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A Career Choice Critique of Legal Ethics Theory

Andrew M. Perlman
Suffolk University Law School, aperlman@suffolk.edu

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A Career Choice Critique of Legal Ethics Theory

Andrew M. Perlman[*]

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[*] Assistant Professor, Suffolk University Law School. B.A., Yale, 1993; J.D., Harvard, 1996; LL.M., Columbia, 2001. For his guidance and helpful comments on numerous drafts of this article, I want to thank William Sage. I am also grateful for the valuable suggestions of Lisa Aidlin, Philip Genty, Jane Ginsburg, Jeffrey Gordon, Doron Kalir, Raleigh Levine, Peter Margulies, Michael O'Hear, Stefan Pryor, Joshua Silverstein, William Simon, Joseph Singer, Frederick Sperling, Byron Stier, Bradley Wendel, and David Wilkins.

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INTRODUCTION

How should lawyers choose their clients and legal strategies? Legal ethicists have offered dramatically different answers to this question,[1] but their responses usually share one common premise: that practitioners have sufficient freedom to make client selection and strategy decisions.[2] In fact, certain types of law practice place such significant restrictions on lawyers' autonomy that career choices now provide many attorneys with their main source of discretion. This article suggests that, in light of these constraints, theorists need to explore the ethical dimensions of career choices but have repeatedly failed to do so.

Consider law firm Covington & Burling's decision in 1985 to drop state-owned South African Airways as a client because of its connection to the apartheid government. Traditional theories have asked whether Covington's lawyers, and specifically those attorneys who made the actual client selection decision, acted ethically.[3] This article suggests that such a focus overlooks the dilemmas faced by lawyers who had little or no direct control over Covington's choice, including associates and junior partners. Given that the airline helped to pay those lawyers' salaries, did they have

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[1] *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 140-200 (2d ed. 1995) (surveying a range of materials that address this question). *Compare* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (offering a justification for the dominant view, which maintains that lawyers should pursue all legally permissible strategies on behalf of a client and that lawyers should not be held accountable for their choices of clients and tactics) [hereinafter Fried, *The Lawyer as Friend*] *and* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986) (same) [hereinafter Pepper, *The Lawyer's Amoral Ethical Role*], *with* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) (presenting a critique of the dominant view that urges lawyers to engage in moral activism when choosing their clients and strategies), *and* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998) (developing a critique that advises lawyers to make professional judgments that are consistent with conceptions of justice).

[2] *See* Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 283 (1993) (noting the implicit assumption of autonomy in traditional understandings of the attorney-client relationship); David Wilkins, *Every Day Practice Is the Troubling Case: Confronting Context in Legal Ethics*, *in* EVERYDAY PRACTICES AND TROUBLE CASES 71 (Austin Sarat et al. eds., 1998) (same).

[3] *See, e.g.*, William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1094-96 (1988).

an ethical obligation to leave the firm if Covington had continued to represent the airline? What about law students who considered joining Covington? Should they have refused the firm's offer of employment?[4] In each of these cases, the lawyers and students had minimal client and strategy selection discretion, so the ethical quandaries they faced—quandaries ethicists typically do not describe—were located at the career choice level.

Current ethics theories do not address these kinds of questions because they incorrectly assume that lawyers have considerable freedom regardless of the practices they select.[5] In reality, many attorneys no longer work in the small settings that have provided substantial discretion in the past;[6] instead, they increasingly practice in large firms, government jobs, in-house counsel positions, and even multidisciplinary arrangements,[7] which generally confer more limited freedom.[8] As a result, existing

[4] Law students at the time faced this very question and frequently decided not to join the firm. Ruth Marcus, *Covington & Burling Drops S. African Airline as Law Client*, WASH. POST, Oct. 5, 1985, at C3 (describing how Covington & Burling "dropped South African Airways as a client after lawyers in the firm criticized its representation of the government-owned airline and students at Harvard, Yale and other law schools began boycotting Covington's efforts to recruit associates"). Simon does refer in passing to law students' decisions to boycott Covington & Burling, but he never addresses how their constraints and considerations differed from Covington's decision-makers. *See* Simon, s*upra* note 3, at 1130.

[5] Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 590 (1985) (claiming that "most of the seminal work in legal ethics has focused on individual lawyer-client relationships that presuppose a considerable measure of personal autonomy"); Wilkins, *supra* note 2, at 80 (explaining that for many lawyers "the claim that they are autonomous decision makers is more myth than reality").

[6] RICHARD ABEL, AMERICAN LAWYERS 203 (1989); Begg, *supra* note 2, at 291; John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 825-26 (1992); Milton C. Regan, *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 6-7 (1999); Rhode, *supra* note 5, at 590; Wilkins, *supra* note 2, at 80; *see also* Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender, and Educational Debt,* 70 N.Y.U. L. REV. 829, 839-46 (1995) (comparing the proportion of lawyers in various forms of practice over several decades and finding that the percentage of solo practitioners has decreased over time).

[7] Although the American Bar Association recently rejected a proposal to permit multidisciplinary practices, see *ABA Rejects Idea Backing Multidisciplinary Practices,* WALL ST. J., July 12, 2000 [hereinafter *ABA Rejects Idea*], some firms already have begun to explore such arrangements within the confines of the present system. *See, e.g.*, Tom Herman, *Ernst & Young Will Finance Launch of Law Firm in Special Arrangement*, WALL ST. J., Nov. 3, 1999, at B10 (describing accounting firm Ernst & Young's financing of a new Washington, D.C. law firm in preparation for the probable change); Ritchenya A. Shepard, *Why MOFO Teams with KPMG*, NAT'L L.J., Aug. 23, 1999, at A12 (reporting an alliance between San Francisco law firm Morrison & Foerster and accounting firm KPMG).

[8] *See* Begg, *supra* note 2, at 292 (explaining that "a significant minority of legal practitioners [such as government, legal aid, and private industry lawyers] find themselves in forms of employment where they may not discriminate in the selection of their clients");

theories do not explore the complexity of the most ethically significant decision available to many lawyers and the decision that is both temporally and conceptually prior to strategy and client selection decisions: the choice of jobs.[9]

What I call a career choice critique rests on this claim and promises to improve existing ethics theories in two ways. First, the critique will ensure that prevailing models advise attorneys regarding their career decisions. The problem is that ethicists have focused on client and tactical choices even though career decisions now offer many lawyers their primary source of discretion.[10] To compensate for this oversight, this article explains how some of the most commonly cited theories can elucidate an "ethic of career choices" that supplies lawyers with career guidance instead of just client and strategy advice.

An elaboration of career choice ethics can also improve the ways in which theories address the related question of moral accountability. A recurring debate is whether advocates are accountable for their clients and the ways in which they represent those clients.[11] When addressing this issue, ethicists have not examined the extent to which career choices determine the very client and strategy decisions that the theories seek to assess.[12] Instead of examining the moral accountability of client and tactical decisions in a vacuum, ethics models must consider how career choices alter the ethical calculus. This article contends that, in some cases, such an approach will generate different conclusions about whether lawyers deserve criticism. It also presents a new critique of the traditional notion (i.e., the dominant view)[13] that we should not hold lawyers morally responsible for their professional judgments. The crux of the new critique is that, even if this notion applies to client and strategy choices, it has no application in the context of career decisions.

Part I of this article explains in more detail how attorneys in many forms of law practice encounter bounded discretion with respect to two of

Wilkins, *supra* note 2, at 81 (observing that many lawyers now "practice in an environment that is increasingly subject to external influence and control").

[9] A few commentators have observed that many lawyers experience limited autonomy, *see supra* note 5, and at least one has trenchantly concluded that we need to craft professional regulations that more accurately reflect the variations among practice types in this regard. Wilkins, *supra* note 2, at 97-98. This work has contributed significantly to the updating of ethics discourse, but this article focuses on the career choice aspect of organizational law practice. Namely, the main source of freedom that these practices supply is the freedom to avoid or to leave a particular job, and ethics theories have not accounted for this development.

[10] *See* discussion *infra* Part I.

[11] *See supra* note 1.

[12] *See* discussion *infra* Part II.

[13] *See* discussion *infra* Part II.A.

the major features of lawyering: the choice of clients and the selection of legal strategies.[14] The claim is that, because of these limitations, lawyers' choices about where they practice provide the main source of autonomous decision-making. Part II describes existing theories of legal ethics, including the dominant view and the critics of that model, and posits that they all supply an impoverished description of the dilemmas many attorneys experience. In particular, these theories do not recognize the constraints described in Part I, and consequently misunderstand or do not acknowledge the increasing importance of job selection decisions. Part III develops a career choice critique that reflects these realities. The critique suggests that we cannot merely examine a snapshot of the process by which lawyers "choose" their clients or legal strategies; rather, we must ask how practitioners should select their jobs in light of the constraints that some forms of practice impose. Through this kind of inquiry, ethicists can formulate a clearer set of prescriptions for autonomy-strapped lawyers, as well as provide a new method for assessing a lawyer's moral accountability and a new critique of the dominant view.

Part IV advances two proposals that are hinted at by these theoretical modifications. First, given the extent to which career choices have taken on increased importance in defining a lawyer's work, law students and attorneys need to make informed job decisions. To this end, law schools should supplement existing ethics courses to include more instruction about the legal profession and the various ways in which practice settings affect lawyers' autonomy.[15] The second proposal is the creation of an ethical obligation to use this information. We need to supplement the Model Rules of Professional Conduct with a provision that would encourage young attorneys to probe prospective employers about their practices and to impose a continuing obligation on more experienced practitioners to consider the ethical implications of remaining in their jobs.[16] By constructing such an obligation, lawyers will not only make more educated decisions about career choices but will utilize their most significant form of autonomy to impact the work that their employers perform.

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[14] *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 1, at 1076-86 (identifying these two features of law practice as the center of discussion).

[15] *See generally* David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach about the Profession*, 49 J. LEGAL EDUC. 76 (1999) (making a similar recommendation). The American Bar Association recently amended the standard governing the instruction students must receive; it now requires that students learn about the "structure" of the profession. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 302(b) (1998). Part IV offers some specific prescriptions for how law schools should satisfy this new standard. *See infra* Part IV.

[16] As explained more fully in Part IV, this addition would fit most comfortably in the preamble to the Model Rules, which describes recommended, but not required, conduct. MODEL RULES OF PROF'L CONDUCT, pmbl. 5 (2000).

I. THE CONSTRAINTS OF ORGANIZATIONAL PRACTICE

This section marshals support for the claim that lawyers in many practices have limited control over client and strategy selection and that career choices are an important—and in some cases, the most important—mechanism by which lawyers can express their freedom. When developing this evidence, it is necessary to keep in mind that the discussion is necessarily a sketch of a broad subject.[17] The purpose is not to provide an all-encompassing description of lawyer autonomy (although that work would certainly be beneficial), but to canvass several organizational practice settings—law firms, in-house positions, government jobs, public interest groups, and multidisciplinary arrangements—in order to demonstrate that career choices offer many lawyers in these settings their main source of freedom. To prove this contention, lawyers must actually have limited client and strategy selection discretion,[18] and they must also have significant job mobility.[19]

A. Limitations on Client and Strategy Selection

A theme that recurs throughout each of the practice settings discussed below is that a lawyer's freedom varies according to a number of factors, including the sophistication of the client, the extent to which the client "belongs" to the lawyer, and the number of lawyers who are working on the matter (i.e., the level of staffing). These kinds of considerations differ among and within practices, so one cannot simply assume that a lawyer in a particular setting either has or does not have autonomy. Nonetheless, each form of practice has certain client selection and strategy choice constraints that lawyers can anticipate and inquire about at the time they accept their jobs. This section explores those constraints.

1. Law Firms

Law firms have become increasingly prevalent, with at least 96,000 lawyers, or about 10% of the practicing bar,[20] in firms of more than 150 attorneys.[21] Although there is little documentation regarding the number of

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[17] For work that examines the autonomy issue in greater detail, see generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

[18] *See infra* Part I.A.

[19] *See infra* Part I.B.

[20] Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547, 1569 n.100 (2000) (noting that the United States had 951,000 lawyers in 1998).

[21] Michael D. Goldhaber, *Among 2000's Lessons: The Big Get Bigger, The Small Stay Pretty Small*, NAT'L L.J., Dec. 4, 2000, at A8 (listing the 250 largest American law firms and identifying how many lawyers practice in each firm). The 250th firm on the list employed 153 lawyers. *Id.* at A1.

lawyers currently practicing in firms of fewer than 150 lawyers, empirical work from the early 1990s suggests that at least 25% of the bar practices in private sector firms of more than ten attorneys.[22] The size of the firm, however, is not as important as the *structure* of the practice; assuming the firm has partners and associates, where partners bring in clients and associates service those clients, the associates (and even "non-rainmaking" partners) will have little discretion over their client and strategy choices.

With respect to client selection, an attorney who joins a firm will typically have to represent the firm's current clients or the clients the firm's partners subsequently obtain.[23] In either case, unless the lawyer brings her own clients to the firm, the lawyer will have minimal control over her employer's choice of clients and will have to accept the work the firm offers.[24] As one law firm associate recently noted, "the ultimate power is to be able to show [a] client to the door. Most lawyers in law firms, even junior partners, hardly ever have that power in their hands."[25] Accordingly, the most significant client selection decision for these attorneys is whether to join a particular firm or, once at the firm, whether to remain there.

One might respond that, even if lawyers are limited to a firm's clientele, they will still have some control over the specific clients they represent. To take the Covington lawyers as an example, attorneys who joined the firm may not have had any direct[26] control over the firm's client

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[22] Kornhauser & Revesz, *supra* note 6, at 839-41. The number is probably higher because the trend has been in the direction of more and larger organizational practices over the last ten years. *See* Goldhaber, *supra* note 21. Moreover, large firm lawyers have a disproportionate influence on the legal profession, so the study of such practices is more important than even their increasing numbers suggest. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 272 (1993) (offering a similar observation).

[23] Corporations have begun to use multiple firms for their legal work, *see, e.g.*, KRONMAN, *supra* note 22, at 277, so lawyers may have more difficulty anticipating which specific clients they will represent when they accept a job. Nonetheless, many firms still have significant relationships with certain clients, making many firms' clienteles reasonably foreseeable at the time of employment. *See Who Represents Corporate America*, NAT'L L.J., June 26, 2000, at C4 (documenting which law firms represent the largest American corporations). Moreover, the trend toward using more firms for legal work may be ending. *See, e.g.*, Jennifer E. King, *More With Less Remains the Mantra as Legal Budgets Continue to Shrink: Counsel Feel Belt-Tightening Pays Off*, CORP. LEGAL TIMES, May 1999, at 1 (citing a survey that found a corporate trend toward concentrating legal work with fewer firms).

[24] In fact, even "rainmaking partners" can have little control over their firm's clients. One powerful senior partner recently left a large Washington law firm as a result of the firm's merger with a firm that advocated positions inconsistent with affirmative action. Jonathan Groner, *Exit Strategy*, LEGAL TIMES, Aug. 7, 2000, at 1.

[25] Amelia J. Uelmen, *Can A Religious Person Be a Big Firm Litigator?*, 26 FORDHAM URB. L.J. 1069, 1102 (1999).

[26] I say "direct" control because even attorneys without decision-making authority can influence a firm's client selection choices. In the Covington example, a number of elite law students boycotted the firm, thus contributing to the firm's decision to drop the airline as a

selection decisions, but they could have refused to represent the airline if they chose.[27] The problem with this objection is that, assuming a lawyer can occasionally refuse to represent a particular client, the political realities of law firms make such refusals extraordinary rather than routine. Partnership has become increasingly difficult to obtain,[28] and part of an associate's success relates to the relationships she has forged with those partners that will have the most influence at the time of partnership decisions.[29] Consequently, an associate's decision to turn down work from partners entails risks to her opportunities for career advancement.[30]

The little empirical work on the subject provides modest support for this contention. Professor Robert Nelson found that lawyers rarely refuse to represent a client, and when they do, partners are "more than twice as likely as associates" to do so.[31] Nelson explains that this finding results from partners' "seniority," though it is not entirely clear what he means by this claim. He might mean that partners have practiced longer than associates, so they have had more opportunities to engage in client selection and rejection. An equally, if not more, plausible interpretation is that associates have less freedom, or at least perceive that they have less freedom, to decline assignments and hence do so less frequently. In other words, the contention that firm lawyers have the freedom to choose their clients is not supported by the limited empirical evidence, and it is also belied by many of the anecdotal reports of law firm practice.[32] In short, it

client. Marcus, *supra* note 4, at C3. This form of control over an employer's decisions is discussed in Part IV. *See infra* Part IV.

[27] Uelmen, *supra* note 25, at 1105 (noting the existence of "conscientious objector" policies at firms with substantial client bases, which allow lawyers to avoid work that they find personally troublesome).

[28] *See* LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 263-74 (1993); KRONMAN, *supra* note 22, at 278-79.

[29] *See, e.g.*, David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1590 n.25, 1609 n.105 (1998). This particular factor assumes that lawyers become associates in an attempt to achieve partnership. Increasing evidence suggests that many lawyers no longer join firms with that ambition. *See infra* note 68.

[30] Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975, 985 (1990); Rhode, *supra* note 5, at 636 (identifying the career risks associated with ruffling the feathers of law firm partners).

[31] Robert Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 534-36 (1985).

[32] *See, e.g.*, CAMERON STRACHER, DOUBLE BILLING: A YOUNG LAWYER'S TALE OF GREED, SEX, LIES, AND THE PURSUIT OF A SWIVEL CHAIR 80-84 (1998) (describing the author's own experiences as a young lawyer in a big firm). My own experiences as a law firm associate and the experiences of my wife and friends also provide anecdotal support for this view. Although we all technically had the freedom to turn down a client for ethical reasons if we chose, the reality was that we had developed relationships with certain

may well be the case that lawyers in firms have the ability to turn down clients in limited circumstances, but this hardly signifies the kind of thoroughgoing client selection capacity typically depicted in the ethics literature.

Law firm lawyers, including even the most senior partners, can also experience extreme constraints on their strategy choices. Senior lawyers increasingly receive instructions on strategy from in-house counsel, even to the point of "giving up first-seat at trial."[33] The legal sophistication of in-house legal staffs has relegated many law firm lawyers to the role of legal technicians.[34] The effect is even more pronounced among partners who do not have many, or any, of their own clients and who service the clients of the firm's "rainmaking" partners. These lawyers not only have limited discretion because of the sophistication of in-house counsel, but they also have to report to the partner ultimately responsible for the client's representation. Associates obviously have even less discretion; they typically have to follow instructions from their senior colleagues, and they often work on discrete parts of legal matters,[35] leaving them few opportunities to offer "big picture" strategic advice.[36] They also have minimal contact with clients,[37] making strategic consultation unrealistic.

Certainly, law firms vary according to how much freedom they confer regarding client and strategy selection.[38] The point here is not that these variations do not exist, but that a substantial number of lawyers who work in firms have limited discretion to choose their clients and tactics because the structure of the practice is not conducive to that kind of freedom. Indeed, even small firms of as few as two attorneys can fit the description if

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partners at our firms and felt that we would damage those relationships if we declined to work for the partners' clients.

[33] Robert E. Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 484-85 (1989); *see also* King, *supra* note 23, at 1 (citing a survey of in-house legal departments which found that 29.6% of in-house counsel at least occasionally serve as first-chair at trial).

[34] *See* Rosen, *supra* note 33, at 485.

[35] Uelmen, *supra* note 25, at 1073 (noting the extent to which firm lawyers perform "impersonal micro-specialized piecework"); *id.* at 1104 (explaining that a first year litigation associate's "day to day legal work consists of very specialized and technical research assignments, a hand in drafting sections of motions and briefs, and sporadic cite-checking [of] colleague's briefs," but rarely includes participating "in conversations of substance about corporate decisions that could influence the common good").

[36] KRONMAN, *supra* note 22, at 275-76, 290-91.

[37] Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 927 (1999) (observing that "[a] typical junior associate will have little client contact").

[38] For example, a law firm may permit lawyers to "conscientiously object" to representing certain clients. *See, e.g.*, Uelmen, *supra* note 25, at 1105. Associates may also be able to position themselves to work with certain partners with more palatable clients.

one lawyer behaves like a partner and the other is expected to act like an associate.[39] Thus, when a lawyer chooses a firm, even a small one, or must decide whether to remain there, that choice can define her work at least as much as the constrained client and strategy choices that serve as the focus of most ethics debates.[40]

2. In-House Counsel

In-house counsel positions, which constitute approximately 10% of the practicing bar,[41] offer perhaps the clearest example of how job choices can limit a lawyer's client selection autonomy. When lawyers accept these positions, they no longer "choose" their clients, and they have little, if any, discretion to refuse work from the single client they represent (absent quitting their jobs). In essence, their job choice *is* their client selection decision; once they have made the career choice, the only way to avoid representing their client is to seek alternative employment.[42]

An in-house lawyer's tactical autonomy, in contrast, will depend on the "business side's" role in defining legal strategies, the size of the in-house legal department,[43] and the extent to which the general counsel or some other supervising attorney oversees how legal matters are conducted. Consider a recent survey that found an average of 129 attorneys in the largest 200 in-house legal departments.[44] To the extent that lawyers accept positions in these departments, they will experience the same bureaucratic and staffing constraints as their law firm counterparts.[45] Even in smaller contexts, the in-house counsel may simply have to abide by the decisions of corporate officers regarding strategic direction.[46] Of course, in-house positions differ, and some may offer lawyers substantial discretion,[47] but the idea here is that an in-house lawyer has no control over her client

[39] This phenomenon is not uncommon among small firms, as many of them ultimately try to emulate the structure and profitability of larger firms. KRONMAN, *supra* note 22, at 312-13.

[40] In fact, even solo practitioners may face constraints on their client selection capacity. For example, solos may encounter financial pressures that effectively require them to accept the business of certain clients or to limit their tactical choices.

[41] Kornhauser & Revesz, *supra* note 6, at 841.

[42] Begg, *supra* note 2, at 293 n.87 (observing that private industry practitioners must either accept their clients or leave their jobs).

[43] *See, e.g.*, KRONMAN, *supra* note 22, at 311 (explaining how the size of an in-house legal department can affect a lawyer's freedom to provide certain kinds of tactical advice).

[44] Peter Aronson, *Biggest In-House*, NAT'L L.J., Aug. 14, 2000, at B5.

[45] *See* KRONMAN, *supra* note 22, at 311.

[46] *See id.* at 310-11.

[47] Rosen, *supra* note 33, at 485-86; *see also* Thomas Scheffey, *"Hard-Ass" General Counsel Fired*, NAT'L L.J., June 12, 2000, at B1 (describing the uncompromising litigation philosophy of the general counsel for a large health care insurance company).

(absent a career choice decision) and may, depending on the specifics of the job, have few opportunities to craft legal strategies on behalf of the company.[48]

3. Government Jobs

Government positions also vary, yet it is possible to identify several features of government practice that can limit attorneys' freedom. With respect to client selection, the government attorney is similar to the in-house lawyer in that the job choice *is* the client selection decision. That is, the choice effectively determines that the lawyer will represent the government. Not only is client selection limited, but the government lawyer can also encounter limitations on *matter* selection. In particular, a government lawyer will often have to alter her view of acceptable cases for political reasons, such as the appointment of new superiors who have different philosophies. For instance, government lawyers who enforce antitrust laws, environmental regulations, or employment discrimination statutes will frequently tailor their work according to the political climate.[49] One could cite numerous manifestations of this phenomenon,[50] but the point is that many government lawyers have limited discretion over the matters they take on.

These lawyers can also experience tactical discretion that is similar to the bounded freedom found in law firms. For example, government lawyers working on a large matter, say the Microsoft antitrust case,[51] may find that very senior lawyers dictate the strategic direction of cases. Of course, a junior lawyer may appreciate these constraints (no young lawyer, after all, has the experience to dictate tactics in a large antitrust case against Microsoft). Nevertheless, the occasional desirability of heavy staffing does

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[48] *See* KRONMAN, *supra* note 22, at 311 (explaining how in-house lawyers can experience limited discretion as a result of their commitment to a single client).

[49] *See, e.g.*, David M. Driesen, *Five Lessons from the Clean Air Act Implementation*, 14 PACE ENVTL. L. REV. 51, 59 (1996) (arguing that the EPA's enforcement of environmental statutes is subject to political pressures); Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TUL. L. REV. 1033, 1051 (1993) (citing scholars who have found that "[g]overnment enforcement of the federal antitrust statutes has vacillated dramatically with changing political climates"). *See generally* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 467-68 (1989). Professor Sunstein observed that:

> [S]tatutes designed to reduce or eliminate the social subordination of disadvantaged groups, or to promote public values like environmental quality and the protection of endangered species, frequently encounter in the implementation process the same obstacles . . . [such as] disparities in political influence . . . that make such statutes necessary in the first place.

Id.

[50] *See supra* note 49.

[51] *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part and rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

not mask the reality that government practice can limit a lawyer's strategic options. In short, many, but certainly not all, government lawyers experience sizable limitations on their ability to choose their clients and strategies, thus leaving career decisions as the primary source of discretion.

4. Public Interest Jobs

Public interest attorneys can face similar limitations but for quite different reasons. A public interest organization might experience administrative restraints, such as a public defender's inability to accept clients who have more than a certain level of income or the inability to accept clients who have committed a crime within the jurisdiction of another public defender office.[52] These lawyers may also lack the freedom to *refuse* clients who have committed horrendous crimes. Other groups may have to pursue the interests of their members, like an environmental group or civil rights organization addressing problems important to constituents. The specifics will depend on the job, but the essential contention remains: public interest attorneys' career choices often predetermine their client selection decisions.[53]

Public interest attorneys traditionally have had significant strategic autonomy, as most of these attorneys work in small offices that cannot afford to assign more than a few lawyers to any particular matter. Financial pressures, however, do place clear limits on some of these lawyers. Public defenders, for example, typically have high caseloads and few financial resources, making extensive preparation, including investigation and motion practice, difficult.[54] These lawyers will not have the financial freedom or the available time to pursue many strategies that they might otherwise employ. In other contexts, a funding source may impose strategic restrictions, such as the government's prohibition on using

[52] Public defenders are probably most accurately characterized as public interest, not government, attorneys. Kornhauser & Revesz, *supra* note 6, at 842. That said, some commentators provide separate treatment for public defenders (and criminal defense lawyers more generally), contending that such lawyers have special obligations to their clients. LUBAN, *supra* note 1, at 58-66. *But see* SIMON, *supra* note 1, at 170-94 (contesting the idea that criminal defense "is distinctive in ways that make the Dominant View uniquely plausible there").

[53] Begg, *supra* note 2, at 293 n.87.

[54] *See generally* Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study,* 27 AM. J. CRIM. L. 1 (1999) (documenting how the continued under-funding of public defender offices has made the provision of competent legal services difficult, if not impossible, in many jurisdictions). Rigg focuses on Iowa, but he notes problems in a number of other states as well, including one particularly egregious example in Louisiana where the Louisiana Supreme Court held that the provision of indigent criminal defense services had become "so lacking that defendants who [had to] . . . depend on it [were] . . . not likely to receive the reasonably effective assistance of counsel the Constitution guarantees . . . ." *Id.* at 35 (quoting *State v. Peart*, 621 So. 2d 780, 783 (La. 1993)).

Legal Services Corporation funds for class actions.[55] In any event, the conclusion here is that many public interest attorneys do have significant limitations on both their client and strategy selection discretion.

5. Trends: Multidisciplinary Practice Arrangements

A description of Multidisciplinary Practice Arrangements (MDPs), which essentially allow lawyers to share fees with non-lawyer partners,[56] is difficult because our treatment of them is still in a state of flux. The American Bar Association (ABA) recently rejected a proposal to permit lawyers to share fees with non-lawyers,[57] and the ethics rules in every state (but not the District of Columbia) currently forbid such arrangements.[58] Nonetheless, some firms already have begun to structure practices within the confines of existing regulations,[59] and many believe state bars should eventually permit such arrangements in order to ensure that American lawyers remain globally competitive.[60]

If states permit MDPs, attorneys who join such practices would, like their large law firm and in-house cousins, have bounded discretion. Ethics rules may restrict non-lawyers in MDPs from having any formal ability to dictate the lawyers' clients and strategies,[61] yet one would expect that MDP practitioners would not have significant freedom to refuse assignments from the MDP's major clients. Moreover, to the extent that the MDP contains a hierarchical structure with heavy staffing on significant legal matters, lawyers in these practices, like law firm practitioners, will also have limited strategic control over their work.

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[55] Alan W. Houseman, *Restrictions By Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2189 (1999).

[56] For an excellent description of multidisciplinary practices and the various costs and benefits of these arrangements, see Symposium, *Future of the Profession: A Symposium on Multidisciplinary Practice,* 84 MINN. L. REV. 1083 (2000).

[57] *ABA Rejects Idea, supra* note 7.

[58] Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 223 (2000).

[59] *See supra* note 7.

[60] John H. Matheson & Edward S. Adams, *Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1300-01 (2000) (identifying this argument as one of many that MDP supporters advance).

[61] *See* MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2000) (prohibiting "a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such services"); *see also* COMMISSION ON MULTIDISCIPLINARY PRACTICE: REPORT (Aug. 1999), *available at* http://www.abanet.org/cpr/mdpreport.html (last visited May 18, 2001) (noting the Commission's continuing agreement with Rule 5.4 despite its recommendation to permit MDPs).

In all, the movement away from the solo and small firm practitioner model that began in recent decades is likely to accelerate in the twenty-first century. The percentage of lawyers working in large firms continues to rise,[62] and lawyers have begun working in multidisciplinary practice-type settings, even without the imprimatur of the ABA or state bar associations.[63] This trend toward organizational practices is likely to make career choices a significant source of autonomy for an increasing number of lawyers.

At this point, one could object that the preceding description of MDPs and other forms of organizational practice overlooks the lawyers who have significant discretion, such as solo practitioners or powerful lawyers in larger settings. The analysis here, however, is not intended to describe all lawyers in all contexts; its contribution to ethics discourse is to suggest that analyses are more complicated in some cases than traditional theories have implied. Put another way, in an increasing number of cases (though not in all cases), lawyers have little autonomy to choose their clients and tactics, so existing ethics theories need to account for this phenomenon even if it has not affected everyone.

B. Career Mobility

In order to demonstrate the importance of job choices for lawyers in organizational practices, one must not only demonstrate that these lawyers have little control over their clients and tactics, but that they actually have control over where they work. The empirical basis for this claim is not difficult to establish; numerous commentators have noted, and in many cases lamented, lawyers' increased willingness and ability to change jobs.[64]

Law firms offer the clearest, and perhaps the prototypical, example of this phenomenon: both associates and partners have exercised extensive freedom to seek alternative employment.[65] Associates, particularly in a favorable economic climate, receive constant inquiries regarding alternative jobs from recruiters.[66] One recent survey revealed that

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[62] Kornhauser & Revesz, *supra* note 6, at 839-40.

[63] Geoffrey C. Hazard, Jr., *Foreward: The Future of the Profession*, 84 MINN. L. REV. 1083, 1084-85 (2000). Arguably, the numerous lawyers working in large accounting firms already practice in MDPs. *Id*.

[64] *See, e.g.*, KRONMAN, *supra* note 22, at 277, 312; Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 545-46 (1997/1998) (arguing that the increasing mobility of lawyers makes it more difficult to obtain solid mentoring and training).

[65] KRONMAN, *supra* note 22, at 277 (discussing the "weakening of the ties that once bound the individual members of a given firm to the firm itself").

[66] *See, e.g.*, *Midlevel Associate Survey,* AM. LAW., Oct. 3, 2000 (finding that more than 75% of associates at firms receive phone calls from "headhunters" at least "a few times a

approximately 19% of large firm associates leave their jobs in any given year,[67] and nearly two-thirds of all law students who join large firms will have quit after five years.[68] Although these lawyers are typically leaving for other private sector jobs (i.e., other firms or in-house counsel jobs),[69] associates nonetheless have many opportunities to pursue alternative positions. At the same time, partners also exercise their freedom to leave.[70] Clients have become increasingly attached to lawyers rather than firms, making it possible for partners to use their stable of clients as a bargaining chip to obtain more lucrative employment elsewhere.[71] Although ethical constraints, such as conflict of interest rules,[72] may affect and limit this

month"); Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 114 (1988) (providing anecdotal support for this contention).

[67] Michael D. Goldhaber, *Waging a War of Attrition*, NAT'L L.J., Dec. 13, 1999, at A1.

[68] NALP FOUND. FOR RESEARCH & EDUC., KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 53 (1998); *see also* Nancy Torner, *Survey Predicts High Turnover Among Law Firm Associates,* CHICAGO LAW., May 2000, at 68 (describing a 1999 Interim Services Legal Workforce Survey that found 56% of law firm associates planning to leave their jobs within the next two years). One is reminded of the old welcoming speech given to first-year law students: "Look to your left, look to your right. One of those people will probably not be here in two years." One could now give a similar speech to first-year associates.

[69] Kathleen Hull, *Cross-Examining the Myth of Lawyers' Misery*, 52 VAND. L. REV. 971, 981-82 (1999) (finding that, among law firm associates in Chicago who changed jobs at least once, 45% worked in another large firm setting, 27% worked in solo practices or small to medium sized firms, and 21% worked in-house or in nonlegal jobs). The glaring statistic, however, is that only 5% of large firm lawyers left firms to accept government, public interest, judicial, or legal education positions. *Id.* This private sector limitation on mobility has implications that should be more fully examined. For example, is the limited mobility between the private and public sectors a result of a lack of interest among law firm lawyers or the limited supply of jobs? Depending on the answers, ethics theories may have to adopt a narrower set of prescriptions for experienced practitioners. If law firm lawyers cannot easily move between the private and public sectors, career choice ethics may have to limit its prescriptions to choices within practice types. At the same time, career choice ethics may take on *increased* importance at the law school stage, when students shape their impressions of their career trajectories.

[70] *See generally* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991); ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS (1994); Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1 (1988); William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 152 (1987) (observing law firm partners' increasing willingness to move to other firms).

[71] KRONMAN, *supra* note 22, at 277-78.

[72] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2000); *see also* Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 86-89 (1998) (explaining that increasing job mobility has caused a concomitant increase in conflicts problems).

mobility, law firm lawyers generally have significant freedom to obtain other positions.

Even outside the law firm context, lawyers have experienced increased mobility. As one commentator has suggested, "there is little reason to believe that [non-firm] lawyers . . . have not also become mobile."[73] Indeed, a 1990 American Bar Association survey found that 18% of all lawyers planned to quit their job within two years.[74] Even the Model Rules of Professional Conduct recognizes that lawyers "move from one association to another several times in their careers."[75] This represents quite a change from the past, when according to one estimate, 94% of lawyers changed jobs no more than once during their lifetimes.[76] In contrast, entire books now exist to help lawyers (and not just law firm lawyers) move into alternative positions both within and outside the legal profession.[77]

One might note that not all lawyers have the kind of mobility described here. Many attorneys do not have numerous career options, either because of a lack of credentials, little or inapplicable experience, or a poor job market.[78] As a result, they may find themselves effectively compelled to accept a job or remain in a job that they would not otherwise have chosen. As explained earlier, however, a career choice critique is not intended to apply to every lawyer; it simply adds a new wrinkle to existing analyses in those cases where lawyers actually do have job choice autonomy. The critique, in other words, need not apply to all lawyers for it to benefit ethics discourse.

The preceding discussion obviously offers only a glimpse of each of several forms of practice, but it is sufficient to establish the basic empirical contention that many lawyers in organizational settings experience limited client and strategy selection autonomy and that, because of their mobility, job choices are their main source of discretion. Part II demonstrates that

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[73] Kilpatrick, *supra* note 64, at 547.

[74] S. Elizabeth Foster, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1682 n.287 (1995).

[75] MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. (2000).

[76] DEBORAH L. ARRON, RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL PROFESSION 2 (1989).

[77] *See, e.g.*, GEORGE H. CAIN, TURNING POINTS: NEW PATHS AND SECOND CAREERS FOR LAWYERS (1994).

[78] It is worth pointing out that the recent economic prosperity and the resulting demand for legal services has enhanced lawyers' freedom of movement. A recession could make the present analysis applicable to fewer attorneys and could make the initial decision to attend law school correspondingly more significant. *See* Cameron Stracher, *Let the Lawyer Layoffs Begin*, WALL ST. J., May 14, 2001, at A18.

prevailing ethics models have not accounted for this development, and Part III shows how a career choice critique can supplement those models so that they reflect the importance of career choices.[79]

II. THE OMISSION OF CAREER CHOICE ANALYSIS IN ETHICS DISCOURSE

As this article neared completion, one of my former students approached me and asked for some advice about summer jobs. He was starting his second year of law school, and he wanted to know more about some law firms he was considering. He heard that one firm in particular had a strong litigation practice, but he expressed some concern because the firm did considerable tobacco defense work. He wondered whether this discovery should affect his decision about whether to join the firm. Although one might expect that ethics theories would offer my student some guidance, they are surprisingly silent on such questions. This section substantiates this omission through an examination of several widely cited ethics models.

The central contention here is that standard theories focus on client selection and strategy choice ethics, but they fail to elucidate a career choice ethic that in many ways predetermines client and strategy decisions. In particular, client selection ethics explains how lawyers should choose their clients and asks whether lawyers are morally accountable for those decisions. Strategy choice ethics asks the same questions in the context of tactical decisions. Career choice ethics, in contrast, asks how lawyers should choose jobs within the legal profession and queries whether lawyers are accountable for those choices. The following discussion demonstrates that existing theories have not articulated a coherent vision of this third (and perhaps most important) form of legal ethics.

A. The Dominant View

The point of departure for many ethics debates is what commentators now frequently refer to as the dominant view[80] or the neutral partisanship model.[81] Before examining how the dominant view omits discussions of

[79] At least one other commentator has found existing ethics models to be incomplete. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 7-8, 37 (1999). In particular, Professor Wendel found that existing theories have offered a monistic account of ethics, relying on one value "as the polestar . . . in ethical deliberation." *Id.* at 37. His contention, however, was not that the theories are inadequate for their failure to consider the ethical implications of career choices, but that they do not consider the plurality of values that should guide ethical decision-making. *Id.*

[80] *See, e.g.*, SIMON, supra note 1, at 7.

[81] *See* RHODE & LUBAN, *supra* note 1, at 135-36, 140. Other monikers include "the full advocacy model, the standard conception, the traditional conception, and (less charitably) the hired gun." Rob Atkinson, *Lawyering in Law's Republic*, 85 VA. L. REV. 1505, 1507

career choice ethics, it will be helpful to provide a detailed description of the model's central contentions. To begin with, the dominant view[82] consists essentially of two concepts: the principles of partisanship and nonaccountability.[83] The partisanship principle supplies the dominant view's prescription regarding strategy choice ethics, and the nonaccountability principle, through its claim that lawyers are not morally accountable for their choices of clients and tactics, contains the dominant view's position on accountability for both client selection ethics and strategy choice ethics.

1. The Partisanship Principle

The partisanship principle, which is also sometimes called the principle of professionalism,[84] holds that lawyers should undertake all lawful actions that best serve their clients' interests,[85] even if those actions are antithetical to the interests of justice or morality in particular cases.[86] In his classic defense of the dominant view, Professor Charles Fried explains that a lawyer should "adopt as his dominant purpose the furthering of his client's interest . . . [and should] put the interests of his client above some idea, however valid, of the collective interest."[87]

n.7 (1999) (reviewing SIMON, *supra* note 1); *see also* Wendel, *supra* note 79, at 8 (referring to the dominant view as the "regulatory model").

[82] Although there is significant evidence that this model did not dominate before the latter half of the nineteenth century, *see* Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 703-09 (1988), Professor Luban has demonstrated convincingly that this view dominates (for the most part) among modern practitioners. LUBAN, *supra* note 1, at 393-403. *But see* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 118-29 (1990) (reviewing LUBAN, *supra* note 1); Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1542-44. Interestingly, this term is a misnomer within academia. Much recent scholarship takes issue with at least some aspect of the dominant view's claims, so the model's real dominance appears to lie more with lawyers than among current theorists.

[83] LUBAN, *supra* note 1, at 11; Murray L. Schwartz, *The Zeal of the Civil Advocate*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 150 (David Luban ed., 1983). It is worth noting that Luban differs from Schwartz in his formulation of the partisanship principle in that Luban views it as applying to all attorneys, whereas Schwartz suggests that it only applies in the litigation setting. LUBAN, *supra* note 1, at 12.

[84] Schwartz, *supra* note 83, at 150.

[85] The idea here is that a lawyer should undertake any action that benefits the client so long as the tactic is legally permissible. *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 1, at 1080-82.

[86] *See, e.g.*, DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 282 (1991); Fried, *The Lawyer as Friend*, *supra* note 1, at 1066; Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 614.

[87] Fried, *The Lawyer as Friend*, *supra* note 1, at 1066.

There appears to be some confusion, however, about the extent to which a lawyer "must"—as opposed to "may"—take all lawful actions to assist a client.[88] Professor Monroe Freedman, an advocate of the partisanship principle,[89] has implicitly offered a way to resolve this ambiguity. He suggests that lawyers should pursue all lawful strategies *after conferring with their clients and after their clients actually have requested that approach*.[90] According to Freedman, the lawyer *may* (in theory) pursue all lawful actions, but *should* only do so if the client has made an informed decision to that effect (i.e., after the lawyer has engaged in a moral dialogue with the client).[91] In short, if the client wants the attorney to pursue a lawful strategy, the dominant view posits that the lawyer must pursue it.

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[88] Professor Simon explains that, under the dominant view, lawyers "must—*or at least may*—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim." SIMON, *supra* note 1, at 7 (emphasis added).

[89] Professor Freedman does not adhere to the nonaccountability principle, so he is only an advocate of one aspect of the dominant view. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 49-52 (1990) (asserting that "the lawyer's choice of client can properly be subjected to the moral scrutiny and criticism of others" but "[o]nce the lawyer has chosen to accept responsibility to represent a client . . . the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client . . .").

[90] *Id.* at 50-52*; see also* Fried, *The Lawyer as Friend*, *supra* note 1, at 1088 (contending that the lawyer should engage clients in a moral dialogue about their options); Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 213-14 (1990); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1563, 1601 & n.131, 1609 (1995) (same) [hereinafter Pepper, *Counseling at the Limits of the Law*]; Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 634-35 (same); Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181 (1999) (same) [hereinafter Pepper, *Lawyer's Ethics in the Gap*]. *See generally* KRONMAN, *supra* note 22 (explaining the importance of what he calls "practical wisdom").

[91] FREEDMAN, *supra* note 89, at 49-51. Luban, however, suggests a different understanding of the dominant view. He claims that the standard conception rejects a lawyer's attempt to "engage the client in moral dialogue." LUBAN, *supra* note 1, at 167. He believes the dominant view construes any effort to "transform[] [a client's] ends to something the lawyer finds more morally acceptable . . . [to be] an infringement on the client's autonomy." *Id.* Luban cites no support for this description of the dominant view, and he actually suggests a different understanding of the standard conception later in his book. *Id.* at 393 (explaining how the rules—at least under the Model Code's Ethical Considerations—have advised lawyers to consult their clients about nonlegal factors, "including the lawyer's view concerning the morality of the case"). Moreover, dominant view proponents, such as Professor Pepper, expressly permit and encourage lawyers to have a moral dialogue with clients. Pepper, *Lawyers' Ethics in the Gap, supra* note 90; *see also* MODEL RULES OF PROF'L CONDUCT Rule 2.1 & cmt. (2000) (commenting that it "is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1983) ("In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."); Fried, *The Lawyer as Friend*, *supra* note 1, at 1088.

Assuming the client wants the lawyer to pursue all lawful options, the lawyer would act according to this principle by, say, cross-examining witnesses in such a way as to make them appear deceitful when the lawyer knows them to be telling the truth or by formulating a course of conduct that falls within the letter of the law but is inconsistent with its spirit.[92] In each of these cases, if the client has made an informed decision about the ethical dilemma,[93] the partisanship principle presumes that the lawyer should follow the client's wishes even if it produces unjust or immoral results.[94]

This principle ultimately makes an argument that concerns strategy choice ethics. Strategy choice ethics consists of two parts—a prescription for how lawyers should select their legal tactics, and an assessment of whether lawyers are accountable for those decisions—and the partisanship principle provides an argument regarding the first part. Of course, the prescriptive and accountability concepts are related,[95] but commentators[96] and rules drafters[97] tend to discuss them separately.

Although the dominant view provides a prescription regarding strategy choice ethics, it does not offer a similar prescription in the context of client selection ethics. The nonaccountability principle (as explained below) suggests that lawyers are not accountable for their clients,[98] but the principle does not indicate how lawyers should make the client selection decision in the first place.[99] Indeed, in contrast to the British "cab rank" rule, which requires barristers to accept cases at their standard fees in all

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[92] *See, e.g.*, FREEDMAN, *supra* note 89; Fried, *The Lawyer as Friend*, *supra* note 1, at 1062-65; Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 614; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RTS. 1, 7-8 (1975).

[93] *See* FREEDMAN, *supra* note 89, at 50-52 (1990) (arguing that an advocate has an obligation to confer with a client to determine how the client wants to resolve an ethical dilemma).

[94] *See, e.g.*, BINDER, *supra* note 86, at 282; FREEDMAN, *supra* note 89, at 50-52; Fried, *The Lawyer as Friend*, *supra* note 1, at 1066.

[95] LUBAN, *supra* note 1, at 155 (observing the relationship between the principles of nonaccountability and partisanship).

[96] *See, e.g.*, LUBAN, *supra* note 1, at xx (identifying this distinction).

[97] *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2000) (stating that lawyers are not accountable for their representation of clients, as those decisions do not "constitute an endorsement of the client's political, economic, social or moral views or activities"), *with id.* R. 1.16 (2000) (offering specific prescriptions regarding a lawyer's client selection responsibilities), *and id.* pmbl. 2 and R. 1.2(a), 1.4, 3.1, 3.4, and 4.1 (prescribing how lawyers should represent their clients).

[98] *See infra* Part II.A.2.

[99] A lawyer, of course, can always decide not to represent a client for a number of legitimate reasons, such as the client's inability to pay for the lawyer's services or the lawyer's incompetence to handle the matter. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.16 (2000). The idea here is that the dominant view appears not to take a stand on the issue of whether a lawyer should select or reject clients on moral grounds.

areas in which they hold themselves out as qualified,[100] the dominant view among American lawyers is that they can choose their clients on nearly[101] any ground they see fit.[102]

Even though the dominant view does not develop an affirmative prescription regarding how lawyers should select their clients, it may provide some guidance about the ways in which attorneys should *not* choose them. Professor David Wilkins adopts Sanford Levinson's term "bleached out professionalism" to describe the pervasive view that lawyers should not rely on non-professional aspects of their identity, such as their race, gender, religion, or moral conscience, when deciding whether to accept particular clients.[103] Wilkins ultimately rejects this form of professionalism, but he claims it is the dominant understanding of client selection.[104]

The question then becomes whether "bleached-out professionalism" actually represents the dominant view, as Wilkins and others claim. The answer is debatable. Professor Stephen Pepper is one proponent of the dominant view who appears to adopt a form of "bleached-out professionalism." Although he claims that lawyers can and should freely choose which clients they represent,[105] he makes clear that he believes that lawyers should not use a moral screen when exercising that discretion.[106] In contrast, Professor Fried, who also embraces the dominant view, suggests that, although a lawyer is not morally obligated to accept any client, "there is nothing wrong" with an advocate who decides to allocate her resources according to her own principles.[107] Accordingly, the dominant view provides a relatively clear prescription regarding how a lawyer should represent a client but a more ambiguous description of how practitioners should choose those clients.

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[100] *See, e.g.*, Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation With Evil*, 66 FORDHAM L. REV. 1339, 1352-53 (1998) (contrasting the American system with the British "cab rank" rule).

[101] In some states, lawyers cannot discriminate against members of certain protected classes. *See, e.g.*, *Stropnicky v. Nathanson*, Mass. Comm'n Against Discrimination, No. 91-BPA-0061 (Feb. 25, 1997) (holding that a lawyer cannot refuse clients on the basis of gender).

[102] MODEL RULES OF PROF'L CONDUCT R. 1.2(b) and 1.16 (2000).

[103] *See, e.g.*, David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility,* 57 MD. L. REV. 1502, 1503-05 (1998) (citing Sanford Levinson, *Identifying the Jewish Lawyer: Reflection on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993)).

[104] *Id.* at 1504-05.

[105] Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 634.

[106] *Id.* at 616-19.

[107] Fried, *The Lawyer as Friend*, *supra* note 1, at 1078.

Interestingly, this ambiguity in the dominant view reflects a more general disregard for client choice ethics, both in the literature[108] and in the ethics rules.[109] The reasons for this disregard are not entirely clear. One might speculate that it reflects the economic realities of law practice; namely, lawyers do not often have the opportunity to turn down clients, so strategy choices have more relevance. There is no empirical evidence, however, to suggest that lawyers have any more control over their strategies than they do over their clients. Alternatively, one commentator has noted a conceptual confusion in the literature between client selection ethics and strategy choice ethics.[110] Perhaps this confusion has contributed to an unbalanced treatment of the topics. Although a more thorough discussion of that imbalance is beyond the scope of this article, it suffices to say that the partisanship principle contains the dominant view's approach to strategy choice ethics and that "bleached out professionalism" represents the closest prescription the dominant view advances regarding client selection ethics.

2. The Nonaccountability Principle

The nonaccountability principle, which is the second component of the dominant view, holds that lawyers are not morally responsible for the clients they represent or for the lawful means they employ to accomplish their clients' objectives.[111] In the context of client selection ethics, the issue typically arises when a lawyer decides to represent a client that society deems morally or politically repugnant, such as an admitted child molester or a Ku Klux Klan rally organizer.[112] The nonaccountability principle posits that the lawyer is never morally responsible for taking on such clients. As Professor Fried argues, "the individual lawyer does a morally worthy thing whomever he serves . . . ."[113] The argument is similar

[108] *See, e.g.*, LUBAN, *supra* note 1; SIMON, *supra* note 1; Fried, *The Lawyer as Friend*, *supra* note 1; Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1.

[109] A review of the Model Rules reveals that only three provisions directly consider the question of client selection, MODEL RULES OF PROF'L CONDUCT R. 1.2(b), 1.16, and pmbl. 5 (2000), whereas a considerable number of the remaining provisions relate to the question of strategy choice.

[110] W. William Hodes, *The Several Stances of the Modern American Lawyer*, 47 U. KAN. L. REV. 777, 783 (1999).

[111] SIMON, *supra* note 1, at 7; Fried, *The Lawyer as Friend*, *supra* note 1, at 1078; Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 617. At least one commentator has urged the adoption of only one half of the nonaccountability principle. FREEDMAN, *supra* note 89, at 50-52 (contending that lawyers are morally accountable for their client selection decisions but not for their strategy selection choices).

[112] *See, e.g.*, Wendel, *supra* note 79, at 55 (examining the same question).

[113] Fried, *The Lawyer as Friend*, *supra* note 1, at 1078; *see also* Schwartz, *supra* note 83, at 150.

with regard to legal strategies; as long as the tactic is lawful, the lawyer should not be criticized for pursuing it.[114] Thus, the nonaccountability principle states that the attorney's role as legal professional immunizes her from moral critique.[115] This principle's relationship to client selection and strategy choice ethics is depicted below, as is the principle's relationship to the partisanship principle.

Table 1:
The Dominant View

	Client Selection Ethics	**Strategy Choice Ethics**
How should lawyers decide?	"Bleached Out Professionalism"?	Apply the Partisanship Principle. (Pursue any lawful strategy that helps the client regardless of the consequences to non-clients.)
Are lawyers accountable for the choice?	No. Apply the Nonaccountability Principle.	No. Apply the Nonaccountability Principle.

Together, the partisanship and nonaccountability principles represent the dominant view's central tenets,[116] and advocates have advanced a number of reasons to support these underlying principles, including the protection of the client's autonomy,[117] the preservation of the lawyer's autonomy,[118] the promotion of equality,[119] and utilitarian calculations.[120] These justifications ultimately rely on the notion that the dominant view is either morally necessary or that society is better off if it adopts the partisanship and nonaccountability principles of lawyering. Critics have

[114] Fried, *The Lawyer as Friend*, *supra* note 1, at 1080-81.

[115] This particular framing of the nonaccountability principle is commonly referred to as "role-differentiated" morality, a term often attributed to Professor Wasserstrom. Wasserstrom, *supra* note 92, at 3 (1975). That is, lawyers are immune from criticism so long as they act lawfully and within their roles as attorneys. LUBAN, *supra* note 1, at 104-47.

[116] LUBAN, *supra* note 1, at xx.

[117] *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 1, at 1073; Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 616-17.

[118] *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 1, at 1068-71.

[119] *See, e.g.*, Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 618-19.

[120] *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 1, at 1067-68. For example, the dominant view might promote the search for truth and the protection of rights. *But see* LUBAN, *supra* note 1, at 68-78 (summarizing and rejecting these justifications for the dominant view).

offered numerous objections to this view,[121] but the next step is to show that the dominant model does not account for the ethical implications of career choices.

3. The Omission of Career Choice Ethics

As explained earlier, career choice ethics concerns itself with a decision that is temporally and conceptually prior to client selection and strategy choice: one's choice of jobs. Even this definition, however, does not capture the fullest possible scope for career choice ethics. That is, the decision to become a lawyer in the first place is a career choice that precedes the selection of a particular job.[122] Parts III and IV contain some thoughts on this broader definition of career choices, but the present discussion focuses on career choice ethics narrowly construed as the selection of jobs within the legal profession. The reason for this emphasis is that the latter choice is more closely connected to the traditional concerns of legal ethics discourse (client and strategy selection). This is not to say that the decision to attend law school cannot affect a lawyer's choices regarding clients and tactics;[123] rather, career decisions broadly understood are just more tenuously related to those choices. Accordingly, this section focuses on the more limited definition of career decisions and demonstrates that the dominant view overlooks it.[124]

Professor Pepper, an oft-cited proponent of the dominant view, presents a clear example of this oversight. He not only ignores career decisions (narrowly defined) when enumerating ethically significant choices, but he fails to acknowledge the career choice implications of the moral dialogue requirement he advocates.[125] With respect to the first point, Pepper describes those decisions over which an attorney has control and

[121] *See infra* Part II.B.

[122] *See, e.g.*, Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 634 (noting the ethical significance of this choice).

[123] For example, law school itself may color a lawyer's moral perspective in a way that affects her subsequent decision-making. *See generally* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983).

[124] The dominant view also overlooks the broad understanding of career choices, but that oversight is beyond the scope of this article.

[125] The idea behind the moral dialogue requirement is that lawyers should not simply pursue every legally permissible strategy that clients request, but should engage clients in a conversation about morally troublesome tactics in an effort to dissuade them from pursuing such strategies. *See, e.g.*, FREEDMAN, *supra* note 89, at 50-52.

which are compatible with the "amoral professional ethic," and he identifies two choices of note.[126] He explains:

> [I]nitially, the lawyer has the choice of whether or not to be a lawyer. It should be clear that this choice involves important moral consequences. Second, the lawyer has the choice of whether or not to accept a person as a client. This choice also involves the exercise of moral autonomy.[127]

Conspicuously absent from this description is the lawyer's choice of jobs. Between the decision to become a lawyer and the choice of specific clients is the decision to work in a particular practice. Pepper, however, overlooks this choice even though it is the moment when a lawyer can most effectively exercise her freedom and even though it can play the most important role in determining a lawyer's clients and how the lawyer represents them.

Professor Pepper also does not acknowledge the significance of career choices in relation to his views on moral dialogue. Recall that Pepper believes that lawyers should pursue any lawful tactic that clients request, but he encourages lawyers to have a moral dialogue with their clients before adopting those requests.[128] The problem is that, even though Pepper dedicates an entire article to this proposition, he does not recognize that lawyers' opportunities to engage in moral dialogue often vary according to the practices they select.[129] Thus, lawyers' career choices will have important implications for whether their practices make possible the kind of conversation that Pepper and others envision.[130]

Pepper ultimately presents an elaborate justification for the dominant view, which refers to the moral relevance of choosing to become a lawyer and deciding to represent particular clients, yet he neglects to mention the extent to which job choices also have an ethical dimension. Moreover, he explains the importance of moral dialogue but does not describe how lawyers' job choices can limit those possibilities. Part III explains the consequences of incorporating job choices into Pepper's analysis, but for now, it suffices to note that the model remains silent on the role that those choices play in structuring attorneys' work.

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[126] Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 634.

[127] *Id*.

[128] Pepper, *Counseling at the Limits of the Law*, *supra* note 90, at 1563.

[129] *See supra* Part I. Professor Pepper does recognize that clients will vary in their receptiveness to moral dialogue and that more sophisticated corporate clients might be hostile toward such a conversation. Pepper, *Lawyers' Ethics in the Gap*, *supra* note 90, at 192-96. He does not examine, however, how these variations should affect a lawyer's career choices. *See id*.

[130] *See* FREEDMAN, *supra* note 89, at 50-52; Fried, *The Lawyer as Friend*, *supra* note 1, at 1088; Wendel, *supra* note 79, at 69-70.

Professor Fried's approach contains the same oversight. He explains why a lawyer's choice of clients is always morally worthy and not subject to criticism,[131] but he does not examine the extent to which the lawyer's career choice is immune from critique. Rather, he obliquely addresses the issue by exploring the consequences of requiring practitioners to filter their decisions through a moral lens:

> [E]ach lawyer would have to consider at the outset of his career and during that career where the greatest need for his particular legal talents lies. He would then have to allocate himself to that area of greatest need. Surely there is nothing wrong in doing this . . . but is a lawyer morally at fault if he does not lead his life in this way?[132]

Fried answers that question by asserting that the lawyer has the moral right "to take up what kind of practice" he chooses.[133] Putting aside Fried's failure to explain why lawyers have such a moral right,[134] his discussion never makes explicit the extent to which certain career choices can actually *limit* the autonomy that he so embraces. For instance, as is the case with Pepper's analysis, Fried describes the importance of moral dialogue without discussing the various ways in which career choices may actually limit lawyers' freedom to choose and then counsel their clients.[135]

In all, dominant view proponents do not discuss the extent to which career choices may affect their analyses, and the reasons for this omission are not entirely obvious. One possibility is that theorists assume their prescriptions would remain unaffected even if they consider career choices. The discussion here, however, already suggests at least one way in which the dominant view would be altered; namely, given that advocates of the dominant view believe in moral dialogue, the dominant view should (but fails to) offer a prescription for how lawyers should choose jobs that provide the freedom to engage in that conversation. Part III explores this contention in more detail, but the goal here has been more limited: to demonstrate that the dominant view does not describe the ethical significance of career choices. As explained below, critics of the dominant view commit the same error of omission.

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[131] Fried, *The Lawyer as Friend*, *supra* note 1, at 1076-80.
[132] *Id.* at 1078.
[133] *Id.*
[134] *See* LUBAN, *supra* note 1, at 286-87 (noting this omission).
[135] Fried, *The Lawyer as Friend*, *supra* note 1, at 1088.

B. Criticism of the Dominant View

Critics have constructed a number of alternatives to the dominant view. Although these critiques often rely on different assumptions and formulate divergent analyses,[136] they are generally united in their attempt to develop a competing vision of ethics infused with some form of judgment that considers non-client interests. These approaches typically refer to two methods for giving substance to these judgments: morality and social values.[137]

Professor David Luban presents one of the most commonly cited versions of a morality-based theory of ethics.[138] According to Luban, a lawyer, at least outside the criminal defense context, should seek morally worthy ends using morally justifiable means.[139] He explains:

> The morally activist lawyer shares and aims to share with her client responsibility for the ends she is promoting in her representation; she also cares more about the means used than the bare fact that they are legal. As a result, the morally activist lawyer will challenge her client if the representation seems to her morally unworthy; she may cajole or negotiate with the client to change the ends or means; she may find herself compelled to initiate action that the client will view as betrayal; and she will not fear to quit. She will have none of the principle of nonaccountability, and she sees severe limitations on what partisanship permits.[140]

Luban, therefore, rejects the dominant view in favor of a model of ethics that relies on what he calls moral activism.[141]

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[136] Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 614 n.7 (citing critiques of the neutral partisanship model based on moral philosophy, religion, socioeconomic analysis, legal analysis, and jurisprudence).

[137] *See* Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 89-90 (2000).

[138] *See, e.g.*, LUBAN, *supra* note 1. *See generally* THOMAS L. SHAFFER & ROBERT COCHRAN, JR., LAWYERS, CLIENTS AND MORAL RESPONSIBILITY (1994); Crystal, *supra* note 137; Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219 (1995); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991). The attempt to enrich legal ethics with conceptions of morality has a long history. *See, e.g.*, DAVID HOFFMAN, A COURSE OF LEGAL STUDY (photo. reprint 1972) (1836).

[139] LUBAN, *supra* note 1, at xxii.

[140] *Id.* Although Luban does refer to a lawyer's willingness to "quit" here, the context implies that he means a lawyer's willingness to quit the client's cause, not to seek a job change. *Id.*

[141] *Id*.

As was the case with the dominant view, Luban's approach does not contain any significant discussion of career choices. This oversight is evident throughout his seminal statement on ethics, *Lawyers and Justice: An Ethical Study*.[142] In it, he spends several chapters describing the merits of public interest and legal services work without suggesting that lawyers should actually pursue such work over other options.[143] The closest he comes to discussing career choices is in the context of an examination of corporate lawyers, where he briefly identifies some problems with their work.[144] Luban writes, however, that his "point is . . . not to inveigh against the corporation lawyer, [but rather,] to praise the people's lawyer."[145] As a result, Luban never actually advocates any particular career path, and one is left guessing about how lawyers should actually select their jobs.

The omission is unsatisfying because Luban spends so much time developing a theory of ethics that urges practitioners to practice law in a morally fulfilling way. What Luban overlooks is that a lawyer's choice of careers may be the most important decision in determining what kind of work the lawyer performs and whether it is performed consistently with particular conceptions of morality. In short, Luban offers a rich discussion of ethics, but he ignores an examination of the career choices that impact so many of the ethical debates that he describes.

Other dominant view critiques contain the same problem. In contrast to morality-based theories of ethics, some models identify faults with the dominant view yet find it troubling to allow lawyers to make professional decisions using common morality.[146] These models advance a variety of reasons for rejecting the dominant view based on some alternative theory. Professor William Simon has constructed perhaps the most thorough of such models, which posits that "[l]awyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice."[147] By justice, Simon does not refer to common morality but to "legal judgments grounded in the methods and sources of authority of the professional culture."[148]

As with Luban's theory, Simon applies his approach to the individual

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[142] *See generally*, LUBAN, *supra* note 1.

[143] *Id.* at 293-391.

[144] *Id.* at 238.

[145] *Id*.

[146] Crystal, *supra* note 137, at 90-91 (citing Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990)); Wendel, *supra* note 79, at 7.

[147] SIMON, *supra* note 1, at 138.

[148] *Id.*

lawyer's decision about how to select clients and how to determine the means of representing those clients, but he offers little discussion about how lawyers should choose their practices.[149] His only comments on the topic appear to be an afterthought; he wrote in one of his older works:

> [T]he analysis ought to be of value to lawyers who are not yet committed to particular areas of practice where ethical discretion is especially constrained. If, for example, the conditions of tax practice require practitioners to exploit to the hilt the discrepancies between public purposes and their formal legislative expression, then lawyers who have a choice might want to avoid tax practice.[150]

He does not elaborate on this observation, even though the choice he identifies has become increasingly important.[151]

In all, Simon, Luban, and proponents of the dominant view differ, and sometimes dramatically so, but they all ultimately share a common flaw. They each focus on the particular moment a lawyer decides to represent a client or pursue a strategy, yet as explained in Part I, that approach ignores how little freedom lawyers in organizational practices have over those "choices." As a result, existing theories have not captured the law practice realities that a growing number of attorneys experience, and the theories have not constructed a satisfactory model for assessing attorneys' decisions. Part III elucidates the implications of this theoretical oversight and suggests how ethics theories should incorporate career choices into their analyses.

III. LOCATING CAREER CHOICE IN LEGAL ETHICS THEORY

The decision to become a lawyer and to pursue a particular line of work within the law both have profound professional and personal consequences.[152] The pursuit of a law degree can, among other things, lead

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[149] Tanina Rostain, *Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment, and the Practice of Justice*, 51 STAN. L. REV. 955, 956 (1999) (reviewing SIMON, *supra* note 1).

[150] Simon, *supra* note 3, at 1131.

[151] Technically, the issue that Simon identifies is not exactly one of career choice ethics. Simon's suggestion is not just that a lawyer might want to avoid certain jobs; he contends that lawyers may have reason to avoid entire practice areas. Put another way, Simon appears to suggest a kind of "practice choice ethics" that could contain different considerations than "career choice ethics." Whereas the latter examines the specific jobs lawyers accept, the former could examine a prior choice: one's decision to specialize in a particular kind of law. That decision relates in some ways to a lawyer's choice of jobs, but it is nonetheless distinct. Although a fuller explication of "practice choice ethics" is beyond the scope of this article, the possibility deserves further study.

[152] Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 634 (noting that the decision to become a lawyer has "important moral consequences"); Schiltz, *supra* note 37,

people to incur significant financial debt,[153] color the moral lens through which they view the world,[154] and affect the types of jobs they will have available. The choice of a particular legal job is no less crucial; in addition to determining an attorney's clients and strategies, it can also dictate income, hours, and overall job satisfaction.[155] The concern here is primarily with the latter decision, as that choice more directly affects those facets of an attorney's work that relate to client selection and strategy decisions.[156]

Despite this emphasis, it is worth noting at least two ways one might examine the broader understanding of career choices discussed earlier (one that would include the decision to attend law school). First, the decision to join the legal profession necessarily entails compliance with the ethics rules that govern it and with the law more generally. To the extent that the rules or the law make people morally uncomfortable, they should reconsider their career choices in the broadest sense. Assume, for example, that someone is not willing to abide by public accommodation laws, such as a Ku Klux Klan member who is only willing to represent white people.[157] Or less perniciously, consider someone who is always morally opposed to arguing a position with which she personally does not agree.[158] These

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at 872-87 (citing numerous studies about the personal lives of attorneys). *See generally* MIKE W. MARTIN, MEANINGFUL WORK: RETHINKING PROFESSIONAL ETHICS (2000) (examining the moral significance of one's work); Norman S. Care, *Career Choice*, 94 ETHICS 283 (Jan. 1984) (same).

[153] According to a 1998 survey, law school graduates had loan balances that averaged approximately $45,000 for public school graduates and $63,000 for private school graduates. Barry Glassman, *Advice for the Debt-Impaired: You Can't Pay Me Enough*, LEGAL TIMES, Nov. 22, 1999, at 30 (citing SALLIE MAE EDUCATION INSTITUTE, 1998 SURVEY OF GRADUATE AID POLICIES, PRACTICES, AND PROCEDURES).

[154] *See, e.g.*, ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 73 (1992) ("Law schooling . . . represents a moral transformation through which students dissociate themselves from previously held notions about justice and replace them with new views consistent with the status quo."); ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL 45 (Howard S. Erlanger ed., 1989) (finding that "any initially strong commitment to altruistic values is not likely to survive the law school years").

[155] *See, e.g.*, Patrick Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 722-24 (1998) (examining these features in the context of large firm practice).

[156] Although not discussed extensively here, lawyers can also choose to leave the profession altogether. For one example of the burgeoning literature on this subject, see CAIN, *supra* note 77.

[157] *Cf. In re* Hale, 723 N.E.2d 206 (Ill. 1999) (Heiple, J., dissenting) (arguing that the Illinois Supreme Court wrongly let stand a decision by Illinois' Committee on Character and Fitness which denied a petition for admission to the Illinois bar by an avowed racist); *Stropnicky v. Nathanson*, Mass. Comm'n Against Discrimination, No. 91-BPA-0061 (Feb. 25, 1997).

[158] Such a stance could easily interfere with a lawyer's duties under a number of the

prospective lawyers would find it hard to avoid violations of the law or the ethics rules and should probably find alternative careers that coincide more closely with their moral outlooks. In other words, lurking at the fringes of a career choice discussion is a decision that is temporally prior to job choices within the profession, and that choice relates to ethics in many ways but is not the focus of the present article.[159]

A fuller understanding of career choices also contributes to a second point. Namely, law schools vary in terms of the job opportunities their graduates have available.[160] Prospective students can consider those variations when deciding whether to attend a specific school or, if the job prospects are not palatable, whether to attend law school at all. Students who attend the most elite schools usually have a larger range of opportunities, including positions at large firms, government agencies, and public interest organizations, while students at other schools may have fewer options, either by category (e.g., large law firms may not recruit students from the school) or within categories (e.g., only some kinds of government agencies may hire from the school).[161] In either case, a prospective law student can anticipate the job choice autonomy she is likely to have upon graduation and make an informed judgment as to whether (or where) to pursue a law degree given her professional and ethical ambitions.[162] That choice, although somewhat removed from the core debates discussed in the ethics literature and thus not examined extensively here, is still significant and deserves further elaboration in subsequent work.

Part IV returns to this observation briefly, but the rest of this section focuses on the more limited conception of career choice: the decision to pursue a specific job within the legal profession. The goal is to explain two ways in which a career choice critique (narrowly understood) impacts legal

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Model Rules of Professional Conduct, including Rule 1.2 ("A lawyer shall abide by a client's decisions concerning the objectives of representation.") and Rule 1.3 cmt. ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer."). MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.3 cmt. (2000).

[159] *See* Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 634 (making a passing reference to the ethics of becoming a lawyer).

[160] Prospective students can obtain this information through the placement statistics that law schools are required to publish. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 509-1 (1998).

[161] Of course, job opportunities range within schools as well. High grades or law review participation at a non-elite school may open up job possibilities that are unavailable to other graduates of the school. Students, however, can take these variations into account, including their likelihood of being among those students who have broader job options, when deciding whether to attend a particular institution.

[162] Indeed, law schools have an obligation to make general job placement data publicly available. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 509-1 (1998).

ethics. First, instead of just prescribing how lawyers should choose their clients and strategies, ethics theories need to guide lawyers in the selection of jobs that can often predetermine those choices. This suggestion, which I call the prescriptive modification, is essentially a supplement to the debate over the partisanship principle. That is, ethicists attempt to describe how lawyers should behave, but those efforts do not provide an adequate framework for understanding how lawyers should make the career choices that play such an important role in dictating their work.

The second claim, which I refer to as the normative modification, is that we need to consider the autonomy-stripping effect of career choices when assessing whether we should criticize lawyers for the work that they perform. By considering the significance of career choices, the critics of the nonaccountability principle will occasionally reach new conclusions as to whether a particular lawyer deserves criticism. Moreover, I claim that the dominant view's nonaccountability principle does not extend to the career choice context even if it applies to client and strategy choices.

One important proviso is necessary at the outset. The discussion is *not* intended to suggest an alternative theory of ethics; rather, a career choice critique supplements, but does not supplant, prevailing accounts. So one could subscribe to a particular theory of client selection and strategy choice ethics, say the view described by Simon in *The Practice of Justice*,[163] yet still recognize that the theory requires a discussion of career choice ethics. Accordingly, a career choice critique suggests ways to enrich, not eliminate, existing theories while remaining largely agnostic as to the underlying merits of the disparate approaches.

A. The Prescriptive Modification: Offering Career Advice

Consider again my former student's query about whether to accept a job at a firm that does tobacco defense work. The standard ethics theories do not offer explicit guidance as to how the student should make that decision. Nonetheless, the theories do implicitly suggest some guiding principles for career choices. This section discusses the prevailing models and describes their career choice implications.

1. The Dominant View and the Pursuit of Moral Dialogue

Recall that the dominant view requires lawyers to undertake all lawful strategies that serve a client's interest (assuming the client requests them).[164] It also suggests that lawyers can choose their clients on nearly any ground they deem appropriate, although there is some disagreement

[163] *See generally* SIMON, *supra* note 1.
[164] *See supra* Part II.A.1.

about whether the dominant view forbids a lawyer from selecting clients on the basis of personal convictions.[165] The question then becomes: how does a career choice critique alter or supplement the dominant view's prescriptions? Put another way, the dominant view addresses client selection ethics and strategy choice ethics, but what does it have to say about career choice ethics?

At first glance it would appear that the dominant view has nothing to contribute to a discussion of career choices; if lawyers do not have any obligations to accept or reject particular clients, no career path is more worthy than any other. A different conclusion emerges, however, once one considers that many dominant view proponents believe that lawyers should consult with their clients before making morally complicated strategic decisions. Because practitioners experience varying constraints on their ability to counsel clients and because practitioners have different attitudes about such counseling, the opportunities to engage in this kind of client conversation will vary depending on the practice a lawyer chooses.[166] Thus, the dominant view appears to advise against accepting positions that do not encourage such counseling or involve clients who do not want it.[167]

This result is surprising. The dominant view's *raison d'etre* is to suggest that lawyers have no moral accountability for their lawful professional decisions, so one would not expect the dominant view to prescribe any particular career choice. But in placing an emphasis on moral dialogue, the dominant view implies that lawyers should pursue those practice types that make that conversation possible. The model would obviously not *require* lawyers to choose specific jobs, yet it does

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[165] *Id*.

[166] For example, large law firms do not appear to provide many opportunities in this regard. *See, e.g.*, KRONMAN, *supra* note 22, at 290; Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 440 (1985) (examining the reluctance of large firm lawyers to engage in moral dialogue); Pepper, *Lawyers' Ethics in the Gap*, *supra* note 90, at 192-94 (same).

[167] One could conceive of other considerations that also would not necessarily conflict with either the partisanship or the nonaccountability principles. For instance, the decision to join some practices, such as large law firms in major cities, may interfere with ethical obligations one has to family or friends. *See* Schiltz, *supra* note 37, at 910 (suggesting that large firm practice is inconsistent with one's communal and personal obligations). Or one might find that some ethics rules, including those requiring competence, obligate one to avoid a particular practice setting. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2000). For example, some public defender offices require such enormous caseloads that clients do not receive adequate representation. *See supra* note 54. The idea is that one can conceive of a number of factors that weigh for or against certain practice settings and that do not conflict with the dominant view's premises. Moral dialogue just happens to be one of the more prominent concerns.

suggest that lawyers should at least consider the autonomy-constraining effects of their job options when choosing their career paths.[168]

A lawyer, according to this view, might consider a number of variables when selecting a job. What obstacles do lawyers in this type of practice face regarding moral dialogue?[169] Are the clients in this type of practice receptive to such ethical counseling? What kind of culture does the specific job promote regarding lawyer-client interactions? No single question will yield a clear answer and opportunities for client counseling will surely be only one of a number of possible factors that a lawyer will, and should, consider when deciding whether to accept a job.[170] The problem is that the dominant view has not recognized that opportunities to engage in moral dialogue vary and that lawyers can consider these differences when they select where they will practice.[171]

The dominant view's prescriptions will, of course, differ depending on the options that a lawyer has available and on the specific version of the dominant view that one adopts. The point here is not to elucidate the "correct" career choice prescription but to suggest that such a prescription is possible and is consistent with the dominant view's underlying premises. Thus, rather than remaining silent about attorneys' career choices, the dominant view's proponents need to advise lawyers how to make those decisions.

2. The Critics' Prescriptions

The critics of the dominant view similarly fail to formulate prescriptions regarding career choices. Consider Professor Luban's argument for a moral activist conception of the lawyer.[172] What is odd about Luban's vision is that, although he believes that lawyers should refer to conceptions of morality when deciding which clients to represent and how to represent those clients, his theory contains almost no guidance as to how attorneys should choose the career paths that dictate so many of those decisions. If he were to apply his theory to career choices, however, some concrete prescriptions would likely emerge. For instance, a proponent of Luban's view might ask what kinds of clients she will represent if she accepts a particular job, what kinds of goals those clients are likely to have (and whether those goals are morally appealing), what kinds of strategies

[168] *Cf.* KRONMAN, *supra* note 22, at 378-81 (suggesting that lawyers should choose jobs that offer opportunities to employ what he calls practical wisdom).

[169] *Id.* (proposing a similar question).

[170] For example, a lawyer may need a certain salary or a setting that involves a particular specialty.

[171] *See supra* note 166.

[172] *See supra* Part II.B.

she will have to pursue (including the moral attractiveness of those tactics), and what other options she has available. She would then employ moral activism at the career choice level and pursue the career option that best fits a particular conception of common morality.

Again, the goal here is not to suggest specific prescriptions that Luban might offer; indeed, any such unvarying formula, such as one that urges all lawyers to join a public interest practice, would undoubtedly be too simplistic (and unrealistic).[173] This recognition, however, does not mean a model like Luban's does not have much to say in the career choice context. That is, Luban's theory hints at how a moral activist attorney might select a career path, yet Luban has left this possibility largely unexplored.

Professor Simon's elaborate and compelling framework also overlooks an opportunity for career choice guidance. Instead of asking whether a particular tactic or client promotes the interests of justice, a lawyer who finds Simon's view persuasive would also ask a different question: Which career option would enable me to promote the interests of justice given the types of clients I am likely to represent and the tactics I am likely to pursue? This question will yield a variety of answers depending on the context, but it at least provides a basis for making that career choice decision.

This approach is similar to the way in which Simon has described client selection. He has argued that when deciding whether to adopt a particular client, a lawyer must necessarily consider a number of factors. For instance, even though Simon believes that "a lawyer should assess [a potential client's] merits in relation to the merits of the claims and goals of others whom she might serve,"[174] he believes that a "lawyer's financial interests are also . . . important."[175] Simply put, Simon believes that lawyers may make different client selection decisions depending on their own circumstances. In the same way, lawyers could examine their own situations when assessing which career path is likely to promote the interests of justice. Thus, a justice-based model will not recommend a career that some "objective" source determines best promotes the interests of justice; it will contain a nuanced set of factors that each lawyer can consider. Again, Simon has noted this possibility, but he has not fully explored it.[176]

In all, ethics models include little guidance regarding what kinds of careers lawyers should pursue. These models, though, actually present

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[173] LUBAN, *supra* note 1, at 152 (making a similar observation in the context of strategy selection).

[174] Simon, *supra* note 3, at 1093.

[175] *Id.*

[176] *Id.* at 1131.

distinct frameworks that attorneys can employ when making career decisions, and ethicists' failure to extend their prescriptions to cover those choices is a significant omission. While no complex theory of ethics will universally recommend one practice type over another, each model does suggest questions that lawyers should consider in light of their own personal and professional circumstances. At the very least, such an inquiry will offer the lawyer and law students far more guidance about career options than most theorists presently provide.[177]

B. The Normative Modification: Establishing Career Choice Accountability

In assessing professional conduct, current models differ widely but ask the same basic question: Can we hold lawyers accountable for their selection of clients and tactics?[178] This article proposes that a career choice critique urges another, and often more relevant, question: Are lawyers accountable for the career paths they have chosen? In the context of the dominant view critics, this question suggests an additional basis for criticizing a lawyer's client and strategy decisions. With respect to the dominant view, one discovers that the nonaccountability principle does not necessarily apply in the career choice setting even if one accepts the dominant view's premises.

1. Supplementing the Critics' Analyses

Critics of the dominant view posit that we can hold lawyers accountable for the clients they represent and the strategies that they choose on behalf of those clients.[179] These models then attempt to describe how we should determine whether a lawyer actually deserves criticism for representing particular clients and adopting certain tactics.[180] The

[177] Not all commentators have avoided this question. For example, Patrick Schiltz has suggested that large law firms foster unethical cultures through their demands on attorneys' time and that lawyers should therefore avoid such firms. Schiltz, *supra* note 37, at 924; *see also* KENNEDY, *supra* note 123 (urging students to avoid law firms); KRONMAN, *supra* note 22, at 378-79 (advising lawyers to avoid large firms because of the failure of those firms to provide an environment hospitable to "practical wisdom"); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1983-84 (1993) (suggesting that African-American lawyers may have reasons to avoid certain practice settings). Of course, one need not agree with these particular prescriptions in order to recognize the value of offering advice on career choices.

[178] *Supra* note 1 and accompanying text.

[179] *See supra* Part II.B.

[180] Keep in mind that a rejection of the nonaccountability principle does not necessarily mean that a lawyer deserves criticism; it only means that a lawyer is *susceptible* to criticism depending on her actions.

contention here is that, by incorporating career choices into these analyses, one may decide that criticism is warranted in some cases that did not previously receive such scrutiny.[181]

To illustrate, consider whether a tobacco defense lawyer deserves criticism for her work. According to Professor Simon, she is certainly accountable for her work, but she would only deserve criticism if she decided to represent the tobacco company when there were other clients available that had more meritorious claims or goals.[182] Assume now that the attorney's firm derived a significant portion of its revenue from tobacco work and that the firm had few litigation opportunities outside of tobacco defense. Even if we believe that the tobacco company does not have a particularly attractive agenda, Simon's analysis implies that we should not criticize the lawyer because she had few viable alternatives.[183]

Once we expand the analysis to include career choices, however, a different conclusion emerges. Assuming that the lawyer did not have many realistic opportunities to represent other clients at her firm and that she had no control over the clients her firm represented, she may still have had a number of options when she accepted her job. She also may currently have numerous job options. Thus, a proponent of Simon's view might criticize the lawyer for foregoing career paths, say at other law firms, that would allow her to represent clients with worthier claims. Put another way, Simon's analysis yields one conclusion when we consider only the lawyer's currently available clients but could yield another conclusion when we consider her career options. Ultimately, the firm may not have a choice, but individual lawyers, such as associates with job alternatives, may have such choices, and that distinction has ethical significance that commentators have ignored.

One might object to this sort of analysis with the same argument typically raised against dominant view critics: If all attorneys adopted this approach, clients like the tobacco company would go unrepresented or would receive inferior representation. This criticism is directed against Simon's position, not the career choice supplementation of it. It is Simon who contends that lawyers should choose clients according to the merits of their agendas, and Simon has provided convincing support for this proposition.[184] The argument here, however, does not rely on the validity

[181] I do not suggest that such a consideration will always produce new conclusions, only that they *may* do so in some circumstances.

[182] Simon, *supra* note 3, at 1093-94. Simon concedes that a lawyer may have to take into account financial constraints and other variables when deciding whether to accept certain clients, but he believes that *ceteris paribus* the attorney should represent those clients whose claims best promote the interests of justice. *Id.*

[183] *Id.*

[184] SIMON, *supra* note 1, at 160-62.

of Simon's theory; it merely demonstrates that his theory has a broader application than he implies. Thus, *assuming one believes in a theory critical of the dominant view,* one can criticize lawyers for a greater range of choices than prevailing theories presently permit. The question then becomes whether the career choice critique has anything to offer the proponent of the dominant view.

2. Revisiting the Nonaccountability Principle

The crux of the argument is that the nonaccountability principle does not extend to career choice ethics even if we assume that it applies to client selection and strategy choice ethics. This contention relies on the dominant view's premise that lawyers have an obligation to engage their clients in a moral dialogue before undertaking certain kinds of strategies.[185] This assumption implies that we can criticize attorneys who do not have this conversation, while still clinging to the dominant view's central claims. In other words, we can criticize lawyers who accept *jobs* that prevent moral dialogue. With this revision, the graphical depiction of the dominant view constructed earlier would appear as follows:

Table 2:
The Dominant View (Restated)

	Career Choice Ethics	Client Selection Ethics	Strategy Choice Ethics
How should lawyers decide?	Avoid jobs that limit moral dialogue.	"Bleached Out Professionalism"?	Apply the Partisanship Principle.
Are lawyers accountable for the choice?	Yes, insofar as lawyers can anticipate how their job choices will affect their opportunities for moral dialogue.	No. Apply the Nonaccountability Principle.	No. Apply the Nonaccountability Principle.

To give some content to this modification, consider a young lawyer who must decide whether to join a large firm that tends to reject moral dialogue[186] or whether to join another firm whose attorneys generally engage in this conversation (or at least find it appropriate).[187] In this

[185] *See supra* Part II.A.

[186] *See, e.g.*, CAPLAN, *supra* note 28, at 147-48 (claiming that such a culture exists at Skadden, Arps, Slate, Meagher and Flom); Scheffey, *supra* note 47 (describing a general counsel of a company that adopted a similar philosophy).

[187] The limited empirical work on moral dialogue suggests that few law firms would

scenario, the dominant view would recommend the latter job and would presumably find fault with the decision to join the former practice. Again, the dominant view proponents would not *require* the lawyer to accept any particular position, but criticism would appear to follow from what these ethicists have proposed.

One possible objection is that we should not criticize the lawyer for pursuing a job that simply increases the likelihood moral dialogue will not take place; we must wait until the discussion has not occurred. According to this claim, the criticism is inappropriate at the career choice stage because there is still a possibility that the lawyer will engage in the necessary moral dialogue or will be able to convince the relevant partners that such dialogue is desirable. This objection, however, does not reflect the realities of many organizational practice settings. An associate in a large law firm that discourages moral dialogue does not have a realistic opportunity to engage in a conversation with a large corporate client about the wisdom of major strategic decisions, nor is the associate likely to convince partners to engage in such a dialogue. Because the job prevents the associate from exercising her ethical obligations (as described by the dominant view's own advocates), a career choice critique suggests that we can find fault with the lawyer's decision to join the firm (or to stay at the firm) even if we accept the dominant view's basic premises.

The objection is nonetheless accurate in one sense. The relationship between career choices and the ethical consequences of those choices is more attenuated than in the context of client selection and strategy choice ethics. In the latter cases, decisions regarding clients and strategies contain the actual source of ethical controversy, whereas in career choice ethics, the controversy relates to the consequences of the career choice. That is, career choice ethics is not concerned with the jobs that lawyers choose *per se*, but with the consequences of those choices on clients and tactics. This attenuation, though, does not negate the importance of career choice ethics; it merely makes its impact less immediate.

Another possible objection is that moral dialogue could undermine the client's freedom to engage in strategic decision-making, as the lawyer might pressure the client to pursue a tactic that she otherwise would not have adopted. Professor Pepper examines this possibility and convincingly rejects it.[188] He argues that moral dialogue is not inconsistent with a

actually fit this description. *See* Nelson, *supra* note 31. That development raises several important questions. Why do so few law firms engage in moral dialogue? What can we do to change attitudes about its significance? What role can legal ethics education play in sensitizing students to these concerns? Professor Pepper has begun this project, but more is left to be done, especially from a pedagogical standpoint. *See generally* Pepper, *Lawyers' Ethics in the Gap*, *supra* note 90.

[188] Pepper, *Lawyers' Ethics in the Gap*, *supra* note 90, at 192-94.

client's autonomy as long as the lawyer is careful when dealing with unsophisticated individuals.[189] In those cases, the lawyer could potentially usurp the client's autonomy by advocating a particular strategic approach too forcefully; however, Pepper concludes that this concern is not present for a great number of clients and that, even where it is present, moral dialogue is not inconsistent with the dominant view's other premises.[190]

Professor Fried offers another objection based on the lawyer's autonomy.[191] He implies that, by criticizing which jobs lawyers accept, we would interfere with one crucial area of a practitioner's autonomous decision-making.[192] Nobody suggests, though, that we should punish lawyers for their career choices; rather, the contention here is that we may have grounds for criticizing those choices. It is hard to conceive how mere criticism, as opposed to punishment, would interfere with a lawyer's freedom.[193]

In all, a career choice critique provides a reformulation of how ethics models should assess the moral value of legal work. In the context of dominant view critics, the career choice critique offers a new method for holding lawyers morally accountable for the work they perform. With respect to the dominant view itself, the critique suggests that the nonaccountability principle does not always apply in the career choice context even if one believes that it applies to client and tactical decisions. Ultimately, this analysis implies that ethics models must consider the role of career choices in order to supply a fuller and more textured account of whether lawyers deserve criticism for their conduct.

IV. PROPOSALS FOR REFORM

The theoretical modifications described above suggest at least two possible reforms. First, given the extent to which attorneys have limited client and strategy selection opportunities in organizational practices, law students and lawyers need to be well-informed when they select their jobs. Currently, law schools do little to provide students with this sort of information,[194] so existing legal ethics courses need to incorporate information about the dynamics of different forms of law practice. Second, lawyers should be ethically obligated to educate themselves about their

[189] *Id.* at 192-93.
[190] *Id.* at 192-94.
[191] Fried, *The Lawyer as Friend*, *supra* note 1, at 1078.
[192] *Id.*
[193] One might then object that criticism without punishment would accomplish little. Although cultural pressures in the form of criticism might not be as effective as an enforceable rule, it nonetheless has some effect on behavior.
[194] *See* Wilkins, *supra* note 15, at 76.

career options by investigating the work of both their present and prospective employers.

Each of these proposals reflects the narrower understanding of career choices (i.e., the selection of a job within the legal profession). At various points, however, a broader conception of career choice, one that includes the decision to become a lawyer and to attend a particular law school, has been discussed. Although this article has not focused extensively on the broader understanding of career choice, one could conceive of proposals that would enhance informed career choice decision-making loosely defined. For example, the ABA currently requires law schools to make public a wide range of "consumer information," including "placement rates and bar passage data."[195] Law schools, however, are not yet required to supply prospective students with detailed information about which particular employers recruit on-campus. Given the disparate ways in which job choices can affect the work lawyers perform, the drafters of the ABA's Standards for the Approval of Law Schools could require law schools to disclose more exact placement data, including an identification of the specific employers who conduct interviews and the success of graduates in obtaining a job with those employers.[196] The rest of this section, however, focuses on the two proposals that emerge from a career choice critique narrowly defined.

A. Educating Students About Career Choices

Law students typically do not receive significant information about the variations among practice settings through any formal instruction.[197] Rather, they often obtain their knowledge through informal sources, such as from fellow students and legal recruiters,[198] who do not necessarily supply reliable descriptions.[199] One way to avoid this problem is for law

[195] ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 509-1 (1998).

[196] Law schools could also provide applicants with background information about the profession so that applicants can process the importance of the placement data they receive. This information could include a description of the major types of practice, the work that lawyers in those practices perform, and the freedom that lawyers retain in each practice setting (including, of course, a description of differences within practice settings as well). This requirement would enable prospective law students to consider the implications of their decision to attend law school. *See, e.g.*, NAT'L ASS'N FOR LAW PLACEMENT, DEGREES OF DIFFERENCE: A HOW-TO GUIDE TO CHOOSING A LAW SCHOOL (1998) (providing some of this information). *Cf.* James D. Gordon, *How Not to Succeed in Law School*, 100 YALE L.J. 1679 (1991) (offering a humorous but pointed description of legal education with the implicit purpose of suggesting that prospective law students consider the implications of attending law school).

[197] Wilkins, *supra* note 15, at 80.

[198] *Id*.

[199] *Id.* at 80-82.

schools to provide students with more information about the profession, particularly early in their legal education.[200]

This suggestion is not novel, as both commentators[201] and the ABA[202] have recognized the importance of teaching about the profession's institutions and practices. In fact, the ABA requires every law student to receive legal ethics instruction, and a recent modification of that curricular standard specifies that law schools must educate students about "the history, goals, structure, duties, values, and responsibilities of the legal profession and its members . . . ."[203] Despite this requirement, two problems remain. First, many law schools, especially elite schools, still do not include significant ethics instruction,[204] let alone instruction that educates students about the realties of different forms of law practice; thus, the proposal here is particularly important for those institutions. Moreover, even where schools adopt a more rigorous approach to legal ethics, there is not much attention to the variations among practice settings because the empirical work for such instruction is sparse.[205] Obviously, then, I share the calls for more research about the dynamics of modern law practice.[206] The discussion here just contains some preliminary thoughts about what career choice pedagogy should look like in the meantime.

The first step would be to help students arrive at a coherent theory of ethics. An exploration of the dominant view and its disparate critics would expose students to the materials they would need in this regard.[207] Professors may have their own favorite theories that they might advocate, but the goal would be to help students make a considered choice among the various approaches. The next step would consist of an examination of the basic practice settings, including large firms, small firms, solo practices, in-house counsel positions, government jobs, public interest groups, and multidisciplinary arrangements. Existing course materials distinguish

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[200] One might suggest that professors are not particularly reliable sources of this kind of information since they generally have rejected law practice in order to teach. Professors, however, are arguably more disinterested than the typical practitioner, who has chosen a particular form of practice over another and would often have at least some bias toward that form of practice.

[201] *See, e.g.*, Wilkins, *supra* note 15, at 78 (making a similar suggestion).

[202] ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 302(b) (1998). This standard contrasts with an earlier provision, which merely required "instruction in the duties and responsibilities of the legal profession," including the Model Rules. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 302(a)(iv) (1995).

[203] ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 302(b) (1998).

[204] Roger C. Cramton & Susan P. Koniak, *Rule, Story and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 147 & n.14 (1996).

[205] Wilkins, *supra* note 15, at 80.

[206] *Id*.

[207] *See, e.g.*, RHODE & LUBAN, *supra* note 1, at 140-200.

among these practice types in order to show the unique ethical dilemmas that lawyers in those settings face,[208] but they typically do not describe the different constraints that lawyers experience. To compensate for this oversight and to give students a flavor for the ways in which these practice types will affect them, a professor could assign readings describing the autonomy limitations identified in Part I. A recent symposium at Vanderbilt University Law School revolving around Professor Patrick Schiltz's criticisms of large law firm practice provides one example of the kind of dialogue one could anticipate occurring in a classroom.[209] Similar readings about other forms of practice could also serve the same purpose.[210]

Finally, once the students have learned how their career choices will affect them, they are in a better position to consider the implications of the ethics theories they have adopted. To take my former student as an example, he needs to determine which ethics model he finds attractive. If he adopts the dominant view, he should ask his prospective employers whether he could work with smaller clients (who may be more likely to allow him some control over strategy). He might also inquire (along the same lines) about his ability to determine which clients he represents and his opportunities for providing strategic advice. In contrast, if he adopts an alternative ethics model, he would need to pose a different set of questions. What kinds of clients will the firm ask him to represent? What kind of work do these clients request? Does he believe that this work is more ethically attractive, either because of morality or some conception of social values, than the work he could perform at other firms?

One might contend that this kind of instruction is unlikely to dissuade students from altering their career choices. For instance, a student with substantial loan debt who attends a law school with little or no loan forgiveness may want to join a large firm if at all possible, and no ethics course is likely to affect that decision. David Luban makes a related observation:

> [O]ur role [as law professors] in the distribution of legal services is determined by the job market our graduates enter; and, whether we wish it to be or not, it is largely a market for private

[208] *See, e.g.*, PHILIP B. HEYMAN & LANCE LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS xxi, 22-183 (1988); *see also* Wendel, *supra* note 79, at 41 (contending that "the context of legal practice plays an important role in the moral evaluations of practitioners") (citing David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye Scholer*, 66 S. CAL. L. REV. 1147 (1993)).

[209] Symposium, *Attorney Well-Being in Large Firms: Choices Facing Young Lawyers*, 52 VAND. L. REV. 871 *passim* (1999).

[210] *See, e.g.*, HEYMAN & LIEBMAN, *supra* note 208, at 22-183 (1988) (providing case studies of the major practice types in an effort to explore the ethics issues that arise in those settings); Rosen, *supra* note 33 (describing the role of in-house counsel).

> practitioners. Our role in the distribution of legal services mirrors rather than shapes the status quo. And so our efforts, regardless of individual teachers' scholarly interests or political orientation or intellectual intentions, go largely to screening, training, and evaluating law students for the benefit of private law firms and their clients.[211]

In short, Luban believes the market defines lawyers' career choices, so educating students about the variations among practice settings in order to mold their job decisions is an exercise in futility.

Even if one agrees that legal educators have little influence over students' career choices (and this is a debatable proposition),[212] that conclusion is not an argument against the kind of curriculum proposed here. The goal of career choice instruction is not to encourage particular forms of practice (though it may have that effect); instead, it should arm students with a way to distinguish among employers even *within* the same practice setting. By learning how different forms of practice operate, young lawyers can make more educated distinctions among the jobs they consider.[213] So if a law student wants to join a law firm, she will make a more educated judgment about which firm to join if she understands how firms operate and knows what questions to ask potential employers in light of that understanding.

One might object that this proposal actually does not go far enough; that is, the placement of career discussions in the context of legal ethics classes suggests that it is not a topic of general curricular concern. The objective, though, is not to confine legal profession discussions to ethics classes. Although those courses certainly offer the most conducive format to such instruction, one could anticipate a discussion of the profession's diversity occurring throughout the curriculum and in numerous settings.[214] Professors should not shy away from sharing their previous job experiences, including both their frustrations and satisfactions. Students often thirst for such information, and professors are either unaware that students would benefit from hearing about it or are too reluctant to discuss

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[211] David Luban, *Faculty Pro Bono and the Question of Identity,* 49 J. LEGAL EDUC. 58, 69 (1999).

[212] *See, e.g.*, KENNEDY, *supra* note 123 (positing that legal education deeply influences a lawyer's choice of careers).

[213] *Id.* at 122 (advocating a program that would educate students about different kinds of practice so that they can make a meaningful choice about career options); Wilkins, *supra* note 15 (recommending a scholarly agenda that would elucidate the realities facing practitioners).

[214] DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998).

it.[215] Clinics can also offer an excellent way to expose students to the realities of law practice, so law schools should provide students with ample opportunities for such work.

In all, legal ethics pedagogy has come a long way since the ABA first required law schools to provide such instruction in 1974.[216] Nonetheless, students still receive limited information about how their career choices affect their freedom. By providing students with more details about different practice settings, we can mitigate the myth and misunderstanding that often circulates among law students and instead prepare them with the information they need to distinguish among potential employers.[217] Such information will increase the likelihood that students will make informed career choices that produce more personally and professionally satisfying outcomes.[218]

B. Making Informed Career Decisions Ethically Obligatory

Once we supply students with more information about the consequences of career choices, we need to ensure that they and their more experienced colleagues actually use that knowledge. The proposal here is to amend the ABA's Model Rules of Professional Conduct, which contains in its preamble a list of twelve lawyer responsibilities.[219] The drafters should consider an amendment that would obligate lawyers to acquire information about prospective employers, including the employers' clients and lawyering philosophy. Moreover, it could impose a continuing duty on attorneys already employed in a large practice to understand the work their employers perform and to determine whether alternative employment might afford a more ethically attractive setting.[220]

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[215] Cramton & Koniak, *supra* note 204, at 147-48 (noting that professors often feel uncomfortable discussing legal ethics in their classes).

[216] ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 302(a)(iii) (1974).

[217] Wilkins, *supra* note 15, at 80.

[218] Informed decision-making is, of course, an end as well as a means. As Dean Anthony Kronman has noted, "being well informed about a choice is something good in itself and not just when it points to the right result." KRONMAN, *supra* note 22, at 87.

[219] MODEL RULES OF PROF'L CONDUCT, pmbl. (2000). The preamble contains a number of aspirational provisions and would be well-suited to the kind of amendment proposed here. In those jurisdictions that still follow the Model Code of Professional Responsibility, an obvious place for such an amendment would be in the section containing the Ethical Canons.

[220] One possible framing of the amendment (but by no means the only one) could be as follows:

> Lawyers in large practice settings often have limited client and strategy selection autonomy. Therefore, before accepting a particular position, attorneys have an ethical obligation to acquire information about prospective employers, including the employers' clients and lawyering philosophy. Moreover, attorneys already employed in an organizational practice have a

To satisfy these obligations, a lawyer seeking employment might have to ask questions of the prospective employer, speak with practitioners who are familiar with the employer, or talk to attorneys who had worked for the employer in the past. A currently employed lawyer might periodically examine the organization's clients or ask the employer for information about those clients and how they are represented.[221] The specific questions students or attorneys might ask would vary depending on their personal preferences, their own theory of ethics, or the practice setting at issue, but by making this inquiry an ethical obligation, we make clear that they should consider the implications of their job choices when deciding how to employ their professional skills.

One could argue that the suggested ethical obligation is not intended to be enforced, so it would have little or no effect. However, just because an ethical obligation is not enforceable does not mean that it cannot have some impact. Every law student is supposed to read the Model Rules of Professional Conduct,[222] and almost every jurisdiction tests that knowledge.[223] By exposing students to the idea that an inquiry is ethically necessary, students are more likely to take seriously their education regarding the legal profession. They will not view instruction regarding practice constraints as idle chatter, but as a necessary part of the information they need to satisfy their ethical responsibilities as legal professionals. The rule might also make students and young lawyers more comfortable asking prospective employers about their practices.

Another possible objection is that the ethical obligation assumes a rejection of the dominant view. If we say that lawyers should understand the client and strategy selection implications of their career choices, we must also be saying that those career choices have some ethical significance, a conclusion seemingly at odds with the dominant model. The dominant view, however, does not preclude an inquiry into the implications of career choices. Remember that the standard conception

> continuing duty to understand the work their employers perform and to determine whether alternative employment might afford a more ethically attractive setting.

[221] A powerful partner at a large Washington firm recently engaged in an excellent example of this sort of inquiry. After the Reverend Jesse Jackson informed the partner that his firm had merged with another firm that took positions hostile to affirmative action, the partner investigated the accusation and left the firm as a result of what he discovered. Groner, *supra* note 24.

[222] ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 302(b) (1998) ("A law school shall require of all students in the J.D. degree program instruction in the . . . Model Rules of Professional Conduct of the American Bar Association.").

[223] *See* National Conference of Bar Examiners, The Multistate Professional Responsibility Examination (2000), *available at* http://www.ncbex.org/Tests/testuse.htm. (last visited Aug. 8, 2001).

recommends that lawyers engage in moral dialogue, so these lawyers should still seek out those practices that recognize the value of such a conversation and should inquire about the prospects of such a dialogue when considering a prospective employer or alternative employment.

At the same time, lawyers who adopt other theories of lawyering might focus on different attributes of a particular practice. Critics of the dominant view might spend more time researching which clients the employer represents. What kind of legal services do those clients need? What kind of reputation do the clients have for being socially responsible? How much pro bono work does the employer permit its attorneys to perform?[224] What lawyering philosophy does the employer tend to adopt?[225] One could envision a wide range of questions that might be relevant depending on the ethical framework, but these questions are important and lawyers who reject the dominant view should pose them when deciding where to employ their professional skills.[226]

One should also not overlook the possibility that autonomy-constrained lawyers can use job decisions to exercise indirect control over attorneys with more discretion. In the Covington case, for example, the firm ultimately decided to drop South African Airlines at least in part because of elite law students' decisions to shun the firm.[227] Thus, lawyers can use career choices to exercise their autonomy as well as to affect the attitudes and decisions of lawyers with the actual decision-making authority. Not only, then, do these decisions offer individual practitioners

[224] This question has become particularly important in light of the significant decreases in pro bono commitment among private practitioners. *See* Greg Winter, *Legal Firms Cutting Back On Free Services for Poor*, N.Y. TIMES, Aug. 17, 2000, at A1.

[225] Different employers often have discernible lawyering philosophies. *See, e.g.*, Scheffey, *supra* note 47, at B1 (describing the general counsel of a large health care company who "seemed to favor litigation over negotiation and was slow to settle" and who was "combative, abrasive, and unbending"). Lawyers can find out about these philosophies and determine whether they want to join a practice that will require them to adopt a particular approach.

[226] Of course, this obligation is meaningless if legal employers are not forthcoming about the details of their practices. Employers should therefore have a corresponding duty to disclose information about their practices when asked. *Cf.* Crystal, *supra* note 137, at 94-101 (suggesting a more radical proposal that would require lawyers to submit for public review their philosophy of lawyering).

[227] Marcus, *supra* note 4. For a more recent example, see Terry Carter, *Sins of The Client*, A.B.A. J., Mar. 2001, at 20 (describing the effects of one firm's representation of the Boy Scouts of America against discrimination charges).

the greatest source of autonomy, but they can actually indirectly affect choices that the lawyer could not directly control herself.[228]

CONCLUSION

Few decisions have a greater impact on our daily lives than our career choices. Our jobs influence the interests we serve, the amount of money we earn, the places we live, the friends we make, and the way we spend a significant portion of our waking hours. Quite simply, we realize the importance of our career decisions, and we take them seriously. It is thus surprising that, although existing ethics theories have advanced important philosophical frameworks, they do not consider the disparate ways in which career decisions can affect their analyses. This article suggests that ethicists should examine the extent to which career choices offer many attorneys their primary source of discretion and how that reality affects ethics theory.

These theoretical modifications also suggest that lawyers, and especially young lawyers, need to make informed career choices. To achieve this goal, we need to supplement existing ethics curricula to include an examination of how different types of practice affect attorney discretion. We also need to convey that attorneys have responsibilities to educate themselves about the implications of their career choices, and the proposed amendment to the Model Rules of Professional Conduct serves that purpose.

In the end, a career choice critique highlights just one example of a larger problem with legal ethics: the failure to account for the diversity of law practice settings and the various ways in which that diversity affects ethics models. Thus, this article ultimately offers what promises to be part of a larger enterprise that places legal ethics in the context of law practice realities and encourages a recursive process, where legal practice informs ethics theory and the theory supplies (yet all too often fails to provide) practical prescriptions.[229] This article, through its exploration of career choices, describes one possible starting place for such an agenda.

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[228] *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[229] *See* Schiltz, *supra* note 155, at 781 (claiming that "much of the academic literature on legal ethics is disconnected from the realities of the practice of law"). For one illustration of such a project, see David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 469-70 (1990) (constructing a theory to moderate the tension between ethics rules and law practice realities).