NEWSLETTER ON PHILOSOPHY AND LAW

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RECENT BOOKS OF INTEREST
FROM THE EDITOR

Theodore Benditt
University of Alabama at Birmingham

We are indebted to Professor David Luban (Law, Georgetown University) for taking on the role of guest editor for this issue; Professor Luban serves as chair of the American Philosophical Association’s Committee on Philosophy and Law. The topic for the current issue is Legal Ethics. As Professor Luban indicates in his introduction, philosophical interest in lawyers’ ethics has had its ups and downs—little interest prior to the 1970s, growing interest in the 1970s and early 1980s, declining interest thereafter, and a new spurt of interest in the late 1990s. An issue central to these discussions is whether there is a peculiarly professional morality that is largely immune from the influence of ordinary morality. Both sides of this topic are represented in the papers in this issue of the Newsletter, along with other matters relating to the teaching and practice of legal ethics.

As always, the Newsletter also contains a number of abstracts of recent articles from law reviews and other journals of interest to philosophers. I want to thank Professors Joan McGregor (Philosophy, Arizona State University) and Sarah Holtman (Philosophy, University of Minnesota, Twin Cities) for contributing some of the abstracts that appear in this issue.

Future Issues of the Newsletter
Topics and editors for the next three issues of the Newsletter are:

Fall, 2003
SCIENCE IN THE LAW
Submission Deadline: June 15, 2003
Editor: Susan Haack
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Courts rely increasingly on scientific testimony; recent controversies over “junk science” in tort litigation and DNA evidence in criminal cases remind us that scientific evidence can be not only a powerful tool, but also powerfully confusing. This interaction of law and science prompts a whole range of philosophical questions: about the honorific use of “science” as an all-purpose term of epistemic praise, about scientific method, textbook versus frontier science, disagreement and the pooling of evidence in scientific communities, truth and consensus, statistical and epistemological probabilities, interests and bias in inquiry, and the strengths and weaknesses of the adversary system as a way of determining the truth and arriving at justice. Even the U.S. Supreme Court, in its efforts to ensure that when courts rely on scientific testimony it is not flimsy speculation but decent work, has found itself tackling the problem of the demarcation of science (Daubert, 1993, Kumho, 1999), and questioning the legitimacy of the distinction between methodology and conclusions (Joiner, 1997).

Spring, 2004
GAME THEORY AND LAW
Submission Deadline: January 15, 2004
Editor: Gerald Gaus
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This issue will be devoted to game theoretic modeling of the law. Contributors will address both meta-issues about employing game theory to understand the law, as well as advance specific applications to different areas of the law. Issues to be considered include the extent to which punishment should fit the crime, and coordination games as models of law.

Fall, 2004
CONSTITUTIONAL INTERPRETATION
Submission Deadline: June 15, 2004
Editor: Theodore M. Benditt
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This issue will be devoted to a variety of issues and topics related to Constitutional interpretation. Proposals are welcome.
Philosophical reflection on legal ethics is almost as old as philosophy itself. Plato’s profound interest in the contrast between sophistry and philosophy leads him to pit Socrates against lawyers in several dialogues (Gorgias, Protagoras, and Republic), and even in the Theatetus we find a discussion (not a flattering one) of the work of lawyers. Yet after Plato and Aristotle’s Rhetoric, the subject pretty much fell off the map of philosophical interests. In the nineteenth century a few British moralists (including Coleridge and William Whewell) discussed the ethics of advocacy, and in the twentieth century Lon Fuller wrote extensively and with remarkable originality on legal ethics. Significantly, however, his legal ethics writings are among the least read of Fuller’s writings, and, more generally, philosophers of law have paid scant attention to the morality of the legal profession. In a way this is unsurprising, because lawyers seem to play a subordinate role in the legal system compared with judges and legislators, whose activities of lawmaking and legal interpretation are central to the philosophy of law. To be interested in lawyers rather than judges can seem like a philosopher of physics becoming interested in engineers and technicians rather than physicists. Nor does the contemporary lawyer seem to raise issues as grandiose as Plato’s preoccupations with sophists and sophistry.

Beginning in the 1970s, however, philosophers began once again to turn attention to lawyers. The lawyer, after all, is the point of contact between the legal system and the ordinary citizens subject to it, so the work of lawyers is hardly irrelevant to the rule of law. Moreover, the work of lawyers in an adversary system seems particularly fraught with tension, because of the requirement of extreme one-sidedness and partisanship in advocacy, coupled with the fact that lawyers generally disclaim moral responsibility for the ends they are accomplishing or the means they use, provided these are lawful. Richard Wasserstrom, in a 1975 paper that helped revive legal ethics as a subject of philosophical interest, argued that lawyers combine an amoral or immoral stance toward lawfulness. Richard Wasserstrom, in a 1975 paper that helped revive legal ethics as a subject of philosophical interest, argued that lawyers combine an amoral or immoral stance toward lawfulness. Richard Wasserstrom, in a 1975 paper that helped revive legal ethics as a subject of philosophical interest, argued that lawyers combine an amoral or immoral stance toward lawfulness. Wasserstrom’s paper suggested that the lawyer’s role morality might be fundamentally flawed.

Over the next decade a large number of articles and books explored these ideas in considerable depth. By this time the subject of legal ethics, which at the beginning of the twentieth century had become derided by a law school dean as “general piffle,” had become a firmly-established field of legal scholarship, particularly because the network of laws regulating lawyers has become increasingly complex. There are now more than a dozen casebooks in legal ethics, and two law reviews (the Journal of the Legal Profession and the Georgetown Journal of Legal Ethics) devoted entirely to it. However, after the burst of philosophical activity in the late 1970s and early 1980s, philosophical interest appeared to wane, and most of the important work on legal ethics in the ensuing decade came from lawyers, historians, sociologists, and economists rather than legal philosophers. Then, in the late 1990s two books of great philosophical distinction appeared, William H. Simon’s The Practice of Justice and Arthur Isak Apelbaum’s Ethics for Adversaries. In addition, several younger philosophers—all working in law school settings—have taken up legal ethics in their work. These include Sharon Dolovich, Heidi Li Feldman, and W. Bradley Wendell. Noteworthy in their work is an at least partial abandonment of the “role morality” framework employed by Fuller, Wasserstrom, and others. At present, then, the philosophical subject remains alive and well and, more importantly, evolving.

The present symposium is not organized around a specific topic in legal ethics, but rather aims to present a variety of recent philosophical perspectives. The papers, however, have significant thematic overlaps among them. My own paper perhaps represents the “mainstream” of the role morality view, which the others all criticize, directly or indirectly. Its topic is legal ethics pedagogy in a law school setting, and it aims to explain why academic philosophy is not a happy fit in the law school ethics class. The paper, which may be regarded as a kind of methodological reflection on the aims and limits of so-called “applied philosophy,” presses two arguments. The first is that investigating the tensions between role morality and ordinary morality requires a legal-ethics analogue to radical skepticism in other areas of philosophy: instead of approaching legal ethics as a set of discrete problems to be resolved or arguments to be analyzed, it raises the possibility that the entire practice of law may be morally indefensible, because lawyers advance client ends without regard to their morality or the morality of the lawful means needed to attain those ends. Charles Fried’s famous question “Can a good lawyer be a good person?” is on a par with the question of whether we can ever know anything at all, or whether there is such a thing as a causal relation. The skeptical stance of the question—a hallmark of modern philosophy—raises familiar Humean and Wittgensteinian problems with how (if at all) one can take the question seriously outside the study. Hence the perpetual lack of fit between the philosophical investigation of legal ethics and the enterprise of law school training in ethics. The second argument questions the possibility of applying moral theory to generate solutions to practical problems. It turns out (or so I argue) that significant problems in professional ethics often lie on the “fault lines” between moral theories, so that it becomes impossible to tell whether a problem represents a counter-example to a moral theory requiring its modification, or simply a problem that the theory can be used to solve. This systematic indeterminacy means, in effect, that moral theories are just as open to question as the problems they are supposed to resolve.

Geoffrey Hazard, the Trustee Professor of Law at the University of Pennsylvania, is the architect of the ABA’s Model Rules of Professional Conduct—the model for most states’ ethics regulations—and is co-author of the principal commentary on the Model Rules. As President of the American Law Institute, he presided during the preparation of the ALI’s Restatement (Third) of the Law Governing Lawyers. In addition, he has authored or co-authored two textbooks on legal ethics and three additional books on the subject. For a number of years, Hazard has argued that philosophers who focus on the problem of role morality have neglected the importance of context in the meaning and application of moral principles. The argument that a lawyer’s role-obligation may conflict with an obligation of ordinary morality presupposes that the action performed in a professional role—and required or permitted by that role—has a counterpart for someone not in the role who is morally forbidden to do it. For example, critics may think that a lawyer who humiliates and browbeats
a truthful opposing witness during cross-examination in order to win an unjust case for a greedy client has done something immoral, because a non-lawyer who humiliates an innocent truth-teller to help a greedy person commit injustice has done something immoral. The two humiliations are counterparts. Hazard believes that this is wrong, because the argument ignores the difference in context between the lawyer’s cross-examination and the non-lawyer’s action. The actions are not counterparts, and thus the moral assessment of one cannot be transferred to the other in the straightforward way that moralists often suppose. The present paper continues to press the complaint that philosophers too often focus on supposedly-universal moral principles with insufficient attention to the importance of context in applying those principles.

In The Practice of Justice, William Simon (the William W. and Gertrude H. Saunders Professor of Law at Stanford University) has also argued for the importance of context in legal ethics. There he offers a sustained criticism of categorical norms of professional conduct, and defends a system based on context-sensitive norms. In the present paper (an abridgment of one originally published in the Georgetown Journal of Legal Ethics), Simon presses this overarching critique of categorical norms by examining the supposed norm against lying. Beginning with an incident from his own legal practice in which he told what he takes to be a justifiable lie, Simon criticizes arguments of Sissela Bok (in her book Lying) that purport to identify the wrong done by lying. Bok’s book represents a view that Simon labels “quasi-categorical moralism”—the view that while moral norms are not categorical and exceptionless, they are almost categorical, with only a few exceptions in extreme cases. In place of quasi-categorical moralism, Simon defends an approach to ethical decision making that is closer to a straightforward cost-benefit test.

W. Bradley Wendell (Professor of Law, Washington and Lee School of Law) offers a reformulation of legal ethics away from the role morality metaphor, but also away from its principal competitor, the law-centered version of legal ethics in Simon’s The Practice of Justice. With Simon (and against my own view), Wendell argues that many philosophers wrongly discount the importance of law and lawfulness in legal ethics—probably, he believes, because philosophers mostly reject a general obligation to obey the law. Lawyers who for moral reasons refuse to pursue their clients’ legal entitlements have in effect substituted their own first-order moral reasoning for the collective reasoning embodied in the law itself. Like Wendell, Simon believes that the question of whether a client’s claims are legally meritorious should play an important part in a lawyer’s ethical decision making. But, Wendell argues, Simon’s theory of legal merit takes a Dworkinian, natural-law turn that means that the lawyer will still be relying on first-order moral judgments in order to decide whether to pursue a client’s claim. Wendell draws on arguments of Jeremy Waldron and Joseph Raz to defend a conception of legal ethics according to which the fact that a client has a legal entitlement provides a second-order reason for setting aside one’s own first-order reasons. That does not mean lawyers should always do what clients want, because if clients wish the lawyer to push the legal envelope (for example, by playing the enforcement lottery, gambling that one’s illegal action will not get detected), that too offends against the authority of the law. Arguing in this fashion, Wendell hopes to put legal ethics on a firmer footing than any of the principal alternatives: the dominant, do-what-the-client-wants view, Simon’s legal-merit alternative, and my own method of weighing role morality against ordinary morality.

Endnotes


Articles

The Owl of Minerva Goes to Law School: Philosophy, Legal Ethics Teaching, and Skepticism

David Luban
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When I started teaching legal ethics in a law school setting more than twenty years ago, my ambition was to bring philosophical rigor and depth to a course widely perceived as a lethal mixture of dreary, formalistic rule-chopping and earnest exhortation. I was young and brash, with boundless faith in the power of philosophy to shed light on practical affairs. I made sure to include classic and contemporary philosophy in the readings, and I handled virtually every topic in my class very differently than most law professors would have handled it. At least, that’s what my students assured me, a response that caused me great pleasure until I realized they didn’t all mean it as a compliment.

Over the years, however, the experience of teaching the course again and again has changed my mind about the pertinence—or perhaps the impertinence—of my mission. Today, I have serious misgivings about trying to inject academic philosophy into the legal ethics course. No doubt mine remains a “philosophical” course, in the sense that the problems I find interesting and the questions I put to students reflect a philosophical sensibility. They might not even occur to a teacher with no background in philosophy. But the philosophical preoccupations have become implicit, not explicit. I assign few or no philosophical readings, and seldom attack issues head-on with the tools of moral theory. The reasons for this change are both practical and theoretical (although, as I shall argue, even the practical problem stems from matters of philosophical significance). Mostly, of course, my changes in pedagogy result from trial and error, just like everyone else’s. But it now seems to me that behind the errors lie issues of significance, reflecting both the uneasy fit between philosophy and practice and also certain limitations of applied ethics that I have only gradually come to appreciate.
This paper aims to set out some preliminary thoughts on both these themes. To begin with the mundane, there’s the problem of coverage. Legal ethics is a big subject. The textbook Deborah Rhode and I wrote weighs in at 900 pages. Of the textbooks most similar to ours in aim and scope, Gillers is a bit longer, Kaufman and Wilkins a bit shorter, and Hazard, Koniat, and Cranton tops out the list at almost 1200 pages. That is a lot of material, and it contains a lot of topics. In many law schools, professional responsibility is a two-hour course, and in almost all the rest it is three hours. You simply cannot do all the topics you should in the time available, and in point of fact nobody even tries.

Where does that leave good old Kant? Let’s take an exemplary passage from the Groundwork. Kant writes as follows:

If I think of a hypothetical imperative as such, I do not know what it will contain until the condition is stated... But if I think of a categorical imperative, I know immediately what it contains. For since the imperative contains besides the law only the necessity that the maxim should accord with this law, while the law contains no condition to which it is restricted, there is nothing remaining in it except the universality of law as such to which the maxim of the action should conform; and in effect this conformity alone is represented as necessary by the imperative.¹

If I were teaching a course on Kant’s ethics, I might spend twenty minutes doing nothing but going over these three thorny sentences with my students clause by clause until they could finally parse out the argument. We would spend weeks going through the entire Groundwork. But in the legal ethics classroom, we don’t have weeks, and we don’t have hours. We may not even have the twenty minutes. The students will certainly not read the entire Groundwork, or even an entire subsection of the Groundwork, because it would be a complete distraction. At best, they will get a three-page snippet of Kant, and Kant does not write in three-page snippets. From the point of view of doing justice to Kant’s argument, I would be embarrassed. It’s no better than treating Kant as if he were writing epigrams for fortune cookies.

In the legal ethics classroom, you might use Kant in a discussion of lawyerly lying. He certainly has important things to say about lying. In the Groundwork, he offers a famous argument against the permissibility of lying promises:

I immediately see that I could will the lie but not a universal law to lie. For with such a law there would be no promises at all... Thus my maxim would necessarily destroy itself as soon as it was made a universal law.²

Now, this argument could easily be brought into the discussion. But suppose a student raises the perfectly reasonable question why one should determine the permissibility of lying by asking whether the permission could be made into a universal law. Kant has an answer to this question, of course. But the answer, set out in the Second Section of the Groundwork, consists in his derivation of the Categorical Imperative in its universalizability formula—ten fiendishly difficult pages culminating in the very argument I quoted earlier. Now we’re back to the exacting task of Kant exegesis. I could brush the student’s question aside, or give a quick, hand-waving answer. But then what’s the point of bringing in Kant?

Furthermore, the practical issue in the course might be, say, whether Bill Clinton deserved to be disbarred for lying about Monica Lewinsky. Will the Kantian apparatus of categorical imperatives, rational beings, and ends in themselves help students think more clearly about perjury, materiality, lawyerly probity, Clinton, Lewinsky, his cigar, her thong, the vast right-wing conspiracy, the whole sordid mess? At this point, I am tempted to quote a letter that a young admirer of Kant wrote him in 1791 to beseech his advice about a matter of the heart. “Great Kant!” she begins, and then explains that her beloved friend has broken off their relationship because of her lie, although she insists that it is not a lie that reflects badly on her character. She continues: “Now put yourself in my place and either damn me or give me solace. I read the metaphysic of morals and the categorical imperative, and it doesn’t help a bit.”³

The reason the categorical imperative doesn’t help a bit is pretty clear. In the Clinton case, suppose the maxim whose permissibility I am to test is this:

One may lie in court about private matters if the questioner’s motives for raising the question are purely to embarrass one for political purposes, provided that the lie is immaterial to the outcome of the litigation, and even though the subject-matter of the lie concerns prior moral wrongdoing.

Determining whether this maxim can be universalized is exactly as difficult as evaluating Clinton’s actions without the categorical imperative. The point of bringing in Kant is to show students that when they judge Clinton, their reasoning implicitly follows the structure imposed by the categorical imperative. That is, the point is to learn about the deep structure of moral reasoning as we already carry it out, not to learn a novel technique of moral reasoning. Kant himself insists that this is so.

Some might object that Kant is an unrepresentative example, because his philosophy is notoriously difficult, and also because it is so systematic that the parts are especially hard to study in isolation. But we would be deceiving ourselves to think that any philosophy, properly done, is easy. Someone once complained to a philosopher about Kant’s obscurity, and received the terse reply: “Don’t blame Kant. Kant didn’t make the world.”⁴ The difficulties come from the world, not from Kant, and that means no one can escape them.

Thus, William Simon, in his essay in this symposium, mentions that in his own class he recounted a war story about a lie he had once told in his law practice. He intended the story only as a passing illustration of a point he was making. “To my surprise, most of the students refused to accept my story as a passing illustration of an obvious point and insisted on a discussion of the ethics of lying (to the point that we never got to what I had intended as the main subject of the class).”⁵ The discussion then turned to a discussion, not of Kant, but of Sissela Bok’s arguments against lying in her eponymous book on the subject. In an obvious way, Simon’s pedagogical experience offers a strong case against my doubts about philosophy in the legal ethics classroom. Here, the students exhibit a commendable unwillingness to accept Simon’s war story at face value—as an instance of plainly-justifiable lie—and insist on probing more deeply into the ethics of lying. When students demand philosophical inquiry, it seems downright perverse to turn them away. Of course it’s perverse, and I would not propose doing so. However, let’s not forget Simon’s parenthetical remark “we never got to what I had intended as the main subject of the class.”
Today many analytic philosophers pride themselves on their plain-spoken clarity, and some even have reason to. But when it is done honestly, analytic philosophy aims at precision, not clarity. Clarity can itself be a kind of opacity, because philosophers achieve it only by smoothing over immensely thorny problems that burst forth when the argument gets probed even a bit. Furthermore, analytic philosophy is a scholastic genre, in the sense that philosophers respond to other philosophers, who are responding in turn to others. Articles begin in the middle of ongoing debates; they discuss and criticize the works of other philosophers whom the student has never read or even heard of. They frame questions in a professional idiom as mannered in its own clear, plain-spoken way as, say, William of Ockham’s Commentary on the Sentences of Peter Lombard. And frequently they proceed by an accretion of finicky little arguments that only a Feinshmecker can appreciate. But legal ethics students are not Feinschmeckers. They do not need industrial strength philosophy for household purposes, nor will it necessarily profit them to learn it.

The argument, so far, is very simple: There is no time in the legal ethics course to do philosophy right, and if you aren’t going to do it right, there’s little point in doing it at all. Earlier I described this as a practical, not a theoretical objection, but I now want to suggest that the mundane concern about how to squeeze a lot of material into a tight curriculum actually cuts deeper than appears at first glance.

The reason for the difficulties of squeezing philosophical inquiry into the legal ethics classroom is not simply that it adds one subject, or a new set of arguments, to a crowded curriculum. If that were the sole issue, it would imply nothing more than that teachers must choose which topic to keep and which to drop. The more important reason is that philosophical inquiry adds a qualitatively different kind of subject-matter, one that threatens to burst the boundary assumptions of discourse about the law.

Some philosophers will deny at the outset that philosophy consists of any particular subject-matter. I have often heard philosophers say that philosophy is nothing more than clear thinking, and that the job of philosophy lies in analyzing arguments. But “philosophy is nothing more than clear thinking” strikes me as wrong, despite the fact that in some circles it seems to have achieved the status of a mantra. For one thing, philosophers are no clearer in their thinking than, say, classical philologists or, more to the point, than good lawyers. Indeed, the basic activities of philosophers pulling apart arguments—identifying ambiguities in the way claims are phrased and theses formulated, drawing distinctions among possible understandings of a slippery term or proposition, formulating and comparing different principles that may be used to explain or justify a disputed point, testing principles against hypothetical examples—are no different than the characteristic techniques of argument in judicial opinions and appellate briefs. The difference becomes thinner still when we consider that a great deal of contemporary normative philosophy draws heavily on legal materials, as well as on economic arguments about rationality and incentives that often appear in law as well. Yet despite these overlaps and similarities, it seems to me indisputable that philosophical treatments of legal problems, including problems of legal ethics, seem markedly different from purely legal treatments, and different (moreover) in a distinctively recognizable way. The question becomes how to characterize this difference.

One answer is that philosophers typically press questions several steps beyond the point where lawyers stop. In one way, all normative theories, philosophical theories just as much as legal theories, beg the question, because they all start somewhere; thus, the issue isn’t whether questions are begged, only where they are begged—and philosophers go further. Pressing lawyers to examine their assumptions beyond the point where they are content to stop has, after all, characterized philosophy ever since Socrates baited Gorgias and Thrasymachus. And, to anticipate my conclusion, I think that this is the real point behind the argument over coverage in the legal ethics course: philosophy always presses further than standard legal inquiry. This, I believe, is not an accidental fact about philosophy in relationship to law. It goes to the very nature of philosophy. To see why, consider some analogous issues in other disciplines.

One way to conceive of the relationship between a discussion of, say, lying as a philosophical topic and lying as a topic in professional ethics is through analogy with the way that a mathematical subject like linear algebra gets treated in a mathematics course as compared with an economics course. In one sense, the objects of algebraic inquiry and the mathematical results are identical in the two courses. (They had better be!) But the economist simply seizes the mathematical tools and puts them to work without caring much why they are true and without regarding them as independently interesting topics for further investigation. In the mathematics course, by contrast, the whole point is to prove the theorems, not simply learn how to apply them. The economist might well point out that if she took time in her course to prove the theorems, there would be no time to do the economics—a complaint that bears obvious similarity to coverage worries in the legal ethics course. One way to put the difference between the mathematician’s take on linear algebra and the economist’s is that the mathematician is interested in the theory behind the algebra, while the economist may well not be. And the mathematician’s interest is, as G. H. Hardy famously argued, an interest that has little if anything to do with the utility of the mathematics, a standpoint that the economist qua economist will find foreign and perhaps a bit repellent.

I think this analogy is partly misleading, however. For one thing, lawyers are not as a- or anti-theoretical as this analogy suggests. Nor, on the other side, do philosophers insist on their own inutility as Hardy does on the inutility of interesting mathematics. Applied philosophers wish passionately to bring their arts to bear on practical problems, and to make the world a better place through their efforts. More importantly, the economist and the mathematician will both agree that the mathematician’s work has a kind of intellectual priority over what the economist does with it, in the sense that without the mathematician’s work there would be no linear algebra for the economist to use. The economist may simply wish to utilize the mathematics, but she understands that someone had to devise it and prove it, else it would not exist. But the lawyer may not, and need not, agree that without a philosophical theory of ethics there would be nothing to say and nothing to teach in regard to lawyers and lying.

A better mathematical analogy to the relationship between the philosophical study of ethics and the ethics taught in law school courses is the relationship between the foundations of mathematics and the mathematics of working mathematicians. In the abstract, the working mathematician will acknowledge that her problems and proofs presuppose the consistency of set theory and, more generally, of the background assumptions that make mathematics possible. After all, from an inconsistency anything follows. But in another, equally important sense, the foundational paradoxes that inspired so much extraordinary effort in the early twentieth century really had no impact on what most mathematicians do for a living. They simply soldiered on, proving their theorems and solving their problems, as though they had nary a...
foundational care in the world. In Wittgenstein’s powerful imagery, “The mathematical problems of what is called foundations are no more the foundation of mathematics for us than the painted rock is the support of a painted tower.”9 Without the painted rock, the painted tower looks surreal; but it does not fall off the canvas. Likewise, philosophers have little difficulty exposing questionable assumptions in the various departments of law, but while lawyers may nod their heads when confronted with theicketness of their doctrines, the doctrines are in no danger of falling off the canvas. Legal choices will continue to be made, cases will be decided, judicial opinions crafted and statutes drafted. Lawyers will continue to advise their clients what the law requires and how it can be loopholed to the client’s advantage. In a deep sense, the philosophical difficulties at the heart of, say, tort theory or legal ethics don’t make a difference.

Some theorists (most visibly, Richard Posner and Richard Rorty) draw pragmatist conclusions from observations like these, and reject the intellectual need for philosophical theory in any department of law.9 But pragmatism is itself a philosophical theory, and a dubious one—recall Sidney Morgenbesser’s deep witticism “Pragmatism may be useful, but it isn’t true”—so the idea of breaking out of the circle of philosophical argument via a pragmatist rejection of philosophy turns out to be self-defeating.10 I draw a different conclusion, namely that jurists must behave as though they are pragmatists, because they need to decide cases in real time, without waiting for a resolution of underlying philosophical difficulties.11 That is, regardless of the merits of pragmatism as a philosophical theory, the relationship of moral philosophy to legal ethics (and philosophy of law to law) will be the painted-rock/painted-tower relationship of Wittgenstein’s imagery.

The reason, I think, has to do with the very nature of philosophical inquiry. Of course, “the very nature of philosophical inquiry” is eminently disputable, and indeed stands in its own right as a philosophical problem (a central point for both Hegel and Wittgenstein). But, as a hypothesis, let me suggest that what makes philosophy from Descartes on distinctive, and separates it most profoundly from the thought-world of the practicing lawyer, is that philosophy takes skeptical arguments—radically skeptical arguments—seriously. By “radically skeptical arguments,” I mean arguments purporting to undermine all claims of a certain kind—claims about knowledge, about personal identity, about induction, about other minds, about causality. These are not merely arguments that claims may have to be weakened (for example, that we can never be absolutely and indefensibly certain about anything). What makes radically skeptical arguments radical is that they purport to show that claims of a certain kind are wholly unjustified, not merely too strong.

It may be objected that radical skepticism forms the topic of only one strain out of many within the philosophical tradition. In my view, however, it is the most distinctive and characteristic strain of modern philosophy; and I think that a coherent, attractive history of modern philosophy as the history of responses to skepticism could readily be composed—and that it would contain most of what we find enduring in modern philosophy. Furthermore, even when a philosopher vehemently rejects skepticism, the fact that philosophers regard skepticism as a problem to be addressed affects the entire edifice of argument that they erect. Epistemology takes on its distinctive hue because its first question must be whether in fact we know anything at all.12 Similarly, the analysis of causation begins with Humean skepticism as a lurking null hypothesis. Rather obviously, the metamathematical paradoxes introduced a form of skeptical doubt into the foundations of mathematics, and this was no doubt the reason that working mathematicians—who do not take skepticism as the null hypothesis—always tended to shrug their shoulders about the paradoxes and go back to work.

In legal ethics, the skeptical question is not far from the surface. It is the question with which Charles Fried began his famous essay “The Lawyer as Friend”: “Can a good lawyer be a good person?”13 Fried proceeds with a recognizable skeptical argument: the good lawyer may be required by her professional role to do things incompatible with “that devotion to the common good characteristic of high moral principles.”14 Hence a good lawyer cannot be a good person. This, I wish to insist, is a radically skeptical conclusion, because it undermines the very possibility of being a morally good lawyer, and hence of there being such a subject as legal ethics. Macaulay put Fried’s problem vividly in his famous essay on Francis Bacon, when he asked why a lawyer “with a wig on his head, and a band round his neck, [would] do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire.”15 The lawyer, on at least one recognizable version of professional ethics—so-called “neutral partisanship”—must discount almost to zero the interests of everyone except the client, regardless of whether the client’s ends are good or ill, and regardless of whether the lawful means of pursuing them are morally decent or indecent. To the extent that neutral partisanship’s account of legal ethics is correct, the skeptical answer to Fried’s skeptical question appears to follow. (To be sure, Fried thought he had found an answer to his skeptical question through the model of “lawyer as friend”—but subsequent discussion has found few takers for Fried’s argument.16)

I think it is fair to say that this skeptical problematic underlies most philosophical writing on legal ethics, beginning perhaps with Wasserstrom’s “Lawyers as Professionals: Some Moral Issues,”17 Fried’s essay, and Simon’s “The Ideology of Advocacy.” It certainly drives my own efforts in Lawyers and Justice, as well as such notable works as Alan Goldman’s The Moral Foundations of Professional Ethics and Arthur Appelbaum’s Ethics for Adversaries. To be sure, none of these authors couches the problem in these terms, that is, by referring explicitly to the tradition of radical skepticism in modern philosophy. But anyone who thinks that the problem of reconciling role morality with ordinary morality lies at the heart of a philosophy of legal ethics has embraced Fried’s skeptical question and undertaken to meet the skeptical arguments that role morality cannot be reconciled with ordinary morality, and thus cannot be morally justified at all. Even William Simon, whose important book The Practice of Justice insists that the real problem of legal ethics is not the problem of role morality but the problem of attaining legal justice, still seems to me to take his bearings from the skeptical question. Simon, too, begins with Fried’s question, even though he quickly argues that the question is ill-formulated and ought to be dropped in favor of an altogether different inquiry, into the nature of legal justice and legal merit. And even so, Simon finds himself impelled to offer a transcendent argument for the overall equivalence of legal and moral merit, further reinforcing the conclusion that he has not substantially departed from the project of responding to the skeptical argument.18

For law students, the skeptical argument is not easy to take seriously, because it tells you nothing at all about how to practice law, just as philosophical arguments about radical epistemological skepticism tell you nothing about how to improve your knowledge-acquiring practices. (The skeptical question also creates intolerable cognitive dissonance in someone borrowing one hundred thousand dollars to finance a law degree, but that’s a different if by no means unrelated...
issue.) Like the working mathematician, law students want to know about the tower, not the rock.

My argument may seem to be a version of the familiar Humean observation that skeptical doubts cannot survive outside the study—and a classroom filled with soon-to-be lawyers, aiming to fulfill their requirement and learn the regulatory codes and ethical traditions of their profession are outside the study. But that isn’t quite right, because in an equally relevant sense the classroom is a suburb of the study. Given sufficient prodding, law students can be gotten into the fly bottle, and entertain the skeptical question and arguments around, at least for a classroom hour or two. And, to circle back to my starting point, once a teacher has gotten students to take the bait, it seems simply irresponsible not to pursue the questions where the arguments lead. Of course, I have said that somewhere along the line every philosophical inquiry must come to a stop; the issue isn’t whether one should beg the question, just where one should beg it. And the skeptical cast of philosophy means that the question gets begged later rather than sooner than lawyers are accustomed to. In the end, then, the reason that inserting philosophy into the legal ethics course places too many time demands is that philosophy is a radically different inquiry, with imperatives of its own that do not yield to someone else’s time-clock. It is, for practical purposes, rather useless—if Hume is right, radical skepticism pretty much has to be — and to do uselessness right takes time.

But surely, the advances in moral theory over recent decades, the elaborate workings out of the Aristotelian, Kantian, and utilitarian traditions, fortified by the insights of feminism and made rigorous through logic and game theory, can be adapted to generate answers to hard questions. Can’t they? I wish to conclude by arguing that they cannot.

Suppose we set aside the skeptical question about role morality. The moral traditions, after all, presuppose that the skeptical challenge has already been met. What remains in professional ethics really amounts to three very different subjects. As commonly understood by practitioners, professional ethics has to do almost entirely with sex, lies, and money. Unethical practitioners are those who become embroiled in financial conflicts of interest, who lie and cheat, or who sleep with their vulnerable clients. When practitioners argue about ethics, they usually differ over which ways of dealing with sex, lies, and money cross the line and which do not. Is it unethical for lawyers to collect large contingency fees on easy cases? For law professors to date students? Understood in these terms, professional ethics is a subject of vast practical importance but little if any philosophical interest. Even though the latter theory will have its own set of intuitively problematic cases that the former theory handles with greater ease. Everyone understands that otherwise-attractive consequentialist theories can require one to violate norms of fairness and even of basic decency, while deontological theories that are abstractly appealing can compel behavior that yields unacceptable consequences. A typical fault-line case is the question of whether a lawyer may lie to a court (a deontological wrong) if that is the only way to prevent a tragic and unjust outcome (a consequentialist right)20; another is the parallel question of whether the rule of confidentiality (usually justified in consequentialist terms) should yield if honoring it sacrifices an innocent man’s life.21 Similar fault lines exist between both of these types of theories and virtue-based accounts of morality. Contemporary moral theorists devote most of their energy to refining the basic moral theories in order to “save the phenomena” without diluting the theory so badly that it loses whatever distinctive attractions it originally had. The result is often an unwieldy structure of epicycles— the capitalized principles and numbered propositions that freight the pages of philosophy journals. But the real trouble with these super-subtle theories is not their intricacy. It is that when the theory confronts a fault-line case, there is simply no way to tell whether the case should be regarded as a counter-example to the theory, calling for another round of epicycles, or whether the theory may be relied upon to resolve the case. The nature of the fault line dictates a systematic indeterminacy between these two possibilities. Hard cases in professional ethics call into question the adequacy of the very moral theories that philosophers originally hoped would resolve the cases. What began as a philosophical interrogation of
professional practices ends up with philosophy itself thrown into question.

This isn’t necessarily a bad outcome. Socrates described himself as a sting-ray, who paralyzes everyone including himself. Historically, the aim and ambition of philosophy is to push a level beyond everyday beliefs, to expose questions where we never suspected questions might arise, and to settle for nothing less than getting to the bottom of things. But things may not have a bottom, and a historical case can be made that no genuine philosophical problem has ever been laid entirely to rest. To treat philosophical doctrines as if they are proven theorems is to treat them in a deeply unphilosophical way.

One way to put the problem is this: so-called “applied” philosophers seem to hold out the promise that philosophy can settle practical issues that otherwise will remain unsettled. But when philosophy is done right, it aims to unsettle issues, not to settle them. To be sure, philosophers can sometimes pare away fallacies and bad arguments; but the most vexing questions in legal ethics are not simply illusions created because some dope botched an argument. Legal ethics raises profound philosophical questions, most obviously the question of whether professional roles can create moral obligations inconsistent with non-professional morality. To appreciate that this is a question is no doubt an important thing for a law student. But the issue cuts deep into the fabric of philosophy itself, exposing uncertainties in the practice of philosophy, perhaps even more than in the practice of law. Don’t blame philosophers. They didn’t make the world. But in the legal ethics classroom, the students will take away little more than the sense that everything is up for grabs all the time—and that seems to me like a recipe for pedagogical disappointment.

Endnotes

‘Note: This paper is an expansion of a talk written for a January, 2003 panel sponsored by the Association of American Law Schools Section on Jurisprudence, on the role of philosophy in law teaching. Its origins as a speech will be apparent, but on the whole it seemed best not to tamper with the conversational style of the original. A portion of the paper is drawn from David Luban, “Professional Ethics,” in R.G. Frey and Christopher H. Wellman, eds., A Companion to Applied Ethics (Blackwell, 2003).

2. Ibid., p. 22; Ak. 403.
4. I owe this recollection to Tony Coady.


7. “The ‘real’ mathematics of the ‘real’ mathematicians, the mathematics of Fermat and Euler and Gauss and Abel and Riemann, is almost wholly ‘useless’ (and this is as true of ‘applied’ as of ‘pure’ mathematics).” G.H. Hardy, A Mathematician’s Apology (London: Cambridge University Press, 1940), p. 119.
11. Here I am hinting at arguments that I develop in greater depth in “What’s Pragmatic About Legal Pragmatism?” in Dickstein, The Revival of Pragmatism, supra., n. 10, pp. 284-85.
12. Here I must acknowledge that my views have been powerfully influenced by the writings of Michael Williams.
14. Ibid.
20. For example, consider a case in which a client seeking political asylum has at some point in his life contributed money to a foreign religious organization that, in addition to its literacy programs, has actively supported a violent insurgency against a dictator in the home country. Under current American law, the client is ineligible for asylum, even though deporting him will lead to his certain death at the hands of the dictator. This will be true even if he contributed only to the literacy program, provided that he knows or reasonably should know that the organization actually supports the insurgency as well. A lawyer may well conclude that lying to a court in order to win the asylum case is, on consequentialist grounds, by far the better course of action than telling the truth and allowing the client to be sent to his death.
21. See, e.g., Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962)(defense attorneys who know from medical reports that accident victim has a potentially-fatal aortic aneurism do not tell him, for fear of raising the price-tag of the settlement).
Context in Ethics

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Introduction

I begin with the proposition that context is determinative in making and evaluating any real-world course of action involving a serious ethical issue. By “context” I mean the circumstances in which such a choice is made, including the situation of the actor, the identity and conduct of other relevant actors, and the events leading up to the moment of action. For example, killing another is interpreted as being wrong in most circumstances, but not so in other circumstances. Self-defense is recognized as a circumstance in which a killing may be not wrongful. So is the situation of a soldier in battle obeying an order to attack an enemy.

By “interpreted as being wrong” I mean that most all disinterested persons in any given culture would reach the same conclusions concerning an array of specific situations. From one place to another there would be different conclusions concerning various cases in the array, reflecting differences in local culture. For example, the threshold of provocation leading to justifiable homicide no doubt would be different in Afghanistan than in Denmark. However, in every culture there would be an array, and points within the array, where a distinction was drawn about whether specific conduct was wrongful. The distinctions would be made even while there was acceptance of the general norm that “thou shalt not kill.” Thus, killing is sometimes wrong, sometimes not, but the general principle against killing is “right.” Context is similarly relevant with regard to other forms of conduct that generally are wrong, such as lying or appropriation of another’s property.

The determinative relevance of context holds equally where the choice as to course of action confronts an actor in determining the actor’s own conduct, and equally so where the assessment is being made by an external observer in appraising another’s conduct.

Recognition of context is particularly important, it seems to me, in addressing problems of professional ethics. “Professional” ethics involves the special problems of a specific vocation, such as that of lawyer (the focus of this symposium), medical ethics, or the ethics of business or political management. The concept in professional ethics continuously includes the nature of the work in which the professional is engaged. In some lines of practice in medicine, for example, the work involves the boundary between life and death. In the practice of law, the work typically involves the boundary between legal right and wrong. The work also involves a relationship of agency on behalf of clients, with all the complexity thereby entailed. However, essentially parallel relationships are part of context in other aspects of life: parenthood, being a co-worker or fellow student, colleagueship, etc. The relationship of bishop and priest in the Catholic Church, as revealed in recent events, surely manifests the contextual significance of the actor’s vocation.

It is not that general moral philosophy—Aristotle, Kant, etc.—is irrelevant to professional ethics, or that the domain of professional ethics is on some different normative plane. It is that general moral philosophy, as I shall argue, plays out differently in different situations and that an actor’s vocation is part of the situation.

Most scholars and commentators accept the “consensus” conclusions concerning the specific courses of action thus described, and indeed would consider the distinctions between the situations as being obvious. Accordingly, responsible members of a community would strongly affirm that killing another is wrong in most circumstances, but would be extremely reluctant or flatly opposed to saying that all killing is wrong. They would be equally reluctant to repudiate the general principle that “thou shalt not kill.”

The problem in ethical or normative analysis therefore is to take account of the determinative significance of context—that wrongfulness of a course of action depends on circumstances—without rejecting the proposition that there are valid general norms, such as “thou shalt not kill.” Addressing that problem invites reconsideration of an old problem, that of the relationship between concrete cases and general norms, and of another old problem, that of the nature of general norms. I presume to offer such a reconsideration.

Courses of Action Involving Serious Ethical Choice

The situations where courses of action involve serious ethical choice have long since been identified. These situations present a question of whether to engage in homicide, theft, or lying, or lesser or more elaborately defined variations of these forms of conduct. A modern elaborately defined variation of the prohibition against killing, for example, is the act of reckless driving resulting in death. A modern variation of wrongful lying is corporate securities fraud, as in the Enron case.

The interests or values at stake in these choices should be identified, even though they too are perhaps obvious. The choice involved is between, on one hand, furthering the actor’s interest or an interest the actor is justified in furthering, and, on the other hand, sacrificing or jeopardizing that interest in deference to the interest of the “target” of the course of action. Thus, an actor who kills a murderous assailant protects the actor’s bodily safety, and perhaps the actor’s life, but supersedes the assailant’s interest in continuing to live and his interest in achieving whatever more immediate goal impelled the assailant to launch the attack. A parallel scenario would involve an actor who is subjected to a trivial provocation, say an insult, but who does not respond by assaulting the provocateur. The actor in this second case suffers the embarrassment, distress or whatever results from the insult, without achieving an offset through retribution or other redress against the provocateur. It is not that a “trivial” provocation is regarded as commendable or that, in a more sensitive calibration, it is socially irrelevant. Even a trivial provocation could justify a reproof, protest or something. It is simply that, measured against human life—even the life of a boor—most provocations are inadequate justification for the insulted victim to kill the provocateur in response.

The same analysis can be applied to theft and lying. Concerning theft, the classic justification on behalf of the actor is that the object that was taken—the apple, the car or the drug—was in need elsewhere more than in continued control by the person having ownership. An explanation typically given by shoplifters is that their need for the item taken was greater than the store owner’s need for it. However, the social fact remains that a store owner properly claims ownership in the inventory, however over-stocked its shelves may be. On the other hand, most people would agree that commandeering another’s automobile to drive a heart-attack victim to the hospital should not be considered theft. Concerning lying, falsehood is a standard mechanism for overcoming another’s resistance to a proposal. The actor tells a lie in order to consummate the transaction (exchange of property, loan, personal commitment, etc.), whereas telling the truth would reveal downside aspects that might kill the deal. Yet lying is in
some contexts recognized as not wrongful. The classic case is misleading the secret police of an oppressive regime—the Gestapo searching for the Frank family.

**General Proscriptions**

The general principles against killing, theft and lying, etc., direct or advise or admonish the actor to proceed in such a way as to give priority to the interest of another party as against the actor’s interest or the interest of another that the actor is properly concerned to protect.

The classic medium of these admonitions or norms is a general prescription. The prime example of a set of such prescriptions in the Western tradition consists of the secular propositions of the Ten Commandments: Thou shalt not kill, commit adultery, steal, bear false witness, or covet “anything that is thy neighbor’s.” Down through the years and across cultures the list has remained essentially the same. A charming bowdlerized version has recently been fashioned by Robert Fulghum, as follows: “Share everything, Play fair, Don’t hit people, Clean up your own mess,” etc. More elaborate versions are constituted in the criminal and regulatory legal codes of every modern legal system—the prohibitions against murder, assault, theft, and fraud, etc., and against conduct entailing attenuated or immanent consequences of the same kind, for example, disregard of safety specifications, nondisclosure in consumer and business transactions, etc.

These prohibitory codes pronounce generalized norms to the effect that categories of possible courses of action are bad in a fundamental sense. The proscriptions are expressed in language—phrases and sentences—and also projected by reference to examples.

Proscriptions formulated in language unavoidably are general or universal, because language is symbol or signal about a thing or action of the kind to which it refers, and not the thing or action itself. Put differently, the disapproved conduct is a hypothetical category or class of conduct, not the conduct itself. Through a different medium, prescription can be conveyed by picture or description or theatrical demonstration. However, even depictions or descriptions are also symbols or signals referring by analogy that is invited from the depiction to categories of possible real-world courses of action. The depiction is not the same as the conduct whose interdiction is addressed. Both verbal proscriptions and depictions are statements to the effect of “Don’t Do This Kind of Thing.”

A similarly general proposition underlies a specific order or command from one person to another, such as “Don’t Do That.” The order itself of course is not a generalization, but rather an ostentation or “pointing to.” However, an order or command involves a general rule or norm by implication. The implication concerns the authority of the person giving the order. By implication, the person uttering the order has or asserts authority to give the direction and the addressee, by the same token, accepts the director’s authority, more or less. Otherwise, giving the direction would be without purpose or effect—talking into the wind. We sometimes see people with mental illness on the street giving what purport to be orders, that no one will heed.

The authority on which the director proceeds may have been conferred in general form, such as: “Joe here is the foreman.” Or the basis of authority may be specific but in turn derived from a rule or norm. Thus, co-worker says: “Joe, the foreman, says not to do X.” The source of authority in such a direction is Joe, not the co-worker, who is, as we say, “only the messenger.” In either case, the authority supporting the direction was Joe’s recognized status as foreman. However, the existence and extent of a director’s authority can be a matter of doubt or dispute. Joe may have authority to order the men down into the mine but not to order one worker to beat up another. Here too “it all depends” on context—who appointed Joe and what was the basis and scope of the appointment, etc.

Whether the conduct was proper or wrongful in each instance depends on context. There has been debate over whether conduct found to be not wrongful was “excused” or “justified,” or whether the conduct was outside the general proscription in the first place and therefore not wrong at all. Debate over that issue bypasses what seems to me the more important point, namely that the conduct is not to be condemned, quite apart from the basis for that conclusion.

Accordingly, I suggest that there should be unembarrassed acknowledgment that some forms of killing are bad, but other forms not so, and so also lying and appropriation of another’s property. The difference between one instance and another, between the acceptable and the wrongful, depends on circumstances. Thus, context is determinatively relevant in assessing real-world conduct, whether one’s own conduct or the conduct of someone else.

**Rejecting the Significance of Context**

Although it is generally taken as “obvious” that the propriety of conduct thus depends on context, there has been intense resistance in some philosophical circles to accepting that conclusion. One common refuge has been to obfuscate the significance of context. Many discourses do this by shifting from one example to another, rather than pursuing analysis of the permutations of a single example. Another obfuscation in contemporary scholarship, in my observation, is resort that has been made to what seems to me misuse of Immanuel Kant’s “categorical imperative.” I do not pretend to be an expert in Kant’s philosophy, but I can read what is to be seen.

The categorical imperative as Kant employed the term did not refer to any particular norm or proscription. Rather, the categorical imperative was an analytic statement about norms. Moreover, Kant was not referring to norms as they actually function in the experience of people in the real world. Instead, he was correlating the idea of normative obligation with the idea of freedom or free will, and entirely excluding “experience” as a relevant factor. Thus, at the outset of his exposition he says:

> The concept of freedom is a pure rational concept, which for this reason is transcendental for theoretical philosophy, that is, it is a concept such that no instance corresponding to it can be given in any possible experience...  

Kant then goes on to say:

> A categorical (unconditional) imperative is one that represents an action as necessarily necessary and makes it necessary not indirectly, through the representation of some end that can be attained by the action, but through the mere representation of this action itself (its form) and hence directly... All other imperatives are technical and are, one and all, conditional. The ground of the possibility of categorical imperatives is this: that they refer to no other property of choice (by which some purpose can be ascribed to it) than simply to its freedom.

This seems to me, as clear as anything in Kant, a categorical exclusion of “experience” in a contrast between “experience” and “pure rational concept,” and a contrast between a “categorical (unconditional) imperative” and “other
imperatives," which are “one and all, conditional.” Kant’s proposition was that a norm (obligation) that would correlate with freedom (capability or responsibility) properly considered as such—the essential character of a norm—would be an unqualified, hence categorical imperative. Indeed, the structure of Kant’s system has “categorical imperative” at the top of the normative hierarchy, so to speak, an intermediate kind of norm called an “axiom,” and then more concrete and worldly norms, including law. The purpose of the structure, as Professor Rawls has explained, is a procedure or algorithm whereby to test whether the actor is sincerely following a principled norm or is merely clothing a self-interested act with purported moral virtue.¹

This is not the place to consider whether Kant’s approach is sound as metaethics; Nietzsche, for example, thought it was nonsense. The point here is that Kant was not addressing any particular norm (such as “thou shalt not kill”) but rather the idea or concept of any norm properly so-called.

However, some analysts appear to treat the concept of categorical imperative as a necessary characteristic of the real-world or secular norms, such as those in the Ten Commandments or the modern penal codes. According to this approach, a proper norm or rule about killing (or theft or lying, etc.) must be framed in unqualified terms. But this approach also tries to take into account the generally shared realization that some killings are not wrong, whereas other killings are wrong. This difficulty then forces the analysis to address wrongs such as killing as being governed by two general rules or two branches of a rule. One rule or branch will state that killing is bad except under X conditions or context, while the other will state that under X context it is not bad, or is justified or excused.²

But this does not really work. As a technical matter (i.e., in legal form or “legalese”) any condition or context can be framed as a generalization. Indeed, this is how legislation is formulated. American tax and regulatory legislation is notorious in this respect. A subsection in the general tax law can provide, by way of hypothetical example, that the capital gains rate shall apply to all income earned by left-handed farmers living in counties with populations between 3,001 and 3,003.

As an analytic matter, the two rules or branches that differentiate wrongful killing from killing that is not wrongful still must be stated in general terms, now terms referring to the context X—or A, B, C or whatever. Thus, a rule can be stated as: “Killing in self-defense” is not bad, self-defense being the X variable. Or, for instance, in the more elaborate form of modern criminal law, “Killing is not wrongful homicide if done in reasonable fear for one’s own life or bodily safety or that of another to whom one has an obligation of responsibility,” or some such legal formula. The X is the description of the context in which the conduct is not wrongful.

These formulations of X are still generalizations and hence cannot in themselves conclusively resolve whether a particular context properly comes within their terms. Some judicial authority (in this country, typically a jury) has to author the transition from generalization to verdict. Of course, any observer also can make the same kind of transition from generalization to conclusion. We all do so in everyday life. But it should be accepted that a transition or translation or normative transformation is involved, whether official (as in the case of a court trial) or unofficial (as in the case of private evaluations and gossip). The transition, by whomever made, moves from the general statement about self defense (for example) to a conclusion that a specific killing was wrongful, or that it was not. “It all depends”—on context. And, after that transition has been made, there still stands a proper general proscription that “thou shalt not kill.”

What is the Hangup?

Some philosophic discussions seem to recoil from this fairly straightforward analysis. There is a persistent wish to say that there is an unqualified rule against killing (or theft, etc.) that cannot be violated. At least, there is impatience with legalistic talk about whether a given act of homicide “really” was a crime or not. Why so?

There seem to me at least three contributing influences. The first is fear or concern about “relativism” in morality. A second is fear or concern that various actors would make different appraisals of specific circumstances, that they would reach different conclusions about context, and that they would accordingly make wrong choice in their courses of action. The result would be instances of wrongdoing—wrongful killing, for example—and loss or diminution of moral and political control of the fields of action. A third is concern that frank recognition of the relevance of context somehow compromises the validity of the general proscriptions whose application is at issue—the norms against killing, theft and lying, etc. Perhaps all of these fears and concerns are essentially the same—different ways of saying the same thing.

Among some religious sectors of the community there is also concern that acceptance of qualifications to the general proscriptions would disparage what is taken to be the author of the prohibitions, i.e., God. Many of us in academic life have had the experience of confronting extreme resistance on the part of some students to entertain any question addressing the absolute character of codes such as the Ten Commandments.

As for the fear of “relativism” in moral theory, a simple example of this concern is exhibited in a translation by Professor H. J. Paton of one of Kant’s works. In the Translator’s Preface to *Groundwork of the Metaphysic of Morals*, Mr. Paton observes:

[Kant’s] main topic—the supreme principle of morality—is of utmost importance to all who are not indifferent to the struggle of good against evil... An exclusively empirical philosophy, as Kant himself argues, can have nothing to say about morality: it can only encourage us to be guided by our emotions, or at the best by an enlightened self-love, at the very time when the abyss between unregulated impulse or undiluted self-interest and moral principles has been so tragically displayed in practice.³

The second concern is that some actors would make wrong choices, if the possibility of choice were acknowledged. There is no question that some actors have made choices in their courses of action that almost everyone would agree were wrong. Hitler and Stalin come to mind and of course other villains of perhaps lower historical standing, including many in the Bible. But villains are able to fashion ethical narratives that justify what they propose to do and have done. Indeed, there is no apparent obstacle to fashioning the Nazi credo, for example, into a Kantian imperative in which death for non-Aryans is framed as a public health measure. Most persons charged with crime seem to have some kind of explanation that they find satisfying or at least plausible.

This concern seems to me terribly naïve and hence fatuous. Evil is in the world, has been here since the beginning, and will continue to be among us. What is required to deal with evil is not moral absolutes but sensible distinctions and adequate policing and other social controls.
The third concern is that recognition of context—recognition that some killings are not wrong—compromises the validity of the general proscription against killing. A response to this concern is simply, Why? What is the “compromise?”

It seems no more a compromise than, for instance, simultaneously observing that $2+2=4$ and that there will have to be some sharing if we have four people at the table and only three apples. Indeed, the manipulations to preserve the integrity of moral principles implicitly disparage and perhaps reject the basic proposition advanced by Immanuel Kant. That proposition is: A moral imperative stands on its own foundation in human reason, uncompromised and unmitigated by conditions or context.

The final concern is that recognizing conditions or context by implication compromises or disparages the authority of God. There are many responses to this concern. One response is as follows: If the foregoing analysis is correct—about the relationship between general norms and specific actions—then the morally problematic character of specific actions casts no aspersions on good general norms, and no aspersions on the ascribed author of the norms. Interpolation between general norms and concrete cases is, after all, the subject of casuistry under canon law (Christian moral discourse), halakhah (Jewish religious law), and shar’ia (Islamic religious law).

Conclusion

Suppose, however, we began with an unembarrassed and unqualified acknowledgment that the general norms against killing, theft and lying are correct or appropriate or good, and indeed accept that they may emanate from God, and also that not all acts of killing, appropriation of another’s property and lying are bad. In this view, to borrow from Kant, a categorical imperative is an intellectual component of decision-making (“reason” in Kant’s terminology) as to courses of action. As such, it has significance that is independent of context. But that norm or algorithm is not exclusively determinative of a course of action, for there is also and always experience or context. Indeed, Kant can be understood as arguing that trying to make a moral norm into the exclusive basis for action compromises the very concept of moral norms. That argument is difficult to accept, perhaps even to comprehend, for those of us who in life have focused on experience, but there it is.

Endnotes

2. Deuteronomy, 5:17-21 (King James version).
6. Ibid., 6:222, 15.
8. I think this is the necessary result of the approach in Jon Elster, Local Justice (New York: Russell Sage Foundation, 1992).
10. Mr. Paton evidently wrote these words in 1947 or thereabouts, although they sound current in 2002.
11. I thank David Luban for this thought.

Virtuous Lying: A Critique of Quasi-Categorical Moralism

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Lawyers have a popular reputation both for amorality and for self-indulgent glibness about morality. Yet, in their public moral discourse, lawyers have a strong affinity for uncompromising categorical prescription. This affinity is especially notable in the treatment of lying in professional responsibility discourse.

The Oregon Supreme Court, for example, recently suggested that the Model Rule of Professional Responsibility forbidding “deception” might prohibit prosecutors from participating in routine undercover operations.1

In the Clinton impeachment, lawyers for the Republican majority condemned Clinton’s deceptive statements about consensual sex on the ground that they were perjury; Clinton’s lawyers defended him on the ground that they were not perjury. The argument that they might be perjury and yet justified (as a defense against illegitimate invasion of privacy) was disparaged by the Republicans as a sign of moral decadence and largely abandoned by the Democrats, even though it appears to have been plausible to a broad range of the public.

The disposition toward categorical moralism is an explicit theme in what is probably the most widely read work on ethics in the professional schools—Sissela Bok’s Lying.2 This book is atypical in many ways as a work of moral philosophy, but it has been widely influential outside philosophy departments, and it articulates a view of moral judgment that plays an important role in the professional schools.

Ethics occupies an uneasy position in the professional schools. Students are told that studying ethics is good for them, and many find this plausible in the abstract. But more often than not they find the subject, as taught, stuffy and unwieldy and doubt that it is of any practical value. The influence of the style of moralism Bok exemplifies bears some responsibility for this reaction.

I. An Illustration

One Friday in 1980, a man I will call Jessie Rogers walked into our legal aid office in Boston to complain that he had just been denied “emergency” Food Stamps by the neighborhood welfare office. He had been released from prison the prior day. The prison authorities had arranged temporary lodging for him in a small room with primitive cooking facilities, given him a little cash, and told him he could receive Food Stamps on application at the welfare office. A social service agency would assess him for employment the following week.

The prison authorities’ expectation that he would receive Food Stamps was not unreasonable. Statutes and regulations entitled financially eligible people in Rogers’ residential circumstances to an “over-the-counter” issue of stamps on application if they were in “immediate need.” The application process called for various documents, such as proof of residence and a Social Security card, which Rogers had satisfied. He was, however, unable to satisfy one of the demands: he did not have a “picture ID,” and neither he nor the welfare worker to whom he applied knew how he could get one in less than five days. Although the regulations stated that documentation requirements should be waived in cases of “immediate need” where there was a reasonable explanation of inability to comply, the worker told Rogers that he could
not receive any benefits until he could produce the "picture ID."

On hearing Rogers' story, our paralegal telephoned the worker to argue that Rogers was entitled to a waiver of the ID requirement. While the paralegal waited, the worker went to consult the office director and returned to confirm the office's refusal to provide benefits. When Rogers and the paralegal told me their stories, I called the office. The worker told me that the director had instructed her not to grant benefits without a "picture ID." I asked to speak to the director. The worker, after hesitating suspiciously, said that the director had "left for the day." The paralegal did not believe this: "They're stonewalling. They hate to waive documentation. On Monday, when we finally get to see the director, he'll claim that the worker never told him Mr. Rogers was in immediate need. In the meantime, they'll have had the satisfaction of jerking Mr. Rogers and us around."

I proposed that the paralegal call the office back and, in a secretarial tone, tell the receptionist that Theresa Taylor wished to speak to the director. Theresa Taylor was the welfare department district manager to whom the office director reported. It worked. Within seconds, the director came on the line. His initially obsequious tone became first irritated and then sheepish as I explained who I was and why his office was clearly obliged to issue stamps immediately to Mr. Rogers. Vindicating our paralegal, the director said with ineptly feigned surprise, "Oh, he's in immediate need! He should have told us that." He finally agreed to yield up the stamps that afternoon.

Getting Food Stamps for somebody who would go hungry without them is satisfying work, especially when you can do it in 10 minutes. I was thus flushed with pride as I related this story to my supervisor and disappointed when he remained impassive as I finished.

"What's the matter?" I asked.

"You realize you violated your professional responsibilities," he said.

"What do you mean?"

"You lied when you said Theresa Taylor was calling. You made a false statement of fact, or had someone do it for you, which is just as bad, and that's a violation of the Code of Professional Responsibility."

I recently told this story to a class of exceptionally thoughtful law students, intending it as a passing example of the untenability of categorical ethical precepts. Various ethicists forbid lying, usually without explicit qualification. Yet lying is sometimes clearly the right thing to do. Good lawyers sometimes lie, I said; a lawyer who says he never lies is either not a good lawyer or is lying.

To my surprise, most of the students refused to accept my story as a passing illustration of an obvious point and insisted on a discussion of the ethics of lying (to the point that we never got to what I had intended as the main subject of the class). They were quite troubled by my cavalier generalization, resisted my interpretation of the Food Stamp story, and expressed sympathy for my supervisor's position. Some of them found my position cynical and conflated it with the views of lawyers who disparage the value of truth and encourage deceptive tactics that advance their clients' goals without regard to the merits.

Midway into this discussion, my colleague Deborah Rhode, whose class this was, retrieved a copy of Sissela Bok's book *Lying* and read some excerpts from it. Despite the book's fame, none of us except Rhode had read it, and we were impressed both that Bok supported the students' concerns and that the students had independently articulated Bok's principal arguments in the earlier discussion.

Bok's and the students' approach might be called Quasi-Categorical Moralism. The position is not easy to define; it needs to be seen in relation to two other positions. First, there's categorical moralism. A categorical moralist—Kant is the classic modern example—holds that some kinds of activities, including lying, are *always* wrong. Everyone today ultimately concedes that, unless we resort to eccentric and circular definitions of the activity in question (for example, defining lying as "unjustified" deception), this approach is untenable. We need only refer to the famous hypothetical about whether it is morally permissible to lie to the murderer about the whereabouts of his intended victim—a sanity test flunked by Kant—to make this point.

Opposed to the categorical approach is the contextual one, which is mine: We should recognize that there are often moral costs to lying and should lie only when these costs are exceeded by the morally relevant benefits. Such costs can be intrinsic as well as consequential; damage to my personal integrity or disrespect for the autonomy of the person I deceive are morally relevant costs. Obviously, the maxim is of limited use until we specify the "morally relevant costs" and their weights, but for that very reason, it ought to be unobjectionable as a starting point.

Yet, Quasi-Categorical Moralism resists strenuously. Indeed, this resistance, more than any alternative formulation, constitutes most of its position. Bok, for example, is vague on prescription. There are three principal elements to her approach.

First, Bok argues that moral judgments about lying are subject to powerful cognitive biases that call for hard presumptions against it. The argument is barely developed, but it is insistently re-asserted as a mainstay of her case.

Second, Bok offers a panoply of references and rhetoric that connote categorical prohibition without actually embracing it. Her book is redolent of nostalgia for the days of Categorical Morality. It's full of quotations from theorists like Saint Augustine who asserted that lying (along with many other activities including masturbation and usury) is invariably wrong. Then, there are sweeping generalizations like these: "[T]he perspective of the deceived leads us to be wary of all deception." (21) "All want to avoid being deceived by *others* as much as possible." (23) "Bias skews all judgment, but never more than in the search for good reasons to deceive." (26) Of course, Bok eventually dissociates herself from categorical prohibition and acknowledges qualifications to the quoted generalizations, but only tentatively and reluctantly.

The third principal element of Bok's approach is an ostensibly stricter standard for lying than my "don't lie unless moral benefits seem to outweigh moral costs" precept. Bok holds that "only where a lie is a *last resort* can one even begin to consider whether it is morally justified." (31) This precept is no less vague than mine, and it could be interpreted to mean the same thing—"last resort" might mean where there's no alternative that's not more morally costly. (However, the idea that you have to make this judgment before you "begin to consider" the problem is somewhat mind-boggling.) The tone of Bok's precept, however, is different. And when we view it in the light of the cognitive bias argument, it may be different.
substantively. Perhaps it means that we should require a higher degree of certainty for judgments that support lying than for judgments that support other courses of action. Perhaps it means that an apparent net margin of benefit is not sufficient; the margin must reach some threshold to warrant lying. (It's not enough that the best honest alternative is worse; it has to be a lot worse.)

Bok neither embraces nor disclaims such positions. She never succeeds in finding a resting place between the uninteresting claim that one shouldn't lie without a moral reason and the untenable claim that, when one has such a reason, it is presumptively trumped by a duty of honesty. The book's undeniable achievement is thus, not to stake out a position or sustain an argument, but to generate, through rhetoric, reference, and example, a sense of anxiety about lying. This anxiety resonates with a broader and deeper anxiety about moral self-assertion that I think is strong among some of the students I spoke to and in certain quarters of elite professionalism. Although this anxiety can be healthy in some contexts, it can be unhealthy in others, including many of those in which Quasi-Categorical Moralism is most likely to be taken sympathetically. So I want to emphasize the limitations of the arguments, rhetoric, and references that support it.

III. Is There a Bias Toward Lying?

Bok's argument seems to be that we are incompetent to weigh the costs and benefits of lying and that our incompetence takes the form of a pervasive bias in favor of it. The Quasi-Categorical norm against lying is thus designed as a mental brake on a proclivity to see lying as the right thing to do. Bok sees the lying bias as arising from three more general psychological tendencies—shortsightedness, selfishness, and addictive pleasure.

The argument is not persuasive. Bok gives many example of pernicious lying, but it is not clear that any of them resulted from psychological bias, as opposed to cognitively lucid bad faith. While there is no doubt that the psychological tendencies she invokes do have a distorting influence on moral judgment, Bok is not convincing that this influence operates consistently in favor of lying.

**Shortsightedness.** “Liars usually weigh only the immediate harm to others against the benefits they want to achieve,” Bok says. They tend to ignore or under-estimate long-term harms, in particular, harms to the liar’s own reputation or credibility and “harm to the general level of social trust and cooperation.”(24)

People have a well-documented tendency to focus on especially vivid contingencies (for example, the possibility of dying in a traffic accident) at the expense of relatively mundane ones (for example, the possibility of dying from asthma). They are also prone to give excessive weight to the near, at the expense of the remote, future. In matters such as saving money, for example, they often express regret, looking back, that they didn’t save more, and looking forward, they often engage in forms of precommitment, such as blocked savings accounts, to prevent anticipated tendencies to overindulge in short-term satisfactions.

Bok thinks of the harms to reputation and to the general level of social trust that she believes are underestimated in judgments about lying as the sort of mundane and remote matters disadvantaged by shortsightedness. Her Quasi-Categorical injunction against lying is a kind of precommitment, analogous to a blocked savings account, against an anticipated tendency to undervalue honesty.

In fact, however, shortsightedness does not imply a bias in favor of lying or warrant the kind of precommitment to honesty Bok favors. This is because some of the important benefits of lying also often take relatively mundane and remote forms and hence would be equally vulnerable to underappreciation by shortsightedness.

Consider how shortsightedness might play out in my Food Stamp story. At the seminar I mentioned, several students insisted that I had failed to appreciate important costs of my lie, especially my diminished future credibility with the welfare department, and urged something like Bok’s “last resort” principle. They thought I had violated the principle and suggested the following alternatives:

1. I could have walked over to the welfare office and searched for some evidence of the director’s presence—say, his car in the parking lot—and then confronted the receptionist with it and a new demand to see him.
2. I could have sought out the real Theresa Taylor, the director’s supervisor, and urged her to instruct her subordinate to take my call.
3. I could have lent the client some money of my own to tide him over the weekend and then presented his claim on Monday, when, presumably, the director would have to receive me.

Even assuming that these courses would have been practicable, they carry costs of their own. The first would have entailed a protracted and potentially embarrassing confrontation with the receptionist. The second was likely to subject the director to a humiliating encounter with his supervisor that might entail significant loss of respect and harm to his prospects for promotion.

At the same time, the third suggestion entailed a cost that my interlocutors did not perceive but that is important to legal aid lawyers and many of their clients. I would have lost an opportunity to force the director to perform his duty. One aspect of this cost concerns my own credibility as an effective lawyer. This little blitzkrieg victory had a good chance of enhancing the director’s view of me as someone not to be trifled with when asserting a valid claim. This would be valuable to me personally and to future clients. The third approach—the loan—would have sacrificed this benefit altogether, and arguably the first two, even if successful, would have been less effective in this respect. They would be more cumbersome and hence less impressive.

This particular cost to me reveals an ambiguity in the meaning of “credibility.” Bok uses “credibility” to connote truthfulness and honesty; hence lying is always a threat to credibility. (24) Credibility-as-honesty is most pertinent with respect to assertions involving statements about existing or past facts. But there is another important kind of credibility. When we speak about the credibility of a person’s statements as to his future intentions we construe honesty but also something more—the capacity or power to fulfill these intentions. A “credible” threat or promise is not just one that the speaker is sincerely committed to, but also one that he is likely to bring about.

Both credibility-as-honesty and credibility-as-power are important, and they do not necessarily go together.4 I might have believed plausibly that my lie would enhance my credibility in the latter, but not in the former sense to an extent that would more than compensate for the loss of credibility in the former sense. The director would be less likely to believe my future factual statements, but more likely to credit my commitment to vindicating my client’s rights. The lie might make him think me less honest but also more clever and tenacious. Precisely because of the relative aggressiveness of the course I took, it may have had the strongest effect in suggesting to the director...
that he was less likely to get away with irresponsible behavior in the future.

These personal costs to me in terms of reduced credibility and respect are relatively remote and intangible harms of the sort that Bok suggests short-sightedness should lead us to underweight. My discussion with the students confirms this prediction. However, contrary to Bok's assumptions, these non-immediate harms weighed in favor of lying. So here short-sightedness bias worked against lying.

Moreover, while Bok assumes a fairly uniform tendency to underestimate reputational costs of lying, she illustrates what I think is a quite common tendency to overestimate them. She speaks as if a lie, once discovered, leads invariably to a general discount in the future willingness to accept the Actor's statements. Thus, in my case, the office director will be less likely to believe anything I say to him in the future. But in fact, the circumstances of the lie will often suggest a far more specific interpretation — that the Actor will lie when she thinks it will save a life or spare someone's feelings, or as in my case, frustrate an official evasion of responsibility.

The same points apply to the second category of concern Bok portrays as jeopardized by short-sightedness — the general level of trust and social cooperation. Bok speaks as if these qualities were simply a function of honesty, or at least, always strengthened by honesty, but the Food Stamp story is a counter-example. Surely the enforcement of rights such as Mr. Rogers' are part of the general level of trust and social cooperation. Again, the tendency of my interlocutors, entirely consistent with Bok's conflation of social trust and cooperation with honesty, was to underestimate these interests. The discussion supports Bok's claim that non-immediate costs may be short-changed, but it shows that these costs don't cut consistently against lying.

We can also see a recognizable counter-tendency to exaggerate the costs of lying to the general level of trust and social cooperation, even when we look only at the honesty dimension of this quality. Kant's refusal to concede justification for lying to the murderer about his victim's whereabouts was based on an absurd overestimation of the costs of the lie: "[T]ruthfulness is a duty which must be regarded as the ground of all duties based on contract, and the laws of these duties would be rendered uncertain and useless if even the least exception to them were admitted," he wrote. But just as it's wrong to assume that every discovered lie leads to a general discount in the willingness to accept the Actor's word, it's wrong to assume that every discovered lie lowers the general willingness of people to rely on each other's words. If people understand even an unjustified lie as a response to an unusual situation, it should not significantly affect their sense of general honesty.

Selfishness. Another way to understand Bok's bias claim is in terms of selfishness.

People "want to be deceived as little as possible" themselves, but they "are much more willing to exonerate a well-intentioned lie on their own part." If we tell people they are warranted in lying to prevent injustice or spare suffering on the part of the deceived, their selfishness is likely to bias their judgments about injustice and suffering.

This intuition, however, is unhelpful to the Quasi-Categorical case against lying because the undoubted bias toward self-interest does not imply a bias in favor of lying. As Bok herself makes clear, self-interest often cuts against lying.

Obviously, self-interest could not explain any tendency to underestimate Bok's first set of costs—harm to reputation and self-respect—since these are costs to the Actor herself. As for Bok's other category of non-immediate harms—damage to the social interest in trust and cooperation—I've already pointed out that a tendency to underestimate such costs does not amount to a tendency to underestimate the costs of lying. Unless we arbitrarily conflate the social interest in trust and cooperation with honesty, we have to recognize that lying can sometimes further this social interest, as in my Food Stamp story.

Bok suggests the selfish bias toward lying arises from "the power that lies bring." The emotional satisfactions of self-assertion encourage lying. But just as clearly other emotional forces sometimes pull in the opposite direction. Lying involves risks of discovery and reputational loss that, as Bok herself emphasizes, can be large and long-lasting. Many people dislike risk. And as Bok would surely agree, lying requires the sacrifice of a spontaneity and transparency in personal relations that many people value. Moreover, many people find the exercise of power upsetting. They prefer not to "get involved" or to mind their "own business."

The conventionally asserted moral pathologies of our culture are associated, not only with the kind of self-assertion Bok fears, but with the kind of self-restraint she promotes. We don't like it that so many people prefer not to participate in politics, don't intervene to assist victims of crime and injustice, and unreflectively conform to the demands of institutionalized authority. These phenomena suggest that there are competing satisfactions to those of self-assertion, and their effect on moral judgment should run counter to the effects of the satisfactions of self-assertion. If, as Bok suggests, lying is associated with the satisfactions of power, then honesty should be associated with the satisfactions of passivity, and these latter satisfactions should generate countervailing pressures on moral judgment.

Addiction. "After the first lies," says Bok, "others come more easily. Psychological barriers wear down; lies seem more necessary, less reprehensible; the ability to make moral distinctions can coarsen; the liar's perception of his chances of being caught may warp."(25) A single lie is a "slippery slope" because the practice of lying intensifies our bias in favor of it.

Of course, the fact that a single lie leads to further ones is not a problem unless these incremental lies are on balance bad ones. The experience of lying might increase the disposition to lie by teaching the Actor something about the benefits and costs of lying. Perhaps the Actor lies more because he discovers that his initial lie does not entail dire consequences of the magnitude predicted by moralistic prohibitionists.

So, to state an objection to the initial lie, the slippery slope argument must assert that the incremental lies it induces are on balance bad. The argument looks like this: Lie A considered on its own might be a good thing, but a person who tells lie A thereby becomes more likely to tell lie B (and perhaps a series of other lies), which is a bad thing. When we consider the costs of Lie B (etc.), permitting Lie A is unacceptable.

Presumably, prior to telling Lie A, the Actor would agree with us that Lie B is bad, but the experience of telling Lie A impairs his ability to make this judgment. The process seems to resemble drug addiction or the political analogue implied in the maxim "Power corrupts." The idea seems to be that the egoistic satisfactions of lying and the concomitant desensitization to non-immediate concerns intensify with repetition.

Bok never really elaborates this argument, but we can concede the plausibility of the psychological phenomenon
she invokes and still object that it does not suggest a bias in favor of lying. We can imagine equally plausibly forms of decisional reflexivity that are likely to bias decision against lying. In cases where the Actor feels justified in lying for altruistic reasons she will typically believe that the lie mitigates injustice or relieves suffering. If she is right and follows Bok's precepts, she will thus often remain passive in the face of injustice or suffering. She will, of course, tell herself that she is not responsible for this injustice or suffering and that her conduct is required by more remote but more important values. This experience is the reverse of intoxication; it is a kind of numbing or distancing. But this numbing or distancing might provide psychological satisfactions of its own, and it is not hard to imagine that repeated experiences of this kind might progressively engender an insensitivity to injustice and suffering.

As I argued above, self-restraint has its satisfactions as well. If lying can bring the intoxication of power, honesty may bring the satisfactions of the quiet life—a sense of safety, release from emotional and intellectual tension and the demands of improvisation, a sense of personal wholeness and transparency, the anticipated or imagined approval of others committed to Quasi-Categorical Moralism. In order to enjoy the quiet satisfactions of self-restraint, I have to push away concerns about particular injustice or suffering. Every time I do this, I might dull my receptivity to such concerns in the future. At the same time my capacities to handle the strains of self-assertion might progressively atrophy. I gradually become incapable of perceiving moral costs not identified by a small number of categorical norms.

If the Slippery Slope of moral self-assertion leads to Lord Acton's "absolute power" (which "corrupts absolutely"), the Slippery Slope of moral self-restraint leads to Hannah Arendt's "banality of evil."

IV. Conclusion
Quasi-categorical injunction seems distinctive to self-consciously moralistic rhetoric as we find it in ethics writing and teaching. The portrayal of morality in literature is in striking contrast. Modern literature sometimes goes to the opposite extreme of celebrating lying as a defense against oppression and injustice, as a liberating form of self-creation, as a safeguard against emotional harm. The theme is especially popular with renegades like Nietzsche, Ibsen, and Wilde, but it is hardly confined to them. The most admired American novel, Huckleberry Finn, is controversial today because of its use of the n-word, but no one seems to object that it is virtually a catalog of lying in the service of virtue.13

Huck separates himself from Quasi-Categorical Moralism in the first paragraph, when he says, "I never see anybody but lied, one time or another, without it was Aunt Polly, or the widow, or maybe Mary." These women are loving and kind, but they are incapable of the kind of heroism Huck casually undertakes. When students roll their eyes at the Aunt Pollys of contemporary ethics education, perhaps they too have something more ambitious in mind.

Endnotes

* A longer version of this essay appeared in 12 Georgetown Journal of Legal Ethics, 433 (1999).


8. An interesting claim of Nietzsche, quoted as an epigram but not discussed by Bok (17), is that the two types of credibility are in powerful tension.

9. “And if [people] find out that he has lied, [the liar] knows that his credibility and the respect for his word have been damaged.”24 Kant, cited in note 4, at 281.

10. See, for example, Joseph Heller, Catch-22 (Everyman's Library ed. 1995), p. 121: “Major Major had lied, and it was good. He was really not surprised that it was good, for he had observed that people who did lie were, on the whole, more resourceful and ambitious and successful than people who did not lie. Had he told the truth to the second C.I.D. man, he would have found himself in trouble. Instead he had lied and he was free to continue his work.”

12. Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (New York: Viking Press, 1963), p. 225: “Those few who were still able to tell right from wrong went really only by their own judgments, and they did so freely; there were no rules to be abided by, under which particular cases with which they were confronted could be subsumed. They had to decide each instance as it arose, because no rules existed for the unprecedented.”

A fairly stable debate has developed in legal ethics between those who argue that a lawyer should always act on the balance of first-order moral reasons as they would apply to a similarly situated non-lawyer actor, and those who believe that a lawyer may not deliberate on the basis of ordinary first-order moral reasons, because of some feature of the lawyer’s role. Some have called the second position the “dominant view” to emphasize the pervasiveness of this reasoning among practicing lawyers. The slogan of the dominant view is “zealous representation within the bounds of law,” a phrase taken from an early set of rules regulating the practice of law. This definition includes not only adversarial litigation, but also negotiations, business transactions, client counseling, and regulatory compliance matters. In all cases, holds the dominant view, once the lawyer and client have established a professional relationship, the lawyer is required to make her best efforts to further the client’s legally permissible ends, as long as these activities will not expose the lawyer or client to some risk of legal liability. Some who adhere to the dominant view believe that a lawyer may be criticized in moral terms for accepting a particular representation, or for failing to withdraw if legally permissible, but even this weaker version of the dominant view would require a lawyer to exclude first-order moral considerations from her deliberations, unless those reasons were aimed at a conclusion that the lawyer should not begin working on a matter, or should attempt to withdraw. Similarly, some dominant view proponents permit lawyers to engage their clients in moral conversation, making reference to first-order moral reasons, but if this conversation fails to change the client’s mind, the lawyer is required to follow the client’s lawful instructions.

Although the basic principle of the dominant view is that a lawyer should disregard otherwise applicable first-order moral reasons when representing a client, the dominant view is generally justified on the basis of countervailing moral reasons that also exist at the first order. Stephen Pepper argues, for example, that the role of the lawyer is justified on the grounds that it furthers the client’s autonomy, which is a moral good for the client. Similarly, Charles Fried appeals to the intrinsic values of loyalty and friendship embodied in the lawyer-client relationship. Alternatively, one might make a straightforwardly consequentialist argument, pointing to the benefits of some act required by the lawyer’s professional duties. For example, it may be the case that the long-run benefits of increased trust between lawyers and clients, which leads to enhanced compliance by clients with the law, are sufficiently significant to outweigh the costs of secret-keeping by lawyers, when disclosure of confidential information might have averted some harm to a third party. In any event, these arguments are supposed to underwrite a broad preclusion of most first-order values from the lawyer’s deliberation. For example, a specific conclusion of the dominant view might be that a lawyer should not consider the harm to third parties as a reason against assisting a client in resisting a regulatory requirement.

The arguments for the dominant view are said to issue in permissions to engage in what would otherwise be morally wrongful conduct. Thus, lawyers are subject to a “role-differentiated” system of morality. The metaphor of role-differentiation imagines actors in situations that are identical in all morally relevant respects, but subject to differing duties, which vary according to whether the actor occupies a given social role. We might ask whether it is possible to describe two morally identical situations, which vary only with respect to whether the actor occupies a social role or not. When David Luban wishes to criticize the lawyer’s obligation to keep client confidences, he imagines a case from the domain of ordinary morality: Suppose Salieri swears you to secrecy and confides that he is slowly poisoning Mozart to death. He then draws from this analogy to argue that the lawyers representing Ford Motor Company should have warned potential victims, or the appropriate regulatory agency, of dangerous defects in the fuel system of the Pinto. The trouble with this argument is that the lawyer for Ford is acting within a complex institutional structure that is set up precisely to supersede ordinary moral reasoning. At the level of first-order reasons for action, we may disagree about the level of care that a manufacturer owes consumers when designing and building a product. Some may desire extensive protection, with the cost passed on to consumers; others may prefer that the product cost less, with the onus on consumers to purchase first-party insurance against potential accident losses. The value of providing access to inexpensive, albeit somewhat less safe cars may outweigh the reduced risk of accidents if all the cars in the world were required to be as safe as Volvos. In any event, these normative questions are channeled into procedures for producing definitive resolutions of the disputes. In the case of product manufacturers, the legal rule that has developed is roughly that a manufacturer need not take safety precautions whose marginal cost outweighs the expected marginal benefit, in terms of savings in accident costs. One may disagree morally with this rule, but the process for arriving at it serves to distinguish the Ford Pinto case from the example of Salieri poisoning Mozart to death. Salieri cannot justify his actions by pointing to a rule generated by an orderly process for resolving normative disagreement. The process may or may not be sufficient to supersede the actor’s moral deliberation (that is the subject of this article), but it does change the morally relevant description of the two situations under comparison. For this reason, I believe talk of role-differentiation is misleading.

Whether or not they talk in terms of roles, opponents of the dominant view can be divided into two camps — call them moralists and legalists. The moralists, who comprise the majority of dominant view critics, locate the relevant values that should bear on lawyers’ actions within the domain of ordinary morality. For example, Luban responds to Pepper that autonomy is not a moral good in itself, but is only instrumentally valuable in permitting a person to accomplish her ends. Whether those ends are themselves worthy is a further moral question that must be answered before we can evaluate the permissibility of the lawyer’s assistance. The legalists, represented most prominently by William Simon, offer a very different critique. For Simon, the values that bear on the evaluation of a lawyer’s actions are internal to the legal system. Because a lawyer’s work on behalf of a client involves the interpretation and application of law, the moral permissibility of the lawyer’s assistance to a client turns on whether the client is legally entitled to realize some goal; and his critique of the dominant view is that it requires lawyers to pursue clients’ ends regardless of legal entitlement. Simon’s legalism does not mean that ordinary moral values are completely excluded from the lawyer’s deliberation, however. Simon professes to be influenced by Ronald Dworkin, who claims that “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural
due process that provide the best constructive interpretation of the community’s legal practice. As Dworkin recognizes, verifying propositions of law through reference to the virtue of integrity requires a large-scale constructive political argument, in which moral principles such as fairness and justice are prominently featured. For Dworkin, integrity provides a touchstone for resolving conflicts between competing legal principles, such as individual responsibility and loss-spreading, or freedom of contract and substantive fairness. Simon needs something like Dworkorian integrity in his system of lawyers’ ethics; otherwise, lawyers would make arbitrary or standardless decisions about how to act as representatives of their clients. Because these decisions directly affect the clients’ legal entitlements, any unguided ethical discretion exercised by lawyers threatens the rule of law.

Both the dominant view and its moralistic and legalistic competitors share one important characteristic: In prescribing the lawyer’s deliberations, none of these ethical theories gives much weight to the fact that the client’s action is permissible under the law. For the dominant view, the law is treated only instrumentally, as a means for setting boundaries around permissible state interference with the client’s autonomy. The source of the lawyer’s ethical obligation is the value of autonomy, not anything intrinsic to the law. The moralists similarly discount the fact of legal permissibility, pointing out that legal entitlements are not conclusive of moral rights — one may have a legal right to do something morally wrongful. Luban argues that dominant-view lawyers exhibit disrespect for the law by using it instrumentally, but his own theory of “moral activist” (one could call it “natural law”) lawyering respects law in a different way, by treating the client’s legal right as irrelevant to the lawyer’s deliberations unless it is morally justifiable on grounds independent of its being a law. The legalist critics seem to have the greatest stake in the legitimacy of legal rights, but the most prominent member of this group, Simon, takes a rather surprising tack in the direction of natural law, arguing that apparent legal entitlements are not really part of the law unless they track moral principles. Moral reasoning is essential to the process of legal reasoning for Simon, as it is for Dworkin, because selecting among competing legal principles is ultimately a question of the constructive interpretation of the entire legal system, guided by principles of political morality. In Simon’s view, if legal texts are interpreted correctly, the morally correct thing for a lawyer to do will also be the legally correct thing to do. Thus, for all of these ethical theories, first-order moral principles are in the driver’s seat, with legality being only a prudential constraint on action.

The relatively low deliberative significance of legality in legal ethics is unsurprising, in light of the conventional wisdom in political philosophy, holding that there is no general obligation to obey the law. The traditional arguments offered in justification of a general duty to obey — express and implied consent, gratitude, fairness, and utility — have all been subjected to devastating criticism. For this reason, hardly anyone writing on legal ethics believes that a legal obligation or permission is conclusive of moral deliberation. A moral “ought” must rather be based on all-things-considered deliberation on first-order reasons for action. An action is morally permitted or required only if morally permitted or required on its own merits, so to speak, leaving aside any general considerations of legality. From the client’s perspective, this sort of reasoning makes a legal entitlement meaningless. A dominant view lawyer would of course assist the client in taking advantage of the legal entitlement, but only because that lawyer is dedicated to the value of autonomy.

If the client has a lawyer who disagrees with the dominant view, however, the client cannot obtain technical assistance to pursue certain legally permissible ends. In Hohfeldian terms, the client’s claim-right to X is rendered empty by severing its connection with a duty on the part of the lawyer to facilitate the client’s access to X. The lawyer is, in effect, overriding the client’s legal entitlement to X on the basis of moral reasons. If the client does not share those reasons, the client is likely to feel betrayed by the lawyer’s refusal to provide assistance.

One response to this problem is that the client does not have a moral claim-right to X, so the lawyer does not have a correlative moral duty to assist the client in obtaining X. Thus, the client is not wronged by the lawyer, morally speaking. For the client not to believe herself to be morally wronged by the lawyer’s refusal to assist her in obtaining X, the client must agree with the lawyer’s moral reasoning, the conclusion of which is that the client does not have a moral right to X. Critics of the dominant view, in effect, assume a fairly wide scope of agreement among lawyers and clients over the morality of the clients’ ends. The possibility of moral disagreement between lawyers and clients appears to count in favor of the dominant view, because the client’s autonomy is lexically prior to the other values considered by the lawyer in her own deliberation. The familiar objection raised here is that the client’s autonomy, by itself, is not a reason for the lawyer to do anything. Perhaps the lawyer has made an express or implied promise to further the client’s lawful projects, but this response simply invites the further objection that one cannot be morally bound by a promise to do an immoral act. From the standpoint of the lawyer’s moral agency, then, a promise to assist clients in realizing their legal entitlements does not eliminate the problem of the lawyer’s perceived complicity in immorality which results from assisting the client. There seems to be no reason for the lawyer to accept a moral constraint, to the effect that the client’s autonomy should be lexically prior to the reasons the lawyer would otherwise take into account as a deliberating agent, including reasons that would require her to disassociate herself from another person’s immoral projects.

Examples of cases raising this problem are familiar from the legal ethics literature: A client wishes to draft a will disinheriting his son for opposing the Vietnam war; a large agribusiness client seeks to exploit a loophole in a statute intended to benefit family farmers; a manufacturer of medical devices asks the lawyer to slow down the regulatory process through non-frivolous legal means in order to continue selling products the lawyer believes are defective; the lawyer is bound by the legal duty of confidentiality not to reveal information that could save the lives of others. If we assume in each case that the moral dialogue between lawyer and client has reached an impasse, and the client insists on the lawyer assisting her in obtaining the relevant legal entitlement, the client and lawyer will in effect be disagreeing about whether the client has a moral claim-right to the entitlement. In the face of such a disagreement, the dominant view mandates that the lawyer defer to the client’s resolution of the moral issues, notwithstanding the principle that one ought to take responsibility for one’s actions and reason autonomously to a conclusion about what one ought to do. Critics of the dominant view similarly accept the imposition of moral reasons by one person on another, in this case by permitting the lawyer to refuse to provide assistance to the client in obtaining a legal entitlement that the client believes herself to be morally permitted to obtain. The dominant view and its opponents therefore seem to be arguing for competing priority principles, which justify subordinating the moral agency of one of the
Talk of subordinating one’s judgment to another’s resolution of a practical dilemma calls to mind the concept of legitimate authority and the justification of a moral obligation to obey the law. As observed previously, most political philosophers do not accept a general duty to obey the law, so it appears that the law is of little assistance in these cases where either the lawyer or the client seeks to hold the other to a resolution of disputed moral issues. But there is a different way to understand the authority of law, which places moral disagreement at the forefront of a theory of legitimacy. Rather than assuming that disagreement between lawyers and clients is a marginal case, this theory of authority begins from the assumption that disagreement is widespread, and that the authority of law depends on its capacity to enable collective social action in the face of persistent disagreement. On this account of authority, the first-order moral disagreement between the lawyer and client, concerning the permissibility of the client’s ends, or the means by which she seeks to achieve them, may be dealt with by considering the second-order reasons given by the law.

Jeremy Waldron observes the intractability of good-faith disagreements on moral and political questions, and argues that the fact of disagreement provides second-order reasons not to act peremptorily on first-order beliefs about the good or justice. In the political domain, action on the basis of considerations of justice, fairness, rights, or the good is of an essentially collective, or social character. It does not make sense to think about action in a sphere governed by the law as being grounded in an individual decision about what one ought to do. Rather, individuals bring only provisional or partial beliefs or views to a process of collective debate and resolution. It is crucial to this process that no person’s views about rights or justice should be accorded greater weight than others’ views. People may attempt to persuade their fellow citizens, but in the end, when all the speeches and lobbying efforts are concluded, everyone submits his or her own beliefs about justice to a vote, and some faction’s view becomes the position taken by society as a whole on the disputed issue. Although it does not directly represent each affected citizen’s vote, the democratic process nevertheless exhibits the virtue of being respectful to the competing views of those with whom we disagree, consistent with the felt need to reach a decision and put an end to the process of deliberation and attempts at persuasion. When we think in a philosophical mindset about matters of justice, we naturally believe we are right and that our view should prevail, although we acknowledge that others disagree with us. When we are dealing with politics, however, the “felt need, shared by the disputants, for common action in spite of such disagreement” impassions us toward a procedural resolution of the dispute, with a view to settling on a single, definitive position representing our collective solution.

How can the result of this process be authoritative with respect to individuals who are subject to the resulting legal obligations? Granting that collective action in the face of moral disagreement is often necessary, acting on the basis of a law with which one disagrees appears to involve an abdication of one’s moral agency, or acting in bad faith, as Sartre would call it. The most promising way to justify the legitimacy of a legal directive, and therefore to provide a second-order reason for an individual to comply with it notwithstanding its conflict with her moral beliefs, is to appeal to reasons that apply independently of the law to the person subject to the directive. This is the account of authority offered by Joseph Raz, upon which Waldron relies in his book. For Raz, authority is legitimate when compliance with authoritative directives is a better way to achieve some end that an agent has, as compared with the agent trying to work out the balance of reasons for himself. The justification for following expert authority obviously works in this way. If I want to make a good brown beef stock, I would do better at that end by following Jacques Pépin’s instructions than by trying to work out the procedure myself. Significantly, I am not acting in bad faith or subordinating my will to Pépin, because in following his directives I am acting on the basis of reasons that are my own — namely, the desire to make a good brown beef stock. The same is true for legal authority in some cases. Raz is actually very cautious about justifying legal authority along these lines. Although he calls this the “normal justification thesis,” he believes there are many cases in which a legal official does not have superior expertise with respect to some end that is shared with the subject of the legal directive. Legal directives are legitimate only where the ostensible authority can claim expertise by virtue of being wiser, better informed, steadier of will, more efficient in decisionmaking, or better positioned to accomplish some objective, as compared with individuals. We can see how this model of legitimacy works with respect to something like a regulation requiring that a drug be sold only on a physician’s prescription. Presumably the physicians working for the Food and Drug Administration are better than most individuals at figuring out whether a drug needs to be taken under medical supervision. For the government to claim superior expertise in working out purely normative issues, however, seems either arrogant or risible — no one believes that the U.S. Congress is a better moral decisionmaker than a reasonably thoughtful citizen.

Waldron’s insight is that we all do share reasons that would justify deferring the resolution of normative issues to a lawmaking body. We all perceive the need for coordinated action in the “circumstances of politics,” that is, in the condition of coexisting with others with whom we do not share beliefs about the good, justice, or rights. Another way to put the point is that we are disputatious but sociable creatures by nature; we each seek our own advantage, but we have a desire for peaceable society with one another. From the standpoint of each affected citizen, one does better at living in a harmonious society with other quarrelsome beings by following legal directives, which are established pursuant to a process for treating disagreements fairly, with due respect for the moral agency of other citizens. To the extent that one wishes to treat one’s fellow citizens respectfully in normative disagreements, one has a dependent reason, in Raz’s sense, which is taken into account by the process of resolving disputes through the means of the law. Following Raz further, this reason preempts recourse to the first-order moral reasons that were the subject of the disagreement. Because the citizen is now subject to a legitimate legal directive, she has a reason not to rely on these first-order reasons in her deliberation about how to act.

Even if one accepts this outline of the justification of authority for citizens, the further question remains of how it may be extended to preempt recourse by lawyers to first-order moral reasons. If the need to act collectively in the face of disagreement is a Razian reason for citizens, which they do better at by following legal directives than by trying to work out the balance of competing values on their own, it still does not appear to be a reason for lawyers, who are acting on behalf of someone else, as representatives, advisors, or advocates. We still need a Razian reason for lawyers. One plausible candidate for this reason is the obligation of respect we owe to the law, in light of the kind of achievement it represents.
Because the law enables collective action notwithstanding deep and persistent disagreement, it ought to be taken seriously, in the sense that one ought not to try to come up with ways to nullify, defy, or evade the law. Lawyers have a great deal of power to do harm here, by undermining the collective achievement of lawmaking by structuring transactions to evade statutory or regulatory requirements. They may also interfere with the operation of the law by resisting it on moral grounds. If the lawyer says to the client, in effect, “You have a legal entitlement to X but I refuse to assist you in obtaining that entitlement for moral reasons,” then the lawyer is simply reinscribing in the attorney-client relationship the very moral disagreement the law was intended to preempt. Thus, a theory of legal ethics that is respectful of the achievement represented by law must build in an ethical constraint to the effect that lawyers should further the end of facilitating collective action in the face of disagreement.

The argument outlined here differs from the usual defense of the dominant view because it does not depend on first-order moral values like the client’s autonomy or the intrinsic value of the lawyer-client relationship. Rather, this kind of modified dominant view is justified at the second order of reasons, by considerations relating to the reasons for treating legal directives as authoritative. These reasons are preemptive of the first-order moral considerations that would ordinarily give the lawyer a sufficient reason not to assist the client in realizing her ends. The conception sketched here differs further from the usual specification of the dominant view in that it gives reasons for lawyers to respect the law, notwithstanding their clients’ wishes, in some cases. Suppose the client wishes to set up a transaction to exploit a loophole in a statute, forum-shop for a judge predisposed to rule in her favor, or take advantage of the underfunding of state enforcement resources by playing the “audit lottery.” The normal dominant view would direct lawyers to assist clients in these projects, as long as they were not illegal under applicable law. The Waldronian dominant view, however, would call upon lawyers to respect the achievement represented by the law — that is, its capacity to facilitate collective action in the face of disagreement. In cases where the lawyer’s actions would in effect undermine the capacity of the law to serve as a focal point for social action, they would be ruled out on second-order moral grounds. Interestingly, the lawyer’s obligation here is aligned with the traditional role of “officer of the court” which is appealed to frequently by opponents of the dominant view.

I offer this argument for the authority-based conception of legal ethics only tentatively at this point, because some difficulties remain to be worked out. One source of concern is its strongly utilitarian nature. The authority of law, for Waldron at least, is based on the good of collective social action in spite of normative disagreement. In other words, a great deal of benefit is created by legal ordering, so the obligation to respect the law is given on utilitarian grounds. This is true despite the possibility that the laws interfere with the moral rights of some citizens. Waldron’s response would of course be that we disagree about what moral rights we have, so these can never be the basis for a theory of authority, but this response begs a deeper question of whether individual rights — even those that are contested — can be sacrificed in the name of collective action. It is usually thought to be the whole point of rights that they block the majority from interfering with some interest of individuals that is of fundamental moral importance.

A further objection is related to Waldron’s claim that a statute provides a single, definitive resolution of a disputed normative question. What if, contrary to this suggestion, there are multiple reasonable ways of reading a statutory provision, and lawyers may disagree in good faith about which is the correct approach? As a reviewer of his book pointed out, Waldron does not say much about how ambiguous statutes should be interpreted. He does not naively plump for a plain meaning or “dictionary” rule favored by Justice Scalia, but I do not think he is sufficiently worried about the possibility that the normative disagreements that were supposed to have been superseded by legislation arise again in the process of interpreting legal texts. The interpretive attitude taken by lawyers and judges toward statutes and common-law decisions can have a great deal of beneficial or harmful effect on the capacity of those legal texts to enable collective social action.

One does not have to believe that words have no determinate meaning in order to be troubled by some of the interpretive issues that courts deal with routinely. Does a statute prohibiting the interstate transportation of motor vehicles apply to airplanes? Does a prohibition on “using” a gun in connection with a drug trafficking offense cover the act of driving around with a loaded gun in the trunk of a car? Not only are these statutes ambiguous, but the sorts of political disagreements they were intended to resolve, for example over the scope of the legitimate role of government in society, are recapitulated as statutory-interpretation issues. A person who believes that negative liberty is prior to equality or other positive rights is likely to support a principle of statutory interpretation that the words of legislation should be read narrowly, or that Congress should not be presumed to have the constitutional power to legislate on some matter. Reasonable lawyers can disagree about the interpretive attitude one ought to take toward the law. One principle might be that it is wrong to exploit loopholes, where a loophole is defined as a reading of the literal text of the statute in a way that is contrary to its obvious purpose. Of course, another lawyer might argue that one person’s loophole is just another person’s clever or aggressive legal position, and if Congress had intended to prevent the activity in question, it would have drafted the text with greater specificity. It seems like some kind of meta-statute is needed, specifying how statutes should be interpreted, but of course even a meta-statute would be subject to disagreement at the level of interpretation. Thus, lawyers’ interpretive attitudes are a critical variable in the effectiveness of the law in resolving disagreement and providing a focal point for collective action.

Having raised these as two of several difficulties with the authority-based justification of the dominant view, I do think it provides a more philosophically robust defense of this conception of lawyers’ ethics than its competitors. It brings legally closer to the center of issues relating to legal ethics, rather than relegating it to the periphery. It also assumes that moral disagreement is not a marginal case, but the backdrop against which we think about professional roles in the first place. If there was no disagreement, there would be no need for law. As Grant Gilmore quipped, “In Heaven there will be no law, and the lion will lie down with the lamb. In Hell there will be nothing but law, and due process will be meticulously observed.” Until we achieve heaven on earth, a theory of legal ethics must not assume that lions and lambs will be able to agree about their respective rights.

**Endnotes**

* I am grateful to David Luban and Greg Cooper for their valuable comments.

1. Here I follow Joseph Raz’s terminology, in recognizing a distinction between reasons for action (first-order reasons) and reasons to act,
10. This distinction is clearly drawn by Luban, in a review essay of Simon’s book. David Luban, “Reason and Passion in Legal Ethics,” *Stanford Law Review* 51 (1999): 873. Luban argues that Simon’s attempt to reduce all conflicts for lawyers between law and morality to conflicts among competing legal interpretations fails, because the lawyer’s antecedent moral commitments largely determine which of several plausible legal interpretations she will accept.
14. Simon does concede at least prima facie weight to a legal rule, where some legal procedure or institution is reliable and well positioned to achieve substantive justice. Simon (1998), 140. He insists, though, that the lawyer cannot treat the existence of a legal rule as an exclusionary reason unless the lawyer is prepared to reason from the ground up to a conclusion that the result reached by the relevant procedures and institutions will be just. As Luban points out, this requirement places great cognitive demands on the lawyer, and makes Simon’s theory vulnerable to the objection that it is unrealistic as a working theory of ethics [Luban (1999), 895-96]. A further objection, anticipating the argument from Jeremy Waldron, below, is that lawyers reasoning in good faith are likely to disagree about whether the rules, procedures, and institutions of the legal system produce just results. If law is to serve its end of enabling social action in the face of disagreements about justice, it must preclude the kind of de novo review of the justice of results that Simon recommends.
16. I am grateful to Greg Cooper for this point.

**RECENT ARTICLES OF INTEREST**

**— ABSTRACTS —**


“In this article we use some simple tools from game theory and behavioral economics to cast light on the maintenance and disruption of unequal relationships through private action and through law.” The authors of this article deal with the following type of situation. In social life there are many inequalities, states of affairs in which some are advantaged and others, often a larger number, are disadvantaged. Not surprisingly, some (though not all) of these inequalities are regarded as unjust and produce indignation among the disadvantaged. Nevertheless, such inequalities often persist because altering the status quo would be harmful to both the advantaged and the disadvantaged, and both sides know it (in game theoretical terms, the status quo is an equilibrium). Yet despite this, people are sometimes willing to accept losses in the effort to alter the status quo, and a credible threat of such a disruption can lead to an alteration. The aim of Ullmann-Margalit’s and Sunstein’s article is to make a case for each of the foregoing claims and to show that law can play a role, on either side, in entrenched or altering relative advantages.

The authors review empirical evidence suggesting that indignation often leads the disadvantaged to risk their material...
self-interest in the attempt to reduce inequality. But in most social situations the status quo can be disrupted, or even threatened, only if many of the disadvantaged are involved, and this leads to strategic problems. First there is a coordination problem, for many indignant people going off in different directions will achieve little. Frequently this is solved by what the authors call ‘indignation entrepreneurs’ who lead the way, signaling a solution that others will now find it sensible to adopt. Second, the possibility of free-riders leads to a prisoners dilemma, which may be solved by militants turning their indignation against malingerers as well as the advantaged.

Law can play a significant role in these contests, the authors believe, and each side will try to recruit the law to its cause. An obvious way in which law can influence the situation is through sanctions. But sanctions are needed primarily when law lacks adequate moral authority. When law does have sufficient moral authority, it can play an important role in virtue of its expressive function, which is the idea that “law is important for what it says, independently of what it does.” On behalf of the disadvantaged, the expressive power of law, independent of any sanctions, may be effective in suggesting that indignation is appropriate, and it may embolden more people to confront perceived injustices. The substantial point is that if there is appropriate moral authority of the law, “the terms of collective action are likely to be altered merely by virtue of the law’s expressive effect.”


Parties to the controversy that surrounded the Florida vote count in the 2000 U.S. Presidential Election invoked the “Rule of Law” in many and conflicting ways. Some identified the exercise of legally authorized discretion by Florida’s Secretary of State as an example of the Rule of Law at work; others characterized her actions as undermining that ideal. Some deemed the Florida Supreme Court decision sanctioning ballot-counters’ use of reasoned judgment as an affirmation of Rule of Law values; others identified appeal to discretion in the absence of clear rules as antithetical to that concept. For some, Gore and Lieberman accepted the supremacy of the Rule of Law by contesting election results in court; for others this resort to litigation evidenced a willingness to roll the dice repeatedly, heedless of consequent damage to the Rule of Law. For some any resolution achieved by appeal to the hierarchy of courts upheld the Rule of Law; for others a resolution by autonomous and unaccountable judges seemed precisely what the ideal properly guards against.

Waldron identifies these varied and often incompatible invocations of the Rule of Law, asks whether they suggest that the ideal has become an “empty slogan,” and argues that this is not the case. He does so by appeal to intellectual history on the one hand and to W.B. Gallie’s account of an “essentially contested” concept on the other. We need only look to Aristotle, widely deemed the founder of the Rule of Law tradition, to find the seeds of the conflicting views evident in Florida. The tensions that begin with Aristotle have persisted and matured over time. That this kind of conflict is neither peculiar to the Rule of Law ideal, nor an indication of its emptiness or inadequacy, becomes evident if we attend to Gallie’s discussion. For Gallie, essentially contested concepts are normative concepts displaying an internal complexity that results in ongoing and unresolvable debate about the nature, or essence, of the ideal in question. Far from rendering the ideal meaningless or useless, the ongoing debate enriches our understanding of the area of value at issue. In arguing that the Rule of Law is such a concept, Waldron identifies various levels of complexity associated with it and shows how Gallie’s original notion can reasonably be broadened and reshaped to better fit the Rule of Law and to afford us greater appreciation of the debates surrounding it (evident in Florida and elsewhere). In particular, for Waldron, the Rule of Law debates show our ongoing struggle to determine how to make laws rule rather than men, the nature of the danger we thus avoid, and what values we serve if we finally achieve the rule of law. Even when parties believe these questions have clear answers, as perhaps was true in Florida, says Waldron, debate may awaken partisans to some of the complexity of the ideal or to the values at stake on the other side.


On what grounds can dangerous people be confined? Certainly if a crime is committed. But how about civil commitment when a crime has not yet been committed, or when someone has already been punished for a crime but is considered dangerous? The Supreme Court has held that dangerousness is not sufficient, presumably because people who have no mental abnormality and have the ability to control their behavior can be dangerous.

Kansas and other states have sought to commit, indefinitely, sexually violent predators “who have a mental abnormality or personality disorder.” In two cases arising under the Kansas law, the Supreme Court has held that under certain circumstances dangerousness together with mental abnormality would justify civil commitment. What has been left unclear is whether some sort of causal link between these (mental abnormality causing dangerousness) is adequate, or whether there must also be a lack of ability to control oneself (since not all mental abnormality results in lack of control). Left unanswered, however, is the meaning of lack of control and whether there must be independent proof of it.

Morse holds that “[i]nvoluntary civil commitment is justified in those cases in which a mental abnormality predisposes a person to dangerous conduct and the abnormality sufficiently compromises the person’s rationality and responsibility for such conduct.” Since the real issue is lack of responsibility, the focus on causal link and loss of control miss the point, for neither inevitably yields non-responsibility. Suppose there is a condition or state of affairs (call it A) that is correlated with (sometimes causes) crime and thus warrants the prediction that a person with A is more likely to commit crime. Does having A diminish a person’s responsibility, or control over his or her actions? It might, but it might not. Suppose A is poverty. The mere fact that poverty is causally linked to crime does not diminish a person’s responsibility. As he puts it, “the causal link is vastly over-inclusive as a general criterion” for non-responsibility and thus for civil commitment. Non-responsibility must be argued on its own merit and not simply inferred from causal link.

Morse also argues that the loss of control criterion is inappropriate for civil commitment, because loss of control is
only a metaphor. There is no literal loss of control when a person acts on a strong desire; the resulting body movements are not involuntary. Nor is the agent subjected to anything like a threat to his or her life, which might make the situation analogous to those in which one can be excused because of duress or compulsion. Once again, the question is whether intense desire diminishes one’s responsibility, and neither causation nor so-called loss of control answer. The real issue, Morse claims, is whether intense desire diminishes one’s capacity for rationality, for practical reason; only in such cases can one be held to be non-responsible. By this criterion, Morse concludes, “most mentally abnormal sexual predators are fully responsible for their sexually predatory conduct” and are thus punishable. But ipso facto, most such predators are sufficiently rational that involuntary civil commitment cannot be justified. Indeed, “the eligibility for punishment and the eligibility for involuntary civil commitment are mutually exclusive.”


In this article, Eisenberg’s concern is how a patent system that was designed for a “brick and mortar world,” that is, designed to establish property rights in mechanical inventions, can work in settling competing claims “to the genome on behalf of the many sequential innovators who elucidate its sequence and function” and protect other interested parties such as the scientific community generally and the public at large. The human genome project, the project to detail the sequence of the human genome, has raised challenges to our legal frameworks for patenting innovations. The patent system was designed to protect property rights in human inventions. DNA sequences pose a number of perplexities for patents. First, patents cannot be secured for “products of nature” and consequently, DNA sequences in naturally occurring forms that do not require human invention cannot be patented. But if the DNA sequences are “isolated and purified,” hence there is human intervention, then the patent system more readily makes sense. A deeper problem, and one that raises questions about the value of the patenting of DNA sequences, is the fact that an application for a patent is not merely the DNA molecules, but their information. This information of the DNA sequence provides the groundwork for future scientific discoveries. “Can the value of this information be captured through patents? Can information about the natural world, as distinguished from tangible human interventions that make use of that information, be patented?” Traditionally, patents have been limited to protecting tangible products or processes, and not information as such. The informational value of the DNA sequence is often much greater than the exclusive right in the DNA molecules. In this article, Eisenberg explores these and other challenges that the patent laws are faced with in the patenting of genes. Ultimately, she is skeptical that patents ought be given to the DNA sequence information.


Just as liberals defend the free-speech rights of people with whom they violently disagree, so too, argues Baker, should they defend states’ rights even though they are historically associated with viewpoints with which they violently disagree. They should defend them on the same ground—that they promote greater individual liberty. States’ rights are a form of negative freedom. Just as individual rights exist to permit and enable individuals to pursue their own vision of the good, so too the autonomy of states permits communities smaller than the national community to pursue their own collective visions of the good. Individual liberty is enhanced because people who do not like their own state’s idea of the good can go to another state. This was the pattern when Mormons moved to Utah, African-Americans left the South, and women moved to gain reproductive autonomy prior to Roe v. Wade. It is still the pattern when people go to states with more favorable gun or gambling laws or more favorable attitudes toward sexuality.

The effect, indeed, the purpose, of national legislation is to enable a majority of states to impose their preferences on other states without the benefit of Constitutional amendment. The most obvious sort of case is when a majority of states simply wants to impose its moral code on others. But strategic behavior can also be involved. If federal funds accompany a federal requirement such as a minimum drinking age, then states that already meet the requirement can get funding without having to alter their practices. Or if certain practices are attractive to business, states disliking those practices can, through national legislation, prevent other states from gaining a competitive advantage.

Opposition to states’ rights is largely based on historical associations. However, it is important to keep in mind, Baker points out, that states’ rights would not resurrect such practices, for they are Constitutionally forbidden. It is also important to bear in mind that states’ rights “have no independent value; their worth derives entirely from their utility in enhancing the freedom and welfare of individuals.”
RECENT BOOKS OF INTEREST


