

A CRITICAL MORALITY FOR LAWYERS: FOUR APPROACHES TO LAWYERS' ETHICS

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Drawing on the scholarship of legal ethicists and case studies of Australian legal practice, this article proposes a set of conceptual tools for assessing the ethics-in-practice and moral judgment of Australian lawyers. The article proposes that different approaches to legal ethical reasoning can be distinguished by the ways they answer the following questions: (1) to what extent should lawyers' ethics be determined by a special and particular social role that lawyers should play? (2) how should lawyer and client relate to one another in relation to ethical issues? Should one's view of morality prevail over the other? (3) what is the lawyer's obligation towards law and justice? (4) to what extent should lawyers in their daily work make sure they care for people and relationships? On this basis I identify four broad approaches to ethical reasoning in legal practice: adversarial advocate; responsible lawyer; moral activism; and ethics of care. A fifth approach, based solely on the law of professional responsibility and rules of professional conduct, is discussed and dismissed as an invalid ethical approach.

I INTRODUCTION

In early 2001, newspapers reported that a leading Melbourne criminal barrister and civil rights advocate had been asked to represent suspected war criminal Konrad Kalejs in a hearing to determine whether Kalejs should be extradited to Latvia to face charges over the deaths of tens of thousands of Jews and other people during World War II. The barrister was a Queen's Counsel, a former president of Liberty Victoria (a civil rights organisation), and was well known for representing a variety of high profile criminal accused, including Julian Knight (in his trial for the Hoddle Street murders), John Elliott (cleared of corporate fraud), and members of Hells Angels. The barrister was also a prominent member of the Jewish community. He was reportedly born in 1946 in Russia. His parents fled to Germany when he was six weeks old and later settled in Israel, from where they migrated to Australia in 1959. In 1997 he was quoted as telling *The Herald Sun* that elderly Jews living in Melbourne would be having sleepless nights

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knowing Mr Kalejs was walking free in Melbourne.¹ Mr Kalejs was 87 years old at the time of the extradition proceedings. He denied the allegation that he had served as an officer in a 'death squad' within a Latvian war camp where an estimated 20 000 to 30 000 Jews, Gypsies, Red Army soldiers and others were executed, starved or tortured. Kalejs had however previously been deported from the US, Canada and Britain because of findings that he had been involved in war crimes. From newspaper reports at the time, it seemed Kalejs' defence to the extradition would be that his health was too poor for extradition to Latvia (his health problems included legal blindness, dementia and prostate cancer). Jewish leaders pointed out that it was not uncommon for war crimes suspects in other countries to make claims of unfitness for trial that were later proved to be unfounded. The extradition process could easily drag on for eighteen months if Kalejs chose to fight it. Should the barrister act for Konrad Kalejs in the extradition proceedings, and if so, how might he proceed?

This situation raises a range of questions about the proper role and conduct of lawyers. To what extent is it the lawyer's role to act as a vigorous advocate for any client who comes along? Should lawyers advocate for clients and causes they personally find morally repugnant? Can they trust the legal system to resolve issues of truth and justice? To what extent should they consider broader duties to society, or their relationships with their own families and communities, in deciding which clients to take on or how to act for them?

Now consider a second scenario, also based on a real situation faced by an Australian lawyer:

You are a solicitor practising in the area of environmental law. Your practice has grown considerably in recent years as the Government introduces tighter environmental controls. You have many clients which are large corporations. You are particularly concerned about two of your oldest and most significant clients which combined account for about thirty percent of your annual fees. One client owns a large warehouse where it has been storing various chemicals. A recent Commonwealth enactment has prohibited the storage of such chemicals in that manner to protect against potential seepage into the surrounding environment. Your other client has a large facility where it stores petrol and other flammable liquids. The same Act has restricted the large-scale storage of such products to particular types of storage facilities as there have been a number of instances where explosions have killed several people. Immediately after the Act is passed, you contact both your clients and advise them of the new law. Their actions are now illegal and, in the case of the

¹ Darrin Farrant, 'Leading QC May Defend Kalejs' *The Age* (Melbourne), 23 January 2001, 1. All the information in this paragraph is from that article and from Richard C Paddock, 'Case Tests Australian Protection of Nazi War Criminal', *The Washington Post* (Washington), 21 January 2001; 'Jewish Leaders Warn Govt to Beware Kalejs Health Defence' (2 January 2001) *AAP News*, AAP Information Services Pty Ltd. See the following newspaper articles for accounts of how the case ended: Nick Lenaghan, 'Vic - Accused Nazi Dies, War Crimes Debate Continues' (30 December 2001) *AAP News*, AAP Information Services Pty Ltd; "'Witch-hunt' Over Kalejs' *Newcastle Herald* (Newcastle), 10 November 2001, 2; 'Kalejs No-show Thwarts Watchers', *The Age* (Melbourne), 26 January 2001, 3.

second client, potentially life-threatening. Both clients refuse to alter their current practices. The first client claims it has been storing its chemicals in that manner for over thirty years and has never had any problems. The second client tells you it cannot afford to alter its storage facilities to the required standards at present, but will attempt to do so over the next ten years as it anticipates making greater profits after the recession. It also claims it has never had any explosions. However, you know that their storage tanks are now twenty-five years old, the same age as a tank that recently exploded killing four people.²

This second scenario raises further questions about the responsibilities of lawyers to obey the law, as well as their responsibilities to clients. Must a lawyer be responsible for actively ensuring their client complies with the law? Does the lawyer have an obligation to make inquiries into facts that may amount to a breach of the law or a hazard to public health and safety? Should lawyers act on broader social responsibilities? Are there circumstances in which a lawyer can, or should, blow the whistle on a client or is client confidentiality absolute? Can lawyers always act honestly and independently in fulfilling their responsibilities to the law when they are dependent on the patronage of major clients? How should lawyers manage their relationships with clients in a way that balances their duty to serve the client with their duty to the court and the law?

Many of the questions raised by these scenarios are ethical questions. They relate generally to what is the good or right thing to do in particular circumstances, or to the moral evaluation of a person's character and actions, as well as to social rules and practices or attitudes.³ Is it possible to be a good person and a good lawyer? As a lawyer, what interests should I spend my life serving? How should I relate to clients? To what extent should I consider non-legal – particularly moral and relational – factors in attempting to solve clients' problems? What obligations do I owe to others beyond my clients such as, for example, opposing parties, colleagues, the public interest, the courts and my family?

Indeed the most significant and frequently discussed ethical issues that face lawyers can be categorised into the following four main questions.

Firstly, to what extent should lawyers' ethics be determined by any special and particular *social* role that lawyers ought fulfill? Should lawyers' conduct be prescribed solely by their role as vigorous (and often adversarial) advocate for clients' interests in a complex and adversarial legal system? Is there some alternative role that prescribes how lawyers should behave – perhaps as an officer of the court or as a trustee of the legal system with a special responsibility for

² Reported as 'Case Study 44' in Debra Lamb, 'Case Studies', in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 237, 253-4.

³ Ethical judgments can involve several activities: '[O]ne involves making personal choices: What is the right thing for me to do in these circumstances? At other times, we are prescribing conduct for others. At still other times, the emphasis shifts away from current choices, our own or anyone else's, and involves a special moral describing or grading [of an actor, an action, a social rule, a prevailing practice, emotional attitudes or other mental states]': Christopher D Stone, *Earth and Other Ethics: The Case for Moral Pluralism* (1988) 118-19.

ensuring compliance? Or should lawyers, in their professional lives, be held to the same general ethics as anyone else? For example, should lawyers argue for positions they do not believe in for the sake of clients, or should this be considered lying? Further, should lawyers always ensure they are directly advancing justice as much as possible, or should they argue their client's case and leave it to the system to determine where justice lies?

Secondly, how should *lawyers and clients* relate to one another in relation to ethical issues? Should lawyers consider the justice or morality of their client's actions in choosing whether and how to represent them? Should ethical considerations – such as the public interest, the personal, moral or religious beliefs of the lawyer or client, the impact of various options on the client's relationships or on the opponent – be explicitly discussed in legal advice and counselling? Should either the lawyer's or the client's view of morality prevail in deciding what to do? When can a lawyer act for a client, and when should a lawyer withdraw from acting for a client because of disagreement over ethical issues?

Thirdly, what is the lawyer's obligation towards *law and justice*? Should lawyers obey the letter of the law but test its limits in the interests of client autonomy? Or should they preserve the spirit and integrity of the law against client interests? Should lawyers work to reform the law and legal institutions in order to improve substantive social justice? For example, should they actively seek out test cases or lobby politically for legislative reform? How much should the lawyer need to find out about a client's honesty, guilt or innocence before advocating for them? In what circumstances should a lawyer be considered blameworthy for helping a client to break or evade the law or escape liability?

Finally, to what extent should lawyers, in their daily work, ensure that they *care for people and relationships*? Should lawyers pursue the moral goodness and/or best interests of the client in the context of his/her relationships despite what the law says or the broader dictates of social justice? Should lawyers work long hours for their calling even if it means neglecting themselves, their families and relationships? Or do lawyers' obligations to law and justice make personal care and relationships subsidiary?

II APPROACHES TO LAWYERS' ETHICS

Legalism tends to dominate the teaching and practical discussion of lawyers' ethics in the legal profession.⁴ Legalism treats legal ethics as a branch of law – 'professional responsibility' – which includes the rules of professional conduct (ie, self-regulatory professional conduct rules and disciplinary systems) and the law of 'lawyering' (including the laws of negligence, contract and equity (trusts and confidentiality) and the fiduciary duties as they apply to lawyers). One ethicist has commented that a focus on the *law* of lawyering in the legal ethics course exacerbates student perceptions that legal ethics courses are 'the "dog of the law school curriculum" in which students learn the rules without a foundation to challenge their premises and to explore their limitations.'⁵ Another puts it even more bluntly: 'Constructing a course around the law is a recipe for idolatry. It is not interesting enough to be ethics. Some of it is in the same category as the manual you read to get a driver's license.'⁶

The 'professional responsibility' approach may cater to the need for certainty, predictability and enforceability in a context where people often consider ethics to be subjective and relative. However it is, by definition, not an 'ethical' approach. It explicitly abandons ethics for rules.⁷ The law of lawyering is significant in that it is one way in which lawyers' ethics are institutionally enforced or regulated, and can certainly be helpful in guiding behaviour.⁸ However, it does not provide a basis for considering what values should motivate lawyer behaviour and choices about what kind of lawyer to be. This is not to say that it is not important to have and enforce a law of lawyering. But it is also necessary to have an ethical perspective on being a lawyer in order to judge what rules should be made (on a professional level) and also to decide (on a personal level) what the rules mean, how to obey them, what to do when there are gaps or conflicts in the rules and whether, in some circumstances, it may even be necessary to disobey them for ethical reasons.

- ⁴ One of the leading texts, Gino E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, 2001), is purely concerned with the law of lawyering. Indeed Dal Pont explicitly states that he chooses to talk about 'professional responsibility' because legal 'ethics' is something different. Nevertheless, he also defends the legalism of professional conduct rules as the most practical approach to the promotion and enforcement of legal ethics: Gino E Dal Pont, 'What are Rules of Professional Conduct For?' (1996) July *New Zealand Law Journal* 254. Another leading text, Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (2001), and the accompanying casebook, Ysaiah Ross and Peter MacFarlane, *Lawyers' Responsibility and Accountability: Cases, Problems and Commentary* (2nd ed, 2002), cover applied legal ethics but also address the law of lawyering in depth.
- ⁵ Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (1992) 306-7.
- ⁶ Thomas Shaffer quoted by Lisa G Lerman, 'Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals' (1998) 39 *William and Mary Law Review* 457, 465.
- ⁷ Alvin Esau, 'What Should We Teach? Three Approaches to Professional Responsibility' in Donald Buckingham, Jerome Bickenbach, Richard Bronaugh and Bertha Wilson, *Legal Ethics in Canada: Theory and Practice* (1996) 178.
- ⁸ See Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676.

Some teachers and commentators on lawyers' ethics go to the opposite extreme and propose that general and abstract moral theories or methodologies should be applied to the practice of law.⁹ Generally, a distinction is made between deontological or rule-based theories, on the one hand, and teleological or consequentialist theories, on the other. Kantian and utilitarian ethics are used, respectively, as the main examples of each approach. According to Kantian ethics, right actions or policies are those that primarily respect individual autonomy. Kantian methods reject the notion that 'the end justifies the means' – arguing that the means, since it often involves what happens to individuals, is at least as important as the outcome. In a teleological approach, by contrast, right actions or policies are those that bring about desirable consequences. Utilitarianism, a type of consequentialism, proposes that 'maximising the public good' should be the criteria for ethical action.

Generally, standard deontological and teleological moral theories are then contrasted with virtue ethics and/or the ethics of care. Virtue ethics shifts the focus of ethical attention from particular conduct and its impact to the quality or character of the actor. Virtue ethics approaches derive from Aristotle's emphasis on right character as a personal virtue and look to how an individual is motivated at a profoundly personal level. The ethics of care focuses attention on people's responsibilities to maintain relationships and communities and show caring responsiveness to others in specific situations. It is proposed as a correction to the traditional emphasis in ethical theories on individual rights and duties and formal, abstract, universalist reasoning.

The trouble with the moral theories approach to legal ethics is that, as is evident from the summaries above, the moral theories are so abstract that it is difficult for students and lawyers to apply them to concrete situations. For practical purposes, tools for moral judgment should help lawyers to identify and understand the ethically salient factors of a situation and to develop their own moral imagination. They need to know what considerations should apply at a more specific level. Furthermore, simply applying general moral theories to legal practice also begs one of the main questions debated in lawyers' ethics: to what extent should lawyers' ethics be determined by any special and particular social role that lawyers should play, or to what extent should lawyers be held to the same general ethics as anyone else?

The purpose of this article is to help build a critical morality of the legal profession. A critical morality assesses mores – actual moral beliefs and accepted practices (including in this context, professional responsibility rules) – to see whether they are rationally defensible and fit the available facts. The aim is not primarily theoretical, but practical. It is to improve the capacity for considered moral judgment – what some have called 'reflective equilibrium'.¹⁰ This does not

⁹ See, eg, Donald Nicholson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (1999) ch 2. For a good overview of the different theories in an applied ethics context see Noel Preston, *Understanding Ethics* (2nd ed, 2001) ch 3.

¹⁰ See Damian Grace and Stephen Cohen, *Business Ethics: Australian Problems and Cases* (2nd ed, 1998) 9.

mean that theory is irrelevant: ethical theories are a resource for decision-making, but they should be constantly tested in their application to particular situations. A critical morality will need to be able to deal with a plurality of theories, each of which is intended to be universal on its own terms. Indeed, this article proposes that there are four main strands of ethical reasoning or considerations available for lawyers in the context of Australian legal institutions: adversarial advocacy; responsible lawyering; moral activism; and ethics of care.¹¹ These four approaches are reflected in applied ethics scholarship and in the commonsense 'folk practices' of lawyers. Each emphasises a different value (or bundle of values) that lawyers should serve in legal practice. These four approaches are set out in this article as 'ideal types' that emphasise what is distinctive about each approach.

Some would argue for a form of 'moral pluralism' – that all four are true and useful in answer to different questions and in different situations. Others would argue that one alone should guide lawyers and, perhaps, the regulation of the ethics of legal practice.¹² As will become evident, the different approaches do tend to complement one another in pointing to different ethical considerations that might carry different weight in different circumstances.¹³ Thus, a practising lawyer could use these four approaches as diagnostic tools to make sure he or she had explored all the facts of the situation, considered all relevant ethical considerations, and come to an authentic response or decision.¹⁴ On the other hand, a lawyer could also use the descriptions set out below more like a menu to choose the ethical approach (or combination of ethical approaches) that most appeals to him or her as a way to organise his or her career in the law. In practice most lawyers, and also the rules of professional responsibility, apply a combination of approaches. However, the first and second – the adversarial advocate and responsible lawyering approaches – are the most dominant. The remainder of this article describes each of these four approaches with reference to applied legal ethics literature, the beliefs and practices of particular Australian lawyers and possible resolutions to the first case study set out at the beginning of this article (the potential resolutions to the second case study are left as an exercise for the reader). Table One sets out a summary of the four approaches and the different ways in which each approach answers the four types of ethical questions set out above.

¹¹ For a similar typology of three possible underlying values that legal practice should serve, see Charles Sampford with Christine Parker, 'Legal Regulation, Ethical Standard-Setting, and Institutional Design', in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice* (1995) 11, 21-4.

¹² Indeed there could be some single 'super' moral theory proposed at an analytical level that incorporates all of the considerations covered by these four approaches. Indeed, it is even quite possible that one of the four approaches below could be analytically conceptualised as a moral theory that entails all those considerations posited as relevant by one or more of the other three approaches.

¹³ I have previously argued, using an earlier (and cruder) formulation of the four approaches set out here, that all four sets of values are necessary to make the legal system work justly as a matter of institutional design: Christine Parker, *Just Lawyers: Regulation and Access to Justice* (1999) ch 5. This article is a re-working and development of those ideas.

¹⁴ As per Preston's 'ethics of response' following Niebuhr: Preston, above n 9, ch 4.

Table One: Approaches to Legal Ethics

	Social Role of Lawyers & Relationship to General Ethics	Relationship to Client and Law
Adversarial Advocate (The traditional conception)	Lawyers' ethics governed by role as advocate in adversarial legal process and complex legal system: partisanship, loyalty and non-accountability.	Lawyers' duty is to advocate client's interests as vigorously as possible within the bounds of the law (barest obligation to legality) – let the chips fall where they may. Extends beyond adversary role to ensuring client autonomy in a complex legal system as required by the rule of law.
Responsible Lawyer (Officer of the court and trustee of the legal system)	Lawyers' ethics governed by role of facilitating the public administration of justice according to law in the public interest.	Duties of advocacy are tempered by duty to ensure integrity of and compliance with the spirit of the law; to ensure that issues are not decided on purely procedural or formal grounds but substantive merits. Lawyer is responsible to make law work as fairly and justly as possible. May need to act as gatekeeper of law and advocate of legal system against client.
Moral Activist (Agents for justice through law reform, public interest lawyering and client counselling)	General ethics, particularly social and political conceptions of justice, moral philosophy and promotion of substantive justice define lawyers' responsibilities.	Lawyers should take advantage of their position to improve justice in two ways: (1) Public interest lawyering and law reform activities to improve access to justice and change the law and legal institutions to make the law more substantively just (in the public interest). (2) Client counselling to seek to persuade clients of the moral thing to do or withdraw if client wants something else.
Ethics of Care (Relational lawyering)	Social role of lawyers is irrelevant. Responsibilities to people, communities and relationships should guide lawyers (and clients) as everybody else.	Preserving relationships and avoiding harm are more important than impersonal justice. The value of law, legal institutions and institutional roles of lawyers and others are derivative of relationships. People and relationships are more important than institutions such as law. The goal of the lawyer-client relationship (like all relationships) should be the moral worth and goodness of both lawyer and client, or at least the nurturing of relationships and community.

III ADVERSARIAL ADVOCACY: THE TRADITIONAL CONCEPTION OF LEGAL ETHICS

The adversarial advocate is the predominant conception of what a lawyer's role and ethics ought to be in most common law countries including Australia. It is also the simplest, clearest and most absolute of the four approaches. It gives a reasonably clear answer of what to do in most situations: that is, a lawyer should advance their client's partisan interests with the maximum vigour permitted by law. This approach to legal ethics is often termed an 'amoral' one because it sees general moral theory as being irrelevant to lawyers' ethics.¹⁵ Rather the basis for lawyers' ethics is found in the social role that lawyers are supposed to play in the adversarial legal system.

Adversarial advocacy combines the 'principle of partisanship' and the 'principle of non-accountability'.¹⁶ The principle of partisanship means that the lawyer should do all for the client that the client would do for themselves, if the client had the knowledge of the lawyer. This is because the adversarial system is based on party control of the proceedings with each party ensuring that all legitimate arguments in their own favour are put forward. The principle of non-accountability follows from this: the lawyer is not morally responsible for either the means or the ends of representation, provided both are lawful. If the lawyer was morally responsible, it is said, the lawyer may not be willing to act vigorously to represent the client's interests.

This approach is most clearly justified in the case of trial lawyers, especially criminal defence advocates who must vigorously assert the rights of the accused against the superior power and resources of the state. By corollary, the adversarial advocate approach is least justifiable if applied to a criminal prosecutor who represents the state against the accused. It is well accepted that prosecutors should act as 'ministers of justice', pay elaborate attention to fairness and candour, and only present to the court those facts and arguments they believe to be well grounded.¹⁷ Historically, the adversarial advocate approach was essentially liberal, motivating lawyers to pursue client interests primarily against the power of the state. It was dependent on a conception of the rule of law that puts the courts between citizens and governments, and required lawyers independent of the state to help those who want to use the law to challenge or defend themselves against the government. However, the adversarial advocate approach has extended beyond representing client interests against state interests to representing client interests against other private interests and in any situation where a lawyer is necessary. Since ours is a complex legal system, lawyers must be readily available to empower those who need to use the law to organise their affairs, settle a dispute, defend themselves against the powers of the state or

¹⁵ Gerald J Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 *New York University Law Review* 63; Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1.

¹⁶ David Luban, *Lawyers and Justice: An Ethical Study* (1988) 7.

¹⁷ See Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002), rule 20.

establish a right against some private interest without pre-judging their clients or being held accountable for what the client chooses to do (provided it is within the bounds of law).

Lord Brougham's 1820 defence of Queen Caroline before the House of Lords is a favourite example of the ideal in action. King George IV was trying to rid himself of Caroline by alleging she had committed adultery but it was well known that the King himself had been unfaithful. Lord Brougham implied that although he did not yet need to defend the Queen by attacking her husband, if such a defence did become necessary neither he nor

even the youngest member in the profession, would hesitate to resort to such a course and fearlessly perform his duty ... [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.¹⁸

These words were controversial at the time they were stated,¹⁹ but the same philosophy can still be found today. In the case of *McCabe v British American Tobacco Australia Services Ltd*,²⁰ at first instance, the Victorian Supreme Court found that Clayton Utz, solicitors for the defendant British American Tobacco ('BAT'), had advised the company on a 'document retention policy' that intentionally resulted in the destruction of thousands of documents. These documents would have been relevant and favourable to McCabe's negligence case against the company for her terminal cancer. The Court also found that the defendant and their legal advisers had misled the plaintiff and the Court about the fact and extent of their document destruction. The judge struck out the defendant's defence and ordered judgment for the plaintiff, without a trial, on the basis that the destruction of documents had unfairly prejudiced the plaintiff's chances of success. This decision was later overturned on appeal.²¹ However, the lawyers for BAT were severely criticised in the media. The following comments in defence of their position well illustrate the traditional, adversarial conception of the responsibility and role of the lawyer:

Moral judgments have no place in the advice a lawyer gives to a client, according to the chief executive partner of Clayton Utz ... Asked what role a lawyer should play if a client was proposing to do something legal, but

¹⁸ Quoted in David Mellinkoff, *The Conscience of a Lawyer* (1973) 188-9.

¹⁹ *Ibid* 189.

²⁰ [2002] VSC 73 (Unreported, Eames J, 22 March 2002).

²¹ *British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002). For an account of the first instance judgment, including discussion of some of the ethical issues involved, see Camille Cameron, 'Hired Guns and Smoking Guns: McCabe v British American Tobacco Australia Ltd' (2002) 25 *University of New South Wales Law Journal* 768.

immoral, he said: 'I'm struggling to see where there would be a case where that would actually arise.' He said: 'The clients are entitled obviously to avail themselves of the full protection of the law and the lawyers are there to advance their clients' interests subject to the constraints of their professional duties and, in particular, their duties to the court. But if they operate within those constraints then they are acting appropriately.' He said a lawyer might advise on the 'appropriateness' of different strategies, but it was wrong for a lawyer to make moral judgments. 'We don't take a moral stance and it's not up to us, as advocates for a client, to take a moral stance. Ultimately that comes to a decision by the client, not the lawyer.' [The chief executive partner] said: 'We operate for a range of clients and make decisions based on a business assessment. What we aspire to ensure that we act with integrity at all times, but I don't think that involves bringing moral judgment to who we act for and who we don't act for.'²²

In the case of barristers, the adversarial advocate approach is taken as far as the 'cab rank' rule which requires that a barrister accept and vigorously defend a brief in any area in which he or she practices, if he or she is available and the client can pay. Whilst solicitors have not had such an onerous duty to initially accept clients, they, like barristers, owe duties of loyalty to their clients: to pursue the clients' cases vigorously, to keep them fully informed, and to take instructions. Indeed most of the rules of law and ethics taught in legal ethics and professional responsibility courses relate to the lawyer's duty of loyalty including the rules of confidentiality, diligence and fiduciary duties. These duties to clients are limited only by the general requirements of the law: a lawyer must represent his or her client to the full extent of the law. For some lawyers the adversarial advocate approach can also motivate a deliberate choice to work for clients who might otherwise miss out on representation because other lawyers find them or their cause distasteful or because they lack resources to pay for a lawyer.

Hence, in the example of the Jewish civil rights advocate and the accused Nazi war criminal at the beginning of this article, the adversarial advocate approach would require the barrister, if he was available, to take on the case and pursue all arguable defences to extradition for his client. Indeed, his history and reputation as a civil rights advocate suggest that normally he might go out of his way to act according to the adversarial advocate approach in ensuring that even the most morally repugnant accused in criminal cases were adequately and vigorously represented. On an adversarial advocate approach, the barrister's Jewish heritage and connections would be seen as a matter of personal loyalties and values and irrelevant to his role as a lawyer in advocating without discrimination for any client. It would be his ethical duty to his client to not allow those loyalties to affect the quality of his representation.

Although proponents of the adversarial advocate approach generally state that client advocacy should extend only as far as the law allows, the lawyer's duty to

²² From Margaret Simons, 'Lawyers Not Moral Judges: Clayton Utz Chief', *The Sunday Age*, (Melbourne), 4 August 2002, 3.

the law is usually left vaguely defined. Indeed, taken to its logical extreme, the adversarial advocate approach requires lawyers to resolve ambiguity in the law and their own ethical duties in favour of the client. One criticism of the adversarial advocate approach is that it prescribes only the barest obligations to the legal framework and is therefore a recipe for sabotage. While the legal system works on the basis that people will generally internalise norms and comply voluntarily, under the adversarial advocate approach

[lawyers] are expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favor their clients. The guiding premise of the entire system is that maintaining the integrity of rights-guarding procedures is more important than obtaining convictions or enforcing the substantive law against its violators.²³

There is little room in the relationship between an adversarial advocate and his or her client for the idea that the law might make legitimate claims on a client, that people might have responsibilities as well as rights under the law, and that a democratic state might 'have a role as guarantor of freedom where liberty is most at peril from the actions of individuals or private institutions'.²⁴ It is a consequentialist theory – individual lawyers and their clients do not have to concern themselves directly with justice or the public interest. This is ethically justified because as long as the lawyers for all parties in any action or matter act adversarially in the narrow interests of their own client, it is said that the legal system will make sure the right outcome ensues. Indeed, the adversarial advocate believes that for lawyers to act otherwise – that is, to judge potential clients before they have had their 'day in court' – would be a presumptuous denial of justice to anyone who wants to use the legal system. However, the fact that the advocacy ideal prescribes devoted service to clients' ends, whatever they may be, is problematic where the market functions so that the rich can buy up most legal services. It is also problematic when it creates a culture in which good advocacy means a culture of excessive adversarialism that raises the costs and length of litigation, making it more and more unaffordable. The advocacy ideal needs to be limited with regard to what it motivates lawyers to do for well paying clients. This is the role of the second ideal, responsible lawyering.

IV RESPONSIBLE LAWYERING: OFFICER OF THE COURT AND TRUSTEE OF THE LEGAL SYSTEM

There are two main alternative ways of thinking about lawyers' ethics in contrast to the adversarial ideal. The first is to accept that lawyers' ethics should be defined by the particular role of lawyers in the legal system and in society, but to define that role differently from the traditional adversarial advocate approach.

²³ Robert W Gordon, 'The Independence of Lawyers' (1988) 68 *Boston University Law Review* 1, 10.

²⁴ David Weisbrot, *Australian Lawyers* (1990) 45.

The second is to abandon the specificity of role morality for lawyers and argue instead that general ethics should apply to lawyers. This section considers the first of these alternatives – a different role morality approach for lawyers known as responsible lawyering. The following two sections consider the moral activist and ethics of care approaches – two approaches that apply more general ethics to the legal profession.

The adversarial advocate is only one social role that could govern the ethics of lawyers. Another possibility is the 'responsible lawyer' approach. The adversarial advocate approach focuses on the lawyer's role as the representative of the client in the legal system. The responsible lawyer approach, by contrast, focuses on the lawyer's role as an officer of the court and guardian of the legal system. The responsible lawyer is still an advocate for the client, but he or she has an overriding duty to maintain the justice and integrity of the legal system, even against client interests, in the public interest. According to this approach to lawyers' ethics,

the wellspring of a lawyer's duties to clients and to the public flows from the legal profession's unique role in society as the trustee for the forms of social order. The forms of social order include not only legislative, judicial and administrative forums, but also the process of private ordering through contract, and the negotiation and drafting of the constitutions of private organizations. Thus what the lawyer does in the privacy of the office may be seen as part of the *public* administration of justice because law is made and applied through lawyer counselling and planning, and often this 'private' law has public impacts as great as any ruling of a high court in a litigation matter. To keep *all* the forms of social order working fairly and with integrity is the obligation of the profession, and each lawyer must place that obligation above any particular client interest contrary to it. Loyalty to the fair process of law is primary and constrains lawyer behaviour on behalf of clients.²⁵

Unlike the adversarial advocate, the responsible lawyer focuses on maintaining the institutions of law and justice in their best possible form. But like adversarial advocacy, in the final analysis this is a broadly consequentialist approach to ethics with a focus on playing the role of responsible lawyer in order to preserve the social good that the legal system attempts to serve. Nevertheless some would argue that the legal system itself often operates in a more deontological way, setting out rules that demand obedience more than outcomes that can be obtained by a variety of means. To the extent that a lawyer sees the legal system as operating deontologically, the responsible lawyer approach will too appear more deontological in his or her approach to ethical issues.

It is generally beyond contention that lawyers should obey the letter of the law and should not assist clients in breaking it,²⁶ and the rules of professional responsibility also include rules designed to ensure that lawyers do not abuse the

²⁵ Esau, above n 7, 178-9.

²⁶ Subject to the possibility of conscientious dissent on a moral activist view, see Part IV.

court process on behalf of their clients. But in legal practice there are also many 'grey' areas where lawyers and their clients have choices about how to interpret the law (or indeed the rules of professional responsibility) and whether to act in accordance with the purpose of the law or solely in the (short-term financial) interests of the client. In choosing how to navigate those grey areas, the responsible lawyer will act in such a way as to contribute to the effectiveness and enforcement of the substantive law. He or she will not use loopholes, procedural rules or barely arguable points to frustrate the substance and spirit of the law. Responsible lawyers see the practice of law as a 'public profession' in which lawyers have a mediating function between the client and the law.²⁷ They certainly advocate for clients' interests but they also represent the law to their clients and help clients comply with the law. Thus, according to the responsible lawyer approach, not only is it desirable for lawyers to be independent of the state, it is also important they show some autonomy from clients and powerful private interests. Lawyers should not be too dependent on or too close to clients. Lawyers, as one legal ethicist has argued,

as people professionally skilled in casuistry, finding loopholes in rules, exploiting any ambiguity and uncertainty, and playing strategic games, ... can completely sabotage the framework. Clients who can afford to pay for such skills can rapidly exhaust adversaries who cannot, and thus turn the legal system into a device for evading the very rules it is designed to enforce, or worse, into a medium for extortion and oppression of the weak by the strong.²⁸

Another ethicist argues, '[i]f lawyers do not moderate their clients' tendency to extract the maximum advantage from the legal system, we can expect legal outcomes to become increasingly skewed in favour of resourceful parties, thus undermining the legitimacy of legal institutions.'²⁹ Since the market will always be such that some people will be able to buy more than others, there must be some limits to what they can buy. Responsible lawyers are prepared to say no to those who are prepared to use their economic power to compromise the integrity of the justice system. Because the legal system depends on shared ideas about justice, lawyers who exercise ethical judgments that go beyond 'pure' legal advice in order to interpret and apply the law might also provide more prescient and strategic advice about how the law is likely to be enforced and interpreted than lawyers who do not consider the ethical perspective.

For the responsible lawyer, just as for the adversarial advocate, personal moral beliefs are generally irrelevant. Instead the responsible lawyer will look to the ethics inherent in their role as officer of the court and in the law itself. This approach does not view lawyers as responsible for positively pursuing substantive justice according to some external standard (unlike the moral activist approach, below). But it does require that lawyers pursue those actions that seem

²⁷ See for example, Robert W Gordon, 'Corporate Law Practice as a Public Calling' (1990) 49 *Maryland Law Review* 255.

²⁸ *Ibid* 259.

²⁹ Robert Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (1988) 234.

likely to promote 'legal justice', that is, the basic values of the legal system. It sees the lawyer's role as helping clients to pursue justice according to law, no more and no less.³⁰

Thus in the extradition scenario at the beginning of this article, the responsible lawyer would have no trouble representing Kalejs in putting any fair arguments to the court that might militate against extradition. However given the fact that, if extradited, Kalejs will nevertheless face a legal trial with due safeguards on the merits of the allegations, and the fact that courts in the US, Britain and Canada had already found at least *prima facie* evidence that he was involved in war crimes, the responsible lawyer may feel that justice is best served if Kalejs is extradited and tried properly as soon as possible. The responsible lawyer would not allow him or her self to be party to any argument against extradition aimed merely at denying extradition without good legal reason, and would form their own view of the available evidence (eg by observations and inquiry as to Kalejs' health situation) in order to make that decision.

Responsible lawyering need not entail lawyers self-righteously forcing rigid interpretations of the law on unwilling clients. Rather, it does mean lawyers who creatively combine technical skill, a sense of social and legal responsibility and the vigorous pursuit of clients' interests; lawyers who do not demand 'dumb, literal obedience to every rule but creative forms of compliance that, although aiming to minimize cost and disruption to the company, effectively still realize the regulation's basic purposes'.³¹ Over the last 10 to 20 years in Australia and elsewhere many corporate lawyers, especially in-house counsel, have recognised that this approach to advising corporate clients is not only more personally satisfying but also, in the final analysis, more helpful to their corporate clients than a purely adversarial approach to lawyering. Lawyers of this type do not confine themselves to being 'the ministry for stopping [suspect] business'.³² They also engage in the creative task of designing systems for ensuring legal compliance and public legitimacy that add value to corporate products and services, improve business efficiency and enhance corporate image. Consider the way that the in-house counsel at the Australian headquarters of a multi-national waste management firm considered his role: following some issues concerning price-fixing and market-sharing conduct in the waste management industry in the US, one of his major areas of responsibility became compliance with competition and consumer protection law. This covers issues such as making sure the company's sales people and operatives are not dividing up the market with other firms and not misleading potential customers about their services. His description of his role is consonant with the responsible lawyer approach:

³⁰ See William Simon, *The Practice of Justice* (1988) 9-11 and 138-69 for an excellent account of this type of approach.

³¹ Gordon, above n 27, 277.

³² This phrase was used by compliance counsel for an insurance company in an interview with the author, 7 January 1998. See generally Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (2002).

You need a fair and just outlook in how a business should be operated ... There must be an underlying sense of fairness in your character ... that you shouldn't be overly opportunistic, smart and technical. It needs to be in your character to go looking for fair solutions to problems rather than just technical legal ones. A lot of lawyers love to be wise guys and to hit people over the head with the technical stuff. But in this work it is not a question of whether something is right or wrong in the [technical] legal sense but of whether it could be perceived to be right or wrong [in the spirit of the law]. In a competitive industry it is to our detriment in the long run if we are seen as a bunch of wise guys.³³

The responsible lawyering approach clearly addresses the problem of lawyers helping clients to escape, manipulate or abuse the legal system. Yet it also puts lawyers in danger of not adequately serving clients' goals and interests. It is probably for this reason that there is no strong tradition in Australian or other common law legal systems which emphasises the responsible lawyering ideal of duty to the justice of law without also emphasising the advocacy ideal of duty to client. The responsible lawyer and adversarial advocate approaches are often in tension with one another in professional conduct rules and widely accepted ideas of legal ethics. This is reflected in the way that debate about ethical issues for lawyers is frequently framed as a question of how to balance the lawyer's duty to the client with the lawyer's duty to the court or, more broadly, to the integrity of the law. Yet they are also recognised as complementing one another. Both approaches derive a role for the lawyer from the system for administration of justice and, in a sense, both roles are required by our system of administration of justice. Radically adversarial, 'loophole' lawyering, untempered by the duty to the law and to the court, cannot ultimately be justified by the legal system because it is destructive of the legal system.

Yet neither the adversarial advocate approach, with its focus on individual client rights, nor the responsible lawyer approach, with its emphasis on preserving the justice of the law as it stands, leaves much scope for critique of the law in accordance with standards of social justice external to the law. The responsible lawyer approach, in particular, allows little possibility for testing the limits of the law or showing up its absurdity. In that sense it is an essentially conservative ethical approach. Moral activism, by contrast, focuses on social critique and promoting reform of the law in the public interest.

³³ Lawyer quoted in *ibid* 172. On preventive lawyering by in-house corporate lawyers see also Robert Gordon and William Simon, 'The Redemption of Professionalism?' in Robert Nelson, David Trubek and Robert Solomon (eds), *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (1992) 230, 252-3; Karl J Mackie, *Lawyers in Business: And the Law Business* (1989); Robert Eli Rosen, 'The Inside Counsel Movement, Professional Judgment and Organizational Representation' (1989) 64 *Indiana Law Journal* 479.

V MORAL ACTIVISM: AGENTS FOR JUSTICE WITH CLIENTS AND THE LAW

The second type of alternative to the adversarial advocate approach is to argue that it is not appropriate for lawyers to have a special ethics defined by role at all. Rather they should abide by ordinary ethics, although the application of these ethics to their practice as lawyers may have particular features. Two approaches to lawyers' ethics that propose different ways in which general ethics should apply to legal practice are the 'moral activist' and 'ethics of care' approaches. The ethics of care is discussed in the following section. It finds its inspiration in theories of virtue ethics and a broader literature on the ethics of care. Moral activism, by contrast, requires that mainstream consequentialist and, to a lesser extent, deontological theories of ethics (and of justice in particular) should be applied to legal practice.

Moral activism argues that lawyers should do good according to whichever general ethical theory the individual lawyer finds attractive (of course, this 'theory' need not be a formal philosophical theory – it may simply be the lawyer's personal ethics and philosophy of life). In particular, lawyers should be particularly concerned with doing justice because the legal system is fundamentally concerned with justice. Thus moral activism encourages lawyers to have their own convictions about what it means to do justice in different circumstances and to seek out ways to implement those convictions as lawyers. They cannot escape moral accountability for their actions by playing the role of adversarial advocate or even responsible lawyer. American legal ethicist David Luban, who coined the term 'moral activism', describes what this is likely to mean in practice in the following way:

Moral activism ... involves law reform – explicitly putting one's *phronesis*, one's savvy, to work for the common weal – and client counseling. ... And client counseling, in turn, means discussing with the client the rightness or wrongness of her projects, and the possible impact of those projects on "the people" in the same matter-of-fact and (one hopes) unmoralistic manner that one discusses the financial aspects of a representation. It may involve considerable negotiation about what will and won't be done in the course of a representation; it may eventuate in a lawyer's accepting a case only on condition that it takes a certain shape, or threatening to withdraw from a case if a client insists on pursuing a project that the lawyer finds unworthy. Crucially, moral activism envisions the possibility that it is the lawyer rather than the client who will eventually modify her moral stance. ... But, ultimately, the encounter may result in a parting of ways or even a betrayal by the lawyer of a client's projects, if the lawyer persists in the conviction that they are immoral or unjust.³⁴

³⁴ Luban, above n 16, 173-4.

Unlike the responsible lawyer approach, moral activism is not confined by the idea of justice inherent in the legal system – instead it contemplates that the legal system may need to be changed to become more just, and that lawyers may have a responsibility to effect this change. Moral activists argue that lawyers should use legal practice to change people, institutions and the law to make them conform better to general ideals of social and political justice. It is a tradition of active citizenship by lawyers to actively improve justice in ways that merely doing their duty to paying clients and the legal system, as per the adversarial advocate and responsible lawyer approaches, leaves untouched. To the extent that the law and legal processes as they stand coincide with the lawyer's ideals of justice, the moral activist lawyer will behave similarly to the responsible lawyer. But the moral activist lawyer does not see him or her self as necessarily confined by a duty to the law where the law is unjust, but rather as obliged to do justice even if that involves changing or challenging the law. Similarly, where a moral activist lawyer believes in the justice of a particular client's cause, they will behave like an adversarial advocate even to the extent of exploiting loopholes and testing the limits of the law to establish their client's cause. But a moral activist will not vigorously advocate for clients where they believe their cause is not just.

Many of the obvious examples of moral activist lawyers are often those from the social democratic left (eg, those lawyers who worked for little or for free to represent indigenous clients in ground-breaking native title claims or stolen generations cases). However a lawyer could equally be a moral activist for other causes and political beliefs. For example, in the Kalejs extradition case, a moral activist lawyer might have a strong belief that prosecuting war crimes more than 50 years after the event is unjust and hence may wish to represent Kalejs to prevent a war crimes trial taking place. Another moral activist lawyer might take the opposite view and see accountability for the horrendous genocides of the twentieth century as an essential element of global justice. Such a lawyer would probably find it impossible to act for Kalejs.

As is evident in the quotation from Luban above, a moral activist approach to legal practice can manifest itself in several ways. Firstly, a moral activist lawyer may try to represent only those clients that embody 'worthy causes' or those who are often the subject of injustice. Lawyers who choose to do legal aid work for a reduced fee, to pursue a career in the legal aid or community legal centre sector or to volunteer their time for poor clients are common examples of moral activism in action.

But moral activism can also lead lawyers to become involved in more politicised law reform activities and in the representation of people and causes to create legal and social change. In this type of 'public interest' lawyering, the lawyer is as likely to seek out the client to fit the cause as the client is to seek out the lawyer. In extreme cases, the participation of individual clients is almost subordinated to the bigger cause such as a class action (against a corporation in a product liability case) or constitutional challenges (to government actions). Consider the litigation concerning the Australian government's actions in preventing 433

asylum seekers on board the Norwegian vessel, MV Tampa, from disembarking on Australian soil. The Victorian Public Interest Law Clearing House (PILCH) organised a team of private lawyers (from a commercial law firm and senior and junior barristers) to act for free in seeking the release and delivery onto Australian soil of the asylum seekers. Because it was impossible to contact the asylum seekers on board the ship, the Victorian Council for Civil Liberties (Liberty Victoria), itself acting through public interest lawyers, became the client. In effect, the public interest lawyers themselves defined the cause and the shape of the litigation in the absence of instructions from the asylum seeker clients. The Directors of PILCH comment about the case:

Striking were the roles of the lawyers, and how they were perceived both within the legal profession and more broadly. 'How much money do you make out of defending these worthless scum?', senior counsel was asked by a member of the public. On another occasion it was '[w]hy don't you and all of your tree-hugging, libertarian, do-gooder, wanker buddies go to Afghanistan and practise your law?' In contrast, his Honour Justice French (one of the judges in the majority in the Full Court [who denied the application]) characterised the lawyers as 'acting according to the highest ideals of the law' and of '[serving] the rule of law and so the whole community'. ... The actions of the lawyer were bold. Amongst other things, these were proceedings against the highest echelons of government. They involved a challenge to executive power to ensure the lawful exercise of discretion and concerned conspicuous and controversial government policy. The issues were highly politicised, as the events unfolded in the weeks leading up to a federal election campaign. ... There is a hunger [amongst lawyers] for public interest work that is interesting, challenging, even confronting and political, and involves direct contact with 'real' people. There is also a desire to see an outcome or a challenge to the status quo, not just on a micro level for individual clients, but also on a larger scale.³⁵

Not all lawyers all the time have the opportunity to get involved in public interest cases for justice causes they really believe in. But, secondly, moral activism would also affect the way that lawyers represent and advise all their clients, as argued in the quotation from Luban above. Moral activist lawyers seek to challenge and persuade clients to do what the lawyer considers the just thing, always bearing in mind the possibility that the client might also persuade the lawyer about what justice involves. Luban illustrates this style of law practice by invoking a famous instance of Abraham Lincoln's advice to one of his law practice clients:

Yes, we can doubtless gain your case for you; we can set a whole neighbourhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem

³⁵ Samantha Burchell and Emma Hunt, 'From Conservatism to Activism: The Evolution of the Public Interest Law Clearing House in Victoria' (2003) 28 *Alternative Law Journal* 8, 11.

to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.³⁶

Contrast this quotation with Lord Brougham's defence of Queen Caroline quoted above.

As its label suggests, moral activism gives lawyers a much more proactive role in ensuring justice than either responsible lawyering or adversarial advocacy. Indeed the justice of our current legal system is at least partially dependent on the fact that there are lawyers (motivated by moral activism) who are willing to work for reduced fees or voluntarily for clients and causes otherwise unable to secure representation, lawyers who seek out and are committed to public interest causes, lawyers who will fight battles no one else will fight, and lawyers who seek to reform the law, the legal system and their own profession in the interests of justice. Yet moral activism as a comprehensive approach to legal practice can also be criticised for neglecting the wisdom of adversarial advocacy that anyone should be entitled to legal representation and the chance to argue their case in court without first having to persuade a lawyer that their case is worthwhile. Furthermore, moral activism runs the risk of encouraging lawyers to act without regard to law and procedural fairness when they do find a client they believe in. Unlike responsible lawyering, moral activism prescribes no particular duty to the law and the legal system where a lawyer believes their cause is just. Finally, as an ethical approach to lawyering, moral activism has a tendency to place the lawyer's commitment to an ideal of justice above the client. The final approach, the ethics of care, puts the focus back on the lawyer's responsibilities to the client and their relationships.

VI ETHICS OF CARE: RELATIONAL LAWYERING

The ethics of care, like moral activism, emphasises the integration of personal ethics with legal practice. While moral activism proposes that lawyers should act in a way calculated to best promote social and political justice, the ethics of care, by contrast, is more concerned with personal and relational ethics. The ethics of care focuses on lawyers' responsibilities to people, communities and relationships. This approach is often linked to the work of Carol Gilligan which proposed that traditional rights-oriented theories of the development of moral

³⁶ Luban, above n 16, 174.

reasoning privileged typically male forms of ethical reasoning and ignored the care based ethics that many females tend to use.³⁷

Whereas the ethics of justice is founded on the idea that everyone should be treated equally, the ethic of care requires that no one should be hurt. Whereas men tend to stand on principle and act according to people's rights irrespective of the consequences, women are more pragmatic, being more concerned to uphold relationships and protect their loved ones from harm. Whereas the ethic of justice assumes that one can resolve moral dilemmas by abstract and universalistic moral reasoning, the ethic of care requires due attention to context and the specific circumstances of each moral dilemma. And in resolving such dilemmas, men tend to rank ethical principles, whereas women attempt to address the concrete needs of all and to ensure that if anyone is going to be harmed it should be those who can best bear the harm.³⁸

The empirical claim made by Gilligan as to whether an ethics of care is a typically female ethic has been controversial for obvious reasons. But the general contours of an ethic of care have developed a life beyond the gender debate. The ethics of care has been generally accepted as an alternative approach to ethical reasoning in general, and the application of ethics in legal practice in particular.

Legal ethicist Thomas Shaffer also developed the language of an 'ethics of care' to describe his deeply humanist, relationship, and faith-based application of ethics to legal practice.³⁹ Because it is a contextual style of ethical reasoning, the ethics of care can be difficult to grasp. One teacher of legal ethics has explained Shaffer's rich descriptions of what it involves in the following way:

The ethics of care is risky. Shaffer attempts to convey it through a series of contrasting terms and through a cast of contrasting characters. The ethics of care is not representation but ministry; its rests not on loyalty but on fidelity, not on contract but on covenant ... Ministry focuses on the relationship between lawyer and client; it makes relationships central. Shaffer's view of relationships is teleological: they are goal directed, "going somewhere". He argues their proper goal is conversion, conversion to truth and goodness. Achieving a conversion requires movement, change. Inducing change requires an ability to persuade. Those who wish to persuade must be open to persuasion. These ideas diverge radically from traditional ideas of law practice. It is not the standard view that one's effectiveness as a lawyer might be measured by the strength of that commitment rather than by the number of

³⁷ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982). For influential applications of Gilligan's work to lawyers' ethics, see Rand Jack and Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989); Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39. For further discussion see Carrie Menkel-Meadow, 'Portia Redux: Another Look at Gender, Feminism, and Legal Ethics' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 25.

³⁸ Caroline Maughan and Julian Webb, *Lawyering Skills and the Legal Process* (1995) 36.

³⁹ Thomas L. Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (1981); Thomas Shaffer and Robert Cochran, *Lawyers, Clients and Moral Responsibility* (1994).

cases he wins. If growth through relationships is central, morals and moral growth often will be the subjects of relationships ...⁴⁰

In both conceptions, the ethics of care for lawyers focuses on trying to serve the best interests of both clients and others in a holistic way that incorporates the moral, emotional, and relational dimensions of a problem into the legal solution. It is particularly concerned with preserving or restoring (even reconciling) relationships and avoiding harm. It sees relationships, including both the client's network of relationships and the lawyer's own relationships with colleagues, family and community, as more important than the institutions of the law or systemic and social ideas of justice and ethics. While few lawyers might label their approach an 'ethics of care', the concerns that motivate academic discussion of the ethics of care have also been tremendously influential in legal practice in recent times in incremental, if not revolutionary, ways. There are at least three practical ways in which 'ethics of care' concerns have influenced legal practice in recent times.⁴¹

Firstly, the ethics of care encourages lawyers to take a more *holistic* view of clients and their problems. Thus, lawyers following the ethics of care are likely to spend more time listening to and discussing the broader concerns of clients and the way that legal issues are likely to impact on other aspects of their lives and relationships. At the very least, the ethics of care encourages lawyers and clients to consider the non-legal and non-financial consequences (eg, relational, psychological and to reputation) of different legal options. Some lawyers even refer clients for advice or counselling for the non-legal aspects of their legal problems or incorporate relational and psychological wellbeing more explicitly into legal representation (eg, through movements such as therapeutic jurisprudence).⁴² More particularly, the ethics of care encourages lawyers and clients to view ethics and the moral propriety of the client and lawyer as an explicit part of the lawyer-client relationship. It assumes that lawyers and clients will want to discuss the ethical implications of different courses of action, as well as the social, psychological, financial and other consequences. But it does not presume that the lawyer's initial view of the ethics of a client's situation are automatically correct. Rather it emphasises dialogue about ethics and respect for each other's positions.

Thus, secondly, the ethics of care emphasises dialogue between lawyer and client and *participatory* approaches to lawyering. The lawyer-client relationship is built on mutual trust and shared knowledge. At the most mundane level, this means that lawyers have a responsibility to make sure that clients understand the consequences, costs and uncertainties associated with alternative courses of action available to them so that the client can choose which option to pursue in an informed way. More ambitiously, the ethics of care puts a premium on the

⁴⁰ Mark Weisberg, 'Integrating Personal and Professional Lives: An Essay on Thomas Shaffer's *On Being a Christian and a Lawyer*' (1984) 9 *Queen's Law Journal* 367.

⁴¹ The three ways are based on Maughan and Webb, above n 38, 118-20.

⁴² See Michael King, 'Applying therapeutic jurisprudence from the Bench: Challenges and Opportunities' (2003) 28 *Alternative Law Journal* 172.

lawyer spending time listening to the broader concerns of the client so that the legal solution they offer fits in with the other aspects of the client's life. It also requires the lawyer and client to both agree as to any course of action that is taken. Neither can decide for the other – the (fully informed, authentic) consent of both to any course of action is considered necessary as the lawyer-client relationship is seen as a partnership in which both parties are equally responsible. Therefore legal advice is likely to be offered in dialogue with the client, rather than the client being told what to do. But at the same time, the lawyer will not take actions in representing a client that the lawyer him or her self does not feel ethically (and generally) comfortable with.

Thirdly, because the ethics of care encourages lawyers (and clients) to see themselves within a network of relationships and to understand the feelings and experiences of others within those relationships, they are likely to look for *non-adversarial ways to resolve disputes* and preserve relationships if possible. Therefore lawyers will recommend dialogic, non-litigious means to resolve disputes such as negotiation, meditation, and other forms of alternative dispute resolution. There will be less emphasis on positional bargaining and more on creative, 'win-win' resolutions. It has been suggested that, following an ethics of care, cases that do go to court

would be conducted on the basis of 'good faith' principles. These would suggest a need for: (a) more dialogue and fuller disclosure between parties; (b) respect for the interests of other parties, resulting in avoidance of trial and pre-trial adversarial tactics, and (c) less intimidatory advocacy when in court.⁴³

Outside of the dispute resolution context, the ethics of care lawyer is also likely to take a collaborative, preventive, problem-solving approach to deals and transactions.

Each of these three aspects of legal practice – holism, lawyer-client participation, and a preventive, problem-solving approach – are now regularly advised in books, seminars and, to an extent, conduct rules on legal interviewing, advising and 'client care'. Many lawyers have chosen to devote themselves to advocating and promoting alternative dispute resolution precisely because they (and their clients) are disenchanted with adversarialism as a way of resolving disputes and prefer to be part of a problem-solving, relationship-preserving way of practising law, whether the concern is with business or family relationships. Similarly, the profession as a whole has also recognised that 'client care' – effective communication with clients and participation by clients in decision-making – is necessary for delivering legal services effectively and preventing client complaints and public disenchantment with the profession. These are everyday ways in which the ethics of care have influenced legal practice.

Consider also the following description of a lawyer-client relationship as an example of a more unusual way in which an ethics of care might be demonstrated:

⁴³ Maughan and Webb, above n 38, 119.

My first legal client in St Kilda, in March 1985, was a sex worker named Julie. She arrived at St Kilda Baptist Church, which surprising as it might sound houses a legal office, five minutes before her case was due to start at the St Kilda Court ... I hurriedly threw on my coat and we started walking to the old St Kilda Court ... I could not help noticing that she was sporting an ugly black eye, with bruising extending down over the cheekbone and towards her chin. I thought she had been callously bashed. I was wrong. I asked her cautiously and sympathetically how she had received the bruising. Julie bluntly told me that her nerves had got to her the previous night when she realised that she might go to prison because of her many prior convictions for theft and prostitution, and so she had attempted to shoot up in her arm. After a number of failed attempts to locate a vein, she had got angry, and in desperation had injected heroin into a vein in her cheek. I inwardly freaked, but tried to look unshocked ... My plea in mitigation of the offence convinced the magistrate to give her one more chance before prison and he imposed yet another fine. Julie was ecstatic and told me indelicately how many clients it would take to pay out the fine ... She planted a big kiss on my cheek and graciously invited me out for lunch. I must confess to some deep-seated, middle-class ambivalence, and I hesitated before accepting ... She replied with delight that she knew a soup kitchen down the road that provided a great free lunch ... My judgments of Julie dissolved when she told me how she had been raped at fifteen by one of the many different men who passed through her mother's life and home. She felt so 'dirty' that she decided she would never let any man do that to her again. She would at least make them pay! I understand how in a tragically coherent way she was taking back power over her life. Who was I to judge? [We arrived] at the meal program. Unannounced, she commanded silence by telling everyone, including those serving, to shut up because she wanted to introduce her lawyer, who was the best legal eagle in town. I politely waved to the many street people gathering for lunch and lined up and got my dinner.⁴⁴

The narrator is a lawyer who also happens to be a minister of religion. His care for his client's legal rights, but also the rest of her life, is obvious from his description of his encounter with her and the way in which he is willing to enter into her life. But the care and respect that this lawyer shows his client is met by an equal care and respect shown by the client towards the lawyer in telling him her story and taking him to lunch to meet her community. Consistent with the ethics of care the human, relational aspects of the lawyer-client interaction are here considered central by both lawyer and client.

In the war crimes extradition scenario at the beginning of this article, an ethics of care approach would require the concerned barrister to consider not only what was in the best interests (including for the moral worthiness) of his potential client, but also the ramifications of taking on this client to his own relationships within his family and community. In relation to the client, a potential lawyer may well be concerned that regardless of what he had done in the past, the client was

⁴⁴ Tim Costello, *Streets of Hope: Finding God in St Kilda* (1998) 1-3.

now an old, sick man and deserving of care and compassion for those reasons, if no other. Hence, a lawyer following the ethics of care may be willing to argue that, regardless of any wrong committed in the past, Kalejs should not be extradited and tried at this late stage of his life. Nevertheless, a strong commitment to the ethics of care is likely to require Kalejs' lawyer also to discuss with him what he (allegedly) did in the past and, assuming he was involved in war crimes in some way, look for ways in which some reconciliation or resolution could be found. This might be difficult in this case given the effluxion of time, the horrific nature of the crimes, and the fact that the client was in fact suffering from dementia. But the goal might be that Kalejs would agree to some sort of apology and acknowledgement of wrongdoing, regardless of whether he was extradited and tried or not. Granted these possibilities for a 'caring' way of representing an alleged war criminal (if the client could be persuaded), the ethics of care also requires a potential lawyer to ask what impact the representation would have on their own personal relationships and community. In this case, given the controversy over such cases, the barrister's previously stated views on Kalejs, and the barrister's position in the Jewish community, taking on this client might easily have been seen as a betrayal of his friends and families and of his own identity. It is possible that a Jewish civil rights advocate (taking a moral activist or adversarial advocate approach) might choose to represent an alleged Nazi war criminal out of his or her commitment to civil rights, if important civil rights issues were at stake. But in this case, the previous decisions by courts abroad that Kalejs was in fact a war criminal, the general view that Australia has been particularly negligent in failing to bring war criminals to justice, and the fact that Kalejs had first escaped to and then returned to Australia having been deported from the US, Britain and Canada, suggest it was open to assume that Kalejs had rather managed to *avoid* justice than been the victim of injustice. Thus it would be difficult for a Jewish lawyer, even a civil rights advocate, plausibly to argue to himself, his friends and community that either justice, or even compassion, required representation of Kalejs in these circumstances. In the final event, the barrister decided not to represent Kalejs.⁴⁵ Kalejs died before the extradition proceedings were complete.

The ethics of care approach is more focused on the client's best interests than the moral activist or responsible lawyer approaches. However, unlike the adversarial advocate approach, it sees the client's best interests in the context of the client's network of relationships. The moral activist sees the individual client as more dispensable in the cause of justice and social change. The ethics of care approach is more interested in personal change than social change. The caring lawyer wants the client to become the best person they can be. In that sense, the ethics of care is as concerned with the ethics of the client as with the ethics of the lawyer, and sees them as being interdependent. However, the ethics of care approach can have quite a conservative impact. Because the emphasis is on the

⁴⁵ It is not known why in real life the barrister did not choose to represent Kalejs, and the author is not intending to speculate or presume as to the reasons for that.

goodness and worth of the individual client and on preserving relationships, it is not strong on identifying and addressing social and political injustice.

VII CONCLUSION

The purpose of this article is practical. The four approaches set out above are a set of conceptual tools that can be used to guide or assess the ethics-in-practice of Australian lawyers. Most lawyers are unlikely to talk in terms of 'adversarial advocacy', 'responsible lawyering', 'moral activism' or the 'ethics of care'. Yet lawyers do implicitly act on intuitions and personal philosophies of life and lawyering that appeal to one or more of the logics in each of the four approaches shown above. Each of these four approaches is therefore capable of providing normative guidance for real lawyers in real situations (and regularly does so). Because they are also based on applied legal ethics theory, these approaches have some theoretical coherence and are capable of providing a basis for 'reflective equilibrium'.⁴⁶ They can be used as a set of considerations that lawyers ought to 'respond' to in deciding what to do in any particular situation.

These four approaches can be seen as options on an a la carte menu – one could choose which approach one prefers for the purpose of guiding one's own life as a lawyer or assessing others. Or they could be seen as the tools and ingredients available for creating your own dish – there are a range of arguments and considerations available which can be combined and used in a variety of ways, each unique to each individual in each of the circumstances of their own life. But each approach requires a response, a decision about whether to use it in a particular situation and, if not, why not, or if so, how? Some of the most thoughtful commentators on legal ethics and the skill of teaching legal ethics argue that the key to understanding and learning legal ethics is a process of judgment. For example, Luban and Milleman argue that 'moral decision making involves identifying which principle is most important given the particularities of the situation, and this capacity is precisely what we mean by judgment ... [R]educing judgment to rules or formulas lands us in an infinite regress of rules.'⁴⁷ Moral judgment without rules or formulas is likely to be messy. The approaches set out here provide a series of questions and considerations that help structure the mess. But it is up to each lawyer to decide what to 'cook' with them.

⁴⁶ Grace and Cohen, above n 10, 9.

⁴⁷ David Luban and Michael Milleman, 'Good Judgment: Ethics Teaching in Dark Times' (1995) 9 *Georgetown Journal of Legal Ethics* 31, 39.