’s work, hard questions arise when the normative values of the legal system or of ordinary morality are in irreducible conflict, and the satisfaction of one value requires the sacrifice of another. Hard questions are different from crummy situations—where circumstances force a lawyer to compromise her pursuit of moral values, but neither commits a serious moral wrong nor accomplishes any moral good. They are also different from moral mistakes—where a lawyer commits a moral wrong, but for no good or defensible reason. The lawyer faced with a hard question must make a conscientious choice about what to do in light of the specific circumstances in which the question arose, and she must be prepared to defend that choice in light of those circumstances and the values at stake.

This Article then applies the hard question analysis to the obligations of defense lawyers in plea bargaining, arguing that plea

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6. See infra Part III.D.
7. See infra Part III.D.
bargaining creates crummy situations for lawyers, and may lead to moral mistakes, but it also produces hard questions. The positive duties of defense lawyers to facilitate plea bargains in their clients’ interests, and to both inform and respect client decision-making, when combined with the structural weaknesses and inadequacies of the criminal justice system, mean that in some circumstances lawyers have to choose between, on the one hand, acting in their clients’ best interests and, on the other hand, refusing to participate in an injustice and misrepresentation to the court. They may also have to choose between ensuring a client makes a wise decision and ensuring that it is in fact their client who makes the decision. That is, if they act in their clients’ best interests they will participate in an injustice and misrepresentation to the court, but if they refuse to participate in an injustice or misrepresentation to the court they will sacrifice their clients’ best interests. If they respect their clients’ decision-making, their clients’ decisions may be foolish or irrational.

Hard questions in plea bargaining arise when (1) the defense lawyer represents a factually or legally innocent client; (2) the client nonetheless faces a reasonable likelihood of conviction at trial and, if convicted, severe punishment; and (3) the client has received a favorable but nonetheless punitive plea offer from the prosecutor. In that situation, accepting the plea is in the client’s best interests, but the plea is also substantively unjust because the client will be punished despite being factually or legally innocent. Further, the client may be unable to make a rational assessment of the offer, and of what will happen if she proceeds to trial. The lawyer may have to choose between ensuring the client ends up with a positive outcome and truly respecting the client’s decision-making. Finally, the client will mislead the court because she will falsely attest to guilt, and the lawyer will participate in that deception. A lawyer thus cannot simultaneously pursue the client’s best interest, respect client autonomy, avoid participating in an injustice, and ensure that she does not mislead the court.

In the view of this Article, the best choice for a defense lawyer faced with this question is to create the best possible result for a client, even if it means participating in an injustice, and even if it involves

8. See infra Part III.
10. Id.
11. In other words, a client who did not commit the acts giving rise to the charge or where the client committed the acts but nonetheless merits acquittal given the constitutional or other arguments available.
12. Freedman, supra note 1, at 1471.
pushing the client to a particular choice. That opinion depends very much on the facts, however, and in any event is less important than emphasizing that the lawyer negotiating a plea bargain for the legally or factually innocent client must answer these hard questions. The lawyer ought to answer conscientiously, in light of the moral and ethical values at stake in the specific circumstances, and with full moral responsibility. Regardless of the answer he gives, an important moral value (or values) is sacrificed.

II. WHAT MAKES A QUESTION “HARD”?

A. Irreducible Moral Conflicts

The lawyer is an officer of the court, participating in a search for truth. Yet no lawyer would consider that he had acted unethically in pleading the statute of frauds or the statute of limitations as a bar to a just claim. Similarly, no lawyer would consider it unethical to prevent the introduction of evidence such as a murder weapon seized in violation of the fourth amendment or a truthful but involuntary confession, or to defend a guilty man on grounds of denial of a speedy trial. Such actions are permissible because there are policy considerations that at times justify frustrating the search for truth and the prosecution of a just claim.\textsuperscript{13}

In his scholarship, Freedman explored the ethical dilemmas of lawyers and how those dilemmas ought to be resolved. This was the situation most famously for defense lawyers in \textit{The Three Hardest Questions}, but he also considered the ethical dilemmas of prosecutors,\textsuperscript{14} civil practitioners,\textsuperscript{15} cause lawyers,\textsuperscript{16} and securities lawyers.\textsuperscript{17} Further, he returned continually to the moral content of the lawyer’s role and the moral criteria relevant for informing lawyer’s decisions in relation to issues such as client selection, client advising, and candor.\textsuperscript{18}

\begin{thebibliography}{18}
\bibitem{13} Id. at 1482.
\bibitem{14} Freedman, \textit{supra} note 4, at 1034-41.
\bibitem{17} Monroe H. Freedman, \textit{A Civil Libertarian Looks at Securities Regulation}, 35 \textit{Ohio St. L.J.} 280, 280-81 (1974).
\end{thebibliography}
In so doing, Freedman revealed certain central preoccupations and positions relevant to the analysis here. Most importantly, he rejected the position that true-hard--ethical problems could be resolved without cost. In his view, at certain points in the discharge of her professional responsibilities a lawyer will have to choose which ethical value to pursue and which to abandon. He saw the legal system as involving trade-offs in values and the lawyer as occupying the center of those trade-offs in many cases. A lawyer whose client insists on testifying untruthfully could choose to respect client confidentiality and the client's right to counsel or be candid with the court. The lawyer could not, however, do all three. A lawyer who identifies a legal argument that benefits her client but is not in the long-term interests of the system as a whole could choose between pursuing the client's legitimate legal interests or the collective legal interests of society; she could not do both. A range of values from the moral norms of the legal system and society as a whole can make a justifiable claim against the lawyer in a given situation, but in some cases, the pursuit of one can only occur at the expense of another.


19. See supra text accompanying note 18.
20. Freedman, supra note 1, at 1472-73.
22. Id.
24. Id. at 571-73.
25. See id. Although the law governing lawyers takes a particular stance on such situations, it does not—as noted by Freedman and discussed further below—eliminate the underlying moral conflict.
The hard questions identified by Freedman all had this quality. A lawyer must choose one moral value and sacrifice another when representing a client who seeks to commit perjury or do something "that is not unlawful, but that is unconscionable"; cross-examining a truthful witness; advising a client while knowing the client may lie as a result of the advice; making a legal argument that helps the client but has bad results for the legal system as a whole; or choosing to take a settlement knowing that the client would lose if the facts were fully aired at trial.

To Freedman, lawyers and legal regulators who concentrated on "such trivia as whether it is ethical to mail out Christmas cards to clients" and who dealt with "really important ethical issues with superficial generalities" failed to understand or contribute to the resolution of ethical problems. They either avoided the hard questions altogether or ducked the moral conflict they created. He also expressed frustration at those who saw ethical problems as susceptible to resolution by the application of a rule; a rule produced a result, but it did so at the cost of evading the nature of the ethical problem it supposedly resolved. Focusing on rules as an answer to moral problems assumed a costless response, without recognizing that the application of a rule is simply a method for answering a moral dilemma, not an elimination of it.

This position was expressed most clearly in his response to criticisms of The Three Hardest Questions offered by then-Chief Justice Burger and U.S. District Attorney for the District of Columbia, David Bress. Burger and Bress argued that a defense lawyer could not introduce perjured testimony but could attack the credibility of the truthful witness on cross-examination. In Freedman’s view, their response to the hard questions required “rigidly legalistic adherence to the norms, regardless of the context in which the lawyer may be acting,

26. See Freedman, supra note 1, at 1469. The exception to this proposition is the “hard questions” Freedman identified with respect to prosecutors. These were not really hard questions. Rather, they were areas where, contrary to popular belief, the behavior of prosecutors can be fairly described as unethical. Overcharging to coerce a plea, condoning or covering up police abuses, suppressing evidence, and similar conduct are bad behavior, not vexing moral issues. Freedman’s point was that making defense counsel more like prosecutors would not necessarily eliminate unethical behavior. Freedman, supra note 4, at 1035-39.
28. See id.
29. Id. at 578.
30. Id.
31. See id.
32. See id.
33. Freedman, supra note 4, at 1032-33.
34. Id. at 1033.
his motives, and the consequences of his act. Further, and most importantly, their response failed to recognize the moral cost of those choices, the denial of the client’s right to confidentiality on the one hand, and the harm to the truthful witness on the other. As Freedman stated, “when the lawyer deliberately sets out to destroy the character and credibility of the truthful prosecutrix, he wreaks untold suffering.” Whatever the right answer, Freedman argued, you cannot reduce the moral conflict that the problem creates, or eliminate the moral costs that any answer imposes.

B. The Moral Values

The principal themes that motivate my philosophy of lawyers’ ethics, then, are the dignity and sanctity of the individual, compassion for fellow human beings, individual autonomy, and equal protection of the laws. And implicit in these is a pervasive ethic of warm zeal in the client’s behalf.

Freedman’s work also indicated the moral values he saw at play in the hard questions of legal ethics—that is, the moral values likely to conflict. Those moral values reflect both values specific to the legal system and those that apply to human relations more generally.

With respect to the legal system, Freedman emphasized the normative claims of adversarial justice, specifically its underlying premise that “an objective, impartial end is sought through self-interested partisanship.” The adversary system “is one of the most efficient and fair methods designed for finding [the truth]” whereby “[t]he judge or jury is given the strongest case that each side can present, and is in a position to make an informed, considered, and fair judgment.” He also emphasized constitutional values in the Bill of Rights, in particular the right to counsel and the presumption of innocence, along with the right to confidentiality, which Freedman argued was a necessary precondition to effective legal representation.

35. Id. at 1046-47.
36. Id. at 1046.
37. Id. at 1047.
40. Freedman, Judge Frankel’s Search for Truth, supra note 18, at 1065.
41. Freedman, supra note 1, at 1471-72.
42. Id. at 1470.
Freedman also asserted the significance of broader legal system values related to the rule of law. He emphasized the extent to which rule by law—a system of pronounced or ascertainable rules enforced through a fair and impartial process—serves to protect and respect the dignity and autonomy of the individual.\textsuperscript{43} Human dignity is respected because even the person known to “have committed a heinous offense” is given due process, and each of us has the freedom to pursue our own conception of the good within what the law permits.\textsuperscript{44} Autonomy is respected by the freedom given to individuals within the boundaries of legality to make their own choices and to pursue their own conception of the good.\textsuperscript{45}

And, its democratic origins give the law legitimacy as a form of social settlement—a set of rules within which we are free to establish our own conception of good:

If, through their constitutionally established processes of democratic government, the people of this country have determined that particular instances of industrial pollution are to be tolerated, should lawyers, as a private elite, choose to reject the democratic will in the course of representing their clients? By what authority is the lawyer to deprive the client of a right that society has chosen to grant?\textsuperscript{46}

The structure of legality—both in its substantively enacted norms and in its processes—provides a salutary check on the risk of abuse of power by government officials, and a significant role of the lawyer is to ensure that the law fulfills that function.\textsuperscript{47}

Along with legal system values, however, Freedman also emphasized the claim and significance of ordinary morality.\textsuperscript{48} Moral values of honesty and candor, and of dignity and autonomy, apply to lawyers as much as to others, and when lawyers mislead or misrepresent, inflict suffering, or impair another person’s self or freedom, they violate those moral norms. In \textit{The Three Hardest Questions}, Freedman rejected “the sophistry” of saying that a factually guilty person who pleads “not guilty” is not lying because they are participating in a “legal fiction.”\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{43} Freedman, \textit{Judge Frankel’s Search for Truth}, supra note 18, at 1063, 1065.
\item \textsuperscript{44} Freedman, \textit{Public Interest Limits}, supra note 18, at 32-33; Freedman, \textit{Judge Frankel’s Search for Truth}, supra note 18, at 1063.
\item \textsuperscript{45} Freedman, supra note 5, at 33 (noting the lawyer has a “responsibility to maximize the client’s autonomy by providing the client with the fullest advice and counsel, legal and moral, so that the client can make the most informed choice possible”); see also Freedman, supra note 38, at 1133 (“As God tells Moses, ‘Whoever wishes to err may err.’”).
\item \textsuperscript{46} Freedman, \textit{Public Interest Limits}, supra note 18, at 34.
\item \textsuperscript{47} Id. at 37-39.
\item \textsuperscript{48} Freedman, \textit{Philosophizing About Lawyers’ Ethics}, supra note 18, at 97.
\item \textsuperscript{49} Freedman, supra note 1, at 1471.
\end{itemize}
The lie may be justified, but that does not make it the truth, and it does not make the moral values of honesty and candor irrelevant to the functioning of the legal system. Indeed, a central justification for the adversary system, in Freedman’s view, was its capacity to result in discovery of the truth. While truth-telling may be subordinate to other ends at times, honesty and candor are not rendered morally irrelevant to lawyer decision-making.

Further, in his emphasis on the moral responsibility of lawyers for their selection of clients and when advising clients, Freedman incorporated into the lawyer’s role the totality of moral claims and obligations. While a lawyer representing a client has responsibility for the legal system values specific to that representation, the lawyer could be subject to legitimate moral criticism for representing morally undeserving clients or for failing to advise clients as to the extra-legal moral dimensions of their choices. The lawyer has to avoid paternalism and respect the client’s freedom of choice, but the lawyer ought not to assume that her “function is to maximize the client’s material or tactical position in every way that is legally permissible” without inquiring into whether that is what the client wants.

Finally, Freedman emphasized the moral duties of empathy and care. For him, the concept of the client that was relevant was not, as some like Thomas Shaffer argued, that the client had the capacity for good. Rather, Freedman proclaimed, “I think of the client principally as someone who is in trouble, vulnerable, and in need of my help.” If Shaffer thought of the client as someone over whom the lawyer had power, Freedman thought of the client as “one whom I have the power to help.” In reflecting on the relationship between his Judaism and his perspective on ethics, Freedman said, “I stress rachmanut, or compassion, for a fellow human being who is suffering, even though his suffering may be his own fault.”

50. Id.
51. Freedman, Judge Frankel’s Search for Truth, supra note 18, at 1065; Freedman, supra note 15, at 570.
52. Freedman, Moral Obligation of Justification, supra note 18, at 117 (“[T]his answer recognizes that the lawyer has the broadest power—ethically and in practice—to decide which clients to represent. And it insists that the lawyer’s decision to accept or reject a particular client is a moral decision. Moreover, that decision is one for which the lawyer can properly be held morally accountable.”).
55. Id.
56. Id.
57. Freedman, supra note 38, at 1133.
In sum, the answer to the question of which moral values Freedman thought could be implicated in legal ethics was, all of them. Lawyers work where people interact with one another, and at the intersection of the person and the state, they represent the human condition, in all its richness and variety, and they work within the complex system that we have developed in order to live with one another with a degree of peace. In occupying that position, lawyers inevitably confront the moral values that govern human interactions, and the normative structure that informs rule by law; whatever it requires in specific circumstances, the lawyer’s role always implicates moral values and requires morally freighted decisions. This is not to suggest that Freedman viewed the lawyer’s role as without moral structure, or that he saw lawyers as free to do whatever they saw fit given the mess of competing moral claims relevant to their conduct. He had a clear perspective on which norms ought to govern, and how, in matters related to client selection, advising clients, and advocating for clients.  

What it does mean, however, is that the choices lawyers make and the things they do implicate a wide range of legal and moral norms. When the behavioral claims of those norms conflict—when one norm requires one course of action and the other requires its opposite—lawyers face hard questions.

C. Answering Hard Questions

I am convinced, however, that a situational approach [to ethical questions] is the more rational and responsible one. At any rate, we should no longer delude ourselves that the complexities of what constitutes responsible professional conduct in the context of an adversary system can be resolved by syllogistic deductions and vague canons or dogmatic prescripts.

The most challenging aspect of Freedman’s work, perhaps, is with respect to his assessment of how lawyers ought to answer hard questions. His work reflects a consistent set of propositions about moral decision-making by lawyers, but those propositions appear hard to reconcile.

58. When selecting a client, all moral or legal system norms can be relevant, and it is the lawyer’s own moral values that ought to determine the choice. When advising a client, moral and legal norms are relevant, but the choice is the client’s, not the lawyer’s. When advocating for a client within the legal system, only legal system norms are relevant, and the paramount norms are the protection of the client’s autonomy and dignity and the respect for constitutional norms in relation to the right to counsel, the presumption of innocence, and the right of confidentiality.

59. Freedman, supra note 4, at 1047.
First, while Freedman saw a wide range of values at play in lawyer decision-making, he had a strong opinion on the relative weight each value had in determining the right course of action for a lawyer in particular circumstances. He argued that ordinary morality can determine lawyer decisions about which clients to represent and play a part in the advice that a lawyer gives to a client, but that in advocating for clients the lawyer's decision must conform to the legal system values that underlie the rule of law in American constitutional democracy. There may be complex and diverse moral values at play or affected by a lawyer's decision, but that does not mean that each value is of equal weight and importance in every context.

Second, Freedman had strong opinions on many of the ethical issues that confront lawyers, in particular on the centrality of zealous representation of any client the lawyer has chosen to represent. As he put it, "[o]nce the lawyer has assumed responsibility for a client’s case... it would be a betrayal of trust for the lawyer to provide that client with less than what the law allows." He never changed his mind on the correct answer to any of the hard questions he identified for the defense attorney, writing in 2006 that "there are circumstances in which a lawyer can ethically make a false statement of fact to a tribunal, can ethically make a false statement of material fact to a third person, and can ethically engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Freedman, in other words, thought there were right answers—or, at least, better and worse answers—to hard questions of legal ethics.

Third, Freedman rejected models of lawyer ethics that emphasize the personal responsibility or personal moral judgment of the lawyer within the lawyer-client relationship. To his mind, while lawyers had personal responsibility and could exercise personal moral judgment, particularly when advising or selecting clients, the ultimate moral decision-maker in the lawyer-client relationship was the client, not the lawyer. As he put it, lawyers “act both professionally and morally in assisting clients to maximize their autonomy,” and “lawyers act unprofessionally and immorally in preempting or overriding their clients’ desires.”

60. Freedman, Public Interest Limits, supra note 18, at 34; Freedman, Client-Centered Lawyering, supra note 18, at 353-54.
61. Freedman, Public Interest Limits, supra note 18, at 34.
62. Freedman, Overzealous Representation, supra note 18, at 782.
Fourth, Freedman rejected rule-based approaches to moral decision-making. He noted his embrace of civil disobedience where appropriate, saying, "I was a free person, with moral responsibility, before I was a lawyer." He also did not view the rules of professional conduct as determinative of ethical issues where those rules produced results contrary to the deeper moral structure of the lawyer's role. He advocated the ethical correctness of positions inconsistent with the law governing lawyers, particularly when he argued that misleading or deceiving the court was a better choice than breaching confidentiality or abandoning the client who enjoyed a right to counsel. In addition, he rejected any approach to professional responsibility that involved "rigidly legalistic adherence to norms, regardless of the context in which the lawyer may be acting, his motives, and the consequences of his act." He saw ethical decisions as situation-specific and not capable of resolution by "syllogistic deductions and vague canons or dogmatic prescripts." Perhaps, for this reason, Freedman was skeptical about the ability of moral philosophy to illuminate ethical principles, challenging "anyone to demonstrate a single significant effect that any moral philosopher has had on any particular issue of legal ethics."

As observed earlier, these precepts can seem difficult to reconcile, particularly to the extent that Freedman rejects both emphasis on the personal moral responsibility of lawyers and emphasis on rule or norm-based decision-making. How can lawyers be both not personally responsible and not permitted to follow rules or norms? Further, how can Freedman argue that ethical decisions are situation-specific while also taking such strong and unyielding positions on the correct resolution of ethical issues?

However, identification of a coherent perspective from Freedman's work is possible. In essence, Freedman's model of moral decision-making requires that a lawyer make personal judgments about the right thing to do, for which she takes responsibility, but it also requires that she do so in light of the specific circumstances in which she finds herself, and with particular attention to the normative framework of the

64. Freedman, supra note 38, at 1130.
65. See Freedman, Oversealous Representation, supra note 18, at 774-77; Freedman, supra note 1, at 1070-71.
66. Freedman, supra note 4, at 1046-47.
67. Id. at 1047.
68. Freedman, Religion Is Not Totally Irrelevant, supra note 18, at 1301; see also Freedman, Philosophizing About Lawyers' Ethics, supra note 18, at 103 ("When moral philosophers ignore these practical concerns [about real lawyers and real clients], they produce articles and books that have no significance in the world of real lawyers and real clients.").
69. See supra Part II.C.
lawyer's role. Once a lawyer takes on a client, the primary moral values are the lawyer's loyalty to the client, pursuit of the client's interests, and respect for the client's decisions. The answer a lawyer gives to a hard question is one that the lawyer determines for herself and for which she takes responsibility, but she has an obligation to make it in light of the norms that govern that particular aspect of the lawyer's role and the factual circumstances in which the dilemma arises.

This approach explains why Freedman had no difficulty articulating very different approaches to the allocation of moral responsibility and the applicable moral principles, in relation to the ethical questions of client selection, client advising, and advocacy. In his view, each of those circumstances warrants a different allocation of moral decision-making and makes different moral values paramount; to identify a singular approach to all of them would be to miss what is important about each. Further, even within a specific circumstance (for example, representing a client at trial) where Freedman himself took a particular position on the appropriate resolution to the question, the lawyer must still make a moral decision in light of the totality of the circumstances, for which she bears responsibility.

Freedman viewed the hard questions of legal ethics as appropriately resolved in a particular way, but he had no objection to the lawyer who experienced moral uncertainty or moral conflict in making her own decision about how to represent a client in a given situation. He did not seek, in considering the hard questions of legal ethics, to identify a set of rules or guidelines about what lawyers ought to do in those circumstances. He had a methodology for thinking about ethical problems, not an answer to every problem that might arise.

In short, Freedman did not object to the thoughtful lawyer trying to navigate the hard questions of legal ethics, even if that lawyer reached a different answer than he would. Rather, his objections were to those critics, particularly those removed from the reality of legal practice, who saw the moral dilemmas of lawyers as straightforward or as susceptible to easy resolution through application of rules or precepts. He reserved his most stinging criticisms for those who thought that pursuit of morality or the interests of justice, or the straightforward application of the rules in favor of cross-examination or against perjury, could eliminate the complexity of the lawyer's obligation to practice law ethically and responsibly. Freedman did not mind if someone disagreed

70. See Freedman, supra note 1, at 1470-73, 1478.
71. Freedman, supra note 5, at 28-29, 31-32.
72. Id. at 29-33, 51-52.
73. Freedman, Philosophizing About Lawyers' Ethics, supra note 18, at 92, 97-99, 103-05;
with his answer to the moral dilemmas. He only minded if his position was mischaracterized, the moral structure of the lawyer’s role was not respected, or the difficulty of an issue was obscured in seeking to resolve it.\textsuperscript{74}

In sum, then, in Freedman’s scholarship, the lawyer’s obligation when faced with a hard question is to make a decision in light of the specific circumstances, placing particular weight on the normative values that most appropriately govern in those circumstances and the nuances of the particular facts giving rise to the question.

\textbf{D. Hard Questions, Crummy Situations, and Moral Mistakes}

In taking Freedman’s analysis of hard questions and applying it to problems beyond those he analyzed, it is important to distinguish hard questions from other circumstances that can arise for the lawyer in practice. Specifically, what this Article describes above as crummy situations and moral mistakes.\textsuperscript{75} As noted, a hard question arises when lawyers face a choice between competing moral values, and to pursue one moral value they must sacrifice another.\textsuperscript{76} But, when lawyers sacrifice a moral value, it is not always because they have been forced to do so to satisfy other moral demands. Sometimes, lawyers violate moral norms for no good reason—in which case they commit a moral mistake. Other times, lawyers fail to fulfill their moral obligations for a reason, and, while inescapable, it does not foster a moral good—in which case they have found themselves in a crummy situation. A moral mistake is a violation of a moral norm unsupported by any claim that the violation was necessary to fulfill other necessary moral duties. A crummy situation is a failure to satisfy moral obligations that do not amount to actual wrongdoing, and which occurs for reasons that, while they cannot be avoided, also do not involve the pursuit of any other moral value.

Freedman himself was not always careful in distinguishing hard questions from moral mistakes. In a paper he wrote as a companion to The Three Hardest Questions, he explored the hard questions for prosecuting attorneys.\textsuperscript{77} In fact, however, the paper largely focused on prosecutorial misconduct, on situations such as prosecutors overcharging to coerce a plea, condoning or covering up police abuses, suppressing evidence, or “attempting to preclude resolution of important issues

Freedman, \textit{supra} note 15, at 576, 578; Freedman, \textit{supra} note 4, at 1030-33.


\textsuperscript{75} \textit{See supra} Parts I, II.A–C.

\textsuperscript{76} \textit{See supra} Part I.

\textsuperscript{77} \textit{See} Freedman, \textit{supra} note 4, at 1031-33.
by depriving courts of jurisdiction." Freedman used these examples to rebut the position that "defense counsel's ethical problems would readily be solved if defense attorneys would simply take their guide from this same standard [that governs prosecutors]." But, in doing so, and in describing them as hard questions, he obscured his own thesis because there is nothing hard or confusing about the decision not to overcharge to coerce a plea, or not condoning or covering up police abuses. Any other choice is simply wrong, not a response to a perplexing moral dilemma.

Lawyers make moral mistakes, and they sometimes do so because of the pressures they face in their practices. The prosecutor who condones or covers up police abuses may be responding to personal pressures from within the hierarchy of her office or to her personal relationship to people in the police department. A lawyer who commits a serious moral wrong because of those pressures or relationships nonetheless commits a moral mistake. Doing a bad thing for an understandable reason does not change the moral character of your actions.

The difference between a moral mistake and a crummy situation relates to the magnitude and nature of the wrong done in failing to fulfill ethical duties, the extent to which the wrong was inescapable rather than simply understandable, and our acceptance of the wrong as part of the trade-offs that we make in pursuit of broader social values. If, for example, we choose to spend public funds on the police rather than on public defenders, we have to accept that we are compromising the nature and quality of the defense that accused persons will receive. Indeed, the classic crummy situation would be the public defenders, or other publicly funded lawyers, who are expected to carry a caseload beyond what is consistent with ensuring a thorough and zealous representation of their clients. There is usually no active misconduct in that situation— unlike the prosecutor who covers up police abuses—but the lawyer will fail to satisfy professional ideals. The lawyer cannot do otherwise. It is, however, still not a hard question because the underfunded lawyer who sacrifices professional ideals has not done so in pursuit of another moral value. Rather, the lawyer has done so due to a lack of choice, and the circumstances of the lawyer’s practice make satisfaction of professional ideals practically impossible.

There is a limit to this defense to ethically inadequate conduct. At a certain point, the failure to achieve professional ideals can become

78. *Id.* at 1035-36.
79. *Id.* at 1033.
sufficiently injurious to another person as to constitute wrongful conduct. In that case, the crummy situation would become a moral mistake. Nevertheless, in either case, the lawyer would not have faced a hard question.

E. Final Points

Above, Part II explores the nature of hard questions in legal ethics, arguing that hard questions arise when moral values conflict, that the moral values relevant to a lawyer include both general moral values and those specific to accomplishing the rule of law in an American constitutional democracy, and that the obligation of a lawyer when faced with a hard question is to make a conscientious decision in light of the moral values and factual circumstances applicable to the situation in which the question arose. Part III uses this analysis to consider the hard questions for a defense attorney in plea bargaining.

III. PLEA BARGAINING AND THE INNOCENT CLIENT

I told them I—in my heart, I just couldn’t do it. It just—my conscience and in my heart, and it’s just morally wrong to say you did something you know in your heart you didn’t do. I couldn’t live with myself if I did that. I couldn’t just—I just couldn’t live with myself. I saw the pictures of the young man and you know, just—just for them to want me to say that I did something so horrible just to get out of prison. I just couldn’t do it.

Patsy Kelly Jarrett ("Kelly") spent nearly thirty years in prison for murder and armed robbery, crimes she did not commit, and her connection to which was supported only by the weakest evidence. Kelly’s decades in prison were not unavoidable. When first charged, she was offered a plea of five to fifteen years if she pled guilty to robbery. She declined, putting her trust in the "American system of justice." In 1986, after Kelly had spent ten years in prison, new lawyers—Claudia Angelos, a New York University law professor, and her then-student

80. See supra Part II.A–D.
81. See infra Part III.
84. Id.
85. Frontline: The Plea, supra note 82; see also The Plea: Patsy Kelly Jarrett, supra note 83.
Abbe Smith—won an application for habeas corpus entitling Kelly to a new trial.86 Pending appeal, prosecutors offered Kelly a second plea of time served if she would plead guilty to the robbery.87 Again, Kelly refused.88 The habeas award was reversed on appeal, and Kelly served another nearly two decades in prison.89 Twice Kelly could have been released from jail in much less than thirty years; twice she refused.

Kelly’s case is remarkable, because of her factual innocence and the length of her incarceration. Abbe Smith, who represented Kelly for many years prior to her release, describes Kelly’s case as exceptional in relation to her practice as a whole.90 At the same time, however, Kelly’s case is not aberrational. Other innocent people are accused of crimes, face the prospect of conviction at trial, and are offered plea bargains preferable to the sentence they would receive if convicted at trial. And still, other people, even if factually guilty of a crime, have circumstances that merit acquittal, whether because of available defenses or constitutional violations in the gathering of evidence or otherwise. Yet, they also face the prospect of conviction and are offered favorable pleas.91

The argument here is that the lawyers for those accused—the legally and factually innocent, who face the prospect of conviction at trial and are offered favorable plea bargains—must resolve hard ethical questions. The hard questions arise because of the nature of the legal and ethical duties that lawyers owe to their clients when combined with the structural frailties in the justice system that make it impossible for those

86. The Plea: Patsy Kelly Jarrett, supra note 83.
87. Id.
88. Id.
89. Id.
90. ABBE SMITH, CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER’S STORY 228 (2008) ("In more than [twenty-five] years of law practice, I have represented a handful of other clients I believed to be innocent. I have represented many clients who were not guilty of the crime charged and many more who, guilty or not, did not deserve to be so harshly punished. In all the time I have been a lawyer, I have never had another case like Kelly’s. I am glad of that. I don’t think I could bear another.").
lawyers to fulfill all of their legal and ethical duties simultaneously. When acting for an innocent accused in a plea bargain, a lawyer can act in his client’s best interests, he can avoid participating in an injustice, or he can avoid misleading the court, but he cannot do all three. The lawyer may be able to respect his client’s decision-making or prevent the client from making a foolish decision, but he may not be able to do both. The plea bargaining system creates crummy situations and includes moral mistakes, but what defense lawyers face when representing these sorts of clients is a truly hard question.

A. The Lawyer’s Duties in Plea Bargaining

I know what I’d tell my client. “Out is out. Out is out. Get out. Get out.” I mean—and I tell them that when they’re confronted with whether or not to plead guilty. I don’t want to stand next to somebody who’s pleading guilty to a crime they didn’t commit, but I don’t want to be standing next to somebody when they’re wrongfully convicted of a charge they—a crime they didn’t commit, and get much more time. So I say—I mean, I’m not shy about trying cases, I’m not shy about fighting the government. But out is out.²

Defense lawyers have an ethical, legal, and perhaps even constitutional duty to assist their clients through the plea bargaining process. At a general level, the duties of defense lawyers in representing clients through the plea bargaining process retain the usual features of the defense lawyer acting for a client—to “zealously assert the client’s position under the rules of the adversary system.”³ More specifically, in the ABA Standards for Criminal Justice: Prosecution and Defense Function, the Defense Standards direct defense counsel to be “open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition.”⁴ The Defense Standards place various obligations on defense counsel participating in disposition discussions, including that the attorney investigate, that the attorney

92. Frontline, The Plea, supra note 82 (statement of N.Y. defense lawyer, Bruce Barket).
93. It is arguable that a plea bargain is a negotiation and thus subject to the duty that “a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.” MODEL CODE OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 2013). However, given its place in the legal system—as a corollary to the criminal trial—it seems more accurate to characterize the plea bargain as equivalent to advocacy than to negotiation.
request disclosure from the prosecutor of "any information that tends to negate guilt, mitigates the offense or is likely to reduce the punishment," and that the attorney ensure that her client "understands any proposed disposition agreement." The attorney "may make a recommendation to the client regarding disposition proposals, but should not unduly pressure the client to make any particular decision." The attorney also has an obligation to oppose improper waiver of the client's rights as part of the disposition agreement.

The National Legal Aid and Defender Association *Performance Guidelines for Criminal Defense Representation* similarly require that defense attorneys "explore with the client the possibility and desirability of reaching a negotiated disposition of charges," and that they develop an "overall negotiation plan," which involves fully exploring the cost and benefits of a plea agreement with a client. They also note that the "decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision."

The Supreme Court has also linked the conduct of defense attorneys in plea bargaining to the Sixth Amendment right to effective assistance of counsel, finding ineffective assistance in cases where lawyers failed to properly advise clients about the consequences of a guilty plea, where a client declined a plea based on improper advice from counsel, and where a lawyer failed to advise a client of the existence of a plea offer. Some academics have suggested that these cases are sufficient to impose on lawyers a positive obligation to negotiate effectively in the plea bargaining process, despite the absence of a constitutional right to a plea bargain. Others have suggested that defense lawyers have a practical obligation to advise their clients in a way that takes into account the psychological biases associated with plea bargaining and, in particular, the difficulty for clients in making rational determinations.

95. ABA Standards for Criminal Justice: Prosecution and Def. Function, Standard 4-6.2(c)-(d).
96. Id. Standard 4-6.2(e).
97. Id. Standard 4-6.4(a).
99. Id. § 6.3(b).
103. See Berger, supra note 99, at 135-37; Roberts, supra note 99, at 2662.
of whether a plea bargain is in their best interests under the circumstances. However, care must be exercised because, "[w]hile lawyers must not substitute their own ends for their clients', they should inform and advise clients about less biased means to those ends." Thus, in the plea bargaining process, defense attorneys ought to provide zealous advocacy and wise counsel, based on sufficient investigation and knowledge, effective negotiation with the prosecutor, and the need to both advise a client and respect that client's decisions. Those duties are unsurprising, yet, given the reality of the plea bargaining process in the American criminal justice system, their satisfaction can nonetheless lead to hard questions for the defense attorney to resolve.

B. Plea Bargaining in Practice

"Most of us don't become criminal defense lawyers because we want to make innocent people plead guilty, but the system stinks. And here's someone who'd been locked up for ten years in a maximum security prison and everybody knew that the court of appeals was going to reverse. There's this one moment, this one opportunity to free her, and I would have done everything within my power to get her to plead guilty."

In a perfect criminal justice system, plea bargains would not produce hard questions for defense counsel. An accused with a strong case, legally or factually, could choose to go to trial without fear of wrongful conviction or unduly punitive consequences. An accused with a weaker case, legally or factually, could negotiate a plea bargain that reflects the benefit to himself and the state from avoiding a trial, and which would allow him to take responsibility for his actions. Further, the lawyer could give information to the accused, and the accused could independently make a rational and informed decision about how to proceed. In these circumstances, any negotiated disposition of the trial could be understood to reflect a form of freedom of contract and the autonomous choice of the accused person. The criminal justice system is, of course, far from perfect. And, its imperfections create hard questions for the defense attorney.

106. Id. at 2519; see also Strutin, supra note 91, at 831-33.
Most obviously, a person who ought to be entitled to an acquittal after a fair trial on the merits is in no way guaranteed to receive one. The accused may be the victim of unfortunate circumstances, of having been in the wrong place at the wrong time, such that the prosecution has a plausible case. The accused may have a defense lawyer who is underfunded with an unrealistic caseload, who lacks the resources necessary to mount a defense, or who is incompetent or idle. The judge or jury may be ignorant, inclined to conviction, or prejudiced in some other relevant respect. The prosecution or police may engage in abusive tactics, such as manipulation or non-disclosure of evidence.\textsuperscript{109} A person innocent in fact or law who has the misfortune to be charged with a crime has at least some risk of wrongful conviction and may have a material risk, depending on the circumstances of the case.\textsuperscript{110}

In the event of a wrongful conviction at trial, an innocent person may also face severe penal consequences. This is true if the crime with which she is charged is serious, as was the case for Kelly,\textsuperscript{111} but it is also true for less serious offenses given sentencing guidelines and rules applicable to state and federal crimes.\textsuperscript{112} While efforts have been made more recently to reduce the severity of punishment attached to certain crimes, it is still the case that conviction at trial can result in lengthy periods of incarceration for a wide range of federal and state offenses.\textsuperscript{113} Further, depending on their economic circumstances, their prior criminal record, and the nature of the crime with which they were charged, some innocent accused spend significant time in pretrial detention. They may also risk consequences other than imprisonment if they go to trial, such as deportation or the requirement that they register as a sex offender.\textsuperscript{114}

The innocent accused may receive plea offers from the prosecutor that are significantly less onerous than the consequences that could arise from conviction at trial. Given the pressure on prosecutors to avoid trial losses, and the legislative expectation that prosecutors will use
mandatory sentences and sentencing guidelines to negotiate a plea, prosecutors have both incentives and the power to make attractive plea offers to accused who have stronger cases, which the factually or legally innocent accused is likely to have.\textsuperscript{115} An accused with a strong case has a better chance of prevailing at trial, which is not in the prosecutor's interest, and the prosecutor has the power to offer that accused a significantly reduced sentence from what would be imposed in the event of a trial conviction. The plea power may also allow the innocent accused to get out of pretrial detention or to avoid non-penal consequences of conviction at trial, such as deportation or registration as a sex offender.\textsuperscript{116}

At the same time, however, the plea offer will impose costs on the accused. It will involve some admission of wrongdoing, and as a consequence, it will require the accused to lie. It may seek to have the accused participate in the prosecution of a third party, even if the accused cannot do so honestly.\textsuperscript{117} It may, and usually will, involve a period of incarceration. In addition, the plea offer will involve the waiver of constitutional rights—at minimum the right to a trial, and at worst the waiver of rights to appeal or to seek exoneration.\textsuperscript{118} It may involve other consequences in relation to immigration or civil forfeiture.\textsuperscript{119}

Also of note for plea bargaining in practice is the difficulty for any accused to assess accurately the desirability of accepting a plea when offered. The difficulties arise, first, because of the sheer complexity of the criminal justice process. As Ken Strutin observes, a person deciding whether to accept a plea "must play out the entire trial in her imagination and filter through the penal code, criminal procedure, and evidence law, as well as forensic science."\textsuperscript{120} He suggests that absent "adequate investigation and legal analysis, the decision to plead or to go to trial will be poorly made."\textsuperscript{121} An accused deciding on the best course of action faces a considerable challenge, even in the best-case scenario, where she has good information and the ability to rationally assess her alternatives.

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\textsuperscript{115} Bibas, supra note 91, at 2471-72.
\textsuperscript{116} Green, supra note 91, at 764.
\textsuperscript{117} See Kevin C. McMunigal, Defense Counsel and Plea Bargain Perjury, 7 OHIO ST. J. CRIM. L. 653, 656-57 (2010).
\textsuperscript{119} Green, supra note 91, at 743, 764.
\textsuperscript{120} Strutin, supra note 91, at 832.
\textsuperscript{121} Id.
\end{flushleft}
And, the accused is rarely, or never, in the best-case scenario to make that rational assessment. Much of the time, the accused makes the decision about whether to plead with insufficient information and with inadequate discovery from the prosecution. He also may have concerns apart from the risk of conviction and the penal consequences associated with conviction, particularly if he is in pretrial detention or is worried about deportation or the requirement to register as a sex offender. The accused also has psychological barriers to making a rational assessment of the plea. As Stephanos Bibas persuasively documented, overconfidence, loss aversion, risk aversion, risk-taking, and discounting of future costs may all affect an accused’s ability to assess a plea. Innocent defendants may be particularly unable to assess the risks and rewards associated with a plea given evidence that perceptions of unfairness may make them reluctant to accept a plea, even when it is in their best interests to do so. In a review of exoneration cases from 1998-2003, only six percent of the persons exonerated had pleaded guilty.

In practice, a legally or factually innocent accused may face a reasonable prospect of conviction at trial, severe penal and other consequences if convicted, a relatively favorable plea bargain offer from the prosecution, and a very limited ability to independently reach a rational decision as to the most prudent course of action. It is in these circumstances that the hard questions for the defense lawyer arise.

C. The Hard Question

And, I regret it every day of my life, every day of my life. I could have insisted—I think I could have—as I’ve often thought, I should have reached across the table and grabbed her by the throat and said, “I’ll quit. I won’t represent you. You must do this. You have no choice.” And, these last—these last [twenty] years, she’d have been with us instead of buried in there.

Well at the end of the day, in this case, evidently the client had certain values that she places above liberty. You know, it’s a sad thing, and what occasions it is the conviction of an innocent person. But from the lawyer’s perspective, you have to respect the client’s decision at the

122. Bibas, supra note 91, at 2493-95.
123. Green, supra note 91, 740-41; see also Jason A. Cade, Plea-Bargain Crisis for Noncitizens in Misdemeanor Court, 34 CARDOZO L. REV. 1751, 1754-56 (2013).
125. Avishalom Tor et al., Fairness and Willingness to Accept Plea Bargain Offers, 7 J. EMPIRICAL LEGAL STUD. 97, 113-14 (2010).
126. Id. at 98-100.
end of the day. If she understands what the stakes are and she knows her own values, she's entitled to say, "I just won't say I'm guilty, because I'm not."

I would have made her plead guilty. I would have been relentless. I would have brought her brother up to Bedford Hills Prison to put pressure on her to plead [guilty]. I would have brought her father, who was aging and infirm, up there to Bedford Hills Prison. If I had to drive down to North Carolina myself and put them in my car, I would have brought them up to the prison and I would have ganged up on her. And I—and I—and I would have had them beg her. And I, and I would have had them cry. And I would have had them say, "Please," you know "you only have this one life." I—I—you know, "I don't"—I would have had her father say "I don't want to die while you—when you're in prison." And, I would have said to Kelly, "You know what, you can fight for your good name outside the prison walls but get out first."

In Freedman's analysis, a hard question arises when the moral values of the legal system or society conflict, when a lawyer’s satisfaction of one moral value requires sacrifice of another. A lawyer participating in a plea negotiation for the factually or legally innocent client will face hard questions. Given her legal and ethical duties, she cannot be a passive bystander in relation to her client’s decision. She must help her client determine the costs and benefits associated with accepting or rejecting the plea, and she must do so taking into account the psychological and informational distortions that impair the client’s ability to assess the circumstances accurately and rationally. At the same time, those legal and ethical duties make it clear that while she needs to advise the client as to the costs and benefits associated with accepting or rejecting the plea, she ought not to substitute her own judgment for the client’s, that it is ultimately the client’s decision about whether to accept the plea.

That statement of the lawyer’s ethical duties tends, however, to obscure the difficulty and cost of fulfilling them. If the lawyer persuades the client to accept the plea, either aggressively or with some restraint, the lawyer will likely have helped the client achieve a far better outcome than if the client had gone to trial and been wrongfully convicted. As Bruce Barket said in The Plea, however bad it may be to stand beside an innocent person accepting a relatively favorable disposition after a false
guilty plea, it is far better than standing beside that person while they are wrongfully convicted and face an extensive period of incarceration, along with other potentially serious consequences.\textsuperscript{131}

The lawyer who does so, however, will also have actively participated in the subversion of the truth. Especially if the client is factually innocent, in whole or in part, the client will attest to the commission of an offense that she did not commit. She may commit perjury and, depending on the nature of the plea she is offered, she may commit perjury in her own case and also in that of a third party.\textsuperscript{132} The lawyer will also have assisted in maintaining an unjust legal system, which depends on the prevalence of plea bargaining to function, and which arguably does so only because everyone goes along with it.\textsuperscript{133} Further, she will have pressured her client to accept a punishment the client does not deserve and forego constitutional rights to which her client is entitled. It may be that the punishment will be less than the client would have received at trial, but the lawyer will have contributed to that outcome rather than resisting it. Finally, given the psychological conditions under which clients consider plea bargains, and particularly overconfidence, a resistance to accepting an unfair consequence, and a discounting of future costs, a lawyer may only be able to get a client to accept a plea through applying considerable pressure. In those circumstances, it may not be possible to both ensure that the client makes a rational decision and that, in fact, it is the client who does so. The lawyer may in effect undermine the client's own commitments and autonomous choices about the best way to receive justice.

If you do not push your client aggressively to take the plea, you will avoid some of these issues. You will respect your client's own choice about how to proceed and will not have pushed your client to accept an unjust result. Your client will enjoy the constitutional rights to which she is entitled. On the other hand, the client may well face far more significant consequences, and an even greater substantive injustice, than if you had pushed them to take the plea. Their decision may be informed by ignorance or psychological weaknesses—by an unwarranted faith in the "American system of justice" or a simple unwillingness to accept how the evidence against them will be perceived in court. The client will

\textsuperscript{131} See \textit{Frontline: The Plea}, supra note 82.

\textsuperscript{132} Although I do not think a lawyer could justify participating in a client's perjury that contributes to the conviction of another person, even if that perjury was a necessary condition of the client receiving a favorable plea, to do so would be an ethical error, not a defensible response to a hard question. See McMunigal, supra note 117, at 657-58.

have reached the decision because their counsel was unwilling to do what was necessary for them to appreciate the reality of their situation. Regardless of how much plausible deniability you will have in that case or how much ability you will have to say that you resisted the injustice rather than participating, it will have occurred because of a decision you made not to push your client to take the plea in the first place.

The defense attorney in circumstances like these thus faces a hard question—whatever choice she makes will involve trading off moral and normative values. The only response she can make to that hard question is to make a conscientious assessment of her legal and ethical obligations, in light of her role in the legal system and given the specific circumstances of the client’s case. The duties to advocate on the client’s behalf while respecting the client’s choices, the duty to pursue a good plea bargain for a client, the likelihood of the client’s conviction at trial, the differences in consequences between the plea and conviction at trial, and the client’s ability to make an independent decision, all ought to inform whether and how hard the lawyer pushes the factually or legally innocent client to accept the plea. But, whatever the lawyer decides, the choice will both satisfy and sacrifice moral values.

In facing this hard question, the defense attorney’s situation is distinct from other circumstances in the plea bargaining process in which lawyers face crummy situations or make moral mistakes. Moral mistakes in plea bargaining include prosecutors overcharging accused to create room to plea, prosecutors failing to disclose information relevant to the accused’s decision about whether to plea, and prosecutors proceeding to trial against innocent accused. They also include defense lawyers who fail to deliver plea offers to their clients, who provide wrong advice to their clients, or who do not discuss the implications of a plea with their clients. In each of these cases, the lawyers have failed to discharge their ethical and legal duties and have violated moral norms without any countervailing moral justification.

Plea bargaining also gives rise to crummy situations. The limited resources dedicated to defending indigent clients, and even to some prosecutors’ offices, mean that those lawyers can only fulfill their ethical obligations in a minimal way. Those lawyers may not act wrongfully, but they do not do the work that their legal and ethical duties assert to be necessary, and which would satisfy the moral values underlying the legal system.

Again though, even if those crummy situations and moral mistakes were to be eliminated, so long as a legally or factually innocent client risks wrongful conviction and severe consequences and is offered a
favorable disposition by plea, defense attorneys will encounter and have to resolve hard questions for which there is no certain ethical answer.

IV. CONCLUSION

When he published *The Three Hardest Questions* fifty years ago, Monroe Freedman elucidated three challenging questions for defense attorneys representing clients at trial. In that article and in his subsequent work, however, he also created a structure for thinking about ethical problems, for understanding when hard questions arise, the moral values at stake, and how lawyers ought to resolve them. That framework allows thoughtful consideration of the ethical challenges of defense attorneys in other contexts—such as plea bargaining—but it also allows consideration of the ethical challenges for lawyers more generally.

Lawyers representing clients like Kelly, faced with a choice between admitting to the commission of a “horrible” crime they did not commit or decades of incarceration, face a true moral dilemma. They cannot fulfill their ethical duties without also sacrificing them, whether it is their client’s best interests, autonomy, justice, or truth. Freedman’s framework helps explain the nature of the dilemma they face and why, as he put it, “the only immorality lies in failing to address and resolve the moral conflict in a conscientious and responsible manner.”

134. Freedman, supra note 1.
135. *Frontline: The Plea*, supra note 82; see *supra* Part III.A.